

# I

## Evolution and Philosophy behind the Indian Constitution

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Three important questions bothered the man right from the beginning of the history of civilization. They are:

1. Is Government necessary?
2. What is the best form of Government?
3. How can we prevent the Government from becoming tyrannical?

Answer to the above three questions is the origin of idea of constitutionalism and then the Constitutional law. The Constitution refers to that body of doctrines and practices which form basis for organizing a state.

The human being, according to the great Greek Philosopher Aristotle, is a political and social animal. Either human being or a family cannot survive in isolation. It became necessary for man to organize himself into communities and societies. With the growth of population, these societies grew and multiplied and some form of rules and regulation was needed. Out of this need arose law and government.

Robert M MacIver, in the *Web of Government*<sup>2</sup>, says that the same necessities that create the family create regulation. The existence of family requires the regulation of sex, the regulation of property, and the regulation of youth...here is government in miniature and already government of a quite elaborate character....family is everywhere the matrix of the government.

MacIver explained the difference between the state and the government and the organ and organization in an effective expression: "When we speak of the estate we mean the organization of which government is the administrative organ. Even organization must have a focus of administration, an agency by which its policies are given specific character and translated into action. But the organization is greater than the organ. In this sense the state is greater and more inclusive than its government. A state has a constitution, a code of laws, a way of setting up its government, a body of citizens...when we think of this whole structure we think of the state... Under these endlessly varied circumstances the habits pertaining to government, which at first were centered in the family and kin-circle, found a locus in the inclusive community".

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<sup>2</sup> Robert M MacIver, *The Web of Government*, New York, Free Press, 1965, p 17

A written constitution is essentially a basic expression of the ideas and organization of a government that is formally presented in one document. Written Constitution is contained in one document, such as Soviet Union or Constitution of India or Swiss Constitution. Some constitutions are found in several documents, such as Canadian Constitution which include a “Constitution Act”, as well as several pieces of the legislation and historical documents. There are governments without constitutions, which are yet constitutional governments because they have limited governments, which can be called constitutional regimes. The British Government does not possess a document called “The Royal Constitution”. There are number of different documents that are part of the body of what is referred to as British Constitutional Law, including:

1. Magna Carta 1215
2. Petition of Right of 1628
3. Bill of Rights 1689
4. The Act of Settlement 1701 and
5. Certain special Acts of Parliament.

### **What is Constitution?**

It is in short, a rule of book of a nation, codifying rule of law.

Constitution is a legal document having a special legal sanctity, which sets out the framework and the principal functions of the organs of the government of a state, and declares the principles governing the operation of those organs<sup>3</sup>. Like every other Constitution, the Indian Constitution also seeks to establish the fundamental organs of government and administration, lays down their structure, composition, powers and principal functions, defines the inter-relationship of one organ with another, and regulates the relationship between the citizen and the state, more particularly the political relationship. The states have reasserted certain principles of law through written Constitutions.

As a democratic Constitution, the Indian masterpiece also reflects the fundamental political values in substantive ways by guaranteeing Fundamental Rights to the citizens, and in procedural ways by providing remedies. It mirrors basic values about who shall govern, and in what direction. Constitution means the structure of a body, organism or organization, or we can also say, what constitutes it or what it consists of. Because the nation is one of the biggest in the world with most of varieties of the people and the cultures, India needs an expressly written code of governance, more specifically when the people chose to have different institutes, estates, mechanisms and levels of sovereignty. And thus we have the longest written constitution, which is one of the essential features of democratic federation.

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<sup>3</sup> Wade and Phillips -- Constitutional Law 14th Edn. P 1

## Functions of the Constitution

The Constitution is a political structure, whether it is written or not and followed or not. They have several functions.

- a) Expression of Ideology: it reflects the ideology and philosophy of a nation state.
- b) Expression of Basic Law: Constitutions present basic laws which could be modified or replaced through a process called extra ordinary procedure of amendment. There is a special law also which usually focus upon the rights of the citizens, for instance, rights concerning language, speech, religion, assembly, the press, property and so on.
- c) Organizational frame work: It provides organizational framework for the governments. It defines the functions legislature, executive and judiciary, their inter-relationship, restrictions on their authority etc.
- d) Levels of Government: Constitution generally explains the levels of different organs of the Government. Whether it is federal, confederal or unitary will be described by the Constitution. They delineate the power levels of national and provincial governments.
- e) Amendment provision: As it would not be possible to foretell all possibilities in future with great degree of accuracy, there must be sufficient provisions for amendment of the Constitution. It should contain a set of directions for its own modifications. The system might collapse if it lacks in scope for modification. Inherent capacity to change according to changing times and needs help any system to survive and improve.

Soviet Constitution was mostly an expression of ideology and was less an expression of organizational set up. The American Constitution is more an expression of governmental organization and a guideline for the power relationship of the regime than an expression of the philosophy of the regime.

## What is Constitutionalism?

One needs to know the ‘Constitutionalism’ and “Constitutional Law” before understanding the philosophy of Constitution of India. Having a Constitution itself is not Constitutionalism. Even a dictator could create a rulebook calling it Constitution, which never meant that such a dictator had any faith in Constitutionalism. Recognizing the need for governance, the Constitutionalism equally emphasizes the necessity of restricting those powers.

The Constitutional law means the rule, which regulates the structure of the principal organs of the Government and their relationship to each other, and determines their principal functions. The rules consist both of legal rules enacted or accepted as binding by all who are concerned in Government. All the Constitutions are the heirs of the past as well as the testators of the future<sup>4</sup>. Constitution of Indian Republic is not the product of a political revolution but of the research and

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<sup>4</sup> Jennings -- Some Characteristics of the Indian Constitution, p. 56, 1953

deliberations of a body of eminent representatives of the people who sought to improve the existing system of administration<sup>5</sup>.

Thus the Constitutionalism, in brief, is specific limitations on general governmental powers to prevent exercise of arbitrary decision-making. Unlimited powers concentrated in a few hands at the helm of affairs and their exercise would jeopardize the freedom of the people. These powers have to be checked and balanced with equally powerful alternatives in a system, where it will be nearly impossible for dictators to emerge. In one word 'Limited Governance' is the Constitutionalism, which is supposed to reflect in the Constitutional Law of a democratic state. Constitution of India is the Constitutional Law incorporating the Constitutionalism. The listed fundamental rights and guaranteed remedies, creation of judiciary as an impartial arbiter with all independent powers besides broad based legislative check on the executive are the reflections of such constitutionalism. From these essential characters the doctrines of judicial review, rule of law, separation of powers, universal franchise, transparent executive, fundamental right to equality and quality of life emerged and consolidated.

At the same time, the rulebook has a responsibility to check anarchy and possibility of people misusing freedom to resort to violent means of overturning the constitutionally governing institutions. That responsibility is undercurrent in the reasonable restrictions placed on the exercise of fundamental rights of the people. The founding fathers of the Constitution made restrictions specific while the rights appear in general terms, paving a way for independent judiciary to expand the scope of freedoms and reading emerging rights into the sacred statements of rights under fundamental rights chapter. At the same time specification of restrictions operate as powerful restraints on the powers of the rulers.

The right as the individual power in the hands of people and authority as the ruling power in the hands of institutions cannot go arbitrary and anarchic undermining the democratic peace. The democratic constitutionalism is three pronged in Indian Constitution, one- guaranteeing freedoms, two- restricting governing institutions, three- empowering the independent arbiter of judiciary with power to review the executive and legislative orders affecting the interests of people in general or afflicting basic norms of rule of law.

### **Basic Philosophy**

Mr. Justice H. R. Khanna in his 'Making of Constitution said: "The framing of a Constitution calls for the highest statecraft. Those entrusted with it have to realize the practical needs of the government and have, at the same time, to keep in view the ideals, which have inspired the nation. They have to be men of vision, yet they cannot forget the grass roots"<sup>6</sup>. A Constitution at the same time has to be a living thing, living not for one or two generations but for succeeding generations of men and women. It is for that reason the provisions of the Constitution are couched in general terms, for the great generalities the Constitution have a content and significance that very from age to age and have, at the same time transcendental continuity about them. ...A constitution states, or ought to state, not the rules of the passing hour, but the principles for an expanding future<sup>7</sup>.

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<sup>5</sup> DD Basu, Introduction to the Constitution of India, p. 3 (3rd Edn. 1946)

<sup>6</sup> Khanna, H R, Making of India's Constitution, pp 1-2.

<sup>7</sup> Ibid, p 3

The Indian Constitution is based on the philosophy of evolving an egalitarian society free from fear and bias based on promoting individual freedom in shaping the government of their choice. The whole foundation of constitutional democracy is building a system of governance in systematic machinery functioning automatically on the wheels of norms and regulations but not on individual whims and fancies. It is easy to dream such a system of rule of law than framing a mechanism for it.

The Indian Constitution is a marathon effort to translate philosophical rule of law into practical set up divided into three significant estates checking each other exercising parallel sovereignty and non-egoistic supremacy in their own way. Apart from excellent separation of powers to avoid the absolute concentration, the Constitution of India envisages a distinct distribution of powers between two major levels of Governments- central and provincial with a fair scope for a third tier – the local bodies. However, the operation of the system came in contrast with men and their manipulations leading to different opinions and indifferent options. Whatever may be the consequential aberrations, the system of rule of law is perfectly reflected in framing of the Constitutional norms codifying the best governing mechanisms tested and trusted in various democratic societies world over.

### **Preamble:**

The first Prime Minister of Independent India categorically presented the objective of the constitution in a lucid statement: “The first task of this Assembly (Constituent Assembly) is to free India through a new Constitution, to feed the starving people and clothe the naked masses and to give each Indian the fullest opportunity to develop himself according to his capability<sup>8</sup>”. This resolve reflected in Resolution passed on the 22<sup>nd</sup> January 1947 and inspired the shaping of the Constitution into a dynamic document. This resolution is the inner theme of the Preamble, which should be read, referred and remembered.

We, THE PEOPLE OF INDIA,  
having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR  
DEMOCRATIC REPUBLIC and to secure to all its citizen:  
JUSTICE-social economic and political;  
LIBERTY of thought, expression, belief, faith and worship;  
EQUALITY of status and of opportunity;  
And promote among them all  
FRATERNITY assuring the dignity of the individual and the unity and integrity of the  
Nation;  
IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949 do  
HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

The concept of “We the people...” being the source and authority for drawing up the Constitution was also taken from the US model and preamble begins with those words. Though the Constituent Assembly had legal power to enact the Constitution, the Preamble followed the

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<sup>8</sup> Constituent Assembly Debates, 22<sup>nd</sup> Jan, 1947, Vol. II p 316

American example and claims that "We the people of India, do hereby adopt, enact and give to ourselves this Constitution" and declared that objective of the Constitution were *justice, liberty, equality and fraternity*. Though there was broad mention of objectives in the Preamble, the framers chose to include detailed goals and objectives in Part IV entitled "Directive Principles of State policy" on the lines of Irish Free State, mentioning that they were not enforceable like Fundamental Rights.

Preamble is a statement of objects, which are expected by the Constitution makers to be realized through the implementation of the Constitution. In *Berubari Union and Exchange of Enclaves*, AIR 1960 SC 845, the Supreme Court considered the preamble a key to open the mind of the Constitution makers. It is a guide to interpretation of the provisions of the Constitution.

Preamble made it clear that Constitution emanated from the people of India and not from any external authority or any less authority than the people of India. Many Constitution experts and the Supreme Court stated that it is a conclusive assumption and a legal fiction, which cannot be tested or questioned in any court. Supreme Court held that the preamble was part of the constitution and it could be amended except the basic features in the Preamble. 42<sup>nd</sup> Amendment inserted three "Secularism, Socialism and Integrity" in Preamble. As these concepts were already implied in the Constitution, the addition was not considered to be the amendment of the basic features.

Dr. B.R. Ambedkar in his concluding speech in the Assembly stated that "Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life, which recognizes liberty, equality and fraternity, which are not to be treated as separate items in a trinity. They form a union of the trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality; equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity"<sup>9</sup>.

### **Constituent Assembly: A Sovereign Body**

The roots of the formation of the Constituent Assembly and the framing of the Constitution are relevant to understand its philosophy and evolution. The Constituent Assembly was formulated under the Cabinet Mission Plan prior to Independence. The elections to the Constituent Assembly were conducted under the system of separate electorate based on the community. After such an election too, it could not become a sovereign body. Thus its authority was limited in respect of the basic principles and procedure. The British Government brought it into existence in their process of conceding less and retaining the most of the authority with itself as counter strategy to the revolutionary raising. The Constituent Assembly was expected to work within the framework of the Cabinet Mission scheme alone. However, these limitations were removed by the Indian Independence Act, 1947 under which it was made free to frame any constitution it pleased.

### **Evolution of the Constitution of India**

Dr. Rajendra Prasad was elected the permanent Chairman of the Constituent Assembly. It met on December 9, 1946. The Muslim League members were not understanding the reason and not

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<sup>9</sup> Basu, D.D. Introduction to the Constitution of India, 18<sup>th</sup> Edition, p 24

agreeing to any viable proposition. The British Authorities were not in a mood to control or convince them. Thus in the initial days, the Constituent Assembly could not deliberate or decide any considerable thing. However, Jawaharlal Nehru moved the Objective Resolution on December 13, 1946 and that was passed on January 22, 1947. It was the expression to the ideals and aspirations of the people of India and so the objectives of the Constitution. These fundamental objectives guided the drafting members in framing a rulebook for the governance of the new nation. This ultimately became the very significant preamble of the Constitution of India.

After the Independence the Drafting Committee was appointed by the Constituent Assembly in accordance with the decisions on the CA on the reports made by the various Committees. Dr. B.R. Ambedkar was appointed the chairman of the Drafting Committee consisting of Sir Alladi Krishnaswamy Iyer, K.M. Munshi, T.T.Krishnamachari, and Gopaldaswami Ayyangar. Sir B.N.Rau prepared the original Draft on which the work of the committee was based. Several eminent personalities were elected to the Constituent Assembly through the indirect method of elections from the members of the Provincial legislatures. Infact, no prominent personality of the country was left out of the Assembly. The members include Jawaharlal Nehru, Rajendra Prasad, Sardar Patel, Maulana Azad, Gopaldaswami Ayyangar, Govind Ballabh Pant, Abdul Gaffar Khan, T.T.Krishnamachary, Alladi Krishnaswami Ayyar, H.N. Kunzu, H.S. Gaur, K.V.Shah, Masani, Acharya Kripalani, Liaquat Ali Khan, Khwaza Nazimuddeen, Sir Feroze Khan Noon, Suhrawardy, Sir Zafarullah Khan, Dr. Sachchidananda Sinha. Except Gandhi and Jinna almost all prominent public figures figured in this August body. They were elected on a limited franchise. But they were also elected on adult franchise in the first general elections held in 1952.

The draft Constitution was published in January 1948 and the people of India were given 8 months to discuss it and suggest changes. On November 4, 1948, the general discussions on the draft commenced in the Constituent Assembly and continued for five days. Then there was a thorough discussion clause by clause for about 32 days. As many as 7635 amendments were proposed and 2473 were actually discussed before a third reading was given for another 12 days. The Constitution of India was adopted and signed by the Chairman Dr Rajendra Prasad on November 26, 1949. The draft was considered for 114 days and the Constituent Assembly sat for 2 years 11 months and 18 days. Initially some important Articles came into existence, but the entire Constitution came into force from January 26, 1950.

There is a criticism that the Constitution would have been adopted by means of a referendum as was done in Ireland. Several old members of the Constituent Assembly were elected to either Parliament or State Assemblies vindicating their contribution to the drafting the Constitution and accepting the principles enshrined therein.

Glanville Austin wrote: "With the adoption of the Constitution by the members of the Constituent Assembly on November 26, 1949, India became the largest democracy in the world. By this act of strength and will, Assembly members began what was perhaps the greatest political venture since that originated in Philadelphia in 1787"<sup>10</sup>.

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<sup>10</sup> Glanville Austin, *The Indian Constitution: Cornerstone of a Nation*, p 308

## **Self-Government and Equality**

A reference to the history of British rule and Indian Independence struggle provide basic idea of self-governance that emerged into a people's participative democracy. The last emperor of Moghul dynasty did not mind to delegate the civil administration authority to the East India Company, which was the first historic blunder that paved the way for the Company rule. The merchants who came for tea and other such things were granted not only the business rights but the revenue power to collect their dues from the clients. After some years the Company also could bargain power of administering justice within its colony and started applying the law of their own developing islands of their own sovereignty in India. This means the power of governance and the civil administration. Then imperialistic interests improved making it a sovereign with active support of the British Crown. When the officers of the company looted the innocent people and cheated the company too, the British Administrators realized that it was no longer good to leave the Indian nation in the hands of company and conveniently took over the reigns of governance. It encouraged the independent princely states if the princes subjugate to British, and if not, they won them over in battles fought by Indian born Crown soldiers backed by English captains.

Till 1947 they tried to create several states within India and gave them all courage to opt out of acceding to Indian Union apart from inciting communal dissensions. Unification of scattered Indian states within the sub-continent was Herculean task, which made the present Indian Union possible after a violent partition into three pieces. The framers of the Constitution intended to secure the hard-won freedom with integrity and preferred a strong union within a federation, which otherwise appear contradictory. Mahatma Gandhi wrote in January 1922 under the caption 'Independence' in his weekly, "Young India": Swaraj, therefore will not be a free gift of the British Parliament. It will be expressed through an Act of Parliament is true. But it will be merely a courteous ratification of the declared wish of the people of India. This statement clarifies the doubts about 'independent' origin of Independence of India, if any.

### **The Task:**

The Constituent Assembly became sovereign body after Indian Independence Act, 1947 was enacted and it was freed from limitations and restrictions imposed by British Parliament earlier under different Acts and plans. The sole task of the Constituent Assembly was framing of the Constitution for Independent India. The search for providing a legal frame and incorporating important systems relevant to India began. The framers looked forward to international documents, progressive democratic constitutions, and constitutional doctrines prevailing in Britain.

It can be said in one word, what was finally adopted by the framers was British form of Government adapted to a Federal Constitution, as stated by the authority on the Constitutional Law of India, H.M. Seervai.

The British has an unwritten unitary Constitution based on two fundamental doctrines:

1. Doctrine of supremacy of the Parliament
2. Cabinet form of Government with a Monarch as its head

What the framers drew from UK was the Westminster model of cabinet Government as the system to govern India, according to Supreme Court. This model increasingly demands a high standard of character and conduct from members of Legislative, Judiciary and higher Civil Service.

Two world wars and consequential trials of war criminals before India achieved Independence marked the international scene. The horrendous thought of extermination of millions of people in gas chambers revealed in Nuremberg trials, war crimes, crimes against humanity, inhuman and barbaric violence over the civil population during wars and civil strife in partition which left a permanent scar reminded the humanity of the need for human life and dignity. Cruelties and infamies during Nazi regime influenced making of the Constitution. Part III with Fundamental rights was generated out of such human suffering and inspired by the Universal Declaration of Human Rights. Fundamental Rights were not included in earlier Constitution i.e., the Government of India Act 1935, because the British parliament was skeptical about the necessity of enshrining Fundamental Rights. The rights declared by UN were not enforceable.

While incorporation of fundamental rights is significant aspect of the new Constitution, the framers deliberated a lot in importing the concept of federalism with changes suitable to Indian circumstances and diversity in unity, rather than unity in diversity. Federalism as a basic philosophy is accepted and provided in the Indian Constitution. The Cooperative Federalism, which is how the character of Indian Constitution was described, has evolved from conflicting situations and controversial background recorded by the history.

### **Why Federalism?**

There are two levels of government above local level, with sovereignty in certain specific areas. The Central government will be having sole authority to coin money, raise an army and declare war, while intermediate level of government, i.e., states or provinces have sole authority to regulate education, criminal law, or civil law, citizens deal with both levels of government.

Federal constitution provides for expression of regional goals and national objectives. It has a special advantage that the Federal Government can absorb some of the costs of new technology or programs that would have to be absorbed completely by member units in a unitary or con-federal government system. It can accommodate the aspirations and sovereign interests of different provinces with ethnic groups, linguistic characteristics. Federation is suitable to a plural society with multiple cultures and multiple language speaking populations.

Federalism allows countries involved to maximize the growth and political strength, while at the same time allowing the expressions of regional characteristics<sup>11</sup>. In situations of large size, involving separation and divergence of communities the federation will be a useful and working system of government. Around 21 nations are federal in this world, which occupy largest part of the globe. While China is Unitary, other four big nations like, Canada, the United States, Brazil and Australia are the federations. The USSR was also a federation, till it had split into some smaller federations. Mexico, Venezuela and Argentina in Latin America; Nigeria in Africa; Switzerland Yugoslavia and Czechoslovakia (till it was split into nations) in Europe and India in Asia are the other federations.

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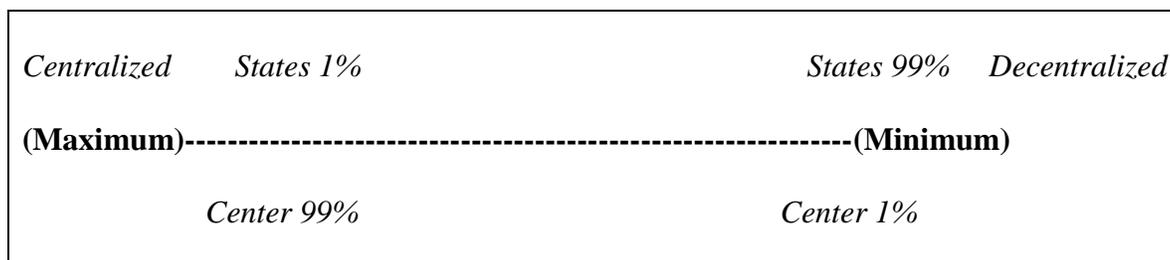
<sup>11</sup> Ronald Watts, *New Federations: Experiments in the Commonwealth*, Oxford Clarendon Press, 1966

Switzerland chose federal system as that suits its three language groups, German, French and Italian. It recognizes three official languages. Of the twenty two Swiss cantons, there are eighteen unilingual cantons, three bilingual cantons and one trilingual canton. The Swiss Constitution guarantees each citizen the right to communicate with the central government in any of the three official languages<sup>12</sup>. Germany also adopted the federal system. Instead of dividing the powers between the Bund (Central Government) and Lander (Member Units), the German Constitution provides for broad area of concurrent jurisdiction. The Upper House of the National Legislature, the Bundesrat, is chosen by the Lander Governments and has an absolute veto over matters of ‘national’ concern<sup>13</sup>.

William Ricker has suggested a useful framework within which the many federal governments of the world may be measured. He has suggested that federations can be measured along a ‘centralized-decentralized’ dimension. The following minimum and maximum, illustrated in Figure may define this dimension.

Minimum: The ruler(s) of the federation can make decisions in only one narrowly restricted category of actions without obtaining the approval of the rulers of the constituent units.

Maximum: The ruler(s) of the federation can make decisions without consulting the rulers of the member governments in all but one narrowly restricted category of action.



### ***Scale of Federalism***

*The closer to the ‘minimum’ end of the scale a federal government is, the more it can be described as a peripheral federation’. The closer to the maximum of the scale a federal government is, the more it can be described as a centralized federation.*

### **Federalism: A Basic Philosophy**

Genesis of idea of federalism in India was first traced in Simon Commission, “Indian Statutory Commission” appointed in 1927. The Commission was meant for revision of the Constitution for India. In its report in 1930, the Commission recommended the evolution of India into “a federation of self-governing units”.

<sup>12</sup> Ursula K Hicks, *Federalism: Failure and Success* New York Oxford University Press, 1978 pp 144-171

<sup>13</sup> *ibid.*

The representatives of Princely States declared during the First Round Table Conference 1930-32) that they would join an “All India federation with a self-governing British India”. The White Paper embodying the report of Round Table Conference, in March 1933 was submitted to Joint Select Committee of Parliament, which preferred creation of “All India Federation”.

By Government of India Act 1935, the background was ready for making India to become a federation with 11 Governor’s Provinces and 650 Native States, who supposed to have fifty per cent seats in Council of States. However, execution of the instrument of accession was the prerequisite to form the Federation, which could not become a reality.

The Cabinet Mission Plan in 1946 contemplated the division of the country into three Zones, Zone A, Zone B and Zone C, based on the concentration of Hindus and Muslims. Zones B and C included Muslim dominated areas. The Center was supposed to be uniting point of these three zones, with its power confined only to Defence, Foreign Affairs and Communication. Constituent Assembly was to be divided into three sections according to the Zonal Scheme for evolving provincial and group Constitutions. The proposal of grouping of Provinces became point of dispute and disagreement, while in general; the Plan was acceptable to major political parties. The division of three Zones eventually resulted in the Partition as a precondition for Independence. While presenting the Partition scheme, Lord Mount batten insisted the major parties to agree for partition to have the federation with a strong center, instead of weak center as contemplated in Cabinet Mission Plan.

Generally speaking, the CONFEDERATION is a system where the units dominate the Union, in Unitary State, the Union dominates the Units, and if Union and Units are co-equal it is Federation. In a Confederation, there will be an alliance between independent states where units can secede. In Unitary State the legislatures of Units derive power from Central Legislature. Vital feature of federation is division of legislative powers, each unit being sovereign in its own sphere.

Dr B.R. Ambedkar used the term Union to make it clear that states had no right to secede from the Union to set themselves into separate States. He said that this Union was Federation and called it a flexible federation to say that it was not as rigid as the American Constitution was. However the expression Federation was not used deliberately.

In *Keshavananda Bharathi* case<sup>14</sup>, the Supreme Court said that the federal character of the Constitution was its basic feature. In *State of Rajasthan v. Union of India* (AIR 1977 SC 1361) it was held that states could not assert any right based on the supposed federal character of the Constitution. Supreme Court said: “The Constitution is amphibian in sense that it can move either on the federal or the unitary plane. When action is taken under Article 356 the movement is on the unitary plane.”

In *West Bengal v. Union of India*<sup>15</sup> the Supreme Court observed: “The Indian Union is not a true federation”.

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<sup>14</sup> AIR 1973 SC 1461

<sup>15</sup> AIR 1963 SC 1241

## **Five Essentials of Federal Character:**

1. The Constitution must be written
2. It must be rigid
3. It must be supreme law of the land
4. There must be division or distribution of powers between the Union or Federal Government and the various States or Provinces
5. There must be an independent and impartial judiciary to interpret the Constitution and the Laws.

Thus, our India emerged as a federation getting relieved from the clutches of British Raj. Several princely states, which were divided and ruled, came together to form the Indian Union. The Center and Provinces of Pre-Independence days became Union and States with clear division of powers enlisted in three lists- Union, States and Concurrent Lists. Most of the federations in the world came into existence because of two or three independent states coming together. In India the process is reverse. Originally it was a vast unitary state with several provinces as administrative units. Indian federation was not the result of an agreement between the federating states.

The Indian Federation was joined by the former Princely States, which later became the units of the federation. Several such states acceded to India and became full-fledged members of the Indian Union. When Constitution came into force the component units were grouped into four categories of States. By a gradual process the reorganization of States took place, which continued up to the close of 1969. In 1969 Twenty Second Amendment to the Constitution was passed. State of Jammu and Kashmir had been accorded a special position in Indian Union. In Sardar Patel's words: "...the first requirement of any progressive country is internal and external security. Therefore I started planning on the integration of the country.....It is impossible to make progress unless you first restore order in the country. Maulana Azad in one of his notes in 1948 referred, inter alia, to a demand gathering strength for linguistic states and observed that the only way of maintaining Indian solidarity was to give a commanding position to the Center in the new Constitutional set up. Indian National Congress was advocating for a strong center from the beginning. In fact, the Cabinet Mission Plan which resulted in weak center proved to be a disaster as the country was bifurcated.

Ambedkar said that the Indian federation was a "Union" because it was indissoluble, and no state had a right to secede from the Indian Union. He said:

The Drafting Committee wanted to make it clear that though India was to be a federation, the federation was not the result of an agreement by the States to join in a federation, and that the federation not being the result of an agreement, no State has the right to secede from it. The federation is a Union because it is indestructible. Though the country and the people may be divided into different states for convenience of administration, the country is one integral whole, its people a single people living under a single imperium derived from a single source. The Americans had to wage a civil war to establish that the States have no right of secession and that their federation was indestructible. The Drafting Committee thought that it was better to make it clear at the outset rather than to leave it to speculation or to dispute<sup>16</sup>.

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<sup>16</sup> Khanna, H R, Making of India's Constitution, EBC, pp20-21

## **Strong Center to secure the nation**

The founding fathers of the Constitution felt a need for a strong Center because of prevailing social economic and political conditions. Ambedkar said in the Constituent Assembly: “The Indian Constitution is a federal Constitution in as much as it established what may be called a dual polity which will consist of the Union at the Center and the States at the periphery each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution”. However, he asserted that the Indian Constitution avoided the tight mould of federalism in which the American Constitution was caught, and could be both unitary as well as federal according to the requirements of time and circumstances.

We the people of India, opted for a federation in which Center was to be very strong and which has in-built mechanism to convert the Constitution into a unitary Constitution in certain circumstances and situations is crystal clear from the various provisions of the Constitution. Each and every regional government of the country is independent each of the other within its sphere. However it is called “cooperative federalism” as the states are expected to cooperate with each other. Thus the Indian Constitution had been cast in a mould of its own. It is certainly federal in so far as it assigns different, distinct and independent legislative fields to the Union and State governments, and in so far as it has in-built mechanism of converting the federation into a unitary system, it is typically Indian model.

### **Federation, a model:**

Among the models available before the Constituent Assembly, the US Constitution was very important document on Federation, the Acts prepared by the UK Parliament prescribing Constitutions for Canada, Australia and India and Bill of rights introduced in US through ten amendments.

### **Executive:**

The framers adopted British model of Executive. The Executive is responsible to Legislature in Canada and Australia and that was the concept in Government of India Act 1935 also. Framers did not hesitate to adopt the same.

### **President:**

The name for the Head of the Nation, i.e., the President, was drawn from US model, while position, functions and powers of the President were almost similar to those of the Head of the Britain, i.e., Crown.

### **Vice President:**

The name and nature of Vice President’s office was also drawn from US Constitution, where Vice President holds the position of ex-officio chairman of Second Chamber. Framers adopted the system of parliamentary executive in preference to the Presidential System of US.

## **Separation of Powers:**

A renowned Constitutional expert, authority on Constitution of India, and an Advocate, Mr. H.M. Seervai removed the common misconception by stating that the machinery of Government set up by our Constitution follows in essentials the British and not the American model. He says:

The doctrine of separation of powers and the doctrine that legislatures are the delegates of the people which are basic doctrines of the US Constitution do not form part of the Constitution of Great Britain or the Constitution of India. Our Constitution has rejected the presidential form of Government, that is, of an executive independent of, and not responsible to, the legislature, and adopted the British model of Government by a Cabinet, that is, of an executive responsible to, removable by, the legislature. (Articles 74, 75 for Union Executive and Arts. 163,164 for State Executive).....The President is the formal head of the Government and has to act on the advice of the Cabinet like the Crown in Great Britain<sup>17</sup>.

## **Legislature:**

1. **Predominant Position:** The Constitution conferred on the House of the People, and on the Legislative Assemblies of each State, the predominant position.
2. **Privileges:** Though it is not as supreme as that of UK Parliament, the Parliament in India also enjoys a superior status in terms of privileges of the British House of Commons at the commencement of the Constitution. (Arts. 105 and 194)
3. **Procedure in respect of finance,** the provision for consolidation fund, the scrutiny and supervision of Union and State public accounts by an independent Comptroller and Auditor General of India, are on lines of British system.

## **Judges:**

The appointment of judges of Supreme Court and High Court and the appointment of subordinate judiciary is also on the lines of British model and not the American model. The judges hold the office till a slated age and that they can be removed only by a process of impeachment. The position of Judges of SC is same in US England and India. In England and India, the judges are not elected like in many states of US.

## **Legalism & Rigidity:**

The following requisites of federalism brought in the legalism and rigidity to the federal structure of the Constitution.

1. A Written Constitution.
2. Concept of Ultra vires, empowering the Courts to declare the law as ultra vires, which makes federalism to give rise to legalism.

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<sup>17</sup> Seervai, the Constitutional law of India, Vol 1, Fourth Edition, p 159

3. Powers of Federal Government lack flexibility for they are limited by the terms conferring the powers, which can be enlarged only by amendment to the Constitution.

Legalism and rigidity are inevitable consequences of federalism. Rigidity is an inherent defect in Federalism and the unavoidable price of federal union. Method of distribution of powers given in detail was hoped to mitigate the rigidity and legalism of a federal constitution.

### **Minimising the Rigidity:**

Dr, Ambedkar listed out various ways adopted to minimise the rigidity and legalism of federal constitution<sup>18</sup>

1. The distribution of legislative power between the Union and the States which gives to the Union exclusive power to legislate in respect of matters contained in List I, and a concurrent power to legislate in respect of matters contained in List III of Schedule VII (Article 246)
2. The power given to Parliament to legislate on exclusively State subjects, namely,
  - a. with respect to a matter in the State List in the national interest Art. 249
  - b. in respect of any matter in the State List if a proclamation of emergency is in operation Art 250.
  - c. For two or more States by consent of those States (Art. 252)
3. Provisions for proclamation of emergency and the effect of such proclamation (Art 353 and 353).
4. Provisions included in the Constitution which are to be operative “unless provision is made to the contrary by Parliament by law” or words to the same effect.
5. Provisions regarding the amendment of the Constitution.

### **Residue Powers:**

1. In the United States Constitution, “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.” (The Tenth Amendment to the Constitution) The powers are thus mutually exclusive and it was left to judicial interpretation to imply a limited field of concurrent legislative action. In Australia, the residuary powers are reserved with States, but the enumerated powers of the Commonwealth are not exclusive so that there is a large field of concurrent legislative action. Canadian Constitution gave residuary powers to the Dominion. It contained double enumeration of exclusive legislative powers. The Government of India Act 1935 gave exhaustive lists of power- List I- Federal, List II Provincial, and List III concurrent Legislative Lists. Article 246, and Schedule VII gave Parliament a very wide field of exclusive legislation and a substantial field of concurrent legislation to mitigate the rigidity and legalism inherent in federalism.

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<sup>18</sup> (Constituent Assembly Debates, Vol VII, p 34.).

## **Conflict between Federal Law and State Law:**

In the United States, Canada and Australia it is well settled that in any irreconcilable conflict between a valid federal law and valid State law the federal law will prevail and the State law will be void to the extent of its repugnancy to the federal law. The paramountcy of federal law was generally provided in GI Act 1935. Section 107 provided flexibility in the exercise of concurrent legislative power where law made by provincial legislature will prevail over earlier Federal law with certain conditions and limitations. Article 254 conferred on Parliament the power to repeal a State law made in exercise of concurrent legislative power.

With regard to taxation power also independent and exclusive lists were made in GI Act, which was adopted by the Constitution. It avoided overlapping powers of the taxation. The Constitution has taken over the principle of exhaustive enumeration of legislative subjects in the three legislative lists with beneficial results. Article 248 gives residuary powers to the Union.

## **Flexibility in working of Federation**

2. Article 249 is a well-drafted provision intending to secure greater flexibility in working the federation. The States have exclusive power to legislate on matters contained in the States List. Article 249 provides for a situation where the national interest requires that Parliament can legislate on a subject in the State List only if Council of States resolves by 2/3 majority that it is necessary in the national interest. Such a resolution remains in force for one year and can be extended beyond. The law passed in pursuance of such resolution ceases to have effect after six months. It is meant to deal with temporary situation. Articles 250, 352 and 353 confer power to issue a proclamation of emergency, after which Parliament can pass laws for a State in respect of the matters contained in the List II. This power has to be exercised by the President of India and requires the approval of both Houses. Dr Ambedkar says that these provisions made the Indian Constitution both Federal and Unitary. In normal times it is framed to work as a federal system. But in times of war it is so designed as to make it work as though it was a unitary system<sup>19</sup>. There is no such provision in the Constitutions of United States, Canada and Australia. However same result is arrived by the judicial interpretations in those three countries. GOI Act 1935 gave express power in times of war to the federal government to legislate even on subjects of exclusive provincial legislation.

## **Emergency Provisions:**

Inclusion of “internal disturbance” in Section 103 of GOI Act, 1935 was questioned on the ground that it was aimed at Freedom Movement. That word found its place in the Constitution also. This is the expression used for imposing Emergency on 26<sup>th</sup> June 1975. This was replaced later by “armed rebellion”.

Two or more states can empower the parliament to legislate on state subject under Article 252. Similar powers were available under GOI Act, 1935 (S. 103). However, the law passed under Article 252 by Parliament, cannot be amended by state legislature. Article 252 provides another flexibility in the working of federal government.

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<sup>19</sup> Constituent Assembly Debates Vol VII pp 34-35

## **Union's Power to Legislate on State Subjects:**

The power of Chief Executive in the Union to legislate on State subjects through ordinance and power of the Union when the constitutional machinery failed in States are other two aspects drawn from the GOI Act, 1935 (Section 42). Article 123 empowers the President to promulgate ordinances during the recess of the Parliament, and Article 213 gives similar power to the Governor in the States. Powers under Article 356 are also found under GOI Act, (Section 45), wherein the Federal executive takes over the administration when the constitutional machinery failed in the state.

## **Restrictions on Trade:**

Section 297 of the Act of 1935 prohibited certain restrictions on internal trade and thus secured freedom of inter-State trade and commerce by providing no provincial legislature or government shall have power to pass any law or take any executive action prohibiting or restricting the entry into or export from a province of any goods or class of goods and by prohibiting discriminatory taxation on goods manufactured and produced outside a province. Thus Government of India Act, 1935 furnished a model, which with some alterations could be adopted by the drafting committee relating to inter-State trade and commerce. But, Seervai says, the framers preferred to borrow Section 92 of the Australian Constitution and couched Article 301 in similar language giving freedom of trade and commerce.

## **Amending Provisions:**

Government of India Act 1935 was not provided with amending provisions because that power was retained by the British Parliament itself. Any Constitution without provision for Amendment will become extremely rigid. The US constitution and Constitutions of other federations made provision for Amendment. Article 368 provided for amendment.

Constitutions of Canada, Australia and GOI Act 1935 did not provide for citizenship, because there was no need. All the citizens of these countries were subjects of United Kingdom and thus were having common citizenship. Indian Constitution provides for single citizenship throughout the country. American Example of dual citizenship, namely, a citizenship of the United States and a citizenship of individual state was not followed in India because the provinces of India were not separate states with constitution of their own.

The US Constitution provided for establishment of dual agencies for carrying out federal and State laws, such as federal courts established in each State and a federal executive operating in each state to enforce federal laws. In the Constitutions of Canada, Australia and in the GOI Act 1935 also such a provision existed. But in these countries Federal Agencies have not come into existence. So is the case with our country too. The Constitution of India provided for such power but in fact this power has not been exercised.

## **Fundamental Rights:**

Great philosophers Locke and Adam Smith and Mill believed that social harmony and progress were compatible with reserving a large area for private life over which neither the State nor

any other authority must be allowed to trespass. Hobbes stressed the need for centralized control and decrease that of the individual. But both the sides agreed that some portion of human existence must remain independent of the sphere of social control. To invade that preserve, however small, would be despotism. Jefferson, Burke, Paine and Mill stated that we must preserve a minimum area of personal freedom if we are not to 'degrade or deny our nature'. We cannot remain absolutely free, and must give up some or our liberty to preserve the rest. But total self-surrender is self-defeating. Since justice demands that all individuals be entitled to a minimum of freedom, all other individuals were of necessity to be restrained, if need be by force, from depriving any one of it<sup>20</sup>. This is the philosophical basis for freedoms and the restrictions over it, which appear in appropriate equilibrium in Indian Constitution.

The inclusion in the Constitution of a distinct part guaranteeing Fundamental Rights can be traced to the forces that operated in the struggle for independence during British Rule. As early as 1895 Bill, which was described by Mrs. Annie Besant as the Home Rule Bill, was introduced which envisaged a Constitution for India guaranteeing to every citizen freedom of expression, inviolability of one's house, right to property, equality before the law and in regard to admission to public office, the right to present claims, petitions and complaints and right to personal liberty. In August 1918 Indian National Congress soon after the publication of the Montagu-Chelmsford Report, made a demand that the new Government of India Act should declare the rights of the people of India as British Citizens. The Constitution of the Irish Free State in 1921 which included a list of Fundamental Rights also made a lasting impression on the Indian leaders.

The Commonwealth of India Bill finalized by the National Convention in 1925 contained specific declaration of rights visualizing for every person in terms practically identical with the relevant provisions of the Irish Constitution specifying fundamental rights. Simon Commission Report in 1930 did not support the demand for enumeration of Fundamental Rights in the Constitution Act on the ground that abstract declaration of such rights was useless there existed the will and means to make them effective. In March 1931 Indian National Congress Karachi session reiterated demand for a written guarantee of Fundamental Rights as essential in any future Constitutional set up in India. The Joint Select Committee of the British Parliament on the Government of India Bill of 1934 did not favour this demand. Thus the Government of India Act 1935 did not enumerate the Fundamental Rights. The Sapru Committee appointed by the All Parties Conference during the year 1944-45 expressed the view that Fundamental Rights should be expressly guaranteed. The British Cabinet Mission Plan of 1946 envisaged the setting up of an Advisory Committee for reporting, inter alia, on Fundamental Rights. The Constituent Assembly has debated every fundamental right and developed the text of the significant Part II.

The American Bill of Rights declared rights in terms almost absolute, leaving it to the courts to impose restrictions over them based on some doctrines. However Indian Constitution provided a new fundamental right under Article 32, namely the right to move the Supreme Court for enforcement of Fundamental Rights.

Existence of Fundamental Rights chapter along with enforcing Articles, Seervai says, is not a feature that distinguishes the Indian Constitution from British, Canadian and Australian Constitutions, and it does not resemble the US Constitution. Doctrine of Ultra vires is not applicable

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<sup>20</sup> Khanna H R, Making of India's Constitution, pp 30-31.

to the Acts made by the British Parliament, but applied by the English courts to subordinate bodies constituted by Statutes or Charter, and the Privy Council considers the validity of laws made in colonies. There is English Bill of Rights, 1689 also which declares the basic freedoms which Englishmen claimed for themselves. The Fundamental Right under Article 32 is not different from the other rights conferred by the Constitution. The well known English Writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto are essential components of judicial review power, which was stated in express terms under Article 32 and 226 and thus the origin of these Articles could be traced in English writs, which were exercised for centuries by the Court of Queen's Bench. Thus Seervai says that no new jurisdiction is created by Constitution of India.

### **State Legislature:**

Seervai also points out another major difference between US and Indian Constitution, while the former provides Constitution only for the Federation, the Indian Constitution provides for Center and States also. In US the legislatures of the States are considered to be the delegates of Federation, whereas the British Parliament never envisaged such a concept. The State legislatures were as supreme and sovereign as British Parliament, which is accepted as the rule in Constitution of India also. The doctrine of immunities of instrumentality evolved by the US Supreme Court, the doctrine of police powers and the doctrine of the political question have no place in our Constitution. For our Constitution is a detailed and an elaborate document containing provisions as regards the power of executive and judiciary, and for distribution of legislative power also. US Constitution is a very brief document which declares rights in wide general terms leaving it to the judiciary to evolve exceptions and qualifications to those rights, which were clearly incorporated as the restrictions over declared rights in the Constitution itself.

### **Distribution of Powers:**

Generally in a Federation the concept is that both the Union and State are equally sovereign and supreme. The principle of distribution being that the powers in matters of national concern and matters where uniformity of laws throughout the country is desirable to the Union and powers in matters concerning the state or local interest being given to the State. There are two forms of distribution. One- enumerated powers are given to the Union and residuary power to States as in the US and Australia. Two-enumerated powers are given to the States and residuary powers being given to the Union as in Canada.

### **India, that is Bharath...**

The First Article of our Constitution says, "India, that is Bharath, shall be a Union of States." Wade and Philips defined the Constitution as a document having a special legal sanctity which sets out the frame-work and the principal functions of the organs of the Government of a State and declares the principles governing the operation of those organs. It is a rulebook for a nation.

A new republic came into force on 26<sup>th</sup> January 1950 on which day the Constitution of India has come into existence. Then the debate about the character of our Constitution started. Is it a Union or Federation?

India emerged as a federation getting relieved from the clutches of British Raj. Several princely states, which were divided and ruled, came together to form the Indian Union. The Centre and Provinces of Pre-Independence days became Union and States with clear division of powers enlisted under three lists- Union, States and Concurrent Lists. Most of the federations in the world came into existence because of two or three independent states coming together. In India the process is reverse. Originally it was a vast unitary state with several provinces as administrative units. Indian federation was not the result of an agreement between the federating states.

The Indian Federation was joined by the former Princely States, which later became the units of the federation. Several such states acceded to India and became full-fledged members of the Indian Union. When Constitution came into force the component units were grouped into four categories of States. By a gradual process the reorganization of States took place which continued up to the close of 1969. In 1969 Twenty Second Amendment to the Constitution was passed. State of Jammu and Kashmir had been accorded a special position in Indian Union. Ambedkar said that the Indian federation was a “Union” because it was indissoluble, and no state had a right to secede from the Indian Union.

### **A strong Centre**

The founding fathers of the Constitution felt a need for a strong Center because of prevailing social economic and political conditions. Ambedkar said in the Constituent Assembly: “The Indian Constitution is a federal Constitution in as much as it established what may be called a dual polity which will consist of the Union at the Center and the States at the periphery each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution”. However, he asserted that the Indian Constitution avoided the tight mould of federalism in which the American Constitution was caught, and could be both unitary as well as federal according to the requirements of time and circumstances.

We the people of India, opted for a federation in which Center was to be very strong and which has in-built mechanism to convert the Constitution into a unitary Constitution in certain circumstances and situations is crystal clear from the various provisions of the Constitution. Each and every regional government of the country is independent each of the other within its sphere. However it is called “cooperative federalism” as the states are expected to cooperate with each other. Thus the Indian Constitution had been cast in a mould of its own. It is certainly federal in so far as it assigns different, distinct and independent legislative fields to the Union and State governments, and in so far as it has in-built mechanism of converting the federation into a unitary system, it is typically Indian model. There is an eternal debate about the character of the Constitution- is it Federal or Unitary.

### **Parliament decides the fate of States**

Article 3 empowers Parliament to abolish or create States and therefore, it is argued that the very existence of States depends upon the mercy of Parliament. Parliament also can change the boundaries of the States.

There are high emergency provisions in favour of the Centre, which negate the federalism. At the same time, the very fact that these provisions are of temporary nature and Emergency which is

also known as President's Rule cannot be perpetrated for long, strengthens the argument that Indian Constitution is a federation.

Whereas the Articles 256,257 read with Article also establish that it is not a federation. Articles 249 to 253 empower in some special circumstances Parliament to legislate on the subjects of State List, which goes to say that it is non-federal.

There is another opinion that it is a quasi-federal constitution and contains more unitary features than federal. The other view is that it is a federal constitution with a novel feature of getting more powerful in national emergencies. The framers of the Constitution view it as Federal Constitution. Ambedkar said: "I think it is agreed that our Constitution notwithstanding the many provisions which are contained in it whereby the Centre has been given powers to override the Provinces non the less, is a Federal Constitution."

