CHAPTER 1

THE HISTORICAL BACKGROUND

Utility of a Historical Retrospect.

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

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

Government of India Act, 1858.

For our present purposes we need not go beyond the year 1858 when the British Crown assumed sovereignty over India from the East India Company, and Parliament enacted the first statute for the governance of India under the direct rule of the British Government,—the Government of India Act, 1858 (21 & 22 Viet., c. 106). This Act serves as the starting point of our survey because it was dominated by the principle of absolute imperial control without any popular participation in the administration of the country, while the subsequent history up to the making of the Constitution is one of gradual relaxation of imperial control and the evolution of responsible government. By this Act, the powers of the Crown were to be exercised by the Secretary of State for India, assisted by a Council of fifteen members (known as the Council of India). The Council was composed exclusively of people from England, some of whom were nominees of the Crown while others were the representatives of the Directors of the East India Co. The Secretary of State, who was responsible to the British Parliament, governed India through the Governor-General, assisted by an Executive Council, which consisted of high officials of the Government.

The essential features of the system[2] introduced by the Act of 1858 were—

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

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

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

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

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

Indian Councils Act of 1861.

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

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

Indian Councils Act, 1892.

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

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

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

Morley-Minto reforms and the Indian Councils Act, 1909.

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

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

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

On the other hand, the positive vice of die system of election introduced by the Act of 1909 was that it provided, for the first time, for separate representation of the Muslim community and thus sowed the seeds of separatism* dial eventually led to the lamentable partition of the country. It can hardly be overlooked that this idea of separate electorates for die Muslims was synchronous with die formation of the Muslim League as a political party (1906).

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

Montagu-Chelmsford Report and the Government of India Act, 1919.

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

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

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

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

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

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

Main Features of the System introduced by the Act of 191».

The main features of the system introduced by the Government of India Act, 1919, were as follows[6]:

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

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

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

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

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

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

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

III. *The Indian Legislature made more representative.* No responsibility was, however, introduced at the Centre and the Governor-General in Council continued to remain responsible only to the British Parliament through the Secretary of State for India. Nevertheless, the Indian Legislature was made more representative and, for tire first time, *bi-cameral.* It was to consist of an Upper House, named the Council of State, composed of 00 members of whom 34 were elected, and a Lower House, named the Legislative Assembly, composed of about 144 members of whom 104 were elected. The powers of both the Houses were equal except that the power to vote supply was given exclusively to the Legislative Assembly. The electorates were, however, arranged on a communal and sectional basis, developing the Morley-Minto device further.

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

Shortcomings of the Act of 1919

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

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

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

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

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

The Simon Commission.

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

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

"Communal Award."

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

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

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

Main features of the system introduced by the Government of India Act, 1935.

(a) *Federation and Provincial Autonomy.* While under all the previous Government of India Acts, the government of India was unjtary, the Act of 1935 prescribed a federation, taking the Provinces and the Indian States as units. But it was optional for the Indian States to join the Federation; and since the Rulers of the Indian States never gave their consent, the Federation envisaged by the Act of 1935 never came into being.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There were similar fetters on the Provincial Legislature.

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

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

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

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

A three-fold division was made in the Act—

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

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

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

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

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

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

Changes introduced by the Indian Independence Act, *1947.*

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

The following were the main results of such adaptations:—

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

> "in constitutional theory, the Government of India is a subordinate official Government under His Majesty's Government."

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

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

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

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

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

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

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

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

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

REFERENCES

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

CHAPTER 2

THE MAKING OF THE CONSTITUTION

Demand for a Constitution framed by a Constituent Assembly

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

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

The failure of the Statutory Commission and the Round Table Conference which led to the enactment of the Government of India Act, 1935, to satisfy Indian aspirations acceittuhted tfie ocmand for a Constitution made by the people of India without outside interference, which was officially asserted by die National Congress in 1935. In 1938, Pandit Nehru definitely formulated his demand for a Constituent Assembly dius:

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

This was reiterated by die Working Committee of die Congress in 1939. U«lht ana ioAlcn, Neiu/tx* *prciity* .

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

Cripps Mission

(a) that die Constitution of India was to be framed by an elected Constituent Assembly of the Indian people;

(b) that the Constitution should give India Dominion Status, equal partnership of the British Commonwealth of Nations;

(c) that diere should be one Indian Union comprising all die Provinces and Indian Slates; but

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

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

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

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

After the rejection of the Cripps proposals (followed by the dynamic 'Quit Lidia' campaign launched by the Congress), various attempts to reconcile the two parties were made including the Simla Conference held at the instance of the Governor-General, Lord WAVELL. These having failed, the British Cabinet sent three of its own members[2] including Cripps himself, to make another serious attempt. But the Cabinet Delegation, too, failed in making the two major parties come to any agreement and were, accordingly, obhged to put forward their own proposals, which were announced simultaneously in India and in England on the 16th May, 1946.

Cabinet Delegation.

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

The broad features of the scheme were—

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

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

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

The scheme laid down by the Cabinet Mission was, however, recommendatory, and it was contemplated by the Mission diat it would be adopted by agreement between the two major parties. A curious situation, however, arose after an election for forming the Constituent Assembly was held. The Muslim League joined the election and its candidates were returned. But a difference of opinion had in the meantime arisen between the Congress and the League regarding the interpretation of the

H.M.G.'s statement of December 6, 1946

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

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

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

H.M.G.'s statement of February 20, 1947.

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

(a) that British rule in India would in any case end by June, 1948, after which the British would certainly transfer authority to IndfaFi hands;

(b) dial if by that time a fully representative Constituent Assembly failed to work out a constitution in accordance with the proposals made by the Cabinet Delegation,—

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

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

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

The Mountbatten Plan.

The actual decisions as to whether the two Provinces of the Punjab and JBengal wm· to be paitiii onoci was, Inmever, left to the vote of the members oI the Legislative Assemblies of these two Provinces, meeting In two parts, according to a plan known as the 'MountbatterTPIan'. It was given a formal shapeday a Statement inadfPby tjie British Government of June 3, 1947, which provided, *inter alia*, that:

and of June 3, 1947.

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

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

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

On the 26th July, 1947, the Governor-General announced the setting up 0T a_sgpatatc f onstitiient Assemhly for Pakistan. **The Plan of June 3, 1947, having been carried out, nothing stood in the way of effecting the transfer of power by enacting a statute of the British Parliament in accordance with the declaration.**

It must be said to the credit of the British Parliament that it lost no time to draft the Indian Independence Bill upon die basis ol die above Plan, and

The Indian Independence Act, 1947.

this Bill was p358ed and placed on the Statute Book, with amazing speed, as the Indian Independence Act, 1947 (10 & 11 Geo. VI, c. 30). The Bill, which was introduced in Parliament on July 4, received the Royal Assent on July IB, 1947, and came into force froiil dial date.

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

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

Constituent Assembly of India.

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

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

(1) Each province and each Indian State or group of States were allotted the total number of seats proportional to their respective populations roughly in the ratio of pne to a million. As a result, the Provinces were to elect 292 members while the Indian States were allotted a minimum of 93 seats.

(2) The seats in each province were distributed among the three main communities, Muslim, Sikh and General, in proportion to their respective populations.

(3) Members of each community in the Provincial Legislative Assembly elected their own representatives by the method of proportional representation with single transferable vote.

(4) The method of selection in the case of representatives of Indian States was to be determined by consultation.

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

The salient principles of the proposed Constitution had been outlined by various committees of the Assembly[3] such as the Union Constitution Committee, the Union Powers Committee, Committee on Fundamental Rights, and, after a general discussion of the reports of these Committees, the Assembly appointed a Drafting Committee on the 29th August, 1947. The Drafting Committee, under the Chairmanship of Dr. Amhedkar, embodied die decision ot the Assembly with alterpntf vft and Additional proposals in the form of T'Draft Constitution of India which was published in February, 1948. The Constituent Assembly next met in November, 1948, to consider the provisions of the Draft, clause by clause. After several session the consideradon of the clauses or second reading was completed Lrr-the 17th October, 1949.

Passing of the Constitution.

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

Date of Commencement of the Constitution.

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

REFERENCES

1. As stated earlier, die Muslim League, professedly a communal party, was formed in 1906. While Its earlier objective was to secure separate representation of die Muslims in die political system, in its Lahore Resolution of 1940, it asserted its demand for the creadon of a separate Muslim State in the Muslim majority areas. This idea was developed into the claim for dividing India into two independent States, when die Cripps offer was announced.
2. Tile Cabinet Mission consisted of Lord PETHICK-LAWRENCE, Sir Stafford Cripps and Mr. A.V. Alexander.
3. Ihe important committees of the Constituent Assembly were,—

   (a) Union Powers Committee. It had 9 members. Shri Jawaliarlal Nehru was its chairman. (b) Committee on Fundamental Rights and MinoriUes. It had 54 members Sardar Yaliabhbhai Patel was its chairman, (c) Steering Committee. It had 3 members. Dr KM Munshi (chairman), Shri Gopalswamy Ayyangar and Shri Bishwanadi Das. (d) Provincial ConstituUon Committee. 25 members Sardar Patel as chairman. (e) Committee on Union ConstituUon 15 members Pt Nehru as chairman.

   The draft was prepared by Sir B N. Rail, Adviser to the Constituent Assembly. A 7 member committee chaired by Sir Alladi Krishnaswamy Iyer was set up to examine the draft. Dr. B.R Ambedkar who was minister for law from 15-8-1D47 to 26-1-1950 piloted the draft constitution in the Assembly.
4. Since dial date, the ConsUtuUon has been freely amended, according to the procedure laid down in Art. 368. — no less than 94 Umes, by 2006 (see Table IV, *post*) For a text of the original ConsUtuUon, with its subsequent amendments, see Author's *Constitution Amendment Acts; Constitutional Law of India*, 6th Ed. (PrenUce-Hall of India).

CHAPTER 3

THE PHILOSOPHY OF THE CONSTITUTION

EVERY Constitution has a philosophy of its own.

The Objectives Resolution.

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

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

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

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

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

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

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

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

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

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

The Preamble.

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

"WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN *SOCIALIST SECULAR*[2] DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

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

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

FRATERNITY assuring the dignity of the individual and the unity *and 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 importance and utility of the Preamble has been pointed out in several decisions of *our* Supreme Court. Though, by itself, it is not enforceable in a Court of law,[1] the Preamble to a written Constitution states the *objects* which the Constitution seeks to establish and promote and also aids the legal interpretation of the Constitution where the language is found to be *ambiguous*.[1] For a proper appreciation of the aims and aspirations embodied in our Constitution, therefore, we must turn to die various expressions contained in die Preamble, as reproduced above.

The Preamble to our Constitudon serves, two purposes:

(a) it indicates die *source* from which die Constitution derives its audiority;

(b) it also states the *objects* which the Constitution seeks to establish and promote.

Independent and Sovereign

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

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

Republic.

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

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

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

Sovereignty not inconsistent with membership of the Commonwealth.

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

"It Is an agreement by free will, to be terminated by free will."*

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

Promotion of International Peace.

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

"The State shall endeavour to—

(a) promote international peace and security;

(b) maintain Just and honourable relations between nations;

(c) foster respect for international law and treaty obligations in the dealings of organised people with one another ; and

(d) encourage settlement of international disputes by arbitration."

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

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

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

Democracy.

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

A Representative Democracy.

(a) As a form of government, the democracy which is envisaged is, of course, a representative democracy and there are in *our* Constitution no agencies of direct control by the people, such as 'relerendum, or 'imUaUve'. The people ol India are to exercise their sovereignty dirough a Parliament at the Centre and a Legislature in each State, which is to be elected on adult franchise[8] and to which the real Executive, namely, die Council of Ministers, shall be responsible. Though diere shall be an elected President at the head of die Union and a Governor nominated by the President at the head of each State, neither of diem can exercise any political function without the advice of the Council of Ministers[8] which is collectively responsible to the people's representatives in the respective Legislatures (excepting functions which the Governor is authorised by the Consdtution itself to discharge in his discretion or on his individual responsibility). The Consdtution holds out equality to all the citizens in die matters of choice of their representatives, who are to run the governmental machinery.

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

The ideal of a democratic republic enshrined in the Preamble of the Constitution can be best explained with reference to the adoption of universal adult suffrage (which has already been explained) and the complete equality between the sexes not only before the law but also in the political sphere. Political Justice means the absence of any arbitrary distinction between man and man in the political sphere. In order to ensure the 'political' justice held out by the Preamble, it was essential that every person in the territory of India, irrespective of his proprietary or educational qualifications, should be allowed to participate in the political system like any other person. Universal adult suffrage was adopted with this object in view. This means that every five years, the members of the Legislatures of the Union and of each State shall be elected by the vote of the entire adult population, according to the principle—'one man, one vote'.

Government of the People, by the People and for the People.

Political Justice.

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

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

A Democratic Society.

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

Or, as Dr. Radhakrishnan has put it—

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

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

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

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

The State in a democratic society derives its strength from the cooperative and dispassionate will of all its free and equal citizens.[13] Social and economic democracy is the foundation on which political democracy would be a way of life in tile Indian polity[14].

Economic justice.

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

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

Social justice.

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

Liberty, equality and fraternity.

The three have to be seemed and protected with social justice and economic empowerment and political justice to all the citizens under the rule of law.[16]

Liberty.

Democracy, in any sense, cannot be established unless certain minimal rights, which are essential for a free and civilised existence, are assured to every member of the community. The Preamble mentions these essential individual rights as 'freedom of thought, expression, belief, faith and worship' and these are guaranteed against all the authorities of the State by Part 111 of the Constitution [*vide Arts.* 19, 25-28], subject, of course, to the implementation of llie Directive Principles, for the common good [*Art.* 31C] and the 'fundamental duties', introduced [*Art.* 51A], by the 42nd Amendment, 1976.

'Liberty' should be coupled with social restraint and subordinated to the liberty of the greatest number for common happiness.[111]

Equality.

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

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

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

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

From a Socialistic Pattern of Society to Socialism.

The realisation of so many objectives would certainly mean an expansion of the functions of the State. The goal envisaged by the Consutution, therelore, is mat of a 'Welfare State'[20] and the establishment of a 'socialist state'[2]. At the Avadi session in 1955, Congress explained this objective as establishing a 'socialistic pattern of society' by a resolution—

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

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

42nd Amendment, 1976.

That the goal of the Indian polity is *socialism* was ensured by inserting the word 'socialist' in the Preamble, by die Constitution (42nd Amendment) Act, 1976. It has been inserted "to spell out expressly the high ideals of socialism". It is to be noted, however, that the 'socialism' envisaged by the Indian Constitution is not the usual scheme of State socialism which involves 'nationalisation' of *all* means of production, and the abolition of private property. As the then Prime Minister Indira Gandhi explained[21]—

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

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

Instead of a total nationalisation of all property and industry, it envisages a 'mixed economy', bul aims at offering 'equal opportunity' to all, and the abolition of 'vested interests'.[2210] From 1992 onwards the trend is now away from socialism to privatisation. Investment in many public enterprises has been divested in favour of private persons and many industries and services which were reserved for the government sector have been thrown open for private enterprise. This is in keeping with the worldwide trend after the collapse of socialism in the U.S.S.R., and East European countries. But the constitutional obligation to pay compensation to the private owner for State acquisition has been taken away by repealing Art. 31, by the Constitution (44th Amendment) Act, 1978, as will be further explained under Chap. 8, *post*.

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

N<Td for fhe Natioifrit' Unitf

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

Fraternity.

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

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

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

It is this spirit of brodierhood dial the Preamble of *our* Constitution reflects.[25]

A Secular State, guaranteeing Freedom of Religion to all.

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

4Jnd Amendment, 1976.

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

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

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

Dignity of the Individual.

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

In order to remove poverty and to bring about a socio-economic revolution, the list of Directives was widened by the Constitution (42nd Amendment) Act, 1976, and it was provided that, in order diat such welfare measures for the benefit of the masses may not be defeated, any measure for the implementation of *any* of the Directives shall be immune from any attack in die Courts on the ground that such measure contravenes any person's fundamental rights under Art. 14 or 19.[28]

Duticsm Cntd

The philosophy contained in die Preamble, as explained in the foregoing pages, has been further highlighted by emphasising that each individual shall not only have the fundamental rights in Part 111 of the Constitution to ensure his liberty of expression, faith and worship, equality of opportunity and the like, but also a corresponding fundamental duty, such as to uphold the sovereignty, unity and integrity of the nation, to maintain secularism and the common brotherhood amongst all the people of India. This has been done by inserting Art. 51A, laying down ten 'Fundamental Dudes', by the Constitution (42nd Amendment) Act, 1976 (see, further, under Chap. 8, *post*).

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

> "... there must be a *capacity* and a *passion* for the enjoyment of liberty—there must be a sense of personality in each, and of respect for personality in all, generally spread through the whole community—before the democratic State can be *truly achieved* . . Perhaps it can be fairly demanded only in a community which has achieved a *sufficient standard of material existence,* and a *sufficient degree of national homogeneity* to devote itself to an ideal of liberty which lias to be *worked out in each by the common effort of all.* If the problems of material existence are still absorbing... the ideal of living a common life of freedom—in other words, of attaining a particular quality of life—will seem an ideal dream. If, again, the problems of national homogeneity are still insistent, and there is *no common feeling of fellowship*—if some sections of the community are regarded by others, whether on the ground of their inferior education, or on the ground of their inferior stock or any other ground, as essentially alien and heterogeneous—the ideal of the common life of freedom will seem equally illusory...."[2*]

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

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

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

> "in a brief and pithy form the argument of much of the book, and it may accordingly *serve as a key note.*"[3]

REFERENCES

1. (1947) C A D 104 (moved by Pandit Jawaharlal Nehru on December 13, 1946).
2. The words in italics were inserted by the Constitution (42nd Amendment) Act, 1976. See Author's *Constitutional Law of India,* Preamble.
3. *A.K. Copalan* v. *State of Madras,* (1950) S.C.R. 88 *(198)\ Union of India* v. *Madan Gopal,* (1954) 6C.R. 541 (555).
4. *Re* Berubari Union, AIR 1960 S.C. 845 *(846).*
5. So called since die Imperial Conference 1926. Later it has come to be mentioned simply as "The Commonwealth" |Cf. BARKER, *Essays on Government* (1956), pp. 1618).

   The concept of Commonwealth as an association has considerably weakened when the United Kingdom virtually segregated itself by refusing to protest against the Racist atrocities committed by the Government of South Africa and later by imposing the visa system upon immigrants from India and some other states.
6. C.A.D., 165-1949.
7. C.A.D., 22-1-1947.
8. The survival of this representative democracy and Parliamentary Government in India for about six decades since Independence should silence her critics, since military regime prevailed in her neighbouring countries until recendy. In 1981, the ConsUtution of Pakistan of 1972 was supplanted by the Provisional Constitution Order, 1981, under which Martial Law was imposed under Gen. Zia-ul-Haq as the Chief Martial Law Administrator, who assumed power in 1977. It is only after Zia's death that in December,

1988, elections were held. But the future is not so certain. Similarly, in Bangladesh, Martial Law was imposed since die assassination of Mujibar Rahainan and the assumption of military rule by Ziaur Rahaman, in 1975 and later on by Lt. General Ershari, until 198G when an election was held and General Ershad elected President amidst a tumultuous situation. President Ershad handed over his power to a neutral Vice-President for conducting fresh elections. At the election Begum Khaleda Zia became the Prime Minister tn March, 1991. In November, 1994, Parliament was dissolved, and, at the fresh election, Mrs. Hasina Wazed was elected the new Prime Minister.

9. This is now expressly ensured by amending Art. 74(1) by the Constitution (42nd Amendment) Act, 1970, and the 44th Amendment Act, 1978.
10. *S.R. Chaudhari* v. *Slate of Punjab,* (2001) 7 S.C.C. 126.
11. Inaugural address of Pandit Nehru at the Seminar on Parliamentary Democracy on 25-2-1956.
12. Speech of the Vice-President, *ibid.*
13. *Stale of Punjab* v. *G.S. Gill,* A.l.R 1997 S.C. 2324.
14. *Samantha* v. *State of A.P.,* A.l.R. 1997 S.C. 3297.
15. *Dalnua Cement (Bharat) Ltd.* v. *Union of India,* (1996) 10 S.C.C. 104.
16. *Ashok Kumar Gupta* v. *State of U.P.,* (1997) 5 S.C.C. 201.
17. *Dalmia Cement (Bharat) Ltd.* v. *Union of India,* (1996) 10 S.C.C. 104.
18. *S.S. Bola* v. *B.lX Sardana,* (1997) 8 S.C.C. 522.
19. *S.S. Bola* v. *B.D. Sardana,* (1997) 8 S.C.C. 522.
20. Cf. *Crown Aluminum Works* v. *Workmen,* (1958) S.C.R. 651.
21. *Statesman,* 25-101976, p. 1; 28-101976, p. 1.
22. See, further, Author's *Constitutional Law of India,* Preamble.
23. It must be pointed out, in this context, that both 'socialism' and 'secularism' are vague words and, in the absence of any explanation of these words in the Constitution, such vagueness is liable to be capitalised by interested political groups and to create confusion in the minds ol the masses of die Republic to instruct whom is one of the objects of the Preamble. The Janata Party sought to offer such explanation, by amending Art. 366 of the Constitution by the 45th Amendment Bill, 1976, which, however, was thwarted by the Congress opposition in die Rajya Sabha.

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

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

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

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

swung from Socialism to the other direction of *laissez fairt*, under which Indian Industry will not have to face open competition from formidable foreign rivals.

24. The Supreme Court has pointed out that in promoting the unity of India, the *common* culture and heritage of India, of which the foundation is the Sanskrit language, must play a leading part [*Santmh* v. *Secretary, Ministry of H.R.D.*, AIR 1905 S.C. 293 (para 18)].
25. *Bommai* v. *Union of India*, AYR. 1994 S.C. 1918. Also see *Sn Adi Visheshwar of Kashi Vishwanalh Temple, Varanasi* v. *State of U.P.*, (1997) 4 S.C.C. 606 (para 26).
26. Islam is the State religion of Pakistan under the Constitution of 1972. This position had been maintained by the Provisional Constitution Order, 1981, issued by General Zia-ul-Haq, who assumed power in 1977 as the Chief Martial Law Administrator. In Bangladesh, Lieut. General Ershad, the President and Chief Martial Law Administrator declared that Islam would be the State religion [*Statesman*, 30-12-1982].
27. *LI.C.* v. *Consumer Centre*, A.LR. 1995 S.C. 1811.
28. This amendment of Art. 3IC, by the 42nd Amendment, has not been touched by the 44th Amendment Act, 1978, because the Congress Opposition in the Rajya Sabha thwarted the Janata attempt, through the 45th Amendment Bill, to revert to the pre-1976 position.
29. BARKER, *Reflections on Government* (Paperback), pp. 192-93.
30. M.K. GANDHI, *India of My Dreams*, pp. 9-10.
31. BARKER, *Principles of Social and Political Theory* (1951, Paperback), Preface, pp. vi, ix.

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

CHAPTER 4

OUTSTANDING FEATURES OF OUR CONSTITUTION

Drawn from different sources.

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

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

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

Hiere were members in the Constituent Assembly[2] who criticised the Constitution which was going to be adopted as a 'slavish imitation of the West' or 'not suited to the genius' of the people. Many apprehended that it would be unworkable. But die fact that it has survived for about sixty years, while Constitutions have sprung up only to wither away in countries around us, such as Burma and Pakistan, belies the apprehension of the critics of the Indian Constitution.

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

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

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

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

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

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

Thr longest Unnum Constitution.

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

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

(i) The framers sought to incorporate the accumulated experience gathered from the working of all the known Constitutions and to avoid all defects and loopholes dial might be anticipated in the light of those Constitutions. Thus, while diey framed die Chapter on the Fundamental Rights upon the model of the American Constitution, and adopted the Parliamentary system of Government from the United Kingdom, they took die idea of the Directive Principles of State Policy from the Constitution of Eire, and added elaborate provisions relating to Emergencies in the light of the Constitution of the German Reich and the Government of India Act, 1935. On the other hand, our Constitution is more full of words than other Constitutions because it has embodied the modified results of judicial decisions made elsewhere interpreting comparable provisions, in order to minimise uncertainty and litigation.

Incorporates the accurnulated experience of different Constitutions.

(ii) Not contented with merely laying down the fundamental principles of governance (as the American Constitution does), tiie authors of the Indian Constitution followed and reproduced the Government of India Act, 1935, in providing matters of administrative detail,—not only because the people were accustomed to the detailed provisions of that Act, but also because the authors had the apprehension that in the present conditions of the country, the Constitution might be perverted unless the form of administration was also included in it. In tire words of Dr. Ambedkar,[1]

Detailed administrative provision* included.

> ". . . It is perfectly possible to pervert the Constitution without changing the form of administration."

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

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

It was also felt that the smooth working of an infant democracy might be jeopardised[4] unless the Constitution mentioned in detail things which were left in other Constitutions to ordinary legislation. This explains why we have in our Constitution detailed provisions about the organisation of the Judiciary, the Services, the Public Service Commissions, Elections and the like. It is the same ideal of 'exhaustiveness' which explains why the provisions of the Indian Constitution as to the division of powers between the Union and the Stales are more numerous than perhaps the aggregate of the provisions relating to that subject in the Constitution of the U.S.A., Australia and Canada.

Peculiarity of the Problems to be lolved.

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

Constitution of the Units also included.

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

Special provisions for Jammu & Kashmir.

Though, as has just been said, the Constitution of the State was provided by the Constitution of India, the State of Jammu and Kashmir was accorded a special status and was allowed to make its own State Constitution. Even all the other provisions of the Constitution of India did not directly apply to Jammu and Kashmir but depended upon an Order made for the President in Constitution with the Government of State,—Tor which provision had to be made in Art. 370 [see Chap. 15].

Nagaland, Sikkim, etc.

Even after the inauguration of the Constitution, Specja] provisions have been inserted *e.g., *Arts.* 371-3711], to meet the regional problems and demands in

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

Federal Relations elaborately dealt with.

(v) Not only are the provisions relating to die Units elaborately given, the tendons between the Federation and the Units ard the Units *inter se*, whether legislative or administradve, are also exhaustively codified, so as to eliminate conflicts as far as possible. The lessons drawn from the political history of India which induced the framers of die Constitution to give it a unitary bias, also prompted them to make detailed provisions "regarding the distribution of powers and functions between the Union and die States in all aspects of their administrative and other activities",[6] and also as regards inter-State relations, co-ordination and adjudication of disputes amongst the States.

Both Justiciable and Non-justiciable Rights included: Fundamental Rights, Directive Principles, and Fundamental Duties.

(vi) There is not only a Bill of Rights containing justiciable fundamental rights of the individual [*Part* III] on die model of die Amendments to the *American* Constitution but also a Part [*Part* IV] containing Directive Principles, which confer no justiciable rights upon die individual but are nevertheless to be regarded as 'fundamental in the governance of the country',—being in the nature of 'principles of social policy' as contained in the Constitution of *Eire* [*ie.*, the Republic of Ireland). It was considered by the makers of *our* Constitution that diough they could not, owing to their very nature, be made legally enforceable, it was well worth to incorporate in the Constitution some basic non-justiciable rights which would serve as moral restraints upon future governments and thus prevent the policy from being torn away from the idea which inspired the makers of die organic law.

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

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

More Flexible than Rigid.

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

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

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

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

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

Legislation as supplementing the Constitution.

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

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

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

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

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

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

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

Reconciliation Of a written Constitution with Parliamentary soverei- Knt7.

V. This combination of the theory of 'fundamental law' which underlies the written Constitution of the United States with the theory of 'Parliamentary sovereignty' which underlies the unwritten Constitution of *England* is the result of the liberal philosophy of the framers of the Indian Constitution which has been so nicely expressed by Pandit Nehru:

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

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

Dr. Jennings[111] characterised *our* Consdtudon as rigid for two reasons: (a) that the process of amendment was complicated and difficult, (b) that matters which should have been left to ordinary legislation having been incorporated into the Consdtudon, no change in diese matters is possible without undergoing the process of amendment. We have seen that the working of the Consdtudon during six decades has *not* justified the apprehension that the process of amendment is very difficult [see also Chap. 10, *post*]. But the other part of his reasoning is obviously sound. In fact, his comments on this point have proved to be prophetic. He cited Art. 224 as an illustration of a provision which had been unnecessarily embodied in the Constitution:

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

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

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

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

Role of Co- Hons under nVHie Constitution.

VI. It is also remarkable that though the framers of the Constitution attempted to make an exhaustive code of organic law, room bas been left for the growth of conventions to supplement the Constitution in matters where it is silent. Thus, while the Constitution embodied the doctrine of Cabinet responsibility in Art. 75, it was not possible to codify the numerous conventions which answer the problems as they may arise in England, from time to time, in the working of the Cabinet system. Take, for instance, the question whether the Ministry should resign whenever there is an adverse vote against it in the House of the People, or whether it is at liberty to regard an accidental defeat on a particular measure as a 'snap vote'.[12] Again, the Constitution cannot possibly give any indication as to which issue should be regarded as a 'vital issue' by a Ministry, so that on a defeat on such an issue the Ministry should be morally bound to resign. Similarly, in what circumstances a Ministry would be justified in advising the President to dissolve Parliament instead of resigning upon an adverse vote, can only be established by convention.

Sir Ivor Jennings[10] is, therefore, justified in observing that—

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

Fundamental IUghu, and Constitutional Remedies.

VH. While the Directive Principles are not enforceable in die Courts, the Fundamental Rights, included in Part III, are so enforceable at the instance of any person whose fundamental right has been infringed by any action of the State,—executive or legislative—and the remedies for enforcing these rights, namely, the writs of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* are also guaranteed by the Constitution. Any law or executive order which offends against a fundamental right is liable to be declared void by the Supreme Court or the High Court.

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

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

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

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

Judicial review makes the Comtitution legalistic.

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

The Founding Fathers of the *American* Constitution, on die odier hand, had the painful experience that even a representative body might be tyrannical, particularly when diey were concerned widi a colonial Empire. Thus it is that the Declaration of Independence recounts the attempts of the British "Legislature to extend an unwarrantable jurisdiction over us" and how the British people had been "deaf of the voice of justice". At heavy cost had the colonists learnt about die frailty and weakness of human nature when the same Parliament which had forced Charles I to sign the Petition of Right (1G28) to acknowledge diat no tax could be levied without die consent of Parliament, did, in 17G5, and the years dial followed, insist on taxing the colonies, regardless of then right of representation, and attempt to enforce such undemocratic laws dirough military rule.

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

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

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

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

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

At the same time, it must be pointed out that since the inauguration of the Constitution, various provisions have been inserted into the Constitution by amendments, which have taken out considerable areas from the pale of judicial review, *e.g.*, by inserting Arts. 31A-31C; and by 1995 as many as 284 Acts,—Central and State,—have been shielded from judicial review on the ground of contravention of the Fundamental Rights, by enumerating them under the 9th Schedule, which relates to Art. 3IB.[11]

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

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

Judicial power of the State exercisable by the Courts under the Constitution as sentinels of Rule of Law is a basic feature of the Constitution.[1*]

Compromise between Judicial Review and Parliamentary Supremacy.

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

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

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

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

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

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

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

Our Constitution thus places die supremacy at the hands of the Legislature as much as that is possible within the bounds of a written Constitution. But, as has been mentioned earlier, die balance between Parliamentary Sovereignty and Judicial Review was seriously disturbed, and a drift towards die former was made, by die Constitution (42nd Amendment) Act, 1976, by inserting some new provisions, *e.g.*, Arts. 3ID. 32A, 131A. 144A. 226A, 228A, 323A-B, 329A.

The Janata Government, coming to power in 1977, restored die pre-1976 position, to a substantial extent, dirough the 43rd and 44dt Amendments, 1977-78, by repeating the following Articles which had been inserted by the 42nd Amendment—3ID, 32A, 131A, 144A, 226A, 228A, 329A; and by restoring Art. 226 to its original form (substantially).

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

Fundamental Rights subject to reasonable regulation by Legislature.

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

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

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

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

Social Equality also guaranteed by the conatitution.

X. Another peculiarity of the Chapter on Fundamental Rights in the Indian Constitution is that it aims at securing not merely political or legal equality, but *social* equality as well. Thus, apart from the usual guarantees that the State will not discriminate between one citizen and another merely on the ground of religion, race, caste, sex or place of birth,—in the matter of appointment, or other employment, offered by the State,—the Constitution includes a prohibition of 'untouchability, in any form and lays down that no citizen may be deprived of access to any public place, of the enjoyment of any public amenity or privilege, only on the ground of religion, race, caste, sex or place of birth.

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

Fundamental Rights checkmated by Fundamental Duties.

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

Though the Directives in Part IV of the ConsUtution were not enforceable in any manner and had to give way before the Fundamental Rights, under the original Constitution, the situation was reversed, through die backdoor, by the 42nd Amendment, 1976, by amending Art. 31C[11]—shielding *all* the Directives in Part IV of the Constitution from the Fundamental Rights in Part III. But this object has been frustrated by the majority decision in the case of *Minerva Mills* v. *Union of India,*[15] as a result of which Art. 31C will shield from unconstitutionality on the ground of violation of Art. 13 those laws which implement only the Directives specified in Art. 39(b)-(c) and not any other Directive included in Part IV of the Constitution.

42nd Amendment 1976.

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

XII. The adoption of universal adult suffrage [*Art.* 326], *without any qualification* either of sex, property, taxation or the like, is a 'bold experiment' in India, having regard to the vast extent of the country and its population, with an over-whelming illiteracy (see Table I, *post*). The suffrage in India, it should be noted, is wider dian that in England or the United States. The concept of popular sovereignty, which underlies the declaration in the Preamble that the Constitution is adopted and given by the 'people of India' unto themselves, would indeed have been hollow unless the franchise—the only effective medium of popular sovereignty in a modem democracy—were extended to the entire adult population which was capable of exercising the right and an independent electoral machinery (under the control of die Election Commission) was set up to ensure the free exercise of its. The electorate has further been widened by lowering the voting age from 21 to 18, by the 61st Constitution Amendment Act, 1988.

Universal Franchise without Communal Representation.

That, notwithstanding the outstanding difficulties, this bold experiment has been crowned with success will be evident from some of the figures[16] relating to the first General Election held under the Constitution in 1952. Out of a total populabon of 356 million and an adult population of 180 million, the number of voters enrolled was 173 million and of these no less than 88 million, *i.e.*, over 50 per cent of the enrolled voters, actually exercised their franchise The orderliness with which eleven General Elections have been conducted speaks eloquendy of the political attainment of the masses, though illiterate, of this vast sub-continent. In the elevendi General Election held in 1996, the number of persons on the electoral roll had come up to 550 million and the same came up to 67,14,87,930 in the 14th General Election in 2004.

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

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

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

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

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

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

Parliamentary combinecT with an elected President at the Head.

But though an elected President is the executive head Gf Qje pnjorl, he is to act on the advice of his ministers, although whedier he so acts according to tile advice of his ministers is not questionable in the courts and there is no mode, short of impeachment, to remove die President if he acts contrary to die Constitution.

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

In die words of *our* Supreme Court,[21]

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

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

42nd Amendment, 1976.

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

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

44th Amendment, 1978.

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

A Federal System with Unitary Bias.

XIV. Perhaps the most remarkable achievement of the Indian Consbtubon is to confer upon a federal system die strength of a unitary government. Though normally the system of government is federal, the Consbtubon enables the federabon to transform itself into a unitary State (by the assumpbon of the powers of States by die Union),—in *emergencies* [*Part* XVIII].

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

Integration of Indian States.

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

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

Status of Indian States under the British Crown.

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

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

Incidents of Paramountcy.

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

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

Place of Indian States in the Federal Scheme proposed by the Government of India Act, 1935.

The Government of India Act, 1935 envisaged a federal structure for the whole of India, in which the Indian States could figure as units, together with the Governors' Provinces. Nevertheless, the framers of die Act differentiated the Indian States from die Provinces in two material respects, and diis differentiation ultimately proved fatal for the scheme itself. The two points of difference were—(a) While in the case of the Provinces accession to the Federation was compulsory or automatic,—in the case of an Indian State it was voluntary and depended upon the option of the Ruler of the State. (b) While in the case of the Provinces, the authority of die Federation over the Provinces (executive as well as legislative) extended over the whole of the federal sphere chalked out by the Act,—in the case of the Indian States, the authority of die Federation could be limited by the Instrument of Accession and all residuary powers belonged to the State. It is needless to elaborate the details of the plan of 1935, for, as has been stated earlier, the accession of the Indian States to the proposed Federation never came true, and this Part of that Act was finally abandoned in 1939, when World War II broke out.

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

Proposal of the Cabinet Mission.

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

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

Lapse of Paramountcy under the Indian Independence Act.

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

'7. (1) As from the appointed day—

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

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

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

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

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

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

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

(iil) The third form of integration was the consolidation of groups of States into new viable units, known as Union of States. The first Union formed was the Saurashtra Union consolidating the Kathiawar States and many other States (February 15, 1948), and the last one was the Union of Travancore-Cochin, formed on July 1, 1949. As many as 275 States were illus integrated into 5 Unions—Madhya Bharat, Patiala and East Punjab States Union, Rajasthan, Saurashtra and Travancore-Cochin. *These were included in the States in Part B* of the First Schedule. The other 3 States included in Part B were—Hyderabad, Jammu and Kashmir and Mysore. The cases of Hyderabad and Jammu and Kashmir were peculiar. Jammu and Kahsmir acceded to India on October 2b, 1947, and so it was included as a Slate in Part B, but the Government of India agreed to take the accession subject to confirmation by the people of the State, and a Constituent Assembly subsequendy confirmed it, in November, 1956. Hyderabad did not formally accede to India, but the Nizam issued a Proclamation recognising the necessity of entering into a constitutional relationship widi the Union of India and accepting die Consdtution of India subject to radficadon by the Constituent Assembly of dial State, and die Constituent Assembly of dial State ratified this. As a result, Hyderabad was included as a State in fart B of the First Schedule of the Constitution.

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

But the story relating to the States in Part B is not yet complete. At the time of dieir accession to the Dominion of India in 1947, die Slates had acceded only on diree subjects, *viz.*, Defence, Foreign Allairs and Communications. With the formation of die Unions and under die influence of political events, the Rulers found it beneficial to have a closer connection with the Union of India and all the Rajpramukhs of the Unions as well as the Maharaja of Mysore, signed revised Instruments of Accession by which all these States acceded to die Dominion of India in respect of *all* matters included in the Union and Concurrent Legislative Lists, except only those relating to taxation. Thus, the States in Part B were brought at par with die States in Part A, subject only to the differences embodied in Art. 238 and the supervisory powers of the Centre for the transitional period of 10 years \[*Art.* 3711. Special provisions were made only for Kashmir [*Art.* 370] in view of its special position and problems. That article makes special provisions for the partial application of the Constitution of India to that State, with the concurrence of the Government of that State.

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

The process of integration culminated in the Constitution (7th Amendment) Act, 1956, which abolished Fail B States as a class and included *all the States in Part A and R in one list.*[1] The special provisions in the Constitution relating to Part B States were, consequently, omitted. The Indian States thus lost their identity and became part of one uniform political organisation embodied in the Constitution of India.[2]

Standardisation of States.

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

Before closing this Chapter, however, it should be pointed out that since the observations in the case of *Golak Nath*[4] culminating with *Keshavananda*[5] the Supreme Court had been urging that there are certain 'basic' features of the Constitution, which were immune from the power of amendment conferred by Art. 368, which, according to the Court, was subject to 'implied' limitations. On the other hand, the Indira Government had been attempting to thwart this doctrine by successive amendments of Art. 368, starting with the 24th Amendment, 1971, and ending with 42nd Amendment Act, 1976, so as to obviate any such conclusion by the Supreme Court.[26] The Court has, however, adhered to its view notwithstanding any of these amendments.[27] The present Chapter does not enter into that controversy, which will be dealt with in Chap. 10 (Procedure for Amendment), *post.* [See that Chapter as to the list of basic feature].

Outstanding and 'basic' features of the Constitution.

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

REFERENCES

1. VII **C.A.D.**, pp 35-38.
2. Vil C A D.. 2, 242; XI C.A.D., 613, 616.
3. The Constitution of the United States, with all its amendments up to dale, consists of not more than 7.000 words.
4. C A D . Vol. XI. pp. 839-40.
5. Of course, some of these provisions have been eliminated by the Constitution (7th Amendment) Act. 1956, which abolished die distinction between different classes of States
6. DK. RAJENDRA PRASAD, C.A.D , Vol. X, p. 891.
7. Die onginal title of this Act was the 'Untouchability (Offences) Act, 1955'. It has been extensively widened and made more rigorous, and renamed as the 'Protection of Civil Rights Act, 1955', by Act 106 of 1976.
8. WlIEARE, *Modem Constitutions*, p. 143.
9. C.A.D. dated 811-194«, pp. 322 23.
10. JENNINGS, *Some Characteristics of the Indian Constitution*, 1953, pp 2, 6, 25-26.