### ***Federal Features:***

1. The first characteristic of federation is distribution of powers among the centre and states with matters of national importance being entrusted with the Union, and matters of local concern remain with the States.
2. Every individual or the institution or system derives power from the Constitution, which is supreme.
3. The written constitution is another feature of federation. Foundations of federation lies in the complicated terms reduced into writing.
4. Once it is written it is expected to be rigid. In a rigid Constitution the process of amendment is difficult. Constitution is a permanent document. It is supreme law of the land. Amending it is not impossible, but difficult.
5. To maintain the division of powers between two levels of the Government, an independent and impartial authority above all the ordinary bodies, the judiciary is established. The judiciary has the final power of interpretation of and guarding the provisions of the Constitution.

### ***Unitary Features:***

1. The union appoints its agents as Governors for the states, in whose name the entire administration runs. They are answerable to the President.
2. Parliament has power to legislate for the states in national interests.
3. The Union decides the fate of the states. Parliament can form new states and alter boundaries of existing states.

4. The Constitution gives more powers to the Union during emergencies. There are three types of emergencies. 1. Emergency caused by war or external aggression, 2. Emergency caused by failure or constitutional machinery of the states.

### **Emerging into a “Cooperative Federation”**

Single citizenship, All India Civil Services, Unified Judiciary, single Election Commission, the Finance Commission, and the Planning Commission also establish the unitary character of our constitution. Indian Constitution is not laissez faire federal Constitution. Paras Diwan, an eminent law writer said in his “Indian Constitutional Law at page 6: “It is essentially a cooperative federation, where two sets of governments are not antagonistically independent of each other but coordinate, cooperate and collaborate in each other’s efforts “to secure to all its citizens justice, social, economic and political, liberty of thought expression, belief, faith and worship: equality of status and of opportunity: and to promote fraternity assuring the dignity of the individual and the unity and integrity of the Nation.”(Preamble of the Indian Constitution)

Paul Appleby calls the Indian Constitution as extremely-federal<sup>21</sup>. The so called autonomy of the states appears to be a myth or practically impossible in certain circumstances. The biggest threat to the autonomy of the states is the provisions like Article 356. The Sarkaria Commission which probed into the centre and state relations suggested exhaustive measures to improve the state autonomy and strengthen the cooperative federalism, the basic concept of our constitution. With the advent of regional parties gaining popularity with their relentless fight against the misrule by Central Governments ignoring the needs of some states, the demand for more powers increased. The unitary features of the Constitution are coming under the constant attack from the states, which are asking for more share in tax revenue and legislative powers.

### **List of Powers**

Generally in federal Constitutions, which follow the American model, enumerate a list of legislative powers for the Union and leave the residue to the States. The Canadian Constitution followed a different pattern. There are two lists of legislative powers, one for Centre and the other for the Provinces and the residue is vested in the Centre. Indian Constitution followed the Canadian Federal model. The Concurrent list is the idea borrowed from the Australian pattern of federal division of powers.

In Government of India Act 1935, a similar division of power was envisaged. These three lists are found in Seventh Schedule. It consists of two elaborate lists for Union and States and an additional list called Concurrent list, regarding which both the Union and States can legislate. The Parliament and State legislatures both have concurrent power of legislation over the items included in this list. So as long as the Parliament does not pass a law on any of these items, the state may pass any law they like on the same. But once the Parliament does enact a law on such items, Parliamentary law shall prevail over any state law in this regard. There is one exception to this general rule. If a state legislature pass any law on an item in concurrent list, a later point of time, it will prevail over an earlier law of the Parliament on the same subject, if the state law was reserved for the consideration of the President or received his assent. This is the original feature of our

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<sup>21</sup> Public Administration in India, Report of Survey (1954), 51.

constitution, which enables a State to pass a more advanced piece of legislation than an existing Parliamentary law, or to provide through a new law with the consent of the Union, to suit the special conditions or circumstances prevailing in that state.

There are several unique features of Indian Constitution, which made it a distinctive federation.

Absence of dual citizenship, Constitution being a single constituent authority to include the powers and functions of both center and states, several express provisions which minimised the rigidity and legality of federal nature, making the state unitary during emergency, unity despite separate existence of center and state with distinct powers, absence of rivalry between center and states are some of the peculiar features of Indian constitution, which justify the description of distinctive federation.

Constitution making is a continuous process. Evolution of the Constitution does not stop with making of a Constitution. It in fact begins with that. Subsequent changes and amendments, dynamic consequences of observance and breach of those provisions, judicial interpretations in live examples offer new colours and deep insights to fill spirit in dry letters of the Constitution. Every significant judgment along with a political development presents the Constitution from an unseen angle and through a different light altogether. Seventy Third and Seventy Fourth Amendment to the Constitution is one such landmark.

### **Continuous evolution and evaluation of Constitution**

The Seventy-third and Seventy-fourth amendments to the Constitution in 1992 have fortified the third tier of the governance, i.e., and local bodies like Panchayats and Municipalities. This amendment did not alter the relationship between the center and states, but tried to create a strong representative polity at third level. It is an encouraging federal tendency.

Second important development is evolution of several procedural curbs on the powers of center under Article 356. Judicial legislation on this aspect emphasizes that the polity under Indian Constitution is basically federal, and center cannot frequently interfere with the administration at the state by resorting to demolition of elected government on political reasons.

S. R. Bommai case and executive actions of the President in sending back the resolution of the Cabinet for imposition of president rule in UP are some more developments which strengthened the federal character of the constitution. Besides this the dynamic politics of the nation necessitated political alliances forming the Government in association with different splinter groups rather than cohesive political parties, each forming into a strong lobby or pressure group which reflect diversity of interests, view points and variety of practical restrictions on exercise of power by the persons occupying top executive positions. The power center has to inevitably heed to the opinion emerging from a relatively small group, which also possessed the power to pull down the Government. By new millennium the federalism and democratic dynamics could be found in coalition politics of India both in ruling and opposition.

## **Nature and Characteristics of Indian Federalism:**

Ivo D. Duchacek has drawn a model to explain the nature and characteristics of the Indian Federalism, and analysed the links between two spheres of seemingly exclusive jurisdiction. He classified these links under two broad categories. They are (I) the Constitutional overlaps and (II) Extra Constitutional overlaps<sup>22</sup>.

### **Constitutional overlaps:**

1. The 'Elastic Clause'
2. Constitutional authorization for federal supervision of local execution of national laws.
3. The right to insure the republican or democratic form of government.
4. Emergency powers in case of invasion or insurrection.
5. War and foreign policy powers.
6. Concurrent powers.
7. Dependence of the central authority on the State government, in such things as state control of national elections, control over the upper chamber, and local administration of national programs. Dependence of the Central Authority on the components also includes the possibility of blackmail, implied in the Constitutional grant of the right of secession<sup>23</sup>.

#### **1. Elastic Clause:**

There is distribution of powers through three lists among the center and states. If the Union law trenches upon the State subjects or vice versa, the courts apply a principle of interpretation known as the "Doctrine of Pith and Substance". This doctrine validates the law despite the entrenchment into the domain of one by another. It proves the elastic nature of powers.

#### **2. Constitutional Authorization for Federal supervision of local execution of national laws:**

Article 256 says that every state has to exercise its executive power so as to ensure the compliance with the laws made by the parliament and any existing laws which apply in that state. To do this, union executive can give directions to a state as it finds necessary for that purpose. Thus the state has an obligation to comply with the law of parliament and union can issue directions for that purpose. This serves a dual purpose, that the state law shall always comply with the Union law and that in execution of the laws the Union can issue directions to the state. Article 257 also deal with the control of the Union over states. Article 258 empowers Union powers on states. Failure to comply with these directives may lead to imposition of President Rule under Article 365. Articles 339(2), 344(6) and 350A authorise the President to issue certain directions to the states to get certain specific things to be given effect to. This aspect has direct impact on the nature of Indian federation itself.

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<sup>22</sup> Ivo D Duchacek, Comparative Federalism, Holt, Rinehart and Winston, inc, New York, 1970, p 278.)

<sup>23</sup> *ibid.* 277

### **3. Right to insure Republican or Democratic form of Government:**

Preamble says that India is Republic and democratic. In Keshavananda Bharathi case it was held that democratic and republican form of government form part of basic structure of the constitution and thus cannot be amended.

### **4. Emergency powers in case of invasion or insurrection:**

Article 352 refers national emergency. Armed rebellion has been substituted for 'internal disturbance' by 44<sup>th</sup> amendment so that emergency cannot be imposed for 'internal disturbance'. This Article gives sweeping powers to the Union in case of emergency. There is an obligation on the Union to protect the states against external aggression or internal disturbance, as per Article 355. Under Article 257-A assistance to states by deployment of armed forces or other forces of the Union was also possible. This provision has been however, omitted by the Constitution 44<sup>th</sup> Amendment in 1978. Even in the absence of such a provision there is definitely an obligation on part of the Union to do so in terms of Article 355. Thus Indian Constitution would satisfy this overlap also giving the power in favour of the Union Government at the time of such emergencies or insurrections.

### **5. War and Foreign Policy Powers:**

These powers are exclusively with the center. Art 352 empowers the Union to impose emergency and give sweeping powers. States cannot question or raise objection till normalcy is restored. Depending upon the nature of emergency the extent of power would also vary. The power of the Union Government during such emergencies of war is provided under Article 246 read with Entries 1 and 2 of List I to Schedule VII which speak about the Defence of India. Article 246 read with entries 10,11,12,13,14,15 and 16 of List I of Schedule VII contain the powers of foreign policy entrusting exclusively to the Union. Article 253 empowers the Parliament to make any law for the whole or any part of the country for implementing any treaty with other countries or any decision made at any international conference. Thus in these two areas the Union has absolute powers.

### **6. Concurrent Powers**

Concurrent list provides scope of legislation for both Union and Center. Article 254 plays key role in interpreting the three lists. In case of conflict the law made by parliament will prevail over the state law [254(1)]. If the State law on subject listed under concurrent list, is reserved for the consideration of the President by the Governor under Article 200, and has received assent from the President then the State law shall prevail over the Central law in that state alone. Nothing in this article shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to or amending, varying or repealing the law made by state. [exception provided under 254(2)]

### **7. Dependence of the central authority on the States for local administration of national programmes:**

The Union has to depend on states for national elections, local administration and national programmes. Article 324(6) imposes an obligation both on the President and the Governors of states to make available such staff as necessary for the discharge of the functions conferred on the Election

Commission. Under Part XI, Chapter II provides the frame for Administrative relations (Art 256-261) with regard to local administration of national programmes and policies. In the implementation of national policies also the Union can issue directions and if these directions are ignored, the Union government can go to the extent of removing the governments under Article 356. These seven overlaps, which are present in the Indian constitution, prove that the Union Government is more powerful than federal units.

### **Extra Constitutional Overlaps:**

- A) Economic and social imperatives such as economic planning, technological innovation (atomic energy, computers, and other costly projects calling for national financing and controls), Social Welfare Programmes and the growth of large national organizations that cut across the territorial divisions, such as manufacturing corporations, insurance companies, banks, labour and farm organizations and mass media. They all challenge the intra-federal boundaries ("the worst inanities" as Morton Grodzins called the boundaries of American States) that had been drawn in earlier eras and that cannot be justified on any grounds of rational efficiency. Planning Commission and National Development Council are extra constitutional bodies which eroded the powers of the states. The projects like atomic energy and other costly enterprises have to be funded by the center and regulated by it. Railways, Airways, waterways, Public Corporations and companies, Banks, Insurance companies, mass media organizations like AIR and Doordarshan are under the control of central authority. But the privatization of these institutions have reduced the control of the Union authority over it and private persons are playing key role by manipulating these organizations
- B) Population shifts, especially the growth of big cities, the emergence of new regional territorial communities regardless of state boundaries, or emergence of new territorial communities within the existing state boundaries. Interstate travel and migration of people from one state to another state created multi-linguistic groups all over the country. Because of this states formed on the basis of language has lost their significance to some extent.
- C) External pressures (threats and opportunities) that result in further extension of the federal powers. Three wars that India fought after independence increased the power of the center. Central authority and command over external affairs and relations with neighbours, increase the importance and power of the Union Government.

Political culture and political parties whose orientation, structure, and changing leaders may have a profound impact on the reality of federalism.(ibid, 279) When there was single party rule in center and states, the power of Union Government was enormous and the federal polity has been totally undermined. Only after the advent of regional parties or due to raise of non-congress parties the situation changed. With the advent of coalition politics, there is some sort of federal character visible in the governance at the center. The regional leaders and parties are playing definite role in national politics and running constitutional offices. Thus a prolonged debate amongst the Constitutional Jurists about the nature of the Indian Constitution went on changing along with emerging character of Indian Constitution Earlier view was that it was a quasi-federal constitution and contains more unitary features than federal.

The other equally strong view that it was a federal constitution with a novel feature of adopting itself to national emergencies. The framing of Indian Constitution as done away with the traditional classification followed by the political scientists such as the Constitutions are either unitary or federal. As discussed above, the framers incorporated a proportionate mix of features of unitary Constitution, wherein the powers of the Government are centralised in one Government viz., the Central Government, the provinces are subordinate to the Centre, and the features of federal Constitution where there will be division of powers between the federal and the State Governments and both are independent in their own spheres. It is mainly federal with unique safeguards for enforcing national unity and growth. It is a Union of composite States of a novel type. It enshrines the principle that in spite of federalism, the national interest ought to be paramount<sup>24</sup>.

### Salient Features

The basic philosophy of our Constitution is summed up in the Preamble, which declares India to be a Sovereign Socialist Secular Democratic Republic.

1. Largest Written Constitution: -- It is a written constitution containing as many as 395 Articles and 9 schedules, originally. It is the bulkiest and the largest one in the world. Constitution of U.S.A. contains just 7 Articles, that of Australia 128 and that of Canada 47 Articles. The 395 Articles of Indian Constitution were divided into 22 parts. After the Constitution 78th Amendment Act, 1995, the Constitution now consists of 443 Articles divided into 26 parts and 12 Schedules. Since 1950 to 1995, 21 Articles have been repealed and 69 more Articles have been added. As the framers wanted to remove difficulties during the working of the Constitution, they incorporated several details to avoid loopholes and defects. They framed the Chapter on Fundamental Rights on the model of the American Constitution, and adopted the parliamentary system of Government from the United Kingdom, they took the idea of the Directive Principles of State Policy from the Constitution of Ireland, and added elaborate provisions relating to Emergency in the light of the Constitution of the German Reich and the Government of India Act, 1935. It lays down the structure not only of the Central Government but also of the States, while American Constitution left the aspect of drafting the provisions of governance to the States. The vastness of the country and diversity in the society with peculiar problems is another reason for bulkiness of the Constitution.

2. Sovereign Socialist, Secular Democratic Republic: -- According to Preamble, India is a Sovereign, Socialist, Secular, Democratic Republic. The word Sovereign emphasises that India is no more dependent upon any outside authority. The term "Socialist" has been inserted in the Preamble by the Constitution 42nd Amendment Act, 1976. In general, it means some form of ownership of the means of production and distribution by the State. India has chosen mixed economy and now drifting towards privatisation. The term Secularism means a State which has no religion of its own as a recognised religion of State. It treats all religions equally. In a secular State the State regulates the relation between man and man. It is not concerned with the relation of man with God. The term "democratic" indicates that the Constitution has established a form of Government which gets authority from the will of the people. The rulers are elected by the people. Justice, liberty Equality and Fraternity are the essential features of the democracy. The term Republic signifies that there shall be an elected head of the State who will be the Chief Executive Head. The President of India,

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<sup>24</sup> Jennings, Some Characteristics of Indian Constitution, p. 55

unlike the British King or Queen, is not a hereditary monarch but an elected person chosen for a limited period. It is an essential ingredient of a Republic.

3. Parliamentary form of Government: -- Both at the Centre and States, the Constitution established a parliamentary form of Government. The British model has been adopted in toto, in this regard. The essence of the parliamentary form of Government is its responsibility to the legislature. The Council of Ministers is collectively responsible to the Lower House i.e., Lok Sabha. In States the Council of Ministers is responsible to Legislature, and therefore it is called responsible Government. On the otherhand the American Government is a Presidential form of Government, where the President, the real executive and elected directly by the people for 4 years. All executive powers are vested in him. He is not responsible to the Lower House, i.e., the Congress. The members of his cabinet are not members of Legislature. They are appointed by the President and therefore, responsible to him.

Parliamentary democracy has three important characteristics namely,--

- (i) the executive is responsible to the Lower House;
- (ii) the Lower House has a democratic basis (i.e. it is elected by the people; and
- (iii) the ultimate legislative and financial control is vested in this Lower House.

The Parliamentary system of Government in India is based on adult suffrage, whereby all citizens of India who are not less than 18 years of age and are not disqualified on certain grounds like non-residence, unsoundness of mind or corrupt practices have the right to be registered as voters in any election to the Lok Sabha and to the Legislative Assemblies of the States.

4. Partly Rigid and Partly Flexible: -- The Constitution of India is partly rigid and partly flexible. There are certain provisions which can be amended by a simple majority in Parliament, while there are certain other provisions whose amendment requires not only a special majority in Parliament but also ratification by at least one half of the State Legislatures.

A written constitution is generally said to be rigid. But the Indian Constitution despite being a written one is not rigid and it is sufficiently flexible.

5. Fundamental Rights: -- The incorporation of a formal declaration of Fundamental Rights in Part III of the Constitution is deemed to be a distinguishing feature of a democratic State. These rights impose limitations on the powers of the State. The State cannot take away or abridge these Fundamental Rights of the citizen guaranteed by the Constitution. If it passes such a law it may be declared as unconstitutional by the Courts. Besides declaring the fundamental rights, the Constitution provided a machinery to enforce them. The Supreme Court is empowered to grant most effective remedies in the nature of Writs of Habeas Corpus, Mandamus, Prohibition, Quo Warranto, and Certiorari whenever these rights are violated. However, the Fundamental Rights are not absolute. They are subjected to certain restrictions, based on some social interests. Thus, our Constitution tries to strike a balance between the individual liberty and the social interest. This idea of incorporating Bill of Rights has been taken from the Constitution of the United States.

6. Directive Principles of State Policy: -- The Directive Principles of State Policy contained in Part IV set out the aims and objectives to be taken up by the States in the governance of the country.

Unlike the Fundamental Rights, these rights are not justiciable. Though by their vary nature they are not justiciable in the Court of law, yet the State Authorities have to answer for them to the electorate at the time of election. The idea of the welfare state envisaged in our Constitution can only be achieved if the States endeavour to implement them with a high sense of moral duty. The support to villages and rural economy called Gram Swaraj, one of the ideals of Mahatma Gandhi could be found only in Directive Principles of State Policy. Ideals which could not be guaranteed as enforceable rights were accommodated in this Part after much deliberations in the Constituent Assembly.

7. Fundamental Duties: -- The Constitution (42nd Amendment Act, 1976) has introduced a Code of ten "Fundamental Duties" for Citizens. The fundamental duties are intended to serve as a constant reminder to every citizen that while the Constitution has specifically conferred on them certain fundamental rights, it also requires the citizens to observe certain basic norms of democratic conduct and democratic behaviours. These duties, like the Directive Principles of State Policy cannot be judicially enforced. However they remind the responsible citizen what Constitution expects from them.

8. Adult Suffrage:-- In the place old communal franchise, the uniform adult suffrage system has been adopted. Under the Indian Constitution every man and woman above 18 years of age has been given the right to elect their representatives for the legislature. The adoption of the universal adult suffrage under Article 326 without any qualification of sex, property, taxation, or the like is a bold experiment in India having regard to vast extent of the country and its population, with an overwhelming illiteracy.

9. An Independent Judiciary :-- After a thorough deliberation in the Constituent Assembly, the founding fathers created an independent judiciary with a power of Judicial Review as the custodian of the fundamental rights of the citizen. It plays a significant role in determining the limits of power of the Centre and States. Single independent judiciary to interpret the Union and State Laws, vibrant judicial review of executive and legislative action are other basic features of the Indian Constitution which secure the philosophical foundations of the rule of law and democracy. The judiciary is the only resort for a citizen to enforce the constitutional provisions and secure the rights.

10. A Secular Socialist State: -- The Citizens of our country are free to follow any religion and they enjoy equal rights without any distinction of caste, creed religion or sex. The word "secular" has been included in the Preamble by Forty Second Amendment. Article 15 (1) prohibits any discrimination based on religion, and Article 25 (1) provides that subject to public order, morality and health and to the other provisions, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

Secularism is also subject to democratic socialism. Religious freedom cannot therefore be used to practice economic exploitation. The right to acquire, own and administer property by religious institutions is subject to the regulatory power of the State.

11. Single Citizenship :-- Though the Constitution envisaged a dual polity i.e., Centre and States, it provides for a single citizenship for the whole of India. The American Constitution provides for dual citizenship i.e., the citizen of USA and a State citizenship. Every Indian has a citizenship

through out the country with same rights. Recently Indian citizenship is given to the non-resident Indians permitting them to retain the foreign citizenship.

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## II

### Rule of Law

**Rajnish Kumar Singh\***

Normative decisions are made at the summit of the state, in a process that itself entails significant political negotiation between public and private interests. However, once those general policy directions are determined, the difficult work of negotiation then shifts to the administrative sphere. The sphere of administrative law is where ‘the rubber meets the road’ in the modern state. It is the point of contact between state and society where efforts to implement specific legislative goals generate the ‘friction’ of social and political resistance. As part of the effort to reduce or override that resistance, legislative norms are often redirected in number of ways and the role of administration in this regard is very significant.

In the England, after an initial attempt at dejudicialisation in the 17th century had failed (due to the Parliament’s successful assertion of supremacy over the crown culminating in the Glorious Revolution of 1688), it would return over the course of the 19th century, albeit sub silencio in tribute to the strength of the prevailing Rule-of-Law culture. By the early-20th century, with the dramatic expansion of the regulatory capabilities of the state, the ordinary English courts became more aware of the new reality and began to vigorously contest the preclusion of judicial review of administrative action. Ultimately, in the decade after World War II, English judges were forced to accept the reality of separate forms of administrative justice, but only after Parliament inscribed in law the general right of appeal to the judicial courts in administrative disputes. Thus the essence of the old Rule-of-Law system was seemingly retained.

In French history, the detachment of state administration from judicial oversight was central to the political effort from the 17th to the 19th centuries to make the state a more effective agent for the construction of a national market economy and a cohesive national political community (both of which French elites regarded as essential to the projection of state power on the international level, particularly in competition with the British and later, the Germans). In English history, the effort to dejudicialise would only be taken up in earnest with the emergence of the ‘Social State’ at the end of the 19th and beginning of the 20th centuries. Although this later quest for dejudicialisation in England would also reflect a desire to make the state a more effective agent of social intervention, that intervention would now be aimed at circumventing the judicial courts as regulatory bodies because they were perceived as excessively attached to traditional prerogatives of private property and laissez-faire. In other words, the English experience in the late-19th and early-20th centuries paralleled the French experience in the 17th and 18th centuries in that each reflected the desire to circumvent the judicial courts in the legal control of administrative action. However, in the earlier French case, administrative dejudicialisation was ultimately in service of very different policy goals. In American law, the most famous exposition of the same principle was drafted by John Adams for the constitution of the Commonwealth of Massachusetts, in justification of the principle of

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separation of powers: “In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”

The concept of rule of law is not a product of the modern era but is an age-old concept which has been evolving with time. Aristotle defined rule of law as “Government of law” as opposed to “Government of Man” i.e. a government, which does not work according to the whims and fancies of man but according to law. Rule of law is derived from the French phrase “La Principe de Legalite” i.e. the principle of legality. It refers to a government based on the principles of law and not of men. In this sense the concept of la principi de legalite was opposed to arbitrary powers.

Later, A.V. Dicey gave meaning to the term rule of law. According to him, it implied three things:

**Absolute Supremacy of law:** as opposed to arbitrariness or wide discretionary powers in the hands of the government. Dicey opines that justice must be done through the known principles of law. This concept of rule of law contemplates the absence of wide discretionary powers in the hands of the government officials. According to him, discretionary powers, this means picking up of alternative options independent of a rule amounts to arbitrariness.

**Equality before law:** it enunciates a democratic principle of equal subjection all persons to the ordinary law of the land as administered by the ordinary courts. Dicey insisted that all persons irrespective of status should be governed by the law passed by the ordinary legislative organs of the state and no specific privileges for government official or any other person must be given.

**The rights of the people must flow from the customs and traditions (rights have common law origin):** Dicey distinguishes the British system from that of many other countries which had written constitutions with a chapter on individual rights, he feared if the source of fundamental rights of the people was any documents, the right could be abrogated at any time by amending the constitution.

This is what happened in India during the 1975 emergency when in the case of *ADM Jabalpur v. Shivkant Shukla* (AIR 1976 SC 1207), the Honorable Supreme Court of India, by majority, ruled that even illegal acts of the government could not be challenged in a court because it was found that the source of personal liberty in India was Article 21 of the Constitution, which had been suspended by the presidential proclamation and not any common law of the people.

In his bold dissent H.R. Khanna J. stated that “the liberty of the individual is the most cherished of human freedoms and even in face of the gravest emergencies, judges have played a historic role in guarding that freedom with zeal and jealousy, though within the bounds, the farthest bounds, of constitutional power.” Referring to Lord Atkin’s dissent in *Liversidge* he said that the world wide interest generated by the lively debate in *Liversidge* has still not abated and repeated citation has not blunted the edge of Atkins classic dissent where he said: “I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive-minded than the Executive.....

In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace...”

### **Meaning of rule of law**

The primary meaning of the term rule of law is that everything must be done according to law. Every act of governmental power, i.e. every act which affects the legal rights, duties or liberties of any person must be shown to have a strictly legal pedigree. This is the principle of legality. But the rule of law demands more than mere legality. This is manifested by the fact that through the maxim “*Quod principi placuit legis habet vigorem*” i.e. a sovereign will have the force of law. This is perfectly legal principle, yet it impresses rule by arbitrary power rather than ascertainable law. So every act of the sovereign must be in accordance and conformity with the constitution.

The secondary meaning of the rule of law is that the government should be conducted within a framework of recognized rules and principles which restrict discretionary powers. An essential part of rule of law thus is a system of rules for preventing the abuse of discretionary powers. The rule of restriction has to be put upon the discretionary powers as a matter of degree.

A third meaning of rule of law, though it is a corollary of the first meaning, is that disputes as to legality of the acts of government are to be decided by the judges who are independent of the executive. Such right to carry on a dispute with the government before the ordinary court manned by judges of highest independence is an important element of rule of law.

A fourth meaning is that law should be even handed between the government and the citizen. The government should not enjoy unnecessary privileges or exceptions from ordinary laws. In principle all public authorities should be subject to all normal duties and liabilities, which are not inconsistent with their governmental functions.

### **Limitations of Dicean Rule of Law:**

Dicey in his paper said that the concept of *Droit Administratif* and discretion in the hands of executive is known to foreign countries and this idea is utterly unknown to the law of England. He said that Englishmen are ruled by the law and by the law alone. He failed to distinguish between discretion given to public officials by statute and the arbitrary discretion at one time claimed by the king. He did not refer to the prerogative writs of *mandamus*, *prohibition* and *certiorari* by which superior courts exercised control over administrative actions and adjudication. Lord Denning has said that far from granting privileges and immunities to public authorities, the French administrative courts exercise supervision and control over public authorities, which is more complete than which the courts exercise in England and that is also the view of leading writers on constitutional and administrative law today. Dicey himself showed a change of heart in his introduction to the eighth edition of the law of the constitution. There he doubted whether law courts were in all cases best suited to adjudicate upon the mistakes or the offences of the civil servants and he said that it was for consideration whether a body of men who combine legal knowledge with official experience and who were independent of government, would not enforce official law more effectively than the High Court. Unfortunately the text remained unchanged and the introduction was forgotten and ignored.

Dicey created a false opposition between ordinary and special law and between ordinary courts and special tribunal. The two kinds of law existed even in his day and ordinary courts, as well as tribunals determined the rights of the parties. As Devlin J., speaking of England, put it, it does not matter where the law comes from whether from equity or common law or from some source as yet untapped. It is equally material whether the law is made by parliament or by judges or even by ministers what matters is the “law of England”.

In the opinion of authors that Dicey did not express a principle of the English Constitution, he might have expressed his political philosophy, for in fact wide discretionary power existed in England. Dicey’s dislike of discretionary power was due, first, to the fear of abuse, and, secondly to the belief that the judicial function consists in applying the settled principles of law to the facts of a case and not in the exercise of discretionary power. Taking the second point the exercise of discretionary power formed then and forms now a large part of the work of regular courts. Decision as to punishment, to admit or reject an appeal, to allow an amendment, to condone delay, to award costs are discretionary powers and like all discretionary powers, may be abused.

Therefore, as pointed out by H.M. Seervai, the rule of law formulated by Dicey belongs to the realm of political and moral philosophy and can be accepted and rejected just as one accepts or rejects as one philosophy.

To what extent can we apply Dicey’s proposition in the modern welfare state? We accept the second proposition of Dicey totally because in the modern welfare state nobody is above law and everyone is subjected equally to the constitution of the land. The constitution has incorporated this principle expressly in articles 14, 19, 21 etc. In AIR 1967 SC 1836 the Supreme Court held that “the doctrine of equality before law is a necessary corollary to the high concept of rule of law accepted by the constitution.”

The first proposition of Dicey is accepted in part and partly it needs to be modified. We accept the assertion that law is supreme and no one is above law. But we need to modify the proposition in relation to the discretionary powers exercised by the government of this day. The intensive government of the modern kind cannot be carried on without a great deal of discretionary power. It is necessary not only for individualization of the administrative power but also it is humanly impossible to lay down a rule for every conceivable eventuality in the complex act of modern government.

In modern welfare state like India, where people are placed at different positions, circumstances and background, each case has to be treated according to its facts and circumstances to which the person is placed in order to do justice. Hence a single or universal rule cannot be applied to one and all. There is thus need to exercise discretionary power while dealing with each case, otherwise it would amount to imposing fetters.

When powers are granted to the public authority for a particular purpose, an element of discretion also crops up. Such exercise of power must undergo the litmus test of the doctrine of substantive ultra vires. The ultra vires doctrine encompasses cases of plain excess of power; it also governs abuse of power, as where something is done unjustifiably, for the wrong reasons or by wrong procedure.

Examples of abuse of power or action unauthorized by law are malafide, malpractice, acting with malice etc.

Examples of non-exercise of power or inaction contrary to law are, acting mechanically, acting under imposition; failure to follow expressly prescribed procedure, etc.

Discretionary power therefore must be used within the principles of legality. Since the terms of acts of parliament are in practice dedicated by the government of the day. This discretionary power is often conferred in excessively sweeping language. Faced with the fact that the parliament freely confers discretionary power with little regard to the dangers of abuse, the court must attempt to strike a balance between the needs of fair and efficient administration and the need to protect the citizens against arbitrary government.

### **Rule of Law and Mixed Economy**

The majority of nations today live under a system that can be best described as “mixed economy”. In the mixed economy systems, public and private enterprise exist side by side or in many cases cooperate in joint public private corporations. The application of rule of law in mixed economy can be seen under two aspects:

Private sector vis-à-vis Public sector: the state can and does exercise various degrees of control over private enterprises in terms of export import, transport etc. but such control must be lawful and not exercised with malicious motive or to serve or safeguard certain vested interests of a particular section of people. It is all the more necessary when both the public and private sector are involved in the same field of investment. Competition may be spurred by coexistence of public and private enterprise in a given field provided fair rule of competition between the two could be established.

Private sector vis-à-vis public at large: the large corporations today have direct and decisive impact on the social, economic and political life of the nations and have assumed quasi public power. They have the power over large number of whose lives they control as employers or members. They exercise power directly and quite powerfully over the citizens whose lives they largely control through standardized terms of contract, price policy, terms and conditions of labour etc.

With so much of quasi-public power in the hands of private enterprises it is imminent that such power can be used by them in an exploitative manner which will be detrimental to the lives of the citizens. Therefore, restriction should be imposed upon them to be fair and just while dealing with the workers and public; and one way of doing it is by following the principles of natural justice where it is applicable.

In the present scenario where disinvestment of the public sector is in full swing and the private enterprises are stepping into the zone of public sector, there is a responsibility upon the private enterprise to maintain the rule of law in their conduct. Reference may be made to the dissenting view of S.B.Sinha J. in *Zee Telifilms v. Union of India*, where he points that in the new market economy we need to change the definition of State under article 12 of the Constitution. The private bodies have assumed quasi public dimension and the state intervention is decreasing every day.

## **Relation between Administrative Law and Rule of Law**

Dicey equated administrative law with the system of “droit administratif” prevailing in France, where there were separate administrative tribunals for deciding cases between government and the citizens. Since his concept of rule of law also meant equal subjection of all classes to the ordinary law of the land administered by ordinary law courts, the French idea of having separate bodies to deal with disputes in which the government is concerned, and keeping such matters out of the purview of ordinary court was opined by him to be against the rule of law. He went on to say that administrative law is antithesis to rule of law.

This theory of Dicey was criticized by many on the ground that he had very narrow concept of administrative law. He misunderstood and misinterpreted the real nature of the French “droit administratif”. Moreover he ignored the privileges and immunities enjoyed by the crown and many statutes which conferred discretionary power on the executive which cannot be called into question in the court of law.

Administrative law and rule of law are in fact complimentary to each other and are not discrete series. The cultural theme of administrative law is also the reconciliation of liberty with power. Both aim at the progressive determination of arbitrariness and fostering a discipline of fairness and openness in the exercise of public power. Administrative law therefore becomes that body of reasonable limitations and affirmative action parameters which are developed to maintain and sustain rule of law in society. Some authors say that rule of law is the touchstone or standard to judge and test whether administrative law prevailed or not and administrative law is the yardstick to see whether rule of law exists or not.

## **Concept of Rule of Law**

The rule of law is a viable and dynamic concept and therefore it is difficult to give an exact definition. According to Friedman, rule of law has two aspects:

Formalistic aspect

Ideological aspect

The formalistic aspect relates to the organized power of state which is working in accordance with the principles of law as opposed to a rule by one man. This aspect of rule of law justifies even the Nazi regime as the conduct of the authorities is according to the prevailing rule, no matter how oppressive and horrendous the rule may be.

The ideological aspect relates to the set of ideas or goals which every government wants to achieve i.e. to maintain the dignity and right and to provide basic necessity to the individual which is required for the development of his personality. In its ideological sense, the concept of rule of law represents an ethical code for the exercise of public power in any country. Strategies of this code differ from society to society depending on the societal needs at any given time, but its basic postulates are universal covering a space and time. These postulates include equality, freedom and accountability.

Equality: It is not a mechanical and negative concept but has progressive and positive contents which oblige every government to create conditions social, economic and political where every individual has an equal opportunity to develop his personality to the fullest and live with dignity.

Freedom: It postulates absence of any arbitrary action, free speech, expression and association, personal liberty and many others.

Accountability: the basic idea behind accountability is that rulers rule with the deference to the people, and therefore, must be accountable to them in the ultimate analysis. The forms of accountability may be different, but the idea must remain the same; that the holders of public office must be able to publicly justify the exercise of public power not only as legally valid but socially justified, proper and reasonable.

The concept of rule of law thus represents values and not institutions and connotes a climate of legal order which is justified and reasonable wherein every exercise of public power is chiefly designed to add something more to the quality of life of the people. Every legislative, executive and judicial exercise of power must depend on this ideal for its validity. Consequently it is the rule of law which must define law rather than the law defining the rule of law.

This ideological concept was developed by the International Commission of Jurists known as Delhi Declaration, 1959 which was later confirmed at Lagos in 1961. According to this formulation, the rule of law implies that the functions of the government in a free society should be so exercised so as to create conditions in which the dignity of man as an individual is upheld. This dignity requires not only the recognition of certain civil and political rights but also creation of certain social, economic, educational and cultural conditions which are essential to the full development of his personality.

The commission identified four areas:

- Legislative and the rule of law
- Executive and the rule of law
- Criminal process and the rule of law
- Judiciary and the rule of law

Legislative and the rule of law: the acts of legislative would amount to rule of law

If legislature passes laws which lays down overall development of the individual which includes not only civil and political rights but also social, economic, cultural and educational rights of the individual necessary to enhance the development of his personality.

When no discriminatory laws are passed:

If retrospective laws are not passed because such laws are generally not meant for protecting the vested interest of or taking out grudge against certain sections or groups of people. But in certain cases government can pass retrospective laws in order to give benefit to its employees. Whenever such laws are passed by the government under article 309 it must have a nexus with the object for which the law was laid down.

Executive and the rule of law: it would amount to rule of law:

When the executive does not exceed the powers given to it i.e. when it is non arbitrary and non discretionary in its actions

If it is able to effectively maintain law and order

When the procedural safeguards are being followed. To ensure “fair play in action” the executive should follow the principles of natural justice:

Right to be heard

Right against bias

Speaking order

In 1960 All LJ 894 the court held that the rule of fair play which is often called the rule of natural justice demands that the authority making the order should not condemn a man without giving an opportunity to be heard.

Criminal process and rule of law: it would amount to rule of law:

When there is certainty of rule of law. “The rule of law means that decisions should be made by the application of known principles and rules in general, such decisions should be predictable and the citizens should know where he is. A decision without any principle or rule is unpredictable and is the antithesis of a decision in accordance with the rule of law” (AIR 1967 SC 1427)

When there is a presumption of innocence

When there is a rule against double jeopardy

When there is a rule against self incrimination

When there is a right to speedy trial and to be represented by a lawyer.

Judiciary and rule of law; it would amount to rule of law when:

An independent and impartial judiciary is erected. Independence of judiciary is essential because it would otherwise lead to usurping of power by one organ of the state leading to tyrannical laws. In Chief Settlement Commissioner Punjab v. Om Prakash (AIR 1969 SC 33) the court stated that “the rule of law means the authority of law courts to test all administrative actions by the standards of legality. The administrative or executive actions that does not meet the standards will be set aside if the aggrieved person brings the appropriate action in the competent court.”

It would amount to rule of law when the power of judicial review is vested in the hands of the judiciary. Judicial control of administrative action is the pivot of administrative law. Without the power of judicial review, the administrative actions which are arbitrary and discretionary and working against the benefit of the society as a whole cannot be curbed and therefore rule of law cannot be maintained. Rule of law serves as the basis of judicial review of administrative actions for the judiciary sees to it that the executive keeps itself within the limits of law and does not overstep the same.

In *C. Ravichandran Iyer v. J.A.M. Bhattacharya* (1995) 5 SCC 457 the court observed that that the rule of law and judicial review are the basic features of the constitution as its integral constitutional structure. Independence of judiciary is an essential attribute of rule of law. If there is one principle which runs through the entire fabric of the constitution, it is the principle of rule of law and under the constitution it is the judiciary which is entrusted with the task of keeping every organ of the state within the limits of law, thereby making rule of law more meaningful and effective.

The Supreme Court, in *In re Vinay Chandra Mishra's case* (1996) 2 SCC 584 stated that “the rule of law is the foundation of a democratic society. The judiciary is the guardian of rule of law. In a democracy like ours where there is written constitution which is above all individuals and institutions and where the power of judicial review is vested in the superior court, the judiciary has a special and additional duty to perform i.e. to see that all the individual and institutions including the executive and legislative act within the framework of not only law but also the fundamental law of the land.

### **Interpretation of Rule of Law by the Judiciary**

The decisions of the judiciary show that the concept of Rule of Law has developed many facets which are not only negative emphasizing on checkup arbitrariness but affirmative also by insisting upon procedural safeguard including Principles of Natural Justice.

1) Negative Interpretation: *Indira Gandhi v. Raj Narain* AIR 1975 SC 2299: in this case the Supreme Court invalidated article 329-A (4) inserted by the 39th Amendment Act, 1975 in the Constitution to immunize the election dispute to the office of the prime minister from any kind of judicial review. Ray CJ held that since the validation of the PM election was not applying any law, therefore it offends the rule of law. According to Mathew J the article offended rule of law which postulates the pervasiveness of the spirit of law throughout the whole range of government in the sense of excluding arbitrary action in any sphere.

In *P. Sambamurthy v. State of A.P* (1987) 1 SCC 362 the Supreme Court stated that the Art. 371 D (5) (proviso) which gave power to the state government to modify or annul any order of the administrative tribunal, clearly violates rule of law.

In *DTC v. Mazdoor Congress* AIR 1991 SC 101 the Supreme Court held that uncannalised discretion vested in the administrative authority is not permissible.

In *Som Raj v. Union of India* (1990) 2 SCC 65 the Supreme Court observed that the absence of arbitrary powers is the first postulate of Rule of Law upon which the constitutional edifice is based. If the discretion is exercised without any rule, it is a situation amounting to antithesis of rule of law.

2) Positive Interpretation: In *A.K. Kraipak v. Union of India* AIR 1970 SC 150, the court held that the concept of rule of law would lose its validity if the instrumentalities of the state are not charged with the duty of discharging their functions in a fair and just manner. The court further stated that the aim of natural justice is to secure justice or to put it negatively, prevent miscarriage of justice. They do not supplant the law of the land but supplement it. The horizon of natural justice is constantly expanding and it covers not only quasi-judicial but also administrative powers.

In *Maneka Gandhi v. Union of India* AIR 1978 SC 5, the court stated that 'fair play in action' required that in administrative proceedings also the doctrine of natural justice must be held to be applicable. The right to prior notice and opportunity of hearing arises only by implication from the duty to act fairly.

The rule of law requires that the court should prevent the abuse of power, and for this purpose the court has read between the lines of the statute and developed general doctrines for keeping executive power within proper guidelines, both as to substance as to procedure.

In a welfare state like India the rule of law and judicial review require greater significance. The administrative power has pervaded in almost every sphere of our lives. Therefore there is a need for consistent enforcement of rule of law so that the executive may not in the belief of its monopoly of wisdom and its zeal for administrative efficiency, oversteps the bounds of its power and spread its tentacles into the domain where the citizens should be free to enjoy the liberty guaranteed to him by the constitution.

The concept of "rule of law" per se says nothing of the "justness" of the laws themselves, but simply how the legal system upholds the law. As a consequence of this, a very undemocratic nation or one without respect for human rights can exist with or without a "rule of law", a situation which many argue is applicable to several modern dictatorships. However, the "rule of law" is considered a pre-requisite for democracy, and as such, has served as a common basis for human rights discourse between countries such as the People's Republic of China and the West.

The rule of law is an ancient ideal of first posited by Aristotle as a system of rules inherent in the natural order. It continues to be important as a normative ideal, even as legal scholars struggle to define it. The concept of impartial rule of law is found in the Chinese political philosophy of Legalism, but the totalitarian nature of the regime that this produced had a profound effect on Chinese political thought which at least rhetorically emphasized personal moral relations over impersonal legal ones. Although Chinese emperors were not subject to law, in practice they found it necessary to act according to regular procedures for reasons of statecraft.

In the Anglo-American legal tradition rule of law has been seen as a guard against despotism and as enforcing limitations on the power of the government. In the People's Republic of China the discourse around rule of law centers on the notion that laws ultimately enhance the power of the state and the nation, which is why the Chinese government adopts the principle of rule by law rather than rule of law.

While there is a consensus in different parts of the world that rule of law is a good thing, this is not a universally accepted proposition. The People's Republic of China during the Cultural

Revolution has been rather negative toward the idea of rule of law, arguing that it interferes with class struggle. Furthermore, rule of law is opposed in many authoritarian and totalitarian states. The explicit policy of those governments, as evidenced in the Night and Fog decrees of Nazi Germany, is that the public should be constantly in fear of the government.

There have been a number of criticisms of the concept of rule of law. One is that by focusing on the procedures used to create the law, one loses sight of the content and consequences of those laws. Another, which has been advised by critical theorists, is that the concept of rule of law is merely a method by which the ruling classes can justify their rule, because they are in charge of determining which laws get passed or not (in other words, they argue that the rule of law is in reality the rule of those people who have the power to make or change laws). Yet another criticism focuses on the emphasis that rule of law places on the prevention of arbitrary action, while giving legitimacy to all actions performed “according to the law”, even when most people would oppose those actions.

As evidence to support these objections, the following example is often given: if an authoritarian government commences legal action against a political dissident, that action may not be arbitrary or made by personal whim, and it may be made exactly according to the law, but it may still be objectionable.

To conclude, one can say that the recent aggressive judicial activism the world over can only be seen as a part of the efforts of the constitutional courts to establish rule of law society which implies that no matter how high a person may be the law is always above him.

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### III

## Basic Structure of the Legislature, Executive and Judiciary

Swati Kapre\*

The Sovereign, socialist, Secular, Democratic and Republic Government of India is based on most important tripod of three organs i.e. executive, legislature, and judiciary.

The present write-up aims at clarifying the basic structure of these three organs of Indian Government.

Before elaborating the structure of these organs, it is important to know about the source and evolution of the duties, power and scope of each of these organs. The Constitution of India is an organic document which defines the powers and functions of these organs and their interrelationship.

It has adopted the federal structure with a strong centre; and simultaneously it provides for Parliamentary democracy with an executive responsible to the legislature, and the judiciary to the legislature and the judiciary to test the validity of the Parliamentary legislation on the basis of the Constitutional provision. Following is the detailed analysis of the structure of each of these organs.

#### I. EXECUTIVE

The Indian executive is two tiers and it constitutes the executive at centre as well as at state level. Let us first elaborate the Union Executive.

##### UNION EXECUTIVE

The Union executive constitutes of the President, Vice-President, and the Council of Ministers.

##### The President

##### Election

India being a republic country, there is no hereditary monarch as the head of State, but is headed by the institution of the President.

Art.52 of the Indian Constitution lays down the provision for creation of the office of the President, who is elected by an indirect method of election, by an electoral college.

The Electoral College consists of the

- Elected members of both the Houses of Parliament.

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- The elected members of the legislative Assemblies of the states
- The elected members of the legislative Assemblies of Union Territories of Delhi and Pondicherry.

As the President is the representative of the nationals as well as a representative of the people in the different states, the uniformity of representation of the different states at the election is ensured.

This proportional representation is sought to be achieved by means of single transferable vote by secret ballot. The votes cast by all members of the Electoral College are allotted to the voters on the basis of following two principles.

1. As far as practicable, there is uniformity in the scale of representation of the different states at the presidential election<sup>25</sup>. To achieve this result, a member of the Electoral College from a state Legislative Assembly has as many votes as are obtained by the following formula.

$$\frac{\text{State Population}}{\text{Total no. of elected member in the State Legislative Assembly}} \times 1000$$

2. There is a parity of votes between the elected members of the houses of Parliament, and of the State Legislative Assemblies, so that the former command the same number of votes in the Electoral College as the latter. This result is achieved by the following formula which gives the number of votes available to a member of parliament in the Electoral College.<sup>26</sup>

Total No. of votes assigned on the members of the State Legislative Assemblies in the Electoral College  
 Total number of elected member of the two Houses of Parliament

Further under Article 71(1) Protection is conferred on the President's election from being challenged on the ground of the existence of any vacancy for whatever reasons among the members of the Electoral College electing him.

### Disputes

According to Article 71(1) all doubts and disputes arising in connection with the election of the President are to be decided by the Supreme Court whose decision is final.

### Qualifications for Post of President

A candidate for the President's post must possess following qualifications

- (a) Must be a Citizen of India.

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<sup>25</sup> Article 55(1)

<sup>26</sup> Article 55(2)c

- (b) Must have completed the age of thirty five years.
- (c) Must be qualified for election as a member of the House Of the People and
- (d) Must not hold any office of profit under the Government of India, or the Government of any State or under any local or other authority subject to the control of any of the said Government.

But a sitting President or Vice President of the Union or the Governor of any state or a Minister either for the Union or for any State is not disqualified for election as President.