11. Die major changes made by Ihe 42nd Amendment Act have been elaborately and critically surveyed in the Author's *Constitution Amendment Acts*, pp. 117-34, which should be read along with this book.
12. C.A.D., Vol. VII, p. 293.
13. *C.C Kanungo* v. *State of Orissa*, (1995) 5 S.C.C. 96 (paras 17 and 18) : A.I.R. 1995 S.C. 1655; *L Chandra Kumar* v. *Union of India*, (1997) 3 S.C.C. 261 (paras 62 and 76) : A.I.R. 1997 S.C. 1125 and *State of A.P.* v. *K. Mohantal*, (1998) 5 S.C.C. 468 (para 9).
14. *Maneka Gandhi* v. *Union of India*, AIR 1978 S.C. 597.
15. *Minerva Mills* v. *Union of India*, AIR 1980 S.C. 1789 (paras 21-26).
16. Report of the First General Elections in India (1951-52), Vol. 1.
17. *Vide* the Constitution (79th Amendment) Act, 1999.
18. Prime Minister Nehru in the Lok Sabha, on 28-3-1957.
19. IV C.A.D., 578 (Sardar Patel).
20. VII C.A.D., 984 (Munshi).
21. *Ram Jauiaya v. State of Punjab*, (1955) 2 S.C.R. 225; *Shamser Singh* v. *State of Punjab*, AIR 1974 S.C. 2192.
22. As will be more fully explained in a later Chapter, the number of the States,—all of one category,—is 28 at die end of 2000. Besides, there are 7 Umon Territories.
23. It should be mentioned, in this context, that the last vestiges of the pnncely order in India have been done away with by the repeal of Arts. 291 and 362, and the insertion of Art 363A, by the Constitution (26th Amendment) Act, 1971 (w.e.f. 28-12-1971), which abolished the Privy Purse granted to the Rulers of the erstwhile Indian States and certain other personal privileges accorded to diem under the Constitution—as a result of which the heads of these pre-Independence Indian States have now been brought down to a level of equality with other citizens of India.
24. *Golak Math* v. *Stale of Punjab*, AIR 1967 S.C. 1643.
25. *Keshavananda* v. *Stale of Kerala*, AIR 1973 S.C. 1461.
26. Tlie Janata Government's efforts to enshrine the 'basic features theory' in the Constitution itself, by requiring a *referendum* to amend four 'basic features', failed owing to Congress opposition to the relevant amendments of Art 368 of the Constitution, as proposed by the 45th Amendment Bill, 1978. The four basic features mentioned in that Bill were—(i) Secular and democratic character of the Constitution; (ii) Fundamental Rights under Part ID, (iii) Free and fair elections to the Legislatures; (iv) Independence of the Judiciary.
27. *Minerva Mills* v. *Union of India*, AIR 1980 S.C. 1789 (paras 21-26, 28, 91, 93-94); *Sampal* v. *Union of India*, AIR 1987 S.C. 386; *Union of India* v. *Raghubtr*, AIR 1989 S.C. 1933 (para 7).

CHAPTER 5

NATURE OF THE FEDERAL SYSTEM

India, a Union of States.

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

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

The word 'Union', of course, does not indicate any particular type of federation, inasmuch as it is used also in the Preamble *0t* the Constitution of the United States—the model of federation; in the Preamble of the British North America Act (which, according to Lord **HALDANE,** did not create a true federation at all); in the Preamble to the Union of South Africa Act, 1909, which patentiy set up a unitary Constitution; and even in the Constitution of the 1/.S.S.R. (1977), which formally acknowledges a right of secession *Art.* 72) to each Republic, *ie.*, unit of the Union.[3]

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

Different types of tionsra in the modem World.

The difficulty of any treatment of federalism is that there is no agreed definition of a federal State. The other difficulty is that it is lu bitual with scholars on the subject to start with die model of the *United States,* die oldest (1787) of all federal Constitutions in the world, and to exclude any system that does not conform to that model from the nomenclature of 'federation'. But numerous countries in the world have, since 1787, adopted Consdtutions having federal features and, if the strict historical standard of die United States be applied to all these later Constitutions, few will stand the test of federalism save perhaps Switzerland and Australia Nothing is, however, gained by excluding so many recent Constitutions from the federal class, for, according to the traditional classification followed by political scientists, Constitutions are either unitary or federal. If, therefore, a Constitution partakes of some features of both types, the only alternative is to analyse those features and to ascertain

whether it is *basically* unitary or federal, although it may have subsidiary variations. A liberal attitude towards the question of federalism is, therefore, inevitable particularly in view of the fact that recent experiments in the world of Constitution-making are departing more and more from tire 'pure' type of either unitary or a federal system. The Author's views on this subject, expressed in the previous Editions of this book as well as in the *Commentary on the Constitution of India*,' now find support from the categorical assertion of a research worker[5] on the subject of federalism (who happens to be an American himself), that the question whether a State is federal or unitary is one of degrees and the answer will depend upon "how many federal features it possesses". Another American scholar[6] has, in the same strain, observed that federation is more a 'functional' than an 'institutional' concept and that any theory which asserts that there are certain inflexible characteristics without which a political system cannot be federal ignores the fact "that institutions are not die same things in different social and cultural environments".

Indian Constitution basically Federal, with unitary features.

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

Essential features of a Federal polity.

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

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

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

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

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

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

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

The Supreme Court has observed that Indian Constitution is basically federal in form and is marked by the traditional characteristics of a federal system, namely, supremacy of the Constitution, division of power between tfie Union and die States and existence of an independent judiciary.[11]

Not much pains need to be taken to demonstrate that the political system introduced by *our* Constitution possesses all the aforesaid essentials of a federal polity. Thus, the Constitution is the supreme organic law of *our* land, and both the Union and die State Governments as well as their respective organs derive dieir authority from die Constitution, and it is not competent for the States to secede from the Union. There is a division of legislative and administrative powers between the Union and the Stale Governments and the Supreme Court stands at the head of ourjudiciary to jealously guard this distribution of powers and to invalidate any action which violates the limitations imposed by the Constitution. This jurisdiction of the Supreme Court may be resorted to not only by a person[9] who has been affected by a Union or State law which, according to him, has violated the constitutional distribution of powers but also by the Union and the States themselves by bringing a direct action against each other, before the Original Jurisdiction of the Supreme Court under Art. 131.10 It is because of these basic federal features that our Supreme Court has described the Constitution as 'federal'.[11]

Peculiar features of Indian Federalism.

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

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

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

tendency, it even goes further than the Canadian precedent. The federalism in India is not a matter of administrative convenience, but one of principle.[1a]

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

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

Federation as envisaged by the Government of India Act, 1935.

By the Act of 1935, the British Parliament set up a federal system in the same manner as it had done in the case of *Canada*, *viz.*, "by creating autonomous units and combining them into a federation by one and the same Act". All powers hitherto exercised in India were resumed by the Crown and redistributed between the Federation and the Provinces by a direct grant. Under this system, the Provinces derived their authority directly from the Crown and exercised legislative and executive powers, broadly free from Central control, within a defined sphere. Nevertheless, the Centre retained control through 'the Governor's special responsibilities' and his obligation to exercise his individual judgment and discretion in certain matters, and the power of the Centre to give direction to the Provinces.[15]

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

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

Not the result of a compact.

It is well worth remembering this peculiarity of the origin of the federal system in India. Neither before nor under the Act of 1935, die Provinces were in any sense 'sovereign' States like die States of the American Union. The Consdtudon, too, has been framed by the 'people of India' assembled in the Constituent Assembly, and the Union of India cannot be said to be the result of any *compact* or agreement between autonomous States.[2] So far as

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

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

The credit of the makers of the Constitution, dierefore, lies not so much in bringing the Indian States under the federal system but in placing them, as much as possible, on the same footing as the other units of the federation, under the same Constitution. In short, the survivors of the old Indian States (States in Part BUj of the First Schedule) were, with minor exceptions, placed under the same political system as the old Provinces (States in Part A[16]). The integration of the units of the two categories has eventually been completed by eliminating the separate entities of States in Part A and States in Part B and replacing them by one category of States, by the Constitution (7th Amendment) Act, 1956.[17]

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

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

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

No State excepting Kashmir, can draw its own Constitution.

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

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

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

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

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

It comprises two propositions—

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

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

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

No right to secede.

(b) But just the contrary of the second proposition has been embodied in *our* Constitution. Under *our* Constitution, it is possible for the Union Parliament to reorganise the States or to alter their boundaries, by a simple majority in the ordinary process of legislation [*Art.* 4(2)]. The Constitution does not require that the *consent* of the Legislature of the States is necessary for enabling Parliament to make such laws; only the President has to 'ascertain' the views of the Legislature of the affected States to recommend a Bill for this purpose to Parliament. Even this obligation is not mandatory insofar as the President is competent to fix a time-limit within which a State must express its views, if at all [Proviso to *Art.* 3, as amended]. In the Indian federation, thus, the States are not "indestructible" units as in the *U.S.A.* The ease with which the federal organisation may be reshaped by an ordinary legislation by the Union Parliament has been demonstrated by the enactment of the States Reorganisation Act, 195b, which reduced the number of States from 27 to 14 within a period of six years from tire commencement of the Constitution. The same process of disintegration of existing States, effected by unilateral legislation by Parliament, has led to the formation, subsequendy, of several new States—Gujarat, Nagaland, Haryana, Karnataka, Meghalaya, Himachal Pradesh, Manipur, Sikkim, Tripura, Mizoram, Arunachal Pradesh, Goa, Chhattisgarh, Uttarakhand, Jharkand.

But consent of a State is not required for altering its boundaries by Parliament.

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

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

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

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

No equality of Stale representation.

Status of Sikkim.

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

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

This innovation was, however, shortlived and its legitimacy has lost all practical interest since all that was done by the 35th Amendment Aqt, 1974, has been undone by the 3(ith Amendment Act, 1975, by which Sikkim has been admitted into the Union of India, *as a full·fledged State* under the First Schedule with effect from 26th April, 1975 (see under Chap. 6, *post*). The original federal scheme of the Indian Constitution, comprising States and the Union Territories, has thus been left unimpaired.

Of course, certain special provisions have been laid down in the new Art. 371F, as regards Sikkim, to meet the special circumstances of that State. Article 371C makes certain special provisions relating to the State of Mizoram, while Arts. 371H and 3711 insert special provisions for Arunachal Pradesh and Goa.

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

No double citizenship.

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

No division of public services.

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

(iii) In the *U.S.A.*, there is a bifurcation of the Judiciary as between the Federal and State Governments. Cases arising out of the federal Constitution and federal laws are tried by the federal Courts, while State Courts deal with cases arising out of the State Constitution and State laws. But in *India*, the same system of Courts, headed by the Supreme Court, will administer both the Union and State laws as they are applicable to the cases coming up for adjudication.

No dual system of Courts.

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

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

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

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

(a) By endowing the Union with as much exclusive powers of legislation as has been found necessary in other countries to meet the ever-growing national exigencies, and, over and above that, by enabling the Union Legislature to take up some subject of State competence, if required in the national interest'. Thus, even apart from emergencies, the Union Parliament may assume legislative power (though temporarily) over any subject included in the State List[1] if the Council of States (Second Chamber of Parliament) resolves, by a two-thirds vote, that such legislation is necessary in the 'national interest' [*Art.* 249]. There is, of course, a federal element in this provision inasmuch as such expansion of the power of the Union into the State sphere is possible only with the consent of the Council of States where the States are represented. But, in actual practice, it will mean an additional weapon in the hands of the Union *vis-a-vis* the States so long as the same party has a solid majority in both the Houses of the Union Parliament.

Union control in normal times.

Strong central bias.

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

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

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

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

A critique of the Federal System.

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

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

hi his later work in Modem Constitutions[24] he puts it, genetically, thus—

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

Prof. Alexandrowicz[24] has taken great pains to combat the view that the Indian federation is 'quasi-federation'. He seems to agree with this Author,[25] when he says that "India is a case *sui generis*". This is in accord with the Author's observation that—

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

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

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

Strictly speaking, any deviation from the American model of pure federation would make a system quasi-federal, and, if so, the Canadian system, too, can hardly escape being branded as quasi-federal. The difference between the *Canadian* and the *Indian* system lies in the degree and extent of the unitary emphasis. The real test of the federal character of a political structure is, as Prof. Wheare has himself observed[22]—

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

The working of federalism in India.

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

Some scholars in India[28] have urged that the unitary bias of *our* Constitution has been accentuated, in its actual working, by two factors so much so that very little is left of federalism. These two factors are—(a) the overwhelming financial power of the Union and the utter dependence of die States upon Union grants for discharging dieir functions; (b) the comprehensive sweep of the Union Planning Commission, set up under the concurrent power over planning. The criticism may be justified in point of degree, but not in principle, for two reasons—

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

(ii) Even in a country like the United States, such factors have, in practice, strengthened the nadonal Government to a degree which could not nave been dreamt of by the fathers of die Constitution. Curiously enough, the same complaint, as in India, has been raised in the United States. Thus, of the centralising power of federal grants, an American writer[29] has observed—

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

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

An American scholar explains the concept of 'co-operative federalism' in these words[30]—

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

Hence, the system of federal co-operation existing under the Indian Constitution, through allocation by the Union of the taxes collected, or direct grants or allocation of plan funds do not necessarily militate against die concept of federalism and that is why Granville Austin[31] prefers to call Indian federalism as 'co-operative federalism' which "produces a strong central . . . government, yet it does not necessarily fresult in weak provincial governments that are largely administrative agenciqs for central policies."

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

(i) There is a normal division of powers under which the Stales enjoy autonomy within their own spheres, with the power to raise revenue;

(ii) The need Tor national integrity and a strong Union government, which the saner section of the people still consider necessary after 59 years of working of the Constitution.

Indian federalism as judicially interpreted.

The interplay of die foregoing two forces has been acknowledged even by the Supreme Court in interpreting various provisions of the Constitution, *e.g.*, in explaining the significance of Art. 3013* thus—

> "The evolution of a federal structure or a quasi federal structure necessarily involved, in the context of the conditions then prevailing, a distribution of powers and a basic part of our Constitution relates to that distribution with the three legislative lists in the Seventh Schedule. The Constitution itself says by Art. 1 dial India is a Union of States and in interpreting the Consutution one must keep in the view *the essential structure* of a federal or quasi-federal Constituuon, namely, that *the units of the Union have also certain powers as has the Union itself* . .
>
> In evolving an intewated policy on this subject our Constitution-makers seem to have kept in mind three main considerations . . first, in the larger interest of India diere must be free (low of trade, commerce and intercourse, both intcr-State and intra-State; second, *the regional interests must not be ignored altogether*, and third, there must be a power of intervention by the Union in case of crisis tij deal widi particular problems that may arise in any part of India . . . Therefore, In interpreting the relevant articles in Part Xifl we must have regard to die *general scheme* of the Constitution of India with special reference to Part 111, Part XU . . . and their inter-relation to Part X1U in *the context of a federal or quasi federal Constitution* in which the Stales have certain powers including the power to raise revenues for their purposes by taxation."

At the same time, there is no denying the fact that the States have occasionally smarted[31] against 'Central dominion' over the States in their exclusive sphere, even in normal times, through the Planning Commission (which itself was not recognised by the Constitution like the Finance Commission, the Public Service Commission or the like). But this is not because the Constitution is not federal in structure[34] or that its provisions envisage unitary control; the defect is *political*, namely, that it is the same Party which dominates both die Union and State Governments and that,

naturally, complaints of discrimination or interference with State autonomy are more common in those States which happen to be, for the time being, under the rule of a Party different from that of the Union Government. The remedy, however, lies through the ballot box. It is through political forces, again, that the Union Government may be prevented from so exercising its constitutional powers as to assume an 'unhealthy paternalism'[15]; but that is beyond the ken of the present work. The remedy for a too frequent use of the power to impose President's rule in a State, under Art. 356, is also political.[36]

Survival of Federation in India.

The strong Central bias has, however, been a boon to keep India together when we find the separatist forces of communalism, linguism and scranible for power, playing havoc notwithstanding all the devices of Central control, even after five decades of the working of the Constitution. It also shows that the States are not really functioning as agents of the Union Government[7] or under the directions of the latter, for then, events like those in Assam (over the language problem) or territorial dispute between Karnataka and Maharashtra could not have taken place at all.

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

(a) The most conclusive evidence of the survival of the federal system in Inaia is the co-existence of the Governments of the parties in die States different from that of the Centre. Of course, the reference of die Kerala Education Bill by the President for the advisory opinion of the Supreme Court instead of giving his assent to the Bill in the usual course, has been criticised in Kerala as an undue interference with die constitutional rights of the State, but thanks to the wisdom and impartiality of the Supreme Court, the opinion delivered by the Court[35] was prompted by a purely legalistic oudook free from any political consideration so diat the federal system may reasonably be expected to remain unimpaired notwithstanding changes in the party situation so long as the Supreme Court discharges its duties as a guardian of die Constitution.

(b) Thai federalism is not dead in India is also evidenced by the fact that new regions are constandy demanding Statehood and that already the Union had to yield to such demand in the cases of Meghalaya, Nagaland, Manipur, Tripura, Mizoram, Arunachal Pradesh, Goa, Chhattisgarh,[37] Uttaranchal[38] and Jharkhand.[39]

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

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

Sarkaria Commission.

It is doubtful, however, whether the agitation for larger constitutional powers in respect of finance will be set at rest by such *ad hoc* palliatives. It is interesting to note that the suggestion, in a previous edition of this book, that the remedy perhaps lay in setting up a Commission for the revision of the Constitution, so that the question of finance may be taken up along with the responsibilities of the Union and the States, on a more comprehensive perspective, has borne fruit in die appointment, in March, 1983, of a one-man Commission, headed by an ex-Supreme Court Judge, **SARKARIA, J.**, empowered to recommend changes[41] in the Centre-State relations in view of the various developments which have taken place since the commencement of the Constitution. The Commission submitted its Report in 1988. The Supreme Court referred to the report in *S.R. Bommai* (see also under 'Inter-State Council', *post*).

The proper assessment of the federal scheme introduced by *our* Constitution is that it introduces a system which is to *normally* work as a federal system but there are provisions for converting it into a unitary or quasi-federal system under specified exceptional circumstances.[42] But the excepdons cannot be held to have overshadowed the basic and normal structure.[43] The exceptions are, no doubt, unique and numerous; but in cases where the exceptions are not attracted, federal provisions are to be applied without being influenced by the existence of the exceptions. Thus, it will not be possible either for the Union or a State to assume powers which are assigned by the Constitution to the other Government, unless such assumption is sanctioned by some provisions of the Constitution itself. Nor would such usurpation or encroachment be valid by consent of the other party, for the Constitution itself provides the cases in which this is permissible by consent (*e.g., Arts.* 252, 258(1), 258A); hence, apart from these exceptional cases, the Constitution would not permit any of the units of the federation to subvert the federal structure set up by the Constitution, even by consent. Nor would this be possible by delegation of powers by one Legislature in favour of another.

Conclusion.

In fine, it may be reiterated that the Constitution of India is *neither purely federal nor purely unitary but is a combination of both. It is a Union or composite State of a novel type.*** It enshrines the principle that "in spite of federalism, the national interest ought to be paramount".[44]

REFERENCES

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

1. Author's *Commentary on the Constitution of India,* 7th (Silver Jubilee) Ed., Vol. A, pp. 33 *et seq.*
5. Prof. W.T. WAGNER, *Federal States and their Judiciary* (Moulton and Co., 1969), p. 25.
6. IJVTMGSTONE, *Federation and Constitutional Change,* 1956, pp. 6-7.
7. Tills view of the Author has been affirmed by the 9Judge Bench Supreme Court decision tn *S.R. Bommai* v. *Union of India, AIR* 1994 S.C. 1918 (para 211).
8. *Ganga Ram Moolchandani* v. *State of Rajasthan,* AIR 2001 SC 2616.
9. Cf. *Gujarat University* v. *Sn Krishna, AIR* 1963 S.C. 703 *{715 IS); Waverly Mills* v. *Rayman & Ca, AIR* 1963 S.C. 90 *{95).*
10. Cf. *State of West Bengal* v. *Union of India, AIR* 1963 S.C. 1241.
11. Cf. *Atiabari Tea Co.* v. *State of Assam,* (1961) 1 S.C.R. 809 *{860); Automobile Transport v. State of Rajasthan,* AfR 1962 S.C. 1406 *{ 1416);* Ref. under *Art. 143, AIR* 1965 S.C. 745 (para 39).
12. *S.R. Bommai* v. *Union of India, AIR* 1994 S.C. 1918; affirming by and large, the views of the author at pp. 35-55 of C7, Vol. A.
13. *Prof. Yashpal* v. *State of Chhattisgarh,* AIR 2005 SC 2026.
14. *Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha,* (2007) 3 SCC 184.
15. Though the federal system as envisaged by the Government of India Act, 1935, could not fully come into being owing to the failure of the Indian States to join it, the provisions relating to the Central Government and the Provinces were given effect to as stated earlier (see under 'Federation and Provincial Autonomy', *ante*).
16. *Vide* Table HI, col. (A).
17. *Texas* v. *White,* (1869) 7 Wall. 700.
18. A contrary instance is to be found in the Constitution of the *U.S.S.R.* which expressly provides that "each Union Republic shall *retain* the right freely to secede from the U.S.S.R." [Art. 72 of the Constitution of 1977; see Author's *Select Constitutions of the World,* 1984 Ed., p. 188).
19. Author's *Constitutional Law of India* (6di Ed., 1991, Prentice-Hall of India, p. 46).
20. Each of the 50 States of U.S.A. has two representatives in the Senate.
21. There are three legislative lists in the Seventh Schedule; 99 items in the Union List, 61 items in the State list and 52 items in the Concurrent List (see Table XIX, *post*).
22. K.C. WHEARE *Federal Government,* 1951, p. 28. He relaxes this view in the 4th Ed. (1963), pp. 26, 77.
23. WHEARE, *Modem Constitutions,* 2nd Ed. (1966), p. 21.
24. C H. ALEXANDROWICZ, *Constitutional Developments in India,* 1957, pp. 157-70.
25. *Vide* Author's *Commentary on the Constitution of India,* 7th Ed., Vol. A, p. 55.
26. APPLEBY, *Public Administration in India* (1953), p. 51.
27. JENNINGS, *Some Characteristics of the Indian Constitution,* p. 1.
28. E.g. SANTHANAM, *Union State Relations in India,* 1960, pp. vii; 51, 59, 63. At p. 70, the learned Audtor observes—

"India has pracUcally functioned as a Unitary State though the Union and the Slates have *tried* to function formally and legally as a Federation."

29. GRIFFITH, *The Impasse of Democracy* 1939, p. 196, quoted in GODSHALL, *Government in the United States,* p. 114.
30. Cf. BIRCH. *Federalism,* pp. 305-06.
31. GRANVILLE AUSTIN, *The Indian Constitution* (1966), pp. 187 *et seq.*
32. *Automobile Transport* v. *State of Rajasthan, AIR* 1962 S.C. 1406 *{141516).* In *Keshavananda* v. *Union of India, AIR* 1973 S.C. 1461, some of the judges (paras 302, 599, 1681) considered federalism to be one of the 'basic features' of *our* Constitution A nine-judge Supreme Court Bench has in *S.R. Bommai* v. *Union of India, AIR* 1994 S.C. 1918 laid down that the Consdtudon is federal and some of the Judges characterised federalism as its basic feature.
33. *Vide* Report of die Centre-State Relations Committee (Rajamannar Committee) (Madras, 1971, pp. 7-9).
34. It is interesting to note that even die Rajamannar Committee characterises the system under the Constitution of India as 'federal' (para 5, p. 16, *ibid.*), but suggests amendment of some of its features which have a unitary trend (para 6, p. 16).

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

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

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

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

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

CHAPTER 11

THE UNION EXECUTIVE

1. The President and the Vice-President.

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

Election of President

The President of India is elected[1] by indirect election, that is, by an electoral college, in accordance with the system of proportional representation by means of the single transferable vote.[2]

The electoral college[1] shall consist of—

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

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

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

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

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

Qualifications for election as President

(a) be a citizen of India;

(b) have completed the age of thirty-five years;

(c) be qualified for election as a member of the House of the People; and

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

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

Term of office of President. The President's term of office is five years from the date on which he enters upon his office; but he is eligible for re-election[6] [*Arts.* 56-57].

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

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

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

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

But the charge cannot be preferred by a House unless—

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

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

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

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

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

Emoiuments and allowances of President.

The President shall be entided without payment of rent to die use of his official residence and shall be also enUded to such emoluments, allowances and privileges as may be determined by Parliament by law (and until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule of the Constitution).[1] By passing the President's Emoluments and Pension (Amendment) Act, 1998, Parliament has raised die emoluments to Rs. *50,000/-* per mensem. The emoluments and allowances of the President shall not be diminished during his term of office [*Art.* 59(3)).

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

Vacancy in the Office of President.

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

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

(ii) By his death.

(iii) By his resignadon.

(iv) On his removal by impeachment.

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

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

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

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

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

Election of Vice-President

The election[1] of the Vice-President, like that of the President, shall be indirect and in accordance with the system of proportional representation by means of the single transferable vote. But his election shall be different from that of the President inasmuch as the State Legislatures shall have no part in it. The Vice-President shall be elected by an electoral college consisting of the members of both Houses Parliament[7] [*Art.* 66(1)].

Qualifications for Vice-President.

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

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

Whether a Member of Legislature may become President or Vice-President.

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

Term of Office of Vice-President.

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

Though there is no specific provision (corresponding to Art. 57) making a Vice-President eligible for re-election, the *Explanation* to Art. 6b suggests that a sitting Vice-President is eligible for re-election and Dr. S. Radhakrishnan was, in fact, elected for a second term in 1957.

Functions of the Vice-President.

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

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

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

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

Emoluments.

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

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

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

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

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

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

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

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

2. Powers and duties of the President.

Nature of the powers of the President.

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

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

> "It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away, subject, of course, to the provisions of the Constitutions or of any law...
>
> The executive function comprises both the determination of the policy as well as carrying it into execution, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact, the carrying on or supervision of the general administration of the State."[9]

Constitutional limitations on President's powers.

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

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

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

The 42nd Amendment.

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

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

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

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

The 44th Amendment.

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

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

The net result after the 44th Amendment, therefore, is that except in certain marginal cases referred to by the Supreme Court[10] (to be noticed presently), the President shall have no power to act in his discretion in any case. He *must* act according to the advice given to him by the Council of Ministers, headed by the Prime Minister, so that refusal to act according to such advice will render him liable to impeachment for violation of the Constitution. This is subject to the President's power to send the advice received from the Council of Ministers, in a particular case, back to them for their reconsideration; and if the Council of Ministers adhere to their previous advice, the President shall have no option but to act in accordance with such advice. The power to return for reconsideration can be exercised only once, on the same matter.

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

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

(a) *Administrative power, ie.,* the execution of the laws and the administration of the departments of government.

(b) *Military power, ie.,* the command of the armed forces and the conduct of war.

(c) *Legislative power, ie.,* the summoning, prorogation, etc., of the legislature, initiation of and assent to legislation and the like.

(d) *Judicial power, i.e.,* granting of pardons, reprieves, etc., to persons convicted of crime.

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

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

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

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

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

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

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

No 'Spoil System'. It is to be noted dial besides the power of appointing the above sPecified functionaries, the Indian Constitutions does not vest in the President any absolute power to appoint *inferior officers* of the Union as is to be found in the *American* Constitution. The Indian Constitution thus seeks to avoid the

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

II. *The Military Power.* The military powers of the Indian President shall be lesser than diose of eidier the American President or of the English Crown.

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

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

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

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

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

(a) Summoning, Prorogation, Dissolution.

Like tlie English Crown *our* President shall have the power to summon or prorogue die Houses of Parliament and to dissolve the lower House.[11] He shall also have the power to summon a joint sitting of both Houses of Parliament in case of a deadlock between diem [*Arts.* 85, 108].

(b) The Opening Address.

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

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

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

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

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

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

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

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

(d) Nominating Members to the Houses.

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

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

(e) laying Reports, etc., before Parliament.

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

(f) factious sanction to legislation.

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

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

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

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

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

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

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

(g) Assent to legislation and Veto.

Veto over Union Legislation.

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

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

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

(iii) He may, *in the case of Rills othrjj/ian Money Bills,* return the Bill for reconsideration of the Houses, \ftith or without a message suggesting amendments. A Money Bill cannot be returned for reconsideration.

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

Nature of the Veto power.

Generally speaking, the object of arming the Executive widi this power is to prevent hasty and ill-considered action by the Legislature. mit the necessity for such powet is removed or at least lessened when tile Executive itself initiates and conducts "legisfifflolWor is responsible lor TegTslaHOftTas under tKe PaiIiaineuiarY or Cabinet system of Government! As a matter o! fact, though a theoredcal power of vetcTis possessed by the Crown in *England,* it has never been used since die time of Queen Anne.

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

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

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

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

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

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

(E) *Pocket Veto.* There is a fourth type of veto called die 'pocket veto' which is possessed by the *American* President. When a Bill is presented to him, he may neidier sign the Bill nor return the Bill for reconsideration widiin 10 days. He may simply let the Bill lie on his desk until the ten-day limit has expired. But, if in the meantime, Congress has adjourned [*i.e.*, before expiry of the period of ten-days from presentation of the Bill to the President), the Bill fails to become a law. Jhis method is known as die 'pocket veto', for, by simply withholding a Bill presented to the PresTHent during the last few days of the session of Congress die President can prevent the Bill to Uecomc law.

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

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

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

(iii) Another point to be noted is that the Constitution does not prescribe any time-limit within which the President is to declare his assent or refusal, or to return the Bill. Article 111 simply says that if the President wants to return the Bill, he shall do it 'as soon as possible' after the Bill is presented to him. By reason of this absence of a time-limit, it seems that tire Indian President would be able to exercise something like a 'pocket veto', by simply keeping the Bill on his desk for an indefinite time,[1] particularly, if he finds that the Ministry is shaky and is likely to collapse shortly.

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

Reservation of a State Bill for the assent of the President is a discretionary power[13] of the Governor of a State. In the case of any Bill presented to the Governor for his assent after it has been passed by both Houses of die Legislature of the State, the Governor may, instead of giving his assent or withholding his assent, reserve the Bill for the consideration of the President.

In one case reservation is compulsory, *viz.*, where the law in question would derogate from the powers of the High Court under die Constitution \[*Art.* 200, 2nd Proviso].

In the case of a Money Bill so reserved, the President may either declare his assent or withhold his assent. But in the case of a Bill, other than

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

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

Disallowance of State legislation.

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

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

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

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

(h) The Ordinance-making Power.

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

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

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

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

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

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

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

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

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

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

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

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

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

Possibility of abuse of the Ordinance making power.

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

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

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

The 38th Amendment.

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

The 44th Amendment.

It is true that when the Ordinance-making power is to be exercised on die advice of a Ministry which commands a majority in Parliament, it makes little difference that the Government seeks to legislate by an Ordinance instead of by an Act of Parliament, because the majority would have ensured a safe passage of the measure through Parliament even if a Bill had been brought instead of promulgating the Ordinance. But the argument would not hold good where the Government of the day did *not* carry an overwhelming majority. Article 123 would, in such a situation, enable die Government to enact a measure for a temporary period by an Ordinance, not being sure of support in Parliament if a Bill had been brought. Even where the Government has a clear majority in Parliament, a debate in Parliament which takes place where a Bill is introduced not only gives a nadon-wide publicity to the 'pros and coas' of the measure but also gives to the two Houses a chance of making amendments to rectify unwelcome features or defects as may be revealed by the debate. All this would be absent where the Government elects to legislate by Ordinance. It is evident, therefore, that there is a likelihood of the power being abused even though it is exercisable on the advice of the Council of Ministers,[1U] because the Ministers themselves might be tempted to resort to an Ordinance simply to avoid a debate in Parliament[16] and may advise the President to prorogue Parliament at any time, having this specific object in mind.

Parliamentary safeguard.

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

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

In *Kehar Singh's* case*[1] the following principles were laid down (a) The convict seeking relief has no right to insist on oral hearing, (b) No guideline need be laid down by the Supreme Court for the exercise of the power, (cl The power is to be exercised by the President on the advice of the Central Government, (d) The President can go into the merits of the case and take a different view, (e) Exercise of the power by the President is not open to

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

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

Parc . . power of PrexTdcn/ and Governor compared.

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

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

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

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

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

(iii) The *only* authority for pardoning a sentence of death Is die Resident.

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

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

Rule-making Power.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The Council of Ministers

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

A body recognised by the Constitution.

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

Minister[illegible] of Ministers.

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

[illegible]ncil of Ministers and Cabinet.

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

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

Salaries of Ministers.

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

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

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

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

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

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

Ministerial Responsibility to Parliament.

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

Collective Responsibility.

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

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

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

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

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

Individual Responsibility to the President.

(B) The principle of individual responsibility to tlte head of die State is embodied in Art. 75(2)—

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

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

(C) But, as stated earlier, the English principle of legal responsibility has not been adopted in *our* Constitution. In *England*, the Crown cannot do any public act without the counter-signature of a Minister who is liable in a Court of law if the act done violates the law of the land and gives rise to a cause of action in favour of an individual. But *our* Constitution does not expressly say that the President can act only *through* Ministers and leaves it to the President to make rules as to how his orders, etc., are to be authenticated; and on the other hand, provides that the Courts will not be entitled to enquire what advice was tendered by the Ministers to the executive head. Hence, if an act of the President is, according to the rules made by him, authenticated by a Secretary to tire Government of India, there is no scope for a Minister being legally responsible for the act even though it may have been done on the advice of the Minister.

Ref Donsibilit y.

Special position of the Prime Minister in the council of Ministers.

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

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

(a) The Prime Minister is the leader of the party in majority in the popular House of the legislature.

(b) He has the power of selecting the other Ministers and also advising the Crown to dismiss any of them individually, or require any of them to resign. Virtually, thus, the other Ministers hold office at the pleasure of the Prime Minister.

(c) The allocation of business amongst the Ministers is a function of the Prime Minister. He can also transfer a Minister from one Department to another.

(d) He is the chairman of the Cabinet, summons its meetings and presides over them.

(e) While the resignation of other Ministers merely creates a vacancy, the resignation or death of the Prime Minister dissolves the Cabinet.

(f) The Prime Minister stands between the Crown and the Cabinet. Though individual Ministers have the right of access to the Crown on matters concerning their own departments, any important communication, particularly relating to policy, can be made only through the Prime Minister.

(g) He is in charge of co-ordinating the policy of the Government and has, accordingly, a right of supervision over all the departments.

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

"It shall be the duty of the Prime Minister—

(a) to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation;

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

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

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

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

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

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

Being a Republic, *India* could not have a hereditary monarch. So, an elected President is at die head of the executive power in India. The tenure of his office is for a fixed term of years as of the American President. He also resembles the American President inasmuch as he is removable by die Legislature under the special quasi-judicial procedure of impeachment. But, on die other hand, he is more akin to the English King than the American President insofar as he has no 'functions' to discharge, on his own authority. *All* the powers and 'funedons' [*Art.* 74(1)] that are vested by the Consdtudon in die President are to be exercised on the advice of die Ministers responsible to the Legislature as in England. While die so-called Cabinet of the American President is responsible to himself and not to Congress, die Council of Ministers of *our* President shall be responsible to Parliament.

Indian President compared with American President and English Crown.

The reason why the framers of the Constitution discarded the *American* model after providing for die election of the I*resident of the Republic by an electoral college formed of members of the Legislatures not only of the Union but also of the States, has thus been explained[27]: hi combining stability with responsibility, they gave more importance to the latter and preferred the system of 'daily assessment of responsibility' to the theory of 'periodic assessment' upon which the American system is founded. Under the American system, conflicts are bound to occur between the Execudve, Legislature and Judiciary; and on the other hand, according to many modem American waiters the absence of co-ordination between the legislature and the Executive is a source of weakness of the American political system. What is wanted in India on her attaining freedom from one and a half century of bondage is a *smooth* form of Government which would be conducive to the manifold development of the country without the least friction,—and to this end, the Cabinet or Parliamentary system of Govern-

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

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

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

Status of the President of India.

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

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

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

When the question went up to the Supreme Court, the Court took the latter view, relying on the interpretation of the words 'aid and advise' in the Dominion Constitution Acts, in these words, in *Ram Jawayu's* case[11]:

> "Under article 53(1) of our Constitution the executive power of the Union is vested in the President. But under article 74 there is to be a Council of Ministers with tile Prime Minister at the head to aid and advise the President in the exercise of his functions. *The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet.* The same provisions obtain in regard to the Government of States; the Governor, occupies the position of the head of the executive in the State but it is virtually the Council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have die same system of parliamentary executive as in England and the Council of Ministers consisting, as it docs, of the members of the legislature is like the British Cabinet, 'a hyphen whlchjoins, a buckle which fastens , the legislative part of the State to the executive part.'"[10]

The foregoing interpretation[11] was reiterated by the Supreme court in several later decisions,[10] so that, so far as judicial interpretation was concerned, it was settled that the Indian President is a constitutional head of die Executive like die British Crown. In *Rao v. IndiraM* a unanimous Court observed—

> "The Constituent Assembly did not choose the Presidential system of Government."

The *2ntl Amendment.

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

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

Though the Janata Government sought to wipe off the radical changes infused into the Constitution by Mrs. Gandhi's Government, it has *not* disturbed the foregoing amendment made in Art 74(1). The only change made by the 44th Amendment Act over the 1976-provision is to add a Proviso which gives the President one chance to refer the advice given to the Council of Ministers back for a reconsideration; but if the Council of Ministers reaffirm their previous advice, the President shall be *bound* to act according to that advice. Article 74(1), as it stands after the 44th Amendment, 1978, stands thus:

44th Amendments!

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

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

The position to-day, therefore, is that the debate whether the President of India has any power to act contrary to the advice given by the Council of Ministers has become *meaningless.* By amending the Constitution in 1976 and 1978, a seal has been put to the controversy which had been mooted by President Rajendra Prasad at the Indian Law Institute[28] dial there was no provision in the Indian Constitution to make it obligatory upon the President to act only in accordance with the advice tendered by the Council of Ministers, on each occasion and under all circumstances.

But, at the same time, the amendment so made has erred on the other side, by making it an *absolute* proposition, without keeping any reserve for situations when the advice of a Prime Minister is not available (*e.g.,* in the case of death);[19] or the advice tendered by the Prime Minister is improper, according to British conventions, *e.g.,* when Prime Minister defeated in Parliament successively asks for its dissolution.[11]

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

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

5. The Attorney-General for India.

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

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

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

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

6. The Comptroller and Auditor-General of India.

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

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

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

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

Conditions of service.

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

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

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

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

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

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

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

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

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

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

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

(v) He shall be disqualified for any further Government 'office' after retirement[32] so dial lie shall have no inducement to please die Executive of die Union or of any State.

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

On the above points, thus, the posidon of the Comptroller and Auditor-General shall be similar to drat of a Judge of the Supreme Court.[13]

Duties and powers.

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

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

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

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

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

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

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

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

Compared with his British counterpart.

As has been just stated, the duty of preparing the accounts was a relic of the Government of India Act, 193.5, which has no precedent in the British system, under which the accounts are prepared, not by the Comptroller and Auditor-General, but by the respective Departments. The legislation to separate the function of preparation of accounts from the Comptroller and Auditor-General of India, thus, brings tills office at par with that of his British counterpart in one respect.

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

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

The functions of tire Comptroller and Auditor-General have recendy been die subject of controversy, in regard to two quesdons:

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

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

(b) Another question is whether the audit of the Comptroller and Auditor-General should be extended to industrial and commercial undertakings carried on by the Government dirough private limited companies, who are governed by the Articles of their Association, or to statutory public corporations or undertakings which are governed by statute. It was righdy contended by a former Comptroller and Auditor-General[35] that inasmuch as money is issued out of the Consolidated Fund of India to invest in these companies and corporations on behalf of the Government, the audit of such companies must necessarily be a right and responsibility of the Comptroller and Auditor-General, while, at present, the Comptroller and Auditor-General can have no such power unless the Articles of Association of such companies or the governing statutes provide for audit by the Comptroller and Auditor-General. The result is diat the report of the Comptroller and

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

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

REFERENCES

1. For the results of the elections so far held, see Table X.
2. As to how the system of Proportional Representation would work, see Author's *Commentary on the Constitution of India*, 7th Ed., Vol. Ey'1, pp. 84-90.
3. At die Presidential election held in 2007, die electoral college consisted of 4896 members **of** which the break-up was 543 Lok Sabha + 233 Rajya Sabha + 4120 State Assembly **members.**
4. C.A.D. , Vol. IV, pp. 734, 846.
5. In his speech in Parliament in 1961, Prime Minister Nehru observed that we should adopt a *convention* that no person shall be a President for more than two terms, and that no amendment of the ConstituUon was necessary to enjoin this.
6. Rs. 10,000 originally, raised to Rs. 20,000 in 1990 and to Rs. 50,000 in 1998 (w.e.f. 1-1-1996).
7. The original ConstituUon provided that the Vice-President would be elected by the two Houses of Parliament, assembled at *a joint meeting.* This cumbrous procedure of a joint meeting of die two Houses for this purpose has been done away with, by amending Art. 66(1) by the Constitution (11th Amendment) Act, 1961. As amended, the members ol both Houses remain the voters, but they may vote by secret ballot, without assembling at a joint meeting.
8. Article 65(3) is to be read with para 4 of Part A of the 2nd Schedule,—the result of which is that until Parliament legislates on this subject (no such law has so far been passed by Parliament till 1987), a Vice-President, while acting as or discharging the functions of die President, shall receive the same emoluments and privileges and allowances as die President gets under Art. 59(3). Since 1996, that emolument is a sum of Rs. 50,(XX)/- per mensem.

   When the Vice-President does not act as President, his only function is that of the Chairman, Council of States, under Art. 97. By passing the Salaries and Allowances of Officers ol Parliament (Amendment) Act, 1998, the salary of the Chairman of the Council of States has been raised to Rs. 40,000/- per mensem, *vide* Act 26 of 1998 (w.e.f. 1-1-1996). He is entided to daily allowance as admissible to Members of Parliament.
9. *Hum Jawaya* v. *State of Punjab,* (1955) 2 S.C.R. 225 *[238-39).*
10. *Shamser Singh* v. *State of Punjab,* AIR 1974 S.C. 2192; *Rao* v. *Indira,* AIR 1971 S.C. 1002 *(1005), Sanjeevi* v *Slate of Madras,* AIR 1970 S.C. 1102 *(1106).*
11. OlCEY. *Law of the Constitution,* 10th Ed., p. 468.
12. The Council of States, also called the uppet House, is *not* subject to dissolution, but is a permanent body. One-durd of its members retire every two years [*Art.* 83(1)].
13. The only instance of the exercise of the President's veto power over a Bill passed by Parliament, so far, has been in regard to the PEPSU Appropriation Bill. It was passed by Parliament under Art. 357, by virtue of the Proclamation under Art. 356. The

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

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

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

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

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

15. *Iloechst Pharmaceuticals* v. *Slate of Bihar*, AIR 1953 S.C. 1019 (para 89).

16. *Lakhinarayan* v. *Prov. of Bihar*, AIR 1950 F.C. 59; *State of Punjab* v. *Satya Pal*, AIR 1969 S.C. 903 *(912)*.