### **Tenure**

The normal tenure of the President is five years from the date on which he enters upon his office, but he continues to hold office even thereafter till his successor enters upon his office<sup>27</sup>.

A person who is or has been the President is eligible for re-election to that office if he fulfills the necessary conditions for this purpose as mentioned above.<sup>28</sup>

The President may resign his office before the expiry of his normal tenure of five years by writing to the Vice-President. The Vice-President has to communicate the President's resignation to the speaker of the Lok Sabha.

### **Impeachment**

The President may be removed from his office, before the expiry of his term, by the process of impeachment on the ground of violation of the Constitution.<sup>29</sup>

Following is the procedure for impeachment.

- a) The proposal to prefer the charge is to be put in the form of a resolution of the House. Such a resolution can be moved only after a fourteen days written notice signed by not less than one fourth of the total number of members of the House.
- b) The resolution must be passed by a majority of not less than two thirds of the total membership of the House

### **Privileges**

The office of the President enjoys many privileges and immunities. He is not answerable to any court for the exercise and performance of the powers and duties of his office, or for "any act done or purporting to be done by him" in the exercise and performance of these powers and duties.<sup>30</sup> The privileges by the members individually are freedom from arrest, exemption from attendance as jurors and witnesses and freedom of speech. At the same time the privileges enjoyed collectively by

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<sup>27</sup> Article 56

<sup>28</sup> Article 57

<sup>29</sup> Article 56(1)b, Article 61(1)

<sup>30</sup> Article 36(1)

the House are the right to publish debates and proceedings and the right to restrain publication by others, the right to exclude others, right to regulate the internal affairs of the House and to decide matters arising within its walls, the right to publish Parliamentary misbehavior and the right to punish members and outsiders for breach of its privileges.

### **Powers and Duties of the President**

The President of India is a head of the “executive power” of the Union According to Article 53 of the Indian Constitution, the “executive power” of the Union shall be vested in President. The literal meaning of the term “executive power” is the execution of the laws enacted by the legislature; but nowadays the function of executive is not limited only to the execution of laws. With the expansion of the state’s function, all the residuary functions of state have passed on to the Executive. Hence in short Executive power can be explained as the residue of powers remaining after deducting the legislative and judicial function.

(a) Administrative power: Administrative means the execution of the laws and the administration of the departments of Government. In matters of administration, not being a real head of the Executive like the American President, the Indian President shall not have any administrative function to discharge nor shall he have that power of control and supervision over the Departments of the Government as the American President possesses.

Tough he may not be the real head of the administration, all officers of the Union shall be his subordinates and he shall have a right to be informed of the affairs of the Union.

The administrative power also includes the power to appoint and remove the high dignitaries of the State.

In making some appointments the President has to consult some persons other than the ministers as well, for e. g. In appointment of the judges of the Supreme Court of India the President shall consult the Chief Justice of India and such other Judges of the Supreme Court and of the High Court as he deems necessary.

b) Military Power: Military power means the command of the armed forces and the conduct of war. The Supreme command of the defence forces is, of course, vested in the President of India, but the Constitution expressly lays down that the exercise of this power shall be regulated by law<sup>31</sup>. This means that though the President may have the power to take action as to declaration of war or peace or the employment of the Defence Forces, it is competent for Parliament to regulate or control the exercise of such power. The President’s powers as Commander-in-chief cannot be construed, as in the U.S.A as a power independent of legislative control. Further Constitution states that certain acts cannot be done without the authority of law, it must be held that such acts cannot be done by the President without approaching Parliament for sanction e.g., acts which involve the expenditure of the money, such as the raising, training and maintenance of the Defence Forces.<sup>32</sup>

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<sup>31</sup> Article: 53(2)

<sup>32</sup> Article: 114(3)

(c) **The Diplomatic Power:** Include all matters which bring the Union into relation with any foreign country. The legislative power as regards these matters as well as the power of making treaties and implementing them, of course, belongs to Parliament. But though the final power as regards these things is vested in Parliament, the Legislature cannot take initiative in such matters. The task of negotiating treaties and agreements with other countries, subject to ratification by Parliament, will thus belong to the President, acting on the advice of his Ministers. Though diplomatic representation as a subject of legislation belongs to the Parliament, like the Head of the other states, the President of India will represent India in International affairs and will have the power of appointing Indian representative to other countries and of receiving diplomatic representatives of other states, as shall be recognized by Parliament.

(d) **Legislative Powers:**

The President of India is a component part of the Union Parliament and here is one of the instances where the Indian Constitution departs from the principle of Separation of Powers underlying the Constitution.

## **The Council Of Ministers**

### **Constitution of Council of Ministers**

The Council of ministers consists of the cabinet system where the number of the ministers is not specified in the Constitution; it is decided on the basis of exigencies of time. This is so because the Indian Constitution has based its cabinet system on the basis of the English System which works on the basis of conventional practices. The council of Ministers belongs three categories of ministers, firstly Cabinet Ministers who are not necessarily part of cabinet but they have to attend the meetings if specially invited by the Prime Minister or for discussing the matters concern with their respectively departments. Secondly the State Ministers who hold separate departments and are responsible for their own departments. Thirdly Deputy Ministers who don't hold any independent departments.

### **Appointments of Ministers**

The Prime Minister is selected by the President; and the President has to restrict the selection to the leader of the majority party in the house of the people, or a person who is in position to win the confidence of the majority in that house. Other Ministers are appointed by the President on the advice of Prime Minister.<sup>33</sup> De Jure the President has power to dismiss the individual Ministers. However the defacto power of dismissing the Ministers lies in the hands of the Prime Minister.

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<sup>33</sup> Article 75 (1)

## **Salaries of Ministers**

The salaries and allowances of ministers depend upon the decision of parliament which it may determine by law from time to time.

## **Ministerial and Collective Responsibility**

The Council of Ministers shall be collectively responsible to the house of people<sup>34</sup>. Hence the Ministry of the body shall be under constitutional obligation to resign as soon as it loses the confidence of the popular house of legislature. The term collective responsibility means that all the members of the Government are united in support of its policies and exhibit that unanimity on public occasions even if they differ in the cabinet meeting and another meaning is the Minister who had an opportunity to speak for or against the policies in the cabinet are personally and morally responsible for their successes and failures<sup>35</sup>.

Simultaneously the Minister is individually responsible to the President. The Ministers shall hold office during the pleasure of the President<sup>36</sup> and hence even if the Ministers are collectively responsible to the Legislature still they are individually liable to be dismissed by the executive head.

## **The Attorney-General for India**

### **Appointment of Attorney- General**

The office of Attorney-General is one of the offices placed on special footing by the constitution. He is the first law officer of the Government of India and his duty is:-

1. To give advice on such legal matters and to perform such other duties of a legal character as may from time to time be referred or assigned to him by the President and
2. To discharge the functions conferred on him by the constitution or any other law for the time being enforce<sup>37</sup>.

The Attorney-General shall be appointed by the President and shall hold the office during the pleasure of the President. The qualification of the Attorney-General is that of the Judge of Supreme Court.

## **The Comptroller and Auditor-General of India**

### **Appointment of Comptroller and Auditor-General**

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<sup>34</sup> Article 75 (3)

<sup>35</sup> Registered Society V/s Union of India, (1999) 6 SCC Page No. 667.

<sup>36</sup> Article 75 (2)

<sup>37</sup> Article 76

Another important office of the Government of India as provided by the constitution is of Comptroller and Auditor-General who controls the entire financial system of the country at the union as well as the State levels<sup>38</sup>.

The basis of the Parliamentary system is the responsibility of the executive and the Legislature and their checks over each other and ultimately of which lies in the system of the financial control of the Legislature. The Legislature can perform its function efficiently provided the Legislature aided by an agency fully independent of the executive, and who would scrutinize the financial transactions of the Government and bring the results before the Legislature.

However the Comptroller and Auditor-General is independent which can be same from the following provisions of the Constitution.

- i. Though appointed by the President, the Comptroller and Auditor-General may be removed only an address from both houses of parliament on the ground of proved misbehavior or incapacity.
- ii. His salary and condition of service shall be statutory and shall not be liable to variation to his disadvantages during the term of his office.

## I. STATE EXECUTIVE

The Indian parliament being the federal we have the two tier system and so the state executive is based on the similar pattern as that of the Union Executive. The State Executive constitutes of the Governor, Chief Minister, and the ministers.

### **The Governor**

The Governor is the head of the state executive. The executive power is vested in the governor and all the executive action of the state has to be taken in the name of the governor. Normally there shall be Governor for each State but the amendment of 1956 makes it possible to appoint the same person as the Governor for two or more States<sup>39</sup>.

### **Appointment of Governor**

The Governor is not elected but is appointed by the President and holds its office at the pleasure of the President.

Any citizen of India who has completed who has completed 35 years of his age is eligible for the office of the Governor but he must not hold any other office of profit, nor be a member of the Legislature of union or of any State<sup>40</sup>. There is no bar to the selection of a Governor from amongst the members of a Legislature but if a member of Legislature is appointed as Governor then he ceases

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<sup>38</sup> Article 148

<sup>39</sup> Article 153

<sup>40</sup> Article 158

to be member immediately upon such appointment. The normal terms of a Governor's office shall be 5 years, but it may be terminated earlier either by the dismissal by the President or resignation.

### **Powers of the Government**

Unlike the President the Governor doesn't have diplomatic or military powers but he possesses executive, Legislative and Judicial power.

(a) Executive Powers:

The Governor has a power to appoint his council of Ministers, Advocate-General and the member State Public Service Commission. The Ministers as well as the Advocate –General holds office during the pleasure of the Governor, however the members of State Public Service Commission cannot be removed by him, they can be removed by the President on the report of the Supreme Court on reference made by the President and, in some cases on the happening of certain disqualifications<sup>41</sup>.

Like the President even the Governor has the power to nominate the members of the Anglo Indian Community to the Legislative Assembly of his State.

(b) Legislative Powers: The Governor is the part of the State Legislature as the President is the part of the Parliament. He has a right of addressing and sending messages, and summoning, proroguing and dissolving the State Legislature just as the President has in case of Parliament. He also possess a similar power of causing to be laid before the State Legislature the annual financial statement and of making demands for grants and recommending money bills<sup>42</sup>.

(c) Judicial Powers: The Governor has the power to grant pardons, reprieves, respites or remission of punishments or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which executive power of the State extends<sup>43</sup>. He is also consulted by the President in the appointment of the Chief Justice and the Judges of High Court of State.

(d) Emergency Powers: The Governor has no emergency powers to meet the situation arising from external aggression or armed rebellion like the President, However he has the power to make a report to the President that whenever he is satisfied that a situation has arisen in which Government of the State cannot be carried on in accordance with the provisions of the constitution, thereby inviting the President to assume to himself the functions of the Government of the State or any of them<sup>44</sup>.

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<sup>41</sup> Article 317

<sup>42</sup> Article 202 & 207

<sup>43</sup> Article 161

<sup>44</sup> Article 356

## **The Council of Ministers**

### Appointment of Council of Ministers

The head of the State Council of Minister is the Chief Minister is appointed by the Governor. While other Ministers are by the Governor on the advice of Chief Minister. The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State and individually responsible for the Governor. The Ministers are jointly and severally responsible to the Legislature they are publicly accountable for the acts or conducts in the performance of their duties. Any person may be appointed a Minister according to the confidence he gains in the Legislative Assembly, but he ceases to be a Minister if he is not or does not remain for a period of six consecutive months, a member of the State Legislature. The salaries and the allowances of the Ministers are governed by laws made by the State Legislature<sup>45</sup>.

### Advocate General

Each State shall have an Advocate General for the State an official corresponding to the Attorney General of India and having similar functions for the State.

## **II. LEGISLATURE**

### **Union Legislature**

#### Composition of Parliament

The Parliament of India is bicameral which consists of 2 houses lower house is called as house of people or Lok Sabha and the upper house called as Council of States or Rajya Sabha .

### **Rajya Sabha**

The maximum strength of Rajya Sabha has been fixed at 250 members out of these 238 members are elected representatives of the States and the Union Territories<sup>46</sup>. The 12 members are nominated by the President from amongst those who have special knowledge or practical experience of such matter as Literature, Science, Art and Social Services<sup>47</sup>.

The representatives of a State in Rajya Sabha are elected by the elected member of the State Legislative Assembly in accordance with the system of proportional representation by means of the single transferable vote<sup>48</sup>.

### **Lok Sabha**

Lok Sabha is the popular house consisting of directly elected members. The maximum strength of Lok Sabha has been fixed at 550 members of whom not more than 530 are elected by the

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<sup>45</sup> Article 164

<sup>46</sup> Article 81 (b)

<sup>47</sup> Article 80 (1)(a),80 (3)

<sup>48</sup> Article 81 (1)(b), 80 (4)

voters in the State and not more than 20 represent the union territories. The member from the State are elected by the system of direct election from territorial constituencies on the basis of adult suffrage <sup>49</sup>.

Every citizen of India who is not less than 18 years of age on a date fixed by Parliament and does not suffer from any disqualification as laid down in the Constitution, or in any law on the ground of non residence, unsoundness of mind, crime or corrupt or illegal practice, is entitled to vote at an election for the Lok Sabha <sup>50</sup>.

Seats in the house are allotted to each state in such a way that as far as practicable, the ratio between the number of seats allotted to a state and its population is the same for all the states this provision does not apply to the state having a population of less than 6 millions.

### **Functions of Parliament**

Following are the various functions of the Parliaments

#### **(i) Providing the Cabinet**

The first and foremost function of Parliament is that of providing the cabinet and holding them responsible. Though the responsibility of the cabinet is to the popular chamber the membership of the cabinet is not restricted to that chamber and some of the members are usually taken from the upper chamber.

#### **Control of the Cabinet**

Article 75 (3) of the Constitution provides for this responsibility of the popular chamber to see that the cabinet remains in power so long as it retains the confidence of the majority in that house.

#### **Criticism of the Cabinet and of Individual ministers**

It is the function of both the houses to participate though the power to bringing about a downfall of the ministry belongs only to the popular chamber. While the cabinet left to formulate the policy, it is the function of the Parliament to bring about the discussion and criticism of that policy on the floor of the house so that not only the cabinet can get the advice of deliberative body and learn about its own errors and deficiencies.

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<sup>49</sup> Article 81 (1) (a)

<sup>50</sup> Article 326

(ii) An organ of Information

The Parliament is more powerful than the press or any other private agencies in context of information because Parliament secures the information authoritatively from those who have the knowledge of things. This information is collected and explored not only through the debates but through the specific mediums of questions to ministers.

(iii) Legislation

The most important function of the Legislation is of enacting and making of Legislation

(iv) Financial Control

It is only the power of the Parliament not only to authorise expenditure for the public services and to specify the purpose to which the money shall be appropriated, but also to provide the way and means to raise the revenue required by means of taxes and other impositions and it also ensures the money that was granted has been spent for authorized purpose.

Duration

Firstly the Council of States is not subject to dissolution. It is a permanent body, 1/3 of its member retire on the expiration of every second year, I accordance with the provisions made by Parliament in this behalf. It follows that there will be an election of 1/3 of the membership of the Council of States at the beginning of every third year<sup>51</sup>.

Secondly normal life of the House of people is five years. But it may be dissolved earlier by the President. However the normal term may be extended by an Act passed by the Parliament itself during the proclamation of emergency.

Session and Dissolution

It is the President's power

- (a) To summon either House
- (b) To Prorogue either House and
- (c) To dissolve the house of people

The Constitution imposes a duty upon the possible to summon each House at at such intervals that six months shall not intervene between its last sitting in on session and the date appointed for its first sitting in the next session<sup>52</sup>. This means that the Parliament must meet at least twice a year and not more than six months shall elapse between the date on which a House is prorogued and the commencement of its next session.

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<sup>51</sup> Article 83 (1)

<sup>52</sup> Article 85 (1)

Hence we need to make a difference between prorogation and dissolution from adjournment. A “session” is the period of time between the first meeting of a Parliament and its prorogation or dissolution. The period between the prorogation and reassemble in a new session is termed as recess.

The sitting of a House may be terminative by

- (a) Dissolution
- (b) Prorogation
- (c) Adjournment

The dissolution may take place by two ways firstly by efflux of time i.e. on the expiry of the term of five years or the terms as extended during a proclamation of emergency and secondly by an exercise of the President’s power under Article 85 (2).

While the powers of dissolution and prorogation are exercised by the President on the advice of his council of ministers, the power to adjourn the daily sittings of the House of people and the council of states belongs to the Speaker and the Chairman respectively.

The dissolution brings the House of people to an end, while prorogation merely terminates a session. Adjournment does not put an end to the existence of a session of Parliament but merely postpones it. A dissolution ends the very life of the existing House of people so that all matters pending before the House lapse with the dissolution.

#### Officers of Parliament

Each house of parliament has its own residing officer and secretarial staff

#### Speaker

There shall be a speaker to preside over the Lok Sabha. The house of people shall as soon as its first meeting is over, choose two members of the house as Speaker and Deputy Speaker<sup>53</sup>. The Speaker is empowered to preside the house but he shall not vote in the first instance however he can exercise the casting vote in case of equality of votes. The speaker should have final power to maintain order within the house of people and to interpret its rules of procedure. In absence quorum it is the duty of the speaker to adjourn the house or to suspend the meeting until there is a quorum.

#### Deputy Speaker

When the office of Speaker is vacant or the Speaker is absent from a seating of the house, then Deputy Speaker presides except when a resolution for his own removal is under consideration. While the house of people has a speaker elected by its members from among themselves, the Chairman of the Council of States performs that function ex-officio.

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<sup>53</sup> Article 93

## Chairman of the Rajya Sabha

The presiding officer of Rajya Sabha is known as the Chairman. The Vice President of India is ex-officio Chairman of the house. The house also elects the Deputy Chairman from amongst its members to vacate his office as soon as he ceases to be a member of the house. He may resign his office by writing to the Chairman. The Deputy Chairman performs the duties of the Chairman when that office is vacant or when the Vice President is acting as President of India. If the office of the Deputy Chairman is also vacant then the duties of the Chairman are performed by such member of Rajya Sabha as President may appoint for the purpose till any of these offices is filled.

## Parliamentary Secretariat

Each house has separate Secretarial staff of its own though there may be some posts common to both the houses. The term of recruitment and conditions of service of persons appointed to the Secretarial staff of a house may be regulated by law by Parliament. Until so regulated, the President of India may, after consultation with the Speaker of Lok Sabha or Chairman of Rajya Sabha as the case may be make rules for the purpose the rules so made have effect subject to provisions of any law which Parliament may make<sup>54</sup>.

## Powers, Privileges and immunity

Both the Houses of Parliament as well as of State Legislature has similar privileges under construction<sup>55</sup>.

## Legislative Procedure

The Legislative Procedure of the Parliament is conducted in different stages relating to the bills other than money bills following are the stages.

a. Introduction of the Bill – A bill other than money or financial bill may be introduced in either House of Parliament and requires passage in both houses before it can be presented for the President's assent. A bill may be introduced either by a minister or by a private member.

b. Motion after the Introduction – After a bill has been introduced or on some subsequent occasion, the member in charge of the bill may make one of the following motions in regards to the bill i.e. – That it be taken in to consideration - that it be referred to select committee – that it be referred to joint committee of the House with concurrence of the other House - that it be circulated for the purpose of eliciting public opinion there on.

On the day on which any of the motions is made or any subsequent to which the discussion is postponed, the principles of the bill and its general provisions may be discussed.

c. Report by Select Committee: After introduction of the bill the member in charge or any other member by way of an amendment may move that bill to be referred to a select committee. When such a motion is carried, the select committee of the house considers the provisions of the bill.

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<sup>54</sup> Article 98

<sup>55</sup> *Supra* at p. 4

After the select committee has considered the bill, it submits its report to the house and after the report is received, a motion that the bill as returned by the select committee be taken into consideration is made. When such a motion is carried the clauses of the bill are open to consideration and amendments are admissible.

d. Passing of the bill in the House where it was introduced – When a motion that the bill be taken into consideration has been carried and no amendment has been made or after the amendments are over, the member in charge may move that the bill be passed.

e. Passing of the bill in the other House – When a bill is passed in one House it is transmitted to the other House. When the bill is received in the other House it undergoes all the stages as in the earlier House. The House may follow either of the courses –

- It may reject the bill altogether
- It may pass the bill with amendments. And the bill will be returned to the originating House.
- It may take no action on the bill i.e. keep it lying on its Table. In such a case if more than 6 months elapse from the date of reception of the bill, the President may summon a joint sitting.

f. President's Assent – When a bill is passed by both the Houses then the bill is presented to the President for his assent. If the President withholds his assent there is an end to the bill. If the President gives his assent the bill becomes an Act from the date of his assent. In case of either refusing or giving assent the President may return the bill for reconsideration of the House. However if the House passes the bill again with or without amendments and is again presented to the President then the President shall have no power to withhold his assent from the bill.

## **State Legislature**

### Composition of State Legislature

The composition of the State Legislature is uniform, however the Constitution makes a distinction between small and bigger states. While the Legislature of every State shall include the Governor and in some of the States it shall consist of two Houses namely the Legislative Assembly and Legislative Council and while in the remaining there shall be one House i.e. Legislative Assembly<sup>56</sup>.

### Legislative Council

The size of the Legislative Council varies with the size of the Legislative Assembly. The membership of the Legislative Council is not more than 1/3 of the membership of the Legislative Assembly but not less than 40. This provision has been adopted so that the upper House may not get predominance in the Legislature<sup>57</sup>.

The system of the composition of the council as laid down in the Constitution is not final. The final power of providing the composition of this chamber of the State Legislature is given to the

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<sup>56</sup> Article 168

<sup>57</sup> Article 171 (1)

Union Parliament<sup>58</sup>. But until Legislates on the matter the composition shall be as given in the Constitution. This is as follows. It will be a partly nominated and partly elected body, the election being the indirect on and in accordance with the principle of the proportional by the single transferable vote. The members are drawn from various sources and hence the council consists of variety of composition.

Broadly 5/6 of the total number of member of the council shall be directly elected and 1/6 will be nominated by the Governor. Where –

- a. 1/3 of the total number of members of the council shall be elected by electorate consisting of members of local bodies, such as Municipalities.
- b. 1/12 shall be elected by electorates consisting of graduates of 3 years standing residing in that State.
- c. 1/12 shall be elected by electorates consisting of persons engaged for at least three years in teaching in education institution within the State not lower in standard than Secondary schools.
- d. 1/3 shall be elected by member of Legislative Assembly from amongst member who are member of Assembly.
- e. The remainders shall be nominated by the Governor from persons having knowledge or practical experience in respect of such matters as Literature, Science, Art, Co-operative movement and Social Service.

#### Legislative Assembly

Legislative Assembly of each State shall be composed of members chosen by direct election on the basis of Adult suffrage from territorial constituencies. The number of members of the Assembly shall not be more than 500 or less than 60. The Assembly in Mizoram and Goa shall have only 40 members each.

There shall be a proportionately equal representation according to population in respect each territorial constituency within a State. There shall be are adjustment by Parliament by law upon the completion of each census<sup>59</sup>.

#### Duration

The duration of the Legislative Assembly is 5 years but it may be dissolved before that by the Governor and the term of 5 years may be extended in case of a proclamation of emergency by the President. In such a case the Union Parliament shall have the power to extend the life of the Legislative Assembly up to a period not exceeding 6 months after the proclamation ceases to have effect, subject to the condition that such extension shall not exceed 1 year at a time<sup>60</sup>.

The Legislative Council is subject to dissolution but 1/3 of its members shall retire on the expiry of every second year. It will thus be a permanent body like the Council of States, only a fraction of its membership will be change every third year.

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<sup>58</sup> Article 171 (2)

<sup>59</sup> Article 170

<sup>60</sup> Article 172 (1)

## Officers

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

## Legislative Procedure

The Legislative procedure in the State having two chamber is broadly similar to that in the Parliament<sup>61</sup>. Except for the following :-

a. As Regards Money Bill: he position is the same. The Legislative Council shall have no power except to make recommendations to the Assembly for amendments or to with hold the bill for the period of 14 days from the date of receipt of the bill. In any case the will of the Assembly shall prevail, and the Assembly is not bound to accept any such recommendations.

b. As regards bill other than money bills, in this case too the only power of Council is to interpose some delay in the passage of the bill for a period of 3 months which is of course larger than as in case of money bills. Hence the Legislative Council shall not be revising but merely advisory and dilatory chamber. If it disagrees to the bill then the bill shall have second journey from the Assembly to the Council but ultimately the view of Assembly shall prevail and in the second journey the Council have no power to withhold the bill for more than a month<sup>62</sup>.

## III. JUDICIARY

Unlike the other two organs of the State there is no federal distribution of judicial powers. Under the Indian Constitution there is one single integrated system of courts for the Union as well as the States which administers both union and State laws. The Supreme Court of India stands at the head of the entire judicial system.

### Hierarchy of Courts

In the hierarchy of the courts at the apex is the Supreme Court of India below which stands the High Courts of different States and under each High Court there is hierarchy of other courts which are referred as “subordinate courts” in the Constitution (foot note).

The bifurcation of the courts is also made on the basis of branches of justice at the lowest stage it is the civil and criminal. The Union and the Bench Courts constituted under Village self Government Acts, which constituted lowest civil and criminal courts respectively have been substituted by the Panchayat courts which have been set up after the enactment of constitution. The Panchayat courts also function on two sides civil and criminal under various regional names such as Nyaya Panchayat, Panchayat, Adalat etc. In some states the Panchayat courts are the criminal court of the lowest jurisdiction I respect of the petty cases. The Munsiff’s court are next in the civil

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<sup>61</sup> *supra* at p. 15

<sup>62</sup> Article 197 (1) b, 197 (2) b.

hierarchy, above Munsiff are the subordinate judges who have got unlimited pecuniary jurisdiction over civil suits and hear first appeals from the decisions of the subordinate judges and also from the Munsiffs and himself possess unlimited civil and criminal jurisdiction further the suits of small value are tried by the provincial small causes court.

Next in the hierarchy is the district judge who is the highest judicial authority for civil as well as criminal in the district. He hears appeals from the decisions of the superior Magistrates and also tries the more serious criminal cases, known as session's cases. A subordinate judge is sometime bestowed with the power of Assistant Session Judge I which case he combines both civil and criminal power like District Judge.

The enactment of criminal procedure code has vested the trial of criminal cases exclusively in the hands of Judicial Magistrate except in the state of J&K and Nagaland. The Chief Judicial Magistrate is the head of the Criminal Courts within the district.

In Calcutta and other metropolitan areas there are Metropolitan Magistrates. The judicial and metropolitan Magistrates discharged judicial function under the administrative control of the State high courts are different from Executive Magistrates who discharges the Executive function of maintaining law and order and under the control of the State Government.

So far as civil judiciary administration is concern, in the Presidency towns called as metropolitan areas; the original side of the High Court at Calcutta tries the bigger civil suits arising within the area of Presidency towns. Suits of lower value within the city are tried by the City Civil Court and the Presidency Small Causes Court. But the Original Criminal jurisdiction of all High courts including Calcutta has been taken away by the Cr.P.C.

The High Court is the Supreme Judicial Tribunal of the State having Original as well as Appellate jurisdiction. It exercises appellate jurisdiction over the District and Session Judge, The Presidency Magistrate and the Original jurisdiction of High Court. There is a High Court for each states except Manipur, Meghalaya, Tripura, which have the High Court of Assam in common. Similarly the High Court of Chandigarh is common for Haryana and Punjab and High Court of Bombay which is in common to the State of Maharashtra and Goa.

## **The Supreme Court**

The Supreme Court of India which is also called as the guardian of the constitution. Since the language of the constitution is not free from ambiguities and its meaning is likely to be interpreted differently by different authorities. Hence there might be a controversy in this regard. In order to resolve this controversy there has to be an independent and impartial authority. And this function can be performed efficiently by none other than the judicial body. Hence the Supreme Court of India is conferred the responsibility of the final interpreter and the guardian of the constitution. Simultaneously it is also the guardian of the fundamental rights of the people.

## Constitution of the Supreme Court

It is the power of the Parliament to make laws regulating the constitution organization, jurisdiction and powers of the Supreme Court. The Supreme Court of India consists of Chief Justice of India and not more than 25 other judges<sup>63</sup>.

## Appointment of Judges

Every Judge of Supreme Court is appointed by the President of India. He shall consult other persons besides taking the advice of his ministers. In case of appointment of Chief Justice he shall consult such judges of the Supreme Court and of the High Court as he may deem necessary. It is a conventional practice that the senior most judge of the Supreme Court to hold the office of the Chief Justice. It was also laid down in the case of Supreme Court advocates V. Union of India<sup>64</sup>. In case of appointment of other judges of Supreme Court the President appoints them in consultation with the Chief Justice of India<sup>65</sup>. The said provision hence modifies the appointment of judges by the executive by providing that the executive should consult members of the judiciary itself who are well qualified to give their opinion in this matter.

## Qualification for Appoint as a Judge

A person shall not be qualified for the appointment as a judge of the Supreme Court unless he is

- a. A citizen of India and
- b. Either
  - i. A distinguished jurist
  - ii. Has been a High Court Judge for 5 years
  - iii. Has been an advocate for at least 10 years<sup>66</sup>.

## Tenure of Judges

No minimum age is prescribed for appointment as a judge of the Supreme Court nor, any fixed period of office. Once appointed a judge of the Supreme Court may cease to be so on happening of any of the following contingencies.

- a. On attaining the age of 65 years.
- b. On resigning his office by writing addressed to the President
- c. On being removed by the President upon an address to that effect being passed by a special majority of each house of Parliament.

The only grounds upon which such removal may take place are proved misbehavior.

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<sup>63</sup> Article 124

<sup>64</sup> (1993) 4 SCC,441

<sup>65</sup> Article 124 (1)

<sup>66</sup> Article 124 (3)

## Impeachment of Judges

Article 124 (4) combined with Judges (Inquiry) Act 1968 lays down the following procedure of impeachment the President

- i. A motion addressed to the President signed by at least 100 members of the Lok Sabha or 50 members of the Rajya Sabha is delivered to the speaker or the Chairman.
- ii. The motion is to be investigated by a committee of three (2 judges of Supreme Court and a distinguish jurist)
- iii. If the committee finds the judge guilty of misbehavior or that he suffers from in capacity the motion together with the report of the committee is taken up for consideration in the House where the motion is pending.
- iv. If the motion is passed in each House of two-thirds of that House present and voting the address is presented to the President.
- v. The Judge will be removed after the President gives his order for removal on the said address.

The procedure of impeachment is the same for judges of Supreme Court and High Courts.

## Types of Jurisdiction

### (i) Original Jurisdiction

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

### (ii) Writ Jurisdiction

The Writ Jurisdiction of the Supreme Court is conferred under Article 32 of the constitution which is used for enforcement of fundamental rights. This jurisdiction is also considered some times as original jurisdiction. However it can be treated as a separate jurisdiction since the dispute in such cases is not in between the units of the union but an aggrieved individual and the Government or any of its agencies.

### (iii) Appellate Jurisdiction

The Supreme Court of India is the highest court of appeal for all the courts in the territory of India. However the appellate jurisdiction of Supreme Court may be divided under three heads.

- a. Cases involving interpretation of constitution – Civil, Criminal or

- otherwise.
- b. Civil cases irrespective of any constitutional question.
- c. Criminal cases irrespective of any constitutional question.

(iv) Advisory Jurisdiction

The Supreme Court shall have an advisory jurisdiction i.e. it can give its opinion any question of law or fact of public importance as may be referred to it for consideration by the President<sup>67</sup>.

(v) Miscellaneous Jurisdiction

Article 317 (1) of the constitution confers the power of reference to the Supreme Court of India under various other provisions like s. 257 of Income Tax Act 1961, s.7 (2) of the Monopolies and Restrictive Trade Practices Act 1969, s.130 (A) of the Customs Act 1962. Appeals also lie to the Supreme Court under the Representation of the People Act, Advocates Act, Contempt of Courts Act, Customs Act, Terrorists and Disruptive Activities Act etc.

## **The High Court**

There shall be a High Court in each State, however a Parliament has the power to establish a common High Court for two or more States as stated above. The High Court at the head of the judiciary in the State.

### Constitution of High Courts

Every High Court shall consist of a Chief Justice and such other judges as the President of India may from time to time upon.

The President has the power has to appoint

- a. Additional judges for a temporary period not exceeding two years for the clearance of arrears of work in a High Court.
- b. An acting Judge, when a permanent Judge of High Court (other than a Chief Justice) is temporarily absent or unable to perform his duties or is appointed to act temporarily as Chief Justice.

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<sup>67</sup> Article 143

## Appoint of Judges of High Court

Every Judge of High Court is appointed by a President. In making the appointment the President shall consult the Chief Justice of India, Governor of the State also the Chief Justice of that High Court in the matter of appointment of a Judge other than Chief Justice. Hence it is a participatory consultative process<sup>68</sup>.

## Qualifications of High Court Judge

The Indian constitution lays down the qualifications for the Judge of the High Court which are as follows.

- a. He must be a citizen of India, not being over 62 years and must have
- b. Held for at least 10 years of judicial office in the territory of India or has been for at least 10 years an advocate of a High Court or of two or more such courts in succession<sup>69</sup>.

## Jurisdiction of High Court

### i. Territorial Jurisdiction

Except where Parliament establishes a common High Court for two or more states or extends the jurisdiction of a High Court to a union territory, the jurisdiction of the High Court of the state is a co-terminous with the territorial limits of that state.

### ii. Ordinary Jurisdiction

The Constitution does not make any provision relating to the general jurisdiction of the High Courts, but maintains their jurisdiction as it existed at the commencement of the Constitution with this improvement that any restrictions upon their jurisdiction as to revenue matters that existed prior to the Constitution shall no longer exist<sup>70</sup>.

### iii. Original Jurisdiction

The High Courts at the three Presidency towns at Calcutta, Bombay and Madras had an original jurisdiction, both civil and criminal, over cases arising within the respective Presidency towns. The original criminal jurisdiction of the High Court has however been taken away by the criminal procedure code of 1973.

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

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<sup>68</sup> Supreme Court Adv. v. Union of India (1993) 4 SCC. 441

<sup>69</sup> Article 217 (2)

<sup>70</sup> Article 225

iv. Appellate Jurisdiction

The Appellate Jurisdiction can be categorized in two categories i.e. civil and criminal.

Civil - On the civil side, an appeal to the High Court is either a first or second appeal; firstly from the decisions of District Judges and from those of subordinate judges in cases of higher value lie direct to the High Court on questions of fact as well as law secondly when any Court subordinate to High Court decides an appeal from the decision of an inferior, a second appeal lies to the High Court from the decision of the lower appellate court, but only on question on law and procedure, as distinguished from question of fact<sup>71</sup>. Thirdly there is provision for appeal under the letters patent of Allahabad, Bombay, Calcutta Madras and Patna High Courts. These appeals lie to the appellate side of the High Court from the decision of a single of the High Court itself, whether made by such judge in exercise of the original or appellate jurisdiction of the High Court.

Criminal - The criminal appellate jurisdiction of the High Court consist of appeal from the decision of firstly a Session Judge or an Additional Session Judge where the sentences is of imprisonment exceeding seven years. Secondly Assistant Session's Judge, Metropolitan Magistrate or other Judicial Magistrates in certain specified cases other then petty cases.

v. Jurisdiction of Superintendence

Every High Court has a power of superintendence over all courts and tribunals throughout the territory in relation to which it exercises jurisdiction, excepting military tribunals<sup>72</sup>.

This power of superintendence is a very wide power in as much as it extends to all courts as well as tribunals within the states, whether such court or tribunal is subject to the appellate jurisdiction of the High Court or not.

vi. Writ Jurisdiction

Article 226 confers upon the High Court the powers to issue writs jurisdiction according to which every High Court shall have power throughout the territorial limits in relation to which it exercises jurisdiction to any person or authority including the appropriate cases, any Government within those territories, directions, orders of writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari or any of them.

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<sup>71</sup> Section 100 of Civil Procedure Code

<sup>72</sup> Article 227

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## IV

### Centre–State Relations

Y. Satyanarayana\*

#### A. Introduction

The study of Centre–State Relations in India assumes significance in the backdrop of the political developments in India during British regime. India has Geo-Political and historical characteristics which have few parallels. Its size and population, geographical, linguistic, religious, racial and other diversities give it the character of a sub-continent. But its natural boundaries marked by mountains and seas, serve to identify it as a separate geographical entity. This insularity over the years, led to the evolution of a composite cultural pervasive under current of one-ness. These gave the country the character of a general Indian personality. Its history is replete with brief periods of political unity and stability followed by spells of dissensions chaos and fragmentation. The strongest kingdoms, from time to time, became empires, extending their sway, more or less, to the natural boundaries of the sub-continent, brining under their suzerainty the local principalities and Kingdoms. But undue centralization often proved counter productive and triggered a chain reaction of divisive forces. Whenever, due to this or other causes, the central authority became decadent and weak, the fissiparous forces became strong and led to its disintegration, some times tempting foreign invaders to conquer the country.

The British also, at the commencement of their regime, tried to centralize all power. But they soon realised, especially after the traumatic consequences of Dalhousie’s policies, that it was not possible to administer so vast and diverse a country like India without progressive devolution of decentralization of powers to the Provinces and Local Bodies. The British Crown had assumed power directly in 1858 due to a notable fall–out of the conflict in 1857. The British then discovered that the Princely States in India could be a potential source of strength for establishing and maintenance of the British power. As a result, they discontinued their policy of further expanding their ‘direct rule’ in the sub-continent and preferred ‘indirect rule’ for these States. But majority of the 500 and odd Princely States, were autonomous only to a limited extent. In all important matters, they were no less submissive in practice to the suzerain power than the British Indian Provinces. In the remote and inaccessible areas, strong local tribal customs and beliefs have to be given due regard and these areas, with long history of isolation retained varying degrees of autonomy. Too centralized an administration was found to be incompatible with the size and diversity of the country. It bred administrative inefficiency and local discontent.

#### B. Pre–Constitution Development

Despite the urge for excessive centralization of administration by the British regime, the prevailing circumstances had forced them to resort to some **decentralization**. The first small but

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significant step in their direction was taken by the Indian Council Act, 1861. It reversed the centralizing tendency that had been set by the Charter Act, 1833. The Indian Councils Act had provided for participation of non-officials in the legislative Council of the Governor-General Similar Provinces. The process of indirect election to these Councils was established in 1892. An important factor which helped and sustained the evolution of a 'dispersed' political system in India, was the decentralization of finances. This process started with the Mayo Scheme in 1871 and confined till it was formalized by the Government of India Act, 1919.

The Government of India Act, 1919 ushered in the first phase of responsible Government in India. It was a significant step in the development of a two-tier polity. While conceding representative Government in a small measure in the Provinces under a 'dyarchical' system, it demarcated the sphere of Provincial Government from that of the Center. By the devolution rules framed under the Act, powers were delegated to the Provinces not only in the administrative but also in the legislative and financial spheres. For this purpose separate Central and Provincial Lists of subjects were drawn up. There was a third List regarding taxation powers of local bodies. In reality the structure remained unitary with the Governor-General in council in effective ultimate control. This led to the failure of reforms of 1919.

Finance was a 'reserved subject' in charge of a member the Executive Council and no progressive measure could be put through without his consent. The main instrument of administration, namely, the Indian Civil Service and the Indian Police Service were under the Control of the Secretary of State and were responsible to him and not to the Ministers. The Governor could act in his discretion, otherwise than on the advice of the Ministers. No Bill could be moved in a Provincial Legislation without the permission of the Governor-General and no bill could become law without his assent. Subsequent attempts for devolution of powers through Simon Commission in 1927 also failed due to over centralization. The Indian National Congress pressed the British Government to accede to the national demands for convening a Round Table Conference or Constituent Assembly to determine the future constitution of India.

The British Government published a white paper in 1933 embodying the principles of constitutional reforms in India. These proposals were considered by the joint select Committee's Reports, a Bill was drafted and enacted in 1935 as the Government of India Act. The Act envisaged an All – India Federation which was to consist of 11 Governors provinces, 6 Chief Commissioner's Provinces and such Indian States as would agree to join the federation. So far as the British Province were concerned it was obligatory for them to join the federation. The Governmental subjects were divided into three Lists - Federal, Provincial and Concurrent.

The Provincial Legislations were given exclusive power to make on the subjects in Provincial List. Similarly the Central Legislature has exclusive power to legislate on the matters in the Federal List. The Centre and the Provinces had concurrent jurisdiction with respect to matters in the concurrent list. The Act thus introduced Provincial autonomy with responsible Government. Subject to the limitations provided therein, the Act, allocated to the Federal and Provincial Legislatures plenary powers, making them supreme within their respective spheres.

The Government of India Act, 1935, is nevertheless an important milestone in the history of constitutional devolution of power, particularly from two stand-points. Firstly, it constitutionally distributed power between the Center and the Provinces. Secondly, subject to certain safe – guard, it

introduced representative government at the provincial level responsible to the Provincial Legislature. The event that ensued the passing of the Government of India Act, 1935 have shown that in a vast country like India, only that polity or system can endure and protect its, unity, integrity and sovereignty against external aggression and internal disruption, which ensures a strong Center with paramount powers, accommodating, at the same time, its traditional diversities.

This lesson of history did not go unnoticed by the framers of the Constitution. Being aware that notwithstanding common cultural heritage, without political cohesion, the country would disintegrate under the pressure of fissiparous forces, they accorded the highest priority to the ensurance of the unity and integrity of the country. As aptly observed by M.C. Setalvad, an eminent jurist, “the founding fathers were painfully conscious that the feeling of Indian nationhood was still in the making and required to be carefully natured. They therefore built a constitutional structure with a powerful central Government envisaging the emergence of an indivisible and integrated India” (Tagore Law Lectures). It was realized that, in India, democracy was yet in its infancy and to prevent or remedy possible breakdown of constitutional machinery in the constituent units, it was essential to invest the union with overriding powers.

The contemporary events also had an inevitable impact on the formulation of the constitution. The large scale communal violence and the influx of millions of displaced persons from Pakistan brought in their train colossal problems which could be tackled only with the pooled strength and resources of the nation.

Even as the Government was struggling to deal with the problems arising out of partition, Jammu and Kashmir were invaded by outside forces. The Consequences of this invasion are too well-know to require any recounting. The Princely States also posed a delicate problem which was solved in a statesman- like manner averting further fragmentation of the country. Eruption of violence in the neighboring country, and the wanton killing of its cabinet spelt out clearly the possible dangers from extremist violent groups. The new Government and its leaders had more than what any could be expected to cope with. The external aggression in Kashmir and the out break of extremist violence in some parts of India under scored the imperative of building a strong Centre capable of protecting the independence and integrity of the country against dangers from both within and without.

The constitution framers were aware that several Provinces, regions or areas of India were economically and industrially far behind relatively to others. There were great economic disparities. The problem of economic integration has many facets. “Two questions, however, stood out: one question was how to achieve a federal, economic and fiscal integration, so that the economic policies affecting the interest of India as a whole could be carried out without putting an ever increasing strain on the unity of India, particularly in the context of a developing economy. The second question was how to foster the development of areas which were under- developed without creating too many preferential or discriminative barriers” (A view expressed by the Supreme Court in *Automobile Transport Limited V. State of Rajasthan*, AIR 1962 SC 1406, page 1415). Not much had been done for the economic development of the country in the pre-independence era. To catch up with the industrially developed nations, the progress that took them centuries, had to be compressed into decades. The nation was committed to a socio-economic revolution designed not only to secure the basic needs of the common man and economic unity of the country, but further to bring about a fundamental change in the structure of the Indian society in accordance with

egalitarian principals. It was felt by the constitution, framers that such a transformation would be brought about only by a strong Central Government.

All the above considerations had prompted the founding fathers of the Constitution to opt for a Constitution which combines the imperatives of a strong— National control with the need for adequate local initiative. In a country too large and diverse for a unitary form of Government, they envisaged a system which could be worked in co-operation by the two levels of the Government - National and regional as a common endeavour to serve the people. Such a system, it was conceived, would be most suited to Indian conditions as it would at once have the advantages of a strong unified central power, and the essential values of federation.

### **C. Birth of the Indian Constitution and its fundamental characteristics:**

A constitution of a country is claimed to be the supreme law to which all other laws must conform. According to Dr. K.C. Wheare, there are two reasons for this scope of the constitution: first, from the nature of the Constitution it must follow that it has superiority over the institution it creates. This should be the whole idea of constitution which is the fundamental law of the land. Secondly, it is often prior in time to the legislature, but even if it is not, it is logically prior because it is not just an ordinary law. Its function is to regulate institution to govern a Government. It cannot be construed in the same way and upon the same principles as a law to regulate the licensing of dogs (modern constitutions by Dr. K.C. Wheare).

Constitution is the creation of Constituent Act. The constituent Assembly addressed itself to the immensely complex task of devising a Union with a strong center. This task was beset with many difficulties. They had to bring into the Union not only the British Indian Provinces, but also the Princely States and the remote inaccessible Tribal Area. They were conscious that several areas and regions of this subcontinent had, for a very long time past, been following their own sub-cultures, customs, traditions, administrative systems and distinct ways of life. It was therefore, readily accepted that there are many matters in which authority must lie solely with the Units. Further, that it would be a retrograde step both politically and administratively to frame a constitution with a unitary State as the basis. The members of the Constituent Assembly, after a long and strenuous discussion and debate settled for a Parliamentary democracy founded on Cabinet form of government at the union as we as in the constituent units. The president and the Governors were envisaged as de jure heads of the respective Governments acting on the advice of the council of Ministers, which comprised the de facto executive.

In devising the pattern of union – state relations they were influenced in varying degrees, by the principles underlying the constitutions of Canada and Australia, which have parliamentary system. They made use of the Government of India Act, 1935, after effecting significant changes in it. Nevertheless, the Constitution, which finally passed, was sui generis. There were substantial differences in both legal provisions and conventions between India and these other countries. The reason was that the geographical, historical, political economic and sociological conditions and compulsions in India were basically different.

The Constitution as it emerged from the Constituent Assembly in 1949, has important federal features but it cannot be called ‘federal’ in classical sense. It cannot be called ‘unitary’ either. It envisages a diversified political system of a special type. According to Dr. B.R. Ambedkar,

Chairman of the drafting committee of the Constituent Assembly, it is unitary in extraordinary situations, such as war or emergency and federal in normal times. Some authorities have classified it as a “quasi federal” Constitution. However, these labels hardly matter as both levels of Government derive their respective powers from a written Constitution, which is supreme, and there is a Supreme Court to interpret the Constitution.

Before examining the striking features of the Indian Constitution, it is necessary to point out the tremendousness of the task which the Constitution making in India involved. That it was not an easy task may well be judged with which the Constitution framers had faced. Firstly, they had to provide a Constitution which would unite a population of over 300 millions. The population is not homogeneous. There are many communities living in this country, and having languages prevalent in different parts of it. The countries of Europe have not been able to join together or coalesce even in a confederacy, much less under one unitary government. Here, inspite of the size of the population, we have succeeded in framing a Constitution which covers the whole of it.

Next, the problem of the Indian States was two-fold. Firstly, the British Declaration on the lapse of paramountcy had freed the Indian States from the suzerainty of the British crown. The communal problem was another bundle which had been solved by getting rid of separate electorates which had poisoned our political life for so many years.

The Indian Constitution is a comprehensive document containing 395 Articles, besides several schedules. Its comprehensive character is evident from the unusual bulk of the Constitution mainly due to some of the following factors:

(a) The Constitution of India, unlike the U.S.A. and Australia, embodies provisions relating to the government machinery in the units. In this respect the Constitution follows the precedent of Canada, for the Canadian Constitution prescribes a Constitution not only for the Union but also constitutions of the provinces.