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

17. *Wadhawa* v. *State of Bihar*, AIR 1987 S.C. 579.

18. *Cooper* v. *Union of India*, AIR 1970 S.C. 564 *(5B8, 644)*; *A K. Boy* v. *Union of India*, AIR 1982 S.C. 710.

19. *Samsher* v. *State of Punjab*, AIR 1974 S.C. 2192 (para 30).

20. *Kehar Singh* v. *Union of India*, AIK 1989 S.C. 653.

21. *Maru Ram* v. *Union of India*, AIR 1980 S.C. 2147, paras 62, 72(a) (Const. Bench] **followed** in *S.R. Bommai* v. *Union of India*, (1994) 3 S.C.C. 1 (para 73)—9Judge Bench.

22. As regards die Union Territories of (a) Goa, Daman & Diu, (b) Pondicherry, (c) Mizoram and (d) Amnachal Pradesh, die President's power to make regulations has ceased, since the setting up of a legislature in each of these Territories, after the amendments of Art. 240(1), in 1962, 1971 and 1975. So far as Mizoram, Arunachal Pradesh and Goa are concerned, they have been promoted to die category of States, in 1986417.

2.1. The words 'armed rebellion' have been substituted for 'internal disturbance', by the 44th Amendment Act, 1978.

24. For further study of the Cabinet system in India, see Author's *Commentary on the Constitution of India* (7th Ed.), Vol. E/[, pp, 195-293.

2.5. In July, 1989, their number was (a) Members of the Cabinet—18; (b) Ministers of State—40 (total 58). In July 1990 (a) the Members of the Cabinet—18; (b) Ministers of State—18; and (c) Deputy Ministers—5. In March 1992 the total was 57. In September, 1995—(a) Memoers of the Cabinet—20, and (b) Ministers of State—50. In December 1996 there were 20 cabinet ministers and 19 ministers of State. In November 2000 there were 29 Cabinet Ministers, 44 State Ministers and no Deputy Ministers. On 22.5.2008, there were 32 Cabinet Ministers, 8 Ministers of State (independent charge) and 40 other Ministers of State.

2ti. *Common Cause, A Registered Society* v. *Union of India,* (1999) 6 S.C.C. 667 (para 3) : A.I.R. 1999 S.C. 2979.

27. C.A.D., Vol. IV, pp. 580, 734; Vol. VII, pp. 32, 974, 984.

28. The suggesUon of President Dr. Kajendra Prasad, in his speech at the Indian Law Institute, that the position of the Indian President was not identical with that of the British Crown, must be read with his quoted observation In the Constituent Assembly [X C.A.D. S[88] which, as a contemporaneous statement, has a great value in assessing the intent of the makers of the Constitution, and the meaning behind Art. 74(1), as it stood up to 1976.

29. K.M. Munshi, die President under the Indian Constitution (1963), p. vtii.

JO. *Sanjeein* v. *State of Madras,* AIR 1970 S.C.. 1102 (7/(76); *Rao* v. *Indira,* AIR 1971 S.C. 1002 (*1005*]; *Shamser Singh* v. *State of Punjab,* AIR 1974 S.C. 2192.

31. B.VSU, *Commentary on the Constitution of India,* 5th Ed., Vol. II, p. 593, where it is stated—

"Constitutional writers agree that a dismissal of the Cabinet by the Crown, would now be an unconstitutional act, except in the abnormal case of a Cabinet refusing to resign or to appeal to the electorate upon a vote of no confidence in the Commons." See the instances given in *Shamser Singh's* case [AIR 1974 S.C. 2192 (para 153)).

32. There was a vehement public criticism that this prohibition in Art 148(4) was violated by tire appointment of a retired Comptroller and Auditor-General as die Chairman of the Finance Commission. According to judicial decisions, an 'office' is an employment which embraces the ideas of tenure, duration, emolument and duties. Now, the Finance Commission is an office created by Art. 280 of the Constitution itself, with a definite tenure, emoluments and duties as defined by the Finance Commission (Miscellaneous Provisions) Act, 1951, read with Art. 280 of die Constitution. Apparendy, therefore, the membership of the Finance Commission is an office under die Government of India, which comes within the purview of Art 148(4).

33. But, as Dr. Ambedkar pointed out in the Constituent Assembly (C.A.D., VIII, p. 407), in one respect the independence of the Comptroller and Auditor-General falls short of dial of the Chief Justice of India. Wnile the power of appointment of the staff of the Supreme Court lias been given to the Chief Justice of India [*Art.* 146(1)], the Comptroller and Auditor General has no power of appointment, and, consequendy, no power of disciplinary control with respect to his subordinates. In the case of the Comptroller and Auditor-General, these powers have been retained by die Government of India though it is obviously derogatory to the administrative efficiency of this highly responsible functionary.

34. AWI-EBY, A., *Re examination of India's Administrative System,* p. 28.

35. Narhari Rao's statement before the Public Accounts Committee, 1952.

CHAPTER 12

THE UNION LEGISLATURE

Functions of Parliament.

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

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

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

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

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

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

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

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

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

Constitution of Parliament.

The Parliament of India consists of the President and two Houses. The lower House is called the House of the People while the upper House is known as the Council of States[1] [*Art.* 79].

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

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

Composition of the Council of States.

The Council of States shall be composed of not more than 250 members, of whom (a) 12 shall be nominated by the President; and (b) the remainder (*ie.*, 238) shall be representatives of the States and the Union Territories elected by the method of indirect election[2] [*Art.* 80].

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

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

(c) *Representation of Union Territories.* The representatives of the Union Territories shall be chosen in such manner as Parliament may prescribe [*Art.* 80(5)]. Under this power Parliament has prescribed[2] that the repre-

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

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

Composition of the House of the People.

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

(a) Not more[3] than 5304 [*Art.* 81(1)(a)] representatives of the States;

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

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

(i) The representatives of the States shall be direedy elected by the people of the State on the basis of adult suffrage. Every citizen who is not less than 18 years of age and is not otherwise disqualified, *e.g.*, by reason of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entided to vote at such election [*Art.* 326].

There will be no reservation nf seals for any minority community other dian the Scheduled Castes and the Scheduled Tribes [*Arts.* 330, 341, 342].

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

(ujfihe members horn the Union Territories are to be chosen in such manner as Parliament may by law provide.

Under this power, Parliament has enacted[0] that representatives of all the Union Territories shall be chosen by direct election.

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

Territorial constituencies for election to the House of the People.

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

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

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

Proportional Representation for Council of States.

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

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

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

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

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

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

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

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

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

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

Duration of Houses of Parliament.

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

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

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

Sessions of Parliament.

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

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

proroUgTtR,nnt and dissolution.

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

T*

Within a session, there are a number of daily 'sittings' separated by adjournments, which postpone the further consideration of business for a specified time—hours, days or weeks.

The sitting of a House may be terminated by (a) dissolution, (b) prorogation, or (c) adjournment:

(i) As stated already, only the House of the People is subject to dissolution. *Dissolution* **mas Like place** in either of two ways—**fa)** By efflux of time, *ie.*, on the expiry of its term ol live years, *tn* the terms as extended during a Proclamation of Emergency. (***by*** By an exercise of the President's power under Art. 85(2).

(ii) While the powers of dissolution and prorogation are exercised by the President on the advice of his Council of Ministers, the power to adjourn the daily sittings of the House of the People and the Council of States belongs to the Speaker and the Chairman, respectively.

A *dissolution* brings the House of die People to an end (so that there must be a fresh election), while *prorogation* merely terminates a session. *Adjournment* does not put an end to the existence of a session of Parliament but merely postpones the further transaction of business for a specified time, hours, days or weeks.

(iii) A *dissolution* ends the very life of the existing House of the People so that *all matters* pending before the House lapse with the dissolution. If these matters have to be pursued, they must be re-introduced in the next £)ouse after fresh election. Such pending business includes not only notices, motions, etc., but Bills, including Bills which originated in the Council and were sent to the House, as well as Bills originating in the House and transmitted to the Council which were pending in the Council on the date 0J dissolution. But a Bill pending in the Council which has not yet been passed by the House shall not lapse on dissolution. A dissolution would not, however, affect a joint sitting of the two Houses summoned by the President to resolve a disagreement between the Houses If the President has notified his intention to hold a joint sitting before the dissolution [*Art.* 108(5)].

Though in *England* prorogation also wipes all business pending at the date of prorogation, in *India*, all Bills pending in Parliament are expressly saved by Art. 107(3). hi the result, the only effect of a *prorogation* is that pending notices, motions and resolutions lapse, but Bills remain unaffected.

Adjournment has no such effect on pending business.

Qualifications for membership of Parliament

In order to be chosen a member of Parliament, a person (a) must be a citizen of India; (b) must be not less than 30 years of age in the case of the Council of States and not less than 25 years of age in the case of the House of the People.

Additional qualifications may be prescribed by Parliament by law [*Art.* 84). A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

Disqualifications for membership.

(a) if he holds any office of profit under the Government of India or the Government of any Slate (other than an office Exempted by Parliament by law) but not a Minister for the Union or for a State; or

(b) if He is of unsound mind and stands so declared by a competent Court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India or has voluntarily acquired citizenship of a foreign State or is under acknowledgment of allegiance or adherence to a foreign power;

(e) if he is so disqualified by or under any law made by Parliament [*Art.* 102].

It may be noted that sex is no disqualification for membership of Parliament and that in the Thirteenth General Election, as many as 32 women secured election to the House of the People.

If any question arises as to whether a member of either House of Parliament has become subject to any of the above disqualifications, ihe President's decision, in accordance with the opinion of tire Election Commission, shall be final [*Art.* 103].

A penalty of Rs. 500 per day may be imposed upon a person who sits or votes in either House of Parliament knowing that he is not qualified or tHafTiels disqualified for membership thereof *Art.* 101].

Vacation of seats by members.

A member of Parliament shall *vacate* his seat in the following cases *Art.* 101]: «

(i) *Dual membership.* (aj ifa person be chosen to membership of both Houses of Parliament he must vacate his seatirxjrne of the two Houses, as may be prescribed by Parliament by law. bTSimilarly, ifa person is elected to the Union Parliament anti a State Letnslature then hemtlSTTgSTgh his seat in the State Legislature; otherwise his seat in Parliament shall fall vacant at the expiration ol tKe periodspccilied in the rules inade by ffig~Preslden̲t.

(ii) *Disqualification.* If a person incurs any of the disqualifications mentioned in Art 102 *(e.g.,* becoming of unsound mind), his seat will thereupon become vacant immediately.

(iii) *Resignation.* A member may resign his seat by writing addressed to the Chairman of tire Council of States or the Speaker of the House of the People, as the case may be, and thereupon his seat shall be vacant.

(ivj *Absence without permission.* The House may declare a seat vacant if the member in question absents himself from all meetings of the House for a period of 60 days without permission of the House.

Under the Salaries, Allowances and Pension of Members of Parliament Act, 1954, as amended by Act 40 of 2006, a member of Parliament is entitled to a salary at the rate of Rs. 16,000 per mensem during the whole term of his office plus an allowance at the rate of Rs. 1000 for each day during any period of residence on duty at the place where

anrers CofaMcmben of Parliament.

Parliament or any Committee thereof is sitting or where any other business connected with his duties as Member of Parliament is transacted. Together with this, he is entitled to travelling allowance, free transit by railways, steamer and other facilities as prescribed by rules framed under the Act. He shall also be entided to a pension, since a 1976 amendment, on a graduated scale for each 5 year term as member of either House.

Officers of Parliament.

Each House of Parliament has its own presiding officer and secretarial staff.

Speaker.

There shall be a *Speaker* to preside over the House of the People. In general, his position is similar to that of the Speaker of the English House of Commons.

The House of die People will, as soon as may be after its first sitting, choose two members of the House to be, respectively, Speaker and Deputy Speaker {*4rt*. 93j. The Speaker or the Deputy Speaker will normally hold office during the life of the House, but his office may terminate earlier in arp< nf thp following ways (i) Hy his ceasing to Be a member oTThe House. *ffiTIy*, resignation in writing, addressed to the Deputy Speaker, and *vice versa*. (iiij By *removal* from office by a resolution, passed by a majority of all the then members of the House \|*Art*. 94]. Such a resolution shall not be moved unless at least LL days' notice has been given of die intention to move the resolution. While a resolution for his removal is under consideration, the Speaker shall not preside but he shall have the right to speak in, and to take part in the proceedings of, the House, and shall have a right of vote except in the case of equality of votes [*Art*. 96].

Powers of the Speaker.

At other meetings of the House the Speaker shall preside. The Speaker will not vote in the first instance, but shall have antT exercise a casting vote in the case oi equality of votes. The absence of vote in the lirsTinstance will make the position of the Speaker as impartial as in England, and the casting vote is given to him only to resolve a deadlock.

The Speaker will have the final power to maintain order within die House of die People and to interpret its Rules of Procedure. In the absence of a quorum, it will be the duty of die Speaker to adjourn the House or to suspend the meeting until there is a quorum.

The Speaker's conduct in regulating the procedure or maintaining order in the House will not be subject to the jurisdiction of any Court \|*Art*. 122].

Besides presiding over his own House, the Speaker possesses certain Y\lH powers nqt belonging tt the CljairiqapvC!f4ji&-£piffl ci lj f Slates

(a) The Speaker shall preside over a joint sitting of die two Houses of Parliament \|*Art*. 118(4)].

(b) When a Money Bill is transmitted from the Lower House to the Upper House, the Speaker shall endorse on the Bill his certificate diat it is a Money Bill [drtTl 10(4)]. Ihe decision of the Speaker as to whether a Bill is Money Bill is final and once the certificate is endorsed by the Speaker on a

Bill, the subsequent procedure in the passage of the Bill must be governed by the provisions relating to Money Bills.

Deputy Speaker.

While the office of Speaker is vacant or the Speaker is absent from a sitting of the House, the Deputy Speaker presides, except when a resolution for his *own* removal is under consideration.

Chairman.

While the House of the People has a Speaker elected by its members from among themselves, the Chairman of the Council of States (who presides over that House) performs that function *ex-officio*. It is the Vice-President of India who shall *ex-officio* be the Chairman of the Council of States and shall preside over that House and shall function as the Presiding Officer of that House so long as he does not officiate as the President of India during a casual vacancy in that office. When the Chairman acts as die President of India, the Office of the Chairman of the Council of States falls vacant and the duties of the office of the Chairman shall be performed by the Deputy Chairman. The Chairman may be removed from his office only if he is removed from the office of the Vice-President, the procedure for which has already been stated. Under the Salaries and Allowances ol Officers of Parliament Act, 1953, as amended, the salary of the Chairman is the same as that of die Speaker, *viz.*, Rs. 40,000 plus a sumptuary allowance of Ks. 1,000 per mensem, but when the Vice-President acts as the President he shall be enlided to the emoluments and allowances of the President *Art.* 65(3)] and during that period he shall cease to earn the salary of the Chairman of the Council of States. The funedons of the Chairman in the Council of States are similar to those »f tin» Speaker in the House of die People except tTTat tKe Speaker has certain special powers accordingly die Constitution, for instance, of certifvintr a Money Bill, or **Dresidin**x over a joint strong ol the two Houses, which have been already mentioned.

Privileges are certain rights belonging to each House of Parliament collectively and some others belonging to the members individually, without which it would be impossible for either House to maintain its independence of action or the dignity of its position.

Powers, Privileges and Immunities of Parliament and its Members.

Both the Houses of Parliament as well as of a State legislature have *snmhu pi&Ei-s* under *our* ConsUtudon.

Clauses (1)-(2) of .Arts. 105 and 194 of *our* ConsUtudon deal only with two matters, *viz.*, freedom of speech and right of publication.

As regard privileges relating to *other* matters, the position, as it stands alter die 44th Amendment, 1978, is as follows—The privileges of members of *our* Parliament were to be the same as those of members of the House of Commons (as diey existed at the commencement of the ConsUtudon), undl *our* Parliament itself takes up legislation relating to privileges in whole or in part. In other words, if Parliament enacts any provision relating to any particular privilege at any time, the English precedents wdl to that extent be superseded in its application to *our* Parliament. No such legislation having been made by *our* Parliament, the privileges were the same as in the House

of the Commons, subject to such exceptions as necessarily follow from the difference in the constitutional set-up in India. Reference to House of Commons was omitted in 1978.

In an earlier case,[10] the Supreme Court held that if there was any conflict between the existing privileges of Parliament and the fundamental rights of a citizen, the former shall prevail, for, the provisions in Arts. 105(3) and 194(3) of the Constitution, which confer upon the Houses of *our* Legislatures the same British privileges as those of the House of Commons, are independent provisions and are not to be construed as subject to Part III of the Constitution, guaranteeing the Fundamental Rights. For instance, if the House of a Legislature expunges a portion of its debates from its proceedings, or otherwise prohibits its publication, anybody who publishes such prohibited debate will be guilty of contempt of Parliament and punishable by the House and the Fundamental Right of freedom of expression [*Art.* 19(1)(a)] will be no defence. But in a later case,[11] the Supreme Court hits held that though the existing privileges would not be fettered by Art. 19(1)(a), they must be read subject to Arts. 20-22 and 32.

Privileges classified.

The privileges of each House may be divided into two groups—(a) those which are enjoyed by the members indivi-Jujjiy, and (b) those which belong to each House of Parliament, as a collective body.

(A) The privileges enjoyed by the members individually are (i) Freedom from arrest; (ii) Exemption from attendance as jurors and witnesses; (iii) Freedom of speech.

(i) *Freedom from Arrest.* Section 135A of the C.P. Code, *as amended* by Act 104 of 1976, exempts a member from arrest during the continuance of a meeting of the Chamber or Committee thereof of which he is a member or of a joint sitting of the Chambers or Committees, and during a period of 40 days before and after such meeting or sitting. This immunity is, however, confined to arrest in civil cases and does not extend to arrest in criminal case or under die law of Preventive Detention.

(ii) *Freedom of Attendance as Witness.* According to the English practice, a member cannot be summoned, without the leave of the House, to give evidence as a witness while Parliament is in session.

(iii) *Freedom of Speech.* As in England, there will be freedom of speech within the walls of each House in the sense of immunity of action for anything said therein. While an ordinary citizen's right of speech is subject to the restrictions specified in Art. 19(2), such as the law relating to defamation, a Member of Parliament cannot be made liable in any court of law in respect of anything said in Parliament or any Committee diereof. But this does not mean unrestricted licence to speak anything that a member may like, regardless of the dignity of the House. The freedom of speech is therefore 'subject to the rules' framed by the House under its powers to regulate its intermd procedure.

The Constitution itself imposes another limitation upon the freedom of speech in Parliament, namely, that no discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court

or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge [*Art.* 121].

(B) The privileges of the House *collectively* are—(i) The right to publish debates and proceedings and the right to restrain publication by others; (ii) The right to exclude others; (iii) The right to regulate the internal affairs of the House, and to decide matters arising within its walls; (iv) The right to publish Parliamentary misbehaviour; (v) The right to punish members and outsiders for breach of its privileges.

Thus, each House of Parliament shall have the power—

(i) To exclude strangers from the galleries at any time. Under the Rules of Procedure, the Speaker and the Chairman have the right to order the 'withdrawal of strangers from any part of the House'.

(ii) To regulate its internal affairs. Each House of Parliament has the right to control and regulate its proceedings and also to decide any matter arising within its walls, without interference from the Courts. What is said or done within die walls of Parliament cannot be inquired into in a Court of Law.

(iii) To punish members and outsiders for breach of its privileges. Each House can punish for contempt or breach of its privileges, and the punishment may take die form of admonition, reprimand or imprisonment. Thus, in the famous *Blitz case*, the Editor of the newspaper was called to the Bar of the House of the People and reprimanded for having published an article derogatory to the dignity of a member in his capacity as member of the House. In 1990, Sri K.K. Tewari, a former Minister was reprimanded by the Rajya Sabha. What constitutes breach of privileges or contempt of Parliament has been fairly setded by a number of precedents in England and India. Broadly speaking—

> "Any act or omission which obstructs or impedes either House of Parliament in the performance of its functions or which obstructs or impedes any member or officer of such House in the discharge of his duty or which has a tendency, direedy or indireedy, to produce such results as may be treated as a contempt, even diough there is no precedent of the offence."[12]

The different stages in the legislative procedure in Parliament relating to Bills *other than Money Bills* are as follows:

Legislative Procedure: I. *Ordinary Bills.*

1. *Introduction.* A Bill other than Money or financial Bills may be introduced in either House of Parliament [*Art.* 107(1)] and requires passage in both Houses before it can be presented for the President's assent. A Bill may be introduced either by a Minister or by a private Member. The difference in the two cases is that any Member other than a Minister desiring to introduce a Bill has to give notice of his intention and to ask for leave of the House to introduce which is, however, rarely opposed. If a Bill has been published in the official gazette before its introduction, no motion for leave to introduce the Bill is necessary. Unless published earlier, the Bill is published in the official gazette as soon as may be after it has been introduced.

2. *Motions after introduction.* After a Bill has been introduced or on some subsequent occasion, the Member in charge of the Bill may make one of the following motions in regards to the Bill, *viz.*—

(a) That it be taken into consideration.

(b) That it be referred to a Select Committee.

(c) That it be referred to a Joint Committee of the House with the concurrence of the other House.

(d) That it be circulated for the purpose of eliciting public opinion thereon.

On the day on which any of the aforesaid motions is made or on any subsequent date to which the discussion is postponed, the principles of the Bill and its general provisions may be discussed. Amendments to the Bill and clause by clause consideration of the provisions of the Bill take place when the motion that the Bill be taken into consideration is carried.

3. *Report by Select Committee.* It has already been stated that after introduction of the Bill the Member in charge or any other Member by way of an amendment may move that the Bill be referred to a Select Committee. When such a motion is carried, a Select Committee of the House considers the provisions of the Bill (but not the principles underlying the Bill which had, in fact, been accepted by the House when the Bill was referred to the Select Committee). After the Select Committee has considered the Bill, it submits its report to the House and after the report is received, a motion that the Bill as returned by the Select Committee be taken into consideration lies. When such a motion is carried, the clauses of the Bill are open to consideration and amendments are admissible.

4. *Passing of the Bill in the House where it was introduced.* When a motion that the Bill be taken into consideration has been carried and no amendment of the Bill has been made or after the amendments are over, the Member in charge may move that the Bill be passed. This stage may be compared to the third reading of a Bill in the House of Commons. After the motion that the Bill may be passed is carried,[13] the Bill is taken as passed so far as that House is concerned.

5. *Passage in the other House.* When a Bill is passed in one House, it is transmitted to the other House. When the Bill is received in the other House it undergoes all tire stages as in the originating House subsequent to its introduction. The House which receives die Bill from another House can, therefore, take either of the following courses:

(i) It may reject tire Bill altogether. In such a case the provisions of Art. 108(1)(a) as to joint sitting may be applied by the President.

(ii) It may pass the Bill with amendments. In this case, the Bill will be returned to the originating House. If the House which originated the Bill accepts the Bill as amended by the other House, it will be presented to the President for his assent [*Art.* 111]. If however the originating House does not agree to die amendments made by the other House and there is final

disagreement as to the amendments between die two Houses, the President may summon a joint sitting to resolve die deadlock [*Art.* 108(1)(b)].

(iii) It may take no action on die Bill, *i.e.*, keep it lying on its Table. In such a case if more than six months elapse from the date of die recepdon of the Bill, the Resident may summon a joint sitting [*Art.* 108(1)(c)].

6. *President's Assent.* When a Bill has been passed by bodi Houses of Parliament either singly or at a joint sitting as provided in **Art**. 108, the Bill is presented to the Resident for his assent If the Resident withholds his assent, diere is an end to the Bill. If the Resident gives his assent, the Bill becomes an Act from the date of his assent Instead of either refusing assent or giving assent, die Resident may return the Bill for reconsideration of die Houses with a message requesting them to reconsider iL If, however, the Houses pass the Bill again with or without amendments and the Bill is presented to the President for his assent after such reconsideration, the Resident shall have no power to widihold his assent from the Bill.

II. ***Money Bills.*** A Bill is deemed to be a 'Money Bill' if it contains only provisions dealing with all or any of the following matters:

(a) the imposidon, abolition, remission, alteradon or regulation of any tax; (b) die regulation of the borrowing of money by die Government; (c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such fund; (d) die appropriation of moneys out of the Consolidated Fund of India; fe) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure; (f) die receipt of money on account of the Consolidated Fund of hidia or die public account of India or the custody or issue of such money or die audit of the accounts of the Union or of a State; or (g) any matter incidental to any of the matters specified in sub-clauses (a) to (1) [*Art.* 110].

But a Bill shall not be deemed to be a Money Bill by reason only dial it provides for imposidon of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for seivices rendered, or by reason dial it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final. This means that the nature of a Bill which is certified by the Speaker as a Money Bill shall not be open to question either in a Court of law or in die eidier House or even by the President.

When a Bill is transmitted to the Council of States or is presented for the assent of the President, it shall bear the endorsement of the Speaker that it is a Money Bill. As pointed out earlier, this is one of the special powers of the Speaker.

rhe following is the procedure for the passing of Money Bills in Parliament:

A Money Bill shall not be introduced in the Council of States.

After a Money Bill has been passed by the House of the People, it shall be transmitted (with the Speaker's certificate that it is a Money Bill) to the Council of States for its recommendations. The Council of States cannot reject a Money Bill nor amend it by virtue of its own powers. It must, within a period of fourteen days from the date of receipt of the Bill, return the Bill to the House of the People which may thereupon either accept or reject all or any of the recommendations of the Council of States.

If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Council of States and accepted by the House of the People.

If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it is passed by the House of the People without any of the amendments recommended by the Council of States.

If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People [*Art.* 109].

Money Bill and Financial Bill.

Generally speaking, a Financial Bill may be said to be any Bill which relates to revenue or expenditure. But it is in a technical sense that the expression is used in the Constitution.

I. The definition of a 'Money Bill' is given in Art. 110 and no Bill is a Money Bill unless it satisfies the requirements of this Article. It lays down that a Bill is a Money Bill if it contains *only* provisions dealing with all or any of the six matters specified in dial Article or matters incidental thereto. These six specified matters have already been stated [See under 'Money Bilk', *ante*].

On the question whether any Bill comes under any of die sub-clauses of Art. 110, the decision of the Speaker of the House of the People is final and his certificate that a particular Bill is a Money Bill is not liable to be quesdoned. Shortly speaking, thus, only those Financial Bilk are Money Bilk which bear the certificate of the Speaker as such.

II. Financial Bills which do not receive the Speaker's certificate are of two classes. These are dealt widi in Art. 117 of the Constitution—

(i) To the first class belongs a Bill which contains any of the matters specified in Art. 110 but does not consist *solely* of those matters, for example, a Bill which contains a taxation clause, but does not deal solely with taxation [*Art.* 117(1)].

(ii) Any ordinary Bill which contains provisions involving expenditure from the Consolidated Fund k a Financial Bill of the second class [*Art.* 117(3)].

HI. The incidents of these three different classes of Bills are as follows—

(i) A Money Bill cannot be introduced in the Council of States nor can it be introduced except on the recommendation of the President. Again, the Council of States has no power to amend or reject such a Bill. It can only recommend amendments to the House of the People.

(ii) A Financial Bill of the first class, that is to say, a Bill which contains any of the matters specified in Art. 110 but does not exclusively deal with such matters, has two features in common with a Money Bill, *viz.*, that it cannot be introduced in the Council of States and also cannot be introduced except on the recommendation of the President. But not being a Money Bill, the Council of States has the same power to reject or amend such a Financial Bill as it has in the case of non-Financial Bills subject to the limitation that an amendment other than for reduction or abolition of a tax cannot be moved in either House without the President's recommendation. Such a Bill has to be passed in the Council of States through three readings like ordinary Bills and in case of a final disagreement between the two Houses over such a Bill, the provision for joint sitting in Art. 108 is attracted. Only Money Bills are excepted out of the provisions relating to a joint sitting [*Art.* 108(1)].

(iii) A Bill which merely involves expenditure and does not include any of the matters specified in Art. 110, is an ordinary Bill and may be initiated in either House and the Council of Slates has full power to reject or amend it. But it has only *one special incident* in view of the financial provision (*i.e.*, provision involving expenditure contained in it) *viz.*, that it must not be *passed* in either House unless the President has recommended the consideration of the Bill. In other words, the President's recommendation is not a condition precedent to its introduction as in the case of Money Bills and other Financial Bills of the first class but in this case it will be sufficient if the President's recommendation is received before the Bill is *considered.* Without such recommendation, however, the consideration of such Bill cannot take place [*Art.* 117(3)].

But for this special incident, a Bill which merely involves expenditure is governed by the same procedure as an ordinary Bill, including the provision of a joint sitting in case of disagreement between the two Houses.

Provision for removing deadlock between two Houses of Parliament.

It has already been made clear that any Bill, *other than a Money Bill,* can become a law only if it is agreed to by both the Houses, with or without amendments. A machinery should then exist, for resolving a deadlock between the two Houses if they fail to agree either as to the provisions of the Bill as introduced or as to the amendments that may have been proposed by either House.

(A) As regards Money Bills, die question does *not* arise, since the House of the People has the final power of passing it, the other House having the power only to make recommendation for the acceptance of the House of the People. In case of disagreement over a Money Bill, thus, the

lower House has the plenary power to override the wishes of the upper Houses, *i.e.*, the Council of States.

(B) As regards all other Bills (including 'Financial Bills'), the machinery provided by the Constitution for resolving a disagreement between the two Houses of Parliament is a joint sitting of the two Houses [*Art.* 108].

The President may notify to the Houses his intention to summon them for a joint sitting in case of disagreement arising between the two Houses in any of the following ways:—

If, after a Bill has been passed by one House and transmitted to the other Houses—

(a) the Bill is rejected by the other House; or

(b) the Houses have finally disagreed as to the amendments to be made in the Bill; or

(c) more than six months have elapsed from the date of the reception of the Bill by the other House without the Bill being passed by it

No such notification can be made by the President if the Bill has already lapsed by the dissolution of the House of the People; but once the President has notified his intention to hold a joint sitting, the subsequent dissolution of the House of the People cannot stand in the way of the joint sitting being held.

Procedure at Joint sitting.

As stated earlier, the Speaker will preside at the joint sitting; in the absence of the Speaker, such person as is determined by the Rules of Procedure made by the President (in consultation with the Chairman of Council of States and the Speaker of the House of People) shall preside [*Art.* 118(4)]. The Rules, so made, provide that

> "During the absence of the Speaker from any joint sitting, the Deputy Speaker of the House or, if he is also absent, the Deputy Chairman of the Council or, if he is also absent, such other person as may be determined by the Members present at the sitting, shall preside."

There are restrictions on the amendments to the Bill which may be proposed at the joint sitting:

(a) If, after its passage in one House, the Bill has been rejected or has not been returned by the other House, only such amendments may be proposed at the joint sitting as are made necessary by the delay in the passage of the Bill.

(b) If the deadlock has been caused because the other House has proposed amendments to which the originating House cannot agree, then (i) amendments necessary owing to the delay in the passage of the Bill, as well as (ii) other amendments as are relevant to the matters with respect to which the House have disagreed, may be proposed at the joint sitting.

If at the joint sitting of the two Houses the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the *total number* of members of both Houses *present and voting*, it shall be deemed for the purposes of this Constitution to have been passed by both the Houses.

Joint sitting cannot be resorted to, for passing Constitution Amending Bill.

It is to be carefully noted that the procedure for joint sitting, as prescribed by Art. 108, is confined to Bills for **ordinary** legislation and does *not* extend to a Bill for amendment of the Constitution, which is governed by Art. 368(2), and must, therefore, be passed by each House, separately, by the special majority laid down. That is why the 43rd Amendment Bill, introduced in the *Lok Sabha* in April 1977, could not overcome the apprehended resistance in the *Rajya Sabha,* by resorting to a joint sitting, as carelessly suggested in some newspaper articles. The 45th Amendment Bill suffered mutilation in the *Rajya Sabha,* for the same reason.

Financial **legislation** in Parliament.

At the beginning of every financial year, the President shall, in respect of the financial **year**, cause to be laid before both the Houses of Parliament a statement of the estimated receipts and expenditure of the Government of India for that year. TTiis is known as the "annual financial statement" *(i.e.,* the 'Budget') *[Art.* 112). It also states the ways and means of meeting the estimated expenditure.

The Annual Financial Statement

In conformity with the usual Parliamentary practice in the United Kingdom, the Budget not only gives the estimates for the ensuing year but offers an opportunity to the Government to review and explain its financial and economic policy and programme to the Legislature to discuss and criticise it. The Annual Financial Statement in *our* Parliament thus contains, apart from the estimates of expenditure, the ways and means to raise the revenue,—

(a) An analysis of the actual receipts and expenditures of the closing year, and the causes of any surplus or deficit in relation to such year;

(b) An explanation of the economic policy and spending programme of tire Government in the coming year and the prospects of revenue.

Votable and non-votable Expenditure.

The estimates of expenditure embodied in the annual financial statement shall show separately—(a) the sums required to meet expenditure described by this Constitution as expenditure *charged upon* the Consolidated Fund of India; and (b) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of India.

(a) So much of the estimates as relates to expenditure charged upon the Consolidated Fund of India shall *not* be submitted to the vote of Parliament but each House is competent to discuss any of these estimates.

(b) So much of die estimates as relates to other expenditure shall be submitted in the form of demands for grants to the House of the People, and that House shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein. No demand for a grant shall however be made except on the recommendation of the President *[Art.* 113).

In practice, the presentation of the Annual Financial Statement is followed by a general discussion in both the Houses of Parliament. The estimates of expenditure, *other than those which are charged*, are then placed before the House of the People in the form of 'demands for grants'.

No money can be withdrawn from the Consolidated Fund except under an Appropriation Act, passed as follows:

As soon as may be after the demands for grants have been voted by the House of the People, there shall be introduced a Bill to provide for the appropriation out of die Consolidated Fund of India of all moneys required to meet—

(a) the grants so made by the House of the People; and (b) the expenditure charged on the Consolidated Fund of India.

This Bill will then be passed as a Money Bill, subject to this condition dial no amendment shall be proposed to any such Bill in either House of Parliament which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund [*Art.* 114].

The following expenditure shall be expenditure charged on the Consolidated Fund of India [*Art.* 112(3)]—

Expenditure charged on the Consolidated Fund of India.

(a) the emoluments and allowances of the President and other expenditure relating to his office; (b) the salaries and allowances of the Chairman and the Deputy Chairman of the Council of States and the Speaker and the Deputy Speaker of the House of the People; (c) debt charges for which the Government of India is liable; (d) (i) the salaries, allowances and pensions payable to or in respect of Judges of the Supreme Court; (ii) the pensions payable to or in respect of Judges of the Federal Court; (iii) the pensions payable to or in respect of Judges of any High Court; (e) the salary, allowances and pension payable to or in respect of the Comptroller and Auditor-General of India; (f) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal; (g) any other expenditure declared by this Constitution or by Parliament by law to be so charged.

Relative part played by the two Houses in financial legislation.

As has been already explained, financial business in Parliament starts with the presenting of the Annual Financial Statement. This Statement is caused to be laid by the President before *both* Houses of Parliament [*Art.* 112]. After the Annual Financial Statement is presented, there is a general discussion of the Statement as a whole in *either* House. This discussion is to be a general discussion relating to a policy involving a review and criticism of the administration and a valuation of the grievances of the people. No motion is moved at this stage nor is the Budget submitted to vote.

(b) The Council of States shall have *no further business* with the Annual Financial Statement beyond the above general discussion. The voting of the grants, that is, of the demands for expenditure made by Government, is an

exclusive business of the House of the People. In the House of the People, after the general discussion is over, estimates are submitted in the form of demands for grants on the particular heads and it is followed by a vote of the House on each of the heads *Art.* 113(2)].

(c) After the grants are voted by the House of the People, the grants so made by the House of the People as well as the expenditure charged on the Consolidated Fund of India are incorporated in an Appropriation Bill. It provides the legal authority for the withdrawal of these sums from the Consolidated Fund of India.

Similarly, the taxing proposals of the budget are embodied in another Bill known as the Annual Finance Bill.

Both these Bills being Money Bills, the special procedure relating to Money Bills shall have to be followed. It means that they can be introduced *only in the House of the People* and after each Bill is passed by the House of the People, it shall be transmitted to the Council of States which shall have the power only to make *recommendations* to the House of the People within a period of 14 days but no power of amending or rejecting the Bill. It shall lie at the hands of the House of the People to accept or reject the recommendations of the Council of States. In either case, the Bill will be deemed to be passed as soon as the House of the People decides whether it would accept or reject any of the recommendations of the Council of States and thereafter the Bill becomes law on receiving the assent of the President.

The financial system consists of two branches—revenue and expenditure.

Parliament's control over the Financial System.

(i) As regards revenue, it is expressly laid down by our Constitution *Art.* 265] that no tax shall be levied or collected excepI by authority of law. The result is that the Executive cannot impose any tax without legislative sanction. If any tax is imposed without legislative authority, the aggrieved person can obtain his relief from the courts of law.

(ii) As regards expenditure, the pivot of parliamentary control is the Consolidated Fund of India. This is the reservoir into which all the revenues received by the Government of India as well as all loans raised by it are paid and the Constitution provides that no moneys shall be appropriated out of the Consolidated Fund of India except in accordance with law [*Art.* 266(3)]. This law means an Act of Appropriation passed in conformity with Art. 114. Whether the expenditure is charged on tire Consolidated Fund of India or it is an amount voted by the House of the People, no money can be issued out of the Consolidated Fund of India unless the expenditure is authorised by an Appropriation Act *Art.* 114(3)]. It follows, accordingly, that tire executive cannot spend the public revenue without parliamentary sanction.

While an Act of Appropriation ensures that there cannot be any expenditure of the public revenues without the sanction of Parliament, Parliament's control over the expenditure cannot be complete unless it is able to ensure economy in the volume of expenditure. On this point, however, a reconciliation has to be made between two conflicting principles,

namely, the need for parliamentary control and the responsibility of the Government in power for the administration and its policies.

Committee on Estimates.

The Government has the sole initiative in formulating its policies and in presenting its demands for carrying out those policies. Parliament can hardly refuse such demands or make drastic cuts in such demands without reflecting on the policy and responsibility of the Government in power. Nor is it expedient to suggest economies in different items of the expenditure proposed by the Government when the demands are presented to the House for its vote, in view of the shortage of time at its disposal. The scrutiny of the expenditure proposed by the Government is, therefore, made by the House in the informal atmosphere of a Committee, known as the Committee on Estimates. After the Annual Financial Statement is presented before the House of the People, this Committee of the House, annually constituted, examines the estimates, in order to:

(a) report to the House what economies, improvements, in organisation, efficiency or administrative reform, consistent with the policy underlying the estimates, may be effected;

(b) suggest alternative policies in order to bring efficiency and economy in administration;

(c) examine whether the money is well laid out within the limits of the policy implied in the estimates;

(d) suggest the form in which estimates are to be presented to Parliament.

Though the report of the Estimates Committee is not debated in the House, the fact that it carries on its examination throughout the year and places its views before the members of the House as a whole exerts a salutary influence in checking Governmental extravagance in making demands in the coming year, and in moulding its policies without friction in the House.

The third factor to be considered is the system of parliamentary control to ensure that the expenditure sanctioned by Parliament has actually been spent in terms of the law of Parliament, that is, the Appropriation Act or Acts. The office of the Comptroller and Auditor-General is the fundamental agency which helps Parliament in this work. The Comptroller and Auditor-General is the guardian of the public purse and it is his function to see that not a paisa is spent without the authority of Parliament. It is the business of the Comptroller and Auditor-General to audit the accounts of the Union and to satisfy himself that the expenditure incurred has been sanctioned by Parliament and that it has taken place in conformity with the rules sanctioned by Parliament. The Comptroller and Auditor-General then submits his report of audit relating to the accounts of die Union to the President who has to lay it before each House of Parliament.

Committee on Public Accounts.

After tlie report of the Comptroller and Auditor-General is laid before the Parliament, it is examined by the Public Accounts Committee. Though this is a Committee of the House of the People (having 15 members from that House),

by an agreement between the two Houses, seven members of the Council of States are also associated with this Committee, in order to strengthen it. The Chairman of the Committee is generally a member of the Lok Sabha who is not a member of the ruling party.

In scrutinising the Appropriation Accounts of the Government of India and the report of the Comptroller and Auditor-General thereon it shall be the duty of the Committee on Public Accounts to satisfy itself—

(a) that the moneys shown in the accounts as having been disbursed were legally available for and applicable to die service or purpose to which they have applied or charged;

(b) that the expenditure conforms to the authority which governs it; and

(c) that every re-appropriation has been made in accordance with the provisions made in this behalf under rules framed by competent authority.

This Committee, in short, scrutinises the report of the Comptroller and Auditor-General in details and then submits its report to the House of the People so that the irregularities noticed by it may be discussed by Parliament and effective steps taken.

All moneys received by or on behalf of the Government of India will be credited to either of two funds—the Consolidated Fund of India, or the 'public account' of India. Tlius,

Consolidated Fund of India.

(a) Subject to the assignment of certain taxes to the States, all *revenues* received by the Government of India, all *loans* raised by the Government and all moneys received by that Government in *repayment of loans* shall form one consolidated fund to be called "the Consolidated Fund of India" [*Art.* 266(1)].

Public Account of India.

(b) All other public moneys received by or on behalf of the Government of India shall be credited to the Public Account of India [*Art.* 266(2)], *e.g.*, moneys received by an officer or Court in connection with affairs of the Union [*Art.* 284].

No money out of the Consolidated Fund of India (or of a State) shall be appropriated except in accordance with a law of Appropriation. The procedure for the passing of an Appropriation Act has been already noted.

Contingency Fund of India.

(c) Art. 267 of the Constitution empowers Parliament and the Legislature of a State to create a 'Contingency Fund' for India or for a State, as the case may be. The 'Contingency Fund' for India has been constituted by the Contingency Fund of India Act, 1950. The Fund will be at the disposal of the executive to enable advances to be made, from time to time, for the purpose of meeting *unforeseen expenditure*, pending authorisation of such expenditure by the Legislature by supplementary, additional or excess grants. The amount of the Fund is subject to be regulated by the appropriate Legislature.

The custody of the Consolidated Fund of India and the Contingency Fund of India, the payment of moneys into such Funds, withdrawal of moneys therefrom, custody of public moneys other than those credited to such Funds, their payment into the public accounts of India and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law by Parliament, and, until provision in that behalf is so made shall be regulated by rules made by die President *Art.* 2831.

Constitutional position of the Council of States as compared with the House of the People.

Though *our* Council of Stales does not occupy as important a place in the constitutional system as the American Senate, its position is not so inferior as that of the House of Lords as it stands to-day. *Barring the specific provisions with respect to which the lower House has special functions,* *&, with respect to money Bills (see *below),* die Constitution proceeds on a theory of equality of status of die two Houses.

This equality of status was explained by die Prime Minister Pandit Nehru himself,[14] in these words—

> "Under our Constitution Parliament consists of two Houses, each functioning in the allotted sphere laid down in the Constitution. We derive authority from that Constitution. Sometimes we refer back to the pracUce and conventions prevailing in die Houses of Parliament of the United Kingdom and even refer erroneously to an Upper House and a Lower House. 1 do not think that is correct. Nor is it helpful always to refer back to the procedure of the British Parliament which has grown up in the course of several hundred years and as a result of conflicts originally with the authority of the King and later between the Commons and the Lords. We have no such history behind us, though in making our Constitution we have profited by the experience of others
>
> Our guide must, therefore, be our own Constitution which has clearly specified die functions of the Council of States and the House of die People. To call either of these Houses an Upper House or a Lower House is not correct. Each House has full authority to regulate Its own procedure within the limits of the Constitution. Neither House by itself, constitutes Parliament. It is the two Houses together that are the Parliament of India ..That Constitution treats the two Houses equally, except in certain financial matters which are to be the sole purview of the House of the People. In regard to what these are, the Speaker is the final authority."

The Constitution also makes no distinction between the two Houses in the matter of selection of Ministers. In fact, during all these years, there have been several Cabinet Ministers from amongst the members of the Council of States, such as the Ministers for Home Affairs, Law, Railway and Transport, Production, Works, Housing and Supply, etc. But the responsibility of such member, as Minister, is to the House of the People [*Art.* 75(3)].

The exceptional provisions which impose limitations upon the powers of the Council of States, as compared with the House of the People are:

(1) A Money Bill shall not be introduced in the Council. Even a Bill having like financial provisions cannot be introduced in the Council.

(2) The Council has no power to reject or amend a Money Bill. The only power it has with respect to Money Bills is to suggest 'recommendations' which may or may not be accepted by the flouse of the People, and

the Bill shall be deemed to have been passed by both Houses of Parliament, without the concurrence of the Council, if the Council does not return the Bill within 14 days of its receipt or makes recommendations which are not accepted by the House.

(3) The Speaker of the House has got the sole and final power deciding whether a Bill is a Money Bill.

(4) Though the Council has the power to discuss, it has no power to vote money for the public expenditure and demands for grants are not submitted for the vote of the Council.

(5) The Council of Ministers is responsible to the House of the People and not to the Council [*Art.* 75(3)].

(6) Apart from this, tire Council suffers, by reason of its numerical minority, in case a joint session is summoned by the President to resolve a deadlock between the two Houses [*Art.* 108(4)].

On the other hand, the Council of States has certain special powers which the other House does not possess and this certainly adds to the prestige of die Council:

(a) Art 249 provides for temporary Union legislation with respect to a matter in the State List, if it is necessary in the national interest, but in this matter a special role has been assigned by the Constitution to the Council. Parliament can assume such legislative power with respect to a State subject only if the Council of States declares, by a resolution supported by not less dian two-diirds of its members present and voting, that it is necessary or expedient in die national interest that Parliament should make laws for the whole or any part of the territory of India with respect to diat matter while the resolution remains in force.

(b) Similarly, under Art. 312 of the Constitution, Parliament is empowered to make laws providing for the creation of one or more All-India Services common to the Union and die States, if the Council of Slates has declared by a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do.

In both the above matters, the Constitudon assigns a special position to die Council because of its federal character and of the fact that a resolution passed by two-thirds of its members would virtually signify the consent of the States.

Notwidistanding these special functions and the dieory of equality propounded by Pandit Nehru, it is not possible for the Council of States, by reason of its very composition, to attain a status of equality with the House of die People. Even though there is no provision in die Constitution, corresponding to Art. 169 relating to die upper Chamber in the States, for die abolition of die upper Chamber in Parliament, diere has been, since die inauguration of die Constitution, a feeling in die House of the People that the Council serves no useful purpose and is nothing but a 'device to flout die voice of die People',[14] which led even to the motion of a Private Member's Resolution for the abolition of the Council. It was stayed for the

time being only at the intervention of the then Prime Minister Pandit Nehru on the ground that the working of the Council was yet too short to adjudge its usefulness.[14]

(c) The most extreme instance of its importance, during its career, has recently been shown by the Council of States in the matter of constitutional amendment. Under Art. 368(2), a Bill for the amendment of the Constitution, in order to be law, must be passed in *each* House of Parliament by the specified special majority, and the device of joint sitting under Art. 108 is *not* available to remove the opposition by the *Rajya Sabha* in respect of a Bill for amendment of the Constitution. While the Janata Party had an overwhelming majority in the *Lok Sabha*, the Congres [(O) and (I) together] had an imposing majority in the *Rajya Sabha* so that there was no chance of the 43rd Amendment Bill, 1977, being passed by a two-thirds majority in the *Rajya Sabha*, as its composition existed in April, 1977. The progress of the 43rd Amendment Bill had, therefore, to be halted alter its introduction in the *Lok Sabha*, since the Congress Party declared its intention to oppose the consideration of this Bill. The opposition of the two Congress Parties also truncated the 45th Constitution Amendment Bill, while in the *Rajya Sabha*.

The Constitution (64th Amendment) Bill, 1989 and the Constitution (65th Amendment) Bill, 1989 could not secure the requisite majority in the *Rajya Sabha* and hence could not be passed (13-101989), even though they had earlier been duly passed by the *Lok Sabha*.

REFERENCES

1. The first general election under the Constitution took place in the winter of 1951 52. The first Lok Sabha, which held its first sitting on 13-5-1952 was dissolved by the President on 4-4-1957.

The second general election was held in the winter of 1956-57, and the second Lok Sabha held its first sitting on 1(45-1957.

Ihe third general election was held in February, 1962, and the third Lok Sabha had its first sitting on 16-4-1962.

The fourth general election was held in February, 1967, and the fourth Lok Sabha had its first sitting on 16-3-1967 and was prematurely dissolved on 27-12-1970.

The fifth general election, which was thus a mid-term election, was held in March, 1971, and the fifth Lok Sabha had its first sitting on March 19, 1971.

Tlie sixth general election was held in March 1977, after the dissolution of the Lok Sabha on 18th January, 1977, during its second extended term. Excepting in Kerala, there was no simultaneous election to the Legislative Assemblies of the Slates. The sixth Lok Sabha had its first sitting on 25-3-1977.

The seventh general election was held in January, 1980 and the first sitting was on 21 1-1980.

The eighth general election was held in December, 1984 and the first sitting was on 15-1-1985.

The ninth general election was held in November, 1989 and the ninth Lok Sabha had its first silting on 18th December 1989.

The tenth general election was held on 20th May, 12th and 15th June, 1991 and the tenth Lok Sabha had its first sitting on 20-6-1991.

The eleventh general election was held in May 1996 and the Eleventh Lok Sabha had its first sitting on 22-51996.

The twelfth general election was held in February, 1998 and the twelfth Lok Sabha had its first sitting on 23-3-1998.

The thirteendi general election was held in September and October, 1999 and the thirteenth Lok Sabha had its first sitting on 20-10-1999.

The fourteenth general election was held in April and May, 2004 and the fourteenth Lok Sabha had Its first sitting on 02-00-2004.

The Rajva Sabha was first consUtuted on 3-4-1952 and it held ns first sitting on 13-3-1952, and the retirement of the first batch of the members of the Rajva Sabha tooT place bn 2-4-1951.

2. Sections 27A, 27H of Representation of thr People Act, 1950
3. Tile actual number of members of the two Houses now is given in Table VTII.
4. As amended by the Constitution (31st Amendment) Act, 1973, and by the Goa, Daman and Diu Reorganisation Act, 1987 w.e.f. 30-5-1987.
5. As amended by tile Constitution (61st Amendment) Act, 1988.
6. The Union Territories (Direct Election to the House of the People) Act, 1905.
7. VII C.A.D. 1262.
8. By the 42nd Amendment Act, 1976, the Indira Government, extended this term to t years but it has been restored to 5 years, by the 44th Amendment Act, 1978.
9. This power was used during the Emergency on the ground of internal disturbance (1975-77).
10. *Shurma* v. *Shri Krishna*, AIR 1959 S.C. 395.
11. Ref. under An. 143, AIR 1965 S.C. 745 (*764, 767*).
12. May, *Parliamentary Practice*, 15th Ed., p. 109.
13. Except in the case of Bills for the amendment of the Constitution (*Art.* 368), all Bills and other questions before each House are passed or carried by a simple majority [*Art.* 100(1)].
14. Statement in the Raiya Sabha dated 6-5-1953. Similar views were reiterated in the other House (H.P. Deb, 12-5-1953).

CHAPTER 13

THE STATE EXECUTIVE

1. The General Structure.

As stated at the outset, *our* Constitution provides for a federal Government, having separate systems of administration for the Union and its Units, namely, die States. The Constitution contains provisions for the governance of both. It lays down a uniform structure for the State Government, in Part VI of the Constitution, which is applicable to all the States, save the State ofjammu & Kashmir which has a separate Constitution for its State Government, for reasons which will be explained in Chap. 15.

Broadly speaking the pattern of Government in die States is die same as that for the Union, namely, a parliamentary system,—the execudve head being a consdtutional ruler who is to act according to the advice of Ministers responsible to the State Legislature (or its popular House, where there are two Houses),—except in matters in respect of which the Governor of a State is empowered by the Constitution to act 'in his discretion' [*Art.* 163(1)].

2. The Governor.

Governor.

At die head of die executive power of a State is the Governor just as the President stands at the head of the executive power of the Union. The executive power of the State is vested in the Governor and all executive action of the State has to be taken in the name of the Governor. Normally, there shall be a Governor for each State, but an amendment of 1956 makes it possible to appoint the same person as the Governor for the two or more States \[*Art.* 153].

Appointment and term of Office of Governor.

The Governor of a State is not elected but is appointed by the President and holds his office at the pleasure of the President .Any citizen of India who has completed 35 years of age is eligible for the office, but he must not hold any other office of profit, nor be a member of the Legislature of the Union or of any State [*Art.* 158]. There is no bar to the selection of a Governor from amongst members of a Legislature but if a Member of a legislature is appointed Governor, he ceases to be a Member immediately upon such appointment.

The normal term of a Governor's office shall be five years, but it may be terminated earlier, by—

(i) Dismissal by the President, at whose 'pleasure' he holds the office [*Art.* 156(1)]; (ii) Resignation [*Art.* 156(2)].

The grounds upon which a Governor may be removed by the President are not laid down in the Constitution, but it is obvious that this power will be sparingly used to meet with cases of gross delinquency, such as bribery, corruption, treason, and the like or violation of the Constitution.[1]

There is no bar to a person being appointed Governor more than once.[2]

Why an appointed Governor.

The original plan in the Draft Constitution was to have elected Governors. But in the Constituent Assembly, it was replaced by the method of appointment by the President, upon the following arguments[3]:

(a) It would save the country from the evil consequences of still another election, run on personal issues. To sink every province into the vortex of an election with millions of primary voters but with no possible issue other than personal, would be highly detrimental to the country's progress.

(b) If the Governor were to be elected by direct vote, then he might consider himself to be superior to the Chief Minister, who was merely returned from a single constituency, and this might lead to frequent *friction* between the Governor and the Chief Minister.

But under the Parliamentary system of Government prescribed by the Constitution, the Governor was to be constitutional head of the State,—the real executive power being vested in the Ministry responsible to the Legislature.

> "When the whole of the executive power is vested in the Council of Ministers, if there is another person who believes that he has got the backing of the province behind him, and, therefore, at his discretion he can come forward and intervene in the governance of the province, it would really amount to a surrender of democracy."[3]

(c) The expenses involved and the elaborate machinery of election would be out of proportion to the powers vested in this Governor who was to act as a mere constitutional head.

(d) A Governor elected by adult franchise to be at the top of the political life in the State would soon prefer to be the Chief Minister or a Minister with effective powers. Tire party in power during the election would naturally put up for Governorship a person who was not as outstanding as the future Chief Minister with the result that the State would not be able to get the best man of the party. All the process of election would have to be gone through only to get a second rate man of the party elected as Governor. Being subsidiary in importance to the Chief Minister, he would be die nominee of the Chief Minister of the State, which was not a desirable thing.

(e) Through the procedure of appointment by the President. the Union Government would be able to maintain intact its control over the States.

(l) The method of election would encourage separatist tendencies. The Governor would then be the nominee of the Government of that particular province to stand for the Governorship. The stability and unity of die Governmental machinery of the country as a whole could be achieved only by adopting the system of nominadon.

"He should be a more detached figure acceptable to the province, otherwise he could not function, and yet may not be a part of the party machine of the province. On the whole it would probably be desirable to have people from outside, eminent in something, education or other fields of life who would naturally co-operate fully with the Government in carrying out the policy of the Government and yet represent before the public something above politics.[3]

The arguments which were advanced, in the Constituent Assembly, *against* nomination are also worthy of consideration:

(i) A nominated Governor would not be able to work for the welfare of a State because he would be a foreigner to that State and would not be able to understand its special needs.

(ii) There was a chance of friction between the Governor and the Chief Minister of the State no less under the system of nomination, if the Premier of the State did not belong to the same party as the nominated Governor.[4]

(iii) The argument that the system of election would not be compatible with the Parliamentary or Cabinet system of Government is not strong enough in view of the fact that even at the Centre there is an elected President to be advised by a Council of Ministers. Of course, the election of the President is not direct but indirect.

(iv) An appointed Governor under the instruction of the Centre might like to run the administration in a certain way contrary to the wishes of the Cabinet. In this tussle, the Cabinet would prevail and the President-appointed Governor would have to be recalled. The system of election, therefore, was far more compatible with good, better and efficient Government plus the right of self-Govemment.

(v) The method of appointment of the head of the State executive by the federal executive is repugnant to the strict federal system as it obtains in the *U.S.A.* and *Australia*.

In actual working, it may be said that in States where one party has a clear majority, the part played by the Governor has been that of a constitutional and impartial head, but in those States where there are multiple parties with an uncertain command over the Legislature, the Governor has acted as a mere agent of the Centre in various matters, such as inviting a person to form a Ministry, because he belonged to the ruling party at the Centre, even though he had no clear following (as in the case of Sri Rajagopalachari in Madras, after the General election in 1952) or bringing about the removal of a Ministry having the confidence of the Legislature, by means of a report under Art. 356(as happened in Kerala in 1959, in the case of the Communist Ministry headed by Sri Namboodiripad). Nevertheless, there is one aspect in which the system of appointing an outsider by the Centre has proved to be beneficial, and that is the prevention of disruptive and separatist forces from impairing the national unity and strength as might otherwise have been possible without the knowledge of the Centre, under a locally elected Governor.

Status of appointed Governor so far.

It is from this standpoint alone that one can tolerate the patently undemocratic instances of appointing a retiring or a retired member 01 the Indian Civil Service or the Indian Administrative Service (who is obviously a veteran bureaucrat) or of the Armed Forces as a Governor.

Conditions of Governor's office.

A Governor gets a monthly emolument of Rs. 36,000, together with the use of an official residence free of rent and also such allowances and privileges as are specified in the Governor's (Emoluments, Allowances and Privileges) Act, 1982 as amended in 1998 (w.e.f. 1-1-1996). The emolument and allowances of a Governor shall not be diminished during his term of office [*Art.* 158(3)-(4)].

Powers of the Governor.

The Governor has no diplomatic or military powers like the President, but he possesses executive, legislative and judicial powers analogous to those of the President.

I. *Executive.* Apart from the power to appoint his Council of Ministers, the Governor has the power to appoint the Advocate-General and the Members of the State Public Service Commission. The Ministers as well as Advocate-General hold office during the pleasure of the Governor, but the Members of the State Public Service Commission cannot be removed by him, they can be removed only by the President on the report of the Supreme Court on reference made by the President and, in some cases, on the happening of certain disqualifications [*Art.* 317].

The Governor has no power to appoint Judges of the State High Court but he is entitled to be consulted by the President in the matter [*Art.* 217(1)].

Like the President, the Governor has the power to nominate members of the Anglo-Indian community to the Legislative Assembly of his State, if he is satisfied that they are not adequately represented in the Assembly; but while the President's corresponding power with regard to the House of the People is limited to a maximum of two members, in the case of the Governor the limit is one member only, since the Constitution (23rd Amendment) Act, 1969 [*Art.* 333].

As regards the upper Chamber of the State Legislature (in States where the Legislature is bi-cameral), namely, the Legislative Council, the Governor has a power of nomination of members corresponding to the power of the President in relation to the Council of States, and the power is similarly exercisable in respect of "persons having special knowledge or practical experience in respect of matters such as literature, science, tut, co-operative movement and social service" [*Art.* 171(5)]. It is to be noted that 'co-operative movement' is not included in the corresponding list relating to the Council of States. The Governor can so nominate 1/6 part of the total members of the Legislative Council.

II. *Legislative.* As regards *legislative* powers, the Governor is a part of the State Legislature [*Art.* 164] just as the President is a part of Parliament. Again, he has a right of addressing and sending messages, and summoning, proroguing and dissolving, in relation to the State Legislature, just as the President has in relation to Parliament.[6] He also possesses a similar power of causing to be laid before the State Legislature the annual financial statement [*Art.* 202] and of making demands for grants and recommending 'Money Bills' [*Art.* 207].

His powers of 'veto' over State legislation and of making Ordinances are dealt with separately. (See Chap. 14 "Governor's power of veto" and "Ordinance-making power of Governor".)

Judicial. 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 [*Art.* 161]. He is also consulted by the President in the appointment of the Chief Justice and the Judges of the High Court of the State.

IV. *Emergency Power.* The Governor has no emergency powers[7] to meet the situation arising from external aggression or *armed rebellion* as tire President has [*Art.* 352(1)], but he has the power to make a report to the President whenever he is satisfied that a situation has arisen in which Government of the State cannot be carried on in accordance with the provisions of the Constitution [*Art.* 356], thereby inviting the President to assume to himself the functions of the Government of the State or any of them. (This is popularly known as 'President's Rule'.]

3. The Council of Ministers.

As has already been stated, the Governor is a constitutional head of the State executive, and has, therefore (subject to his discretionary functions noted below), to act on the advice of a Council of Ministers [4rt. 163]. The provisions relating to the Council of Ministers of the Governor are, therefore, subject to exceptions to be stated presently, similar to those relating to the Council of Ministers of the President

Council of Ministers.

At the head of a State Council of Ministers is the *Chief* Minister (corresponding to the *Prime* Minister of the Union). The Chief Minister is appointed by the Governor,[8] while the other Ministers are appointed by the Governor on the advice of the Chief Minister. The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State and individually responsible to the Governor. The Ministers are jointly and severally responsible to the Legislature. He/They is/are publicly accountable for the acts or conducts in the performance of duties.[9] Any person[10] may be appointed a Minister (provided he has the confidence of the Legislative Assembly), but he ceases to be a Minister if he is not or does not remain, for a period of six consecutive months, a member of the State Legislature. The salaries and allowances of Ministers are governed by laws made by the State Legislature [*Art.* 164].

Relationship between the Governor and his Ministers.

It may be said that, in general, the relation between the Governor and his ministers is similar to that between the President and his ministers, with this important difference that while the Constitution does not empower the President to **exercise any** function 'in his discretion', it authorises the Governor to exercise some functions 'on his discretion'. In this respect, the principle of Cabinet responsibility in the States differs from that in the Union.

Article 163(1) says—

> "There shall be a Council of Ministers.... to aid and advise the Governor in the exercise of his functions, *except* in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion."

It is because of this discretionary jurisdiction of the Governor that no amendment was made by the 42nd Amendment Act in Art. 163(1) as in Art. 74(1), which we have noticed in Chap. 11.

In the exercise of the functions which the Governor is empowered to exercise in his discretion, he will *not* be required to act according to the advice of his ministers or even to seek such advice. Again, if any question arises whether any matter is or is not a matter as regards which the Governor is required by the Constitution to act in his discretion, the decision of the Governor shall be final, and the validity of anything done by the Governor shall not be called into question on the ground that he ought or ought not to have acted in his discretion *[Art.* 163(2)].

A. The functions which are specially required by the Constitution to be exercised by the Governor in his discretion are—

Discretionary functions of Governor

(a) Para 9(2) of the 6th Sch. which provides that the Governor of Assam shall, in his discretion, determine the amount payable by the State of Assam to the District Council, as royalty accruing from licences for minerals.[11]

(b) Art. 239(2) [added by the Constitution (7th Amendment) Act, 1956] which authorises the President to appoint the Governor of a State as the administrator of an adjoining Union Territory and provides that where a Governor is so appointed, he shall exercise his functions as such administrator 'independendy of his Council of Ministers'.

B. Besides the above functions to be exercised by the Governor 'in his discretion', there are certain functions under the amended Constitution which are to be exercised by the Governor 'on his special responsibility',—which practically means the same thing as 'in his discretion', because though in cases of special responsibility, he is to *consult* his Council of Ministers, the final decision shall be 'in his individual judgment', which no court can question. Such functions are—

Special Responsibilities.

(i) Under Art. 371(2), as amended,[12] the President may direct that the Governor of Maharashtra or Gujarat shall have a special responsibility for taking steps for the development of certain areas in the State, such as Vidarbha, Saurashtra.

(ii) The Governor of Nagaland shall, under Art. 371A(1)(b) (introduced in 1962), have similar responsibility with respect to law and order in that State so long as internal disturbances caused by the hostile Nagas in that State continue.

(iii) Similarly, Art. 371C(1), as inserted in 1971, empowers the President to direct that the Governor of Manipur shall have special responsibility to secure the proper functioning of the Committee of the Legislative Assembly of the State consisting of the members elected from the Hill Areas of that State.

(iv) Art. 371F(g), inserted by die Constitution (36th Amendment) Act, 1975, similarly, imposes a special responsibility upon the Governor of Sikkim "for peace and for an equitable arrangement for ensuring the social and economic advancement of different sections of the population of Sikkim".

In the discharge of such special responsibility, the Governor has to act according to the directions issued by the President from time to time, and subject diereto, he is to act 'in his discretion'.

C. In view of the responsibility of the Governor to the President and of the fact that the Governor's decision as to whether he should act in his discretion in any particular matter is final [*Art.* 163(2)], it would be possible for a Governor to act without ministerial advice in certain *other* matters, according to the circumstances, even though they are not specifically mentioned in the Constitution as discretionary functions.[13]

Discretion in practice in certain matters.

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

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

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

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

President's control over the Governor.

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

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

Whether Governor competent to dismiss a Chief Minister.

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

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

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

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

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

> "(1) ... *and the* Ministers *shall hold office at the pleasure of the Governor:*
>
> (2) *The* Council *of Ministers shall be* collectively *responsible to the Legislattu Assembly of the State.*"

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

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

(b) He can dismiss a Council of Ministers or the Chief Minister (whose dismissal means a fall of the Council of Ministers), *only* when the Legislative Assembly has *expressed* its want of confidence in the Council of Ministers, either by a direct vote of noconfidence or censure or by defeating an important measure or the like, and the Governor does not think fit to dissolve the Assembly. The Governor cannot do so at his pleasure on his *subjective estimate* of the strength of the Chief Minister in the Assembly at any point of lime, because it is for the Legislative Assembly to enforce the collective responsibility of the Council of Ministers to itself, under Art. 164(2).

Testing majority support.

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

4. The Advocate-General

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

Advocate-General.

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

REFERENCES

1. A glaring exception lo this sound principle took place when the President, on the advice of the National Front Prime Minister Sri V.P. Singh, in December HIS), asked all the Governors to resign, simply because another Parts had come to power at lire Union. Of course, eventually, some of diem were not required to resign.
2. Thus, Sri V.V. Giri, who was appointed Governor of U.P. In 1958, was appointed Governor of Kerala in I960 for the unexpired portion of his term and in June 1902 he was reappointed Governor of Kerala for a second term, limited up to June 1964 (*Statesman*,1(46-1962), Srimati Padmaja Natdu, Governor of West Bengal, also got a second term.
3. **C.A.D., Vol. VII, p. 455.**
4. Indeed there did occur some friction between the Governor and the Chief Minister during 1987-89 in Andhra Pradesh and Kerala where they belonged to different political parties. But, strikingly, there was disagreement between the Governor Govind Naratn Singh and the Chief Ministei of Bihar (1985); and Governor Smt. Sarla Grewal and the Chief Minister of Madhya Pradesh (1989) even though hailing from the same party.
5. Emoluments of Governor as enhanced *vide* Act No. 27 of 1998, s. 2 (w.e.f. 1.1.1996).
6. Of course, as has been pointed out in other contexts, the Upper House of the Union legislature, if., the Council of States or of the State legislature, if., the Legislative Council, Is not subject to dissolution but is subject to a system of periodical retirement.

Hence, the President or the Governor's power of dissolution must be understood to refer to the dissolution of the House of the People and the Legislative Assembly, respectively.

In those States where the State Legislature consists of one House only [*Art.* 168(1)(b)] (p. 233, *post*), a dissolution of the Legislative Assembly results in the dissolution of the Stale Legislature (because there is no Legislative Council to survive.)

7. Only the Governor of Jammu & Kashmir is vested with the power to impose Governor's Rule under s. 92 of Constitution of J. & K.
8. The Governor may appoint a person to be the Chief Minister on his own estimation that such person is likely to command a majority in the State Assembly and he can exercise this power even before the Assembly is fully constituted. Such act, itself, would not establish *mala fides* on the part of the Governor [*Rajnarain* v. *Bhajanlal*, (1982) P&if, dated 20-10-1982; *Statesman* (DJ/21-10-1982].
9. *Secretary, Jaipur Development Authority, Jaipur* v. *Daulat Mai Jam*, (1997) 1 S.C.C. 35 (para 10).
10. It is striking that no member of the 1975 Abdullah Ministry of Jammu & Kashmir was Initially a member of die State Legislanirc.
11. The Naga Hills-Tuensang Area has been taken out of this discretionary sphere, by making it a separate State, named Nagaland. Hence, Para 18 of the 6th Sch. has been omitted in 1971.
12. That is, as amended by the Constitution (7th Amendment) Act, 1956 and the Bombay Reorganisation Act, 1960. By the Constitution (32nd Amendment) Act, 1973, Andhra Pradesh has been taken out of Art. 371 and provided for separately, in *new* Art. 37 ID.
13. *Samsher* v. *State of Punjab*, AIR 1974 S.C. 2192 (paras 47, 88, 153).
14. This happened in the case of the Kerala Education Bill *mde* In re *Kerala Education Bill* AIR 1958 S.C. 956). In *Hoechst Pharamaceuticals* v. *State of Bihar*, AIR 1953 S.C. 1019 (para 89), llte function under Art. 200 has been held to be discretionary.
15. In some cases, the Supreme Court has observed that Unless a particular provision of the Constitution expressly *requires* the Governor to act in his discretion, his power to act without die advice of Ministers cannot be drawn by implication [*Sanjeevi* v. *State of Madras*, (1970) 2 S.C.C. 672 *(677)*. But this observation is now to be read subject to the exceptional contingencies mentioned in the 7Judge decision m [&nruAer v. *State of Punjab*, AIR 1974 S.C. 2192, *above*].
16. The dismissal of the Tamil Nadu Governor, Prabhudas Patwari in October, 1980 (***Statesman***, 3110-19801 demonstrates that the President's 'pleasure' under Art. 156(1) can be used by the Prime Minister to dismiss any Governor for political reasons, and without assigning any cause.
17. *Jagdambika Pal* v. *Union of India*,(1999) 9 S.C.C. 95.
18. *Vide* **HALSBURY, LAWS OF** ENGLAND **(4th Ed. 1974)**, Vol. **8. Pp. 696-97**.
19. *S.R. Bommai* v. *Union of India*, (1994) 3 S.C.C. 1.
20. *Ibid.*, para 395.
21. *Ibid.*, para 119.

CHAPTER 14
THE STATE LEGISLATURE

The Unicameral and Bicameral Legislatures.

THOUGH a uniform pattern of government is prescribed for the States, in the matter of the composition of the Legislature, the Constitution makes a distinction between the bigger and the smaller States. While the Legislature of every State shall include the Governor and, in some of the States, it shall consist of two Houses, namely, the Legislative Assembly and the Legislative Council, while in the rest, there shall be only one House, *it.*, the Legislative Assembly [*Art.* 168].

Owing to changes introduced since the inauguration of the Constitution, in accordance with the procedure laid down in Art. 169, the States having two Houses,[1] in 2008, are Andhra Pradesh;[2] Bihar; Maharashtra;[3] Karnataka and Uttar Pradesh[4] *ArL* 168]. To these must be added Jammu & Kashmir, which has adopted a bi-cameral Legislature, by her own State Constitution.

Creation and abolition of Second Chambers in States.

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

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

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

Composition of the Legislative Council.

The size[5] of the Legislative Council shall vary with that of the Legislative Assembly,—the membership of the Council bemg not more than one-third of the membership of the Legislative Assembly but not less than 40. This provision has been adopted so that the Upper House (the Council) may not get a predominance in the Legislature [*Art.* 171(1)].

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

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

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

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

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

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

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

Composition of the Legislative Assembly.

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

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

As stated already, the Governor has the power to nominate[6] *one* member of the Anglo-Indian community as he deems fit, if he is of opinion that they are not adequately represented in the Assembly [*Art.* 333]. Such reservation will cease on the expiration of sixty[7] years from the commencement of the Constitution [*Art.* 334].

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

Duration of the Legislative Assembly.

(i) It may be dissolved sooner than five years, by the Governor.[8]

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

Duration of the Legislative Council.

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

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

Qualifications for membership of the State Legislature.

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

(a) is a citizen of India;

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

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

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

Disqualifications for membership.

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

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

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

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

(b) is of unsound mind as declared by a competent court;

(c) is an undischarged insolvent;

(d) is not a citizen of India or has voluntarily acquired the citizenship of a foreign State or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) is so disqualified by or under any law made by Parliament (in other words, the law of Parliament may disqualify a person for membership even of a State Legislature, on such grounds as may be laid down in such law). Thus, the Representation of the People Act, 1951, has laid down some grounds of disqualification, *e.g.*, conviction by a court, having been found guilty of a corrupt or illegal practice in relation to election, being a director or managing agent of a corporation in which Government has a financial interest (under conditions laid down in that Act).

Article 192 lays down that if any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned above, the question shall be referred to the Governor of that State for decision who will act according to the opinion of die Election Commission. His decision shall be final and not liable to be questioned in any court of law.

Legislative procedure in a State having Bi-cameral Legislature, as compared with that in Parliament.

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

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

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

II. *As regards Bills other than Money Bills,* too, the only power of the Council is to interpose some *delay* in the passage of the Bill for a period of Ume (3 months) [*Art.* 197(1)(b)] which is, of course, larger than in the case of Money Bills. The Legislative Council of a State, thus, shall not be a revising but mere *advisory* or *dilatory* Chamber. If it disagrees to such a Bill, the Bill must have *second journey* from the Assembly to the Council, but ultimately the view of tire Assembly shall prevail and in the second journey, the Council shall have no power to withhold the Bill for more than a month [*Art.* 197(2)(b)].

Legislative Council compared with Council of States.

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

Provision for reiohdng deadlock between two Houses.

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

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

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

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

Comparison of procedure in Parliament and State Legislature.

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

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

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

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

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

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

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

(a) A Money Bill cannot originate in the Second Chamber or Upper House (*Le.*, the Council of States or the Legislative Council).

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

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

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

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

II. *As regards Bills other than Money Bills:*

Parliament	*State Legislature*
(a) Such Bills may be introduced in either House of Parliament.	(a) Such Bills may be introduced in either House of a State Legislature.
(b) A Bill is deemed to have been passed by Parliament only if both Houses have agreed to the Bill in its original form or with amendments agreed to by both Houses. In case of disagreement between the two Houses in any of the following manner, the deadlock may be solved only by a joint sitting of the two Houses, if summoned by the President.	(b) The Legislative Council has no coordinate power, and in a case of disagreement between the two Houses, the will of the Legisative Assembly shall ultimately prevaU. Hence, there is no provision for a joint sitting for resolving a deadlock between the two Houses.
	(c) A disagreement between the two Houses may take place if die Legislative Council, *on receipt of a Bill passed by the Assembly*—
(c) The disagreement may take place if a House, on receipt of a Bill passed by the other House— (i) rejects the Bill; or (ii) proposes amendments as are not agreeable to the other House; or (iii) does not pass the Bill within six months of its receipt of tire BUI.	(i) rejects the BiU; or (ii) makes amendments to die BiU, which are not agreed to by the originating House; or (iii) does not pass the BiU widiin three months from the date of its receipt from the originating House. WliUe the period for passing a BiU received from the lower House is six months in the case of the CouncU of States, it is three mondis only in the case of the Legislative CouncU.
(d) In a case of disagreement, a passing of the BiU by the House of the People, a second time, cannot over-ride the CouncU of States. The only means of resolving the deadlock is a joint sitting of the two Houses. But if the President, in his discretion, does not summon a joint sitting, there is an end of the BiU and, thus, the Council of States has effective power, subject to a joint sitting, of preventing the passing of a Bill.	(d) In case of such disagreement, a passing of the BiU by the Assembly for a second time is sufficient for the passing of the BiU by the Legislature, and if the BUI is so passed and transmitted to the Legislative CouncU again, the only thing that the CouncU may do is to withhold it for a period of one month from the date of its receipt of the BiU on its second journey. If the Council either rejects the BiU again, or proposes amendments not

Parliament	*State Legislature*
	agreeable to the Assembly or allows one month to elapse without passing the Bill, the Bill shall be deemed to have been passed by the State Legislature in the form in which it is passed by the Assembly for the second time, with such amendments, if any, as have been made by the Council and as are agreed to by the Assembly.
	(e) The foregoing procedure applies *only* in the case of disagreement relating to a Bill *originating in the Legislative Assembly*.
	In the case of a Bill originating in the Legislative Council and transmitted to the Assembly, after its passage in the Council, if the Legislative Assembly either rejects the Bill or makes amendments which are not agreed to by the Council, there is an immediate end of the Bill, and no question of its passage by the Assembly would arise.

Utility of the Second Chamber in a State.

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

(a) The very composition of the Legislative Council, renders its position weak, being partly elected and partly nominated, and representing various interests.

(b) Its very existence depends upon the will of the Legislative Assembly, because the latter has the power to pass a resolution for the abolition of the second Chamber by an Act of Parliament.

(c) The Council of Ministers is responsible only to the Assembly.

(d) The Council cannot reject or amend a Money Bill. It can only withhold the Bill for a period not exceeding 14 days or make recommendations for amendments.

(e) As regards ordinary legislation (*i.e.*with respect to Bills other than Money Bills), too, the position of the Council is nothing but subordinate to the Assembly, for it can at most interpose a delay of four months (in two

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

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

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

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

Governor's power of veto.

(a) He may declare his *assent* to the Bill, in which case, it would become law at once; or,

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

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

(d) The Governor may reserve[9] a Bill for the consideration of the President. In one case reservation is compulsory, *viz.*, where the law in question would derogate from the powers of the High Court under the Constitution.

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

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

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

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

Veto Powers of President and Governor, compared.

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

President	*Governor*
(A) 1. May assent to the Bill passed by the Houses of Parliament.	1. May assent to the Bill passed by the State Legislature.
2. May declare that he withholds his assent, in which case, the Union Bill fails to become law.	2. May declare that he withholds his assent, in which case, it fails to become law.
3. In case of a Bill other than a Money Bill, may return it for reconsideration by Parliament, with a message to both Houses. If the Bill is again passed by Parliament, with or without amendments, and again presented to the President, the President shall have no other alternative than to declare his assent to it.	3. In case of a Bill other titan a Money Bill, may return it for reconsideration by the State Legislature, with a message. If the Legislature again passes the Bill with or without amendments, and it is again presented to the Governor, the Governor shall have no other alternative dtan to declare his assent to it
	4. Instead of either assenting to, withholding assent from, or returning the Bill for reconsideration bv the State Legislature, Governor may *reserve* a Bill for consideration of the President, in any case he thinks fit.
	Such reservation is, however, obligators if tire Bill is so much derogatory to the powers of the High Court that it would endanger the constitutional position of the High Court, if the Bill became lavs.
(B) In the case of a State Bill reserved by the Governor for the President's consideration (as stated in para 4 of col. 2):	
(a) If it is a Money Bill, the President may either declare that he assents to it or withholds his assent to it	
(b) If it is a Bill other titan a Money Bill, the President may—	
(i) declare that he assents to it or that he withholds his assent from it, or	

President	*Governor*
(ii) return the Bill to the State Legislature with a message for reconsideration, in which case, the State Legislature must reconsider the Bill within six months, and if it is passed again, with or without amendments, it must be again presented, *direct*, to the President for his assent, but the President is *not* bound to give his assent, even though the Bill has been passed by the State Legislature, for a second time.	Once the Governor reserves a Bill for the President's consideration, the subsequent enactment of the Bill is in the hands of the President and the Governor shall have no further part in its career.

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

Ordinance-making power of Governor.

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

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

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

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

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

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

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

(a) A Bill containing the same provisions would under the Constitution have required the previous sanction of the President for the introduction thereof into the Legislature;[10] or (b) the Governor would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President;[11] or (c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President[12] [*Art.* 213].

Ordinance-making power of President and Governor compared.

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

President	*Governor*
1. Can make Ordinance only when either of the two Houses of Parliament is not in session.	1. Can make Ordinance only when the State Legislature or either of the two Houses (where the State Legislature is bi-cameral) is not in session.
The President or Governor must be satisfied that circumstances exist which render it necessary for him to take immediate action.	
	But Governor cannot make an Ordinance relating to three specified matters, without instructions from President (see *above*).
2. Ordinance has the same force and is subject to the same limitations as an Act of Parliament.	2. Ordinance has the same force and is subject to the same limitations as an Act of the State Legislature.
	But as regards repugnancy with a Union law relating to a Concurrent subject, if the Governor's Ordinance has been made in pursuance of 'instructions of the President', the Governor's Ordinance shall prevail as if it were an Act of the State Legislature which had been reserved for the consideration of the President and assented to by him.
3. (a) Must be laid before both Houses of Parliament when it reassembles.	3. (a) Must be laid before the Legislative Assembly or before both Houses of the State Legislature (where it is bi-cameral), when the Legislature re-assembles.
(b) Shall cease to operate on the expiry of six weeks from the reassembly of Parliament or, if, before that period, resolutions disapproving the Ordinance are passed by both Houses, from the date of the second of such resolutions.	(b) Shall cease to operate on the expiry of six weeks from the reassembly of the State Legislature or, if before the expiry of that period, resolutions disapproving the Ordinance are passed by the Assembly or, where there are two Houses the resolution passed by

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

Privileges of a State Legislature.

The privileges of the Legislature of a State are similar to those of the Union Parliament inasmuch as the constitutional provisions *Arts.* 105 and 194] are identical. The question of the privileges of a State Legislature has been brought to the notice of the public, particularly in relation to the power of the Legislature to punish for contempt and the jurisdiction of the Courts in respect thereof. Though all aspects of this question have not yet been settled, the following propositions may be formulated from the decisions of the Supreme Court:

la) Each House of the State Legislamre has the power to punish for breach of its privileges or for contempt.

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

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

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

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

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

New States added since 1950.

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

Andhra Pradesh.

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

Gujarat.

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

Kerala.

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

Maharashtra.

See under Gujarat, *above*.

Nagaland.

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

Haryana.

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

Karnataka.

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

Himachal Pradesh.

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

Manipur and Tripura.

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

Meghalaya.

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

Sikkim.

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

Mizoram.

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

Arunachal Pradesh.

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

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

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

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

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

REFERENCES

1. (a) The Legislative Council in Andhra Pradesh has been abolished by the Andhra Pradesh Legislative Council (Abolition) Act, 198.5. (b) By reason of s. 8(2) of the Constitution (7th Amendment) Act, 1956, Madhya Pradesh shall have a second House (Legislative Council) only after a notification to this effect has been made by President No such notiflcaUon having been made so far, Madhya Pradesh is still having one Chamber. (c) The LegislaUve Council of Tamil Nadu has been abolished in August 1986, by passing the Tamil Nadu LegislaUve Council (Abolidon) Act 1986.
2. Revived by die Andhra Pradesh LegislaUve Council Act 2005 (1 of 2006).
3. Maharashtra has been created out of Bombay, by the Bombay ReorganisaUon Act 1960.
4. West Bengal has abolished its LegislaUve Council w.c.f 1-8 1969 by a notification under the West Bengal LegislaUve Council (AboliUon) Act 1969, and Punjab has abolished its LegislaUve Council, under tlie Punjab LegislaUve Council (AboliUon) Act, 1969.
5. See Table XV for membership of the State legislatures.
6. The number of Anglo-Indian members so nominated by the Governor of the several States as in September, 1990, was as follows : Andhra 1, Bihar 1; Karnataka 1; Kerala 1; Madhya Pradesh 1; Tamil Nadu 1; Maharashtra 1; Uttar Pradesh 1; West Bengal 1. The present posiuon is not available.
7. The original period of ten years has been extended to sixty years, gradually by tire Constitution (8th Amendment) Act, 1959, the 23rd Amendment Act, 1969, tire 45th Amendment Act, 1980, the 62nd Amendment Act, 1989 and the 79th Amendment Act, 1999.
8. In this context, we should refer to the much-debated quesUon as to whether the Governor has any discretion to dissolve the Assembly witlioul or against the advice of the Chief Minister, or through the device of suspending die State Legislature under Art 356. In the general elecUon to the *I.ok Sabha*, held in March, 1977, the Congress Party was routed by the Janata Party. It was urged by die Janata Government at the Centre that in view of this verdict die Congress Party had no moral right to continue in power in 9 States, viz., Bihar, Haryana, Himachal Pradesh, M.P., Orissa, Punjab, Rajasthan, U.P., West Bengal. In pursuance of diis view, the Union Home Minister (Mr. Charan Singh) issued on, 18-4-1977, an 'appeal' to the Chief Ministers of these 9 States to advise their respective Governors to dissolve the Assemblies and hold an election in June, 1977 (while their extended term would have expired in March, 1978). But the Congress Party advised die Chief Ministers not to yield to diis appeal or pressure, and contended that die proposition dial die English Sovereign can dissolve Parliament without the advice of die Prime Minister was wrong and obsolete and that die Crown's prerogative in this behalf had been turned into a privilege of the Prime Minister. In short, under the British Parliamentary system which had been adopted under the Indian Constitution, a Governor could not dissolve die Assembly contrary to die advice of die Chief Minister of die State. It was also urged that Art. 356 was not intended to be used for such purposes.