(b) Certain areas known as the Tribal Areas and scheduled areas special Provisions in the welfare and autonomy of the tribal people.

(c) Many provisions had to be included in the nature of transitional provisions.

(d) A good number of provisions have been included to avoid some of the Difficulties which were experienced in the working of other Constitution.

(e) The Constitution contains detailed provisions relating to the working of various institutions set up under the Constitution mainly with a view to avoiding difficulties which a newly born democratic republic might experience in working the Constitution efficiently.

Our constitution is a sovereign, socialist, secular, democratic republic imbibing the aims and aspirations of the people of India and these have been translated into the various provisions of the Constitution. All governmental organs and institutions owe their origin to the Constitution and derive their powers from its provisions. These organs and institutions enjoy only such powers as are conferred on them and function within limits demarcated by the Constitution. The Constitution

amending power embodied in Article 368 is subject to the doctrine of “Basic structure” propounded by the Supreme Court in *Kesavananda Bharati V. State of Kerala*. This ruling has in any way strengthened the federal character of the Constitution.

On the question of form of the Constitution, the Constituent Assembly devoted considerable time and energy. What label shall be affixed to the Indian constitution? The members of the Drafting Committee call it federal, but many others would dispute this title. It is therefore, necessary to ascertain first, what federal constitution and what its essential characteristics are, and then to examine our Constitution to find out if it has those characteristics of a federal Constitution. The Constitution of U.S.A., which everybody regards as truly federal, establishes dual polity or dual form of government, the Federal Government and the State Governments. The field of government is divided between the Federal and State Governments which are not subordinate one to another but are co-ordinate and independent within the sphere allotted to them. The existence of co-ordinate authorities independent of each other is the gist of the federal principle.

A Constitution which embodies a federal system has normally the following five characteristics:

1. **Written constitution:** - It will be practically impossible to maintain the supremacy of the constitution; unless the terms thereof have been reduced into writing. To base a federal arrangement upon understandings or conventions would be certain to generate misunderstandings and disagreements.
2. **Supremacy of the Constitution:** - This implies that the Constitution should be binding on the Federal and State Governments. Neither of the two governments should be in a position to override the provisions of the Constitution relating to the powers and status which each is to enjoy. This requirement is satisfied if the supremacy or overriding authority is accorded to the provisions relating to the division of powers.
3. **Rigidity of the Constitution:-** This feature is an obvious corollary to the supremacy of the Constitution. It does not mean legal immutability of the Constitution. What it means is that the power of amending the Constitution, so far at least as concerning those provisions of the Constitution which regulate the States and powers of the Federal and State Governments, should not be confided exclusively either to the Federal or State Government.
4. **Distribution of power:** - An essential feature of every federal Constitution is the distribution of powers between the Central Government and the Governments of the several units forming the Federation. Federation means the distribution of the force of the State among a number of co-ordinate bodies, each originating in and controlled by the Constitution.
5. **Authority of the constitution:** - This involves two connected matters: Firstly, there must be some authority, normally courts of law, which can prevent the federal and state powers and declare laws made by them ultra – vires on ground of excess of power. Secondly, an independent and autonomous judiciary with an apex judicial institution (the Supreme Court) which should not be dependent upon the federal and state governments, and should have the authority to say the last word in matters involving constitutional interpretation.

Many outstanding jurists have acknowledged the fact that all the essential characteristics as discussed above are present in the Indian Constitution. The Constitution established a dual polity consisting of the Union at the center and States at the periphery, each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution. The powers of Center and States are clearly demarcated and plenary in nature. Enactments in excess of the powers of the Center or the State are invalid as ultravires the Constitution. Finally, the Constitution a Supreme Court to decide disputes between the Union and the States and States inter se and to have a final word on the scope of the Constitution.

#### **D. Legislative Relations**

In devising the scheme of distribution of power between the Union and the States, the Constituent Assembly did not adopt a doctrinaire approach based on the out-moded concept of classical federalism (like the American federation). They moulded the federal idea to suit the peculiar needs, traditions and aspirations of the Indian people. They had learnt from the experience of the working of the older federations as to what institutional improvements would be necessary to ensure the vitality of the system and its adaptability to the changing various factors, the American system was under going considerable changes and adjustments. Inter – Governmental dependence was increasing. Emphasis was shifting from co-ordination to co-operation. New areas of National concern were emerging. National policies were extending into new fields which were the traditional preserve of the States and their local sub-divisions.

These functional realities, centralizing trends and changing concept of federalism find reflection in the scheme of distribution of power adopted in our constitution. This scheme seeks to reconcile the imperatives for a strong Center with the need for State autonomy. These are the main considerations which weighed with the framers of the Constitution in assigning to the Center a pre-eminent role in all spheres of Union-State arrangements, particularly, in the constitutional scheme of distribution of legislative powers.

The distribution of legislative powers between the Union and the States is one of the fundamental characteristics of a Federal Constitution. This can be achieved by a single, two fold or three – fold enumeration of law making powers. The U.S. Constitution specifically enumerates the powers of the federation and leaves the unremunerated residue, except those prohibited by the constitution, to the States. The Australian Constitution, while enumerating the powers of the Commonwealth, leaves the residue to the States. The Constitution of Canada distributes the power between the Dominion and the Provinces by making a three-fold enumeration, leaving general “residuary” power to the Dominion Parliament to make laws for peace, order and good government of Canada, in relation to all matters not coming within the class of subjects assigned to the legislatures of the Provinces.

The Constitution of India also adopts a three –fold distribution of the subjects of legislative power by placing them in VII Schedule Vide List I (union) List II (state) List III (concurrent). Chapter I in part XI of the Constitution enumerates the provisions which Govern Union – State Legislative relations. It comprises eleven Articles, 245 to 255 out which the provisions in Articles 245, 246, 248 and 254 (read with the VIII schedule) constitute the core of the distribution of legislative powers.

Clause (1) of Articles 245 defines the extent of territorial jurisdiction of Parliament to legislate for the whole of India or part of India and on State Legislatures to legislate for the whole or any part of a State. The legislative power so conferred by Article 245 is distributed by Article 246 between the Union and the States with reference to the subjects enumerated in the three Lists of VIII. The power assigned; to the state legislatures under Article 246 is expressly subject to the supremacy of parliamentary legislative power in case of irreconcilable overlap between the Lists. A facet of the principle applicable in the Concurrent sphere is embodied in Article 254 (1).

Article 248 read with Entry 97 of List-I confers exclusive power on the parliament to make any law with respect to any matter not enumerated in the Concurrent List or the State List. The provisions of Article 249 to 256 contain the nature of exceptions to the normal rule that in respect of a matter coming in its pith and substance within the State List, the State Legislature have exclusive power to make law - Article 249 enables the parliament to legislate with respect to a matter in the State List, if Rajya Sabha by a two-thirds majority passes a resolution to the effect that it will be expedient in the national interest to do so. The life of such legislation cannot extend beyond one and a half years. Parliament may also legislate with respect to any matter in the State List if a proclamation of emergency is in operation, as contemplated in Article 250. Under article 252 the Parliament may also legislate in the State field, for two or more states, if they so desire and any other State can also adopt such a legislation. Another unique feature of Union legislative power is that it can also make law on an entry in the state list to the extent necessary to give effect to an international agreement (Article 253).

Apart from the provisions contained in chapter I of part XI, there are Articles 352, 353, 358 and 359 (read with article 250) and article 360 which govern Legislative relations between the union and the States during an emergency. The inter-linked Articles 356 and 357 govern Union-State Relations during the President's Rule. The reservation of State Bills under Article 200 and the exercise of its powers by the Union executive with respect to such Bills under Article 201 have a direct impact on the Union-State Relations in the legislative sphere. Similarly several other Articles such as Articles 3,4, 31A, 31C, 285,286,288,289,293 and 304 (b) have also significant bearing on the Union - State relations. The legislative power conferred on the union legislature through these provisions has been ceterised as extra- ordinary, unwarranted and anti-federal.

Rule of Union Supremacy implied in the non-obstinate clause found in Article 246. Thus the legislative power of the Union is predominant over that of the States. Despite an attempt to make the legislative Lists mutually exclusive, so overlapping may remain due to limitations of drafting. Hence the Union supremacy is justified. More-over, no unfailing formulae for identifying matter of exclusive 'National' or 'local' concern or of 'concurrent' interest is available.

These concepts are neither absolute nor constant. While in some matters overlap between the Lists is inevitable, in certain others it is part of a deliberate design to ensure the adaptability of the system to changing times and circumstances. It is not possible to eliminate such overlapping absolutely, the first attempt should be to reconcile them. This is done by applying the test of 'path and substance'. The impugned legislation is examined as a whole to ascertain its true nature and character for the purpose of determining whether it falls in list I or list II. If by this test it is found that in pith and substance it falls under one of these Lists, but in regard to incidental or ancillary matters it encroaches on an Entry in the other List, the conflict would stand resolved in favour of the

former Lists. If the conflict between the two Lists cannot fairly be resolved, in this manner, the power of the State Legislature with respect to the overlapping field in List II, must give way to list I. In short, when a matter, in substance falls within the Union List, Parliament has exclusive legislative power with respect to it, notwithstanding that it may be covered also by either or both the other two Lists.

While list III of the VII Schedule confers concurrent jurisdiction on the central as well as state legislatures, it is likely that a conflict may arise between the law made by the center and the state on the same Entry in the concurrent List. Such conflict is precisely known as the “Rule of Repugnancy” as interpreted under Article 254 of the constitution. Although the non-obstacle clause of Article 246, and clause (1) of Article 254 are facets of rule of “Union supremacy” there is a difference in the nature, extent and effect of their operation. While the non-obstacle clause in article 246 is attracted when there is an irreconcilable conflict between the mutually exclusive legislative lists, Article 254 (1) applies only where there is repugnancy between a Union law and State law, both occupying the same field with respect to a matter in the Concurrent List. It has no application where the State law in its pith and substance falls within an Entry in the State List, its impedimental trespass on an Entry in the Concurrent List notwithstanding. Further, a challenge on the ground of non-obstacle clause of Article 246 is more fundamental than the one on the plea of repugnancy under Article 254 (1) does not rest on the principle of ultra vires, but of repugnancy which renders the state law ‘void’ i.e, inoperative or mute only to the extent of repugnancy.

The demand of some state governments and their supporting political parties before the Sarkaria Commission seeking changes in the scheme of legislative relations, in general and Article 246 and 254 in particular rests on the broad premise that this is necessary to bring about a ‘true’ federation. An appraisal of this criticism can appropriately begin by addressing ourselves to the question, whether the two – fold principle of Union Supremacy in article 246 and 256 (1) is an anti – federal feature of our constitution. The constitution of the United States of America which has been considered the most ‘federal’ and unquestionably the pioneer in experimenting the federalism – inter alia provides that the laws of the United States made in pursuance of the constitution shall be the supreme law of the land, and any thing in the constitution or the laws of any State to the contrary notwithstanding. This provision known as “supremacy clause’ has been interpreted by the Federal Supreme Court of the United States of America to mean that “State action incompatible with any legitimate exercise of federal power, loses all validity even though taken within a sphere the State might otherwise act” (Schwart Berbad’s text book of U.S. Constitutional Law, 2<sup>nd</sup> edn. Page 48).

Similarly, in Canada, judicial decisions have held (a) that if there is an irreconcilable overlapping or conflict as between the heads of Dominion and Provincial power enumerated under sections 91 and 92, respectively, the latter shall yield to the former and (b) that a Dominion Legislation which strictly relates to its power enumerated in section 91 is of paramount authority, notwithstanding the fact that it trenches upon a head specified in section 92. In the same way section 109 of the Australian Constitution provides: When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”. The German Constitution also gives supremacy to Federal Legislation in case of conflict with State Legislation.

In every constitutional system having two levels of government with demarcated jurisdiction, conflicts respecting power are inimitable. A law passed by a State legislature, though otherwise

valid may impinge upon the competence of the Union Vice-versa. Simultaneous operation side-by-side of two inconsistent laws, each of equal validity, will be an absurdity. The rule of federal supremacy is a technique to avoid such absurdity, resolve conflicts and ensure harmony between the Union and the State laws. This principle therefore is indispensable for the successful functioning of any federal or quasi-federal Constitution. It is indeed the king pin of the federal system. Draw it out; the entire system falls to pieces.

#### **E. Centre–State Administrative Relations**

The term “Executive power” has no precise definition either in the constitution or any statute or rule conferring executive power. Nevertheless, there is some demarcation of executive power between the Center and the States. Ordinarily, executive power connotes, “the residue of governmental functions that remain after legislative and judicial powers are taken away,” (per supreme court in *Ramjawaya Kapoor V. State of Rajasthan*, 1955 2 SCR 225 ). The exercise of executive function comprises both the determination of policy as well as carrying into execution, the maintenance of order, the promotion of social and economic welfare, in fact, the carrying on or supervision of the general administration of the state.

Normally, the executive powers of the Union and the States are coextensive with their respective legislative powers. There are two exceptions to this rule provided in the provisions to clause (1) and in clause (2) of Article 73 ; first, matters in the concurrent lists shall ordinarily remain with the respective States unless the Constitution or Parliament by law expressly provides otherwise. Second, the executive power of a State or its officers and authorities existing immediately before the commencement of the Constitution even with respects to matters in the Union List, shall continue until otherwise provided by Parliament. There are some other provisions of the Constitution which expressly confers executive power on the Union and the States. For instance, Article 298 specially extends the executive power of the Union and of each State to the carrying on of any trade or business, and the acquisition, holding and disposal of property and making of contracts for any purpose (read with Article 299 and 300).

It is significant to note that the division of executive power between the Union and the States even with reference to matters in List I and List II is not sharp, hard and fast. The limits of their executive power indicated by Articles 73 and 162 are flexible and extensible. In certain matters or situations, for example Article 72 (1) (c), 253 and 356 (1) (a) the executive power of the union may project into the State field. Similarly in some cases, as for instance in the matter of any grant for any public purpose under Article 282, the division of powers with reference to the three Lists in the Seventh Schedule loses significance.

The administration of laws in a two-tier system can be secured either by the same or their separate agencies. In some countries, the federal and state governments have separate agencies, parallel services and courts for the administration of their respective laws. However, under the Indian constitution, the position is different. Broadly, there is only one set of courts with the Supreme Court at its apex. Jurisdiction for administration of union and state laws is conferred on the same hierarchy of courts through legislations under relevant entries such as 95 of List I 65 of List II and 46 of List III. The center has no separate instrumentalities of its own executive of many of its laws. Only a few subjects in the union lists – such as defense, foreign affairs, foreign exchange All India Radio, Posts and Telegraphs, Radio & Television, Currency, Railways, customs, Central

Excise, Income Tax etc – are administrated by the Union directly through its own agencies. Administration of several matters in the Union List and most matters in the concurrent sphere and the enforcement of the Union Laws relating to them, is secured through the machinery of the States.

The constitution enables the Union to entrust its executive power to the agencies of the State for administration of Union laws. There are several matters in the Union List which have an interface with those in the State List. The Union may leave the administration of laws with respect to these matters to the States, subject to the formers directions. For instance, the Mines and Minerals (regulation and Development) Act, 1975, enacted by parliament by virtue of Entry 54, List I, and the Mineral Confessional Rules framed thereunder; leave the initial power to grant a mining license to the State. Another example is of the Central Sales Tax Act enacted by Parliament by virtue of Entry 92 of List I read with Article 269 (1) (a). Under this Act, tax on sale or purchase of goods, other than newspapers, which takes place in the course of inter–state trade, is levied by the Union but is assessed and collected by the States on behalf of Union Government? Section 9 of Central Sales Tax Act, 1956 makes an express provision to this effect.

Part II of Chapter XI of the Constitution of India contains general provisions under the caption “Administrative Relations”. To be more precise, Articles 256, 257, 258, 258A, 260 and 261 constitute these provisions. Article 262 (Dispute relating to water) and 263 (Co-ordination between States) have also been placed in the same; chapter. Apart from these Articles there are special provisions in Articles 353 (a) and 360 (3) which, in the event of an emergency, extend the executive power of the Union to the state field. Article 356 enables the president to assume functions of the government of the state and powers vested in or exercisable by the Governor or subordinate authorities.

Article 256 of the constitution enacts that it shall be the duty of the state so to exercise its executive power as to secure that due effect is given within the state to every Act of Parliament which applies in that state. This is a statement of constitutional duty of every state. The Government of India is entitled to give directions to the State Government regarding the duty which Article 256 ensures due respect for the Central laws in the states, Article 257 empowers the Union to give direction to the States in certain other matters.

These are:

- (i) The manner in which the extensive power of the state shall be exercised so as not to impede or abridge the executive power of the Union;
- (ii) The construction of means of commutation, declared to be national or military importance, and
- (iii) Measures to be taken for the protection of railways with in the State.

Article 258 enable the president only to entrust to the states the functions which are vested in the Union and which are exercisable by the President on behalf of the Union, but Union, but does not authorize the President to entrust to any other person or body the powers and functions with which he is by the express provisions of the constitution as president invested, such as the power to promulgate Ordinances under Article 123; suspend the provisions of Articles 268 to 279; to declare an emergency under Article 360 (Financial Emergency) ; make rules regulating the recruitment and

to the service conditions of persons appointed to posts and services in connection with the affairs of the union under Article 309. While the president is empowered by Article 258 (1) to entrust union functions to a state Government or its officers, there was no corresponding provision enabling the Governor of a State to entrust State functions to the Central Government or its officers. This lacuna was found to be of practical difficulty in connection with the execution of certain developmental projects of a State. This lacuna has been removed by inserting Article 258-A through the constitution (Seventh Amendments) Act, 1956.

The provisions contained in Articles 256 and 257 are essential to ensure harmonious exercise of the executive power by the Union supremacy and to enforce this principle by giving appropriate directions, in the event of irreconcilable differences on vital issues. Non compliance of the directions of the Center under these provisions will attract the provisions of Article 365 which provides, “where any state has failed to comply with, or to give effect to, any direction given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that such a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution”. However, Article 365 does not impose any Constitutional obligation on the President, to resort to any action against an erring State. The inevitable consequence of applying Article 365 is to invoke Article 356 (Imposition of President Rule in a State). Thus Article 365 acts as a screen to prevent any hasty resort to drastic action under Article 356 in the event of failure on a the part of a state government to comply with or to give effect to any constitutional direction given in the exercise of the executive power of the Union. The extra – ordinary powers under Article 365 are therefore necessary, but should be exercised with great caution and in extreme cases.

The diffused pattern of distribution of governmental functions between the Union and the States, and the manner in which the administration and enforcement of most Union laws is secured through the machinery of the states, postulate late that the inter–governmental relations under the constitution have to be worked on the principles of the co-operative federalism. Several other features of he constitution reinforce this conclusion. For ensuring inter – governmental Co-ordination and Co-operation, the constitution envisages several institutions or bodies. The most important of them is the forum of Inter state council contemplated by Article 263.

The Inter Governmental Council contemplated under Article 263 is a kin to the inter–provincial council contemplated under section 135 of the Government of India Act, 1935. In a dual polity, co-ordination of policies and their implementation become extremely important, specially in view of large areas of common interest and shared action. This can only be done through a sustained process of contact, consultation and interaction, for which a proper forum is necessary. There is another historical factor which under-scores the urgency of setting up an all-embracing Inter – State council. Before 1967, it was easier to resolve differences or problems that arose between the Union and States, at the party level, because the same party was in power in power in the Union and in the States. Since 1967, parties or coalitions of parties other than the one running the Government at the Union, have been in power in several States. These State governments of diverse hues have different views on regional and inter – state problems. In such a situation, the setting up of a standing Inter – state council with a comprehensive character under Article 263 has become indispensable.

## **F. Financial relations**

Mobilization, sharing and utilization of financial resources play a very crucial role in all systems of multi – tier government and can give rise to difficult problems of inter – governmental relations unless handled in a spirit of mutual understanding and accommodation. In some of these systems, the national and lower tiers of government have concurrent powers in regard to certain taxes, borrowings and out lays. This concurrency of jurisdiction often results in serious economic and administrative problems which have to be sorted out through difficult negotiations, compacts or resort to courts.

In the other bifurcated systems, there is clear cut division of powers of taxation and borrowings between the national and lower levels of government which, by its very nature, can rarely match their resources and needs. It requires a mechanism for adjusting the surpluses and deficits, and reducing unavoidable vertical or horizontal imbalances of different constituent units, through resource transfers. India falls in the latter category. The constitution allots separate legislative heads of taxation to the union and the States. There are no taxes in the sphere of their concurrent jurisdictions. Borrowings and foreign exchange entitlements are controlled by the Union.

The Constitution envisages the institution of a quasi–Judicial character, the Finance Commission, which is setup periodically for advising the President, among other things, on the division of certain tax – revenues raised by the Union, between the union and the states. The recommendations of the Finance Commission are based on certain norms evolved by it in respect of growth rate of taxes, levels of expenditure, returns or investments, etc. Since the Finance Commission is constituted only periodically, the assumptions made by it remain broadly ‘static’ during the period covered.

There is a second institution, the Planning Commission, setup by an executive order of the Union Government, which advises the Union Government regarding the desirable transfer of resources to the States, over and above those recommended by the Finance Commission. Its recommendations cover, among other things, feasible changes in tax rates and efforts by both, quantum and allocation of borrowings between the Union and the States. Since the Planning Commission is a continuing body, its recommendations are based on ‘dynamic’ assumptions which take into account the change in the economic structure.

## **G. The Institution of Governor**

The role of the Governor has emerged as one of the key issues in Union – state relations. The Indian political scene was dominated by a single party for a number of years after independence. Problems which arose in the working of union – state relations were mostly matters for adjustments in the intra – party forum and the Governor had very little occasion for using his discretionary powers. The institution of Governor remained largely latent. Events in Kerala in 1959 when President’s rule was imposed, brought in to some prominence the role of the Governor, but thereafter it did not attract much attention for some years. A major change occurred after the Fourth General Elections in 1967. In a number of states the party in power was different from that in the Union. The subsequent decades saw the fragmentation of political parties and emergence of new regional parties. These developments gave rise to chronic instability in several states. As a consequence, the Governors were called upon to exercise their discretionary powers more frequently. The manner in

which they exercised these functions has had a direct impact on Union – state relations. Points of friction between the Union and the states began to multiply.

The role of the Governor has come in for attack on the ground that some Governors have failed to display the qualities of impartiality and sagacity expected of them. It has been alleged that the governors have not acted with necessary objectivity either in the manner of exercise of their discretion or in their role as a vital link between the Union and the states. Many have traced this mainly to the fact that the Governor is appointed by, and holds office during the pleasure of the President, (in effect the Union Council of Ministers). The part paid by some Governors, particularly in recommending President's rule and in reserving State Bills for the consideration of the President, have evoked strong resentment. Frequent removal and transfer of Governors before their term expired have lowered the prestige of this office. Criticism has also been leveled that the Union government utilizes the Governors, looking forward to future office under the union or active role in politics after their tenure, came to regard themselves as agents of the union.

The Constituent Assembly discussed at length the various provisions relating to the Governors. Two important issues were considered. The first issue was whether there should be an elected Governor. It was recognized that the co-existence of an elected Governor and a Chief Minister responsible to the legislature might lead to friction and consequent weakness in administration. The concept of elected Governor was given up in favour of a nominated Governor. Explaining in the Constituent Assembly why a Governor should be nominated by the President and not elected, Jawaharlal Nehru observed that “an elected Governor would to some extent encourage the separatist provincial tendency more than other wise. There will be for fever links with Center. The second issue related to the extent of discretionary powers to be allowed to the Governor. However, after due deliberations in the Constitution Assembly, the only explicit provisions retained were those relating to Tribal areas, in Assam where the administration was made a central responsibility. Dr. Ambedkar was of the view that vesting Governor with certain discretionary powers was not contrary to responsible government.

The Constitution as it finally emerged, envisages that normally there shall be a Governor for each state (Article 153). The governor is appointed by the President and holds office during his pleasure (Articles 155 and 156 (1) ). Article 154 vests executive power of the state in the Governor who exercises it either directly or through officers subordinate to him in accordance with the Constitution. Under Article 163 (1) he exercise almost all his executive power and legislative functions with the aid and advice of his Council of Ministers. Thus, executive power vests theoretically in the Governor, but is really exercised by his Council of Ministers, except in the limited sphere of his discretionary action.

The Governor whether acting with or without the advice of the council of Ministers, plays a pivotal role in our constitutional system and in its working. He is the linchpin of the constitutional apparatus of the state. All executive action of the state of government is expressed to be taken in his name. He chooses and appoints the Chief Minister in his discretion, on the criterion that the latter should be able to form a Ministry commanding majority support in the Assembly. Without his assent, no Bill can become law. Without his prior authorization no money Bill can be introduced in the state legislature. A large number of other important functions have also been entrusted by the Constitution to the Governor which it will not be possible to recapitulate all of them.

The functions of the Governor are diverse and important. Functioning in normal times as the constitutional head of the state and as a vital link between the Union and the States, he becomes an agent of the union in certain special circumstances, e.g., when a proclamation under article 356 is in operation. He fills the vacuum and ensures continuity in executive governments for short periods during which no Council of Minister is available to aid and advise him. The governor is the key functionary of the system envisaged by the constitution. No other constitutional functionary can discharge these responsibilities in addition to his own duties. Therefore, the office of the Governor has assumed the character of a constitutional institution which can never be dispensed with in a democratic federal state.

The choice of the Governor has always been the subject of concern for all those who believed in true federal polity. Speaking in the constituent Assembly on the choice of the Governor, Jawaharalal Nehru observed:

“I think it would be definitely better if he was not so intimately with the local politics of the Province ... And would it not be better to have a more detached figure, obviously; a figure that ... Must be acceptable to the government of the Provinces and yet he must not be known to be a part of the party machine of that province ... But on the whole it probably would be desirable to have people from outside- eminent people, some times, people who have not taken too keen a part in politics - politicians would probably like a more active domain for their activities but there may be an eminent educationalist or persons eminent in other walks of life, who would naturally while co-operating fully with the government and carrying out the policy of the government, at any rate helping in every way so that that policy might be carried out, he would nevertheless represent before the public some one slightly above the party and thereby, infact, help that government more than if he was considered as part of the party machine.

But it is obviously desirable that eminent leaders of minorities ... eminent leaders of groups should have a chance. I think they will have a far better chance in the process of nomination than in election.”

The Administrative reforms Commission (ARC) study team on Center–State Relationships found that many Governors have fallen short of the standards expected of them. It suggested that a systematic and careful search should be made to locate best men for this office. The dignity of the office suffered when persons defeated in elections were appointed. It recommended that person to be appointed as Governor should be one who has long experience in public life and administration and can be trusted to rise above party prejudices and predictions. The government of India accepted this recommendation.

## **H. Harmonizing Union–State Relations through Constitutional Mechanisms**

The Supreme Court has jurisdiction to hear disputes between the states involving the existence or extent of a legal right. But experience of the working of federations has shown that inter – state disputes of a non-legal character some time arise. It was considered designable to provide some constitutional machinery for disposing of such differences. The constitution contemplates the creation of an Inter – state council (Article 263) for better co-ordination between the states and harmonizing the union – state and Inter – state relations with the aid of constitutional

machinery. Power, therefore, is given to the President to setup an Inter- state council charged with the duty of enquiring into and advising as to inter – state disputes, investigating subjects interesting to one or more states or the union or more states, and making recommendations in particular for the better co-ordination of policy and action on any subject.

The states Re-organization Act, 1956 has set up five Zonal councils, namely, the North Zone Council, the Council of Central Zone, and Western Zone Council. Each of these councils consists of the Union Home Minister, Chief Ministers of the members States and two other Ministers nominated by the Governor of the State concerned. The Union Home Minister is the ex-office Chairman of each of these Councils. In each Council there are included advisers from the Planning Commission and the Chief Secretaries of the state government concerned. It has a separate staff and a secretariat. Such councils have been intended for the promotion of collective approach and effort to solve, common problems of the member states. They are also intended to foster inter – state concord and thereby to strengthen the Center and the States.

The sprit of co-operative federalism requires proper understanding and mutual confidence between the Chief Executive of the Union and state Governments. This type of working relationship should be considered desirable and essential for the successful working of a dual polity with such large areas of inter – dependence. A group of senior statesmen, meeting in camera free from the pressures of public glare, will presumably be able to see problems from a national perspective, which does not necessarily mean foregoing the interests of one’s own State and region. Such a body while being a formal institution, will also retain the flexibility of a body working on mutual faith and trust, born out of the requirement of being kept informed and consulted on matters of national importance.

## **I        Sarkaria Commission and a brief sketch of its Recommendations**

Since the review of the Administrative Reforms Commission on the Administrative aspects of the union – state relation (1966-67) much has happened in the realm of Union – State relations. In the wake of social, economic and political developments over the years, new trends, tensions and issues have arisen consensus and co-operation which is a pre-requisite for a smooth functioning of Union-State relations is threatened by political confrontation. In this perspective, after nature consideration, the late Prime Minister (Indira Gandhi) with great foresight and wisdom called for a fresh comprehensive review of the arrangements between the Union and the States, in all spheres. On March 24, 1983 she announced in the parliament the proposal to appoint a commission headed by R.S. Sankaria, a retired judge of the Supreme Court. She declared that “The Commission will review the existing arrangements between the Union and the States while keeping in view the social and economic developments that have taken place over the years. The Commission was expected to take into account the importance of unity and integrity of the country for promoting the welfare of the people.

The Commission after a detailed review of the constitutional provisions in the backdrop of their working by the Union and the State governments had submitted its voluminous report in the year 1988. The report embodies highly positive and progressive recommendations, inter alias, on the center – state relations in legislative, administrative and financial spheres. Under noted are a few of the important recommendations.

1. The Residuary power in regard to taxation matters should continue to remain exclusively in the competence of Parliament,. While the residuary field other than that of taxation, should be placed in the Concurrent List.
2. Federalism is more a functional arrangement for co-operative action, than a static institutional concept. Article 258 provides a tool, by the liberal use of which co-operative federalism can be substantially realized in the working of the system. A more extensive and general use of this tool should be made, than has hitherto been done, for progressive decentralization of powers to the government of the states and or their officers and authorities.
3. It would be neither feasible nor designable to formulate a comprehensive set of guide lines for the exercise of discretionary powers of the Governor. A Governor should be free to deal with a situation according to his best judgment, keeping in view the Constitution and the law and the convention of the Parliamentary system contained in chapter IV and as well as in chapter V “reservation of Bills by Governor for Presidents consideration” and chapter VI “Emergency Provisions”.
4. The monetary limit of “ Rupees two hundred fifty per annum” fixed 37 years ago on taxes that can be levied on professions, trades, callings and employments (Entry 60 of List II) should be in consultation with the States, revised upwards immediately and reviewed periodically (revised to Rs.2500/- per annum by the constitution 60<sup>th</sup> Amendment).
5. Taxation of Agricultural Income is a sensitive matter. Both the Union and the State Governments are not inclined at present for a change in the Constitutional provisions in regard to Entry 46 of List II. Many problems have been highlighted by the Union and the State Governments in connection with the levy of such a tax. Nonetheless, in view of its potentials, the question of raising resources from this source by forging political consensus and the modalities of levying of the tax and collection of proceeds etc., would require an in depth and comprehensive consideration in the National Economic and Development Council( NEDC).
6. It is necessary that a comprehensive paper on direct, indirect and cross-subsidies, covering both Union and state governments, is prepared by the Planning Commission every year and brought up before NEDC for discussing. Since the increasing burden of subsidies has a direct relevance to the availability of resources for the execution of the plan.

## **REFERENCES**

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- (c) **V.N. Shukla**
- (d) **V.D. Mahajan**
- (e) **D.A.V. Dicey**
- (f) **H.R. Khanna**

## 2. Reports

- (a) **Administrative Reforms Commission 1966**
- (b) **Sarkaria Commission on Union State Relations**

## **Civil Services under the Constitution of India**

### 1. A unique feature of the Constitution of India

- (a) One of the unique features of the Constitution of India is that it has dealt with “Services” under the Union and the States. This has reference to the Part XIV of the Constitution of India.
- (b) Part XIV consists of two chapters, namely, Chapter-I and Chapter-II. Chapter-I makes provisions with respect to “services” and Chapter-II relates to the “Public Service Commissions”.

### 2. The legal position of a Government Servant

- (a) The origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office, the Government servant acquires a status and his rights and obligations are not longer determined by consent of both parties but by statute or statutory rules, which may be framed or altered by the Government unilaterally.
- (b) The legal position of a Government servant is one of status than of contract.
- (c) The relationship between the Government and its servant is not like an ordinary contract of service between a master and his servant. The legal relationship is something entirely different, something in the nature of status. The duties of status are fixed by the law and in the enforcement of these duties, society has an interest.

***Reference: Roshan Lal Tandon vs. Union of India reported in AIR 1967 SC 1889.***

- (d) Literally, status means standing or social position but that is not the sense in which this term has been used here.
- (e) In the language of jurisprudence, status is the legal relation of an individual to the rest of the community.
- (f) In the context of service when the relationship between the Employer and the Employee is regulated by Law, it is described as “Status”

(g) The powers and duties of the Government Servants are fixed by Law and not by agreement.

(g) The powers and duties

### 3. **Broad outline of the Chapter I of part XIV of the Constitution**

(a) Chapter I contains seven articles, of which Articles 309, 310, 311 and 312 are the most material. They deal with matters as indicated below:

(b) Art. 309 - It itself makes not provision for recruitment or conditions of service of Government servants but confers powers upon the appropriate legislature to make laws and upon the President and the Governor of a State to frame rules in respect thereof.

(c) Art. 310 - It relates to the tenure of office of the members of the defence services and of civil services and accords constitutional sanction to the doctrine of pleasure.

(d) Art. 311 - It provides for certain safeguards to persons employed in civil capacities under the Union or a State but not to members of the defence services.

(e) Art. 312 - It refers to the All India Services. It speaks of how a new All India Service may be created. It also authorises the parliament to make Law regulating the recruitment to and conditions of services of the members of the All India Services.

### 4. **The Structure of Part XIV of the Constitution at a Glance**

#### 5. **Classification of the Services**

Services under the Union and the States



**They may be broadly classified under the following two heads:**

- (i) **Under the Union, that is, under the Government of India.**
- (ii) **Under the State, that is, under any of the State Governments.**

### 6. **Categorization of the Services under the Union**

Services under the Government of India may be categorized as follows :

(a) Defence Services (Army, Navy and Air Forces)

- (b) All India Services (IAS, IPS and IFS)
- (c) Central Services
- (d) Other Services.

## **7. Conditions of Service - What do they mean?**

### **(A) Conditions of Service**

All those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and ever beyond it in matters like pension etc.

### **(B) Conditions**

1. Salary
2. Increments
3. Efficiency Bar
4. Leave
5. Transfer
6. Probation
7. Confirmation
8. Promotion
9. Deputation
10. Lien
11. Retirement
12. Pension
13. Gratuity
14. Conduct
15. Suspension
16. Tenure
17. Termination
18. Disciplinary Proceedings
19. Subsistence Allowance
20. Punishment

The list under clause (B) is not exhaustive but it is illustrative.

## **8. Power to legislate and authority to make rules (Article 309)**

- (a) Powers are conferred upon the Parliament and the President under Article 309 to make law and to frame rules respectively, regarding recruitment and conditions of the Services under the Union save and except in respect of the All India Services and certain other Public Servants for whom specific provisions have been made in the Constitution of India vide para.
- (b) The State Legislatures and the Governor are also vested with the powers to make law and to frame rules respectively.

- (c) Service Rules other than those relating to the All India Services and certain other posts are made by the President in respect of the Central Govt. employees or by the Governor in respect of the State Govt. employees, as the case may be, under Article 309 of the Constitution of India.

Examples:-

- (i) The Central Civil Service (Conduct) Rules, 1964.  
Central Civil Services (Classification, Control and Appeal  
( ) Rules, 1965  
Titles of the Rules framed by a State Government (Say-  
Govt. of West Bengal) are given in the Appendix-“A”.

(d) So far as the All India Services are concerned, the Parliament passed the All India Services Act. 1951, in pursuance of Article 312(1), read with entry No.70 of List No.I, Seventh Schedule, Constitution of India.

(e) Section 3 of the All India Services Act. 1951 has delegated to the Central Government the power of making Rules for regulation of recruitment and conditions of Services of persons appointed to the All India Services.

(f) In exercise of the powers conferred by Section 3 of the All India Services Act. 1951 the Central Government, after consultation with the Governments of the States concerned, have made many Rules, of which mention may be made of the following :-

- i. **All India Services (Conduct) Rules. 1968**
- ii. **All India Services (Discipline and Appeal) Rules, 1969**
- iii. **All India Services (Confidential Rolls) Rules, 1970**
- iv. **IAS (Probation) Rules 1954**
- v. **IPS (Probation) Rules 1954**
- vi. **IFS (Probation) Rules 1968**

**Note : More Rules and Regulations are mentioned in Appendix-“B”.**

## **9. Basic Characteristics of the All India Services**

- (a) Members of the All India Services are common to the Union and the States.
- (b) Each member of an All India Service is allotted to a particular cadre.
- (c) The Cadre exists in the State and not at the centre.
- (d) They are an additional agency of Central of the Union over the States.
- (e) His appointment to a post under the Union is considered as on deputation.
- (f) All India Services are regarded also as instruments for “National Integration”.

(g) Members of the All India Services are subject to disciplinary control of the Government of India and also to the State Government if the alleged misconduct is committed while service the State Government penalties of dismissal, removal or compulsory retirement can be imposed only by the Government of India and not by the State Government.

**10. Doctrine of pleasure what it is**

- (a) The Civil Services in India are modeled upon the British pattern, though there are important differences between the two.
- (b) The doctrine of pleasure is prevalent in England.
- (c) There, every public servant holds his/her appointment during the pleasure of the crown.
- (d) “During the pleasure” is different from “During good conduct”.
- (e) When a person holds office during the pleasure of the crown, his appointment can be terminated at will at any time without assigning any reason.
- (f) The crown could not be sued even for recovery of arrears of salary, it being a bounty of the crown and not a contractual debt.
- (g) The exercise of pleasure by the crown can, however, be restricted only by an Act of the British Parliament.
- (h) The doctrine of pleasure is based on “Public Policy” and not on “special prerogative of the crown”.

**11. Doctrine of pleasure - what it is?**

- (a) It has been adopted in India subject to certain exceptions, that is, in a modified form.
- (b) The rigour of the British concept of “Doctrine of Pleasure” has been toned down in India.
- (c) It is the Article 310(1) of the Constitution of India, which has accorded constitutional sanction to the doctrine of pleasure.
- (d) Here, in India, a Govt. servant holds his office during the pleasure of the President or the Governor, as the case may be - President if he is an employee under the Central Government and Governor, if he is an employee of any State Government.
- (e) There are restrictions imposed upon the doctrine of pleasure in India, which may be described under the following three heads:-

- i. Procedural
- ii. Substantive
- iii. Non-justiciable

## 12. Restrictions on the Doctrine of Pleasure:-

- (a) The doctrine of pleasure is subject to the safeguards provided by Article 311. In other words, Art. 311 is a proviso to Art.310 (1).
- (b) The doctrine of pleasure is controlled by the Fundamental Rights.

There are certain constitutional functionaries who do not hold their offices during the pleasure of the President or the Governor, such as,

Judges of the Supreme Court and High Courts, the Chief Election Commissioner, Election Commissioners and Regional Commissioners and the

Comptroller and Auditor General of India. That apart, the Chairpersons and members of the Public Service Commissions also enjoy qualified constitutional immunity.

- (d) The doctrine of pleasure does not apply to services under Special Contracts vide Article 310(2).
- (e) Public Service Commissions are required to be consulted on all disciplinary matter affecting civil servants vide Article 320(3)(c). These provisions have, however, been held to be not mandatory. Moreover, the President or the Governor may make regulations specifying the matters in which it shall not be necessary to consult the commission.
- (f) The right of a civil servant to sue the Govt. for arrears of salary or even for damages for wrongful dismissal has been recognized in India.
- (g) Article 310(1) should be read subject to the Rules framed by the Government under Article 309. No rule made under article 309 can be allowed to offend against the doctrine of pleasure as embodied in Article 310(1).

## 13. Article 311 Magna Carta for Civil Servants in India

- (a) What it does?  
It provides for certain safeguards.
- (b) Of what kind?  
Procedural
- (c) Against what?
  - (i) Dismissal or removal by incompetent authority.

- (ii) Arbitrary punishment of any of the three kinds, namely, Dismissal, Removal or Reduction in rank.

**14. Article 311 to whom it applies:-**

- (a) a member of an All India Service.
- (b) a member of a civil service of the Union.
- (c) a member of a civil service of a State.
- (d) a person who holds a CIVIL post under the Union or a State.

**15. Article 311 does not apply to**

- (a) a civilian employed in a defence department.
- (b) an employee of a statutory corporation like LIC, Food Corporation of India etc. or of a Government Company.
- (c) Defence Personnel.

**16. Safeguards of Article 311- an outline**

Two safeguards as indicated below:-

- (1) No dismissal or Removal by authority subordinate to appointing authority.
- (2) No dismissal or removal or reduction in rank.  
Without inquiry in which:-
  - (i) charge should be communicated to the Government Servant concerned.
  - (ii) he and she should be given reasonable opportunity of being heard in respect of charges, and
  - (iii) penalty may be imposed on the basis of evidence adduced during such inquiry.

**17. Second Show Cause Notice regarding punishment - is it necessary now?**

No, it is no longer necessary to give a second show cause notice to the delinquent calling upon him to show cause as to why the proposed penalty should not be inflicted upon him.

Once he is found guilty upon the basis of evidence adduced at the Inquiry, it shall be open to the competent authority to award such punishment as may be deemed appropriate. The penalty should not however, be excessive or disproportionate.

**18. Exceptions where Inquiry as enjoined under Article 311(2) may be dispensed with**

- (a) Misconduct (thrust on misconduct)  
Criminal Charge  
Conviction by a Court of Law.

- (b) Satisfaction of the Disciplinary Authority  
-Not reasonably practicable to hold inquiry - Reasons to be recorded.
- (c) Satisfaction of the President or Governor  
-in the interest of the security of the State.  
-Not expedient to hold inquiry.

**19. 311 - Probationers, Officiating or Temporary employees on the civil side of the Government - are they entitled to the benefit of Article 311?**

- (a) Yes, they are also entitled to the benefit of Article 311. There is nothing within the four corners of Article 311 to render it inapplicable to any of these employees.
- (b) It should, however, be borne in mind that Article 311(2) is attracted only when any of the three major penalties is sought to be imposed on account of misconduct, or inefficiency, negligence or on any other ground which is capable of being explained.
- (c) Article 311 has no application when the action proposed to be taken is not penal at all or is penal but not dismissal, removal or reduction in rank.

**20. Probationer his position**

- (a) When we say that Mr. 'X' is a probationer in the context of government service, what we exactly mean is that he is on trial. The question that arises is what kind of trial it is? The answer is his suitability or fitness is being assessed with reference to the service or post to which he has been appointed on probation.
- (b) A probationer has no right to hold the post to which he has been appointed on probation. It is inherent in his appointment that if he is found suitable, he will be confirmed. But if he is not found suitable, he shall be liable to be discharged.

In case of conviction on a criminal charge, dismissal or removal is not automatic. The disciplinary authority has to apply its mind to the nature and gravity of the offence and to find out what penalty, if any, is warranted.

- (c) In this connection, the two distinct powers of the Govt. may be borne in mind. One power relates to the disciplinary jurisdiction, in exercise of which a penal action may be taken. If a probationer is sought to be punished, he is entitled to the benefit of Article 311. In other words, if a probationer is proposed to be dismissed or removed or reduced in rank, the mandatory procedure of Article 311 has to be followed. On the other hand, the Govt. has also a right to act in accordance with the contract. As I have already indicated, the position of the government servant, after he has entered into the system is one more of status than of contract. He is, therefore, controlled by the statute or statutory rules. The rules may provide for discharge of a probationer on the ground of unsuitability or on the ground that he is lacking in qualities essentially

needed for public service. When the appointment of a probationer is terminated on the ground of unsuitability, Article 311 will have not application.

- (d) In practice, what poses difficulty is that whether the termination is by way of punishment or it is a termination simpliciter in accordance with the rules or in keeping with the terms of the contract. The order by itself is not conclusive on this point. The order may be innocuous or innocent. In appropriate cases, the Court may, however, look into the circumstances leading to the order of termination in order to determine whether the order is penal in character or it is an order of discharge simpliciter.
- (e) If the order attaches any stigma, then it should be construed as penal and in such event, Article 311 is attracted.
- (f) Even if the order is innocuous, but there is an alleged specific misconduct on the part of the probationer forming the foundation of the order, then, also the order should be construed as having been passed by way of punishment. The idea is that if there is an instance of misconduct or misdemeanour, then, an enquiry, as contemplated in Section 311 ought to be instituted and the probationer must be given reasonable opportunity of being heard.
- (g) What is important is that the form of the order alone cannot decide the real nature of the order. If it is a cloak or camouflage for a penal action, then the Court is entitled to pierce the veil and to determine the real nature of the order and to insist on Article 311 being complied with.

## **21. Fundamental Rights and the Government Servants**

- (a) It should not supposed that the civil servants have surrendered or relinquished or waived their fundamental rights at the time of joining the Govt. Service.
- (b) In fact, none of the fundamental rights guaranteed under Part III of the Constitution of India can be waived. Hence, the question of waiver does not arise at all.
- (c) The question that naturally arises is whether the government servants the fundamental rights to the same extent and in the same measure as are available to the ordinary citizens. In order to find a suitable answer to this question, reference ought to be made to Article 33 of the Constitution of India.
- (d) Article 33 authorises the Parliament to abrogate or restrict fundamental rights in their application to certain categories of Govt. servants as specified therein, namely, members of the armed forces such as Army, Navy, Air Force, Police Force changed with the maintenance of public order and persons employed in any Bureau or any Organisation established by the State for the purpose of intelligence and counter-intelligence, and persons employed in connection with telecommunication systems such as Intelligence Branch of the Govt. of India, RAW, IB, SSB (Special Service Bureau) and the wireless department attached to any police organisation.

- (e) Such abrogation or restriction may be resorted to in order to ensure the proper discharge of duties and maintenance of discipline among those categories of employees.
- (f) If you check up Army Act, Navy Act, Air Force Act, you will find instances of abrogation or restriction of fundamental rights in respect of defence personnel. So far as the police is concerned, Police Forces (Restriction of rights) Act was passed by the Parliament in the year 1966.

So far as the civil servants, falling outside the purview of the Article 33 are concerned, it cannot be said that they do not or cannot enjoy fundamental rights. In this context, it ought not to be forgotten that none of the fundamental rights is absolute. They are subject to reasonable restrictions. Hence, reasonable restrictions may be imposed upon the fundamental rights of the government servants falling outside the purview of Article 33 upon the grounds recognized under the Constitution of India, such as public order, decency, morality and integrity of India as well as upon certain ground spelt out by the Supreme Court such as :

- i. Efficiency
- ii. Honesty
- iii. Impartiality
- iv. Discipline
- v. Responsibility

(h) No service rules can be permitted to offend against any of the fundamental rights and if it does so, it is liable to be struck down as null and void. It is, however, permissible to impose reasonable restrictions on any of the recognised grounds. These principles are, however, not applicable to the Government Servants whose fundamental rights have been abrogated or restricted by law made under Article 33 of the Constitution of India.