The question was eventually taken to the Supreme Court by some of the affected States by way of a suit (under Art 131) against the Union of India. The suit was dismissed by a Bench of 7 Judges, at the hearing on the prayer for temporary injtmcuon, though the Judges gave separate reasons in 6 concurring judgments [itu/r *of Rajasthan* v. *Union of India*, AIR 1977 S.C. 13bl j. The judges agreed on the following points: (i) The reasons behind an Executive decision to dissolve the Legislature are *political* and not justiciable in a court of law. (Il) So also is the question of the President's satisfaction for the purpose of using the power under Art. 356,—unless it was shown that there was no satisfaction at all or the satisfaction was based on extraneous grounds (paras 59, 83 (BEG. CJ.); 124 (CHANDRACHUD, J.); 144 (BHAGWATI & GUPTA JJ.); 170 (GOSWAMI, J.); 179 (UNTWALIA, J.); 206 (FAZAL. AU, J.)]. Ml the judges held that on the facts on the record, it was not possible to hold that the order of the President under Art. 356, suspending die constitutional system in the relevant States was actuated by *mala fidts* or extraneous considerations.

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

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

CHAPTER 15

THE STATE OF JAMMU & KASHMIR

Peculiar position of the State.

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

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

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

To understand why Jammu & Kashmir, being a State included in the First Schedule of the Constitution of India, should yet be accorded a separate treatment, a retrospect of the development of the constitutional relationship of the State with India becomes necessary. Under the British regime, Jammu & Kashmir was an Indian State ruled by a hereditary Maharaja. On the 26th of October, 1947, when the State was attacked by Azad Kashmir Forces with the support of Pakistan, the Maharaja (Sir Hari Singh) was obliged to seek the help of India, after executing an Instrument of Accession similar to that executed by the Rulers of other Indian States. By the Accession the Dominion of India acquired jurisdiction over the State with respect to the subjects of Defence, External Affairs and Communications, and like other Indian States which survived as political units at the time of the making of the Constitution of India, the State of Jammu & Kashmir was included as a Part B State in the First Schedule of the Constitution of India, as it was promulgated in 1950.

History of the integration of Jammu and Kashmir with India.

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

Position of the State under the original Constitution of India.

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

Implications of the Accession.

Since the liberality of the Government of India has been misunderstood and misinterpreted in interested quarters, overlooking the *legal* implications of the Accession of the State to India, we should pause for a moment to explain these legal implications lest they be lost sight of in the turmoil of political events which have clouded the patent fact of the Accession. The first thing to be noted is that the Instrument of Accession signed by Maharaja Hari Singh on the 26th October, 1947, was in the *same form*[1] as was executed by the Rulers of the numerous other States which had acceded to India following the enactment of the Indian Independence Act, 1947. The legal consequences of the execution of the Instrument of Accession by the Ruler of Jammu & Kashmir cannot, accordingly, be in any way different from those arising from the same fact in the case of the other Indian States. It may be recalled[2] that owing to the lapse of paramountcy under s. 7(1)(b) of the Indian Independence Act, 1947, the Indian States regained the position of absolute sovereignty which they had enjoyed prior to the assumption of suzerainty by the British Crown. The Rulers of the Indian States thus became unquestionably competent to accede to either of the newly created Dominions of India and Pakistan, in exercise of their sovereignty. The legal basis[3] as well as the form of Accession were the same in the case of those States which acceded to Pakistan and those which acceded to India. There is, therefore, no doubt that by the act of Accession the State of Jammu & Kashmir became *legally and irrevocably* a part of the territory of India and that the Government of India was entitled to exercise jurisdiction over the State with respect to those matters to which the Instrument of Accession extended. If, in spite of this, the Government of India had given an assurance to the effect that the Accession or the constitutional relationship between India and the State would be subject to confirmation by the people of the State, under no circumstances can any *third party* take advantage of such extra-legal assurances and claim that the legal act had not been completed.

Articles of the Constitution which apply of their own force to the State.

When India made her Constitution in 1949, it is natural that this dual attitude of the Government of India should be reflected in the position offered to the State of Jammu & Kashmir within the framework of that Constitution. The act of Accession was unequivocally given legal effect by declaring Jammu & Kashmir a part of the territory of India [*Art.* 1]. But the application of the other provisions of the Constitution of India to Jammu & Kashmir was placed on a tentative basis, subject to the eventual approval of the Constituent Assembly of the State. The Constitution thus provided that the only Articles of the Constitution which would apply of their own force to Jammu & Kashmir were—Arts. 1 and 370. The application of the other

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

The Conatitution Order of 1950.

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

Subsequent Orders.

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

Making of the State Con*titution.

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

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

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

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

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

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

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

Important provisions of the State Constitution.

The more important provisions of the State Constitution of Jammu & Kashmir (as amended up to 1934) are as follows:

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

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

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

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

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

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

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

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

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

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

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

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

Indira-Abdullah Agreement of 1975.

Notwithstanding the liberal measures introduced in the State by the adoption of a separate State Constitution, the pro-Pakistani elements in Jammu & Kashmir continued their agitation for the holding of a plebiscite to finally determine whether the State should accede to Intlia or Pakistan and there were violent incidents initiated by the 'Plebiscite Front',—a pro-Pakistani party which had been formed with the avowed object of secession from India. Sheikh Abdullah got involved in these anti-Indian movements and went on criticising the Indian policy towards the State, as a result of which he had to be placed under preventive detention in 1955. After a short release in 1964 on the profession of a changed attitude, he again went wrong, so that he was again detained in 1965 under the D.I.R., and eventually extemed from the State in 1971. This was followed by a period of blowing hot and cold, leading to a series of negotiations between

the representatives of India and the Plebiscite Front, and an agreement was eventually reached and announced, on February 24, 1975.[7]

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

It should, however, be mentioned diat owing to differences over matters arising out of the Agreement, it has *not* been implemented by issuing a fresh Presidential Order under Art 370.*

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

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

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

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

(b) *Autonomy of the Stale in certain matters.* The plenary power of the Indian Parliament is also curbed in certain other matters, with respect to which Parliament cannot make any law without the consent of the Legislature of the State of Jammu & Kashmir, where that State is to be affected by such legislation, *e.g.*, (i) alteration of the name or territories of the State [*Art.* J], (ii) international treaty or agreement affecting the disposition of any pan of the territory of the State *Art. 25J*\.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "Notwithstanding anything in the foregoing provisions of this article, die President may, by public notification, declare diat this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:
>
> Provided that the recommendation of die Constiuent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification."

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

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

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

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

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

REFERENCES

1. *Vide Whilt Paper on Indian Stales* (MS. (j) rule pp. 111, 165.
2. Vide Author's *Commentary on the Constitution of India*, 5th Ed., Vol. 4, p. 38.
3. Sections 56 of the Government of India Act, 1935, read with s. 7(1)(b) of the Indian Independence Act, 1947.
4. As to die Constitution of Jammu & Kashmir see pp. 27ff. of Author's *Commentary on The Constitution of India*, 6th Ed., Vol. P. Momemndous other changes were proposed to be introduced after the agreement arrived at between the Government of India and Sheikh Abdullah, in Fcbruaiy, 1975. But this agreement could not be implemented owing to difference in maUcr 0f detail (see also f.n. 8, below.)
5. The very definition of 'State' (in Art. 152) for the purpose of Part VI excludes the State of Jammu & Kashmir.
6. Their posiuon is sought to be drastically changed by a Resettlement Bill passed by the Jammu & Kashmir Legislature, which has been *referred* by the President to the Supreme Court of India for its opinion as to its constitutional validity.
7. *Vide Statesman*, Calcutta, 25-2T975, pp. 1, 7. He was released shortly after this Agreement and made the Chief Minister in February, 1975, on the resignation of the Mir Qasim ministry. At the election held in July, 1975, Sheikh Abdullah was elected to the Jammu & Kashmir Assembly and his Chief Ministership was thus upheld by election. He was retaining that office till his death in 1982.
8. Until the amendment of the Order in 1963, the Concurrent List was altogether inapplicable tojammu & Kashmir. Its application has been extended by the Amendment Order of 1964, subject to exceptions introduced in 1972.

CHAPTER 16

ADMINISTRATION OF UNION TERRITORIES AND ACQUIRED TERRITORIES

Genesis of Union Territories.

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

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

The special feature **of** these Part C States was that they were administered by the President **through** a Chief Commissioner or a Lieutenant-Governor, acting as his agent. Parliament had legislative power relating to *any* subject as regards the Part C States, but die Constitution empowered **Parliament** to create a Legislature as well as a Council of Advisers or Ministers for a Part C State. In exercise of Uiis power, Parliament enacted the Government of Part C States Act, 1951, by which a Council of Advisers or Ministers was set up in each Part C State, to advise the Chief Commissioner, under the overall control of die President, and also a Legislative Assembly to function as the Legislature of the State, widiout derogation to the plenary powers of Parliament.

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

Union Territories.

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

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

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

Since some of the erstwhile Union Territories (Himachal Pradesh, Manipur, Tripura, Mizoram, Arunachal Pradesh[1] and Goa) have been lifted up into die category of 'States', die number of Union Territories is, at die end of 2(XXJ, *seven*[1] [see Table 111, *post*].

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

Administrator.

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

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

. . . for Legislative Assembly and Council of Ministers.

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

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

Legislative Power.

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

concerned, the President has got a legislative power, namely, to make regulations for the peace, progress and good government of these Territories. This power of the President overrides die legislative power of Parliament inasmuch as a regulation made by the President as regards these Territories may repeal or amend any Act of Parliament which is for die time being applicable to the Union Territory [*Art.* 240(2)). But the President's power to make reguladons shall remain suspended *while* the legislature is funcdoning in any of these States,—to be revived as soon as such Legislature is dissolved or suspended.

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

Parliament mav by law constitute a High Court for a Union Territory or declare any court in any such Territory to be a High Court for all or any of the purposes of diis Constitution [*Art.* 241). Until such legislation is made the exisdng High Courts relating to such territories shall continue to exercise their jurisdiction. hi the result, the Punjab and Haryana High Court acts as the High Court of Chandigarh; the *Lakshadweep* is under the jurisdiction of the Kerala High Court; the Calcutta High Court has got jurisdiction over the Andaman and Nicobar Islands [*vide* Table XVT), the Madras High Court has jurisdiction over Pondicherry; the Bombay High court over Dadra and Nagar Haveli; and the Gauhati High Court (Assam) over Mizoram and Arunachul Pradesh. The Territory of Goa, Daman and Diu had a Judicial Commissioner but recently the jurisdiction of die Bombay High Court has been extended to diis Territory. Delhi has a separate High Court of its own since 1966.

High Courts for Union Territories.

There are no separate provisions in the Constitution relating to die administration of Acquired Territories but the provisions relating to Union Territories will extend by virtue of ther definition of 'Union Territory' [*Art.* 366(30)), as including "any odier territory comprised within the territory of India but not specified in that Schedule". Thus, the Territory of Pondicherry, Karaikal, Yanam and Mahe, was being administered by the President of India through a Chief Commissioner until it was made a Union Territory, in 1962. Parliament has plenary power of legislation regarding such territory as in the case of the Union Territories [*Art.* 246(4)).

Acquired Territories.

REFERENCES

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

CHAPTER 17

THE NEW SYSTEM OF PANCHAYATS AND MUNICIPALITIES

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

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

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

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

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

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

Special features of the new system.

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

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

It is to be recalled that 'local Government' including self-Govemment institutions in both urban and rural areas is an exclusive State subject under Entry 5 of List 11 of the 7th Sch., so diat the Union cannot enact any law to create rights and liabilities relating to these subjects. What the Union has, therefore, done is to outline the scheme which would be implemented by the several States by making laws, or amending their own existing laws to bring them in conformity with the provisions of the 73rd and 74th Constitution Amendment Acts.

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

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

CHAPTER 18

PANCHAYATS

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

3-tier system.

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

Composition.

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

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

Reservation of seats for Scheduled Castes and Scheduled Tribes.

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

Reservation for women.

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

Reservation of offices of Chairpersons.

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

These reservations favouring the Scheduled Castes and Tribes shall cease to be operative when die period specified in Art. 334 (at present 50 years *i.e.*, upto 24-1-2010).

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

Duration of Panchayat.

Every Panchayat shall continue for five years from the date of its first meting. But it can be dissolved earlier in accordance vvith the procedure prescribed by State law. Elections must take place before the expiry of the above period. In case it is dissolved earlier, then the elections must take place within six months of its dissolution. A Panchayat reconstituted after premature dissolution [*Le.* before the expiry of die full period of five years) shall continue only for the remainder of the period. But if the remainder of die period is less dian six months it shall not be necessary to hold elections.

Qualification for membership.

Article 243F provides that all persons who are qualified to be chosen to die State Legislature shall be qualified to be chosen as a member of a Panchayat. The only difference is that a person who has attained the age of 21 years will be eligible to be a member (in case of State Legislature the prescribed age is 25 years—Art. 173). If a question arises as to whedier a member has become subject to any disqualification, die question shall be referred to such authority as die State Legislature may provide by law.

Powers, authority and responsibilities of Panchayats.

State Legislatures have die legislative power, to confer on the Panchayats such powers and authority as may be necessary to enable them to function as institutions of self-government [*Arts.* 243G-243H]. They may be entrusted widi the responsibility of (a) preparing plans for economic development and social jusdee, (b) implementation of schemes for economic development and social justice, and (c) in regard to matters listed in die Elevendi Schedule (inserted by the 73rd Amendment). The list contains 29 items, *e.g.*, land improvement, minor irrigafion, animal husbandry, fisheries, education, women and child development etc. The 11th Sch. thus distributes powers between the State Legislature and die Panchayat just as die 7di Sch. distributes powers between the Union and die Stale Legislature.

Taxes to impose and finaiudal resources.

A State may by law authorise a Panchayat to levy, collect and appropriate taxes, duties, toils etc. The law may lay down the procedure to be followed as well as the limits of diese exacdons. It can also assign to a Panchayat various taxes, dudes etc. collected by the State Government. Grants-in-aid may be given to die Panchayats from the Consolidated Fund of the State.

Panchayat Finance Commissions.

Within one year from 25th April 1993, *i.e.* the date on which the ConsUtudon 73rd Amendment came into force and afterwards every five years the State Government shall appoint a finance Commission to review the financial posidon of die Panchayats and to make recommendauons as to—

(a) the disdibution between die State and the Panchayats of the net proceeds of taxes, dudes, tolls and fees leviable by die State which may be divided between them and how allocation would be made among various levels of Panchayats;

(b) what taxes, dudes, tolls and fees may be assigned to the Panchayats;

(c) grant-in-aid to the Panchayats.

The report oi die Commission, together with a memorandum of action taken on it, shall be laid before die State Legislature. These provisions are modelled on Art. 280 which contains provisions regarding appointment of a Finance Commission for distribudon of finances between the Union and die States.

State Election Commission.

Article 243K is designed to ensure free and fair elections to the Panchayats.

Article 243K provides for die Constitution of a State Election Commission consisting of a State Election Commissioner to be appointed by die Governor. Powers of superintendence, direction and control of elections to the Panchayats, including preparation of electoral rolls for it shall vest in die State Election Commission. To ensure the independence of the Commission it is laid down that State Election Commissioner can be removed only in the same manner and on the same grounds as a Judge of a High Court. The State Legislatures have die power to legislate on all matters relating to elections to Panchayats.

As under Art. 329, courts shall have no jurisdiction to examine the validity of a law, relating to delimitation of constituencies or the allotments of seats, made under Art. 243K. An election to a Panchayat can be called in question only by an election petition which should be presented to such authority and in such manner as may be prescribed by or under any law made by the State Legislature.

byf *o interference Courts in electoral matters.

REFERENCES

1. For the text ol the 73rd Amendment Act relating to Panchayats [*Arts.* 243-243-01. set Author's *Constitution Amendment Acts*, 7th Ed. pp. 170-77; *Shorter constitution of India*, 14th Ed., 2(X«.

CHAPTER 19

MUNICIPALITIES AND PLANNING COMMITTEES

PART IXA which has come into force on 1-6-1993 gives a constitutional foundation to the local self-government units in urban areas. In fact such institutions are in existence all over the country.

Some of the provisions are similar to those contained in Part IX, *e.g.* Reservation of Seats, Finance Commission, Election Commission etc.

This part gives birth to two typos of bodies:

(i) Institutions of self-government [*Art.* 243QJ, and

(ii) Institutions for planning [*Arts.* 243ZX and 243 ZEJ.

Institutions of self-government, called by a general name "municipalities" are of three types:

(a) Nagar Panchayat, for a transitional area, *i.e.* an area which is being transformed from a rural area to an urban area.

(b) Municipal Council for a smaller urban area.

(c) Municipal Corporation for a larger urban area.

Article 243Q makes it obligatory for every State to constitute such units. But if there is an urban area or part of it where municipal services are being provided or proposed to be provided by an industrial establishment in that area then considering also the size of the area and other factors the Governor may specify it to be an industrial township. For such an area it is not mandatory to constitute a Municipality.

Composition of Municipalities. The members of a municipality would generally be elected by direct election. The Legislature of a State may by law provide for representation **in** a **munidpallfy** of (i) persons having special knowledge or experience in municipal administration, (ii) Members of Lok Sabha, State Assembly, Rajya Sabha and Legislative Council, and (iii) the Chairpersons of Committees constituted under Cl. (5) of Art. 243S. The Chairperson shall be elected in die manner provided by the Legislature.

Wards Committee. For one or more wards comprised widiin the territorial area of a municipality having a population of three lacs or more it would be obligatory to constitute Ward Committees. The State Legislature shall make provision with respect to its composition, territorial area and the manner in which the seats in a ward committee shall be filled.

Other Committees. h is open for the State Legislature to constitute Committees in addition to the wards committees.

Reservations of seats for Scheduled Castes and Scheduled Tribes. As in Part LX reservations of seats are to be made in favour of the Scheduled Castes and Scheduled Tribes in every Municipality.

Reservation for women. Out of the total number of seats to be filled by direct elections at least 1/3rd would be reserved for women. This includes the quota for women belonging to Scheduled Castes and Tribes.

Reservation of offices of Chairpersons. h has been left to the State legislature to prescribe by law the manner of reservation of the offices of the Chairpersons of Municipalities.

Ail reservations in favour of Scheduled Castes and Tribes shall come to an end with the expiry of lire period specified in .Art. 334.

It is permissible for a State Legislature to make provisions for reservation of seats or offices of Chairpersons in favour of backward classes.

Municipalities. Every Municipality shall continue for five years from the date of its first meeting. But it may be dissolved earlier according to lavv. Article 243Q further prescribes that before dissolution a reasonable opportunity of being heard must be given to the municipality. Elections to constitute a Municipality shall be completed before the expiry of the period of five years. If the Municipality has been superseded before the expiry of its term, the elections must be completed within six months of its dissolution. A Municipality constituted after its dissolution shall continue only for the remainder of the term. But if the remainder of the period is less than six months it shall not be necessary to hold elections.

It has been provided that no amendment of the law in force shall cause dissolution of a Municipality before the expiry of the five years term.

Qualification for membership. Article 243V lays down that all persons who are qualified to be chosen to the State legislature shall be qualified for being a member of a Municipality. There is an important difference. Persons who have attained the age of 21 years will be eligible to be a member. While the constiuitional requirement is that for election to the State legislature of a State a person must have attained the age of 25 years *Art.* 173].

Responsibilities of Municipalities. Legislatures of States have been conferred the power *Art.* 243W] to confer on the Municipalities all such powers and **authority** a* may be necessary to enable them to function as institutions of self-government. It has specifically been mentioned that they may be given the responsibility of (a) preparation of plans for economic development and social justice, (b) implementation of schemes as may be entrusted to them, and (c) in regard to matters listed in the 12th schedule. This schedule contains 18 items, *e.g.* Urban Planning, Regulation of Land Use, Roads and

Bridges, VYater Supply, Public Health, Fire Services, Urban Forestry, Slums, etc.

Power to impose taxes and financial resources.

A State legislature may by law authorise a Municipality to levy, collect and appropriate taxes, dudes, tolls etc. The law may lay down the limits and Prcscribe the procedure to be followed. It can also assign to a Municipality various taxes, duties etc. collected by the State Government. Grants-in-aid may be given to the Municipalities, from the Consolidated Fund of the State.

Panchayat Finance Commission.

The Finance Commission appointed under Art. 243-1 (see Chap. 18 lmcler Panchayat Finance Commission) shall also review tile financial position of die Municipalities and make recommendations as to—

(a) die distribution between the State and the Municipalities of the net proceeds of taxes, dudes, tolls and fees leviable by die State which may be divided between them and allocadon of shares amongst different levels of Municipaliues.

(b) die taxes, dudes, tolls and fees diat may be assigned to the Municipalides.

(c) grants-in-aid to die Municipalides.

(d) die measures needed to improve the financial posidon of die Municipalides.

(e) any other matter diat may be referred to it by the Governor.

Elections to Municipalities.

The State Elecdon Commission appointed under Art. 243K shall have die Povver of superintendence, direction and control of (i) the preparation of electoral rolls for, and (ii) the conduct of all elections to the Municipalities. State Legislatures have been vested with necessary power to regulate by law all matters relating to elections to Municipalities.

Bar to interference by courts in electoral matters.

The courts shall have no jurisdiction to examine die validity of a law, relating to delimitation of constituencies or die allotment of seats made under Art. 243ZA. An election to a Municipality can be called in question only by an election petition which should be presented to such audiority and in such maimer as may be prescribed by or under any law made by the State legislature.

Committees for (a) District Planning and Un PlanninBt.ropoli-

Apart from giving constitutional recognition to Municipalities the 74th Amendment[1] lays dowai dial in every State two committees shall be consututed.

(1) At die district level a District Planning Committee [*Art.* 243ZD].

(2) In even metropolitan area a Metropolitan Planning Committee [*Art.* 243ZB].

The composition of the committees and the manner in which the seats are to be filled are to be provided by a law to be made by die State legislature. But it has been laid down diat,—

(a) in case of the District Planning Committee at least 4/5th of the members shall be elected by the elected members of die district level Panchayat and of die Municipalities in the district from amongst themselves. Their proportion would be in accordance with the ratio of urban and rural population of die district.

(b) in case of Metropolitan Planning Committee at least 2/3rd of the members of the committee shall be elected by die Members of the Municipalities and Chairpersons of die Panchayats in die Metropolitan area from amongst themselves. The proportion of seats to be shared by them would be based on the ratio of the population of the Municipalities and of the Panchayats in die area.

The State legislantre would by law make provision with respect to (i) the functions relating to district planning that may be assigned to the district committees, and (ii) the manner in which die Chairperson of a district committee may be chosen.

The Committee shall prepare and forward the development plan to the State Government. In regard to the Metropolitan Planning Committee which is to prepare a development plan for the whole Metropolitan area the State Legislature may by law make provision for

(1) die representation of the Central and State Governments and of such organisations and institutions as may be deemed necessary,

(2) the functions relating to planning and co-ordination for the Metropolitan area,

(3) the manner in which the Chairpersons of such committees shall be chosen.

Tlie development plan shall be forwarded to die State Government.

Addition to the duties of the Finance Commission under Art. 280.

This part adds one more function to die duties cast on the Finance Commission appointed by die President under Art. 2HO. The Commission will make recommendations in regard to the measures needed to augment the Consolidated Fund of a State to supplement the resources of the Municipalities in the State on the basis of the recommendations made by the Stale Finance Commission.

REFERENCES

1. Ini the text of the 71th Amendment Act relating to Municipalities [Arts 243P-243ZG], see Author's *Constitution Amendment Arts*, 7th Ed., pp. 177-84; *Shorter Constitution of Intha*, !4th Ed., 2008

CHAPTER 20

ADMINISTRATION OF SCHEDULED AND TRIBAL AREAS

THE Constitution makes special provisions for the Administration of certain areas called 'Scheduled Areas' in States other than Assam, Meghalaya, Tripura and Mizoram even though such areas are situated within a State or Union Territory [*Art.* 244(1)], presumably because of the backwardness of the people of these Areas. Subject to legislation by Parliament, the power to declare any area as a 'Scheduled Area' is given to the President [5th *Schedule, paras* 6-7] and the President has made the Scheduled Areas Order, 1950, in pursuance of this power. These are Areas inhabited by Tribes specified as 'Scheduled Tribes', in States *other than* Assam, Meghalaya Tripura and Mizoram.[1] Special provisions for the administration of such Areas are given in the 5th Schedule.

Scheduled Areas.

The Tribal Areas in the States of Assam, Meghalaya, Tripura and Mizoram are separately dealt with [*Art.* 244(2)], and provisions for their administration are to be found in die Sixth Schedule to the Constitution.

Tribal Areas.

The systems of administration under the Fifth and Sixth Schedules may be summarised as follows:

Administration of Scheduled Areas in States *other than Assam, Meghalaya, Tripura and Mizoram.*

I. The 5th Schedule of the Constitution deals with the administration and control of Scheduled Areas as well as of Scheduled Tribes *in States other than Assam, Meghalaya, Tripura and Mizoram.* The main features of the administration provided in this Schedule are as follows:

The executive power of the Union shall extend to giving directions to the respective States regarding the administration of the Scheduled Areas [*Sch.* V, *para* 3]. The Governors of the States in which there are 'Scheduled Areas'[1] have to submit reports to die President regarding the administration of such Areas, annually or whenever so required by the President [5th. V, *para* 3]. Tribes Advisory Councils are to be constituted to give advice on such matters as welfare and advancement of the Scheduled Tribes in the States as may be referred to them by the Governor [5th. V, *para* 4].

The Governor is authorised to direct that any particular Act of Parliament or of tlie Legislature of the State shall not apply to a Scheduled Area or shall apple, only subject to exceptions or modifications. The Governor is also authorised to make regulations to prohibit or restrict the transfer of land by, or among members of, the Scheduled Tribes, regulate die allotment of land,

;md regulate the business of money-lending. .All such regulations made by die Governor must have the assent of the President].SWi. V, *para* 51.

The foregoing provisions of the Constitution relating to die administration of the Scheduled Areas and Tribes may be altered by Parliament by ordinary legislation, without being required to go through the formalities relating to the amendment of the Constitution [.SVC V, *para* 7(2)].

The Constitution provides for the appointment of a Commission to report on die administration of the Scheduled Areas and the welfare of die Scheduled Tribes in the Stales. The President may appoint such Commission at any time, but the appointment of such Commission at die end of ten years from the commencement of die Constitution is obligator/ [*Art.* 339(1)]. A Commission was according!y appointed (widi Sri U.N. Dhebar as Chairman) in 1960 and it submitted its report to the President towards the end of 1961.

Tribal Areas in Assam, Meghalaya, Tripura and Mizoram.

II. The Tribal Areas in Assam, Meghalaya, Tripura and Mizoram are specified in die Table appended to die 6th Schedule (para 20) in *%e Constitution, which has undergone several amendments. Originally, it consisted of two Parts, A and B. But since the creation of die States of Nagaland, die Table (as amended in 1972, 1984 and 1988) includes 9 areas, in four Parts:

Part I—1. Tile North Kachar Hills District; 2. The Karbi Anglong District.; 3. The Bodoland Territonal Areas District.

Part II—1. Tlie KJiasi Hills District; 2. Thejaintia Hills District; 3. The Garo Hills District (in Meghalava).

Part IIA—Tripura Tribal .Areas District.

Part III—1. The Chakma District; 2. The Mara District; 3. The Lai District.

While ihe administration of Scheduled Areas in States *other than* Assam, Meghalaya, Tripura and Mizoram is dealt with in Sell. V, the tidi Schedule deals with the tribal areas in Assam, Meghalaya, Tripura and Mizoram.[2]

These Tribal Areas are to be administered as autonomous districts. These autonomous districts are not outside the executive authority of the State concerned but provision is made for die creation of District Councils and Regional Councils for die exercise of certain legislative and judicial functions. These Councils are primarily representative bodies and they have got die power of law-making[3] in certain specified fields such as management of a forest other dian a reserved forest, inheritance of property, marriage and social customs, and die Governor may also confer upon these Councils the power to try certain suits or offences.[5] These Councils have also the power to assess and collect land revenue and to impose certain specified taxes. The laws made by the Councils shall have, however, no effect unless assented to by die Governor.

With respect to the matters over which die District and Regional Councils are thus empowered to make laws, Acts of the State Legislature shall not extend to such Areas unless the relevant District Council so directs by public notification.[5] As regards other matters, the President with respect to a

Central Act and the Governor with respect to a State Act, may direct that an Act of Parliament or of the State legislature shall *not* apply to an autonomous district or shall apply only subject to exceptions or modifications as he may specify in his notification.

These Councils shall also possess judicial power, civil and criminal, subject to die jurisdiction of die High Court as the Governor may from dine to dmc specify.

REFERENCES

1. These Slates, in 1984, are —Andhra Pradesh, Bihar, Gujarat, Himachal Pradesh, Madhya Pradesh, Maharashtra, Orissa and Rajasthan (*India 1984*, p. 152).
2. Meghalaya was added bv the North-Eastern Areas (Reorganisation) Act, 1971. Tripura bv the Constitution (49th Amendment) Act, 1984 and Mizoram by State of Mizoram Act, 1986.
3. Para 3, Sixth Schedule
4. Para 4, Sixth Schedule.
5. Paras 12, 12A, 12AA and 12B, Sixth Schedule.

CHAPTER 21

ORGANISATION OF THE JUDICIARY IN GENERAL

No Federal D»tribution of Judicial Powers.

IT has already been pointed out, that notwithstanding tile adoption of a federal system, die Constitution of India has not provided for a double system of Courts as in die *United states.* Under *our* Constitution diere is a single integrated system of Courts for the Union as well as the States which administer both Union and State laws, and at the head of the entire system stands die Supreme Court of India. Below the Supreme Court stand die High Courts of die different States[1] and under each High Court diere is a hierarchy of other Courts which are referred to in die ConsUtudon as 'subordinate courts' *i.e.,* courts subordinate to and under die control of the High Court *Arts.* 233-2371.

The organisation of the subordinate judiciary varies slighdy from State to State, but the essential features may be explained with reference to Table XVI, *post,* which has been drawn with reference to the system obtaining in the majority of die States.

The Supreme Court has issued a direction[2] to the Union and the States to consdtute an All India Judicial Sendee and to bring about uniformity in designadon of officers both in criminal and civil side. Concrete steps in this direcdons are yet to be taken by die Government.

The h*erlrCky o* Courts.

At the lowest stage, the two branches of jusdee,—civil and criminal,—are bifurcated. The Union Courts and the Bench Courts, consdtuted under the Village Self-Government Acts, which consdtuted die lowest civil and criminal Courts respectively, have been subsdtuted by Panchayat Courts set up under post-Consdtudon State legislation. The Panchayat Courts also function on tw o sides, civil and criminal, under various regional names, such as the *Nyaya Panchayat, Panchayat Adalal, Gram Kutchery* , and die like. In some Stales, the Panchayat Courts, are the Criminal Courts of the lowest jurisdiction,[3] in respecl of petty cases.

The MunsflTs Courts are tile next liigher Civil Courts, having jurisdiction as determined by High Courts. Above die Munsifls are Subordinate Judges who have got unlimited pecuniary jurisdiction over civil suits and hear first appeals from the judgments of Munsifls. The District Judge hears first appeals from the decisions of Subordinate Judges and also from the Munsifls (unless they are transferred to a Subordinate Judge) and himself possesses unlimited original

jurisdiction, both civil and criminal. Suits of a small value are tried by die Provincial Small Causes Courts.

The District Judge is die highest judicial audiority (civil and criminal) in die district. He hears appeals from die decisions of the superior Magistrates and also tries the more serious criminal cases, known as the Sessions cases. A Subordinate Judge is sometimes vested also with the powers of an Assistant Sessions Judge, in which case he combines in his hands bodi civil and criminal powers like a District Judge.[3]

Since the enactment of the Criminal Procedure Code, 1973, die trial of criminal cases is done exclusively by Judicial Magisuates', except in Jammu & Kashmir and Nagaland, to which diat Code does not apply. The Chief Judicial Magistrate is die head of the Criminal Courts within die district In Calcutta and odier 'metropolitan areas', there are Metropolitan Magistrates.[3] The Judicial and Metropolitan Magistrates, discharging judicial functions, under the administrative conUol of the State High Court, are to be distinguished from Executive Magistrates who discharge die executive function of maintaining law and order, under the control of the State Government.

There are special arrangements for civil judicial administration in the 'Presidency towns', which are now called 'metropolitan areas'. The Original Side of the High Court at Calcutta tries the bigger *civil* suits arising widiin the area of die Presidency town. Suits of lower value within the City are tried by the City Civil Court and die Presidency Small Causes Court. But die Original *Criminal* jurisdiction of all High Courts, including Calcutta, has been taken away by the Criminal Procedure Code, 1973. *

Tlie High Court is the supreme judicial tribunal of the State,—having both Original and Appellate jurisdiction. It exercises appellate jurisdiction over die District and Sessions Judge, die Presidency Magisuates and the Original Side of the High Court itself (where die Original Side still continues). There is a High Court for each of die States, except Manipur, Meghalaya, Tripura and Nagaland which have the High Court of Assam (at Gauhati) as dieir common High Court; and Haryana, which has a common High Court (at Chandigarh) with Punjab. The Bombay High Court is common to Maharashtra and Goa.

As regards the Judiciary in Union Territories, see under 'Union Territories'.

The Supreme Court has appellate jurisdiction over the High Courts and is the highest tribunal of the land. The Supreme Court also possesses original and advisory jurisdictions which will be fully explained hereafter (in Chap. 22).

REFERENCES

1. For a list ol High Courts, their seat and territorial lurisdtcnon. see Table XVTi
2. *Ml India Judges Assort.* v. *Union of India,* AIR 1992 S.C. Iti5.
3. See Author's *Criminal Procedure Code, 1973* (Prentice-Hall of India, 2nd Ed, 1992), pp. id *cl set/*

CHAPTER 22

THE SUPREME COURT

Constitution of the Supreme Court.

PARLIAMENT has the power to make laws regulating the constitution, organisation, jurisdiction and powers of the Supreme Court. Subject to such legislation, the Supreme Court consists of die Chief Justice of India and not more than *twenty·five*[1] other Judges *Art.* 124].

Besides, the Chief Justice of India has the power, with the previous consent of the President, to request a retired Supreme Court Judge to act as a Judge of the Supreme Court for a temporary period. Similarly, a High Court Judge may he appointed *ad hoc* Judge of the Supreme Court for a temporarv period if there is a lack of quorum of the permanent Judges [*Arts* 127-128].

ADoointment of Judges.

Every Judge of the Supreme Court shall be appointed by the President of Inclia. The President shall, in this matter, consult other persons besides taking the advice of his Ministers. In the matter of appointment of the Chief Justice of India, he shall consult such Judges of the Supreme Court and of the High Courts as he may deem necessary. A ninejudge Bench of the Supreme Court has laid down diat the seniormost Judge of die Supreme Court considered fit to hold the office should be appointed to the office of Chief Justice of India/ And in the case of appointment of other Judges of the Supreme Court, consultation with the Chief Justice of India, in addition to the above, is obligatory [*Art.* 124(1)]. Consultation would generally mean concurrence.- The above provision, dius, modifies die mode of appointment of Judges by die Executive—by providing diat the Executive should consult members of the Judiciary itself, who are well-qualified to give dieir opinion in this matter.[3]

In a reference[4] (not as a review or reconsideration of die *Second Judges case*) made by die President under Art. 143 relating to the consultation between die Chief Justice of India and his brother Judges in matters of appointment of the Supreme Court Judges and the refevance of seniority in making such appointments, the ninejudge Bench opined:

1. The opinion of the CJ1, having primacy in the consultative process and reflecting the opinion of the judiciary, has to be formed on the basis of consultation with die *collegium,* comprising of the CJI and die four senior most Judges of die Supreme Court. The Judge, yvlio is to succeed die CJI should also be included, if he is not one of the four senior most Judges. Their views should be obtained in writing.

2. Views of the senior most Judges of the Supreme Court, who hail from the High Courts where the persons to be recommended are functioning as Judges, if not the part of the *collegium*, must be obtained in writing.

3. The recommendation of the *collegium* alongwith the views of its members and that of the senior most Judges of die Supreme Court who hail from the High Courts where die persons to be recommended are functioning as Judges should be conveyed by the Chief Justice of India to the Govt. of India.

4. The substance of the views of die others consulted by the Chief Justice of India or on his behalf, particularly those of nonjudges (Members of the Bar) should be stated in the memorandum and be conveyed to the Govt. of India.

5. Normally, die *collegium* should make its recommendation on the basis of consensus but in case of difference of opinion no one would be appointed, if die CJI dissents.

b. If two or more members of the *collegium* dissent, CJI should not persist with the recommendation.

7. In case of non-appointment of die person recommended, die materials and information conveyed by the Govt. of India, must be placed before the original *collegium* or die reconstituted one, if so, to consider whether the recommendation should be withdrawn or reiterated. It is only if it unanimously reiterated dial the appointment must be made.

8. The CJI may, in his discretion, bring to die knowledge of die person recommended the reasons disclosed by die Govt. of India for his non-appointment and ask for his response diereto, which, if made, be considered by die *collegium* before withdrawing or reitirating the recommendation.

d. Merit should be predominant consideration though inter-seniority among the Judges in dieu High Courts and their combined seniority on all India basis should be given weight.

10. Cogent and good reasons should be recorded for recommending a person of outstanding merit regardless of his lower seniority.

11. For recommending one of several persons of more or less equal degree of merit, the factor of the High Courts not represented on die Supreme Court, may be considered.

12. The Judge passed over can be reconsidered unless for strong reasons, it is recorded that he be never appointed.

13. The recommendations made by the CJI without complying with the norms and requirements, are not binding on die Govt. of India.

?pƐjimmen!ns for as judge.

A person shall not be qualified for appointment as a Judge of die Supreme Court unless he is (a) a citizen of India; and Ɛ) either, (i) a distinguished jurist; or (ii) has been a High Court Judge for at least 5 years; or (iii) has been an Advocate of a High Court (or two or more such

Courts in succession) for at least 10 years [*Art.* 124(3)].

Tenure of Judges.

No minimum age is prescribed for appointment as a Judge of the Supreme Court, nor any fixed period of office. Once appointed, a Judge of the Supreme Court may cease to be so, on the happening of any one of the following contingencies (other than death):

(a) On attaining the age of 65 years; (b) On resigning his office by writing addressed to the President; (c) On being removed by the President upon an address to that effect being passed by a special majority of each House of Parliament (*viz.*, a majority of the total membership of that House and by majority of not less than two-thirds of the members of that House present and voting).

The only grounds upon which such removal may take place are (1) 'proved misbehaviour' and (2) 'incapacity' [*Art.* 124(4)].

Impeachment of a Judge.

The combined effect of Art. 124(4) and the Judges (Inquiry) Act, 1968 is that the following procedure is to be observed for removal of a Judge. This is commonly known as impeachment—

(1) A motion addressed to the President signed by at least 100 members of the Lok Sabha or 50 members of the Rajya Sabha is delivered to the Speaker or the Chairman.

(2) The motion is to be investigated by a Committee of three (2 Judges of the Supreme Court and a distinguished jurist).

(3) If the Committee finds the Judge guilty of misbehaviour or that he suffers from incapacity the motion (para 1, *above*) together with the report of the Committee is taken up for consideration in the House where the motion is pending.

(4) If the motion is passed in each House by majority of the total membership of that House and by a majority of not less than two-thirds of that House present and voting the address is presented to the President.

(5) The Judge will be removed after the President gives his order for removal on the said address.

The procedure for impeachment is the same for judges of the Supreme Court and the High Courts. After the Constitution this procedure was started against SHRI R. RAMASWAMY in 1991-93. The Committee found the Judge guilty. In the Lok Sabha the Congress Party abstained from voting and so the motion could not be passed with requisite majority.

Salaries, etc.

A Judge of the Supreme Court gets a salary of Rs. 30,000 *per mensem* and the use of an official residence free of rent. The salary of the Chief Justice is Rs. 33,000.

Independence of Supreme Court Judges, how secured.

The independence of the Judges of the Supreme Court is sought to be secured by the Constitution in a number of ways:

(a) Though the appointing authority is the President, acting with the advice of his Council of Ministers, the

appointment of Supreme Court Judge has been lifted from the realm of pure politics by requiring the President to consult the Chief Justice of India in the matter.[3]

(b) By laving down that a Judge of the Supreme Court shall not be removed by the President, except on a joint address by both Houses of Parliament (supported by a majority of the total membership and a majority of not less than two-thirds of the members present and voting, in each House), on ground of proved misbehaviour or incapacity of the Judge in question *Art.* 124(4)).

This provision is similar to the rule prevailing in England since the Act of Settlement, 1701, to die effect that though Judges of the Superior Courts are appointed by the Crown, they do not hold office during his pleasure, but hold their office 'on good behaviour' and the Crown may remove them only upon a joint address from both Houses of Parliament.

(c) By fixing the salaries of the Judges by the Constitution and providing that though the allowances, leave and pension may be determined by law made by Parliament, these shall not be varied to the disadvantage of a Judge during his term of office. In other words, he will not be affected adversely by any changes made by law since his appoinunent *[Art.* 125(2)].

But it will be competent for the President to override this guarantee, under a Proclamation of 'Financial Emergency' *[Art.* 360(4)(b)].

(d) By providing that the administrative expenses of the Supreme Court, die salaries and allowances, etc., of the Judges as well as of the staff of the Supreme Court shall be 'charged upon the Consolidated Fund of India'; *i.c.*, shall not be subject to vote in Parliament *[Art.* 146(3)).

(e) By forbidding the discussion of the conduct of a Judge of the Supreme Court (or of a High Court) in Parliament, except upon a motion for an address to the President for the removal of the Judge [*Art.* 121).

(1) By laying down dial after retirement, a Judge of the Supreme Court shall not plead or act in any Court or before any authority within the territory of India" *[Art.* 124(7)].

[It is to be noted that there are analogous provisions in die case of High Court Judges; see Chap. 23, *post]*

Position of the Supreme Court under the Constitution.

It has been righdy said that the jurisdiction and powers of our Supreme Court are in their nature and extent wider than those exercised by the highest Court of any other country.[7] It is at once a federal Court, a Court of appeal and a guardian of the Constitution, and the law declared by it, in the exercise of any its jurisdictions under the Constitution, is binding on all other Courts within the territory of India *[Art.* 141].

Compared with the American Supreme Court.

Our Supreme Court possesses larger powers[8] dian the American Supreme Court in several respects—

Firstly, the American Supreme Court's appellate jurisdiction is confined to cases arising out of the federal relationship or those relating to the constitutional validity of laws and treaties. But *our* Supreme Court is not only a federal court and a guardian of the Constitution, but also the highest court of appeal in the land, relating to civil and criminal cases [*Arts.* 133-131], apart from cases relating to the interpretation of die Constitution.

Secondly, *our* Supreme Court has an extraordinary power to entertain appeal, without any limitation upon its discretion, from the decision not only of any court but also of any tribunal within the territory of India [*Art.* 136]. No such power belongs to the American Supreme Court.

Thirdly, while the American Supreme Court has denied to itself any power to advise die Government and confined itself only to the determination of actual controversies between parties to a litigation, *our* Supreme Court is vested by die Constitution itself with the power to deliver advisory opinion on any question of fact or law that may be referred to it by the President (*Art.* 143).

(i) As a Federal Court.

Every federal Constitution, whatever the degree of cohesion it aims at, involves a distribution of powers between the Union and the units comPos*ng die Union, and both Union and State Governments derive their audiority from, and are limited by the same Constitution. In a unitary Constitution, like that of England, die local administrative or legislative bodies are mere subordinate bodies under die central authority. Hence, there is no need of judicially determining disputes between the central and local authorities. But in a federal Constitution, die powers are divided between the national and Slate Governments, and there must be some authority to determine disputes between the Union and the States or the Stales *inter sc* and to maintain the distribution of powers as made by the Constitution.

Though *our* federation is not in the nature of a treaty or compact between die component units, there is, nevertheless, a division of legislative as well as administrative powers between the Union and die States. Article 131 of *our* Constitution, dierefore, vests the Supreme Court with original and exclusive jurisdiction to determine justiciable disputes between the Union and die States or between the States *inter sc*.[H]

(ii) As a Court of Appeal.

Like the House of Lords in England, the Supreme Court of India is the final appellate tribunal of the land, and in some respects, the jurisdiction of the Supreme Court is even wider than diat of the House of Lords. As regards *criminal* appeals, an appeal lies to the House Qf Lords only if the Attorney-General certifies that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance and diat it is desirable in die public interest that a further appeal should be brought. But in cases specified in Cls. (a) and (*b*) of Art. 134(1) of *our* Constitution (death sentences), an appeal will lie to die Supreme Court as of right.

As to appeals from High Courts in *civil* cases, however, the position has been altered by an amendment of Art. 133(1) by the Constitution (30th

Amendment) Act, 1972, which has likened the law to dial in England. Civi appeals from the decisions of the Court of Appeal lie to the House of Lord: only if die Court of Appeal or the House of Lords grants leave to appeal. Under Art. 133(1) of *our* Constitution as it originally stood, an appeal to die Supreme Court lay as of right in cases of higher value (as certified by die High Court). But this value test and die category of appeal as of right has been abolished by the amendment of 1972, under which appeal from the decision of a High Court in a civil matter will lie to die Supreme Court only if die High Court certifies that the case involves 'a substantial question of law of general importance' and that 'die said question needs to be decided by the Supreme Court'.[8]

But the right of the Supreme Court to entertain appeal, *by special leave*, in any cause or matter determined by any Court or tribunal in India, save military tribunals, is unlimited (*Art.* 136).

(iii) As a Guardian of the Constitution.

As against unconstitutional acts of the Executive the jurisdiction of die Courts is nearly the same under all constitutional systems. But not so is the control of the Judiciary over the Legislature.

It is ture dial there is no express provision in *our* Constitution empowering the *Courts* to invalidate laws; but die Constimtion has imposed definite limitations upon each of the organs of the state, and any transgression of diose limitations would make die law *void*. It is for the Courts to decide whether any of the constitutional limitations has been transgressed or not,* because the Constitution is the organic law subject to which ordinary laws are made by the Legislature which itself is set up by the Constitution.

Thus, Art. 13 declares dial any law which contravenes any of the provisions of the Fart on Fundamental Rights, shall be *void*. But, as *our* Supreme Court has observed,[9] even without the specific provision in Art. 13 (which has been inserted only by way of abundant caution), die Court would have the powers to declare any enactment which transgresses a fundamental right as invalid.

Similarly, Art. 254 says diat in case of inconsistency between Union and state laws in certain cases, the State law shall be *void*.

The limitations imposed by *our* Constitution upon the powers of Legislatures are—(a) Fundamental rights conferred by Part III. (b) Legislative competence. (c) Specific provisions of die Constitution imposing limitations relating to particular matters.[10]

It is clear from the above that (apart from the jurisdiction to issue the writs to enforce the fundamental rights, which has been explained earlier) the jurisdiction of the Supreme Court is three-fold: (a) Original; (b) Appellate; and (c) Advisory.

A. Original Jurisdiction of Supreme Court.

The Original jurisdiction of the Supreme Court is dealt with in Art. 131 of the Constitution. The functions of the Supreme OOurt under Art. 131 are purely of a federal character and are confined to disputes between the Government of India and any of the States of die Union, the

Government of India and any State or States on one side and any other State or Stales on the other side, or between two or more States *inter se*. In short, these are disputes between different units of the federation which will be within the exclusive original jurisdiction of the Supreme Court. The Original jurisdiction of the Supreme Court will be *exclusive*, which means that no other court in India shall have the power to entertain any such suit. On tile other hand, the Supreme Court in its original jurisdiction will not be entitled to entertain any suit where *both* the parties are not units of the federation. If any suit is brought either against the State or the Government of India by a private citizen, that will *not lie* within the original jurisdiction of the Supreme Court but will be brought in the ordinary courts under the ordinary law.

Again, one class of disputes, though a federal nature, is excluded from this original jurisdiction of the Supreme Court, namely, a dispute arising out of any treaty, agreement, covenant, engagement; 'sanad' or other similar instrument which, having been entered into or executed before tire commencement of this Constitution continues in operation alter such commencement or which provides that the said jurisdiction shall not extend to such a dispute.[11] But these disputes may be referred by the President to the Supreme Court for its *advisory* opinion.

It may be noted that until 1DG2, no suit in the original jurisdiction had been decided by the Supreme Court. It seems that the disputes, if any, between tire Union and the units or between the units *inter se* had so far been settled by negotiation or agreement rather than by adjudication. The Grst suit, brought by tire State of West Bengal against the Union of India in 1961, to declare the unconstitutionality of the Coal Bearing Areas (Acquisition and Development) Act, 1957, was dismissed by the Supreme Court.[12]

In this context, it should be further noted that there are certain provisions in the Constitution which exclude from the original jurisdiction of the Supreme Court certain disputes, the determination of which is vested in other tribunals:

(i) Disputes specified in the Proviso to Arts. 131 and 363(1).

(ii) Complaints as to interference with inler-State water supplies, referred to the statutory tribunal mentioned in Art. 262, if Parliament so legislates.

Since Parliament has enacted the Inter-State Water Disputes Act (33 of 1956), Art. 262 has now to be read with s. 11 of that Act.

(iii) Matters referred to the Finance Commission *Art.* 280).

(iv) Adjustment of certain expenses as between the Union and the Stales under Arts. 257(4), 258(3).

(v) Adjustment of certain expenses as between the Union and the States [*Art.* 290].

B. Writ Jurisdiction.

The jurisdiction of the Supreme Court to entertain an application under Art. 32 for the issue of a constitutional writ for the enforcement of Fundamental Rights, is sometimes treated as an 'original' jurisdiction of the Supreme

Court. It is no doubt original in the sense that the party aggrieved has the right to directly move the Supreme Court by presenting a petition, instead of coming through a High Court by way of appeal Nevertheless, it should be treated as a separate jurisdiction since the dispute in such cases is not between the units of die Union but an aggrieved individual and die Government or any of its agencies. Hence, the jurisdiction under An. 32 has no analogy to the jurisdiction under Art. 131.

The Supreme Court is the highest court of appeal from all courts in die territory of India, die jurisdiction of the Judicial Committee of die Privy Council to hear appeals from India having been abolished on the eve of the Constitution. Ilie *Appellate* jurisdiction of the Supreme Court may be divided under three heads:

dicriCn ofaSupJreme Court.

(i) Cases involving interpretation of the Constitution,—civd, criminal or otherwise.

(ii) Civil cases, irrespective of any constitutional question

(iii) Criminal cases, irrespective of any constitutional question.

Apart from appeals to the Supreme Court by special leave of that Court under Art. 136, an appeal lies to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in two classes of cases—

(A) Where die case involves a substantial question of law as to the *interpretation of the Constitution,* an appeal shall lie to the Supreme Court on die certificate of the High Court that such a question is involved or on the leave of die Supreme Court where the High Court has refused to grant such a certificate but the Supreme Court is satisfied that a substantial question of law as to the interpretation of the ConstiUition is involved in die case *Art.* 132].

(B) hi cases where no *constitutional* question is involved, appeal shall lie to die Supreme Court if die High Court certifies dial die following conditions are satisfied *Art.* 133(1)]—

(i) that the case involves a substantial question of law;

(ii) dial in die opinion of the High Court the said question should be decided by the Supreme Court.

Prior to the Constitution, there was no court of criminal appeal over the High Courts. It was only in a limited sphere that the Privy Council entertained appeals in criminal cases from the High Courts by *special leave* but diere was no appeal *as of right*. Article 134 of die Constitution for the first time provides for an appeal to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court, as of right, in two specified classes of cases—

(i) Criminal.

(a) where the High Court has on an appeal reversed an order of acquittal of an accused person and sentenced him to death;

(b) where the High Court has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused and sentenced him to death.

In these two classes of cases relating to a sentence of death by the High Court, appeal lies to the Supreme Court as of right.

Besides the above two classes of cases, an appeal may lie to the Supreme Court in any criminal case if the High Court certifies that the case is a fit one Ior appeal to the Supreme Court. The certificate cf the High Court would, of course, be granted only where some substantial question of law or some matter of great public importance or the infringement of some essential principles of justice are involved. Appeal may also lie to the Supreme Court (under *Art.* 132) from a criminal proceeding if the High Court certifies that the case involves a substantial question of law as to the mterpretation of the Constitution.

Except in the above cases, no appeal lies from a criminal proceeding of the High Court to the Supreme Court under the Constitution but Parliament has been empowered to make any law conferring on the Supreme Court further powers to hear appeals from criminal matters.

(ii) Appeal by Special Leave.

While the Constitution provides for regular appeals to the Supreme Court from decisions of the High Courts in Arts. 132 to 134, there may still remain some cases where justice might require the interference of the Supreme Court with decisions not only of the High Courts outside the purview of Arts. 132-134 but also of any other court or tribunal within the territory of India. Such residuary power outside the ordinary law relating to appeal is conferred upon the Supreme Court by .Art. 136. This Article is worded in the widest terms possibfe—

> "131. (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.
>
> (2) Nothing in clause (1) shall apply to any judgment, determinaUon, sentence or order passed or made bv any court or tribunal constituted by or under any law relating to the .Armed Forces."

It vests in the Supreme Court a plenary jurisdiction in die matter of entertaining and hearing appeals, by granting special leave, against any kind of judgment or order made by any court or tribunal (except a military tribunal) in any proceeding and the exercise of the power is left entirely to the *discretion* of the Supreme Court unfettered by tiny restrictions and this power cannot be curtailed by any legislation short of amending the Article itself. This wide power is not, however, to be exercised by the Supreme Court so as to entertain an appeal in *any* case where no appeal is otherwise provided by the law or the Constitution. It is a special power which is to be exercised only under *exceptional circumstances* and the Supreme Court has already laid down die principles according to which this extraordinary power shall be used, *e.g.*, where there has been a violation of die principles of natural jusdee. In *civil cases* the special leave to appeal under this Article would not be granted unless diere is some substantial question of law or general public interest involved in the case. Similarly, in *criminal* cases the

Supreme Court will not interfere under Art. 136 unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against.[13] Similarly, it will not substitute its own decision for the determination of a *tribunal* but it would interfere to quash the decision of a quasi-judicial tribunal under its extraordinary powers conferred by Art. 136 when the tribunal has either exceeded its jurisdiction or has approached the question referred to in a manner which is likely to result in injustice or has adopted a procedure which runs counter to the established rules of natural justice.[14]

D. Advisory jurisdiction.

Besides the above regular jurisdiction of the Supreme Court, it shall have an *advisory* jurisdiction, to give its *opinion,* on any question of law or fact of public importance as may be referred to it for consideration by the President.

Article 143 of die Constitution lays down that the Supreme Court may be required to express its opinion in two classes of matters, in an advisory capacity as distinguished horn its judicial capacity :

(a) In dif first class, any question of law may be referred to the Supreme Court for its opinion if die President considers dial the question is of such a nature and of such public importance dial it is expedient to obtain die opinion of the Supreme Court. It differs from a regular adjudicadon before the Supreme Court in this sense that there is no litigation between two parties in such a case and dial the opinion given by the Supreme Court on such a reference is not binding upon the Government itself and further that the opinion is not executable as a judgment of the Supreme Court. The opinion is only advisory and ihe Government may take it into consideradon in taking any action in the matter but it is not bound to act in conformity with the opinion so received. The chief utility of such an advisory judicial opinion is to enable the Government to secure an audioritative opinion either as to the validity of a legislative measure before it is enacted or as to some other matter which may not go to the courts in the ordinary course and yet die Government is anxious to have audioritative legal opinion before taking any action.

Up to 2007 there were *fourteen* cases of reference of this class made by the President.[15-20] It may be mentioned diat though die opinion of the Supreme Court on such a reference may not be binding on the Government, the propositions of law declared by the Supreme Court even on such a reference are binding on die subordinate courts. In fact, the propositions laid down in the *Delhi Laws* case[15] have been frequendy referred to and followed since then by die subordinate courts. The Supreme Court is entided to decline to answer a question posed to it under Art. 143 if it is superfluous or unnecessary.[22]

(b) The second class of cases belong to the disputes arising out of pre-Constitution treaties and agreements which are excluded by Art. 131, Proviso, from die Original Jurisdiction of die Supreme Court, as we have already seen. In odier words, though such disputes cannot come to die Supreme Court as a litigation under its C..iginal jurisdiction, the subject-

matter of such disputes may be referred to by the President for die opinion of the Supreme Court in its advisory capacity.

E. Miscellaneous Jurisdiction.

There are provisions for reference to this Court under Art. 317(1) of die Constitution, s. 257 of the Income-tax Act, 1961, s. 7(2) of the Monopolies and Restrictive Trade Practices Act, 1969, s. 130A of the Customs Act, 1962 and s. 35H of the Central Excise and Salt Act, 1944.

Appeals also lie to Supreme Court under the Representation of the People Act, 1951; Monopolies and Restrictive Trade Practices Act, 1969; Advocates Act, 1961; Contempt of Courts Act, 1971; Customs Act, 1962; Central Excise and Salt Act, 1944; Terrorist Affected Areas (Special Courts) Act, 1984; Terrorist and Disruptive Activities (Prevention) Act, 1985; Trial of Offences relating to Transactions in Securities Act, 1992 and Consumer Protection Act, 1986.

Election Petitions under Part 111 of the Presidential and Vice-Presidential Elections Act, 1952 are also filed directly in the Supreme Court.

The 42nd, 43rd and 44th Amendments.

The jurisdiction of die Supreme Court, as outlined in die foregoing Pages, was curtaded by the 42nd Amendment of the Constitution (1976), in several ways. But some of these changes have been recoiled by the Janata Government, by repealing diem by die 43rd Amendment Act, 1977, so diat die reader need not bother about diem. The provisions so repealed are Arts. 32A, 144A.

But there are several odier provisions which were introduced by the 42nd Amendment Act, 1976, but the Janata Government failed to dislodge them, owing to the opposition of die Congress Party in the *Rajya Sabha*. These are—

(i) *Art. 323A—323B.* The intent of these two new Articles was to take away the jurisdiction of the Supreme Court under Art. 32 over orders and decisions of Administrative Tribunals. These Articles could, however, be implemented only by legislation which Mrs. Gandhi's *first* Government had no time to undertake.

Article 323A has been implemented by the Administrative Tribunals Act, 1985 [see, further, under Chap. 30, *post*].

But subsequendy, the position turned out to be otherwise as the Supreme Court declared the Articles 323-A, Cl. 2(d) and 323-B, Cl. 3(d) and also die "exclusion of jurisdiction" clauses in till die legislations enacted in pursuance of these Articles, unconstitutional to the extent they excluded the jurisdiction of die High Courts and the Supreme Court under Articles 226/227 and 32.[29]

(ii) *Art. 368(4)—(5).* These two clauses were inserted in Art. 368 with a view to preventing the Supreme Court from invalidating any Constitution Amendment Act on the dieory of 'basic features of Constitution' or anydiing of that nature.

Curioulsy, however, these Clauses have been emasculated by die Supreme Qiurt itself, striking diem down on the ground dial diey are violative of two 'basic features' of the Constitution—(a) the limited nature of

the amending power under Art. 368, and (b) judicial review,—in the ***Minerva Mills*** case.[10]

REFERENCES

1. Tin Constitution provided for seven Judges besides the Chief Justice, subject to legislation by Parliament Parliament has enacted the Supreme Court (Number of Judges) Acts, 195b and 198b, raising this number to 25.
2. *Supreme Court Advocates* v. *Union of India*, (1991) 4 S.C.C. 111 (9Judge Bench).
3. VIII C.A.D. 258. But there is no such safeguard in the case of appointment of a Chief Justice, and when A.N. **RAY**, J., was appointed Chief Justice, alter superseding three senior Judges.– HEGDE, GROVER and SHEL.AT, there was an uproar in which the Supreme Court Bar Association joined, that the Senior Judges had been superseded solely because their judgment in *Keshavananda's* case (AIR 1973 S.C. 14hl) had been unfavourable to the Government.

   Again in January 1977 instead of H.R. KHANNA, J., the seniormost Judge M.U. BEG, J. was made the Cliiefjustice of India. Justice KHANXA resigned just as the dtree Judges had done a few years back. It was said the supersession was because of his dissenting judgment in *A.D.M.* v. *Shukla*, AIK 1976 S.C. 1207.

   After the judgment referred to in f.n. 2 above viz. *Supreme Court Advocates* v. *Union of India*, it appears that discretion of the execuUve has been curtailed.
4. *Special Reference No. / of 1998*, Re :, (1998) 7 S.C.C. 739. The Bench expressed its opnmistic view that the successive CJIs shall henceforth act in accordance with *the Second Judges case* and the opinion in the instant reference.
5. Ihe salaries of Judges of the Supreme Court and the High Courts has been enhanced ***vide*** Act 18 of 1998, s. 7 (w.e.f. 1.1.1996).
6. Bug curiously, there is no bar against a retired Judge from being appointed to any office under the Government [as there is in the case of the Comptroller and Auditor-General: Art. 148(4)]; and die expectation of such employment after retirement tndireedy detracts from die independence of die Judges from executive influence. In fact, retired Judges have been appointed to hold offices such as that of Governor, Ambassador and the like, apart from membership of numerous Commissions or Boards.
7. Attorney-General of India (1956) S.C.R. 8; A.K. AIYAR, *The Constitution and Fundamental Rights*, 1955, p. 15.
8. *Vide* Audior's *Constitutional Law of India* (PrenUce-Hall of India 1991), pp. 168 *et. seq.*
9. *A.K. Gopalan* v. *Stale of Madras*, (1950) S.C.R. 88 (700); Ref. Under Art 143, AIR 1965 S.C. 745 (762).
10. *Vide* Author's *Constitutional Law of India, ibid*, p. 270.
11. Article 131, *Proviso*, as amended by the Constitution (7th Amendment) Act, 1956.
12. *State of West Bengal* v. *Union of India*, AIR 1963 S.C. 1241.
13. *Pntam Singh* v. *State*, AIR 1950 S.C. 169.
14. *D.C. Mills* v. *Commr. of I.T.*, AIR 1955 S.C. 65.
15. In re *Delhi Laws Act, 1912* (1951) S.C.R. 747 [regarding the validity of the Delhi Laws Act, 1912].
16. Re *Kerala Education Bill*, AIR 1958 S.C. 956 [regarding die constiluuonahty of the Kerala Education Bill].
17. Re *Beruban Union*, (1960) 3 S.C.R. 250 Iregarding die procedure for implementaUon of die Indo-Paklstan Agreement relating to trie Berubari llnion].
18. In re *Sea Customs*, AIR 1963 S.C. 1760 [regarding die consntuUonality of the Sea Customs Amendment Bill, with reference to Art. 289 of die Consutulion].
19. Special Reference 1 of 1964 (re. U.P. Legislature), AIR 1965 S.C. 74.5.
20. In re *Presidential Election, 1974*, AIK 1974 S.C. 1682.
21. In re *Special Courts Bill, 1978*, AIR 1979 S.C. 178 (dated 1.12.1978).
22. In re *Cautery Waters Disputes 7ribunal*, AIR 1992 S.C. 1183.
23. *Special Reference No. 1 of 1993*. [regarding issue of an ordinance to acquire certain disputed land near Ramjanma Bhumi and whedier a temple stood at that place) *Ismail Faruqui* v. *Union of India*, (1994) 6 S.C.C. 360 (Rama janma Bhumi case).

24 *Special Reference No. 1 of 1998,* (1998) 7 SCC 739. [Regarding consultation with die Chief Justice of India and mediod of communicating in regard to appointment of S.C. and H.C Judges]

IS Reference No. 1 of 1982 [Regarding validity of Resetdement Act, passed by the State of J&K. decided or 8.11.2001 but unreported yet].

20 *Special Referente No. 1 of 2002, (In re, Gujarat Assembly Election Matter,* (2002) 8 SCC 237 [Gujarat Assembly was prematuredly dissolved. Reference was regarding whedier the new Assembly must meet widiin six mondis. It involved interpretation of Arts. 174, 324 and 35ti].

27. *Special Reference No. 1 of 2001,* (2004) 4 SCC 489 (Regarding whether States have legislative competence to legislate on the subject of natural gas and liquefied natural gas under Entry 25 of List II of Sch. V'll or whether die Union has exclusive jurisdiction over natural gas in whatever physical form under Entry 53 List 1 of Sch. VII). [Opinion delivered on 25-03-2004).

28. The Punjab Termination of Agreement Act, 2004, passed by Punjab State Legislature referred in July 2004 regarding legislative competence (not yet decided).

29. *1. Chandra Kumar* v. *Union of India,* (1997) 3 S.C.C. 201 : A.I.R. 1997 S.C. 1125.

30. *Minerva Mills* v. *Union of India,* AIR 1980 S.C. 1789 (paras 22-2t>, 28, 93-94).

CHAPTER 23

THE HIGH COURT

The High Court of a State.

THERE shall be a High Court in each State [*Art.* 214] but Parliament has die power to establish a common High Court for two or more States[1] [*Art.* 231]. The High Court stands at the head of the Judiciary in the State [see Table XVII].

Constitution of High Courts.

(a) Every High Court shall consist of a Chief Justice and such other fudges as the President of India may from time to time appoint.

(b) Besides, the President has the power to appoint (i) *additional* Judges for a temporary period not exceeding two years, for the clearance of arrears of work in a High Court; (ii) an acting Judge, when a permanent Judge of a High Court (other than a Chief Justice) is temporarily absent or unable to perform his duties or is appointed to act temporarily as Chief Justice. The acting Judge holds office until the permanent Judge resumes his office. But neither an additional nor an acting Judge can hold office beyond the age of 62 years.[2]

Appointment and Conditions of the Office of a Judge of a High Court.

Every Judge of a High Court shall be appointed by the President. In making die appointment, lire President shall consult die Chief Justice of India, the Governor of the State (and also the Chief Justice of diat High Court in the matter of appointment of a Judge other than the Chief Justice).

Participatory Consultative Process.—A nincjudge Bench of the Supreme Court[3] has held that (1) die process of the appointment of the Judges of the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise.

(2) Initiation of the proposal for appointment in the case of High Court must invariably be made by die Chief Justice of that High Court.

(3) hi the event of conflicting opinions by the constitutional functionaries, the opinion of die judiciary 'symbolised by the view of the Chief Justice of India' formed by him in consultation widi two senior most Judges of the Supreme Court who come from diat State, would have supremacy.

(4) No appointment of any Judge of a High Court can be made unless it is in conformity with die opinion of the Chief Justice of India.

(5) In exceptional cases alone, for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating dial the recoinmendee is not suitable for appointment. that the appointment recommended by the Chief Justice of India may not be made. However, if die stated reasons are not accepted by the CJ1 and the other Judges of the Supreme Court, consulted by liim in the matter, on reiteration of the recommendadon by die CJI, the appoinunent should be made as a healthy convention.

Subsequently, the President of Lidia in exercise of his powers under Art. 143 made a Reference' to the Supreme Court relating to die consultation between die CJI and his brother Judges in matters of appointments of die High Court Judges, but not as a review or reconsideration of the *Supreme Court Advocates case [Second Judges case)* above. The S.C. opined that "consultation with the CJI" implies consultation with a plurality of Judges in the formation of opinion. His sole opinion does not constitute consultation. Only a *collegium* comprising die CJI and two senior most Judges of the S.C., as was in the *Second Judges case* above, should make the recommendation. The *collegium* in making its decision should take into account the opinion of die CJI of the High Court concerned which "would be endded to the greatest weight," the views of the odier Judges of the High Court who may be consulted and die views of the other Judges of the S.C. "who are conversant with the affairs of the High Court concerned." The views of die Judges of the S.C. who were puisne Judges of the High Court or CJ., thereof, will also be obtained irrespective of the fact diat the H.C. is not dieir parent H.C. and diey were transfered there. All these views should be expressed in writing and be conveyed to the Govt. of India alongwith die recommendation of the *collegium*. The recommendations made by die CJI without complying with the norms and requirements of the consultadon process, as aforestated, are not binding upon the Govt. of India.

Judicial review would be available if die aforestated procedure is not followed or the appointee is found to lack eligibility.

A Judge of the High Court shall hold office unul the age of 62 years.[2]

Every Judge,—permanent, additional or acting,—may vacate his office earlier in any of the following ways—

(i) By resignation in writing addressed to die President.

(ii) By being appointed a Judge of the Supreme Court or being transferred to any other High Court, by the President.

(iii) By removal by the President on an address of both Houses of Parliament (supported by a majority of the total membership of diat house and by the vote of not less than 2/3 of the members present), on the ground of proved misbehaviour or incapacity. The mode of removal of a Judge of the High Court shall dius be die same as that of a Judge of die Supreme Court, and both shall hold office during 'good behaviour' [*Art.* 217(1)]. This procedure is known as impeachment and is the same as that for a Judge of

ihc Supreme Coun. [For details, see Chap. 22 under. "Impeachment of a Judge".]

Salaries, etc.

A Judge of a High Court gets a salary of Rs. 26,000/- *per mensem* while the Chief Justice gets Rs. 30,0(X)/- *per mensemA* He is also entitled to such allowances and rights in respect of leave and pension as Parliament may from time to time determine, but such allowances and rights cannot be varied bv Parliament to the disadvantage of ajudge after his appointment *Art* 2211.

Qualifications for Appointment as High Court Judge.

'1he qualifications laid down in the Constitution for being eligible for appoinunent as ajudge of die High Court are that—

(a) he must be a citizen of India, not being over f)2 years; and must have

(b) (i) held for at least 10 years a judicial office in die territory of India; or

(ii) been for at least 10 years an advocate of a High Coun or of two or more such Courts in succession *Art.* 217(2)|.

Independence of the Judges.

As in the case of die Judges of die Supreme Court, the Constitution seeks to maintain die independence of the Judges of the High Courts by a number of provisions:

(a) By laying down that a Judge of the High Court shall not be removed, except in the manner provided for the removal of ajudge of the Supreme Court, dial is, upon an address of each House of Parliament (passed by a special majority [*Art.* 218];

(b) By providing dial the expenditure in respect of die salaries and allowances of the Judges shall be charged on the Consolidated Fund of die State |*Art.* 202(3)(d)[;

(c) By specifying in the Constitution the salaries payable to die Judges and providing that the allowances of a Judge or his rights in respect of absence or pension shall not be varied by Parliament to his disadvantage after his appointment *Art.* 221], except under a Proclamation of Financial Emergency [*Art.* 360(4)(b)|;

(d) By laying down that after retirement a permanent Judge of High Court shall not plead or act in a Court or before any audiority in India, except the Supreme Court and a High Court other dian the High Court in which he had held his office [*Art.* 220].

Control of the Union over High Courts.

As Sir Alladi Krishnaswami explamed in the Constituent Assembly,"1 while ensuring the independence of the Judiciary, the Constitution placed die High Courts under the control of die Union in certain important matters, in order to keep them outside the range of 'provincial politics'. Thus, even though the High Court stands at the head of the State Judiciary, it is not so sharply separated from die federal Government as the highest Court of an .American State (called the Stale Supreme Court) is. The control of die Union over a High Court in India is exercised in die following matters:

(a) Appointment [*Art.* 217], transfer[7] from one High Court to another [*Art.* 222] and removal [*Art.* 217(1), *Prov.* (b)], and determination of dispute as to age [*Art.* 217(3)], of Judges of High Courts.

Transfer.—Now the power to transfer of the High Court Judges remains no more a method of control over the High Court by the Union Government as the Supreme Court has prescribed a procedure for the purpose in a Reference made by the President of India in exercise of his powers under Art. 143. The Supreme Court opined that the Chief Justice of India should obtain the views of the Chief Justice of the High Court from which the proposed transfer is to be effected as also that of the Chief Justice of the High Court to which the transfer is to be effected (as was stated in the *Second Judges case* in 1993). The Chief Jusdce of India should also take into account the views of one or more Supreme Court Judges who are in posidon to provide material which would assist in the process of deciding whether or not a proposed transfer should take place. These views should be expressed in writing and should be considered by CJI and the four senior most puisne Judges of the Supreme Court. These views and those of each of the four senior most Judges should be conveyed to the Govt. of India with the proposal of transfer.

What applies to the transfer of puisne Judges of a H.C. applies as well to the transfer of the Chiefjusdce of a High as a C.J. of another H.C. except that in this case, only the views of one or more knowledgeable Judges need be taken into account.

These factors, including the response of the High Court Chief Jusdce or the puisne Judge proposed to be transferred, to the proposal to transfer him, should be placed before the *collegium*—the CJI and his first four puisne Judges—to be taken into account by it before reaching a final conclusion on the proposal.

Unless the decision to transfer has been taken in the manner aforestated, it is not decisive and does not bind the Govt. of India and shall be subject to judicial review.

(b) The constitudon and organisation of High Courts and the power to establish a common High Court for two or more States and to extend the jurisdiction of a High Court to, or to exclude its jurisdiction from, a Union Territory, are all exclusive powers of the Union Parliament.

It should be pointed out in the present context that there are some provisions introduced into the original Constitution by subsequent amendments, which affect the independence of High Court Judges, as compared with Supreme Court Judges :

(a) Art. 224 was introduced by substitution, in 1956, to provide for the appointment of additional Judges to meet any temporary increase in the business of a High Court. An additional Judge, so appointed, holds office for two years, but he may be made permanent at the end of that term. There is no such corresponding provision for the Supreme Court. It was introduced in the case of the High Courts because of the problem of arrears of work, which was expected to disappear in the near future. Now that the problem of arrears has become a standing problem which is being met by

the addition of more Judges, there is no particular reason why the make-shift device of additional appointment should continue. The inherent vice of this latter device is that it keeps an additional Judge on probation and under the tutelage of the Chief Justice as well as the Government as to whether he would get a permanent appointment at the end of two years. So far as the judicial power of a High Court Judge is concerned, he ranks as an equal to every other member of a Bench and is not expected, according to any principle relating to the administration of justice, to 'agree' with die Chief justice or any other senior member of a Bench where his learning, conscience or wisdom dictates odierwise, or to stay his hands where the merits of a case require a judgment against the Government. The fear of losing his job on the expiry of two years obviously acts as an inarticulate obsession upon an additionaljudge.

(b) Similarly, Cl.(3) was inserted in Art. 217 in 1963, giving die President, in consultation with the Chief Justice of India, the final power to determine the age of High Court Judge, if any question is raised by any body in that behalf. By the same amendment of 1963 (15th Amendment), Cl.(2A) was inserted in Art.124, laying down dial a similar question as to die age of a Supreme Court Judge shall be determined in such manner as Parliament may by law provide. A High Court Judge's position has thus become not only unnecessarily inferior to that of a Supreme Court Judge but even to that of a subordinate Judicial Officer, because any administrative determination of the latter's age is open to challenge in a Court of law, but in the case of a High Court Judge, it is made final' by die Constitution itself.[4] There is, apparendy, no impelling reason why a provision similar to Cl. (2A) to Art. 124 shall not be introduced in Art. 217, in place of Cl. (3), in question.

(c) Anodier agency of control over High Court Judges is die provision in Art. 221(1) for dieir transfer from one High Court to anodier, which has been given a momentum in 1994 by transferring as many as 50 Judges at a time.[10] In order that the power of the President to order such transfer is not used as a punitive measure, die Supreme Court has laid down[11] dial while no consent of die Judge concerned would be required, the President would not be competent to exercise the power except on the recommendation of die Chief Justice of India.

Territorial Jurisdiction of a High Court.

Except where Parliament establishes a common High Court lor two or more States [*Art.* 2311 or extends the jurisdiction of a High Court to a Union Territory, the jurisdiction of die High Court of a State is co-terminous widi the territorial limits of dial State.[12]

As has already been stated, Parliament has extended the jurisdiction of some of the High Courts to dieir adjoining Union Territories, by enacting die States Reorganisation Act, 1956. Thus, the jurisdiction ol the Calcutta High Court extends to the Andaman and Nicobar Islands; that of the Kerala High Court extends to the Lakshadweep (see Table XV1[J.

Ordinary Jurisdiction of High Courts.

Tlk' Constitution does not make any provision relating to die general jurisdiction of the High Courts, but maintains their jurisdiction as it existed at the

commencement of the Constitution, with this improvement that any restrictions upon their jurisdiction as to revenue matters that existed prior to the Constitution shall no longer exist [*Art.* 225].

The existing jurisdictions of the High Courts are governed by the Letters Patent and Central and State Acts; in particular, their civil and criminal jurisdictions are primarily governed by the two Codes of Civil and Criminal Procedure.

(a) The High Courts at the three Presidency towns of Calcutta, Bombay and Madras had an original jurisdiction, both civil and criminal, over cases arising within the respective Presidency towns. The original *criminal* jurisdiction of the High Courts has, however, been completely taken away by the Criminal Procedure Code, 1973.

(a) Original.

Though City Civil Courts have also been set up to try civil cases within the same area, the original civil jurisdiction of these High Courts has not altogether been abolished but retained in respect of actions of higher value.

(b) The appellate jurisdiction of the High Court, similarly, is both civil and criminal.

(b) Appellate.

(I) On the civil side, an appeal to the High Court is either a First appeal or a Second appeal.

(i) Appeal from the decisions of District Judges and from those of Subordinate Judges in cases of a higher value (broadly speaking), lie direct to the High Court, on questions of fact as well as of law.

(ii) When any Court subordinate to the High Court [*i.e.*, the District Judge or Subordinate Judge) decides an appeal from the decision of an inferior Court, a second appeal lies to the High Court from the decision of the lower appellate Court, but only on question of law and procedure, as distinguished from questions of fact [r. 100, C.P. Code].

(iii) Besides, there is a provision for appeal under the Letters Patent of the Allahabad, Bombay, Calcutta, Madras and Patna High Courts. These appeals lie to the Appellate Side of die High Court from the decision of a single Judge of die High Court itself, whether made by such Judge in die exercise of the original or appellate jurisdiction of the High Court.

(II) Tlie criminal appellate jurisdiction of the High Court is not less complicated. It consists of appeals from die decisions of—

(a) A Sessions fudge or an Additional Sessions Judge, where the sentence is of imprisonment exceeding seven years;

(b) An Assistant Sessions Judge, Metropolitan Magistrate or other Judicial Magistrates in certain specified cases other dien 'pettv' cases [rr. 374, 370, 370G, Cr.P.C., 1973]

Every High Court has a power of superintendence over all Courts and tribunals throughout the territory in reladon to which il exercises jurisdiction, excepting military tribunals [*Art.* 227]. This power of superintendence is a very wide power inasmuch as it extends to all Courts as

High Court's Power of suporintendence.

well as tribunals within the State, whether such Court or tribunal[12] is subject to the *appellate* jurisdiction of the High Court or not. Further, this power of superintendence would include a revisional jurisdiction to intervene in cases of gross injustice or non-exercise or abuse of jurisdiction or refusal to exercise jurisdiction, or in case of an error of law apparent on the face of the record, or violation of the principles of natural justice, or arbitrary or capricious exercise of authority, or discretion or arriving at a finding which is perverse or based on no material, or a flagrant or patent error in procedure, even though no appeal or revision against the orders of such tribunal was otherwise available.

Jurisdiction over Administrative Tribunals.

By reason of the extension of Governmental activities and the complicated nature of issues to be dealt with by the administration, many modem statutes have entrusted administrative bodies with the function of deciding disputes and quasi-judicial issues that arise in connection with die administration of such laws, eidier because the ordinary courts are already overburdened to take up these new matters or the disputes are of such a technical nature that diey can be decided only by persons who have an intimate knowledge of the working of die Act under which it arises. Thus, in India, quasi-judicial powers have been vested in administrative authorities such as the Transport Authorities under the Motor Vehicles Act; die Rent Controller under the State Rent Control Acts. Besides, diere are special tribunals which are not a part of the judicial administration but have all the 'trappings' of a court. Nevertheless, they are not courts in the proper sense of the term, in view of the special procedure followed by them. All these tribunals have one feature in common, *viz.* diat they determine questions affecting the rights of the citizens and their decisions are binding upon them.

Since die decisions of such tribunals have the force or effect of a judicial decision upon the parties, and yet die tribunals do not follow the exact procedure adopted by courts of justice, the need arises to place diem under die control of superior courts to keep diem within die proper limits of their jurisdiction and also to prevent diem from committing any act of gross injustice.

hi *England*, judicial review over the decisions of the quasi judicial tribunals is done by die High Court in die exercise of its power to issue the prerogative writs.

In *India*, there are several provisions in the Constitution which place diese tribunals under the control and supervision of die superior courts of the land, *viz.*, die Supreme Court and die High Courts :

(i) If the tribunal makes an order which infringes a fundamental right of a person, he can obtain relief by applying for a wTit of *certiorari* to quash that decision, either by applying for it to the Supreme Court under Art. 32 or to die High Court under Art. 226. Even apart from the infringement of the fundamental right, a High Court is competent to grant a writ of *certiorari*, if the tribunal either acts without jurisdiction or in excess of its jurisdiction as conferred by the statutes by which it was created or it makes an order

contrary to the rules of natural justice or where there is some error of law apparent on the face of its record.

(ii) Besides the power of issuing the writs, every High Court has a general power of superintendence over all the tribunals functioning within its jurisdiction under Art. 227 and this superintendence has been interpreted as both administrative and judicial superintendence. Hence, even where die writ of *certiorari* is not available but a flagrant injustice has been committed or is going to be committed, the High Court may interfere and quash die order of a tribunal under Art 227.11

(iii) Above all, the Supreme Court may grant special leave to appeal from any determination made by any tribunal in India, under Art. 136 wherever there exist extraordinary circumstances calling for interference of the Supreme Court. Broadly speaking, die Supreme Court can exercise this power under Art. 136 over a tribunal wherever a writ for *certiorari* would he against the tribunal; for example, where die Uibunal has either exceeded its jurisdiction or has approached the question referred to it in a manner which is likely to result in injustice or has adopted a procedure which runs counter to the established rules of natural justice. The extraordinary power would, however, be exercised by die Supreme Court in rare and exceptional circumstances and not to interfere widi the decisions of such tribunals as a court of appeal.

The Writ Jurisdiction of Supreme Court and High Court.

Besides die above, the Supreme Court as well as die High Courts possess what may be called an extraordinary jurisdiction, under Arts. 32 and 226 of the Constitudon, respectively, which extends not only to inferior courts and tribunals but also to the State or any authority or person, endowed with State authority. The peculiarity of diis jurisdiction is dial being conferred by the Constitution, it cannot be taken away or abridged by anything short of an amendment of die Constitution itself. As has already been pointed out, die jurisdiction to issue writs under these Articles is larger in the case of High Court inasmuch as while the Supreme Court can issue diem only where a fundamental right has been infringed, a High Court can issue them not only in such cases but also where an ordinary legal right has been infringed, provided a writ is a proper remedy in such cases, according to well-established principles.