## Appendix - A

### Extract Provisions of Constitution of India

#### ALL INDIA SERVICES

2. The All India Services Act, 1951
3. The All India Services (Conditions of Service – Residuary Matters) Rules, 1960
4. The All India Services (Conduct) Rules, 1968
5. The All India Services (Confidential Rolls) Rules, 1970
6. All India Services (Commutation of Pension) Regulations, 1959
7. The All India Services (Dearness Allowance) Rules, 1972
8. The All India Services (Death-cum-Retirement) Rules, 1958
9. The All India Services (Discipline and Appeal) Rules, 1969
10. The All India Services (Group Insurance) Rules, 1981
11. All India Services (Joint Cadre) Rules, 1972
12. The All India Services (Leave) Rules 1955
13. The All India Services (Leave Travel Concession) Rules, 1975
14. The All India Service (Home Rent Allowance) Rules, 1977
15. The All India Services (Compensatory Allowance) Rules, 1981
16. The All India Services (Medical Attendance) Rules, 1954
17. The All India Services (Provident Fund) Rules, 1955
18. The All India Services (Remittances into and Payments from Provident Fund and Family Pension Funds) Rules, 1958
19. The All India Services (Special Disability Leave) Regulations, 1957
20. The All India Services (Study Leave) Regulations, 1960
21. The All India Services (Travelling Allowances) Rules, 1954

#### THE INDIAN ADMINISTRATIVE SERVICE

22. The Indian Administrative Service (Appointment by Promotion) Regulations, 1955
23. Indian Administrative Service (Appointment by Selection) Regulations, 1956
24. The Indian Administrative Service (Cadre) Rules, 1954
25. The Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955
26. The Indian Administrative Service (Pay) Rules 1954
27. The Indian Administrative Service (Probation) Rules, 1954
28. Indian Administrative Service (Probationers' Final Examination) Regulations, 1955
29. The Indian Administrative Service (Recruitment) Rules, 1954
30. Indian Administrative Service (Regulation of Seniority) Rules, 1987
31. The Indian Administrative Service (Pay) Eighth Amendment Rules, 1989
32. The Indian Administrative Service (Appointment by Competitive Examination) Second Amendment Regulation, 1989

### **THE INDIAN FOREST SERVICE**

- 33. The Indian Forest Service (Appointment by Competitive Examination) Regulations, 1967**
- 34. The Indian Forest Service (Appointment by Promotion) Regulations Rules, 1966**
- 35. The Indian Forest Service (Cadre) Rules, 1966**
- 36. The Indian Forest Service (Fixation of Cadre Strength) Regulations, 1966**
- 37. The Indian Forest Service (Initial Recruitment) Regulations, 1966**
- 38. The Indian Forest Service (Pay) Rules, 1968**
- 39. The Indian Forest Service (Probation) Rules, 1968**
- 40. The Indian Forest Service (Probationers' Final Examination) Regulations, 1968**
- 41. The Indian Forest Service (Recruitment) Rules, 1966**
- 42. The Indian Forest Service (Regulation of Seniority) Rules, 1968**

### **THE INDIAN POLICE SERVICE**

- 43. Indian Police Service (Appointment by Competitive Examination) Regulations, 1955**
- 44. The Indian Police Service (Appointment by Promotion) Regulation, 1955**
- 45. The Indian Police Service (Pay) Rules, 1954**
- 46. The Indian Police Service (Special Allowance) Rules, 1977**
- 47. The Indian Police Service (Probationers' Final Examination) Regulations.**
- 48. The Indian Police Service (Probation) Rules, 1954**
- 49. The Indian Police Service (Recruitment) Rules, 1954**
- 50. The Indian Police Service (Regulation of Seniority) Rules, 1954**
- 51. The Indian Police Service (Cadre) Rules, 1954**
- 52. Indian Police Service (Uniform) Rules, 1954**
- 53. Indian Police Service (Pay) Seventh Amendment Rules, 1989**
- 54. Indian Police Service (Pay) Sixth Amendment Rules, 1989**

## **THE CENTRAL CIVIL SERVICES**

- 55. The Central Civil Services (Classification, Control and Appeal) Rules, 1965**
- 56. The Central Civil Services (Conduct) Rules, 1964**
- 57. The Central Civil Services (Leave) Rules**
- 58. Central Civil Services (Revised Pay) Rules, 1986**
- 59. The Central Civil Services (Temporary Service) Rules, 1978**

## **MISCELLANEOUS**

- 60. Acceptance of Fourth Pay Commission Report by the Government of India**
- 61. Civilians in Defence Service (Revised Pay) Rules, 1986**
- 62. The Departmental Inquiries (Enforcement of Attendance of Witnesses and Production of Documents) Act, 1972**
- 63. The Former Secretary of State Service Officers Conditions of Service) Act, 1972**
- 64. Indian Customs and Central Excise Service Group 'A' Rules, 1987**
- 65. The Indian Revenue Service Rules, 1988**
- 66. The Indian Administrative Service (Appointment by Competitive Examination) Regulations, 1955**
- 67. International Airports Authority of India Employees (Conduct, Discipline and Appeal) Regulations, 1987**
- 68. The Leave Travel Concession Rules, 1988**
- 69. Miscellaneous Executive Instructions Concerning All India Services**
- 70. The Public Servants Inquiries Act, 1850**
- 71. The Railway Servants (Discipline and Appeal) Rules, 1968**
- 72. The Railway Servants (Pass) Rules, 1986**
- 73. Redeployment of Surplus Staff Against Vacancies in Central Civil Services and Posts (Group 'A' and 'B') Rules, 1986**
- 74. Supreme Court Officers and Servants Rules, 1961**
- 75. The Indian Foreign Service (Conduct and Discipline) Rules, 1961**

**Appendix - B.**

- 1. The West Bengal Service Rules.**
- 2. The West Bengal Services (Classification, Control and Appeal) Rules, 1971.**
- 3. The West Bengal Services (Duties, Rights and Obligations of the Government Employees) Rules, 1980.**
- 4. The West Bengal Services (Death-cum-Retirement Benefit) Rules, 1971.**
- 5. The West Bengal Services (Commutation of Pension) Rules, 1983.**
- 6. The West Bengal Services (Revision of Pay and Allowance) Rules, 1981.**
- 7. West Bengal Services (Determination of Seniority) Rules, 1981.**
- 8. West Bengal Services (Appointment, Probation and Confirmation) Rules, 1979.**

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## V Delegated Legislation

**Rajnish Kumar Singh\***

The concept of “delegated legislation” can be traced down to 1539 when Henry VIII was given wide power to legislate by proclamations. In modern times, with the growth of administrative process, the administrators have become the fountainhead of law making. All law making which takes place outside the legislature is expressed as rules, regulations, bye laws, orders, schemes, directions or notifications etc.

Salmond defines subordinate law as that which proceeds from any authority other than the Sovereign power and is therefore, dependent for its continued existence and validity on some superior or supreme authority.

Art. 13(3) of the Constitution of India defines law and includes within its sphere ordinances, orders, byelaws, rules, regulations and notifications the have the force of law. In *Sikkim v. Surendra Sharma* (1994) 5 SCC 282 the Supreme Court held that “All Laws in force” mentioned in sub clause (k) of Art. 371 F of the Constitution of India includes subordinate legislation.

Difference between rules, regulation and byelaws: Generally, the statutes provide for power to make rules where the general policy has been specified in the statute but the details have been left to be specified by the rules. Usually, technical or other matters, which do not affect the policy of the legislation, are included in regulations. Bye laws are usually matter of local importance, and the power to make byelaws is generally given to the local or self governing authority. All the terms are usually used interchangeably.

Orders: - Under Section 3 of the Essential Commodities Act, 1955 order passed is a general order as distinguished from executive order which is specific. Order asking a person to evacuate his house is an executive order whereas an order laying down prices of commodities is a legislative order.

### **Need for the growth of Delegated Legislation:-**

The primary reason for the need for the growth of delegated legislation is the Socio- economic reforms in developing nations. It is a modern trend as the Parliament passes only a skeletal legislation.

Eg. : - Import and Export (Central) Act, 1947 – which contains only 8 Sections.

Reasons for growth of Delegated Legislation:

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1. Law making in an ever widening modern welfare and service state is not possible. For the nature and quality of work required, 365 days fail to suffice, and if overburdened the parliament cannot give quality legislation. Also it is occupied with important policy matters and rarely finds time to discuss matters in great detail.
2. Filling in details of legislation- The executive in consultation with experts or with its own experience of local conditions can better improvise legislation. Also legislation has become highly technical because of the complexities of a modern govt.
3. Need for flexibility: - Ordinary legislative process suffers from the limitation of lack of experiment. A law can be repealed by the parliament itself, and if it requires adjustment, administrative rule making is the only answer between two sessions of parliament.
4. Meeting Emergency Situations - it is a cushion against crisis and serves good purpose if an emergency legislation is needed.
5. When Government action requires discretion: rule making power of administrative agencies is needed when the government needs to have discretion to carry out policy objectives.
6. It increases direct participation of those who are governed is only possible in delegated legislation.

Committee on Ministers' power concluded and recommended that administrative rule making is useful, inevitable and indispensable.

It has been stated in Cooley's Constitutional Limitations, Volume I at page 224 in these words:-

“One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.”

The same author observes thus in his well-known book on Constitutional Law (4th Edition, page 138):-

“No legislative body can delegate to another department of the government, or to any other authority, the power, either generally or specially, to enact laws. The reason is found in the very existence of its own powers. This high prerogative has been entrusted to its own wisdom, judgment, and patriotism, and not to those of other persons, and it will act ultra vires if it undertakes to delegate the trust, instead of executing it.”

## **Types of Delegated legislation: -**

(I) Power to bring an Act into operation: the government can enact a rule on a due date by notification in the Gazette. This is because government has better knowledge of the practical exigencies of bringing the law into force.

The Court cannot ask the government to bring the law into force. It was held in *A.K. Roy. v. UOI* AIR 1982 SC 710 where the constitution of the Advisory Board was in question and the term qualified to be a High Court judge changed to “actual or had been a High Court judge”. National Security Act 1980 did not have this provision it was held by the court that it cannot ask the government to implement the Act.

(II) Conditional Legislation: - The legislature makes the law but leaves it to the executive to bring the act into operation when conditions demanding such operation are obtained. The conditions are:

To bring an act into operation.

To extend the application of any act in force in one territory.

To extend or to except from the operation of an Act certain categories of subjects or territories.

Fact finding- The element of delegation that is present does not relate to any legislative function, but to the determination of a contingently or event, upon the happening of which the legislative provisions are made to operate. The law is full and complete when it leaves the legislative chamber, but the operation of the law is made dependent upon the fulfillment of a condition and what is delegated to an outside body is the authority to determine, by the exercise of its own judgment, whether or not the condition has been fulfilled.

The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government.” [Locke’s Appeal, 1873, 72 Pa. 491].

*Queen v. Burah* 3 App. Cas. 889 laid down and later followed in *King v. Benoari Lal Sarma* [72 I.A 57] that “conditioned legislation is not to be a species of delegated legislation at all. It comes under a separate category, and if in particular case all the element of conditional legislation exist, the question does not arise as to whether in leaving the tool of determining the condition to an outside authority, the legislature acted beyond the scope of its powers”.

The distinction between the two i.e. conditional and subordinate legislation is that of discretion. Conditional legislation is fact-finding and subordinate legislation is discretionary. Conditional legislation is a fiction developed by the U.S. Court to get away from the operation of the doctrine of separation of power.

Putting it metaphorically, by Subordinate legislation the gun powder is with the executive and by conditional legislation gun and gun powder both are with the with the legislation and executive to pull the trigger. Conditional legislation contains no element of delegation of legislative power and is,

therefore, not open to attack on the ground of excessive delegation. Delegated legislation does confer some legislative power on some outside authority and is; open to attack on the ground of excessive delegation

The case of *Lachmi Narain v. UOI* AIR 1976 SC 714, the Supreme Court, clearing the position, stated that “no useful purpose is served by calling a power conferred by a status as conditional legislation instead of delegated legislation.”

There is no difference between them in principle, for conditional legislation like delegated legislation has “content howsoever small restricted, of the law making power itself-and in neither case can the person be entrusted with the power to beyond the limits which circumscribe the power.”

In *Inder Singh v. State of Rajasthan* AIR 1957 SC 510; the Supreme Court upheld the validity of Rajasthan Tenants Protection Ordinance on the ground that it is conditioned legislation. The Ordinance was promulgated for two years but S.3 had authorized the governor to extend its life by issuing notification if required.

*Tulsipur Sugar Co. Ltd. v. Notified Area Committee* AIR 1980 SC 882 was the case where notification issued u/s 3 of U.P. Towner Area Act, 1914 vide which the Limits of Tulsipur town had been extended to the village Shitalpur it was held as conditional legislation. It laid down that conditional legislation cannot be characterized as subordinate legislation. It is strange logic as the latter is a broader term and includes the former.

In *K. S. E. Board v. Indian aluminum* A.I.R. 1976 SC 1031, the act governing the regular production, supply of essential articles but the definition of essential article was left to the executive. The Supreme Court held it as a conditional legislation.

**Delegated Legislation:** -A portion of law-making power of the legislative is conferred or bestowed upon a subordinate authority. Rules and regulations which are to be framed by the latter constitute an integral portion of the statute itself. It is within power of parliament when legislating within its legislative few to confer suborbital administrative and legislative powers upon some other authority.

Subordinate legislation is the legislation made by an authority subordinate to the sovereign authority, namely, the legislature. According to Sir John Salmond, “Subordinate legislation is that which proceeds from any authority other than the sovereign power and is, therefore, dependent for its continued existence and validity on some superior or supreme authority.” Most of the enactments provide for the powers for making rules, regulations, bye-laws or other statutory instruments which are exercised by specified subordinate authorities. Such legislation is to be made within the framework of the powers so delegated by the legislature and is, therefore, known as delegated legislation.

### **Nature of subordinate legislation**

‘Subordinate ness’ in subordinate legislation is not merely suggestive of the level of the authority making it but also of the nature of the legislation itself. Delegated legislation under such delegated powers is ancillary and cannot, by its very nature, replace or modify the parent law nor can it lay

down details akin to substantive law. There are differences where pieces of subordinate legislation which tended to replace or modify the provisions of the basic law or attempted to lay down new law had been struck down as ultra vires.

### **Control of legislature on delegated legislation**

While in the context of increasing complexity of law-making, subordinate legislation has become an important constituent element of legislation. Thus, it is equally important to see how this process of legislation by the executive under delegated powers can be reconciled with the democratic principles of parliamentary control. Legislation is an inherent and inalienable right of Parliament and it has to be seen that this power is not usurped nor transgressed under the guise of what is called subordinate legislation. This has been discussed later under the heading “Judicial Control of Delegated Legislation”

### **Purpose based classification: -**

Enabling Acts: - appointed day clause: under this the executive has to appoint a day for the Act to come into operation.

### **Extension and Application Acts**

Dispensing and Suspending Acts: - to make exemption from all or any provision of the Act in a particular case or class of cases or territory, when circumstances warrant it. These are meant to enable the administration to relieve hardship which may be occasioned as a result of uniform enforcement of law.

Alteration Acts: - Technically alteration amounts to amendment, yet it is a wide term and includes both modification and amendment. The power to modify Acts has mostly been delegated as a sequel to the power to the power of extension and application of laws. The power of modification is limited to consequential changes, but, if overstepped it suffers challenge on the ground that it is not within the legislative intent of modification.

In *Queen v. Burah* the Privy Council held that the 9th Section of the Act conferring power upon the Lieutenant-Governor to determine whether the Act or any part of it should be applied to a certain district was a form of conditional legislation and did not amount to delegation of legislative powers. It is akin to “removing difficulty” so that the various states may coexist.

Power to make rules “to carry out the purpose of the Act”

Classifying and fixing standard Acts: - Power is given to fix standard of purity, quality or fitness for human consumption.

Clarify the provision of the statutes Acts: to issue interpretation on various provisions of the enabling Act.

The Committee on Ministers Powers, 1932, distinguished two types of parliamentary delegation:

1. **Normal Delegation: -**

- a) Positive: - where the limits of delegation are clearly defined in the enabling Act.
- b) Negative: - does not include power to do certain things (these are not allowed)

2. **Exceptional Delegation: -**

- a) Power to legislate on matters of principle (policy)
- b) Power to amend an Act of parliament (In re Delhi laws Acts)  
(Henry VIII clause – indicates executive autocracy)

In *W.B. State Electricity Board v. Desh Bandhu Gosh* (1958) 3 SCC 116 it was held that Regulation 34 of the West Bengal State Electricity Regulation which had authorized the Board to terminate the Service of any permanent employer on three months notice or pay in lieu thereof. This hire and fire rules of regulation 34 is parallel to Henry VIII clause.

Similar position was held by the court in the case of *Central Inland Water Transport Corporation Limited v. Brojo Nath Ganguly* AIR 1986 SC 1571 wherein Rule 9 of the service rules of the CIWTC conferred power to terminate on similar lines. As in the case of *Desh Bandhu Ghosh* the court went on to say that No other description of Rule 9(i) can be given than to call it “the Henry VIII clause”. It confers absolute and arbitrary power upon the Corporation and therefore invalid.

### Constitutionality of Delegated Legislation

#### Position in the USA

Two phenomena operate in USA. These are:

Separation of Power.

“Delegatus non potest delegare”.

Since the US Congress was itself a delegate, the question arose as to how it could delegate its own power. The framers of the American Constitution were imbued with the political theories propagated by John Locke and Montesquieu. John Locke, in his *Civil Government*, article 141 stated: “The legislature cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others.”

According to Locke “the legislature neither must, nor can, transfer the power of making laws to anybody else, or place it anywhere but where the people have.” (*Civil Government*, Article 142). Montesquieu in his *Esprit Des Lois* developed this doctrine of Separation of Powers. While after 1688 England definitely departed from the rigid doctrine of separation of powers and has never come back to it, the framers of the American Constitution adopted the doctrine in its full force because, as explained by Professor Wills, “the fathers undoubtedly were so afraid of despotism and tyranny that they intended to establish a separation of the powers of government in order to prevent the exercise of all the powers of government by any single branch of government.” Indeed, forty State Constitutions expressly provided for the separation of powers and it was only the remaining eight State Constitutions that, like the Federal Constitution, did not expressly create a separation of governmental powers, although they “vested” the powers separately in the three departments of government. Reference may be made to the following provisions of the Federal Constitution:

Art. 1, Section 1: All legislative powers herein granted shall be vested in the Congress of the United States, which shall consist of a Senate and House of Representatives.

Art. 2, Section 1: The executive power shall be vested in a President of the United States of America.

Art. 3, Section 1: The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish.

In view of this separate enumeration of the three powers and the vesting of each in separate bodies, the United States Supreme Court in *Springer v. Government of Phillipine Islands* [(1927) 277 U.S. 189; 72 L. Ed. 845] said that “the separation of power is implicit in all, as a conclusion logically following from the separation of the several departments.” The correct position, as stated by Professor Willis, is that “the doctrine of the separation of governmental powers is an American doctrine and an implied doctrine of the United States Constitution, and of those State Constitutions which do not expressly set it forth.” Alongside this doctrine of separation of powers the American constitutional law had another doctrine which also negatives the delegation of power. In Sutherland’s *Statutory Construction*, 3rd Edn., Vol. 1, p. 56, it is stated that “incident to the separation-of-powers doctrine was the corollary that legislative power could not be exercised by any agency of the government save the legislature.” The application of this corollary is thus explained by Willis as “The rule against the delegation of legislative powers, if there is such a rule, is broader than any doctrine of separation of powers. That part of it which forbids the delegation of powers to other branches or the government comes within the doctrine of separation of powers. That part of it which forbids the delegation of powers to independent boards or commissions rests upon the maxim *delegata potestas non potest delegare*.”

In *Panama Refining Co. v. Ryan* [293 U.S. 388] Chief Justice Hughes very clearly stated that “the Congress manifestly is not permitted to abdicate or transfer to others the essential legislative functions with which it is invested. In every case, the learned Chief Justice continued, “in which the question has been raised the court has recognized that there are limits of delegation which there is no constitutional authority to transcend..... We think that Section 9(c) goes beyond those limits; as to transportation of oil production in excess of state permission the Congress has declared no policy, has established no standard, and has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.” Mr. Justice Cardozo differed from the majority view in this case and held that a reference, express or implied, to the policy of Congress as declared in Section 1 was a sufficient definition of a standard to make the statute valid. “Discretion is not unconfined and vagrant” thus observed the learned Judge. “It is confined within the banks that keep it from overflowing.”

The constitution had never been regarded as denying to congress the necessary resources of flexibility and practicability, which would enable it to perform its function in laying down policies and establishing standard, while laving to administration the making of subordinate rules within prescribed limits.

It is interesting to note that in the later case of *Schechter Poultry Corporation* [295 U.S. 495] where the legislative power was held to be unconstitutionally delegated by the provision of Section 3 of the National Industrial Recovery Act of 1933 as no definite standard was set up or indicated by

the legislature, Cardozo J. agreed with the opinion of the Court and held that the delegated power of legislation which had found expression in that Code was not canalized within banks but was unconfined and vagrant. "Here in the case before us" thus observed the learned Judge "is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. This is delegation running riot. No such plenitude of powers is capable of transfer". As said above, these are the only two cases up till now in which the statutes of Congress have been declared invalid because of delegation of essential legislative powers.

The maxim delegates non potest delegare is sometimes spoken of as laying down a rule of the law of agency; its ambit is certainly wider than that and it is made use of in various fields of law as a doctrine which prohibits a person upon whom a duty or office has developed or trust has been imposed from delegating his duties or powers to other persons. The introduction of this maxim into the constitutional field cannot be said to be altogether unwarranted, though its basis rests upon a doubtful political doctrine. To attract the application of this maxim, it is essential that the authority attempting to delegate its powers must itself be a delegate of some other authority. The legislature, as it exists in India at present day, undoubtedly in the creature of the Indian Constitution, which defines its powers and lays down its duties; and the Constitution itself is a gift of the people of India to themselves. But it is not a sound political theory that the legislature acts merely as a delegate of the people. This theory once popularized by Locke and eulogized by early American writers is not much in favor in modern times.

In *Wayman v. Southend* [10 Wheat 1 U.S. 1825] the observations of Marshall C.J. that the line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made and power given to those who are to act under such general provision to fill up details, the resulting judicial dilemma, when the American courts finally were squarely confronted with delegation cases, was resolved by the judicious choice of words to describe the word "delegated power". The authority transferred was, in Justice Holmes' felicitous phrase, "softened by a quasi", and the courts were thus able to grant the fact of delegated legislation and still to deny the name. This result is well put in Prof. Cushman's syllogism:

"Major premise: Legislative power cannot be constitutionally delegated by Congress.

Minor premise: It is essential that certain powers be delegated to administrative officers and regulatory commissions.

Conclusion: Therefore the powers thus delegated are not legislative powers. They are instead administrative or quasi-legislative powers."

## Position in UK

In England the Parliament is Supreme, unhampered by any constitutional limitations with wide legislative powers to the executive. Parliament being supreme and its power to legislate being unlimited, there is nothing to prevent Parliament from delegating its legislative power to the executive officers or other subordinate bodies. Sir Cecil Carr in his “Delegated Legislation” quoted in the Report of the Committee on Ministers’ Powers, usually referred to as the Donoughmore Committee, said:

“The first and by the far smallest part is made by the Crown under what survives of the prerogative. The second and weightiest part is made by the King in Parliament and consists of what we call Acts of Parliament. The third and bulkiest part is made by such persons or bodies as the King in Parliament entrusts with legislative power.”

As observed by Sir Cecil Carr, “the truth is that if Parliament were not willing to delegate law-making power, Parliament would be unable to pass the kind and quantity of legislation which modern public opinion requires.”

In England, the practice of delegating legislative power has certainly been facilitated by the close fusion of the legislative and executive power resulting from the development the cabinet system of government in England.

Delegated legislation has been divided in the Donoughmore Committee’s Report into two classes, (i) normal and (ii) exceptional. The normal type is said to have two distinguishable characteristics, one positive and the other negative. In the normal type of delegation the “positive characteristic is that the limits of the delegated power are defined so clearly by the enabling Act as to be made plainly known to Parliament, to the executive and to the public and to be readily enforceable by the judiciary.” The negative characteristic is that the powers delegated are stated not to include the power to do certain things. The exceptional type of delegation has been classified by the Donoughmore Committee under four heads, namely –

- (i) Power to legislate on matters of principle and even to impose taxation;
- (ii) Power to amend Acts of Parliament, either the Act by which the powers are delegated or other Acts (nicknamed as Henry VIII clause);
- (iii) Power conferring so wide discretion on a Minister, that it is almost impossible to know what limit Parliament did intend to impose;
- (iv) Instances where Parliament, without formally abandoning its normal practice of limiting delegated powers, has in effect done so by forbidding control of the Courts.

Committees on Ministers Powers observed that “The precise limits of law making power which parliament intends to confer on a minister should always be expressly defined in clear language by the statutes which confer it – when discretion is conferred, its limits should be defined with equal clearness. Laying down of limits in the enabling Acts within which executive action must work is of greater importance to England than to any other country, because in the absence of any constitutional limitation, it is on the basis of those parliamentary limits alone that the Power of judicial review can be exercised”.

## Position in India

### Pre Independence:

The case of *Queen v. Burah* wherein the Privy Council had validated only Conditional Legislation and therefore as per its reasoning delegated legislation is not permitted. The Council of the Governor General of India for making laws and regulations made an Act to remove the Garo Hills from the jurisdiction of the tribunals established under the General Regulations and Acts passed by any legislature in British India and provided that “no Act hereafter passed by the Council of the Governor-General for making laws and regulations shall be deemed to extend to any part of the said territory unless the same was specifically named therein”. The administration of civil and criminal justice within the said territory was vested in such officers as the Lieutenant-Governor may from time to time appoint. Section 8 and 9 of the said Act provided as follows:-

“Section 8: The said Lieutenant-Governor may from time to time, by notification in the Calcutta Gazette, extend to the said territory any law, or any portion of any law, now in force in the other territories subject to his Government, or which may hereafter be enacted by the Council of the Governor-General, or of the said Lieutenant-Governor, for making laws and regulations, and may on making such extension direct by whom any powers or duties incident to the provisions so extended shall be exercised or performed, and make any order which he shall deem requisite for carrying such provisions into operation.”

“Section 9: The said Lieutenant-Governor may from time to time, by notification in the Calcutta Gazette, extend mutatis mutandis all or any of the provisions contained in the other Sections of this Act to the Jaintia Hills, the Naga Hills, and to such portion of the Khasi Hills as for the time being forms part of British India. Every such notification shall specify the boundaries of the territories to which it applies.”

The Lieutenant-Governor of Bengal issued a notification in exercise of the power conferred on him by Section 9 and extended the provisions of the said Act to the territory known as the Khasi and Jaintia Hills and excluded them from the jurisdiction of the ordinary civil and criminal court. By a majority judgment the Calcutta High Court decided that the said notification had no legal force or effect. In the Calcutta High Court, Mr. Kennedy, counsel for the Crown, boldly claimed for the Indian Legislative Council the power to transfer legislative functions to the Lieutenant-Governor of Bengal and Markby J. framed the question for decision as follows: “Can the Legislature confer on the Lieutenant-Governor legislative power?” Answer: “It is a general principle of law in India that any substantial delegation of legislative authority by the Legislature of this country is void.”

Lord Selbourne after agreeing with the High Court that Act XXII of 1869 was within the legislative power of the Governor-General in Council, considered the limited question whether consistently with that view the 9th Section of that Act ought nevertheless to be held void and of no effect. The Board noticed that the majority of the Judges of the Calcutta High Court based their decision on the view that the 9th Section was not legislation but was a delegation of legislative power. They noticed that in the leading judgment of Markby J. the principle of agency was relied upon and the Indian Legislature seemed to be regarded an agent delegate, acting under a mandate from the Imperial Parliament. They rejected this view. They observed: “The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of

course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have plenary powers of legislation as large and of the same nature as those of Parliament itself.

The established courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited....it is not for any court of justice to inquire further or to enlarge constructively those conditions and restrictions”.

It was held that Indian legislators have plenary powers and it exercised the power in its own right and not as an agent or a delegate of the British parliament. The Privy Council laid down that “seeking of assistance of a subordinate agency in the framing of rules and regulations which are to become a part of the law and conferring on another body the essential legislative functions which under the constitution should be exercised by the legislature itself”. It also stated that the essential legislative function consists in the determination or choosing of the legislative policy and formally enacting that policy into binding rule of conduct.

Also in *King v. Benoari Lal Sharma*, conditional legislation was again applied by the Privy Council wherein the validity of an emergency ordinance by the Governor-General of India was challenged inter alia on the ground that it provided for setting up of special criminal courts for particular kinds of offences, but the actual setting up of the courts was left to the Provincial Governments which were authorized to set them up at such time and place as they considered proper. The Judicial Committee held that “this is not delegated legislation at all. It is merely an example of the not uncommon legislative power by which the local application of the provisions of a statute is determined by the judgment of a local administrative body as to its necessity. The Privy Council held that “Local application of the provision of a state is determined by the judgment of a local administrative body as to its necessity.”

Also the Federal Court in *Jatindra Nath v. State of Bihar* AIR 1949 FC 175 wherein the S. 1 (3) of Bihar maintenance of public order Act, 1948 was challenged as it gave power of extension with modification to provincial Govt. held that “the power of extension with modification is unconstitutional as legislative power cannot be delegated”. But this created doubts on the limits of delegation.

Post – Independence:

In *re Delhi Laws Act*, The Delhi Laws Act, 1912, giving power to the Government to extend to Delhi and Ajmer-Marwar with such restrictions and modifications as it thought fit any law in force in any other part of India, was held *intra vires*- The case also discussed the validity of the law empowering the Government to extend to Part C States any law in force in Part A states and to repeal existing laws-it was held *ultra vires*.

Under Article 143 of the Constitution the President asking the Court's opinion on the three questions submitted for its consideration and report. The three questions are as follows:-

“(1) Was Section 7 of the Delhi Laws Act, 1912, or any of the provisions thereof are in what particular or particulars or to what extent ultra vires the Legislature which passed the said Act?”

2. Section 7 of the Delhi Laws Act, mentioned in the question, runs as follows:-

“The Provincial Government may, by notification in the official gazette, extend with such restrictions and modifications as it thinks fit to the Province of Delhi or any part thereof, any enactment which is in force in any part of British India at the date of such notification.”

“(2) Was the Ajmer-Merwara (Extension of Laws) Act, 1947, or any of the provisions thereof and in what particular or particulars or to what extent ultra vires the Legislature which passed the said Act?”

3. Section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, runs as follows:-

“Extension of Enactments to Ajmer-Merwara. - The Central Government may, by notification in the official gazette, extend to the Province of Ajmer-Merwara with such restrictions and modifications as it thinks fit any enactment which is in force in any other Province at the date of such notification.”

“(3) Is Section 2 of the Part C States (Laws) Act, 1950, or any of the provisions thereof and in what particular or particulars or to what extent ultra vires the Parliament?”

4. Section 2 of the Part C States (Laws) Act, 1950, runs as follows:-

“Power to extend enactments to certain Part C States. - The Central Government may, by notification in the Official Gazette, extend to any Part C State (other than Coorg and the Andaman and Nicobar Islands) or to any part of such State, with such restrictions and modifications as it thinks fit, any enactment which is in force in a Part A State at the date of the notification and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State.

The three Sections referred to in the three questions are all in respect of what is described as the delegation of legislative power and the three particular Acts are selected to raise the question in respect of the three main stages in the constitutional development of India. The first covers the legislative powers of the Indian Legislature during the period prior to the Government of India Act, 1915. The second is in respect of its legislative power after the Government of India Act, 1935, as amended by the Indian Independence Act of 1947. The last is in respect of the power of the Indian Parliament under the present Constitution of 1950.

As regards constitution of the delegation of legislative powers the Indian Legislature cannot be in the same position as the prominent British Parliament and how far delegation is permissible has got to be ascertained in India as a matter of construction from the express provisions of the Indian Constitution. It cannot be said that an unlimited right of delegation is inherent in the legislature power itself. This is not warranted by the provisions of the Constitution and the legitimacy of delegation depends entirely upon its being used as an ancillary measure which the legislature

considers to be necessary for the purpose of exercising its legislative powers effectively and completely.

The legislature must retain in its own hands the essential legislative functions which consist in declaring the legislative policy and laying down the standard which is to be enacted into a rule of law, and what can be delegated in the task of subordinate legislation which by its very nature is ancillary to the statute which delegates the power to make it. Provided the legislative policy is enunciated with sufficient clearness or a standard laid down the courts cannot and should not interfere with the discretion that undoubtedly rests with the legislature itself in determining the extent of delegation necessary in a particular case. These are the limits within which delegated legislation is constitutional provided of course the legislature is competent to deal with and legislate on the particular subject-matter. It is in the light of these principles that the constitutional validity of the three legislative provisions must be examined in respect to which the reference has been made.

The conclusion must therefore necessarily be that there is a rule against grant of essential legislative power but the rule was not violated in the present instance. The word “restriction” and the word “modification” have been employed also in a cognate sense and it does not involve any material or substantial alteration. The dictionary meaning of the expression “to modify” is to “tone down” or “to soften the rigidity of the thing” or “to make partial changes without any radical alteration.” It would be quite reasonable to hold that the word “modification” in Section 7 of the Delhi Laws Act means and signifies changes of such character as are necessary to make the statute which is sought to be extended suitable to the local conditions of the province.

It was observed that the executive government is not entitled to change the whole nature or policy underlying any particular Act or take different portions from different statutes and prepare what has been described before us as “amalgam” of several laws. The Attorney-General very fairly admitted that these things would be beyond the scope of the Section itself and if such changes are made, they would be invalid as contravening the provision of Section 7 of the Delhi Law Act, though that is no reason for holding Section 7 itself to be invalid on that ground. The word “modification” occurring in Section 7 of the Delhi Laws Act does not mean or involve any change of policy by is confined to alteration of such a character which keeps the policy of the Act intact and introduces such changes as are appropriate to local conditions of which the executive government is made the judge, therefore there is no unwarrantable delegation of legislative powers in Section 7 of the Delhi Laws Act.

The court made the following observations:

Surrender of essential legislative function would amount to abdication of legislative power in the eye of law.

Court would interfere if no guidance is discernable or if delegation amounts to abdication.

Limits of the power of delegation in India would have to be ascertained as a matter of construction from the provisions of the constitution itself.

Then in the case of *Raj Narain Singh v. Chairman Patna Administration committee* AIR 1954 SC 569 in which S.3(1)(f) of the Bihar and Orissa Act empowered the local administration to extend to

Patna the provisions of any Sections of the Act ( Bengal Municipality Act, 1884) subject to such modification, as it might think fit. The government picked up Section 104 and after modifications applied it to the town of Patna. One of the essential features of the Act was the provision that no municipality competent to tax could be thrust upon a locality without giving its inhabitants a chance of being heard and of being given as opportunity to object. The Section(s) which provided for an opportunity to object was excluded from the notification. It was held as amounting to tamper with the policy of the Act.

In *Lachmi Narain v. UOI* (1976 2) SCC 95, the validity of Section 2 of Union Territories (Laws) Act, 1950 and Section 6 of Bengal Finance (Sales Tax) Act, 1941 was to be determined. The issue was that whether notification issued by Central Government in purported exercise of its powers under Section 2 was ultra vires of the Laws Act.

In the High Court the validity of the withdrawal of the exemptions was challenged on the following grounds:

(1) The power given by Section 2 of the Laws Act to the Central Government to extend enactments in force in a State to a Union territory, with such restrictions and modifications, as it thinks fit could be exercised only to make such modifications in the enactment as were necessary in view of the peculiar local conditions. The modification in Section 6(2) of the Bengal Act made by SRO 3908, dated October 7, 1957, was not necessitated by this reason. It was therefore, ultra vires Section 2 of the Laws Act.

(2) Such a modification could be made only once when the Bengal Act was extended to Delhi in 1951. No modification could be made after such extension.

(3) The modification could not change the policy of the legislature reflected in the Bengal Act and the impugned modification was contrary to it.

(4) The modifications giving notice to withdrawn the exemptions and the notifications issued pursuant thereto withdrawing the exemptions from sales tax with respect to durries, ghee and other items relevant to these petitions were void as the statutory notice of not less than three months as required by Section 6(2) prior to its modification by the impugned notification of December 7, 1957, had not been given.

Finding on all the four grounds in favour of the writ petitioners, the learned Single Judge declared that the purported modification of Section 6(2) of the Bengal Finance (Sales Tax) Act, 1941, by the Government of India's notification No. SRO 3908, dated December 7, 1957, was ineffective and Section 6(2) continues to be the same as before as if it was not so modified at all. In consequence, he quashed the government notifications Nos. GSR 964, dated June 16, 1966 and GSR 1061, dated June 29, 1966, because they were not in compliance with the requirement of Section 6(2) of the Bengal Act. The contentions canvassed before the learned Single Judge was repeated before the appellate Bench of the High Court. The Bench did not pointedly examine the scope of the power of modification given to the Central Government by Section 2 of the Laws Act with specific reference to the purpose for which it was conferred and its precise limitations. It did not squarely dispel the reasoning of the learned Single Judge that the power of modification is an integral part of the power of extension and "cannot therefore be exercised except for the purpose of the extension".

In the Supreme Court it was contended that the power of modification given by Section 2 of the Laws Act does not exhaust itself on first exercise; it can be exercised even subsequently if through oversight or otherwise, at the time of extension of the enactment, the Central Government fails to adapt or modify certain provisions of the extended enactment for bringing it in accord with local conditions. The reasoning of the appellate Bench of the High Court that whatever infirmity may have existed in the impugned notification and the modification made thereby in Section 6(2), it was rectified and cured by Parliament when it passed the Amendment Act 20 of 1959. It was urged that the Bengal Act together with the modifications made by notifications, dated April 28, 1951 and December 7, 1957, must have been before Parliament when it considered and passed the Amendment Act of 1959. If in Section 6(2) the requirement as to “not less than three months’ notice” was mandatory and a matter of legislative policy, then the exemptions from tax granted to durries, pure silk, etc. after the issue of the impugned notification must be treated non est and void ab initio, inasmuch as the amendments of the Second Schedule whereby those exemptions were granted, were made without complying with the requirement of “not less than three months’ notice”.

It was argued that if this requirement was a sine qua non for the amendment of the Second Schedule, it could not be treated mandatory in one situation and directory in another. If it was mandatory then compliance with it would be absolutely necessary both for granting an exemption and withdrawing an exemption from tax. In this view of the matter, the withdrawal of the exemption through the impugned notification was a mere formality; the notifications simply declared the withdrawal of something which did not exist in the eye of law. Appellants could not, therefore, have any cause of grievance if the invalid and still-born exemptions were withdrawn by the question notifications. The Supreme Court, after considering the contentions of both the parties, held that: “in regard to the argument that the power conferred by Section 2 of the Laws Act is a power of conditional legislation and not a power of ‘delegated’ legislation, in our opinion, no useful purpose will be served to pursue this line or argument because the distinction propounded between the two categories of legislative powers makes no difference, in principle. In either case, the person to whom the power is entrusted can do nothing beyond the limits which circumscribe the power; he has to act - to use the words of Lord Selbourne -within the general scope of the affirmative words which give the power” and without violating any “express conditions or restrictions by which that power is limited”. There is no magic in a name; whether you call it the power of “conditional legislation” as Privy Council called it in *Burah’s* or delegated legislation.”

It also laid down that modification can be done as the power does not exhaust itself on 1st exercise whether the Central Govt. fails to adapt or modify at the time of extension. If at all any defect crops up it can be cured by the amendment. It will be clear that the primary power bestowed by the Section on the Central Government is one of extension that is bringing into operation and effect, in a Union territory, an enactment already in force in a State. The discretion conferred by the Section to make ‘restrictions and modifications; in the enactment sought to be extended, is not a separate and independent power. It is an integral constituent of the powers of extension. It cannot be exercised apart from the power of extension. This is indubitably clear from the preposition “with” which immediately precedes the phrase ‘such restrictions and modifications’ and conjoins it to the principal clause of the Section which gives the power of extension. According to the Shorter Oxford Dictionary, one meaning of the word “with”, (which accords here with the context), is “part of the same whole”.

The power given by Section 2 exhausts itself on extension of the enactment; it cannot be exercised repeatedly or subsequently to such extension. It can be exercised only once, simultaneously with the extension of the enactment. This is one dimension of the statutory limits which circumscribe the power. The second is that the power cannot be used for a purpose other than that of extension. In the exercise of this power, only such restrictions and modifications can be validly engrafted in the enactment sought to be extended, which are necessary to bring it into operation and effect in the Union Territory. "Modifications" which are not necessary for, or ancillary and subservient to the purpose of extension, are not permissible. Only such "modifications" can be legitimately necessary for such purpose as are required to adjust, adapt and make the enactment suitable to the peculiar local conditions of the Union territory for carrying it into operation and effect. In the context of the Section, the words "restrictions and modifications" do not cover such alterations as involve a change in any essential feature, of the enactment or the legislative policy built into it. This is the third dimension of the limits that circumscribe the power.

It is true that the word "such restrictions and modifications as it thinks fit", if construed literally and in isolation, appear to give unfettered power of amending and modifying the enactment sought to be extended. Such a wide construction must be eschewed lest the very validity of the Section becomes vulnerable on account of the vice of excessive delegation. Moreover, such a construction would be repugnant to the context and the content of the Section, read as a whole, and the statutory limits and conditions attaching to the exercise of the power. We must, therefore, confine the scope of the words "restrictions and modifications" to alterations of such a character which keep the inbuilt policy, essence and substance of the enactment sought to be extended, intact, and introduce only such peripheral or insubstantial changes which are appropriate and necessary to adapt and adjust it to the local conditions of the Union territory.

Limits on power of modification

It can be done at the time of extension only.

Modification which is not necessary for extension cannot be done.

Modification should not lead to change in the essential features and the policy of the parent Act.

Therefore the order of 1957 transgressed the limits in two respects:

The power has not been exercised at the time of extension.

ii) It changed the essential feature

In *Brij Sunder v. First Addl. Distt. Judge* AIR 1989 SC 572 the court allowed even the extension of future laws of another state to which the adopting state legislative never had the opportunity to exercise its mind. Section 5.3 of Cantonments (Extension of Rent control Laws) Act, 1957 was challenged. Court stated that "The central Govt. may, by notification in the official Gazette, extend to any cantonment with such restrictions and modification as it think fit, any enactment relating to the control of rent and regulation of house accommodation which is in force on the date of notification which is in force on the date of notification in the state in which the cantonment is situated." And the date of notification-was deleted by the Central Act, 1972 with retrospective effect.

That made it possible that by notification even future enactments would automatically apply to the cantonment area. The Supreme Court SC held that cantonment areas in the state should be subject to the same tenancy legislation as in the other area, it follows that even future amendments in such state legislative should be effective in cantonment areas as well.

Abdication Test: It was developed in the case of Gwalior Rayon Silk Manufacturing Co. Ltd. v. Asstt. C. S. T. AIR 1974 SC 1660. The court stated that “So long as legislature can repeal the enabling Act delegating law-making power, it must be considered as valid no matter how so ever general the delegation may be.”

J. Mathew applied this test in N.K. Papiiah v. Excise Commr. AIR 1975 SC 1007. In this case it was contended for the appellants that the power to fix the rate of excise duty conferred by Section 22 of the Mysore Excise Act of 1965 on the government was bad for the reason that it was an abdication by the State legislature of its essential legislative function. The court, speaking through Mathew, J. upheld the validity of Section 22 and stated that “we are unable to appreciate that the constituent body can be restrained from doing what a legislature is free to do. We are therefore unable to accept the argument that Section 1(2) confers an uncontrolled power on the executive and is, by its unreasonableness, violative of Articles 14 and 19 of the Constitution.”

### **Delegation of Taxing Power**

The power to levy tax is an essential legislative function The Constitution u/A 265 says:

“No tax shall be levied or collected except by authority of law”. The legislature has to decide how much to tax and whom to tax. The legislature cannot legislate on all aspect of taxation, some delegation is unavoidable

#### **Object of Taxing Powers**

The object of taxing powers does not limit itself to revenue collection for the state but also for regulating the socio, economic or political structure of the country.

In the case of Avinder Singh v. Stare of Punjab (AIR 1979 SC 321), Krishna Iyer, J. laid down the test for valid delegation. The test is as follows:

1. The legislature cannot efface itself.
2. It cannot delegate the plenary or the essential legislative functions.
3. Even if there is delegation, Parliamentary control over delegations should be a living activity as a constitutional necessity.

He also stated that “While what constitutes an essential legislative feature cannot be delineated in detail, it certainly cannot include a change of policy. The legislature is the master of legislative policy and if delegation is free to switch policy it may be usurpation of legislative power itself”. In this case Sec 90 (4) of the Punjab Municipal Corporation Act 1976 was under question as it required various municipalities to impose a tax of Re 1 per bottle of foreign liquor. On the failure of the municipality to take action the govt. of Punjab imposed the same tax, and thus the power to impose tax was challenged on the ground of excessive delegation.

“For the purpose of the Act”:- lay down sufficient guidelines for the imposition of tax.

Sub - sec (3) of S .90:- rate of levy to be determined by the state Govt.

S. Sec (5):-State Govt. to notify the tax which the corporation shall levy.

These provisions show that the levy of tax shall be only for the purpose of the Act”

An expression which sets a ceiling on the total guideline that may be collected and also contains the objects for which levies can be spent and: - It provides sufficient guidelines for the same.

In Darshan Lal Mehra v. UOI AIR 1992 SC 714 the U.P. Nagar Mahapalika Adhnyam, 1959, S.2 was in question under which taxing power was delegated to the Mahapalika and it was contended that it is abdication of legislative function.

The court rejected this contention that since the act under which this power is given is having a statutory force and the state government has framed rules and the said rules are laid before the house and the legislature has the power to modify the rules, therefore it is not an abdication of legislative power.

In the case of Western Indian theatre, Ltd. v. Cantonment Board Poona Cantonment AIR 1959 SC 582 the different rates of entertainment tax imposed on two different Cinemas was challenged. The court rejected it saying that keeping in mind the large accommodation, locality, the number of visitors and overall circumstances the imposition of different rate of tax is justified and is not discriminatory.

In the case of Delhi Municipal Corporation v. Birla Cotton Spinning Weaving. Mills AIR 1968 SC 1232 the power delegated to the corporation to impose electricity tax without prescribing any maximum limit was upheld on the ground that the corporation is also a representative and responsive body which stands a guarantee against the misuse of the power. It also held that “The court is generally willing to uphold delegation of fiscal power in favor of elected bodies such as panchayats or municipalities”

The underlying factors were:

- i) Delegation was to a local body which was popularly elected.
- ii) The upper limit of the tax was deducible from the nature of its functions
- iii) The body was subject to Govt. control.

In J.R.G. Manufactory Association v. UOI AIR 1970 SC 1589, S.12 (2) of the Rubber Act empowered the Rubber Board to levy an excise duty either on the producers of rubber or the infectors of rubber goods, which was challenged as excessive delegation of power. It was held that there is no excessive delegation. There are inherent checks on the exercise of such power, namely, the representative character of the Board and the control of the control Govt. The Act Provided that tax can be levied only according to the rules made by the Govt. subject to the laying procedure executive may be empowered to fix the rates of fixation.

Devi Das v. State of Punjab AIR 1967 SC 1895, where the court held it valid that the Executive can levy tax at a rate between 1% and 2% but if the Govt. levies sales tax at such rates and it 'deems fit', it is invalid.

In S.B. Dayal v. State of UP AIR 1972 SC 1168, the Apex Court meted out the philosophy as "In a modern society taxation is an instrument of planning. It can be used to achieve the economic and social goals of the state for that reason the power to tax must be a flexible power"

Therefore we can conclude that:

- Taxing power is an essential legislative power.
- It can be delegated once the legislature lays down the policy; sufficient guidelines for the imposition of tax.
- It is sufficient guideline if the power is "for the purpose of the Act"
- Wide expressions like those above are sufficient policy when power is delegated to a representative authority.

Legislative power can be validly delegated to exempt any item, bring certain item in the ambit of tax, determine the rate within the minimum and the maximum limit, even when limits are not prescribed it should be delegated to a representative body and should be subject to any control and if different rate of tax is imposed for different commodities then it must satisfy the test of reasonable classify.

Therefore we can see the phrase "No taxation without representation" being slowly obliterated as now wide taxing powers are given to the administrative authorities.

### **Control of Delegated Legislation**

In the present complex society, the legislature many a times delegates even essential legislative functions as well, therefore the more efficient way is to have control at the time of exercise of delegated powers. The Committee on Ministers Powers agreed that the delegated legislation has its definite advantage provided that powers are exercised in the right way. Risks of abuse are incidental, and safeguards are required.

Arguments Against delegation:

- 1) Important matters are left to executive and it endangers civil and personal liberties.
- 2) Inadequate scrutiny by parliament of rules and regulations framed.
- 3) Full publicity and commutation with the affected is not always practicable.

The control over delegated legislation is exercised by three mechanisms:

Procedural Control

Parliamentary Control

Judicial Control (discussed in Chapter titled "Administrative Discretion")

Procedural Control: this is done by way of publication of rules, both ante-natal and post-natal and also by consultation with the affected parties and stakeholders. The underlying idea is to make administrative rule making more democratic.

### **Publication of Delegated Legislation:**

A piece of delegated legislation must be published and people must have access to it, as ignorance of law is no excuse. Also one thing to be kept in mind is that the rules should not be made in secret chambers of administration/bureaucracy.

### **Position in the USA**

Provisions for publication of rules have been made in the “Federal Register Act, 1935” Antenatal Publicity is most beneficial in practice because those subject to administrative regulations tend to be members of trade performing the routine task of scanning the Federal Register.

Sec. 4 of Federal Administrative Procedure Act, 1946 provides for publication of the proposed rules in the Federal Register. Opportunity to the interested persons to participate in administrative rule making is made possible through submissions.

Exception: a rule may not be published in case of impracticality, if unnecessary, or if it is against public interest.

### **Position in England**

Statutory Instrument Act, 1946 provides that immediately after a statutory rule has been made it shall be sent to the Queen’s Printer to be numbered in accordance with the regulations made under the Act. There is no general requirement for antecedent publicity, however in individual cases, Parliament may provide for antenatal publicity and prior consultation (The Factories Act, 1961).

### **Position in India**

There is no separate law governing the procedure of administrative rule making. The parent act may or may not provide for procedural requirements. Certain cases where parent act provides for antenatal or (pre) publication are: S. 30 (3) of the Chartered Accountants Act, 1949, S. 15 of the Central Tea Board Act, 1949 etc.

S. 23 of General Clauses Act, 1897 defines Previous Publication as:

- 1) Rules must be published in draft form in the Gazette.
- 2) That objections and suggestions be invited by a specific date mentioned
- 3) Those objection be considered Administrative rule making under any other name other than rule regulation and bye- laws may not have applications u/s 23.

The Committees on Subordinate Legislations appointed by the Lok Sabha, made efforts to secure improvement in the publication of rules in the Gazette so that the people knew them. It recommended that:

- Amended version of the rules should be published.
- Explanatory notes not forming part of rules and amendments should be appended to explain their general purport.
- Name of authority under which the rules have been made should be cited. The Committees recommended publication on the line of UK's annual publication of statutory instruments.

Consultations with affected person

It democratizes the administrative rule making and increases its acceptability and effectiveness as there is no general law and it is the parent act which provides for the same.

In *Hindustan Zinc Ltd. v. A.P.S.E.B.* (1991) 3SCC 299 Section 16 (5) of the Electricity (Supply) Act 1948 was under consideration as it contained a provision for the consultation with the State Electricity consultative Board before raising tariffs. The Supreme Court held that "It is not mandatory and failure to consult does not make the exercise of power invalid because there was provision for laying the annual financial statement before the legislature and thereby there is sufficient control."

Consultation can be in different forms:

- (i) Official consultation: The Parent Act may provide for consultations with a named body (eg.- Banking companies Act provides RBI)
- (ii) Consultation with the Board created by statute dealing with a particular subject (eg. Govt. to make rules after consultations with Tea Board)
- (iii) With Administrative Board:- The Act may set up a Board to advice the Govt. (eg. :- Mines Act 1901)
- (iv) With Interested persons: - To invite people participation. There may be Acts which provide that affected parties may themselves prepare the rules (eg: - Mine Act, wherein the owners of mines draft rule for safety in mines)

In *Banwarilal Agarwal v. State of Bihar* AIR 1961 SC 849, it was held that the provision under the Mines Act of 1952 requiring consultations with the mining boards before framing regulations was mandatory. It also held that consultation was essential in the interest of public welfare.

*P.V. S. Sivarajan v. UOI* AIR 1959 SC 556: in this it was laid down by the apex court that where the rule making authority is required to consult a committee before making the rules, it is enough if such a committee is consulted but the rule making authority is not bound to abide by its recommendations. In a conflict between administrative efficiency and individual interest consultation should be the rule and not exception and a sufficient time should be allowed.

**Position in England** The Statutory instruments Act 1996 does not mandate prior consultation and public participation is provided by the techniques of consulting statutory advisory agencies which

are supposed to reflect public opinion.(eg :- Tribunal and Inquiries Act 1958 - Prior Consultations with council on Tribunals before the procedural rule are made for Tribunals

### **Position in the USA**

S. 4 of Administrative Procedure Act, 1946 gives opportunity to submit view, but does not give any oral hearing. But generally the statute itself provides for hearing over and above the minimum laid down in the 1946 Act.

Coming into force of a rule:

If date is not laid down then a rule will come into force on the date of publication except service rules.

In Banarani Das v. State of U.P. AIR 1959 All 393 it was held by the court that service rules come in to force from the date when they are made.

Retrospective operation of Rules-General Presumption: Rule making delegated by the legislature does not include the power to make rules with retrospective effect, unless the legislature has expressly given such power.

- Committee on subordinating legislations says that if in any particular case, the rule had to be given retrospective effect, in view of unavoidable circumstances; a clarification should be given by way of an explanation in the rules. The authority must show that there was sufficient, reasonable and rational justification for applying the rules retrospectively.

In B.S. Yadav v. State of Haryana AIR 1981 SC 561, the Governor of Punjab under Article 309 amended the seniority rules on 31st Dec. 1976, but gave them retrospective operation from 9th April 1976. The retrospective operation disturbed the seniority of many persons. The Supreme Court struck down the retrospective operation the ground that there was no nexus between the rule and its retrospectivity.

In Raj Soni v. Air Officer, Incharge Administration (1990) 3 SC 261 it reiterated the rule laid down in the B. S. Yadav case.

### **Post Publication**

If the parent act prescribes a mode then it must be followed, but if parent act is silent then the rules by administrative authority may prescribe the manner of publications (it should be sufficient and reasonable). Also, if the rules do not prescribe a mode or if the rule prescribe unreasonable mode then the rules shall take effect only when published through the customary recognized official channel i.e. official gazette or some other reasonable mode.

The questions whether mode of publications prescribed is mandatory or discretionary cannot be answered by applying a fixed formula. It would depend on-

- Language of the statute
- Purpose for which the provision was make
- Intentions of the Legislature

- Injustice which may be caused to public
- Relation of a particular provision to other provisions dealing with the same subject matter.

In *Raza Buland Sugar Co. v. Rampur Municipality* AIR 1965 SC 895 it was held that if the publication is vague the persons affected could not properly avail the right of representative and thus it is invalid.

In *Harla v. State of Rajasthan* AIR 1951 SC 467, Jaipur Opium Act was in question as it was never published in any form and Harla was prosecuted for the possession of the of opium in quantity more than permitted. It was held by the court that a law could not be enforced unless published.

In *Govindlal Chhaganlal Patel v. Agricultural Produce Market Committee* AIR 1976 SC 263, wherein in the erstwhile composite State of Bombay there was in operation an Act called the Bombay Agricultural Produce Markets Act, 22 of 1939. On the bifurcation of that State on May 1, 1960 the new State of Gujarat was formed. The Bombay Act of 1939 was extended by an appropriate order to the State of Gujarat by the Government of that State. That Act remained in operation in Gujarat till September 1, 1964 on which date the Gujarat Agricultural Produce Markets Act, 20 of 1964, came into force.

Section 4 of the Act empowers the State Government to appoint an officer to be the Director of Agricultural Marketing and Rural Finance. Section 5, 6(1) and 6(5) of the Act read thus :

**5. Declaration of intention of regulating purchase and sale of agricultural produce in specified area-**

(1) The Director may, by notification in the official Gazette, declare his intention of regulating the purchase and sale of such agricultural produce and in such area, as may be specified therein. Such notification shall also be published in Gujarati in a newspaper having circulation in the area and in such other manner as may be prescribed.

(2) Such notification shall state that any objection or suggestion received by the director within the period specified in the notification which shall not be less than one month from the date of the publication of the notification, shall be considered by the Director.

(3) The Director shall also send a copy of the notification to each of the local authorities functioning in the area specified in the notification with a request to submit its objections and suggestions if any, in writing to the Director within the period specified in the notification.

**6. Declaration of market areas**

(1) After the expiry of the period specified in the notification issued under Section 5 (hereinafter referred to in this Section as the said notification'), and after considering the objections and suggestions received before its expiry and holding such inquiry as may be necessary, the Director may, by notification in the Official Gazette, declare the area specified in the said notification or any portion thereof to be a market area for the purposes of this Act in respect of all or any of the kinds of agricultural produce specified in the said notification. A notification under this Section shall also be

published in Gujarati in a newspaper having circulation in the said area and in such other manner, as may be prescribed.

(5) After declaring in the manner specified in Section 5 his intention of so doing, and following the procedure therein, the Director may, at any time by notification in the Official Gazette, exclude any area from a market area specified in a notification issued under sub-Section (1), or include any area therein and exclude from or add to the kinds of agricultural produce so specified any kind of agricultural produce.

Rule 3 of the Gujarat Agricultural Produce Markets Rules, 1965 provides that a notification under Section 5(1) or Section 6(1) shall also be published by affixing a copy thereof at some conspicuous place in the office of each of the local authorities functioning in the area specified in the notification.

The issue raised was whether the notification issued under Section 6(5) of the Act, covering additional varieties of agricultural produce like ginger and onion, must not only be published in the official gazette but must also be published in Gujarati in a newspaper. The concluding sentence of Section 6(1) says that a notification under “this Section ” “shall also be published in Gujarati in a newspaper” having circulation in the particular area. The argument of the appellant is twofold: Firstly, that “this Section ” means “this sub-Section ” so that the procedure in regard to publication which is laid down in sub-Section (1) of Section 6 must be restricted to notifications issued under that sub-Section and cannot be extended to those issued under sub-Section (5) of Section 6; and secondly, assuming that the words “this Section ” are wide enough to cover ever sub-Section of Section 6, the word “shall” ought to be read as “may”. It was held by the court that it is not reasonable to assume in the legislature an ignorance of the distinction between “Section” and “Sub Section”.

It was further laid down that in case of ambiguity, rules of interpretation would be applied to unravel the mind of the law makers. The court placed reliance on the case of *Shriram v. State of Bombay* AIR 1961 SC 674 wherein it was held that if the words of a statute are themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the Legislature. The additional mode of publication prescribed by law must, in the absence of anything to the contrary appearing from the context of the provision or its object, be assumed to have a meaning and a purpose. In *Khub Chand v. State of Rajasthan* AIR 1967 SC 1074 it was observed that: The term ‘shall’ in its ordinary significance is mandatory and the court shall ordinarily give that interpretation to that term unless such an interpretation leads to some absurd or inconvenient consequence or be at variance with the intent of the Legislature, to be collected from other parts of the Act. The construction of the said expression depends on the provisions of a particular Act, the setting in which the expression appears, the object for which the direction is given, the consequences that would flow from the infringement of the direction and such other considerations.

The same principle was expressed thus in *Haridwar Singh v. Bagun Sumbrui* AIR 1972 SC 1242 as several tests have been propounded in decided cases for determining the question whether a provision in a statute, or a rule is mandatory or directory. No universal rule can be laid down on this matter. In each case one must look to the subject matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured. It was held

that the requirement to publish in Gujarati newspaper is “Mandatory”. It is a matter of common knowledge that publication in a newspaper attracts greater public attention than publication in the Official Gazette. That is why the Legislature has taken care to direct that the notification shall also be published in Gujarati in a newspaper. A violation of this requirement is likely to affect valuable right of traders and agriculturists because in the absence of proper and adequate publicity, their right of trade and business shall have been hampered without affording to them an opportunity to offer objections and suggestions, an opportunity which the statute clearly deems so desirable. Also, penal sanction under Section 8 and 36 means that the notification must receive due publicity and since the statute itself has provided adequate means of publicity there is no reason to permit a departure.

In *Municipal Board, Hapur v. Raghuvendra Kripal* AIR 1966 SC 693, it was laid down that provisions prescribing the manner of previous publication are directory and if there was substantial compliance with the publications requirement, a mere technical flaw in the manner of publication would not make the rule invalid.

In *M/s Sanik Industries, Rajkot v. Rajkot Municipality* AIR 1986 SC 1518, a rule was published in a Gujarati local newspaper in draft form and after considering the objections the final rules were placed at the central office of the Municipality for inspection by people. The court in this case laid down that the requirement of publication is mandatory; the mode of such publication was directory. It also held that no lapse was committed just because the final rules were not published in the same newspaper.

In *D.B. Raju v. H.J. Katharaj* (1990) 4 SCC 178, the court laid down that where a law demanded compliance, those who were governed must be notified directly and reliably of the law and all the changes and additions made, if by various processes.

Unlike Parliamentary Legislation which is publicly made, delegated legislation is often made secretly in the chambers of executive, it is necessary that delegated legislation in order to be effective must be published or promulgated in some suitable manner whether such publications was prescribed by the parent Act or not.

### **Parliamentary Control**

In *Avninder Singh* Justice Krishna Iyer stated that Parliamentary control should be a living continuity.

In the US the control of Congress is highly restricted. Whereas in England the parliament is sovereign and the Statutory Instruments Act, 1946 provides that all administrative rule making is subject to control of parliament through the Select Committee on Statutory Instruments which was set up in the House of Commons in England in 1944 on the recommendations of the Committee on Ministers Power.

In India parliamentary control is exercised because the executive is responsible and answerable to the parliament.

Control can be classified into two categories:

**Pre Enactment Control:** at this stage there is debate on the legislation containing delegation, its necessity and the extent of delegation the type of delegation it provides and the authority to keep a

check on it etc. At this stage questions can be raised in the house and a notice for discussion can be given. The rules of procedure of Lok Sabha mentions that a bill involving delegation shall be accompanied by a memorandum explaining such proposals, drawing attention to the scope and also stating whether they are general or special. A memorandum does not generally contain the details. The committee on subordinate legislation has acknowledged this deficiency. Pre enactment control is considered to be not effective.

Post enactment control: it is more of supervision on the delegated legislation rather than delegating legislation. It involved two aspects, which are:

Laying down the subordinate legislation. There are generally three means of laying down a subordinate legislation. These are:

Simple laying down: in this the subordinate rules come in to effect as soon as they are laid down.

Laying Subject to negative resolution: under this a rule comes into effect as soon it is laid but shall cease if annulled by a resolution to that effect. It includes the power of modification also. The period for which the rules are to be laid differ from statute to statute. Also the enabling acts do not provide any fixed time; generally it varies from 7 to 30 days. Committee on Sub Legislation opines that all rules shall be laid on the table for a uniform and total period of 30 days. But it may not be useful if it is necessary to enforce the rule immediately.

Subject to positive resolution: here normally no order shall be made unless a draft has been laid before the parliament and has been approved by a resolution of both the houses. In this there is a debate over the proposal and then it is acted upon. But since this mode defeats the whole purpose of delegated legislation it is sparingly used in exceptional cases.

The Committee says that if it is not possible to lay before publication, it should be tabled as soon as possible after publication but with an explanation as to why it could not be laid before publication. When rules are laid the statement of object and reasons and explanatory notes should be appended. The delegated legislation provision (amendment) Act 1983 incorporated laying provisions in as many as 50 odd acts which did not contain such provisions. Another act of 1985 was moved but lapsed on dissolution of the Lok Sabha.

At this time one question is raised that is, whether the government bound to lay down rules where no provision requiring the laying of such rules before the house of Parliament exists?

As per the Committee of Sub Legislation the rules should be laid even though the parent act did not require it. Also sub delegated legislation need not be laid before the legislatures and is free from legislative supervision.

In the UK Section 4(2) of the Statutory Instruments Act, 1946 spells out that laying of provisions is mandatory, whereas in India the consequence of non compliance depends on whether the provisions of enabling act are mandatory or directory.

In *Bailey v. Williamson* 873 LR VIII QB 118, where by section 9 of the Parks Regulations Act, 1872, the royal parks were aimed to be protected from injury. It was provided that bye-rules made in

pursuance of the first schedule to the act shall be forthwith laid before both the houses of the parliament. If the parliament be sitting or not then within 3 weeks after the beginning of the next session. It was held that the rules became effective from the time they were made and it could not be the intention of the legislature that laying be made a condition precedent.

In *Jan Mohammad v. State of Gujarat* AIR 1966 SC 385 the state government u/s 26(1) of the Bombay Agricultural Produce Market Act 1939 framed rules which were not laid before the house as under the act. Justice Shah speaking for the bench upheld the validity giving the reasoning that because of WW II the legislature was not in session and the rules are valid from the date on which they are made under Sec. 26(1) because failure to place the rules before the house does not affect the validity. Granting that the provision 5 of section 26 by reason of the failure to place the rules before the house were violated. He opined that subsection 5 having regard to the purpose for which it is made and in the context in which it occurs, cannot be regarded as mandatory. And since the rules have been in operation since 1941 and also by virtue of S. 64 of the Gujarat Act, 1964 he validated the rules and ordered that they be continued.

In the case of *D. K. Krishnan v. Secretary, Regional Transport Authority, Chittoor* AIR 1956 AP 129, where the validity of the Rule 134A of the Madras Motor Vehicles Rules, 1940, made under the Motor Vehicles Act, 1939, empowering the RTA to delegate its functions to the secretary was challenged on the ground that it was not laid before the House as required by S133 (3) of the act. J Subba Rao held that “where the statute makes laying of the rules before the parliament a condition precedent or the resolution of the parliament a condition subsequent, there is no difficulty as in the former case the rule has no legal force at all till the condition precedent is complied with and in the latter case it ceased to have force from the date of non compliance with the condition subsequent. Nor can there be any difficulty in a case where the parliament or the legislature, as the case may be specifically provides the legal effect for non compliance with that condition. But more important question arises when the parliament directs the laying of the rules before the parliament without providing for the consequences of non compliance. If the legislature intended to make the rule mandatory they would have clearly mentioned the legal consequences of its non compliance. In the present case it is not made a condition precedent or a condition subsequent and it does not provide for any affirmative resolution.” Therefore the court held that the rules will continue till modified and the requirement is only directory in nature.

In the case of *State v. Karna* (1973) 24 RLW 487, the same question was before the Rajasthan High Court in connection with the Rajasthan Food grains (Restrictions on Border Movement) 1959 and the court observed that “it is important to note that laying the order before the house is not a condition precedent for bringing into force the order. All that subsection 6 provides is that every order made under section 3 of the Essential Commodities Act, shall be laid before the house as soon as it is made or after it is made. It is significant that the order is valid and effective from the date of promulgation. Even the limit or period within which it must be placed before the parliament has not been specified. It is therefore not possible to hold Section 6 as mandatory and that if the legislature intended to make it mandatory it could have mentioned it in express words.”

In case of *Mathura Prasad Yadav v. Inspector General, Railway Protection Force, Railway Board, New Delhi*, (1974) 19 MPLJ 373 it was contended that regulation 14 of the RPF regulations 1966 made u/s 21 of the RPF act 1957 was invalid as it was not laid before the house as required by s. 21 (3) of the act. The court opined that what is the consequence of the failure to lay the regulation

before the house and correct construction of words used is necessary. If a laying clause defers the coming into force of the rule until laid then it is mandatory as in such cases rules do not come into force or laying is obligatory to make the rule operative. The court held that such laying where laying with modification and rule remains operative are considered as directory.

In the case of *State of U.P. v. Babu Ram Upadhyay* AIR 1961 SC 751, Justice Subba Rao, citing Crawford on Construction of Statutes stated that “shall” prima facie shows that it is mandatory but the court has to ascertain the real intention from the nature, design, scope of the provision and the consequences which would follow from constructing it one way or the other. It also has to look into the circumstances that whether the statute provides for a contingency of non compliance with the provision or whether the non compliance is vitiated by some compliance or whether the object of the statute is defeated or furthered.

In the case of *Atlas Cycle Industries Ltd. v. State of Haryana* AIR 1979 SC 1149, S 3 of Essential Commodities Act, 1955 and Iron and Steel Control Order, 1956 Clause 15(1) was under consideration. The above-mentioned clause was an empowering clause which empowered the controller to fix the maximum price for sheets of Iron and Steel. On the spot check the appellant was found acquiring the sheets at a rate higher than the maximum prescribed. A case was made u/s 120 B IPC. S. 7 of the Essential Commodities Act, 1955 read with Clause. 15(1) of the Control order. The contentions of the appellant were that order is not valid as the laying requirement was not followed, the appellant lacked mens rea as it procured iron and steel openly and that the act of the Development Officer is violative of A.14 as those who were selling were not prosecuted and it is a discriminatory treatment. The respondent contended that the order in question had not been placed but contended that S. 3 (6) laying is not mandatory. The High Court held that the notification is issued u/s 4 and not u/s 3 the in section 4 no laying requirement has to be fulfilled. S 3(6) ordains that every order made under this section by the Central government or any authority empowered therewith shall be laid before the house as soon as may be, after it is made. S 4 of the act lays down that an order made under section 3 may confer powers and impose duties upon the central government and state government or officers authorized therewith and may contain directions thereof as to the exercise of any such powers or discharge of any such duties. The Supreme Court stated that “shall” is not conclusive and decisive of the matter and the court has to ascertain the true intention of the legislature and the whole scope, nature and design of the statute. It held that each case must depend on its own circumstances or the wordings of the statute under which the rules are made. In the present case S. 3(6) does not provide that subject to negative or positive resolution. It never specifies that whether it is open to approval or disapproval and does not even say that it shall be subject to modifications and also it does not specify the period for which it is to be laid and furthermore it does not provide for the penalty for non observance. Therefore it is a case of simple laying and is directory and not mandatory.

b) Indirect Supervision by Committee: in India each house has set up a committee on subordinate legislation. Each committee consists of 15 members. In 1953 the Lok Sabha formed a committee of which the members are nominated by the speaker. The chairman of the committee is a member of opposition. The ministers are barred from being a member of the committee. In 1964 the Rajya Sabha formed its committee and its chairman was nominated by the chairman of the Rajya Sabha and here the ministers are not excluded from it.

The rule 317 of the Rules of Procedure and Conduct of Business in the Lok Sabha provides for committee on sub legislation. General functions of the committee is to scrutinize and report to the house of the people, whether the power to make regulations, sub rules, bye laws etc conferred by the constitution or delegated by the parliament are being properly exercised within such delegation. See whether the order is in accordance with the object, or it contains matter which may properly be dealt with an act of the Parliament, or whether it contains imposition of tax or bars the jurisdiction of courts or gives retrospective effect, or involves expenditure from the consolidated fund and whether there is an unjustifiable delay in the publication. If the committee feels that an order may be annulled wholly or in parts or amend in any respect, it should repeat its opinion and the grounds thereof to the house. The government also attaches great weight and importance to the report of the committee and if it finds a difficulty in implement the suggestions it places it view before the committee. The committee of the Rajya Sabha examines all the orders passed in pursuance of an act of parliament and especially scrutinizes them in order to find out whether it affects the part III of the Constitution.

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## VI

### Legal Remedies Including the Writs

**Madabhushi Sridhar\***

There are several legal remedies to protect the rights of the people. The system of law aims at securing the interests of individuals and resolves the disputes through authoritative adjudication with binding decision. Remedies provided by law are called legal remedies, of which the writs form an important component. In fact, the power of higher courts in granting writs to the authorities to provide relief to the aggrieved citizens is the ultimate method of protection of rights. All personal rights, contractual rights and constitutional rights are secured through the judicial process. Remedies are of two kinds- Constitutional which are also called public law remedies, and legal remedies, i.e., private law remedies. While constitutional law deals with rights in general against public bodies, the private law remedies are agitated between individuals.

The Constitution provided for remedies to individuals under Article 226 and 32, and some more remedial provisions are also made, such as Articles 136, 299, 300. Some remedies are available for the government servants under articles 309 to 311 of the Constitution of India.

#### **A. Legal Remedies**

Several other right-duty situations arise between the persons depending on the context and circumstances of their day to day operations in the dynamic society. They are as follows:

- (1) Domestic or matrimonial remedies under personal law
- (2) Remedies under Criminal Law
- (3) Contractual remedies
- (4) Remedies provided by Law of Torts
- (5) Remedies and Specific Relief Act
- (6) Other Legal Remedies under Statutes

#### **1. Personal Law Remedies**

Marriage being a sacred contract, it creates rights and obligations for the spouses and they are adjudicated whenever the parties approach with a complaint of breach of duty and violation of rights. Some of the marital remedies are as follows:

- (a) Divorce/Nullity of marriage: On grounds of adultery, desertion and cruelty the couple can seek divorce. There are various other grounds on which spouses can seek matrimonial relief.

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(b) **Judicial Separation:** In judicial separation, the marital bond remains till another chance for protecting the bond is exhausted. If the couple reconciles to live together marriage remains, if not leads to divorce.

(c) **Restitution of conjugal rights:** Conjugal relationship is one of the main purposes of marriage, and unilateral absence from conjugal life gives rise to a right to the other spouse a remedy for seeking a decree or order for living together. If the decree for conjugal right could not be enforced, the aggrieved spouse can seek divorce.

(d) **Maintenance:** one of the parties, generally the wife needs to maintain her life either during the marriage or after the separation, which needs to be provided for. Thus the maintenance is of two kinds:

- (i) Pendente lite and expenses for proceedings
- (ii) Permanent alimony and maintenance

Marriage laws pertaining to Hindus, Muslims, Christians and Special Marriage Act, which is applicable for the couples married and registered under this Act, irrespective of their caste or religion provided for all the above kinds of remedies.

Personal Law remedies also include succession rights. Succession laws of different religions provide for legal shares of property left over by the deceased among the legal heirs. During 2005, the Hindu Succession Act, 1956 is amended to provide equal right to women to seek partition of coparcenary property and claim a share as if she is a male member. It is an attempt to bring gender equality.

Protection of Women from Domestic Violence Act, 2005 provided additional remedies to women of different status such as wife, daughter, sister or mother for violence perpetuated against her by members of the family. Such remedies include compensation for injury, torture, mental cruelty etc. Dowry Prohibition Act, 1961 and Criminal Law provisions penalize criminal actions of the spouses, and victims can also seek compensation under law of torts.

## **2. Remedies under Criminal Law**

The Criminal law is of two types, substantial criminal law and procedural law. In fact, every person has right to life and any injury to life will be a crime. Person who intentionally causes injuries or death to the other is penalized. Securing the penalty for the proved criminal is a criminal law remedy available to the society in general, while victim has a right to claim damages under law of torts for the injury caused because of the crime.

Indian Penal Code has codified the right of private defence under Sections 96-106. Every person has right to his life, liberty and property which the law of crimes seeks to protect realizing the constitutional right to life and personal liberty under Article 21. Every person can protect his person, property and liberty as explained below:

(a) Offences against Person: Offences against person include causing injury, hurt or grievous hurt, murder, rape, attempt to commit suicide, abetment to commit suicide, assault, sexual harassment etc.

(b) Every person has right to property against the following crimes. Law supports the protection of property, both movable and immovable, against

- (i) Theft
- (ii) Robbery & Dacoity
- (iii) Mischief
- (iv) Trespass

Under Criminal Procedure Code: The following are the remedies available under Code of Criminal Procedure:

1. Restoration of abducted female (98).
2. Security for keeping peace and good behaviour:
  - (a) On Conviction (106)
  - (b) Other apprehended cases (107-118)
3. Public Nuisance (133-143)
4. Urgent cases of Nuisance or apprehended danger (144)
5. Disputes relating to immovable property (145)
6. Maintenance of wives, children and parents (125-128)
7. Compensation to victim (357)
8. Compensation to victim : groundlessly arrested (358)
9. Order to pay costs in non-cognizable cases (359)
10. Compensation to accused on discharge or acquittal (250)
11. Restoration of property (451,452)
12. Adjournment Costs
13. Punishment
  - (a) Death
  - (b) Imprisonment for a term or life
  - (c) Forfeiture
  - (d) Fine
  - (e) Deprivation of Civil Rights

### 3. Remedies under Law of Contracts

The general law of contracts created mechanism to secure the rights of the parties to the contract on breach and fraud etc. The Contracts Act 1872 defines the contract, prescribes the essential conditions of valid contract, liabilities of surety, bailee, partners, and rights relating to negotiable instruments etc. Generally damages can be claimed for breach of contract.

Following remedies are available under Contracts Act:

- (a) Courts have power to set aside the contract induced by undue influence, etc.

- (b) Decide consequences of rescission of voidable contract
- (c) Obligation of person receiving advantage under void agreement
- (d) Devolution of joint liability
- (e) Damages for breach of contract, etc.
- (f) Devolution of joint liability
- (g) Liability of joint promissors
- (h) Liability of co-sureties to contribution
- (i) Grant of penalty, when specified.

#### **4. Remedies provided by Law of Torts**

Law of Torts provide for a civil remedy for injuries caused to a person by another. The injuries include

- (a) assault, battery (physical injury or interference with the person) causing death,
- (b) injuries affecting family relations such as enticement of wife, children or servant,
- (c) wrongful confinement,
- (d) injury to reputation, i.e., defamation,
- (e) injury to property e.g., trespass, conversion, passing off, breach of intellectual property rights,
- (f) wrong to person and property such as deceit, negligence, nuisance and conspiracy,
- (g) interference with the free conduct of business,
- (h) abuse of legal procedure e.g., malicious prosecution and champerty, and
- (i) other wrongs like invasion of privacy and abuse of statutory power.

#### **Remedies**

Under law of torts the remedies are of two kinds-

- (a) Judicial, and
- (b) Extra judicial.

##### **a) Judicial Remedies:**

(a) Damages: Generally the Remedy for above wrongs is payment of damages. There are various kinds of damages granted by civil courts under law of torts. They are:

- (i) Ordinary damages
- (ii) Nominal Damages
- (iii) Special Damages
- (iv) Exemplary Damages or punitive damages
- (b) Injunction
- (c) Specific Performance
- (d) Restitution of property.

##### **b) Extra Judicial Remedies**

Every body has right of private defence to protect life and property of the self and of those whom they are interested in. The law of torts recognize the following varieties of extra judicial remedies:

- (a) Self defence
- (b) Expulsion of trespasser
- (c) Reentry on land
- (d) Recaption of Chattel
- (e) Distress damage feasant or distraint of things doing damage
- (f) Abatement of nuisance

## **5. Remedies under Specific Relief Act**

The Specific Relief Act provided for some special remedies under special circumstances. It provides for

- (a) specific performance of certain contracts, where mere damages for breach of contract will not do justice,
- (b) protection of possession of immovable property, driving out of even the title holder of the property if the possession taken over by undue and unjustifiable means,

© specific recovery of the property appropriated without justification,  
This law (Specific Relief Act, 1963) provided for following reliefs:

- (a) Declaratory decree (ss 34 & 35)
- (b) Injunction (SS 37 & 38)
- © Rectification of documents, if the real intention of the parties is not truly reflected (s 26)
- (d) Rescission of contracts in the interest of security equitable protection of rights of parties (S 30)
- (e) Direction to require benefit to be restored or compensation to be paid. (s 33)
- (f) Granting Damages (S 40)

## **6. Other Statutory Remedies**

a) Under Consumer Protection Act, 1986:

The Consumer Protection Act is considered to be partial codification of law of torts, where the injuries caused by negligent service are remedied. This enactment, being the result of consumer protection movement, provides following rights and protections.

- (a) Protection against hazardous good
- (b) Right to information
- (c) Right of access to verity
- (d) Right to due attention at appropriate forums
- (e) Unscrupulous Expatriation
- (f) Right to consumer education

Apart from the above rights the law provided remedy for deficiency in services and supply of defective goods to purchaser. The law is aimed at creating a parallel and separate forum for redressing the consumer problems. General remedy available is payment of damages as fixed by the consumer forum.

#### b) Equitable Remedies

To secure various rights discussed above, the civil procedure code provided for a procedure by following which the citizen can seek some provisional equitable remedies. Under Order 39 rules 1 and 2, the party can seek attachment of the property of the other party or appointment of receiver for the property of the others or seek the arrest or seek the security for availability and to be bound by law.

#### c) Under Transfer of Property

Transfer of Property Act deals with various kinds of transfers and safeguards the parties from powerful side by prescribing certain statutory conditions to follow while conveying the property. It protects the mortgagor to regain the property and not to lose simply by virtue of mortgage. It also protects the rights of tenants and the owner to re-enter the property by following procedure. The Transfer of Property Act, 1872 defines the 'property', 'immovable property', explains essentials of valid sale, agreement to sell, mortgage, lease and gift. Several rights and remedies are provided regarding various kinds of transfers. Following remedies are also available:

- (a) Equity of the equal parties to the transaction is protected under section 40.
- (b) Equity law demands that the first in time shall prevail under section 48
- (c) There is provision for payment for improvements of the land belonging to others, under specified circumstances, under section 57
- (d) Usufructory mortgager has right to recover possession under section 62
- (e) Rights of the parties where contract is partly performed, is protected under section 53A
- (f) Section 81 provides for marshalling of securities and contribution to mortgage debt.

### **7. General Remedies under Civil Law**

Thus according to all above civil laws, the following are the remedies available for the aggrieved persons.

- 1. Damages
- 2. Partition
  - (a) Preliminary decree – determination of share
  - (b) Final decree – actual partition by metes and bounds
- 3. Dissolution of partnership
  - (a) Settlement of accounts
  - (b) Dissolution

4. Accounts
  - (a) Settlement of accounts
  - (b) Actual disbursement
5. Eviction of a tenant or licensee or trespasser
6. Mesne Profit – In respect of unlawful occupation of immovable property
7. Interest – u/s 34 CPC in money decree; court can award for following:
  - (a) Prior to filing of suit
  - (b) In Pendency of suit
  - © From date of decree to realization

#### **8. Costs – at the discretion of the courts**

- (a) General cost u/s 35 of CPC
- (b) Compensatory cost u/s 35A of CPC
- © Cost for delay u/s 35B of CPC

**9. Removal of defect/replacement of goods/refund of price or service charges and compensation of any loss or injury suffered by consumer.** Defiance of order attracts imprisonment and/or fine (Consumer Protection Act.)

#### **10. Matrimonial**

- (a) Divorce/Nullity of marriage
- (b) Judicial Separation
- (c) Restitution of conjugal rights
- (d) Maintenance
  - (a) Pendente lite and expenses for proceedings
  - (b) Permanent alimony and maintenance

#### **B. Constitutional Remedies**

The unique feature of Indian Constitution is provision of a fundamental right to remedy. As aptly described by Dr. B. R. Ambedkar, Chairman of Drafting Committee of Constituent Assembly, Article 32 is the real heart and soul of the Constitution. It is through Article 32, a victimized citizen can approach the apex court of justice without completing the formalities of passing through all the hierarchy. A kind of straight and instant remedy is provided in summary manner to ensure the protection of the fundamental rights and realize the guarantees offered by the state.

Each and every fundamental right constitutes a direct limitation on the powers of the government. Any right being stifled by state could be the subject matter of agitation before the Supreme Court. Though it involves a trouble for common man to go to highest court in the Capital of the Country, the possibility of securing remedy makes it very significant.

The very concept of right to remedy under Article 32 and to almost the same extent under Article 226 at High Courts, is significant and makes Indian Constitution superior to all contemporary democratic constitutions. Entire judicial process flowed from these two very important articles and scores of rights were restored to the people in India.

While Articles 14 to 31 (repealed) 31C, which are substantive rights, Article 32 provides for a procedural right. It is also called as remedial right for enforcement of those substantial rights. Only when it is essentially established that a fundamental right is violated the Article 32 can be invoked and otherwise it cannot be. You cannot question any administrative action or legislation if those actions do not violate the fundamental rights, under this provision. The Supreme Courts jurisdiction under Article 32 extends to whole of India, while that of Article 226 is the concerned State in which the High Court is located. However under Article 226 the jurisdiction of the High Court is available not only for the protection of fundamental rights but also for other purposes relating to the judicial control of administrative authorities by means of writs only in its appellate jurisdiction, unless the fundamental right is involved in which case it exercises original jurisdiction under Article 32. The power to issue writs is now available only to High Courts and the Supreme Court of India, but the Parliament has power to confer it to the other courts also. Thus under the Administrative Tribunals Act, 1985, writ jurisdiction has been conferred on the administrative tribunals which deals with service disputes concerning the public servants. Except in this aspect, the power has not been exercised by the Parliament so far. Any government can initiate action to confer these powers on other courts for the purpose of enforcing the fundamental rights.

The right to constitutional remedies allows Indian citizens to stand up for their rights against anybody even the government of India. This fundamental right is described in the constitution as:

**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 clauses (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.

**Article 33:** Power of Parliament to modify the rights conferred by this Part in their application to Forces, etc.- Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to:-

- (a) The members of the Armed Forces; or
- (b) The members of the Forces charged with the maintenance of public order; or

(c) Persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or

(d) Persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in clauses (a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

**Article 34:** Restriction on rights conferred by this Part while martial law is in force in any area.- Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

**Article 35:** Legislation to give effect to the provisions of this Part. - Notwithstanding anything in this Constitution,-

(a) Parliament shall have, and the Legislature of a State shall not have, power to make laws-

with respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law made by Parliament; and for prescribing punishment for those acts which are declared to be offences under this Part; and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii)

(b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by Parliament.

### **Article 226: Power of High Courts to issue certain Writs**

(1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and 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 said 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.

Articles 32 and 226 are the provisions of the Constitution that together provide an effective guarantee that every person has a fundamental right of access to courts. Article 32 confers power on the Supreme Court to enforce the fundamental rights. It provides a guaranteed, quick and summary remedy for enforcing the Fundamental Rights because a person can go straight to the Supreme Court without having to go undergo the dilatory process of proceeding from the lower to higher court as he has to do in other ordinary litigation. The Supreme Court is thus constitution the protector and guarantor of the fundamental rights.

The High courts have a parallel power under Article 226 to enforce the fundamental rights. Article 226 differs from Article 32 in that whereas Article 32 can be invoked only for the enforcement of Fundamental Rights, Article 226 can be invoked not only for the enforcement of Fundamental Rights but for any 'other purpose' as well. This means that the Supreme Court's power under Article 32 is restricted as compared with the power of a High Court under Article 226, for, if an administrative action does not affect a Fundamental Right, then it can be challenged only in the High Court under Article 226, and not in the Supreme Court under Article 32. Another corollary to this difference is that a PIL (Public Interest Litigation) writ petition can be filed in Supreme Court under Article 32 only if a question concerning the enforcement of a fundamental right is involved. Under Article 226, a writ petition can be filed in a High court whether or not a Fundamental Right is involved.

The provision of legal aid is fundamental to promoting access to courts. The Supreme Court of India has taken imaginative measures to promote access to justice when people would otherwise be denied their fundamental rights. It has done this by the twin strategy of loosening the traditional rules of locus standi, and relaxing procedural rules in such cases. Thus where it receives a letter addressed to it by an individual acting pro bono publico, it may treat the letter as a writ initiating legal proceedings. In appropriate cases it has appointed commissioners or expert bodies to undertake fact-finding investigations. Thus, the mechanism of PIL now serves a much broader function than merely espousal of the grievances of the weak and the disadvantaged persons. It is now being used to ventilate public grievances where the society as a whole, rather than a specific individual, feels aggrieved.

Several sections of the constitution such as Articles 13 (Laws inconsistent with or in derogation of the fundamental rights (are void)); 14 (Equality before law); 20 (Protection in respect of conviction for offenses); 21 (Protection of life and personal liberty); 22 (Protection against arrest and detention in certain cases); 38 (State to secure a social order for the promotion of welfare of the people); 39 (Certain principles of policy to be followed by the State) have been interpreted in conjunction with Article 32 and 226 to extend right of access to courts and judicial redress in various matters. Not only that, but for enforcement of these rights, the Supreme Court, and several High Courts also issued the writs, emphatically directing the wrongdoing authorities from either resisting to violate or pay damages for violation or to do a particular activity or refrain from doing something which affects the rights of the people.

The writs are of various types. The following is the brief description of various writs:

**a) Habeas Corpus**

The writ of habeas corpus — an effective bulwark of personal liberty — is a remedy available to a person who is confined without legal justification. The words habeas corpus literally mean "to have the body". When a prima facie case for the issue of writ has been made, then the court issues a rule nisi upon the relevant authority to show cause why the writ should not be issued. This is in order to let the court know on what grounds he has been confined and to set him free if there is no justification for his detention. This writ has to be obeyed by the detaining authority by producing the person before the court.

Under Articles 32 and 226, any person can move for this writ to the Supreme Court and High Court respectively. The applicant may be the prisoner or any person acting on his behalf to safeguard his liberty for the issuance of the writ of habeas corpus as no man can be punished or deprived of his personal liberty except for violation of law and in the ordinary legal manner. An appeal to the Supreme Court may lie against an order granting or rejecting the application (Articles 132, 134 or 136). Disobeying this writ is met with by punishment for contempt of court under the Contempt of Courts Act.

**b) Mandamus**

The word mandamus literally means "we command". The writ of mandamus is a command issued to direct any person, corporation, inferior court, or Government requiring him/it to do a particular thing specified therein, which pertains to his/its office and is further in the nature of a public duty. This writ is used when the inferior tribunal has declined to exercise jurisdiction while resort to certiorari and prohibition arises when the tribunal has wrongly exercised jurisdiction or exceeded its jurisdiction and are available only against judicial and quasi-judicial bodies.

Mandamus can be issued against any public authority. It commands activity. The writ is used for securing judicial enforcement of public duties. In a fit case, the court can direct executives to carry out Directive Principles of the Constitution through this writ (State of Maharashtra vs MP Vashi, 1995 (4) SCALE). The applicant must have a legal right to the performance of a legal duty by the person against whom the writ is prayed for. It is not issued if the authority has discretion.

The Constitution, through Articles 226 and 32, enables mandamus to be issued by the High Courts and the Supreme Court to all authorities.

Mandamus does not lie against the President or the Governor of a State for the exercise of their duties and power (Article 361). It does not lie also against a private individual or body except where the state is in collusion with such private party in the matter of contravention of any provision of the Constitution of a statute. It is a discretionary remedy and the High Court may refuse if alternative remedy exists except in case of infringement of fundamental rights.

### **c) Prohibition**

A writ of prohibition is issued to an inferior court, preventing the latter from usurping jurisdiction which is not legally vested in it. When a tribunal acts without or in excess of jurisdiction, or in violation of rules or law, a writ of prohibition can be asked for. It is generally issued before the trial of the case.

While mandamus commands activity, prohibition commands inactivity, it is available only against judicial or quasi-judicial authorities and is not available against a public officer who is not vested with judicial functions. If abuse of power is apparent, this writ may be of right and not a matter of discretion.

### **d) Certiorari**

It is available to any person, wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially in excess of their legal authority (The King vs Electricity Commissioners, (1924) I.K.B. 171, R 204-5).

The writ removes the proceedings from such body to the High Court, to quash a decision that goes beyond its jurisdiction. Under the Constitution of India, all High Courts can issue the writ of certiorari throughout their territorial jurisdiction when the subordinate judicial authority acts i) without or in excess of jurisdiction, in ii) contravention of the rules of natural justice or iii) commits an error apparent on the face of the record. The jurisdiction of the Supreme Court to issue such writs arises under Article 32. Although the object of both the writs of prohibition and of certiorari is the same, prohibition is available at an earlier stage whereas certiorari is available at a later stage but in similar grounds, that is, certiorari is issued after authority has exercised its powers.

e) Quo Warranto: The writ of quo warranto enables enquiry into the legality of the claim which a person asserts, to an office or franchise and to oust him from such position if he is an usurper. The holder of the office has to show to the court under what authority he holds the office. It is issued when: i) the office is of public and of a substantive nature; ii) created by statute or by the Constitution itself, and iii) the respondent has asserted his claim to the office. It can be issued even though he has not assumed the charge of the office.

The fundamental basis of the proceeding of quo warranto is that the public has an interest to see that a lawful claimant does not usurp a public office. It is a discretionary remedy which the court may grant or refuse.

Generally speaking, the Article 32 confers powers on any person to approach the Supreme Court of India straight away for a remedy. But it is established in many decisions that a person seeking a remedy under this Article has to exhaust the alternative remedies before approaching the Court through a writ petition. There are number of exceptions to this rule. Article 32 itself is a fundamental right and the remedy cannot be denied on technical grounds when there is a violation of his fundamental right.

If the writ petition filed under Article 226 before any High Court is dismissed, the petitioner cannot file a similar petition before the Supreme Court under Article 32, since the principle of *res judicata*, i.e., already decided case cannot be re-agitated before the Courts of Law. However this doctrine of *res judicata* will not apply in the cases of writs of habeas corpus because to secure the personal liberty is a precious thing, and if writ could not be issued directing the physical presence of arrested person in one instance, it can be issued at another point of time. The Doctrine of Constructive *Res Judicata* also will not apply in case of writ petitions. This principle means, if a plea is supposed to have been taken up in previous litigation, but that was not raised and decided, the plaintiff is precluded from raising that plea in another petition. This has been incorporated to prevent multiple litigation and to enable the petitioners to consolidate all his claims in one and first petition itself. It is presumed to have been raised and rejected, though in fact they were not raised at all. This constructive *res judicata* will not be applicable in writ petitions, and petitioners are free to raise a fresh ground seeking the writ. This writ jurisdiction has been incorporated within the fundamental rights chapter, and it cannot be taken away by any statute.