Public interest litigation.—Following English and American decisions, our Supreme Court has admitted exceptions from the strict rules relating to affidavit *locus standi* and the like in the case of a class of litigations, classified as 'public interest litigation' (PIL) *i.e.*, where die public in general are interested in die vindication of some right or the enforcement of some public duty.[1*] The High Courts also have started following diis practice in dieir jurisdiction under Art. 226,[10] and die Supreme Court has approved this practice, observing that where public interest is undermined by an arbitrary and perverse executive action, it would be the duty of the High Court to issue a writ.[1']

The Court must satisfy itself diat die party bringing the PIE is litigating *bona fide* for public good It should not be merely a cloak for attaining

private ends of a third party or of the party bringing the petition. The court can examine the previous records of public service rendered by the litigant.[18] An advocate filed a writ petition against the State or its instrumentalities seeking not only compensation to a victim of rape committed by its employees (the railway employees) but also so many other reliefs including eradication of anti-social and criminal activities at the railway stations. The Supreme Court held that the petition was in the nature of a PIL and the advocate could bring in the same for which no personal injury or loss is an essential element.[19]

Control over Subordinate Courts.

As the head of the Judiciary in the State, the High Court has got an administrative control over the subordinate judiciary in the State in respect of certain matters, besides its appellate and supervisory jurisdiction over them. The Subordinate Courts include District Judges, Judges of the City Civil Courts as well as the Metropolitan Magistrates and members of the judicial service of the State.

The control over the Judges of these Subordinate Courts is exercised by the High Courts in the following matters—

(a) The High Court is to be consulted by the Governor in the matter of appointing, posting and promoting District Judges [*Art.* 233].

(b) The High Court is consulted, along with the State Public Service Commission, by the Governor in appointing persons (other than District Judges) to the judicial service of the State [*Art.* 234].

(c) The control over district courts and courts subordinate thereto, including the posting and promotion of, and the grant of leave to, transfers of, disciplinary control over including inquiries, suspension and punishment, and compulsory retirement of, persons belonging to the judicial service and holding any post inferior to the post of a district judge is vested in High Court [*Art.* 235].

Control over the subordinate courts is the collective and individual responsibility of the High Court.[20]

The 42nd, 43rd and 44th Amendments.

The foregoing survey of the jurisdiction of a High Court under the original Constitution was drastically curtailed in various ways, by the Constitution (42nd Amendment) Act, 1976, which has been referred to at the end of Chap. 22 *ante*, in the context of the Supreme Court, but the new provisions in Arts. 226A and 228A which had been inserted by the Constitution (42nd Amendment) Act, 1976, have all been omitted by the 43rd Amendment Act, 1977, *and the original position has been restored*.

In this context, we must mention Arts. 323A-323B, inserted by the 42nd Amendment Act.

Parliament has passed the Administrative Tribunals Act, 1985, implementing Art. 323A, under which the Central Government has set up Central Administrative Tribunals with respect to services under the Union.

As a result, all Courts of law including the High Court shall cease to have any jurisdiction to entertain any litigation relating to the recruitment

and oilier service matters relating to persons appointed to die public services of die l'nion, whether in its original or appellate jurisdiction. JTte Supreme Court has, however, been spared its special leave jurisdiction of appeals from these Tribunals, under Art. 136 of the Constitution. But subscquendy, the position turned out to be otherwise as die Supreme Court declared die Articles 323-A. Cl. 2(d) and 32TB. Cl. 3(d) and also the "exclusion of jurisdiction" clauses in all die legislations enacted in pursuance of diese Articles, unconstiludonal to the extent diey excluded the jurisdiction of the 1ligh Courts and the Supreme Court under Articles 226/227 and 32.[11]

REFERENCES

1. Under this provision, ihe High Court of Assam (at Cauhad)ts the common High Court for Assam, Nagaland, Manipur, Meghalaya, Tripura, Arunachal I'radesh and Muuram (Table XVIII), and the Bomba) High Court serves both Maharashtra and Goa.
2. By the Constitution (15dt Amendment) Act, 1903, the age of reUrement of High Court Judges has been raised from 60 to 62.
3. *Supreme Conn Advocates* v. *Union of India*, (1993) 1 S.C.C. 441.
4. *Speiiul ReferenceNo. 1 of 1998*, Re : (1098) 7 S.C.C. 73!) [9Judge Bench].
5. This is die salary as enhanced *vide* Act 18 of 1998, s. 7 (w.e.l 1.1.1996).
6. CAD., dated 22 11 1948.
7. Cf. *Gupta* v. *President of India*, AIR 1982 S.C. 149 (7Judge Bench).
8. *Special Reference No. 1 of 1998*, Re :, (1998) 7 S.C.C. 739.
9. In dns context, see *Union of India* v. *Jyoti Prakash*, AIR 1971 S.C. 1093, and the comments of die author thereon, at pp. 24611. of Vol. G of the Author's *Commentary on the Constitution o) India* (6lh Ed.)
10. *Statesman*, Calcutta,14-4-1994. 16-4-1994 (p. a).
11. *S.C. Advocates* v. *Union of India*, (1993) 4 S.C.C. 441 (para 472)—9Judge Bench.
12. See Table XVII as to the territorial jurisdiction of the several High Courts. Delhi which was under the jurisdiction ol the Punjab High Court has now its own High Court since 1996.
13. BASICS *Criminal ISocedure Code* (Prendce-Hall of India, 1979), p. 29.
14. The 42nd Amendment Act, 1976, also took away this jurisdicdon of the High Courts ovei tribunals, under Art. 227(1), by omitdng the word 'tribunals' dierefrom; but the 44lh Amendment Act,1978, has *restored* the word, so that a High Court retains its power of superintendence over anv tribunal within its territorial jurisdicdon. This jurisdicUon of the High Court was taken away in respect of Administrative Tribunals set up under Art. 323A, by the Administrative Tribunals Act, 1!)IHj but the provisions in diese Articles and m the legislaUons enacted in pursuance thereof excluding the jurisdicdon of S.C. and H.C.s under Arts. 32 and 2267227 have been declared to be unconstitutional by die Supreme Court in *L. Chandra Kumar* v. *U.O.I.*, (1997) 3 S.C.C. 261 : A.I.R. 1997 S.C. 1125.
15. *People's Union* v. *Union of India*.*WAS* 1982 S.C. 1473 (para 1).
16. *State of W.Ii.* v. *Sampul*, AIR 1985 S.C. 195 (para 10).
17. *Chaitanya* v. *Stale of Karnataka*, A.l.K. 1986 S.C. 825 (para 10).
18. *Raunag International Ltd* v. *LV.R. Construction Ltd.*, (1999) 1 S.C.C. 492 (para 12) : A.I.R. 1999 S.C. 393.
19. *Chairman, Railway Board* v. *Chandnma Das*, (2000) 2 S.C.C. 465.
20. *Hiigh Court of Judicature at Bombay* v. *Shirish Kumar Rangrao Patil*,(1997) 6 S.C.C. 339.
21. *L. Chandra Kumar* v. *Union of India*,(\'M7) 3 S.C.C. 261 : A.I.R. 1997 S.C. 1125.

CHAPTER 24

DISTRIBUTION OF LEGISLATIVE AND EXECUTIVE POWERS

Nature of the Union.

THE nature of the federal system introduced by *our* Constitution has been fully explained earlier (Chap. 5).

To recapitulate its essential features: Though there is a strong admixture of unitary bias and the exceptions from the traditional federal scheme are many, die Constitution introduces a federal system as the basic structure of government of the country. The Union is composed of 28 States[1] and both the Union and the States derive their authority from liie Constimtion which divides all powers,—legislative, executive and financial, as between them. [The judicial powers, as already pointed out (Chap. 22), are, not divided and there is a common Judiciary for the Union and the States.) The result is dial die Stales are not delegates of die Union and that, though there are agencies and devices for Union control over die Stales in many matters,—subject to such exceptions, die States are autonomous within dieir own spheres as allotted by die Constitution, and both die Union and the States are equally subject to die limitations imposed by die Constitution, say, for instance, the exercise of legislative powers being limited by Fundamental Rights.

Thus, neither die Union Legislature (Parliament) nor a State Legislature can be said to be 'sovereign' in the legalistic sense,—each being limited by the provisions of the Constimtion effecting die distribution of legislative powers as between them, apart from the Fundamental Rights and other specific provisions restraining their powers in certain matters, *e.g.*, Art. 276(2) [limiting the power of a State legislature to impose a tax on professions); Art. 303 (limiting the powers of both Parliament and a State Legislature with regard to legislation relating to trade and commerce). If any of these constitutional limitations is violated, the law of the Legislature concerned is liable to be declared invalid by die Courts.

The Scheme of Distribution of Legislative Powers.

As has been pointed out at the outset, a federal system postulates a distribution of powers between the federation and die units. Though the nature of distribution varies accorciing to die local and political background in each country, die division, obviously, proceeds on two lines—

(a) The *territory* over which the Federation and die Units shall, respectively, have dieir jurisdiction.

(b) The *subjects* to which their respective jurisdiction shall extend.

The distribution of legislative powers in *our* Constitution under both heads is as follows:

Territorial Extent of Union and State Legislation.

I. As regards die territory with respect to which die Legislature may legislate, the State Legislature naturally suffers from a limitation to which Parliament is not subject, namely, that die territory of the Union being divided amongst the States, die jurisdiction of each State must be confined to its own territory. When, therefore, a State Legislature makes a law relating to a subject within its competence, it must be read as referring to persons or objects situated within the territory of the State concerned. A State Legislature can make laws for die whole or any part of the State to which it belongs [*Art.* 245(1)]. It is not possible for a State Legislature to enlarge its territorial jurisdiction under any circumstances except when the boundaries of the State itself are widened by an Act of Parliament.

Parliament has, on die other hand, die power to legislate for die whole or any part of the territory of India, which includes not only die States but also the Union Territories or any other area, for the time being, included in the territory of India [*Art.* 246(4)]. It also possesses the power of 'extra-territorial legislation' [*Art.* 245(2)], which no State Legislature possesses. This means that laws made by Parliament will govern not only persons and property within die territory of India but also Indian subjects resident and their property situated *anywhere* in the world. No such power to affect persons or property outside die borders of its own State can be claimed by a State Legislature in India.

Limitations to the Territorial Jurisdiction of Parliament.

The plenary territorial jurisdiction of Parliament is, however, subject to some special provisions of the Constitution—

(i) As regards some of the Union Territories, such as die Andaman and *Lakshadweep* group of Islands, Regulations may be made by die President to have the same force as Acts of Parliament and such Regulations may repeal or amend a law made by Parliament in relation to such Territory [*Art.* 240(2)].

(ii) The application of Acts of Parliament to any Scheduled Area may be barred or modified by notifications made by the Governor [*Para* 5 of the 5th Schedule].[2]

(iii) Besides, die Governor of Assam may, by public notification, direct that any other Act of Parliament shall not apply to an autonomous district or an autonomous region in die State of Assam or shall apply to such district or region or part thereof subject to such exceptions or modifications as he may specify in die notification [*Para* 12(1)(b) of die 6th Sch.].[3] Similar power has been vested in die President as regards the autonomous district or region in Meghalaya, Tripura and Mizoram by Paras 12A, 12AA and 12B of the 6th Schedule.

It is obvious that the foregoing special provisions have been inserted in view of the backwardness of die specified areas to which the indiscriminate application of the general laws might cause hardship or odier injurious consequences.

Distribution of Legislative Subjects.

II. As regards the *subjects* of legislation, the Constitution adopts from die Government of India Act, 1935, a *threefold* distribution of *legislative* powers between the Union and the States *Art.* 246]. While in the *United States* and *Australia,* there is only a single enumeration of powers,—only the powers of the Federal Legislature being enumerated,—in *Canada* there is a double enumeration, and the Government of India Act, 1935, introduced a scheme of threefold enumeration, namely, Federal, Provincial and Concurrent. The Constitution adopts this scheme from the Act of 1935 by enumerating possible subjects of legislation under three Legislative Lists in Sell. VII of die Constitution (see Table XLX).[4]

List I or the *Union* list includes (in 2008) 100 subjects over which the Union shall have exclusive power of legislation. These include defence, foreign affairs, banking, insurance, currency and coinage, Union duties and taxes.

List II or the *State* List comprises 61 items or entries over which the State Legislature shall have exclusive power of legislation, such as public order and police, local government, public healdi and simitation, agriculture, forests, fisheries, State taxes and duties.

List III gives *concurrent* powers to the Union and the State Legislatures over 52 items, such as Criminal law and procedure. Civil procedure, marriage, contracts, torts, trusts, welfare of labour, economic and social planning and education.

In case of *overlapping* of a matter as between the diree Lists, predominance has been given to die Union Legislature, as under the Government of India Act, 1935. Thus, die power of die State Legislature to legislate with respect to matters enumerated in the State List has been made subject to die power of Parliament to legislate in respect of matters enumerated in the Union and Concurrent Lists, and the entries in die State List have to be interpreted accordingly.

In die *concurrent* sphere, in case of repugnancy between a Union and a State law relating to die *same* subject, the former prevails. If, however, the State law was reserved for die assent of the President and has received such assent, the Slate law may prevail notwithstanding such repugnancy, but it would still be competent for Parliament to override such State law by subsequent legislation *Art.* 254(2)].[5]

Residuary Powers.

The vesting of residual power under die Constitution follows the precedent of *Canada,* for, it is given to die Union instead of the States (as in the *U.S.A.* and *Australia).* In this respect, the Constitution differs from die Government of India Act, 1935, for, under diat Act, die residual powers were vested neidier in die Federal nor in die State Legislature, but were placed in the hands of die Governor-General; die Constitution vests the residuary power, *i.e.,* die power to legislate with respect to any matter *not* enumerated in any one of the diree Lists,—in the Union legislature *Art.* 248],[6] and the final determination as to whether a particular matter falls under die residuary power or not is that of the Courts.

It should be noted, however, that since the three Lists attempt at an exhaustive enumeration of all possible subjects of legislation, and the Courts interpret the ambit of the enumerated powers liberally, the scope for the application of the residuary power will be very narrow.[7]

Expansion of the Legislative Powers of the Union under different circumstances.

While the foregoing may be said to be an account of the normal distribution of the legislative powers, there are certain exceptional circumstances under which the above system of distribution is eidier suspended or the powers of the Union Parliament are extended over State subjects. These exceptional or extraordinary circumstances are—

(a) In the *National Interest.* Parliament shall have the power to make laws with respect to any matter included in the State List, for a temporary period, if the Council of States declares by a resolution of 2/3 of its members present and voting, that it is necessary in the *national* interest that Parliament shall have power to legislate over such matters. Each such resolution will give a lease of one year to the law in question.

A law made by Parliament, which Parliament would not but for the passing of such resolution have been competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after die resolution has ceased to be in force, except as respects diings done or omitted to be done before the expiration of the said period [*Art.* 249]. The resolution of the Council of States may be renewed for a period of one year at a lime.

(b) Under a *Proclamation of Emergency.* While a Proclamation of 'Emergency' made by the President is in operation, Parliament shall have similar power to legislate with respect to State subjects.

A law made by Parliament, which Parliament would not but for the issue of such Proclamation have been competent to make, shall, to the extent of incompetency, cease to have effect on the expiration of a period of six months after the Proclamadon has ceased to operate, except as respects diings done or omitted to be done before the expiration of die said period [*Art.* 250].

(c) *By agreement between States.* If the Legislatures of two or more States resolve that it shall be lawful for Parliament to make laws widi respect to any matters included in the State List relating to those States, Parliament shall have such power as regards such States. It shall also be open to any odier State to adopt such Union legislation in relation to itself by a resolution passed in dial behalf in the Legislature of the State. In short, this is an extension of the jurisdiction of Parliament by consent of the State legislatures [*Art.* 252].[8]

Thus, though Parliament has no competence to impose an estate duty with respect to *agricultural* lands, Parliament, in the Estate Duty Act, 1953, included die agricultural lands situated in certain States, by virtue of resolutions passed by the Legislatures of such States, under Art. 252, to confer such power upon Parliament. That Act has since been repealed.

Other examples of such legislation are: Prize Competition Act, 1955; Urban Land (Ceiling and Regulation) Act, 1976; Water (Prevention and Control of Pollution) Act, 1974.

(d) *To implement Treaties.* Parliament shall have the power to legislate with respect to *any* subject for the purpose of implementing treaties or international agreements and conventions. In odier words, the normal distribution of powers will not stand in the way of Parliament to enact legislation for earning out its international obligations, even though such legislation may be necessary in relation to a Stale subject \[*Art.* 253].

Examples of such legislation are: Geneva Convention Act, 1960; Anti-Hijacking Act, 1982; United Nations (Privileges and Immunities) Act, 1947.

(e) *Under a Proclamation of Failure of Constitutional Machinery in the States.* When such a Proclamation is made by the President, the President may declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament \[*Art.* 356(1)(b)].

Interpretation of the Legislative Lists.

The interpretation of over 200 Entries in the three Legislative Lists is no easy task for the Courts and the Courts have to apply various judicial principles to reconcile the different Entries, a discussion of which would be beyond the scope of the present work.[9] Suffice it to say that—

(a) Each Entry is given the widest import that its words are capable of, without rendering anodier Entry nugatory.[10]

(b) In order to determine whether a particular enactment falls under one Entry or the other, it is die 'pidi and substance' of such enactment and not its legisladve label diat is taken account of.[11] If the enacunent substantially lads under an Entry over which the Legislature has jurisdiction, an incidental encroachment upon another Entry over which it had no competence will not invalidate the law.[10]

(c) On die other hand, where a Legislature has no power to legislate widi respect to a matter, die Courts wid not permit such Legislature to transgress its own powers or to encroach upon diose of another Legislature by resorting to any device or 'colourable legislation.'[12]

(d) The motives of the Legislature are, otherwise, irrelevant for determining whether it has transgressed die constitutional limits of its legislative power.[12]

Distribution of Executive Powers.

The distribution of *executive* powers between the Union and the States is somewhat more complicated dian that of the legislative powers.

1. In general, it follows the scheme of distribution of the legislative powers. In the result, the executive power of a State is, in the main, co-extensive widi its legislative powers,—which means that the executive power of State shall extend only to its own territory and widi respect to diose subjects over which it has legislative competence *[Art.* 162]. Conversely, the *Union* shall have exclusive executive power over (a) the matters with respect to which Parliament has exclusive power to make laws (*ie.*, matters in last l

of Sch. VII), and (b) die exercise of its powers conferred by any treaty or agreement [*Art.* 73]. On the other hand, a State shall have exclusive executive power over matters included in List II [*Art.* 162].

II. It is in the *concurrent* sphere dial some novelty has been introduced. As regards matters included in the Concurrent Legislative List (*Le.*, List III), die executive function shall *ordinarily* remain with the Slates, but subject to the provisions of the Constitution or of any law of Parliament conferring such function expressly upon the Union. Under die Government of India Act, 1935, the Centre had only a power to give directions to Provincial Executive to execute a Central law relating to a Concurrent subject. But diis power of giving directions proved ineffective; so, the Constitution provides diat die Union may, whenever it thinks fit, itself take up the administration of Union laws relating to any Concurrent subject.

In the result, the executive power relating to concurrent subjects remains widi the States, except in two cases—

(a) Where a law of Parliament relating to such subjects vests some executive function specifically in die Union, *e.g.*, die Land Acquisition Act, 1894; die Industrial Disputes Act, 1947 [Proviso to Art. 73(1)]. So far as these functions specified in such Union law are concerned, it is die Union and not the States which shall have the executive power while the rest of the executive power relating to the subjects shall remain with die States.

(b) Where the provisions of die Constitution itself vest some executive functions upon the Union. Thus,

(i) The executive power to implement any treaty or international agreement belongs exclusively to the Union, whether die subject appertains to the Union, State or Concurrent Ust [*Art.* 73(1)(b)].

(ii) The Union has the power to give directions to the State Governments as regards die exercise of their executive power, in certain matters—

(I) *In Normal times:*

(a) To ensure due compliance widi Union laws and existing laws which apply in that State [*Art.* 2561.

(b) To ensure that die exercise of the executive power of die State does not interfere widi the exercise of the executive power of the Union [*Art.* 257(1)].

(c) To ensure die construction and maintenance of the means of communication of national or military importance by the State [*Art.* 257(2)].

(d) To ensure protection of railways widiin the State [*Art.* 257(3)].

(e) To ensure drawing and execution of schemes specified in the directions to be essential for the welfare of die Scheduled Tribes in the States [*Art.* 339(2)].

(1) To secure die provision of adequate facilities for instruction in the modier-tongue at the primary stage of education to children belonging to linguistic minority groups [*Art.* 350A].

(g) To ensure the development of the Hindi language *Art.* 351).

(h) To ensure that the government of a State is carried on in accordance with the provisions of the Constitution |*Art.* 355].

(II) *In Emergencies:*

id) During a Proclamation of Emergency, the power of the Union to give directions extends to the giving of directions as to die *manner* in which die executive power of the State is to be exercised, relating to any matter [*Art.* 353(a)] (so as to bring the State Government under the complete control of die Union, without suspending it).

(b) Upon a Proclamation of failure of constitutional machinery in a State, die President shall be entided to assume to himself all or any of the executive powers of the State [*Art.* 353(1)].

(Ilf) *During a Proclamation of Financial Emergency:*

(a) To observe canons of financial propriety, as may be specified in die directions [*Art.* 360(3)].

(b) To reduce the salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including die Judges of the Supreme Court and High Courts [*Art.* 360(4)(b)].

(c) To require all Money Bills or odier Financial Bills to be reserved for the consideration of the President after they are passed by the Legislature of the State [*Art.* 360(4)].

Ill. While as regards the legislative powers," it is not competent for die Union [apart from *Art.* 252, see *ante*) and a State to encroach upon each other's exclusive jurisdiction by mutual consent, diis is possible as regards executive poweis. Thus, with die consent of the Government of a State, the Union may entrust its own executive functions relating to any matter to such State Government or its officers [*Art.* 258(1)|. Conversely, with the consent of the Union Government, it is competent for a State Government to entrust any of its executive functions to the former [*Art.* 258A].

IV. On the other hand, under Art. 258(2), a law made by Parliament relating to a Union subject may *authorise* die Central Government to delegate its functions or duties to die State Government or its officers (irrespective of the consent of such State Government).

REFERENCES

1. Tilt· creation of Chhatisgarh. Uttaranchal (now Uttarakhand) and Jharkhand Slates by caning nui their territories from the territories of the Madhva Pradesh, the 1·:r Pradesh and the Bihar States respectively in 2000 has raised the number of States from 25 to 28.
2. See Author's *Constitutional Law of India* (Prentice-Hall of India, tith Ed., 1901) pp 265, 158.
3. *ttnd*, p. 4to.
4. As stated earlier, the distribution does not apply to the Union Territories, HI regard to which Parliament is competent to legislate with respect to any subject, including those which are enumerated in die 'State Last'.
5. See Author's *Constitutional I.au of India* (Prentice-Hall of India, 1991), pp 281-8t.
6. *Ibid.*, p 279.

7. See *Second Gift Tax Officer* v. *Hazareth*, AIR 1970 S.C. 999, *Union of India* v. *Dhtllon*, (1971) 2 S.C.C.779: *Azam* v. *Expenditure Tax Officer*, (1971) 3 S.C.C. 621; *Shorter Constitution of India*, 14th Ed., 2008, Sch. VII, under 'General Rules for Interpretation of the Entries' *etc.*

X See Author's *Constitutional Taw of India* (Prentice Hall of India, 1991), p. 280.

X *Vide* Author's *Commentary on the Constitution of India*, 5th Ed., Vol. IV, pp. 95 *el seif*, and *Shorter Constitution of India*, 14th Ed., 2008, Sch. VII, under 'General Rules for interpretation of the Entries' *etc.; Constitutional Law of India* nth Ed., pp. 475-500.

10. *State of Bombay* v. *Balsara*, (1951) S.C.R. 082; *Ramaknshna* v. *Municipal Committee*, (1950) S.C.R. 15 (25).

11. *Amar Singh* v. *Stale of Rajasthan*, (1955) 2 S.C.R. 303 (325).

12. *K.C.G. Narayana Deo* v. *State of Onssa*, (1954) S.C.R. 1.

CHAPTER 25

DISTRIBUTION OF FINANCIAL POWERS

Need for Distribution of Financial Resources.

NO system of fedeiation can be successful unless both the Union and the States have at Lheir disposal adequate financial resources to enable them to discharge their respective responsibilities under the Constitution.

To achieve this object, *our* Constitution has made elaborate provisions, mainly following the lines of the Government of India Act, 1935, relating to the distribution of the taxes as well as non-tax revenues and the power of borrowing, supplemented by provisions for grants-in-aid by the Union to the States.

Before entering into these elaborate provisions which set up a complicated arrangement for the distribution of the financial resources of the country, it has to be noted that the object of this complicated machinery is an equitable distribution of the financial resources between the two units of the federation, instead of dividing the resources into two watertight compartments, as under the usual federal system. A fitting introduction to this arrangement has been given by our Supreme Court,[1] in these words:

> "Sources of revenue which have been allocated to the Union are not meant entirely for die purposes of the Union but have to be distributed according to the principles laid down by Parliamentary legislation as contemplated by the Articles aforesaid. Thus all the taxes and duties levied by the Union ... do not form part of the Consolidated Fund of India but many of these taxes and duties arc distributed amongst the States and form part of die Consolidated Fund of the States. Even those taxes and duties which constitute the Consolidated Fund of India may be used for the purposes of supplementing die revenues of the States in accordance with their needs. The question of distribution of the aforesaid taxes and duties amongst the States and die principles governing diem, as also the principles governing grants-in-aid ... are matters which have to be decided by a high-powered Finance Commission, which is a responsible body designated to determine diose matters in an objective way... The Constitution-makers realised the fact that diose sources of revenue allocated to the States may not be sufficient for their purposes and that the Government of India would have to subsidise their welfare activities... Realising the limitadons on the financial resources of the States and the growing needs of the community in a welfare State, die Constitution has made... specific provisions empowering Parliament to set aside a portion of its revenues... for the benefit of the States, not in stated proportions but according to their needs ... The resources of the Union Government are not meant exclusively for the benefit of the Union activities ... In odier words, the Union and the States togedier form one

organic whole for the purposes of utilisation of the resources of territories of India as a whole."

Principles underlying distribution of Tax Revenues..

The Constitution makes a distinction between tiie legislative power to levs a tax and the power to *appropriate* the proceeds of a tax so levied. In *India,* tile powers of a Legislature in these two respects tire not identical.

Distribution of Legislative Powers to levy Taxes.

(A) The legislative power to make a law for imposing a tax is divided as between the Union and the States by means of Specjflc Entries in the Union and State Legislative Lists in Sch. VII (see Table XIX). Thus, while the State Legislature has the power to levy an estate duty in respect of agricultural lands [Entry 48 of List II], the power to levy an estate duty in respect of non-agricultural land belongs to Parliament [Entry 87 of List I]. Similarly, it is the State Legislature which is competent to levy a tax on agricultural income [Entry 46 of List II], while Parliament has the power to levy income-tax on all incomes other than agricultural [Entry 82 of list I].

'Ilie residuary power as regards taxation (as in general legislation) belongs to Parliament [Entry 97 of List I] and the Gift tax and Expenditure tax have been held to derive their authority from this residuary power. There is no concurrent sphere in the matter of tax legislation.

Before leaving this topic, it should be pointed out that though a State Legislature has the power to levy any of the taxes enumerated in the State legislative List, in the case of certain taxes, this power is subject to certain limitations imposed by the substantive provisions of the Constitution. Thus—

fat Yax. Professions

(a) While EnUy 60 of List II of Sch. VII authorises a State Legislature to levX a 9ix on profession, trade, calling or employment, die total amount payable in respect of any one person to die State or any other authority in the State by way of such tax shall not exceed Rs. 2,500 *per annum* [*Art*. 276(2)].

(b) Sates Tax.

(b) The power to impose taxes on sale or purchase of goods other than newspapers' belongs to die State [Entry 54, List II]. But 'taxes on imports and exports' [Entry 83, List I] and 'taxes on sales in die course of inter-State trade and commerce' [Entry 92A, List I] are exclusive Union subjects. Article 286 is intended to ensure diat sales taxes imposed by States do not interfere with imports and exports or inter-State trade and commerce, which are matters of national concern, and should, therefore, be beyond the competence of the States. Hence, certain limitations have been laid down by Art. 286 upon the power of the States to enact sides tax legisladon:

1. (a) No tax shall be imposed on sale or purchase which takes place *outside the Stale.*

(b) No tax shall be imposed on sale or purchase which takes place *in the course of import* into or *export* out of India.[1]

2. In connection with inler-State trade and commerce there are two limitations—

(i) The power to tax sales taking place 'in the course of inter-State trade and commerce'[4] is within the exclusive competence of Parliament [Entry 92A, list I].

(ii) Even though a sale does not take place 'in the course of inter-State trade or commerce, State taxation would be subject to restrictions and conditions imposed by Parliament if the sale relates to 'goods declared by Parliament to be of *special importance* in inter-State Uade and commerce'. In pursuance of this power, Parliament has declared sugar, tobacco, cotton, silk and woollen fabrics to be goods of special importance in inter-State trade and commerce, by enacting the Additional Duties of Excise (Goods of Special Importance) Act, 1957 [r. 7], and imposed special restrictions upon the States to levy tax on the sales of these goods.

(c) Tax on Conmmption or Sale of Electricity.

(c) Save insofar as Parliament may by law otherwise preside, no law of a State shall impose, or authorise the imposition of, a tax on the consumption or sale of electricity (whether produced by a Government or other persons) which is—

(i) consumed by the Government of India, or sold to the Government of India for consumption by dial Government; or

(ii) consumed in the construction, maintenance or operation of any railway by the Government of India, or a railway company operating that railway, or sold to that Government or any such railway company for consumption in the construction, maintenance or operation of any railway [*Art.* 287].

(d) Exemption of Union and State properties from mutual taxation.

(d) The property of the Union shall, save insofar as Parliament may by law otherwise provide, be exempt from all taxes unposed by a state or by any authority widiin a State [*Art.* 285(1)].

Conversely, the property and income of a State shall be exempt from Union taxation [*Art.* 289(1)]. There is, however, one exception in this case. If a State enters into a trade or business, other than a trade or business which is declared by Parliament to be incidental to the ordinary business of government, it shall not be exempt from Union taxation [*Art.* 289(2)]. The immunity, again, relates to a tax on property. Hence, the property of a State is not immune horn customs duty.[1]

Distribution of proceeds of Taxes.

(B) Even though a Legislature may have been given the power to levy a tax because of its affinity to the subject-matter of fixation, the yield of different taxes coming within die State legislative sphere may not be large enough to serve die purposes of a Slate. To meet this situadon, the Constitution makes special provisions:

(i) Some duties are leviable by the Union; but they are to be collected and entirely appropriated by the States after collecdon.

(ii) There are some taxes which are both levied and collected by the Union, but the proceeds are then assigned by the Union to those States within which they have been levied.

(iii) Again, there are taxes which are levied and collected by the Union but the proceeds are distributed between the Union and the State.

The distribution of the tax-revenue between the Union and the States, according to the foregoing principles, stands as follows:

(A) Taxes belonging to the Union exclusively:

1. Customs. 2. Corporation tax. 3. Taxes on capital value of assets of individuals and Companies. 4. Surcharge on income tax, etc. 5. Fees in respect of matters in the Union List (List I).

(B) Taxes belonging to the States exclusively:

1. Land Revenue. 2. Stamp duty except in documents included in the Union List. 3. Succession duty, Estate duty, and Income tax on *agricultural land.* 4. Taxes on passengers and goods carried on inland waterways. 5. Taxes on lands and buildings, mineral rights. 6. Taxes on animals and boats, on road vehicles, on advertisements, on consumption of electricity, on luxuries and amusements, etc. 7. Taxes on entry of goods into local areas. 8. Sales Tax. 9. Tolls. 10. Fees in respect of matters in the State List. 11. Taxes on professions, trades, etc., not exceeding Rs. 2,500 per annum (List II).

(C) Duties Levied by the Union but Collected and Appropriated by the States:

Stamp duties on bills of Exchange, etc., and Excise duties on medicinal and toilet preparations containing alcohol, though they are included in die Union Ust and *levied* by the LTnion, shall be collected by the States insofar as leviable within dieir respective territories, and shall form part of die States by whom they are collected [*Art.* 268).

(D) Taxes Levied as well as Collected by the Union, but Assigned to the States within which they are Leviable:

(a) Dudes on succession to property other dian agricultural land. (b) Estate duty in respect of property odier than agricultural land. (c) Terminal taxes on goods or passengers carried by railway, air or sea. (d) Taxes on railway fares and freights. (e) Taxes on stock exchange other than stamp dudes. (f) Taxes on sales of and advertisements in newspapers. (g) Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce. (h) Taxes on inter-State consignment of goods [*Art.* 269).

(E) Taxes Levied and Collected by the Union and Distributed between Union and the States:

Certain taxes shall be levied as well as collected by the Union, but their proceeds shall be divided between the Union and the States in a certain proportion, in order to effect an equitable division of the financial resources. These are—

(a) Taxes on income *other than on agricultural income* [*Art.* 270).

(b) Duties of excise as are included in the Union List, excepting medicinal and toilet preparations may also be distributed, if Parliament by law so provides [*Art.* 272].

(F) The principal sources of non-tax revenues of the Union are the receipts from—

Distribution of Non-tax Revenues.

Railways; Posts and Telegraphs; Broadcasting; Opium; Currency and Mint; Industrial and Commercial Undertakings of the Central Government relating to the subjects over which the Union has jurisdiction.

Of the Industrial and Commercial Undertakings relating to Central subjects may be mentioned—

The Industrial Finance Corporation; Air India; Indian Airlines; Industries in which the Government of India have made investments, such as the Steel Authority of India; the Hindustan Shipyard Ltd; the Indian Telephone Industries Ltd.

(G) The States, similarly, have their receipts from—

Forests, Irrigation and Commercial Enterprises (like Electricity, Road Transport) and Industrial Undertakings (such as Soap, Sandalwood, Iron and Steel in Karnataka, Paper in Madhya Pradesh, Milk Supply in Mumbai, Deep-sea Fishing and Silk in West Bengal).

Grants-in-Aid.

Even after the assignment to the States of a share of the Central taxes, die resources of till the States may not be adequate enough. The Constitution, therefore, provides that grants-in-aid shall be made in each year by the Union to such States as Parliament may determine to be in need of assistance; particularly, for the promotion of welfare of tribal areas, including special grants to Assam in this respect [*Art.* 275].

Constitution and Functions of the Finance Commission.

Articles 270, 273, 275 and 280 provide for the constitution of a Finance Commission (at five year intervals) to recommend to the President certain measures relating to the distribution of financial resources between the Union and the States,—for instance, the percentage of the net proceeds of income-tax which should be assigned by the Union to the States and the manner in which the share to be assigned shall be distributed among the States [*Art.* 280].

The constitution of the Finance Commission is laid down in Art. 280, which has to be read with the Finance Commission (Miscellaneous Provisions) Act of 1951, which has supplemented the provisions of the Constitution. Briefly speaking, the Commission has to be constituted by the President, every five years. The Chairman must be a person having 'experience in public affairs'; and the other four members must be appointed from amongst the following—

(a) A High Court Judge or one qualified to be appointed as such; (b) a person having special knowledge of the finances and accounts of the Government; (c) a person having wide experience in financial matters and administration ; (d) a person having special knowledge of economics.

It shall be the duty of the Commission to make recommendations to the President as to—

(a) the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them under this Chapter and the allocation between the States of die respective shares of such proceeds;

(b) the principles which should govern the grants-in aid of the revenues of die States out of the Consolidated Fund of India;

(c) the measures needed to augment die Consolidated Fund of a Slate to supplement the resources of die Panchayats in the State;[5]

(d) the measures needed to augment the Consolidated Fund of a State to supplement the resources of die Municipalities in the State;[6]

(e) any odier matter referred to die Commission by die President in the interests of sound finance.

The First Finance Commissioninance

The First Finance Commission was constituted in 1951, with Sri Neogy as the Chairman, and it submitted its report in 1953. Government accepted its recommendations which, *inter alia*, were that—

(a) 55 per cent of the net proceeds of income-tax shall be assigned by the Union to the States and that it shall be distributed among the States in the shares prescribed by the Commission.

(b) The Commission laid down the principles for guidance of the Government of India in the matter of making general grants-in aid to States which require Onancial assistance and also recommended specific sums to be given to certain States such as West Bengal, Punjab, Assam, during the five years from 1952 to 1957.

The Second Finance Commission.

A Second Finance Commission, with Sri Santhanam as die Chairman, was constituted in 1956. Its report was submitted to Government ill September, 1957 and its recommendaUons were given ellect to tor the quinquennium commencing from April, 1957.

The Third Finance Commission.

A Third Finance Commission, with Sri A.K. Chanda as its Chairman, was appointed in December, 1960. It submitted its report in 1962.

The Fourth Finance Commission.

The Fourth Finance Commission with Dr. RAjAMANNAR, retired Chief Justice of die Madras High Court, as its Chairman, was constituted in May, 1964.

The Fifth Finance Commission.

A Fifdi Finance Commission, headed by Sri Mahavir Tyagi, was consUtuted in March, 1968, with respect to the quinquennjum commencing from 1-4-1969. It submitted its final report in July 1969, and recommended that the States' share of income-tax should be raised to 75 per cent and of Union Excise duties should be raised to 20 per cent.

The Sixth Finance Cummission.

The Sixdi Finance Commission, headed by Sri Brahmananda Reddy, submitted its Report in October, 1973. This Commissjon was, for die first time, required to go into the question of the debt posidon of the States and their non-plan capital gap.

A Seventh Finance Commission was appointed in June, 1977 in relation to the next quinquennium from 1979, with Sri Shelat, a retired Judge of the Supreme Court as its Chairman. It submitted its report in October, 1978.

The Seventh Finance Commission.

The Eighth Finance Commission was set up in 1982, with ex-Minister, Shri Y.B. Chavan as its head.

The Eighth Finance Commission.

The Eighth Finance Commission submitted its report in 1984, but its recommendations, granting moneys to the States, were not implemented by die Government ol India, on the ground of financial difficulties and late receipt of the Commission's Report. Obviously, this placed some of the States in financial difficulty and the State of West Bengal raised vehement protest against this unforeseen situation. Responsible authorities in West Bengal threatened litigation but eventually nothing was done presumably because die matter was non-justiciable. Amide 280(3) enjoins the Finance Commission to make 'recommendations' to die President and the only duty imposed on the President, by Art. 281, is to lay the recommendaUons of the Commission before each House of Parliament. It is nowhere laid down in die Constitution diat die recommendations of the Commission shall be binding upon the Government of India or that it would give rise to a legal right in favour of die beneficiary States to receive the moneys recommended to be offered to them by the Commission. Of course, non-implementation would cause grave dislocation ui States which might have acted upon dieir anticipation founded on die Commission's Report. The remedy for such dislocadon or injustice lies only in die ballot box.

The Ninth Finance Commission, headed by Shri N K.P. Salve, submitted its reports in 1988 and 1989; all its recommendations have been accepted by die Government.[7]

The Ninth Finance Commission.

The Tenth Finance Commission was consdtuted on 16-6-1992, with Shri K.C. Pant as its Chairman. It submitted its report on 26-11-1994.

The Tenth Finance Commission.

The Elevendi Finance Commission was constituted on 3-7-1998. It submitted its report on 7-7-2000.

The Eleventh Finance Commission.

The Twelfth Finance Commission was constituted on 1.11.2002 widi Dr. C. Rangarajan as its Chairman. It submitted its report on 17.12.2004.

The Twelfth Finance Commission

The Thirteenth Finance Commission was constituted on 1.11.2007 with Shri Vijay Kelkar as its Chairman and is expected to submit its report by October, 2(X)9.

The Thirteenth Finance Commission

Safeguarding the interests of the States in the shared Taxes.

By way of safeguarding the interests of the States in the Union taxes which are divisible according to die foregoing provisions, it is provided by die Constitudon [*Art.* 274] that no Bill or amendment which—

(a) varies the rate of any tax or duty in which the States are interested; or

(b) affects the principles on which moneys are distributable according to the foregoing provisions of the Constitution; or

(c) imposes any surcharge on any such tax or duty for the purposes of the Union,

shall be introduced or moved in Parliament except on die recommendation of the President.

Subject to die above condition, however, it is competent for Parliament to increase the rate of any such tax or duly (by imposing a surcharge) for purposes of the Union [*Art.* 271].

Financial control by the Union in Emergencies.

As in the legislative and administrative spheres, so in financial matters, die normal relation between the Union and die States (under Arts. 268-279) is liable to be modified in different kinds of emergencies. Tims,

(a) While a Proclamation of Emergency [*Art.* 352(1)] is in operation, the President may by order direct that, for a period not extending beyond the expiration of the financial year in which the Proclamation ceases to operate, all or any of die provisions relating to the division of die taxes between the Union and the States and grants-in-aid shall be suspended [*Art.* 354). In the result, if any such order is made by the President, the States will be left to their narrow resources from the revenues under the State List, without any augmentation by contributions from the Union.

(b) While a Proclamation of Financial Emergency (dr/. 360(1)] is made by the President, it shall be competent for die Union to give directions to die States—

(i) to observe such canons of financial propriety and other safeguards as may be specified in the directions;

(ii) to reduce the salaries and allowances of all persons serving in connection with the affairs of the State, including High Court Judges;

(iii) to reserve for the consideration of the President all money and financial Bills, after they are passed by the Legislature ol the State [*Art.* 360]

Borrowing Powers of the Union and the States.

The Union shall have unlimited power of borrowing, upon the security of the revenues of India either widiin India or outside. The Union Executive shall exercise the power subject oniy m such limits as may be fixed by Parliament from time to time [Ir/. 292].

The borrowing power of a State is, however, subject to a number of constitutional limitations:

(i) It cannot borrow outside India. Under the *Government of India Act, 1935,* die States had the power to borrow outside India widi the consent of die Centre. But this power is totally denied to the States by the Constitution; the Union shall have the sole right to enter into the international money market in the matter of borrowing.

(ii) Hie State Executive shall have die power to borrow, within the territory of India upon die security of die revenues of the State; subject to the following conditions:

(a) Limitations as may be imposed by the State legislature.