The rights of people are enforced through writs against the state. The state as defined in article 12 includes not only the Government of India, Parliament of India, the Government and the Legislature of a State or a Union Territory, but all local authorities such as Panchayats, Municipalities, and other local self-governing institutions and 'other authorities'. The expression 'other authorities' include all statutory authorities and the state instrumentalities or agencies of the State<sup>73</sup>. Thus the administrative actions taken up by these authorities can be questioned under writ jurisdiction of higher Courts. The Writ Procedure has been used in England since the thirteenth century for purposes of securing human rights of the people. In India the writ procedure was introduced by the Regulating Act 1773, which empowered Supreme Court at Calcutta established by Royal Charter on 26<sup>th</sup> March 1774 to issue prerogative writs. The Indian High Courts Act 1861 replaced the Supreme Court with High Courts at Bombay, Calcutta and Madras with writ issuing powers. The High Courts other than these Presidency courts were not having writ powers. Section 45 of Specific Relief Act 1877 empowered the three Presidency High Courts to make orders requiring any specific act to be done or forborne within the local limits of their ordinary civil jurisdiction by any person holding a public office or by any corporation or inferior court. 1923 Criminal Procedure Code was amended to confer the power to issue writs on all High Courts. Section 115 of Code of Civil Procedure 1908 provided that a High Court might call for the record of an inferior court and if there had been absence of jurisdiction or failure to exercise jurisdiction or material irregularity in the exercise of jurisdiction, it could make such orders as it thought fit. This was a provision similar to *Cirtiorari*.

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<sup>73</sup> *Ajay Hasia v Khalid Mujib* AIR 1981 SC 487

The High Courts can issue the writs for any purpose. “For any purpose” means for enforcement of statutory or common law right, other than a right acquired through a contract or under any personal law<sup>74</sup>.

Article 227 confers upon High Courts the power of superintendence over all Courts and tribunals in the country. It is not just administrative supervision but also of judicial supervision on all tribunals except tribunals relating to the armed forces.

These writs are generally called prerogative because they are issued by the Sovereign. The expression used in these Articles of Constitution of India ‘writs in the nature of’ suggest that writs need not be exactly similar to those in England. The power conferred to issue appropriate remedies against illegal legislative as well as administrative acts. The scope of writs under the Constitution is much higher and wider than that of the prerogative writs in England. Our courts can issue directions, orders or writs other than prerogative writs. This enables the court to mould the relief to meet peculiar and complicated requirements of this country<sup>75</sup>.

In England the Rules of Supreme Court were amended in 1977 to bring in reforms. Liberalization of rules of locus standi, which made it possible to obtain the appropriate remedy in the form of an order through one single proceeding came in through enactment of Supreme Court Act 1981 In India, a petition can be disposed of under whichever provision is more beneficial to the Petitioner. The Courts in India have detechnicalised the writ jurisdiction by introducing various inputs, such as appointment of commissioners, or epistolary jurisdiction (entertaining letters as petition), to facilitate access to the writ jurisdiction<sup>76</sup>. The Constitution of India has assigned the Supreme Court and High Courts the role of custodian and guarantor of the fundamental rights<sup>77</sup>.

*Azad Rikshaw Pullers Union v Punjab*<sup>78</sup> the Punjab Government has come out with a scheme under which only those rikshaw pullers who owned vehicles could obtain licence to the riskhaws. It was challenged. Many rikshaw pullers do not own the vehicles and owners do not pull rikshaws. Several rikshaws were idle. The Supreme Court instead of pronouncing on the Constitutional validity of the Punjab Cycle rickshaw (Regulation of rikshaws) Act 1975, under which the scheme was made, brought about a settlement by which riskhaw pullers obtained loans from a bank, so they could buy the vehicles and repay the loan later through easy instalments. For the purpose of achieving social justice, the Court has enough power to mould the relief and mend the technicalities. Under article 32 the grant of appropriate remedy is not discretionary but a matter of right. In *Fertilizer Corporation Kamgar Union v India* AIR 1981 SC 344 Chandrachud CJ said: the jurisdiction conferred on the Supreme Court by Article 32 is an important part of the basic structure of the Constitution because it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement, if and when they are violated.

The basic principle of judicial review is that courts do not sit in appeal over the decisions of administrative authorities. Therefore, courts do not determine, under the power of judicial review, the questions that fall within the jurisdiction of such authorities. The Courts made a distinction

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<sup>74</sup> *Calcutta Gas Co Proprietary Ltd v West Bengal* 1962 SC 1044

<sup>75</sup> *TC Basappa v T Nagappa* AIR 1954 SC 440.

<sup>76</sup> S.P. Sathe, *Administrative Law*, 7<sup>th</sup> edition, 461

<sup>77</sup> *KK Kochunni v Madras* AIR 1959 SC 725

<sup>78</sup> AIR 1981 SC14

between acts that were ultra vires or in violation of the principles of natural justice and acts that were erroneous, though within jurisdiction.

While exercising the powers under Article 32 the Supreme Court expanded the scope of right to life under Article 21 to include several aspects of better living. With the growth of public interest litigation article 32 has become an important site for the vindication of various group human rights.

A rule was gradually evolved as a judicial policy that the court will not entertain a writ petition under article 226 if there was an alternative remedy. It was a rule of policy, convenience and discretion, rather than a rule of law. If the alternative remedy was onerous and burdensome or where the decision of an authority was without jurisdiction or in violation of the rules of natural justice or there was an error of law apparent on the face of record or where the statute under which an administrative order was passed was unconstitutional, the courts granted the remedy under art 226<sup>79</sup>. In 1976 the Constitution (Forty-second) Amendment Act 1976, exhaustion of alternative remedies was converted into a rule of law. Clause (3) was added to article 226 providing that no petition for redress of any injury shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force. This provision was subsequently deleted by Constitution (Forty-fourth Amendment Act 1978. However the above clause before its deletion was interpreted to mean that a writ would be non-maintainable only when the alternative remedy was adequate and equally efficacious. The Court is not disabled by this rule and it can give relief under peculiar and special facts.

The law of limitation does not directly apply to writ petitions, but the courts have held that a petition would be barred if it comes to the Court after the lapse of a reasonable time. This is not a rule of law but a rule of practice. In this writ jurisdiction the court is not court of appeal and will not here questions of facts. It does not undertake assessment of evidence to determine questions of facts.

The words ‘in the nature of’ in article 226 enabled the High Courts to issue interim relief’s of the nature of injunctions or stay orders as temporary reliefs until the substantive matters are settled finally.

## **Exceptions**

The Constitutional remedies are not available under Articles 32, 226, 227 and 136 under two occasions. The Parliament has power under Article 33, to determine by law to what extent any of the remedial rights are available against Armed Forces or the forces charged with the maintenance of public order. The right to move the court for the enforcement of fundamental rights can be suspended during a declaration of emergency. The President may under Article 352 by proclamation make a declaration of existence of emergency. In ADM Jabalpur v Shivkant Shukla AIR 1976 SC 1207 the Supreme Court by a majority of four against one (Khanna J) held that prima facie valid detention order, was a complete answer to a petition for habeas corpus. This decision was criticized severely while the Khanna’s dissent was well appreciated. The emergency provisions were amended by the Constitution (Forty-Fourth) Amendment Act 1978. There cannot be any declaration of emergency on the ground of internal disturbance. Except when internal rebellion is threatened, the

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<sup>79</sup> S.P. Sathe, Administrative Law, 7<sup>th</sup> edition, 474

emergency can never be declared. Even during emergency, the right to move a Court for the enforcement of the rights guaranteed by articles 20 and 21 of the Constitution (regarding rights of a person accused of an offence and the right to personal liberty) shall not be suspended.

The High Courts have the power of superintendence over all courts throughout the territories in relation which it exercises jurisdiction under clause (2) of Article 227. The High Court may call for returns from such courts; make regulations of practice for such courts, prescribes forms in which books, entries and accounts shall be kept by officers of such courts. The power of superintendence includes judicial superintendence also. This power of superintendence should not be exercised when the petitioner has not exercised the alternative statutory remedies. The power of superintendence under Article 227 is wider than the power to issue writs under Article 226 in some aspects, in some other aspects it was narrower.

Under Article 136 (1) the Supreme Court has the power to grant special leave of appeal from judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. The Court has been expressly forbidden to hear appeal against any judgment, determination, sentence or order passed or made by any court martial or military tribunal. The jurisdiction under this article is discretionary in nature and supposed to be exercised very sparingly under exceptional and special circumstances.

Generally a person coming to court has to show that he has an interest to protect. He cannot raise a vicarious claim, He cannot agitate the right of a third person or invite the court to deal with an academic or hypothetical question. The principle behind these rules is to prevent spurious claims or speculative litigation or to preserve the time and energy of courts from being wasted. Usually the statutory remedies are available for the persons aggrieved.

### **Public Interest**

There is a distinction between a private grievance and a public grievance. Where public power has been abused and used for private gain, it is public grievance and in such allegations the Courts granted locus standi to a person who might not be an aggrieved person in the technical sense. As the Supreme Court gave a liberal interpretation to provisions of Part III of the Constitution, the remedial jurisprudence has been expanded. A person or an association of persons now could move the courts to protect the fundamental rights of the victims of social injustice. The test that apply is:

- (a) person or persons whose cause was espoused by the petitioner must be devoid of resources in terms of money and knowledge; and
- (b) the petitioner himself must not have any personal interest in the matter he is espousing.

Thus the Public Interest Litigation the PIL is now available in following forms:

- (a) Courts acted suo moto in response to letters written by persons or organizations on behalf of the victims of injustice

(b) Petitions filed by social action groups or eminent, selfless individuals on behalf of the victims of social injustice, who because of lack of resources such as knowledge and money could not have approached the court, were entertained despite technical inadequacies.

In *Hussainara Khatoon v Bihar*<sup>80</sup>, first time the Supreme Court acted suo moto and dealt the question of undertrial prisoners who were languishing in jails for decades together. Under Cr.P.C. a person's undertrial detention is to be set off from his total period of the sentence if found guilty. But due to enormous delay in judicial process, the under trial detention exceeds the period of sentence prescribed for the offence. The Court held that right to speedy trial was part of article 21 and that was deprived of. In *Kadra Pahadiya & Others v Bihar*<sup>81</sup> a letter written by a social scientist was positively responded to by Supreme Court. The apex court ordered acquittal of undertrial prisoners who were young boys.

A prisoner wrote to Justice Krishna Iyer from prison cell that another prisoner in his neighbour prison cell was being tortured by police by inserting a baton into his anus. This letter led to a decision in *Sunil Batra v Delhi Administration*<sup>82</sup>.

The Supreme Court also took suo moto action based on a newspaper report about a tragedy in which 25 mentally challenged patients were killed at Ervadi of Tamilnadu, by fire as they could not escape because they were chained to their beds or to poles. The Court criticized the governments for non-implementation of Mental Health Act 1987<sup>83</sup>.

Because of liberalization of locus standi, the constitutional remedies under Article 32 and 226 have been made available to unfortunate millions of victims, who had no means to approach the courts. Several social organizations and public spirited individuals could agitate for the rights of those down trodden who could have never knocked the doors of justice.

It is in this writ jurisdiction, the scope of human rights, particularly, the right to life under article 21 has been expanded by humanistic interpretation of provisions of constitution against inhuman strict reading by the executive administrators. When Bihar rulers were resorting to repeated promulgation of Ordinances and their repromulgation after lapse to avoid the legislative scrutiny but have the benefit of oppressive law, a professor of economics Mr DC Wadhwa raised the question before the Supreme Court, wherein it was held that such repeated promulgation of ordinance was against the mandate of Articles 123 and 213 of the Constitution<sup>84</sup>. There are some more cases wherein the public interest litigation expanded the remedial jurisprudence.

*BodhisattwaGautam v. Subhra Chakraborty*<sup>85</sup>

Facts: The Supreme court ordered the accused to pay Rs.1, 000 per month as an interim compensation to the victim of rape during the pendency of the criminal case.

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<sup>80</sup> AIR 1979 SC 1360

<sup>81</sup> 1981 SC 939 and (1983) 2 SCC 104

<sup>82</sup> AIR 1978 SC 1675

<sup>83</sup> Re Death of 25 Chained Inmates in Asylum Fire in Tamil Nadu AIR 2002 SC 979

<sup>84</sup> DC Wadhwa v Bihar, AIR 1987 SC 579

<sup>85</sup> (1996) 1 SCC 490

Ruling: Rape is violative of Right to Life under Article 21 which includes right to live with human dignity. The Supreme Court has the jurisdiction to enforce the fundamental rights against private bodies and individuals and can award compensation for violation of fundamental rights. It can exercise its jurisdiction suo moto or on the basis of PIL

Common Cause, a Registered Society v. Union of India<sup>86</sup>

Facts: The Supreme court held it had committed an error apparent on the face of the record in its previous judgment in holding that a minister committed misfeasance in the public office and directed notice to be issued to him to show cause why police be not directed to register a case and institute criminal prosecution against him for criminal breach of trust or any other offence and awarded payment of an exemplary damages of Rs. 50 lakhs to the Govt. by him. The Court now held it to be not sustainable and recalled the same. Ruling: The Council of Ministers shall be collectively responsible to the House of People. This “collective responsibility” under Article 75 has two meanings. First that all members of a government are unanimous in support of its policies and second that the ministers, who had an opportunity to speak for or against the policies in the cabinet are thereby personally and morally responsible for its success and failure.

Merely because a person is elected by the people and inducted as a minister, he cannot be said to be holding a trust on behalf of the people so as to be liable for any criminal breach of trusts.

An order passed by the Minister though expressed in the name of the president, remains that of the minister and it cannot be treated to have been issued by the president personally and such an order is subject to judicial review.

The Right to Life as interpreted under Article 21 includes the right to move freely and mingle with fellow beings which is violated if CBI is directed to investigate an offence without a prima facie case.

Bandhua Mukti Morcha v. Union of India<sup>87</sup>

Facts: The Supreme Court entertained a matter concerning release of bonded labor raised by an organization dedicated to the cause of release of bonded labor.

Ruling: The court explained the philosophy underlying PIL as follows: (at 813) “Where a person or class of persons to whom legal injury is caused by reason of violation of a fundamental right is unable to approach the court of judicial redress on account of poverty or disability or socially or economically disadvantaged position, any member of the public acting bona fide can move the court for relief under Article 32 and a fortiori also under Article 226, so that the fundamental rights may be meaningful not only for the rich and the well to do who have the means to approach the court but also for the large masses of people who are living a life of want and destitution and who are by reason of lack of awareness, assertiveness and resources unable to seek judicial redress.

Ram Prasad v.State of Bihar<sup>88</sup>

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<sup>86</sup> (1999) 6 SCC 667

<sup>87</sup> (1984) 3 SCC 161

Facts: The Court held that the Sathi Land Restoration Act, 1950 was void as it singled out a particular individual from his fellow subjects and visited him with a disability which was not imposed on others and against which even the right to complain was taken away. The Court also held that the Act was highly discriminatory. The Act sought to nullify a settlement made by the Court of Wards which was in management of the Bethiah Raj, it would appear under political pressure, as it was found on evidence that other settlements of lands belonging to the Bethiah Raj on similar terms had not been proceeded against, or sought to be invalidated.

Ruling: The Court observed that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of law or the surrounding circumstances brought to the notice of the court on which the classification may be reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminatory legislation. In the absence of a reasonable basis for special treatment, there is a violation of Article 14, if an individual is deprived of his right to access to a Court of Law for the vindication of just grievances, a right belonging to every individual.

Hussainara Khatoun (IV) v Home Secretary, State of Bihar<sup>89</sup>

Facts: The case dealt, inter alia, with the rights of the under trial prisoners on habeas corpus petitions which disclosed a shocking state of affairs in regard to administration of justice in the State of Bihar. An alarmingly large number of men and women, children including, were behind prison bars for years awaiting trial in courts of law. The offences with which some of them were charged were trivial, which even if proved, would not warrant punishment for more than a few months, perhaps a year or two, and yet they remained in jail, deprived of their freedom, for periods ranging from three to ten years without even as much as their trial having commenced. The Court ordered immediate release of these under trials many of whom were kept in jail without trial or even without a charge

Ruling: Fairness under Article 21 is impaired where procedural law does not provide speedy trial of accused; does not provide for his pre-trial release on bail on his personal bond, when he is indigent and there is no substantial risk of his absconding; if an under-trial prisoner is kept in jail for a period longer than the maximum term of imprisonment which could have been awarded on his conviction and if he is not offered free legal aid, where he is too poor to engage a lawyer, provided the lawyer engaged by the State is not objected to by the accused.

Where the petitioner succeeds in establishing his case, the Court would grant him any relief which is necessary to afford proper justice, or to prevent manifest injustice regardless of technicalities such as to issue directions to the Government and other appropriate authorities, as may be necessary, to secure to a prisoner his constitutional rights.

The Supreme Court (per Bhagwati J) (at 107, para 10) held that the state cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that the State has no

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<sup>88</sup> 1963 SCR 1129

<sup>89</sup> (1980) 1 SCC 98

adequate financial resources to incur the necessary expenditure needed for improving the administrative and judicial apparatus with a view to improving speedy trial.

*Khatri v. State of Bihar II*<sup>90</sup>

**Facts:** Several petitioners filed writ petitions under Article 32 for the enforcement of their fundamental rights under Article 21 on the allegation that they were blinded by the police while they were in its custody. The question arose whether the Court could order production of certain reports submitted by the CID to the State government and some correspondence between the government and certain officials.

**Rulings:** The only object of a habeas corpus is to release a person from illegal detention. But even in a proceeding for habeas corpus, the Court is competent to mould the relief as to meet the requirements of a particular case or issue appropriate directions. The Court said that the proceedings under Article 32 are neither ‘inquiry’ nor a ‘trial’ for an offence. Neither the Supreme Court is a criminal court nor the petitioners accused persons and so criminal procedural laws are not applicable to the Court’s writ jurisdiction under Article 32.

The SC again emphasized that the state governments cannot avoid their constitutional obligation to provide free legal service to the poor accused by pleading financial or administrative inability. A trial held without offering legal aid to an indigent accused at state cost will be vitiated and conviction will be set aside. Providing free legal service to the poor and the needy is an essential element to any “reasonable, fair and just” procedure.

The provision of legal aid is fundamental to ensuring access to courts. This right of the indigent arises from the moment he is first produced before a magistrate. It is at this stage that the accused gets his first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody and so the accused needs competent legal advice and representation at this stage. The accused can also claim free legal aid after he has been sentenced by a court but is entitled to appeal against the verdict. The Court further emphasized that it is the legal obligation of the magistrate or judge before whom the accused is produced to inform him that if he is unable to engage a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the state. The Court took the view that the right to free legal aid would be illusory for the indigent accused unless the trial judge informs him of such a right

The Court also urged that the constitutional requirement to produce an arrested person before a judicial magistrate within 24 hours of his arrest be strictly and scrupulously observed.

*Sheela Barse v. Union of India*<sup>91</sup>

**Facts:** Ms. Sheela Barse, a dedicated social worker took up the case of helpless children below age of 16 illegally detained in jails. She petitioned for the release of such young children from jails, production of information as to the existence of juvenile courts, homes and schools and for a

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<sup>90</sup> (1981) 1 SCC 635] (the Bhagalpur Blinding case)

<sup>91</sup> (1986) 3 SCC 596

direction that the District judges should visit jails or sub-jails within their jurisdiction to ensure children are properly looked after when in custody.

Ruling: The Court held that it is the right of a public minded citizen to bring an action for the enforcement of fundamental rights of a disabled segment of the citizenry.

Where the Court comes to a conclusion that the right to speedy trial of an accused has been infringed, the charge or the conviction, as the case may be, shall be quashed.

The Court directed that surprise visits should be paid to the police lock-ups by a judge of the City court appointed by the Principal judge.

The Court observed that children in jail are entitled to special treatment. Children are national assets and they should be treated with special care. The Court urged the setting up of remand and juvenile homes for children in jails.

Thus legal remedies cover a very wide range of solutions to various problems. The remedial jurisdiction is expanded with liberal interpretation of the High Courts and the Supreme Court through their activist approach. While the Constitutional remedies are within the reach of people for whom State Capitals and National Capitals are accessible. The subordinate judiciary is entrusted with responsibility of providing remedial relief at the district level under civil and criminal statutes from where the appeals are available up to the highest courts. It is for the citizens to stake claims for enforcement of their rights. The judicial activism is basically the citizen's activism which will transform the remedial system and realize the solutions envisaged by the legislation.

According to the maxim, *ubi jus ibi remedium* where there is a right there must be a remedy. Hence the law that defines a right has an obligation to provide a forum to seek a remedy and also provide for a remedy. Only in the legal set up the rights get realized and governments will be peaceful. It is the duty of every responsible citizen to bring grievance to the notice of appropriate forum for appropriate remedy.

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## VII

### India's New Foreign Policy Strategy

C. Raja Mohan \*

#### I. Introduction

Most nations and large ones at that do not easily alter their international orientation. States tend to be conservative about foreign policy. Fundamental changes in foreign policy take place only when there is a revolutionary change either at home or in the world. Much as the ascent of Deng Xiaoping in the late 1970s produced radical changes in Chinese foreign policy, India's relations with the world have seen a fundamental transformation over the last decade and a half. A number of factors were at work in India. The old political and economic order at home had collapsed and externally the end of the Cold War removed all the old benchmarks that guided India's foreign policy. Many of the core beliefs of the old system had to be discarded and consensus generated on new ones. The collapse of the Soviet Union and the new wave of economic globalization left India scrambling to find new anchors for its conduct of external relations. This paper examines the origin, dynamics and the implications of India's new foreign policy strategy.

Most Indians agree that its first Prime Minister Jawaharlal Nehru had defined a unique foreign policy for India at the very dawn of its independence. Despite many critics of his worldview, a broad national consensus had emerged around Nehru's ideas on independent foreign policy, non-alignment, and third world solidarity. Since the 1990s, though, the challenge for the Indian leaders has been to reinterpret Nehru's ideas to suit the new political context that had confronted it. The new Indian leaders could neither denounce Nehru nor formally reject Nehru's ideas, for that would have invited serious political trouble. Yet they had to continually improvise and refashion India's foreign policy to suit the new requirements.

This has not been easy. The tension between the imperative of the new and the resistance of the old ideas on how to conduct foreign policy is real and is unlikely to end in the near future. The fear of the new and fondness for the old continue to be reflected in all aspects of Indian diplomacy from engaging the United States to an optimal strategy towards the smallest of the neighbours. The "new" foreign policy of India is indeed work in progress. Yet it is not difficult to see that the direction of Indian diplomacy has changed substantially since the end of the cold war amidst internal and external impulses.

#### II. Structural Changes in India's World View

Underlying India's current foreign policy strategy are a set of important transitions in India's world view. The Indian political leadership articulated not all of these self-consciously or clearly. A few of those changes stand out and are unlikely to be reversed. The first was the transition from the national consensus on building a "socialist society" to building a "modern capitalist" one. The

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socialist ideal, with its roots in the national movement, had so dominated the Indian political discourse by the early 1970s that a Constitutional amendment was passed in 1976 to make the nation into a “socialist republic”. But 1991 saw the collapse of the Soviet Union, the veritable symbol of socialism, and the edifice of India’s state-socialism began to crumble. Adapting to the new challenges of globalization now became the principal national objective. The change in the national economic strategy in 1991 inevitably produced abundant new options on the foreign policy front.

Implicit in this was the second transition, from the past emphasis on politics to a new stress on economics in the making of foreign policy. India began to realize in the 1990s how far behind it had fallen the rest of Asia, including China, in economic development. With the socialist strait jacket gone, and the pressures to compete with other emerging markets, Indian diplomacy now entered uncharted waters. In the past, foreign for aid was so symbolic of Indian diplomacy that sought to meet the government’s external financing requirements as well as developmental needs. India was now seeking foreign direct investment, and access to markets in the developed world. The slow but successful economic reforms unleashed the potential of the nation, generated rapid economic growth and provided a basis to transform its relations with great powers, regional rivals Pakistan and China, and the neighborhood as a whole.

A third transition in Indian foreign policy is about the shift from being a leader of the “Third World” to the recognition of the potential that India could emerge as a great power in its own right. While independent India always had a sense of its own greatness that never seemed realistic until the Indian economy began to grow rapidly in the 1990s. In the early decades of its independent existence, India viewed many of the international and regional security issues through the prism of the third world and “anti-imperialism”. The 1990s, however, brought home some painful truths. There was no real third world trade union that India believed it was leading. After a radical phase in the 1970s, most developing nations had begun to adopt pragmatic economic policies and sought to integrate with the international market. Much of the developing world had made considerable economic advances, leaving the South Asia way behind. While the rhetoric on the third world remained popular, the policy orientation in India’s external relations increasingly focused on India’s own self interest. There was a growing perception, flowing from the Chinese example, that if India could sustain high growth rates it had a chance to gain a place at the international high table.

The 1990s also saw India begin discarding the “anti-Western” political impulses that were so dominant in the worldview that shaped Indian diplomacy right up to 1991. Rejecting the “anti-Western” mode of thinking was the fourth important transition of Indian foreign policy. As the world’s largest democracy, India was the most committed to Western political values outside the Euro-Atlantic world. Yet the Cold War saw India emerge as the most articulate opponent of the Western world view. A strong anti-Western bias crept into Indian foreign policy supported by the left as well as the right and underwritten by the security establishment. The disappearance of the Soviet Union and China’s rise as a great power demanded that India to break the decades old anti-Western approaches to foreign policy.

Finally, the fifth transition in Indian foreign policy in the 1990s was from idealism to realism. Idealism came naturally to the Indian elite that won independence from the British by arguing against colonialism on the basis of first principles of Enlightenment. The new leaders of India had contempt for “power politics”. They the believed it was a negative but lingering legacy from 19 century Europe that had no the relevance to the new times of the mid 20 century. India

tended to see its role in world politics as the harbinger of a new set of principles of peaceful coexistence and multilateralism which if applied properly would transform the world. Although Nehru demonstrated realism on many fronts, especially in India's immediate neighborhood, the public articulation of India's foreign policy had the stamp of idealism all over it. Since the 1990s, India could no longer sustain the presumed idealism of its foreign policy. India had to come to terms with the painful reality that its relative standing in the world had substantially declined during the Cold War. Much like Deng Xiaoping who prescribed pragmatism for China, the Indian leaders began to emphasize practical ways to achieve power and prosperity for India.

### **III. Dynamics of the New Foreign Policy**

One area, which saw the cumulative impact of all these transitions in a powerful manner, was India's nuclear diplomacy. After years of promoting idealistic slogans such as universal disarmament, India by the late 1990s recognized the importance of becoming a declared nuclear weapon power. Despite the steady nuclearization of its security environment over the decades, India remained ambiguous about its attitudes to its national own nuclear weapons programme. Even as it tested a nuclear device in 1974, India refused to follow through with the nuclear weapons project. By the late 1990s, though, India found it necessary to make itself an unambiguous nuclear power. The economic growth of the decade gave it the self-confidence that it could ride through the inevitable international reaction to it. India was also right in betting that a country of its size and economic potential could not be sanctioned and isolated for too long. Even more important, India sensed that there might be diplomatic opportunities for getting the great powers acknowledge if not legitimize its nuclear weapons programme and remove the high technology sanctions against it. Within seven years after its second round of nuclear testing in 1998, India signed the historic nuclear deal with the Bush Administration in July 2005 under which the U.S. agreed to change its domestic non-proliferation law and revise the international guidelines on nuclear cooperation in favour of India.

Another area of transformation was India's relations with the great powers. The end of the Cold War and the collapse of the Soviet Union, allowed India to pursue, without the political inhibitions of the past, simultaneous expansion of relations with all the major powers. Injecting political and economic substance into the long emaciated relationship with the United States, now the lone super power, became the principal national strategic objective. At the same time, India was unwilling to let its old ties to the Soviet Union, now a weakened Russia withers away. Since the end of the Cold War, Russia has remained an important source of arms and a strategic partner. Meanwhile India's ties with Europe, China and Japan have all become far more weighty and diversified. The upgradation of the relations with China since the early 1990s has been one of the biggest achievements of India's new foreign policy. The once wary relationship with China has now blossomed into a strategic partnership for peace and development. China is now all set to emerge as India's single largest trading partner. India and Japan, which drifted apart from the Cold War, have steadily expanded the basis for political cooperation in recent years and have proclaimed a strategic partnership in 2005.

India's new foreign policy was not all about "big power diplomacy". It involved a strong effort to find political reconciliation with two of its large neighbours—Pakistan and China. Since the end of the Cold War, India had sought to cope with Pakistan in the radically changed context that brought nuclear weapons into the bilateral equation and an increased ability of Pakistan to intervene in the disputed state of Jammu and Kashmir through cross-border terrorism. The diplomatic history

of Indo-Pak relations in the 1990s is a rich, if frustrating, tapestry that included every possible development—from a limited conventional war to a total military confrontation to many summits that struggled to define a new framework peace between the two neighbours. A new peace process under way since 2004 has produced the first important steps towards a normalization of Indo-Pak relations, including a serious negotiation on the Kashmir dispute. At the same India is also involved in purposeful negotiations to end the long-standing boundary dispute with China. For the first time since its independence, India is now addressing its two of most important sources of insecurity—unresolved territorial questions with Pakistan and China. Both involve de-emphasizing territorial nationalism, which in turn carry significant political risks at home. Yet, the Indian political leadership now believes resolving either or both of these problems would fundamentally alter India's security condition.

By the 1990s, India, which always saw itself as the pre-eminent power in South Asia, found its relations with the smaller neighbours had reached a dead end. Recognizing the need to transform its South Asian policy, India embarked on a series of policy innovations that demanded greater generosity and a willingness to walk more than half the distance in resolving its many accumulated problems with smaller neighbours. As it embarked upon the policy of economic globalization, India also saw the importance of promoting regional economic integration in the Subcontinent, which was a single market until the Partition of the region took place in 1947. While India's weight in the region began to increase it also had to temper the past temptations to unilaterally intervene in the internal conflicts of its neighbours. Unlike in the past, when it sought to keep major powers out of the Subcontinent, India is now working closely with the great powers in resolving the political crises in Nepal and Sri Lanka. India's unilateralism in the region is increasingly being replaced by a multilateral approach. India has also supported the participation of China, Japan, and the U.S. as observers in the principal mechanism for regionalism, the South Asian Association for Regional Cooperation.

Even as India seeks to define a new approach towards smaller neighbours, the regions abutting the Subcontinent beckoned India to reassert its claim for a say in the affairs of the Indian Ocean and its littoral. The 1990s saw India making a determined effort to reconnect with its extended neighbourhood in South East Asia, Afghanistan and Central Asia, and the Middle East. India's renewed engagement with the surrounding regions is within a new framework that emphasized economic relations and energy diplomacy rather than the traditional notion of third world solidarity through the nonaligned movement. The Cold War and India's insular economic policies in the first four decades had undermined India's standing to the East and West of its neighbourhood and prevented New Delhi from ensuring its much-vaunted importance in the Indian Ocean littoral. But India's new economic and foreign policies have given India a real the opportunity to realize the vision of Lord Curzon, the British viceroy at the turn of the 20century of Indian leadership in the region stretching from Aden to Malacca. After decades of neglecting economic and political regionalism, India is now an active participant in various regional organizations from the East Asia Summit to the African Union.

During the 1990s Indian diplomacy had to develop a new strategy to deal with the Islamic world. Even as it renewed its engagement with Israel that was kept at arms length for decades India also sought to redefine its policies towards key Islamic countries. The reality of a large Islamic population—nearly 150 million today-- had always been an important factor in India's foreign policy. In the past, it merely meant supporting various Islamic causes. But today, the relationship

with the Islamic world is being deepened on the basis of economic and commercial cooperation, energy security and cooperation in combating religious extremism and terrorism. This gave an unprecedented depth and breadth to India's ties to the Islamic world since the end of the Cold War.

#### **IV. Long Term Implications**

The innovations in India's foreign policy strategy since the early 1990s has resulted in the happy situation of simultaneous expansion of relations with all the major powers, growing weight in Asia and the Indian Ocean regions, and the prospect of improved relations with important neighbours. Given its impending relative rise in the international system, India is bound to be confronted by a number of challenges. First the new focus on the importance of power is not without problems. Despite being marginalized in recent years, the imperatives of idealism and moralism have not completely disappeared from India's foreign policy. Since 1991, India has moved from its traditional emphasis on the "power of the argument" to a new stress on the "argument of power". Given its noisy democracy, India cannot build domestic political support to foreign policy initiatives purely on the argument of power. It would continue to need a set of values and norms to justify its actions on the world stage. As a consequence the tension between "power and principle" would remain an enduring one in India's foreign policy strategy.

Second, increased power potential will mean that India would have to take positions on major international issues and regional conflicts. In recent years, New Delhi has either avoided or merely substituted them with generalized slogans. Just as Beijing is being pressed to become a "stake-holder" in the international system, New Delhi too would come under greater pressure to stop being a "free rider". In other words, India would have to often find ways to limit the pursuit of "national interest" in order to contribute to "collective interests" of the international system.

Third, as India emerges as an important element of future balance of power in the world, it would be pressed to make choices in favour of one or the other great powers at least on specific issues. The absence of great power confrontation in the last few years has allowed India the luxury of converting the slogan of "non-alignment" into an "independent" foreign policy. But amidst potential new rivalries among the U.S., China, Europe, Russia, and Japan, New Delhi would be compelled to make often wrenching political choices. While India making potential alliances with one or other major powers cannot be ruled out in the future, as a large country, India would remain loath to limit its freedom of action through formal alliances.

Fourth, the demands on India to contribute to order and stability in its immediate and extended neighbourhood would dramatically increase in the coming decades. This would in turn draw India deeper into great power rivalries in various regions and the internal conflicts of smaller countries. Use of military force, either unilaterally or under multilateral mechanisms, could also become frequent. Meanwhile the India, like China, is increasingly turning towards other developing countries for stable supply of energy and mineral resources, giving growing amounts of economic assistance, providing arms and military training, and seeking long-term naval access arrangements. A rising India would, then, be no longer remain immune to the many tragedies of great power politics.

Finally, India, like other great powers before it, is also in the danger of falling a victim to ultranationalism and an over-determination of national interest. Tempering nationalism and

balancing ends and means are two challenges that come inseparably with a rising power potential on the world stage.

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## VIII

### Political Implications of Inter-State Disparity

Prabhat Prasad Ghosh, Chirashree Das Gupta\*

The literature on India's economic development that has emerged over the last 60 years is very large, covering nearly all its dimensions. On the specifics of regional development patterns, the existing literature is again substantial, some of the earlier studies dating back to the 1970s or early 1980s (Chattopadhyay et al 1973; Mathur 1983). Simultaneously, there has emerged a parallel and large literature on political developments in India which, on the one hand, underlines the basic strength of Indian democracy as evidenced by the resilience of its political system and, on the other, raises serious questions about how the same system, its federal structure, political parties and periodic elections have failed to bring about the desired social, economic and political changes (Jalal 1995; Chatterjee 1997; Chadda 2000). With such a wide body of knowledge at hand on post-independent India's economic and political developments, one would have expected a third group of studies where these two inherently correlated developments are analysed within a single framework. The study of politics, almost by its very definition, encompasses not merely the locus and modus operandi of power, but nearly all aspects of "behaviour," including the creation and distribution of wealth. Indeed, it is this aspect of social relations, over which power is exercised most extensively, that makes the two developments – economic and political – highly correlated. Even when such an analysis has been attempted in a political economy framework (Bardhan 1984; Kaviraj 1995; Nayyar 2001), the level of aggregation has been the nation or the national economy as a whole, leaving little scope for analysing the import of widening regional disparity in India. There is a voluminous literature on the economic and political developments of individual regions or states (and here again it is largely separated along the boundaries of the two disciplines), but endogenising the concept of region in a political economy account of the nation state and the national economy has probably not been attempted.

Against this backdrop, this paper is an attempt to analyse the political implications of regional disparity in the country in the post-independence period, keeping in view the nature of federalism and democracy enshrined in the Indian Constitution. Before we enter into a discussion on the political implications, the paper presents the crucial findings on regional disparity in India since the 1960s, based on the existing literature. Although a part of this literature is devoted to the determinants of regional disparity, an issue on which opinions differ considerably, our attention is restricted to the pattern and trend of regional disparity on which a reasonable agreement exists among different authors. There are at least two political perspectives from which one could interrogate the observed trends in regional disparity, the first being the federal aspects of the Constitution vis-à-vis both its political and fiscal dimensions and, second, the challenges and limits to the overall functioning of democracy and its evolution over the last six decades. We investigate which of these limitations are attributable to the phenomenon of regional disparity in the second and third sections, one focusing on the contours of federalism in India and the other studying its link with the functioning of liberal democracy. The last section situates certain changes in the institutional role

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of finance commissions over the post-independence period in the light of the observations on the link between regional disparity, federalism and democracy.

## **1 Trends in Regional Disparity**

At independence, the Indian economy was characterised by not only economic stagnation, but also wide regional disparity. The reasons for this have been well documented by a growing corpus of work by historians and are beyond the scope of this paper. But to set out the context, it is worth observing that colonial economic policies in different periods between 1757 and 1947, in the content of trade policy itself, the differential land tenure systems and “personal laws” or the selective role of public investment, were entirely guided by the country’s change in strategic importance in the British Empire. The regions that had undergone significant economic transformation at the time of independence were all around the three seats of colonial economic power – Calcutta, Bombay and Madras. Outside these, there were only a few regions where because of reasons other than trade (for example, location of military establishments) or some highly specific conditions leading to the development of a local capitalist class (for example, the textile industry in Ahmedabad), some significant economic transformation had taken place. The British administrative machinery had on the one hand limited economic development of India by separating the link between economic and political power. This meant that at the turn of the century, emerging Indian capital could only develop in and around the “capitalist enclaves” in a society where non-capitalist social relations still dominated. On the other hand, the Indian commercial classes were protected from the wrath and struggles of the exploited and the oppressed through the “rule of law” enforced uniformly by an elaborate police force and judicial structure. The same administrative-judicial institutions later combined with a discriminatory electoral franchise provided a convenient means of depriving the peasantry of their crops, resources, customary security and personal protection. That the existing regional disparities like social inequalities and sectoral disparities at the time of independence were the consequences of economic policies and were almost wholly unrelated to the resource endowments of different regions is apparent from the fact that the central Indian plateau where the mineral resources of the country are concentrated was one of the poorest regions of the country. So was the Gangetic plain which is endowed with extremely fertile agricultural land along with rich biodiversity (except certain parts of Bengal – the seat of the colonial establishment till 1912 and colonial enterprise till the First World War).

It was, therefore, not surprising that within the realm of economic policy, right from the First Five-Year Plan, the goal of a “balanced regional growth” was considered politically as important as the goal of aggregate growth (Kumari 2006). Up to the Fourth Five-Year Plan, three basic strategies that mentioned balanced economic growth as one of the aims were undertaken –

(a) According priority to agriculture, irrigation, and community development, which all related to the rural sector where development deficits were most stark, (b) providing equitable infrastructural facilities (power, roads, communications, educational and health institutions) in all regions, and (c) locating new enterprises, whether public or private, based on the need to address regional disparity. It must be noted that these strategies did yield results, but they evolved over a period of time and as such the reduction of regional disparities in the early period of planning, observed later in the paper, cannot be causally ascribed to the basket of policies.

However, the long-term trend in regional disparity in India has been one of widening. Taking the period from the 1950s to the 1980s and using a weighted coefficient of variation, Mathur (1994) concluded that regional disparity in India had lessened during the 1950s and up to the mid-1960s, but had thereafter widened steadily. Because of the reorganisation of the states in 1956, other studies on long-run trends in regional disparity refer to periods, starting from 1960-61 or a year later. In one such study (Chaudhuri 2000), regional disparity is measured as the coefficient of variation (CV) of per capita state domestic product (PCSDP) indices, taking the all-India per capita gross domestic product (GDP) as 100. Starting with 1961-62, the CVs of PCSDP indices are computed at five-year intervals, again showing that it steadily increased from 18.2 in 1961-62 to 35.4 in 1997-98. In another exhaustive study (Dasgupta et al 2000), covering the period 1970-71 to 1995-96 and using the CV of PCSDP as the measure of interstate disparity, it was concluded that “Indian states have diverged in terms of per capita real state domestic product (SDP) over the 25 years under consideration”. Apart from establishing the widening of regional disparity, the study also showed that it is the low-income states that have exhibited lower growth rates in SDP, another important aspect of the dynamics of regional disparity in India. Since liberalisation has meant a major paradigm shift in the source of economic growth, some authors have compared the growth performance of different state economies during the 1980s and 1990s, that is, in the immediate pre- and post-reform decades. Based on the coefficient of variation of growth rates of SDP, it is observed that regional disparities were wider in the 1990s than in the 1980s; these disparities are even wider in terms of growth rates of per capita SDP, since low-income states are also at the lower end of the demographic transition (Bhattacharya et al 2004). That the process of liberalisation has accentuated the trend in widening of regional disparity in India is also corroborated by two other studies (Nagraj et al 1998; Ahluwalia 2002), which taken together show that the Gini coefficient of per capita SDP was 0.152 in the beginning of the 1980s, rose to 0.171 in the beginning of the 1990s, and increased faster thereafter to reach 0.239 in 2003-04. The existing literature thus brings out the following conclusions about the pattern and trend of regional inequalities in India.

(a) Independent India inherited an economy which had wide regional disparities because of colonial interests; its few relatively developed regions consisted of industrial and trading enclaves mainly around the port cities. Removal of regional disparity has been constantly underlined in all plan documents. But, except during the early years of planning, inter-state disparity in India has steadily widened. One should emphasise here that this is the only aspect of India’s development experience where actual “progress” has been in the “opposite” direction. For other socio economic development objectives like income, employment, education or health status, progress might have been slower than desired, or reversals apparent in the recent period as in the case of poverty, hunger and nutrition, but no other indicator has shown such a secular regressive trend in the entire post-independence period.

(b) The phenomenon of widening regional disparity has been a feature of the Indian economy since the 1960s, but the process of economic liberalisation has certainly accentuated it. This intensification of regional disparity is also accompanied by wider sectoral disparities, particularly between agriculture and non-agriculture, in different regions, along with wider rural-urban disparities (Krishna 2004).

(c) Apart from widening over the years, regional disparity in India also shows that the relative ranks of different states in terms of their per capita income levels have remained practically unchanged in the last three decades, with very moderate changes in the ranks of middle- or high-income states

within their respective groups. In other words, the regions that were poor (rich) earlier are the ones that continue to be poor (rich) now. Such a secular homogeneity among the poorer and richer regions of India probably signifies a close relation between the overall national growth strategy in the pre- and post-liberalisation periods and its regional outcomes.

(d) The division of the major states in India into the three broad groups of high- middle- and low-income states since the 1970s interestingly generates three almost contiguous zones. At the top, one finds four states (Punjab, Haryana, Gujarat and Maharashtra) which, but for the location of Rajasthan, would mean a contiguous zone of relative prosperity, all in the western half of the country. The middle-income states (Tamil Nadu, Kerala, Karnataka, Andhra Pradesh and West Bengal) again form a contiguous zone in the southern part of the peninsula, except for West Bengal. That leaves four Hindi heartland states (Rajasthan, Madhya Pradesh, Uttar Pradesh and Bihar) to form a contiguous zone of poor states, with one of its remaining members (Orissa) just bordering the Hindi heartland and another (Assam) located at a distance. This geographical pattern of prosperity has no association with the natural endowment of the different states.

(e) The increase in regional disparity and social disparity has been significantly correlated with marked patterns in the post-liberalisation period. The coefficient of variation in rural poverty ratios across states increased from 42% in 1993-94 to 56% in 1999-2000 while it rose from 44% to 63% for urban areas during the same period (Mahendra Dev and Babu 2008). The composition of the poor has also been changing. Rural poverty is becoming concentrated in agricultural labour households and artisan households and urban poverty in casual labour households. In high-income states, poverty is concentrated in agricultural labour households, while in low-income states it extends to other occupational groups (Radhakrishna and Ray 2005). Poverty is also concentrated among dalits and adivasis. The poor among those classified as scheduled castes in rural areas are concentrated in Uttar Pradesh (58%), Bihar, and West Bengal while the poor among dalits in urban areas are concentrated in Madhya Pradesh and Uttar Pradesh (41%). Although official poverty is relatively low in Punjab, around 80% of the rural poor in this state are dalits

## **Intensification**

Before we move to the next section on the implications of ever-widening regional disparities on political developments in India, the first argument can be set out: regional disparities have intensified not in spite of the country's development strategy, but largely because of it. Notwithstanding federal constitutional provisions that allocate different social and economic sectors between the central and state governments and elaborate guidelines regarding their fiscal dimensions, the "core" of economic development strategies in India has always been decided at the centre, mainly through the sectoral allocation of resources, regional allocation being only a by-product of this exercise. Consequently, regional disparities are largely a consequence of sectoral disparities. Taking the two major sectors, agriculture and non-agriculture, one may note that their long-term growth rates (1950-2000) have been 2.6% and 5.8% respectively (Sivasubramonian 2004). For both these sectors, the core of the development strategy was substantial state intervention, either through public investment or administered prices, both of which contributed to creating the regional, sectoral and social epicentres of economic growth, at least up to the 1980s.

For the non-agricultural sector, the most important component of state intervention was public investment in infrastructure and basic industries. Starting with a share of around one-fourth

during the early 1950s, the contribution of the public sector in total gross capital formation in India had risen to nearly half by the middle of the 1980s; thereafter, it started decreasing because of the reversal entailed in the reform paradigm (Chaudhuri 2000). With the huge investments that infrastructure and basic industries entailed, the strategy of public investment under planning was to “crowd in” private investment in the non-agricultural economy. Together with this investment support, the state also followed a policy of administered prices, which amounted to subsidising many of the industrial inputs like steel and energy. Thus, along with some regulatory measures restricting the free play of private capital in sectors of its choice, the state provided the private capitalist sector with considerable patronage and incentive through huge public investment.

In parallel, the core element of the state’s development strategy for the agricultural sector was the Green Revolution policy introduced after the food crisis of the 1960s. Unlike the strategy of industrialisation which remain unaltered through the period of planning (except for the Patent Act of 1970 which changed the nature of technology acquisition and development), the state had to change its policy of non-intervention in agriculture during the mid-1960s after a serious food shortage in the urban areas (commonly interpreted as a wage goods bottleneck) started unsettling its growing industrial sector. At this point, the agricultural development strategy changed to concentrate only on those areas where, because of earlier investment in agriculture, irrigation facilities were of an assured nature and landholding patterns were not frozen through the zamindari system. This covered barely one-fifth of the cultivated areas in the country, mostly in northern India. And the outcome of the water-seed-fertiliser technology, all of them subsidised, was the Green Revolution enabling the Indian economy to attain self-sufficiency in foodgrains (Sen 1974). This self-sufficiency was, however, a limited phenomenon because the aim of the policy was itself narrow. It did not imply adequate food for all; instead, it only meant adequate food for those who had the purchasing power to buy it, leaving a large majority of hungry households without purchasing power (Patnaik 2007). Thereafter, agricultural production levels in India have been sufficient to meet the entire urban food demand and also create a large food stock, the two together ensuring that the industrial sector does not suffer from any food supply constraint even in the face of serious crop failures and agrarian distress. Thus the narrow aim of sector-specific intervention within an overall policy of non-intervention was instrumental in reinforcing social, sectoral and regional bias.

Both these core elements of India’s development strategy were sector-specific and hence apparently region-neutral, more so the strategy of industrialisation. But, much to the disadvantage of low-income states, this strategy was region-specific as well. Both the strategies of industrialisation and agricultural growth entailed asymmetric geographical distribution of resources in favour of states that were already better off because of historical reasons. Considering the strategy of directed investment in industry through licensing first, one may note that at least initially it implied favourable private investment patterns in some low-income states like Bihar, Madhya Pradesh and Orissa because of their rich mineral resources. But this possibility was more than offset by the policy of freight equalisation which ensured availability of basic industrial inputs like coal and steel at the same prices throughout India. This promoted the growth of industries in those regions where the industrial economy was already relatively large (to take advantage of external economies) and deprived the remaining regions of India, including even those states which arguably had a natural comparative advantage for industrialisation. In the case of the Green Revolution strategy, the economic rationale was not an increase in agrarian productivity-led growth as such, which would have entailed extensive institutional change (Rao 1999), but only ensuring that the supply of foodgrains was adequate to meet the food demand of the urban market. A failure to do so would

have caused wages to rise, threatening the profit levels of the industrial capitalist. For this limited objective to be met it was not at all necessary to promote growth in agricultural productivity throughout India through institutional and technical change; covering barely one-fifth of the cultivated area in the country under the Green Revolution was sufficient to attain the goal. Apparently, it could be argued that once a region (initially uncovered by the new technology) managed to set up an adequate irrigation infrastructure, the benefits of the substantially subsidised new technology were as much within its access as the areas already covered. But once the limited objectives of the industrial sector had been served, public investment in agriculture started declining even in absolute size in the late 1970s (Rao C H 2006). Consequently, the spread of Green Revolution after its initial “success” in selected areas thinned out elsewhere in the country. One can, thus, conclude that within the clear sector-specificity of the state-led long-term development strategy of the Indian economy, namely, the modality of industrial development and the narrow aim of agrarian policy goals, was hidden a region-specificity, a result of which was the widening of regional disparities in India.

An analysis of long-term trends in inter-state disparity in per capita income shows that it has been widening all along since the 1960s; but during the 1990s, the process has been faster (Ahluwalia 2002). This is apparently paradoxical – for, if the argument of those who called for narrowing down the role of the state in the economy was to hold, and if the earlier regional disparities were caused by the development strategies of the state, its much smaller role during the 1990s should have at least arrested the trend of widening regional disparities if not reversed it. That did not happen because low-income states, when exposed to the unfettered forces of the market, were inherently more disadvantaged than during the period of directed development. By the end of the 1990s, the low-income states in India were not only poor vis-à-vis their income levels, they also had accumulated deficits in infrastructure, suffered a weakening of the institutional structures of social transformation from above, and their governments were incapacitated because of their steadily weakening financial base.

## **2. Federalism and Regional Disparity**

The Indian Constitution does not easily lend itself to the standard binary classification of unitary and federal (Rao and Singh 2006). On the one hand, the provision of legislative bodies in different states makes it a federal constitution; on the other, through a number of legislative and executive powers that the Constitution bestows on the central government, relating to both command over resources and exercise of political power, its unitary character is too prominent. The Indian Constitution is generally characterised as a “federal constitution with unitary bias,” a description that is far from definitive and only underlines its dual character. As a consequence, over the last 60 years, federalism in India has had to face not only the challenge of an evolving *modus operandi*, but also a parallel one of holding its own space, often threatened by the elements of unitarism. At the root of this contestation lies the political structure that the British bequeathed to the colonial administration, finding it advantageous to promote sub-national political entities to forestall the emergence of a strong national identity, starting with the partition of Bengal in 1905, which had to be reversed but was pursued in other ways after the Government of India Act of 1912 (Rao and Singh 2006). When the Constitution was drafted, its authors felt that, after independence, what could possibly hold together a large nation like India was a strong central government, even when the contradictions due

to such a centralising state were apparent in the debates in the Constituent Assembly and the National Planning Committee (Chibber 2003).

The problems with this political arrangement were clear after the use of Article 356 in Kerala in 1959. But it was only by the end of the 1960s, when the diverging trends of regional disparity started that the pressing questions about the functioning of the state and economy, including the issue of federalism, came to the political foreground. The most important liberal rationale for federalism is its efficacy as a “mechanism of managing diversity,” a phenomenon more likely in large countries marked by plurality. But that is not the only task of federalism. Besides a liberal answer to the question of identity, federalism also incorporates the constitutional arrangement of sharing of power, outlining the domain of political federalism, and a parallel arrangement for the sharing of resources, not the whole of which is defined constitutionally, to delineate the space for fiscal federalism. Admittedly, these two subsystems, political and fiscal federalism, may influence each other, but their trajectories are not necessarily parallel.

The working of Indian federalism since independence appears to be a telling example of a divergence. To take the case of political federalism first, the democratic and political process has triggered a gradual but significant dispersion of power to state-level political parties, and regional parties have become a more important, often critical, part of coalitions at the centre in the period of economic reform (Jayal et al 2007). This is not an isolated view. Another summative judgment on the working of federalism in India notes that it would be an exaggeration to maintain that federalism has withered away in the actual working of the Constitution. The most conclusive evidence of the survival of the federal system is the coexistence of state governments with sharply divergent ideological complexions. A more assured space for the federal components of overall political power is also apparent now, as the arbitrary use of Article 356 of the Constitution has been tempered after a series of political and judicial contestations, though the constitutional provision has not been amended.

However, the weak basis of fiscal federalism has been eroded further in the same period. There are several economic trends, stemming from the dominant policy paradigm, that have severely weakened the space for fiscal federalism since the economic reforms of 1991 because of the increasing shift to rule-based fiscal control (Isaac and Chakraborty 2008). The erosion of fiscal federalism has led to competition between state governments in several economic fields. The recent scenario vis-à-vis the location of private investment in industry, either domestic or foreign, where the different states engage in fierce competition in terms of the incentives they offer prospective investors is one example. As a consequence, industrial units are now located not where the cost advantage lies as advocated by pure marketists, but on the lure of a range of incentives which, for historical reasons, are larger in high-income states. The states competed with each other even before the economic reforms when public investment played a larger role in industrial development, and the centre, by virtue of its constitutional position decided the nation’s industrial policy, and through its economic policy paradigm had some regulatory authority to influence the destination of private investment. But such vertical competition, where the states at the regional level were vying for the attention of the centre, has now been replaced by horizontal competition where state governments vie for the attention of private investors. The winners and losers in this competition form two separate groups, the former ascribing their success to their efficiency and quality of governance and the latter underlining the historical burden of post-independence neglect and the “race to the bottom.” The above transformation of Indian federalism to a stage where the competitive elements

shaping the constituent regions are involved in a contest was a gradual process initially, but since the early 1990s, has been a very pronounced phenomenon. The allocative role through policy tools like freight equalisation and industrial licensing had already reinforced regional economic divergence (Banerjee and Ghosh 1988; Singh 2008). This horizontal competition between regions and states has been concomitant with the intensification of the horizontal contradictions within the dominant classes in the different regions during the decade after liberalisation.

The tension between industrial capitalists and agrarian capital was aggravated in Punjab, Haryana and western Uttar Pradesh in the aftermath of the Green Revolution and underlined the politics of center-state relationships in the 1970s (Sathyamurthy 1997). But by the beginning of the 1980s, agrarian change outside the classic Green Revolution belts laid the foundations for capitalist development in the non-farm sector (Kapadia and Lerche 1999). In Punjab, Haryana, Gujarat, Maharashtra, Tamil Nadu, Andhra Pradesh and Karnataka, regional accumulation processes led to the emergence of first-generation business houses mainly drawing from the agrarian economy unlike the old business houses that emerged from trade, commerce and money lending (Baru 2000). The changing political basis of federalism has emerged from this section of the dominant classes and their relationship with successive state and central governments and regional political parties (Gupta 2007). Thus, the very basis of the potential for growth in the liberalised economy has also been the basis of increasing regional disparity. The political tensions inherent in this paradox have been reflected in demands for fiscal federalism, as is evident from the increasing collaboration among states in representations to the centre, as well as the political articulation of diverging interests between rich and poor states, sometimes cutting across party-political divides. These pushes and pulls have had considerable impact on Indian democracy.

### **3 Democracy And Regional Disparity**

The question of the relationship between regional disparity and democracy has been treated as a subsidiary one in much of the literature. However, economic development (Lipset 1959), inter-elite relations (Rustow 1973), relationship between social classes (Moore 1967), and political institutions to channel and contain conflict (Heper 1991) have been put forth as the determining basis of the advance of liberal democracy (Pinkney 2004), where it is conceived as a specific governmental form (Kaviraj 2000). While much of the recent literature on democracy in India has focused on the question of coalition politics (Yadav 2000, Hasan 2000, Arora 2000), by the mid-1960s, while the paradigm of economic growth and social redistribution under the “Nehruvian consensus” broke down, the political debate revealed an underlying lack of agreement on the form of strong state and, among some groups, resistance to the goal of creating a nation state in the absence of a dominant culture. The tension between centralising and decentralising tendencies culminated in the Emergency. Since then, this tension heightened to reach recognisable patterns by the mid-1980s (Frankel 2005).

The nomenclature of national and regional parties obfuscates the fact that even the Congress has been unable to preserve its national character through regional representation in party structures and the Bharatiya Janata Party (BJP) is struggling to break from regional confinement. This leads us to the next significant question about the relationship between democracy and power. The tension around centralisation has been attributed to size, diversity and fragmentation, but the sources of fragmentation have not been unchanging. Since the Green Revolution in agriculture, renewed efforts to enforce land ceiling legislation in the 1970s, the increasing political assertiveness of the emerging

elites in state-level politics, the increased prominence of social issues concerning dalits, adivasis, women, the poor and the landless, the question of status and safety of minorities and the salience of issues of law and order have intensified in recent decades (Brass 1997). While there is no one-to-one mapping between regional disparity and the tensions around centralisation and thus the question of extent of diffusion of power in the democratic polity – both show the same pattern over time – the decisive factors in the political arena over democratic power can be traced to the mid-1960s and have only intensified in the last two decades.

It is in addressing the question of left-wing extremism that a consensus around issues that connect our earlier observations about the trends in regional disparity and the concentrated dimensions of the social and the sectoral by region can be seen. This literature raises three interconnected dimensions of disparity and exclusion – regional, social and sectoral (Kujur 2008) – and concludes that the institutions of liberal democracy in India have not been conducive to ensuring political participation in the mainstream of the polity of groups in the interstices of these three forms of exclusion and disparity. Inter-elite relations have been another domain but the literature is highly contested. However, two dimensions of the question can be addressed. One set of questions relate to elite anxieties about more equitable sharing of economic and political power through affirmative action.

Here, the political experience of the last two decades since the implementation of the Mandal Commission report in 1989 provides a clear indication that the contest between the traditional and emerging elite was concentrated in the social milieu of widening regional disparity in the Hindi heartland states (Shah 2004). The other set relates to the question of the limits of coalition politics as a power-sharing arrangement to address regional disparity. First, coalition politics while setting regional questions on the national agenda has not in itself been able to reverse the centralising aspect of the economic reforms paradigm of the union government. Second, coalition politics has not in itself meant a move towards policies to reverse the trend of widening regional disparity though the question has come to the fore because of the increasing importance of regional aspirations in the national polity.

#### **4 Implications for the Finance Commissions**

In this paper, we have tried to trace the political issues around federalism and democracy that stem from the widening of interstate and regional disparity in India. The finance commission has the status of a constitutionally mandated “neutral” arbiter in the process of financial devolution in a context where the structure of Indian federalism and democracy in the post-reform period entails the concentration of fiscal and financial resources in the hands of the central government. As we noted earlier, the post-liberalisation period has seen a significant increase in interstate disparity, contrary to the expectation that removing the policy barriers that had been the cause of widening regional disparity would entail a reversal of the process. Successive finance commissions, through their assessments of the states’ own revenue capacity and the structural constraints on these, have historically accepted and acted on this question while deciding on horizontal devolution. The emergence of the per capita income gap as the most important index in the devolution formula reflects this fact. But the per capita income gap, while it reflects the trends in regional disparity, does not in itself address the causal factors of regional disparity and the pressing question of widening regional disparity, which is a product of the reigning policy paradigm.

On the question of vertical devolution, central political priorities on economic policy matters have played a far greater decisive role, reducing the question of vertical devolution to a residual matter through the mandates in the Terms of Reference. This has been a marked development since the Tenth Finance Commission. In the post-liberalisation period, the onus has fallen on the states which have fallen behind to find ways in which they can find resources to fulfil their committed expenditure requirements, leave alone the question of expenditure to reverse trends in disparity. The latter is difficult due to a constrained fiscal space where revenue mobilising powers are constrained by the socio economic structure and borrowing powers are curbed by central decisions, conditions and directives. This has accentuated the institutional gap between the states that have fallen behind and those that have forged ahead. The corpus of vertical devolution, though increasing, has fallen far short of the need for public expenditure and investment necessary in laggard regions to reverse the process of divergence.

If widening interstate disparity in its three intersecting dimensions – regional, sectoral and social – has to be addressed within the institutional space provided by democratic and federal structures to the finance commission operating within permanent rules set by the Constitution, while it responds to the political implications of such disparity, two broad conclusions can be drawn. Central policy goals that accentuate competition between states and impose rule-based constraints on the policy flexibility of states should not be institutionalised through finance commission recommendations. If widening interstate disparity has to be addressed both by the own action of states and broader central policies, then very high levels of public expenditure are needed not just in social sector, but also in vital economic sectors by states constrained by resource gaps. The broad principles of the formula for fiscal disparity have led to a move towards democratisation of the political-devolution have to be based on an economics that is not compared to the 1950s. But concomitant economic policies to strained by an anathema to public investment. bridge this disparity have been few and far between. Thus the political contests between the new and old elites over debate on the means and ends of economic policy in India are far federalism and democracy stemming from interstate economic from over.

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## IX

### **Human Rights Movement in India: A Historical Perspective\***

**Aswini K Ray**

The historical narrative of the origin and evaluation of the human rights movements in India has been contextualized within the analytical framework of a 'post-colonial democracy'. This is different from the mainstream discourse on Indian politics, which is rooted within the axiomatic framework of a liberal democracy because of its institutional underpinning of western liberal vintage. For the same reason, Marxists refer to it as a 'bourgeois democracy', often derisively. But there are serious empirical, logical, and analytical problems with such an axiomatic assumption, howsoever widespread it may be, as I have argued elsewhere [Ray 1989].

Many historically inherited structural asymmetries between the post-colonial Indian state, and the western nation states, as well as their respective interface with the political economy and civil society, have shaped the origin, evolution and content of political democracy differently. These divergences may better explain the manifest operational asymmetries of comparable liberal institutions of western vintage in the Indian context. These differences pertain particularly of the rights of citizens, which constitutes the core concern of the liberal democratic agenda. Some of the structural asymmetries of the Indian state and its interface with the civil society, historically inherited from the colonial era, operationally impinging on the rights of the citizens would be spelled out at the outset.

The first asymmetry is the disjunction between the relatively modern post-colonial Indian state and its predominantly traditional social fabric, disparately segmented and stratified around multiple ascriptive identities of religion, race, language, tribe, caste, spatial location, along with gender. Universal adult franchise of the republican constitution linked this inherited duality within India's political democracy at its origin, creating continuing tension between tradition and modernity in India politics, which one political leader described as the 'India vs Bharat' syndrome [Joshi 1989].

The second asymmetry is the inherited duality within Indian's post-colonial state apparatus, between its relatively developed coercive component, like the police, intelligence, paramilitary institutions, and the penal code on the one hand and the weak democratic instruments of conflict-resolution on the other. The republican constitution by including them both within their respective institutional moorings, provided them some contrived democratic legitimacy.

The other important asymmetry has been the relatively narrow social base of democratic consciousness around citizens' rights because of the specific historical trajectory of

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political democracy in India, as we would later argue. These asymmetries impinging on the political process have shaped the operational content of the citizens' rights as guaranteed by India's republican constitution, in a way different from western liberal democracies.

Equally important has been the disjunction between the nation and the state in India, in sharp context with the western nation states during the origin of political democracy. In fact, the nation building agenda was among the most critical structural compulsions of most of the post-colonial states and, in India, within the democratic process. Equally important was the secular agenda as a structural imperative of post-colonial nation-building in India, in a sense different from the western nation states. This was because of the uniquely staggering range of diverse ascriptive identities, including that of religion, coexisting in India's composite culture, as part of its civilisational heritage.

In the origin of western liberal democracies, democratic upsurge from within the civil society democratised their autocratic state apparatus, operationally de-linking it from the church as its principle ally; so that, the emergence of the western liberal democracies simultaneously heralded the secular state. 'No Pope. No King' was the clarion call of the revolutionaries in England (1640) and France (1789). The historical trajectory of political democracy in India was sharply different: the colonial state was generally secular in its oppression, against which the politics of the liberation struggle spawned challenges to the secular moorings of the civil society. In fact, political democracy in India emerged simultaneously with the most bitter communal holocaust in the region challenging the ideal of the secular state at its origin, from within the emerging civil society. This was at sharp variance with the historical trajectory of western liberal democracies wherein the democratic agenda encompassed the secular goal, institutionalizing them simultaneously at the level of citizens' rights. But in India's post-colonial democracy, the secular nation-building agenda still remains unfinished which seriously impinges on the rights of citizens, both as individuals and as members of the myriad 'minority groups' of ascriptive identities. These shifting identities have spawned ever new minority and majority groups which are mostly shaped, temporally and spatially, by the political process rather than through individual choice of the citizen.

Dalits, tribal, and the hill-people, along with women, elderly people, and children are among the more abiding of the disadvantaged group-identities, more visible within the arena of electoral politics, than at the centre stage of political democracy in the context of its central concern around citizen's rights.

An economic historian viewed India's post-colonial economy in the following way: "British imperialism created in India a structure of society which made its evolution into a modern capitalist economy well-nigh impossible" [Bagchi 1973]. This aspect of India's post-colonial economy is also correspondingly reflected in the political sphere, in the operational context of its post-colonial democracy emerging from the constitutional blue-print of a liberal democracy.

The civil and democratic rights movement in India, and its intellectual discourse, though part of the global human rights discourse, are constantly faced with many of these specific complexities of the political process. They are periodically called upon to respond to

them with indigenous theoretical and conceptual innovations in view of the paucity of comparable resources in the asymmetrical western liberal democratic experience. This challenge still remains inadequately responded because of the limited empirical base of political theory within the western experience.

### **Sources of Citizen's Rights in India**

The historical trajectory of democratic transformation of European autocracies has hinged upon the successful assertion of three important components of human freedom: (i) freedom of expression; (ii) freedom from arbitrary imprisonment; (iii) freedom from custodial violence. The legitimation of these freedoms as the inalienable civil and political rights of the citizens against the state constitute historical landmarks in the evaluation of liberal democracies, initially in Europe, and subsequently in other parts of the world. For example, the Magna Carta (1215), Petition of Rights (1627), and the Bill of Rights (1688) in England, and the Declaration of the Rights of Men and Citizens (1791) adopted by the French National Assembly in 1789 after the French Revolution are now part of the universal human heritage of the struggle against oppression, in its myriad dimensions. Other democratic projects have drawn inspiration from these reservoirs of experience in humane governance. But even before that, the Philadelphia Constitutional Convention (1787) in the US adopted the first ten amendments of its own constitution as the citizens' Bill of Rights. These civil and political rights constitute the sources of the first generation of the modern concept of human rights; human, because they are part of the universal human heritage; and, also because they distinguish the essence of human existence from all other forms of life in the planet.

The Russian revolution under the Bolshevik slogan of "bread, land, and all power to the Soviets" inspired the Leninist decree of the Soviet Bill of Rights with its conscious primacy of economic and social rights over civil and political rights. These have inspired other contemporary socialist projects in state and nation building, and contributed to the emergence of the second generation of human rights. They remain so even after the collapse of the Socialist Utopia in the Soviet project.

These, along with the post-war era's concern for the right of self-determination of the colonial world, and against racial discrimination, are embedded in the Universal Declaration of Human Rights, unanimously adopted by the UN in its general assembly session on December 10, 1948. The universal popular legitimacy of this declaration has transcended the shifting fortunes of the UN system. Since then this day is celebrated across the world as the human rights day, also in India as one of the original signatories to the UN declaration. Conjecturally, that was also the phase of India's national liberation, and the constitution-making process.

The contemporary universal concerns also had their influence on the deliberations of India's constituent assembly, and also thereafter. But the domestic social base of the constituent assembly, representing roughly 35 percent of the Indian population based on property and educational qualification, and the Congress Party ideology, influenced the final

outcome of its deliberation on citizen's rights. A critical distinction between the first generation of human rights consisting of civil and political rights which were included in the enforceable part of its Fundamental Rights (part III) chapter, while most of the second generation of economic and social rights were restricted within the non-justiceable part of the Constitution in the chapter on Directive Principles of State Policy (part IV). Together, they constitute, what are called democratic rights in the present human rights discourse in India.

The colonial liberation of the 1960s spawned the third generation of human rights further underscoring the freedom from racial discrimination and from hunger, disease and malnutrition; and, subsequently, in the post-cold war era, encompassing new concerns, like development, environment, gender justice, minority rights, education, child and bonded labour, refugees, displaced persons and against all forms of torture. These concerns continue to be periodically incorporated within the ambit of the global regime of human rights as part of its universalist agenda. They have also been expressed periodically within the UN system, through many special covenants, like the one on civil and political rights (1966), on economic, social and cultural rights (1966), rights of development (1986), against torture (1984), against gender discrimination of women (1979), rights of the child (1989), etc. The widening ambit of such concern around universal justice appears to be among the more benign incidental fallouts of the process of globalization of the post-cold war era. They have also influenced the civil rights movement in India.

The operational salience of such universal normative concerns has varied within the different sovereign states of the global system, largely shaped by the level democratic consciousness within their respective domestic social and political base. For example, India signed the UN Covenant on Civil and Political Rights (1966), paradoxically only in 1976, in the midst of the national emergency which denied the citizens their civil and political rights enshrined in the constitution. In fact, the civil and democratic rights movement in India, as an autonomous watchdog of citizens' constitutionally guaranteed fundamental rights also began in 1976. Since the signing of the UN covenant by the authoritarian Indian regime of the emergency era, which denied civil and political rights to its citizens at home, coincided with the emergence of the civil and democratic rights movement in India, it may be useful to analytically distinguish between the causal and conjunctural links between these two important events in India's democratic evolution.

Through the cold war era, when human rights issues were enmeshed in the superpowers' global gamesmanship, particularly within the western strategy, the signatories to the UN covenant on political on civil and political rights also included many clients-states of the western military alliances in the 'third world' which were ruled by varying versions of repressive, oligarchical, and military regimes. Even in the case of non-aligned India, while the UN covenant was adopted by the general assembly in 1966 after Indira Gandhi had emerged as prime minister of the country her regime opted to sign it only 10 years later in the midst of the national emergency. This suggests that it was meant more to assuage western criticism of her emergency politics than in response to her domestic critics, most of whom were in prison, their freedom of expression restricted, and the press remained censored. At any rate, the civil rights movement in India, at its origin in 1976, was too weak and defensive to constitute any serious domestic pressure-group on the emergency-regime to sign the International Covenant.

Consequently, in terms of causal linkage, while the civil rights movements in India was spawned by the domestic excesses of the emergency regime, as we would argue, the signing of the international covenant by the non-aligned Indian state, appears to be causally related to the regime's response to its liberal critics in the western democracies, in tandem with similar response of client regimes of the western alliance in the cold war era. But the parliamentary ratification of the UN covenant by the subsequently coalition regime of the Janata Party in 1979 underscores the useful catalytic role of international monitoring on such issues, as well as their salience within the post-emergency political discourse in India, even before India's formal economic globalization through liberalization and structural adjustment in 1991. Soon thereafter, the Human Rights Bill was introduced in the Indian parliament, creating the National Human Rights Commission in 1993. This opened new options for the fledgling movement.

These sequences and their causal linkages are important to underscore at the outset, in view of the periodic allegations of its critics against the movement as being allegedly 'western inspired'. Also the analytical distinction between the causal and the conjectural in the Indian case may enable some broad generalizations around the possible role of international agencies in promoting normative concerns within the sovereign states' domestic politics. In the case of India's struggle for democratic rights, international networking has been a useful complementary instrument for civil rights groups within a social movement which originated indigenously in India's domestic politics. The external and the internal stimuli have reinforced each other, along with their cumulative mutual salience within India's democratic political discourse in a dialectical relationship, particularly after the globalization of the economy. But it is important to remember that while the intellectual resources of the citizens' constitutional rights was drawn from the western historical experience, the origin of the civil rights movement in India was in no sense 'western inspired'.

At this stage, another important conceptual point also needs to be de-mystified. Since the origin of the movement, the conceptual distinction between civil, democratic, fundamental, and human rights has remained somewhat blurred within the intellectual and political discourse in India; they have often been used synonymously, as also in this analysis. While the proximate context of its origin in the political economy of India's emergency era shaped its initial focus around the civil and political rights of the citizens as guaranteed in the Constitution's fundamental rights chapter, the social base of the activists of the movements, as well as the new generation of human rights concerns in the more globalized international arena have influenced to expand its sights. In the process, while the concern has had new converts in India, the concept has remained somewhat mystified.

### **Citizens' Rights in Indian Constitution**

The most striking asymmetry in the historical trajectory of the origin of political democracy in India, and the western industrial societies is in the nature of their respective concern for the rights of citizens as individuals. This asymmetry has shaped the operational content of the citizens' rights in India.

For a start, political democracy in India ushered by its republican constitution, enshrining the fundamental rights of citizens, and universal adult franchise, emerged from the struggle for national liberation against alien colonial rule rather than the assertion of the rights of citizens against an entrenched indigenous ancient regime. The mainstream intellectual and political discourse of the liberation struggle had its central focus around the nation as a community, initially against colonial rule, and later also against contesting groups like Muslims, Sikhs, dalits and tribals as communities claiming nationhood. This is in sharp contrast to the origin of liberal democracy in the western autocracies with its central focus around individual liberty. The concern for 'group rights', in western liberal democracy is of relatively recent origin, long after individual rights, as the essence of democratic governance, have been legitimized and operationally institutionalized.

The inadequate concern for the rights of individual has manifested itself in many ways through the liberation struggle. Gandhiji's emphasis on the 'village community', rather than the individual citizens, as the basic unit of Indian democracy also underscores the point. In fact, civil liberties of individuals, within the concerns of India's liberation struggle, manifested itself as late as in the 1930s when Nehru started the Civil Liberties Union to provide legal aid to the freedom fighters accused of treason. The Congress Party, only at its Karachi session of 1931, passed the first resolution demanding civil liberties and equal rights of citizens. But the state of civil liberties under provincial autonomy, after the elections of 1973, have been summed up by the erstwhile secretary of Indian Civil Liberties Union...major repressive laws still remain in the statute books. The criminal law amendment act is one such...the Punjab governments has been the worst sinner in the user of this act. Bengal comes next...Both these provinces, however, are beaten...by the Congress government in Madras" {Desai 1948}.

The relative inadequacy of experience and concern, around the struggle for individual liberty against an entrenched ancient regime also manifested itself in the post-colonial constitution-making process within the constituent assembly of India, whose members were elected on the basis of property as a qualification. The empirical base of the debate on citizens' rights was the western historical experience. The two contesting paradigms within the assembly's committee on fundamental rights were the American system of judicial supremacy, and the British practice of parliamentary sovereignty as the guardian of the rights, which was ultimately resolved by a 'golden mean'. The final compromise delinking the judicially enforceable rights of citizens (part III) and non-judicial directive principles of state (part IV) was based on the Irish model. The 'due process' clause, in the provision for judicial review was altered to 'procedure established by law' after B N Rao, a member of the drafting committee, was so advised by a US supreme court judge in Washington.

In fact, the constitution-making process itself, which ushered political democracy in India, emerged from an act of the British parliament; and many of the institutional underpinnings of the republican constitution had their origin in British colonial rule. The constituent assembly of India was created by the Government of India Act of 1935 passed by the British parliament, which also conferred to it its 'sovereign' status, though the Constitution created by it was attributed to 'we the people of India'. The institutions of democratic governance, like the parliamentary system, federal structure, bureaucracy, judiciary, the legal system and the civil and criminal procedure code, the penal code of 1860 including the

preventive detention provisions, originating from the 'Defence of India Act' of 1858, and the police code of 1861, along with other liberal institutions owe their origin to British colonial rule. In most cases, the post-colonial republican constitution legitimized this institution by contriving their representative credentials through 'we the people of India' as enshrined in the preamble. A painstaking India researcher on the subject sums up the asymmetry of the origins of similar assemblies: "The Philadelphia constitutional convention (1787), and the French national assembly (1789-91) were convened at the height of two major national revolutions, the constituent assembly of India, on the other hand, came through a deal that was backed by the strength of a mass movement, but was not exactly a product of it" [Chaubey 1973]. Consequently, unlike in the western liberal democracies, the institutional underpinnings of India's political democracy were the product of colonial rule. This contributed to the asymmetry of India's democratic institutions from their western role-models, which were indigenously rooted in their original habitats.

Most of the western-educated leaders of the all-class national liberation movement led by the Congress Party, and the over-whelming majority of the founding fathers of the Republic within India's constituent assembly drawn from the liberal professions, were inspired to replicate the institutional blueprint of a western liberal democracy in India's post-colonial political economy. Gandhiji, though western-educated, was by choice the most notable exception from this inspiration, remained marginalised from the constituent-making process. But as early as in 1895, the liberal leader, S.N Banerjee, later Congress president, asserted "to England, we look for inspiration and guidance...From England must come the crowning mandate which will enfranchise our peoples. England is our political guide" [Chaubey op cit]. In 1945, on the eve of the constitution-making process, the US educated chairman of the drafting committee of the constituent assembly, Ambedkar stated: "For a Constitution of India, all that was necessary was to modify some provisions of the Government of India Act (1935)" [Chaubey op cit], In many ways, he proved to be prophetic.

Notwithstanding the liberal inspiration of the founding fathers, the historical origin of the constitutional assembly, and its limited social base, constricted its deliberations from the inception on most issues, including fundamental rights. Besides, it 'not only recorded the inevitable misfortune of partition, but also was instrumental to its occurrence,' [Chaubey op cit]. From the circumstances of its origin, it was biased in favour of strong state with a 'strong centre' as the main instrument of the post-colonial agenda of nation-building through economic development and social transformation. That explains the option for a British parliamentary model with a unitary bias within its 'quasi-federal state, unlike in the US. These options had built-in long-term operational implications on individual liberty, including group-rights within India's disparate social plurality, such as they were included in the constitution. With education and property as the qualification for their representative status within the constituent assembly, the unequal beneficiaries of the colonial process of modernization, as founding fathers of the Indian Constitution found themselves catapulted by the momentum of the liberation struggle to create a blueprint for political democracy whose implicit agenda was to undermine the entrenched dominance of its creators. It was a remarkable achievement to create such a blueprint, possible in the political culture of the hightide of national resurgence. But when the tide inevitably ebbed, the political will to pursue the agenda waned. That created operational

complexities for political democracy in India, and the content of citizens' rights, in spite of their constitutional legitimacy.

But some of the structural contradictions of the era of the all-class struggle for national liberation manifested themselves even within the constitution-making process, also on the issue of fundamental rights. For example, demands to make the provisions of the directive principles enforceable and justifiable were rejected; so were demands to include 'rights of workers', right to employment', and the provision for a 'secular federal, socialist state' within the enforceable chapter on fundamental rights. The home ministry bureaucrats objected to the provision for an 'advisory board' on the exercise of executive power of preventive detention carried forward from the colonial era. The drafting committee prescribed circumstances to legitimize prolonged preventive detention. Predictably, the right to property evoked the most intense debate, with most members favoring judicial sanction to it. On this issue, Nehru assuaged members' fears by assuring 'no expropriation without compensation' that was 'fair and equitable'. Sanctity of the right to property was to be ensured through special provisions, but tenancy reforms of the colonial era was restricted within the federal division of power exclusively to the state legislatures dominated by the landlords. These provisions also had their long-term impact on the operational context of the rights of citizens, particularly in India's predominant rural areas.

But even on the final outcome of the proceedings codified in the constitution as fundamental rights, the lone communist member of the constituent assembly, Somnath Lahiry said: "These are fundamental rights from a police constable's point of view... none of the existing provisions (of colonial rule) of the power of executive have been done away with" [Deasi 1986}. According to socialist leader Jayaprakash Narayan: "The Indian Constitution is not likely to be, unless drastically amended, and instrument of full political and social democracy". In later years of its operation it drew even sharper criticism. According to a distinguished sociologist: "The constitution has clothed almost all the rights in the part III, embodying fundamental rights, in such phraseology that they are susceptible to diverse and contradictory interpretation. They are capable of being non-functional in the part larger context of arrangements provided in other parts of the constitution itself" [Deasi 1986}. According to a legal view, "the inclusion of parallel 'preventive detention system', embodied in the constitution itself has created a situation wherein it negates all rights provided in the preamble and part III and IV of the Constitution" [Mukhoty 1986]. Another critic describes the provision of preventive detention as the "undemocratic heart of the constitution", underlying "the fraud that was practiced on the Indian people by the unrepresentative constituent assembly...it give enough opportunities to the executive and legislature to bring in enactments which negate the very rights which it is supposed to confer on the people [Padmanabham 1986].

Such criticism of the chapter on fundamental rights apart, the operational complexities of political democracy in India has recurrently brought the constitutional to the centre stage of political controversy and partisan populist politics particularly since the late 1960s after the first orchestrated split within the ruling Congress party in 1969. Many such controversies have been around the chapter on citizens' rights. In 53 years, the Indian Constitution has been amended almost twice more often than the US in over 200 years. IN the process, the political legitimacy of the Constitution itself has been undermined in popular perception. There have been periodic demands for a new Constitution, without any consensus on its content.

More alarmingly, since the proven institutions of democratic governance of western vintage have operated differently in the Indian context, questions have been raised discreetly about the viability of political democracy in the country. Within the Congress Party in the emergency era there have been demands for a 'limited dictatorship', however historically and conceptually incongruous the term may be. The apologists of the mercifully brief authoritarian regime of the emergency era in India belonged to the mindset of western cold war vintage, promoted by its funding agencies. Fortunately, after the end of the cold war, they have disappeared at least from its original habitat in the western donor agencies, and consequently in India too.

But in the Indian context, the authoritarian experiment of the emergency era was an extreme manifestation of the above mindset emerging from the dysfunctionality of many democratic institutions. It is possible to argue that much of the mystification around the operational distortions of Indian democracy stems from its ahistorical conceptualization as another version of liberal democracy, based on the formal democratic institutions of western vintage. The analytical framework of a 'post-colonial democracy' appears to provide more explanatory potential for the empirically valid proposition of comparable formal institutions of western governance operating asymmetrically in the Indian context. Such historically rooted causality also suggests different prescriptive formulations to mitigate the manifest operational inadequacies of political democracy in India sharply different from the theorists of 'third world modernisation' of the cold war era. It would underscore the need for greater democratization through indigenous institutional and political innovations, as the civil and the excesses of the emergency regime seeks to provide, rather than 'throwing away the baby with the bath water', implicit in the theory of 'third world modernisation', or the elusive pursuit to replicate a western liberal democracy in India's post-colonial political economy.

### **Democratic Rights in Operation**

The operational distortions of India's democracy, insofar as they have constrained the exercise of the constitutional right of the citizens can be seen at many levels. For example, the electoral system, from the inception of universal adult suffrage, has not been able to provide a government at the centre and in many of the constituent states with a majority of electoral votes. The party-system at the regional level of the federal structure, particularly after the first orchestrated split in the Congress Party, in 1969, has largely polarized around single individuals as leaders often symbolizing a single ascriptive identity. Even at the federal centre, far-reaching social economic and political decisions affecting the constitutional rights of the citizens have been taken without any democratic endorsement or by minority parties in a 'huge-parliament'.

In fact the emergency of 1975-77 which was the most comprehensive assault on the citizens' rights, which was imposed by the prime minister without the cabinet or parliament discussing much less approving it. The decision to implement the Mandal Commission's recommendations, which constituted a major social policy, was taken by a minority government, sparking off considerable violence. So has been the most far-reaching economic policy decision for structural adjustment and liberalization taken by a minority government, in a hung parliament, without popular mandate for the party or the policy. The decision on the nuclear tests of 1998

and the country's transformation to the status of a military nuclear power was also taken by a minority-led government and announced post-facto to the people. These policy decisions, even when normatively desirable, remain democratically contestable.

The more significant macro-level operational distortions of India's post-colonial democracy have generally tended to reinforce the inherited structural constraints across the board. For example, the disjunction between a relatively modern state, apparatus, and the revivalist traditional ascriptive identities within the emerging civil society, has been increasing. Unlike in western democracies, political modernisation through universal adult franchise has stoked social revivalism in India, spawning new minority groups along with the old ones, often perceiving themselves to be marginalized at various tiers of the federal structure. This process has created new sources of tensions within the built-in unitary bias of the federal structure, with its impact on the rights of citizens, both as individuals and groups. In the absence of reform of the democratic institutions of conflict-resolution, continuous proliferation and periodic modernisation of the coercive instruments of the state continues unabated. The social base of democratic consciousness remains narrow, with a majority of the citizen unaware, of, or unconcerned with, their constitutional rights. That made it so easy to impose and withdraw the national emergency between 1975 and 1977 by a single leader's personal fiat, however charismatic the leader.

The secular democratic state has been increasingly under pressure from social revivalism, which is affecting weak democratic institutions of conflict-resolution, undermining their professional efficiency to contain social and political violence. Consequently, the post-colonial Indian state has been increasingly dependent on coercive repression of social conflicts, thereby reinforcing the vicious circle of greater violence and coercion.

The phenomenal increase in the level of social violence and state coercion has made the political process more vulnerable to criminalization, with increasing representation of the underworld within democratic institutions. This process has also brought about new challenges to the operational context to the constitutional rights of citizens.

The pace of the subterranean process of operational liberalization of political democracy in India, beginning almost simultaneously with the inception of the republican constitution, has accelerated over time. The emergency of 1975-77, was in many ways, the high watermark of this process. The operational de-liberalisation of the democratic structure has manifested itself through four forms of state responses to the escalating level of social conflicts and violence: (i) increasing constriction of fundamental rights through formal constitutional amendments like the 1<sup>st</sup>, 4<sup>th</sup>, 16<sup>th</sup>, and the 42<sup>nd</sup> during the national emergency; (ii) proliferation of new repressive legislations, often through repeated executive ordinances by passing the legislatures like the MISA, COFEPOSA, ESMA, TADA, POTA, etc (iii) recurrent use of the 'preventive detention' clause through the use of the colonial 'Disturbed Areas Act' and the Armed Forces Special Powers Act, etc, (iv) proliferation, and modernization of new coercive instruments, as well as their frequent use without transparent accountability like the BSF, ITBP, RAF, CRPF, CISF, 'Black Cat' commandos, etc, along with new intelligence outfits like CBI, RAW.

Within this ongoing process of retrogressive de-liberalisation of political democracy, the periodic debate on the judiciary vs parliament as the ultimate arbiter of fundamental rights of citizens appears somewhat banal. At any rate, since the inception of the Constitution, no new right has been added to Part III, while most of the seven components in the part have been constricted by periodic amendments; and citizens' duties included in it through the 42<sup>nd</sup> Amendment of the emergency era.

The sovereign parliament, and the judiciary as the supreme arbiter of the Constitution, despite periodic tensions, have generally cooperated with each other in this general process of deliberalisation of India's democratic structure. The trend over the years indicates that the judiciary has generally asserted its supremacy against weak executive authority, and capitulated against strong assertion of executive power at the cost of citizens' rights, as in the case of the 42<sup>nd</sup> Amendment. The era of 'judicial activism' in more recent times ought to be seen in this historical context of its role as the constitutionally envisaged defender of the rights of citizens.

These general trends within India's post-colonial democracy, as argued earlier, are casually rooted within the structural distortions of its historical inheritance. The fortuitous conjuncture of the national emergency accelerated the pace of these distortions and vastly increased the scale of operational complexities within the democratic process, many of them till now irreversible.

It was fortuitous, because the emergency was not the consequence of any sudden systematic crisis, and there was nothing inevitable about it. Yet the ease with which a single individual, howsoever charismatic, was able to impose it, and allowed the state power to be wielded by an 'extra-constitutional authority' [Selbourne 1977] underscored the narrow social base of democratic consciousness in the country after nearly 25 years of the inception of the republican constitution. But the fact that it proved to be dysfunctional for the governance of the political system, and collapsed of its own weight, also helped to underscore the potential parameters of systematic reform in India, strictly within the permissible contours of democratic governance. But in this intervening period of 19 months when the emergency was in force, the professional efficiency of almost all institutions of democratic governance had been further undermined by the politically orchestrated dent in their autonomy, further stoking the vicious circle of social violence and state coercion within the political process.

This was the structural and temporal context of the origin of the civil and democratic rights movement in India.

### **Origin of the Civil Rights Movement**

India's democratic politics, on the eve of the emergency in 1975 had spawned three contesting approaches to economic development and social transformation that grew from widely shared concerns around the inadequacy of the erstwhile political process to achieve these goals. Dominant among them was Indira Gandhi's '21-point programme' which, along with her heir apparent and son's 4-points programme, had been formally owned up by the ruling Congress Party. It targeted its appeal to the economically deprived and the socially oppressed with the promise of 'Garibi-Hatao'; it sought to de-legitimise the constitutional

structure and the judiciary as being constrictive of the goal, and demanded 'commitment' from the incumbents in the democratic institutions to 'share the philosophy'. Operationally, a small coterie of party apparatchiks, personally loyal to the leader, supported by hand-picked, lumpenised groups from the unemployed urban middle classes at the behest of the 'extra-constitutional authority', remained the major instruments of the programme. Its allies from within the state apparatus consisted of the more enterprising section of the bureaucracy, judiciary and scientific establishments, arguably 'sharing' the philosophy and programme of the leader.

The other approach was that of the Naxalities, particularly in Bengal, Andhra and Kerala, disillusioned both by 'bourgeois democracy', and the mainstream communist parties 'co-opted' within it. The peasant insurrections and urban violence, unleashed by them soon exhausted its potentials because of the general apathy of the target groups of their programme, and the unprecedented level of coercion, including 'encounter deaths', unleashed by the state against them. By the time the national emergency was imposed, the more fortunate among them were being tortured in prisons.

The third approach was a revived version of the Gandhian model led by the former socialist leader, Jayaprakash Narayan blending Vinoba Bhave's Bhoodaan movement, along with the call for a 'total revolution' to usher in a 'party less democracy'. Its main political instrument was the urban educated youth, largely drawn from the delaying educational institutions of Bihar and Gujarat, and organized under the banner of the 'Navanirman samity' aimed at eradicating corruption in public life in pursuit of its larger goals.

The emergency regime, by terrorizing its contesting adversaries, aborted the potentials of these alternative approaches. But its own record on the promised goals, and the ultimate collapse of the emergency regime itself, also undermined the political viability of its advocated strategy in the Indian context. On the rebound, the political parties which were the main victims of the emergency, the CPM and the BJP, along with the Jammāt-e-Islami in Kashmir, and the Akalis in Punjab, reaped electoral dividends in the general elections of 1977. But the subsequent collapse of the short-lived Janata regime in 1980, and the re-emergence of Indira Gandhi with massive electoral support, helped to under score the endemic authoritarian potentials within India's democratic structure, its revivalist social proclivities, and the continuing narrow social base of democratic consciousness around citizens' rights in India.

This was the political and ideological scenario for the emergence of the civil and democratic rights movements in India in 1976, as an autonomous watchdog of the rights of citizens, and for the promotion of mass awareness around such rights; along with the goal of widening the ambit of its concern for the new generation of rights, and to supplement the incremental potentials of the democratic institutions to enforce the constitutional rights of citizen.

Its original activist support base consisted of people drawn from two opposite ideological stream: the liberals who had taken the democratic structure for granted, and shared the incarceration of the emergency era with the Naxalities who had dismissed the incremental potentials of India's liberal democracy and over-estimated the popular appeal of their

revolutionary option. During the origin of the movement, it was useful that these two groups shared their goals; for the liberal stalwarts provided the necessary media appeal to the cause of the movement, while the former radicals provided the necessary activist in-puts to the cause that promised few immediate rewards. It also enabled an implicit division of labour among such groups, with the liberals largely concerned with ensuring the observance of part III of the constitutional rights, and the radicals supplementing it with demands around part IV of the Indian Constitution, along with new concerns of the second and third generation of human rights.

From its fortuitous origin in the emergency era, with its activist base largely consisting of a section of urban youth in scattered groups in the cities, the movement has managed to proliferate into new areas, and induct new sources of support among the marginalized sections of the people, and also some of the victims of state and or social oppression often in league in India, particularly in rural areas. More important, its increasing popular legitimacy has attracted it to a section from within the dysfunctional democratic institutions like the judiciary, bureaucracy and the media, some openly others discreetly. Despite its fortuitous origin, it seems to have filled up a historic structural gap within India's post colonial democracy that was envisaged to replicate a western liberal democracy, somewhat a historically, as we have argued from the present advantage of hindsight.

### **Role of the Movement**

In terms of concrete achievements in pursuit of its larger goals, one must mention the right of 'public interest litigation' (PIL) which has been the only new citizens' right of the post-republican era. This has been an instance of 'judicial legislation' in response to the petition filed in the Supreme Court by the Peoples' Union for Democratic Rights (Delhi) in the *Asiad Labour Case* (1982), demanding the enforcement of the Minimum Wages Act by the government even in the case of labour employed by private contractors. The PIL has opened up new uncharted space for the enforcement of the constitutional rights of the citizens and for the newer generation of human rights, with considerable salience in the democratic politics in recent times.

But more than this concrete gain, the movement has contributed to stoke the fading political will within the democratic process towards the normative goals of economic and social transformation, with particular concern for the rights of the oppressed disadvantaged and the deprived. This remains an important imperative in the new era of structural adjustment and economic liberalisation within the increasing trends of political deliberalisation. The National Human Rights Commission, which is part of the package of the new economic agenda, and the global regime of human rights, now have forged formal links and informal networks with the civil rights groups in the country, and have cumulatively widened the political space for these normative concerns within some of the corrupt, inefficient, partisan institutions of governance. Some incremental reforms of prison conditions, electoral system, the police, judiciary, and to enforce accountability and transparency within the coercive instruments of the state, and a fresh look at the repressive colonial legislations like the "Disturbed Areas Act" and 'Armed Forces Special Powers Act', and also TADA, is among its

contributions. This is not entirely inconsequential in the context of the general atrophy of democratic institutions and their increasing insensitivity and criminalization.

But even more important, during social violence around elemental instincts of religion and caste, it has provided the emotional bond of unity among the citizens through its concern for the victims of such violence. For example the PUCL-PUDR (Delhi) joint report on *Who Are the Guilty?* (1984) after the anti-Sikh riots in Delhi helped to assuage the feelings of the affected people and expose the guilty for punishment, though they still remained unpunished. Similarly, in cases of excesses of state repression against political terrorists in Kashmir, Punjab, north-east, the concern of the civil rights movement has helped sustain the emotional and political bonds between groups of citizens of the Indian state who are still inadequately integrated with the national identity.

But this has also exposed the movement to inspired criticism of being 'anti national' and 'foreign inspired'. Thus a contrived dichotomy between human rights and national security has been artificially orchestrated. This has posed new challenges for the movement in terrorism affected regions of the country. Within the residual remains of India's post colonial political culture, such criticism, howsoever baseless, pose some professional hazards for the movement and its activists. But the more important problem facing the movement, paradoxically, stems from its increasing popular appeal, and the legitimacy of human rights concerns both within on the national and global regimes geared to them. This has resulted in mushrooming of NGOs funded by foreign agencies concerned with human rights, involving in some cases professionally inefficient social and moral dregs into the movement. This situation has the endemic potential of degenerating the movement from its inspiration in radical idealism to one offering rewarding career option, as in the case of the socialist movement in the 1970s.

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