(b) If tiie Union has guaranteed an outstanding loan of die State, no fresh loan can be raised by the State without consent of die Union Government.

(c) The Government of India may itself offer a loan to a State, under a law made by Parliament. So long as such a loan or any part thereof remains outstanding, no fresh loan can be raised by the State without the consent of die Government of India. The Government of India may impose terms in giving its consent as above [*Art.* 293).

Demand for more Financial power by States.

Before closing diis Chapter, it should be pointed out dial there is a **growing** demand from some of the Stales for greater financial powers, by amending the Constitution, if necessary, which was stoudy resisted by Prime Minister Desai.[8] There are two relevant considerations on this issue:

(i) The steps taken by Pakistan to make nuclear bombs togedier with die equivocal conduct of China leave no room for complacence in the matter of defence. Hence, die Union cannot yield to any weakening of its resources that would prejudice die defence potendal of die country.[9]

(ii) On the other hand, the welfare acdvides of the Slates involving huge expenditure, natural calamities, etc., which could not be fully envisaged in 1950, call for a revision of the financial provisions of the Constitution.

The entire subject of 'Centre-State Relations' has been reviewed by the Sarkaria Commission. Its Report is under consideration by die Government.[10]

REFERENCES

1. *Coffer Board x. C.T.O.*, AIR 1971 S.C. 870
2. Hie maximum limit of the professions tax has been raised from Rs. 230 to Rs. 2500, bv the Constitution (tjtith Amendment) Ace 1988.
3. *Stair of J & K* v. *Caltex*. AIR 1966 S.C. 1350.
4. In re *Sea Customs Act*, AIR 1963 S.C. 1760 (*1771*).
5. Inserted by die Constitution (73rd Amendment) Act, 1992, w.e.f. 24-4-1993.
6. Inserted by the Constituuon (71th Amendment) Act, 1992, w.e.f. 1-6-1993.
7. *Vide* India, 1990, p. 349.
8. Mrs. Gandhi's Second Government has also adhered to the recommendations of the Administrative Reforms Commission that no amendment of the ConsUtution is necessary to alter die relation between die Centre anil die States. on the ground, *inter alia*, dial the financial deficiencies of particular States are being periodically examined and provided for bv the Finance Commission, by making larger grants to those States from the Union revenues, according to the provisions of the Constitution.
9. For India's Annual Budget and defence expenditure for 2008-2009, see Table I
10. *Vide* Author's *Comparative Federalism* (Prentice-Hall of India, 1987)

CHAPTER 27

INTER-STATE RELATIONS

I. INTER-STATE COMITY

Inter State Comity.

Though a federal Constitution involves the sovereignty of the Units within their respective territorial limits, it is not possible for them to remain in complete isolation from each oilier and die very exercise of internal sovereignty by a Unit would require its recognition by, and co-operation of, the other Units of the federation. All federal Constitutions, therefore, lay down certain rules of comity which the Units are required to observe, in their treatment of each other. These rules and agencies relate to such matters as—

(a) Recognition of the public acts, records and judicial proceedings of each other.

(b) Extra-judicial setdement of disputes.

(c) Co-ordination between States.

(d) Freedom of inter-State trade, commerce and intercourse.

Full Faith and Credit.

(A) *Recognition of Public Acts, etc.* Since die jurisdiction of each State is confined to its own territory [*Arts.* Iti2, 24.1(1)], the acts and records of one State might have been refused to be recognised in another State, without a provision to compel such recognition. The Constitution, therefore, provides that—

> "Full faith and credit shall be given throughout the territory of India to public acts, rccords and judicial proceedings of the Union and every State" [Art. 2til(1)j.

Flits means that duly authenticated copies of statutes or statutory instruments, judgments or orders of one State shall be given recognition in another State in the same manner as die statutes, etc., of the latter State itself. Parliament has the power to legislate as to the mode of proof of such acts and records or the effects thereof [*Art.* 261(2)].

Prevention and Settlement of Disputes.

(B) *Extra judicial Settlement of Disputes.* Since the Slates, in every federation, normally act as independent units in the exercise of their internal sovereignty, conflicts of interest between die units are sure to arise. Hence, in order to maintain die strengdi of die Union, it is essential that there should be adequate provision for judicial determination of disputes between the units and for setdement of disputes bv extra-judicial bodies as well as their prevention by consultation and joint action. While Art. 131 provides for the judicial determination of disputes between States

by vesting the Supreme Court with exclusive jurisdiction in the matter. Art. 262 provides for the adjudication of *one class* of such disputes by an extra-judicial tribunal, while Art. 263 provides for the prevention of inter-state disputes by investigation and recommendation by an administrative body. Titus—

(i) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley and also provide for the exclusion of the jurisdiction of all Courts, including the Supreme Court, to entertain such disputes [*Art.* 262].

In exercise of this power, Parliament has enacted the Inter-State Water Disputes Act, 1956, providing for the constitution of an *ad hoc* Tribunal for die adjudication of any dispute arising between two or more States with regard to die waters of any inter-State river or river valley.

(ii) The President can establish an inter-State Council for enquiring into and advising upon inter-State disputes, if at any time it appears to him that the public interests would be served by the establishment of such Council [*Art.* 263(a)].

(C) *Co-ordination between States.* The power of die President to set up inter-State Councils may be exercised not only for advising upon disputes, but also for the purpose of investigating and discussing subjects in which some or all of the States or the Union and one or more of the States have a common interest. In exercise of diis power, the President has already constituted the Central Council of Health, the Central Council of Local Self-Government, die Central Council of Indian Medicine,[1] Central Councd of Homeopaths.

Inter-State Councils.

In this connection, it should be mentioned that advisory bodies to advise on inter-State matters have also been established under statutory authority:

(a) Zonal Councds have been established by die States Reorganisation Act, 1956 to *advise* on matters of common interest to each of the five zones into which die territory of India has been divided,—Northern, Southern, Eastern, Western and Central.

Zonal Councils.

It should be remembered diat these Zonal Councils do not owe their origin to die Constitution but to an Act of Parliament, having been introduced by the Slates Reorganisadon Act, as a part of die scheme of reorganisation of the States widi a view to securing co-operadon and co-ordination as between the States, the Union Territories and the Union, particularly in respect of economic and social development. The creation of die Zonal Councils was a logical outcome of die reorganisation of die States on a linguistic basis. For, if the cultural and economic affinity of linguistic States with their contiguous States was to be maintained and their common interests were to be served by co-operative action, a common meeting ground of some sort was indispensable. The object of diese Councils, as Pandit Nehru envisaged it, is to "develop the habit of co-operative working". The presence of a Union Minister, nominated by die Union Government, in

each of these Councils (and the Chief Ministers of the Stales concerned) also luithers co-ordination and national integration through an extra-consututional advisory organisation, without undermining the autonomy of the States. II properly worked, these Councils would Uius foster die federal sentiment by resisting die separatist tendencies of linguism and provincialism.

(i) The *Central* Zone, comprising the States of Uttar Pradesh, Madhya Pradesh, Chhatisgarh and Uttarakhand.

(ii) The *Northern* Zone, comprising the States of Haryana, Himachal Pradesh, Punjab, Rajasthan, Jammu & Kashmir, and the Union Territories of Delhi *Si* Chandigarh.

(iii) The *Eastern* Zone, comprising the States of Bihar, West Bengal, Orissa, Sikkim and Jharkhand.

(iv) The *Western* Zone, comprising die States of Gujarat. Maharashtra and Goa and the Union Territories of Dadra & Nagar Haveli, Daman & Diu.

(v) The *Southern* Zone, comprising die States of Andhra Pradesh, Karnataka, Tamil Nadu, Kerala, and the Union Territory of Pondicherry.

(vi) The Nordi Estem Zone, comprising the States of Assam, Meghalaya, Nagaland, Manipur, Tripura, Mizoram, Arunachal Pradesh.

Each Zonal Council consists of the Chief Minister and two odier Ministers of each of the Sates in die Zone and the Administrator in die case of a Union Territory. There is also provisioin lor holding joint meetings of two or more Zonal Councils. The Union Home Minister has been nominated to be die common chairman of all the Zonal Councils.

The Zonal Councils, as already stated, discuss matters of common concern to the States and Territories comprised in each Zone, such as, economic and social planning, border disputes, inter-State transport, matters arising out of the reorganisation of States and the like, and give advice to the Governments of the States concerned as well as the Government ol India.[J]

Besides the Zonal Councils, there is a North-Eastern Council, set up under the North-Eastern Coucil Act, 1971, to deal with the common problems of Assam, Meghalaya, Manipur, Nagaland, Tripura. Arunachal Pradesh and Mizoram.

River Board.

(b) The River Boards Act, 1956, provides lor the establishment of a River Board for the purpose of advising the Governments interested in relation to the regulation or development of an inter-State river or river valley.

Water Disputes Tribunal.

(c) The inter-State Water Disputes Act, 1956, provides for die reference of an *inter-State* river dispute for arbitration by a Water Disputes Tribunal, whose award would be final according to Art. 262(2).

II FREEDOM OF INTER-STA IT TRADE AND COMMERCE

The great problem of any federal structure is to minimise inter-State barriers as much as possible, so that the people may leel that they are members of one nation, though they may, individually, be residents of any

of the Units of the Union. One of the means to achieve this object is to guarantee to every citizen the freedom of movement and residence throughout the country. Our Constitution guarantees this right by Art. 19(1)(d) & (e).

No less important is the freedom of movement or passage of commodities and of commercial transactions between one part of the country and mother The progress of the country as a whole also requires free flow of commerce and intercourse as between different parts, without any barrier. This is particularly essential in a federal system. This freedom is sought to be secured by the provisions [*Arts.* 301—307] contained in Part XIII of *our* Constitution. These provisions, however, are not confined to *inter-state* freedom but include *intra-State* freedom as well. In other words, subject to the exceptions laid down in this Part, no restrictions can be imposed upon the flow of trade, commerce and intercourse, not only as between one State and another but as between any two points within the territory of India whether any State border has to be crossed or not

Need for the Freedom of Trade and Commerce.

Article 301 thus declares—

"Subject to the other provisions of this Pan, trade, commerce and intercourse throughout the lerruory of India shall be free."

Art. 303(1) declares that neither the Parliament nor the State Legislature shall have power to make any law giving, or authorising the giving of, any preference to one State over another; or making or authorising die making of. any discrimination between one State and another, in die field of trade, commerce or intercourse. Hence, if a State prohibits the sale of lottery tickets of others and promotes that of its own, it would be discriminatory and violative of Art. 303.3

The limitations imposed upon die above freedom by die other provisions of Part XIII are—

(a) Non-discriminatory restrictions may be imposed by Parliament, in die public interest [*Art.* 302].

By virtue of diis power. Parliament has enacted the Essential Commodities Act, 19.55. which empowers, 'in the interest of the general public', the Central Government to control the production, supply and distribution of certain 'essential commodities', such as coal, cotton, iron and steel, petroleum.

(b) Even discriminatory or preferential provisions may be made by Parliament, for the purpose of dealing with a scarcity of goods arising in any part of India [*Art.* 303(2)].

(c) Reasonable restrictions may be imposed by a State "in the public interest" [*Art.* 304(b)].

(d) Non-discriminatory taxes may be imposed by a State on goods imported from other States or Union Territories, similarly as on *intra-State* goods [*Art.* 304(a)].

(e) The appropriate Legislature may make a law [under *Art.* 19(6)(ii)] for the carrying on by the State, or by a corporation owned or controlled by

die State, of any trade, business, mdustry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

Freedoms under Arts. 1!i(1)(g) and 101.

Before leaving this topic, we should notice tire difference in die scope of the provisions of Arts. 1!)(1)(g) and 301 both of which guarantee the freedom of trade and commerce.

Though this question has not been finally settled, it may be stated broadly that Art. 19(1)(g) looks at the freedom from the standpoint of the *individual* who seeks to cant on a trade or profession and guarantees such freedom throughout the territory of India subject to reasonable restrictions, as indicated in Art. 19(5). Atticle 301, on the other hand, looks at the freedom from the standpoint of the movement or passage of commodities or die carrying on of commercial transactions between *one place and another,* irrespective of the individuals who may be engaged in such trade or commerce. The only resuicuons that can be unposed on the freedom declared by Art. 301 are to be found in Arts. 302—305. But if either of these freedoms be restricted, the aggrieved individual[4] or even a State[5] may challenge the constitudonality of the restriction, whether imposed by an executive order or by legislation.[4] When there is a violation of Art. 301 or 301. there would ordinarily be an infringement of an individual's fundamental right guaranteed by Art. 10(1)(g), in which case, he can bring an application under Art. 32, even though Art. 301 or 104 is not included in I'art 111 as a fundamental right.[6]

REFERENCES

1. *India,* I'HH2. p. 101.
2. Alter a lapse uf some three years, sittings of Zonal Councils have been revived Irom HI78 [SI A 11.SMAN, 89 11)78, p. i)]. Vet, it must be said that this scheme has *not* been fully utilised [see Author's *Comparative Federalism,* 1087, pp. 574IT.]
3. *HR. Enterprises* v. *Stale of U.P.,* (1!)!)) D S.C.C. 70(1.
4. *Aliaban lea Cu* v. *State of Assam.* AIR 1961 S.C. 232; *Automobile Transport* v. *State of Rajasthan,* AIR 1962 SC. 1406.
5. *State of Rajasthan v. Mangital,* (/96A 2 SC.C. 710 (7I t). *Slate of Assam* v. *Lahanya Prabha,* AIR 1967 S.C. 1574 [1S7R).
6. *Syed Ahmed* v. *State of Mysore,* AIR 1975 S.C. 1113.

CHAPTER 28

EMERGENCY PROVISIONS

FEDERAL government, according to *Bryce*, means weak government because it involves a division of power. Every modem federation, however, has sought to avoid this weakness by providing for die assumption of larger powers by the federal government whenever unified action is necessary by reason of emergent circumstances, internal or external. But while in countries like the *United States* this expansion of federal power takes place through the wisdom of judicial interpretation, in *India*, the Constitution itself provides for conferring extraordinary powers upon die Union in case of different kinds of emergencies. As has been stated earlier, die Emergency provisions of *our* Constitution enable the federal government to acquire the strength of a unitary system whenever the exigencies of the situation so demand.

Different kinds of Emergencies.

The Constitution provides for *three different kinds* of abnormal situations which call for a departure from the normal governmental machinery set up by the Constitution:— *viz.*, (i) An emergency due to war, external aggression or *armed rebellion*[1] [*Art.* 352). This may be referred to as 'national emergency', to distinguish it from the next category. (ii) Failure of constitutional macliinerv in the States [*Art.* 356]. (iii) Financial emergence [*Art* 360).

An 'armed rebellion' poses a threat to die security of die State as distinguished from 'internal disturbance' contemplated under .Art. 355.[2]

Where the Constitution simply uses the expression 'Proclamation of Emergency', the reference is [*Art.* 366(18)] to a Proclamadon of the first category, *ue.*, under .An. 352.

42nd and 44th Amendments.

Tlie Emergency provisions in Part XVIII of the Constitution [.Arts. 352-360) have been extensively amended by the 42nd Amendment (1976) and the 44th Amendment (1978) Acts, so that the *resultant* position may be stated for the convenience of the reader, as follows:

I. A 'Proclamation of Emergency' may be made by the President at any time he is satisfied that die security of India or any part thereof lias been threatened by war, external aggression or *armed rebellion*[1] [*Art.* 352). It may be made even before the *actual occurrence* of any such disturbance, *eg.*, when external aggression is apprehended.

An 'Emergency' means the existence of a condition whereby the security of India or any part thereof is threatened by war or external aggression or *tinned rebellion*.[1] A state of emergency exists under the Constitution when the President makes a 'Proclamation of Emergency'. The actual occurrence of war or any armed rebellion, is not necessary to justify a Proclamation of Emergency of the President. The President may make such a Proclamation if lie is satisfied dial there is an imminent danger of such external aggression or *armed rebellion*. But no such Proclamation can be made by the President unless die Union Ministers of Cabinet rank, headed by the Prime Minister, recommend to him, *in writing*, that such a Proclamadon should be issued *Art.* 352(3)].

A. Proclamation of Emergency:

While the 42nd Amendment made the declaradon immune from judicial review, dial fetter has been removed by the 44di Amendment, so that the constitutionality of die Proclamadon can be questioned in a Court on the ground of *mala fides*.

Every such Proclamadon must be laid before bodi Houses of Parliament and shall cease to be in operation unless it is approved by resolutions of both Houses of Parliament within *out month* from die date of its issue.

Until the 44th Amendment of 1978, diere was no Parliamentary control over the revocation of a Proclamadon, once the issue of the Proclamation had been approved by resolutions of the Houses of Parliament.

After die 44th Amendment, a Proclamation under Art. 352 may come to an end in the following ways:

(a) On die expiry of *one* mondi from its issue, unless it is approved by resolutions of bodi Houses of Parliament before die expiry of that period. If the House of die People is dissolved at die date of issue of the Proclamation or within one month thereof, the Proclamation may survive until 30 days from the date of the first sitting of the House after its reconstitution, provided die Council of States has in the meantime approved of it by a resolution *Cl.* (4)].

How a Proclamation may terminate.

(b) It will gel a fresh lease of six months from the date it is approved by resolutions of both Houses of Parliament [G. 5], so that it will terminate at die end of six months from the date of last such resolution.

(c) Every such resolution under Cls. (4)-(5), must be passed by either House by a majority of the total membership of diat House and by a majority of not less than two-thirds of the members of that House present and voting [C/. (6)].

(d) The President must issue a Proclamation of revocation any time that the House of the People passes a resolution *disapproving* of die issue or continuance of die Proclamation *Cl.* (7)]. For die purpose of convening a special sitting of die House of the People for passing such a resolution of disapproval, not less than 1/10 of the Members of the House may give a notice in writing to the Speaker or to die President (when the House is nut in session) to convene a special sitting of the House for this purpose. A special

sitting of tlie House shall be held within 14 days from the date on which the notice is received by the Speaker or as the case may be by the President [67. (8)].

It may be that an armed rebellion or external aggression has affected only a *part* of the territory of India which is needed to be brought under greater control. Hence, it has been provided, by tire 44th Amendment, that a Proclamation under Art. 352 may be made in respect of the whole of India or only a part thereof.

The Executive and the Legislature of the Union shall have extraordinary powers during an emergency.

The effects of a Proclamation of Emergency may be discussed under four heads—(i) Executive; (ii) Legislative.; (iii) Financial and (iv) As to Fundamental Rights.

(i) *Executive.* When a Proclamation of Emergency has been made, the executive power of the Union shall, during the operation of the Proclamation, extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised [*Art.* 353(a)].

In normal times, the Union Executive has the power to give directions to a State, which includes only the matters specified in Arts. 255-257.

Effects of Proclamation of Emergency.

But under a Proclamation of Emergency, the Government of India shall acquire the power to give directions to a State on *'any'* matter, so dial though the State Government will not be suspended, it will be under the complete *control* of the Union Executive, and the administration of the country insofar as die Prodamadon goes, will function as under a unitary system with local sub-divisions.

(ii) *Legislative.* (a) While a Proclamation of Emergency is in operadon, Parliament may, by law, extend die normal life of the House of the People (5 years) for a period not exceeding one year at a time and not extending in any case beyond a period of 6 months after the Prodamadon has ceased to operate [Proviso to *Art.* 83(2), *anle*]. (This power also was used by Mrs. Gandhi in 1976—Act 109 of 1976).

(b) As soon as a Proclamation of Emergency is made, the legislative competence of the Union Parliament shall be automatically widened and die limitation imposed as regards List II, by Art. 246(3), shall be removed. In other words, during the operation of the Proclamation of Emergency, Parliament shall have the power to legislate as regards List II (State List) as well [*Art.* 250(1)]. Though the Proclamation *will not suspend the State* Legislature, it will suspend die distribution of legislative powers between the Union and the State, so far as the Union is concerned,—so diat the Union Parliament may meet the emergency by legislation over any subject as may be necessary as if the Constitution were unitary.

(c) In order to carry out the laws made by die Union Parliament under its extended jurisdiction as outlined above, Parliament shall also have the power to make laws conferring powers, or imposing duties (as may be necessary for the purpose), upon the Executive of die Union in respect of

any matter, even though such matter normally belonged to State jurisdiction [*Art.* 353(b)].

(iii) *Financial.* During the operation of the Proclamation of Emergency the President shall have the constitutional power to modify the provisions of the Constitution relating to the allocation of financial resources [*Arts.* 268-279] between the Union and the States, by his own Order. But no such Order shall have effect beyond the financial year in which die Proclamation itself ceases to operate, and, further, such Order of die President shall be subject to approval by Parliament [*Art.* 354].

(iv) *As regards Fundamental Rights.* Articles 358-359 lay down the effects of a Proclamation of Emergency upon fundamental rights. As amended up to 1978. by the 44th Amendment Act, the following results emerge—

I. While Art. 358 provides that the State would be free from the limitations imposed by Art. !9, so diat these rights would be non-existent against the State during the operation of a Proclamation of Emergency, under Art. 359, the right to *move the Courts* for the enforcement of die rights or any of them, may be suspended by Order of the President.

II. While Art. 359 would apply to an Emergency declared on any of die grounds specified in Art. 352, *i.e.*, war, external aggression or armed rebellion, die application of Art. 358 is confined to die case of Emergency on grounds of war or external aggression only.

III. While Art. 358 comes into operation automatically to suspend Art. 19 as soon as a Proclamadon of Emergency on the ground of war or external aggression is issued, to apply Air. 359 a further Order is to be made by the President, specifying diose Fundamental Rights against which the suspension of enforcement shall be operative.

IV. Art. 358 suspends Art. 19; the suspension of enforcement under Art. 359 shall relate only to those Fundamental Rights which are specified in die President's Order, *excepting Arts. 20 and 21.* In the result, notwithstanding an Emergency, access to the Courts cannot be barred to enforce a prisoner's or detenu's right under Art. 20 or 21.'

V. Neither Art. 358 nor 359 shall have the effect of suspending the operation of the relevant fundamental right unless the law which affects the aggrieved individual contains a recital to die effect diat "such law is in relation to the Proclamation of Emergency". In die absence of such recital in die law itself, neither such law nor any execudve action taken under it shall have any immunity from challenge for violation of a fundamental right during operation of the Emergency [*Cl.* (2) of *Art.* 358 and *Cl.* (IB) of *Art.* 359].

Uses of the Emergency Powers.

A. The *first* Proclamation of Emergency under Art. 352 was made by the President on October 26, 1962, in view of the Chinese aggression in die NEFA. It was also provided by a Presidential Order, issued under Art. 359, that a person arrested or imprisoned under die Defence of India Act would not be entttled to move any Court for die enforcement of any of his Fundamental

Rights under Art. 14, 19 or 21. This Proclamation of Emergency was revoked by an order made by llie President on January 10, 1968.

B. The *second* Proclamation of Emergency under Art. 352 was made by the President on December 3, 1971 when Pakistan launched an undeclared war against India.

A Presidential Order under Art. 359 was promulgated on December 25, 1974, in view of certain High Court decisions releasing some detenus under the Maintenance of Internal Security Act, 1971 for smuggling operations. This Presidential Order suspended the right of any such detenu to move *any* Court for die enforcement of his fundamental rights under Arts. 14, 21 and 22, for a period of six months or during the continuance of the ProclamaUon of Emergency of 1971, whichever expired earlier.

Though diere was a ceasefire on die capitulation of Pakistan in Bangladesh in December, 1971, followed by die Simula Agreement between India and Pakistan, the ProclamaUon of 1971 was continued, owing to the persistence of hosdle atUude of Pakistan. It was thus in operadon when the diird ProclamaUon ofjune 25, 1975 was made.

C. While the two preceding Proclamations under Art. 352 were made on the ground of *external* aggression, die *third* Proclamation of Emergency under Art. 352 was made on June 25, 1975, on the ground of "*internal* disturbance".[5]

The "internal disturbance", which was cited in the Press Note relating to the ProclamaUon, was that 'certain persons have been inciting die Police and the Armed Forces against the discharge of dieir duties and dieir normal functioning'.[5] Both the second and third proclamations were revoked on 21st March, 1977.

Internal Disturbance no more ground of Emergency.

It should be noted dial after 1978, it is not possible to issue a Proclamation of Emergency on the ground of 'internal disturbance', short of an armed rebellion, for, the words 'internal disturbance' have been substituted by the words 'armed rebellion', by die Constitution (44tli Amendment) Act, 1978.[1]

II. The Constitution provides for carrying on the administration of a State in case of a failure of me constitutional machinery.

B. Proclamation of Failure of Constitutiuna) Machinery in a Slate.

(a) It is a duty of the Union to ensure that die government of every State is earned on in accordance widi the provisions of die Constitution [*Art.* 355). So, the President is empowered to make a Proclamation, when he is satished dial die Govemment of a State cannot be carried on in accordance widi die provisions of die Constitution, either on the report of the Governor of the State or odierwise [*Art.* 356(1)]. (For uses of this power, see *below.*)

(b) Such Proclamation may also be made by the President where any State has failed to comply with, or to give effect to, any directions given by the Union, in die exercise of its executive power to the State [*Art.* 365]."

By such Proclamation, the President may—

(a) assume to himself all or any of the functions of the Executive of the State or of any other authority save the High Court; and

(b) declare that the powers of the Legislature of the State shall be exercisable by or under die authority of Parliament. In short, by such Proclamation, the Union would assume control over all functions in the State administration, except judicial.

When the State Legislature is dius suspended by the Proclamation, it shall by competent—

(a) for Parliament to delegate the power to make laws for the Stale to the President or any other authority speciGed by him; (b) for die President to authorise, when die House of the People is not in session, expenditure from the Consolidated Fund of the State pending die sanction of such expenditure from Parliament; and (c) for the President to promulgate Ordinances for die administration of the State when Parliament is not in session [Art. 357].

The duration of such Proclamation shall ordinarily be for *two* mondis. If, however, die Proclamation was issued when die House of the People was dissolved or dissolution took place during the period of the two mondis above-mentioned, the Proclamation would cease to operate on the expiry of 30 days from die date on which the reconstituted House of the People first met, unless die Proclamation is approved by Parliament. The two months' duration of such Proclamation can be extended by resoludons passed by both Houses of Parliament for a period of six months at a time, subject to a maximum duration of diree years [*Art.* 356(3)-(4)]; but if die duration is sought to be extended beyond *one* year, two odier conditions, as inserted by the 44th Amendment Act, 1978, have to be satisGed, namely, dial—

ejUensVon[18] for of duration beyond one year.

(a) a Proclamation of Emergency is in operation, in the whole of India or as die case may be, in die whole or any part of the Slate, at the lime of the passing of such resolution, and

(b) die Election Commission certiGes that the continuance in force of the Proclamation approved under Cl. (3) during the period speciGed in such resolution is necessary on account of difGculties in holding general elections to die Legislative Assembly of the State concerned.

By the 42nd Amendment, 1976, the President's satisfaction for the making of a Proclamation under Art. 356 had been made immune from judicial review; but the 44th Amendment of 1978 has removed that fetter, so that die Courts may now interfere if the Proclamation is *mala* fideJ or die reasons disclosed for making the Proclamation have no reasonable nexus with the satisfaction of the President.[1]

Judicial Review.

The Author's views expressed above have been upheld by the Supreme Court in *S.R. Bommai's* case[2] where a nine-Juage Bench held that the validity of a Proclamation imder Art. 356 can be judicially reviewed to examine (i) whether it was

issued on the basis of any material, (ii) whether the material was relevant, (iii) whether it was issued *mala fide.*

The Proclamation in case of failure of the constitutional machinery differs from a Proclamation of 'Emergency' on the following points:

Arts. 352 and 35« compared.

(i) A Proclamation of Emergency may be made by the President only when the *security* of India or any part thereof is threatened by war, external aggression or armed rebellion. A Proclamation in respeci of failure of the constitutional machinery may be made by the President when the constitutional government of State cannot be carried on for any reasons, not necessarily coimected with *war* or *armed rebellion.*

(ii) When a Proclamation of Emergency is made, the Centre shall gel no power to *suspend* the State Government or any part thereof. The Stale Executive and Legislature would continue in operation and retain their powers. .All that the Centre would get are *concurrent* powers of legislation and administration of the State.

But under a Proclamation in case of failure of die constitutional machinery, the State Legislature would be suspended and the executive authority of the State would be assumed by the President in whole or in part. [This is why it is popularly referred to as the imposition of the *'President's rule'.*\

(iii) Under a Proclamation of Emergency, Parliament can legislate in respect of State subjects only by itself; by under a Proclamation of the other kind, it ran delegate its powers to legislate for the State,—to tire President or any other authority specified by him.

(iv) br the case of a Proclamation of failure of constitutional machinery, there is a maximum limitation to the power of Parliament to extend the operation of the Proclamation, namely, three years [*Art.* 356(4), *Proviso* 1], but in die case of a Proclamation of Emergency, it may be continued for a period of six months by each resolution of the Houses of Parliament approving its continuance, so that if Parliament so approves, the Proclamation may be continued indefinitely as long as the Proclamation is not revoked or the Parliament does not cease to make resolutions approving its continuance [*new Cl.* (5) to *Art.* 352, inserted by die 44di .Amendment Act, 1978].

Use of the Power.

It is clear dial the power to declare a Proclamation of failure of constitutional machinery in a State has nothing to do with any external aggression or armed rebellion; it is an extraordinary power of the Union to meet a *political* breakdown in any of the units of the federation for the failure by such Unit to comply with the federal directives [*Art.* 365)], which might affect die national strength. It is one ol the coercive powers at the hands of the Union to maintain die democratic form of government, and to prevent factional strifes from paralysing the governmental machinery, in the States. The importance of this power in the political system of India can hardly be overlooked in view of ihe fact that it has been used not less dian 108 times during the first 50 years of the working of the Constitution (till March 2001).

For details see Table XXI.

Frequent and improper use of the power under Art. 356 deprecated.

From the foregoing history of the use of the power conferred upon the Union under Art. 356, it is evident that it is a drastic coercive power which takes nearly the substance away from the normal federal polity prescribed by the Constitution. It is, therefore, to be always remembered that the provision for such drastic power was defended by Dr. Ambedkar in the Constituent Assembly[8] on the plea that the use of this drastic power would be a *matter of the last resort:*

> . . . the proper thing we ought to expect is that such articles will never be called into operation and *that they would remain a dead-letter.* If at all they are brought into operation, I hope the President who is endowed with this power *will take proper precautions* before actually suspending the administration of the Province.

It is natural, therefore, that the propriety of the use of this provision (which was envisaged by Dr. B.R. Ambedkar[8] to 'remain a dead-letter'), on numerous occasions (more than any other provision of the Constitution), has evoked criticism from different quarters. The judgment of the Supreme Court in the *Rajasthan* case[6] also did not lay down the law correctly. The views of the Author were expressed in detail in the Kith Edition of this book (at pp. 336-37). In view of *S.R. Bommai's* case[7] (ninejudge Bench) the comments have been replaced by the law as declared by the Supreme Court, which affirm the Author's view.

Power under Art. 356 must be used rarely.

In *S.R. Bommai's* case[7] the Court has clearly subscribed to the view that the power under Art. 356 is an exceptional power and has to be resorted to only occasionally to meet the exigencies of special situations. The Court quoted the Sarkaria Commission Report to give examples of situations when such power should *not* be used. It made it clear that Art. 356 cannot be invoked for superseding a duly constituted ministry and dissolving the Assembly on the sole ground that in the elections to the Lok Sabha, the ruling party in the State suffered a massive defeat.

After *Bommai's* case[7] it is settled that the Courts possess the power to review the Proclamation on the grounds mentioned above [see under "JUDICIAL REVIEW", *ante*]. This will surely have a restraining effect on the tendency to use the power on flimsy grounds.

President not to take irreversible steps under Art. 356(1) (a), (b) & (c).

In *S.R. Bommai's* case[7] it has been pronounced that till the Proclamation is approved by both Houses of Parliament, it is not permissible for the President to take any irreversible action under Cls. (a), (b) and (c) of Art. 356(1). Hence the Legislative Assembly of a State cannot be dissolved before the Proclamation is approved by both Houses of Parliament.

Power to restore *status quo ante.*

If the Court holds the Proclamation to be invalid then in spite of the fact that it has been approved by the Parliament, the Court has the power to restore, in its discretion, *status quo ante, it.* the Court may order that the dissolved Ministry and Assembly will be revived.[7]

Illustration of cases where resort to Art. 356 would not be proper

Some of the situations which do *not* amount to failure of constitutional machinery are given below. They are based on the report of the Sarkaria Commission and have the approval of the Court in *S.R. Bommai's* case.[9]

(1) a situation of maladministration in a State, where a duly constituted ministry enjoys support of the Assembly.

(2) where a Ministry resigns or is dismissed on losing majority support and die Governor recommends imposition of President's Rule without exploring the possibility of installing an alternative government.

(3) where a Ministry has not been defeated on the floor of the House, the Governor on his subjective assessment recommends supersession and imposition of President's Rule.

(4) where in general elecdons to the Lok Sabha the ruling party in the State has suffered a massive defeat.

(5) where there is situation of internal disturbance but all possible measures to contain the situation by die Union in discharge of its duty, under Art. 355, have not been exhaused.

(6) where no prior warning or opportunity is given to the State Government to correct itself in cases where directives were issued under Arts. 256, 257 etc.

(7) where die power is used to sort out intra-party problems of the ruling party.

(8) die power cannot be legitimately exercised on the sole ground of stringent financial exigencies of the State.

(9) the power cannot be invoked merely on the ground that diere are serious allegations of corruption against die Ministry.

(10) exercise of die power for a purpose extraneous or irrelevant to those which are permitted by the Constitution would be vitiated by legal *mala fides.*

Proper occasions for use suggested.

A proper occasion for use of this power would, of course, be when a Ministry *resigns* after defeat in the Legislature and no other Ministry commanding a majority in the Assembly can at once be formed. Dissolution of die Assembly may be a radical solution, but, that being expensive, a resort to Art. 356 may be made to allow die state of flux in the Assembly to subside so as to obviate the need for a dissolution, if possible. A similar situation would arise where die party having a majority *declines* to form a Ministry and the Governor fails in his attempt to find a coalition Ministry. Another obviously proper use is mentioned in Art. 365 of the Constitution itself; but curiously, none of die numerous past occasions *specifically* refers to this contingency. Hie provision in Art. 365 relates to the failure of a State Government to carry out the directives of the Union Government which the latter has the authority under the Constitution to issue (*e.g.*, under *Arts.* 256,

257). The Union may also issue such a directive under die implied power conferred by die latter part of Art. 355, "to ensure that die government of every State is carried on in accordance with the provisions of this Constitution".[6]

Effect of 44th Amendment on Art. 356.

The only change diat the 44di Amendment Act, 1978 (sponsored by die Janata Government), has made in this Article, is to subsdtute Cl. (5) to limit the duradon of a Proclamadon made under Art. 356 to a period of *one year* unless a Proclamadon of Emergency under Art. 352 is in operadon and the Election Commission cerdfies dial it is not possible to hole elections to the Legislative Assembly of the State concerned immediately, in which case, it may be extended up to diree years, by successive resolutions for continuance being passed by both Houses of Parliament

It is to be noted that the foregoing amendment has not specified any conditions or circumstances under which the power under Ait. 356 can be used. Hence, in the light of die *Rajasthan* decisionno legal challenge could be offered when Mrs. Gandhi repeated the Janata experiment in February, 1980, in die same nine States, on the same ground, *viz.*, *that* the Janata Party, which was in power in *those* States, was routed in die *Lok Sabha* election.

Proclamation of Financial Emergency.

III. If the President is satisfied diat a situation has ansen whereby the financial stability or credit of India or of any part of die territory thereof is threatened, he may by a Proclamation make a declaration to diat effect [*Art.* 360(1)].

The consequences of such a declaration are :

(a) During the period any such Proclamation is in operation, the executive authority of the Union shall extend to die giving of directions to any State to observe such canons of financial propriety as may be specified in the directions.

(b) Any such direction may also include—

(i) a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State;

(ii) a provision requiring all Money Bills or other financial Bills to be reserved for the consideration of the President after they are passed by the Legislature of the State.

(c) It shall be competent for die President during the period diat any such Proclamation is in operation to issue directions for die reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including die Judges of die Supreme Court and the High Courts [*Art.* 360(3)-(4)].

The duration of such Proclamation will be similar to that of a Proclamation of Emergency, dial is to say, it shall ordinarily remain in force for a period of *two* months, unless before die expiry of diat period, it is approved by resolutions of both Houses of Parliament. If die House of the

People is dissolved within the aforesaid period of two months, die Proclamation shall cease to operate on the expiry of thirty days from the date on which die House of the People first sits after its reconstitution, unless before the expiry of that period of thirty days it has been approved by both Houses of Parliament. It may be revoked by the President at any time, by making another Proclamation.

No use of Art. 360 has ever been made.

REFERENCES

1. Since the amendment of Art. 352 in 1978, it is no longer possible to make a Proclamation of Emergency, on die ground of mere 'internal disturbance' which does not constitute an 'armed rebellion'.
2. *Naga People's Movement of Human Rights* v. *Union of India*, (1998) 2 S.C.C. 109 (paras 31 and 32) : A I R 199H S.C. +31.
3. Cf. *Stale of Rajasthan* v. *Union of India*, AIR 1977 S.C. 1361 (paras 12+, 1+4); *Mmerva Mills* v. *Union of India*, AIR 1980 S.C. 1789 (paras 103-04); *S.R. Bommat* v. *Union of India*, (199+) 3 S.C.C. 1.
+. This amendment, saving Arts. 20 and 21 from the ntischief of Art. 339, has been made by die ++th Amendment Act, 1978 in order to *supersede* the view taken in the case of *A.D.M.* v. *Shukla*, AIR 1976 S.C. 1207, that when Art. 21 is suspended by an Order under Art. 359, die person imprisoned or detained "loses his *locus standi* to regain his liberty on *any* ground".
5. An official version of die reasons which impelled Mrs. Gandhi to assume dial 'the security of India was threatened by internal disturbances' may be had from *India, 1976*, pp. i ii. Hits Proclamation was revoked on March 21, 1977.
6. *Stale of Rajasthan* v. *Union of India*, AIR 1977 S.C. 1361 (paras 58-59).
7. *S.R. Bommat* v. *Union of India*, (1994) 3 S.C.C. 1.
8. C.A. Debates IX, p. 177.
9. *Ibid.*, f.n. 7, para 82.

CHAPTER 26

ADMINISTRATIVE RELATIONS BETWEEN THE UNION AND THE STATES

Need for co-ordination between the units of the Federation.

ANY federal scheme involves the setting up of dual governments and division of powers. But the success and strength of the federal polity depends upon the maximum of co-operation and co-ordination between the governments. The topic may be discussed under two heads:

(a) Relation between die Union and States;

(b) Relation between die States *inter se*.

In die present Chapter die former aspect will be discussed and die inter-Slate relations will be dealt with in the next Chapter.

(A) TLCHNIQI EN OK UNION CONTROL OVER SI ATEN

It would be convenient to discuss this matter under two heads—(i) in emergencies; (ii) in normal limes.

I. *In Emergencies.* It has already been pointed out that in 'emergencies' die government under the Indian Constitution will work as if it were a unitary government. 'Phis aspect will be more full) discussed in Chap. 28.

II. *hi Normal Times.* Even in normal times, the Constitution has devised techniques of control over the States by the Union to ensure dial die State governments do not interfere with die legislative and executive policies of die Union and also to ensure the efficiency and strength of each individual unit which is essential for the strength ol die Union.

Some of diese avenues of conuol arise out of the executive and legislative powers vested in die President, in relation to the Stales, *e.g.* :

(i) The power to appoint and dismiss die Governor [*Arts.* 155-1.5b]; die power to appoint other dignitaries in the State, *e.g.*, judges ol the High Court; Members of the State Public Service Commission [*Arts.* 217, 3171.

(ii) Legislative powers, *e.g.*, previous sanction to introduce legislation in the State Legislature [*Art.* 304. Proviso]; assent to specified legislation which must be reserved for his consideration *Arl.* 31A(1), Prow 1; 31C, Prow 288(2)]; instruction of President required for the Governor to make

Ordinance relating to specified matters [*Art.* 213(1), 1'rov.j; veto power in respect of other State Bills reserved by the Governor [*Art.* 200, 1'rov. 1|

These having been exphtined in the preceding Chapters, in the present chapter we shall discuss other specific agencies for Union control, namely:

(i) Directions to the Stale Government.
(ii) Delegation of Union functions.
(iii) All-India Services.
(iv) Grant-in-aid.
(v) Inter-State Councils.
(vi) Inter-State Commerce Commission [*Art.* 3071.

Directions by the Union to State Governments.

Tlte idea of die Union giving directions to the States is foreign and repugnant to a truly federal system. But this idea was taken by the framers of *our* Constitution from the Government of India Act, 1035, in view of die peculiar conditions of this country and. particularly, the circumstances out of which the federation emerged.

The circumstances under which and the matters relating to which it shall be competent for the Union to give direebons to a Slate have already been stated. The sanction prescribed by the Constitution to secure compliance with such directions remains to be discussed.

It is to be noted that the Constitution prescribes a coercive sanction for the enforcement of the directions issued under any of the foregoing powers, namely, the power of the President to make a Proclamation tinder Art. 356. This is provided in Art. 365 as follows :

Sanction for enforcement of Directions.

"Where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union undei any of the provisions of this Constitution, it shall be lawful for the I'resident to hold that a situation has arisen in which tlie Government of the State cannot be carried on in accordance with the provisions of this ConsUtution."

And as soon as a Proclamation under Art. 356 is made by the President he will be entitled to assume to himself any of the functions ol the Stale Government as are specified in that Article.

Delegation of Functions.

It has already been stated that with the consent of the Government of a State, President may entrust to that Government executive functions ol the Union relating to any matter [*Art.* 258(1)). While legislating on a Union subject. Parliament may delegate powers to the State Governments and their officers insofar as the statute is applicable in tile respective States [*Art.* 258(2)).

Conversely, a State Government may, with the consent of the G< /eminent of India, confer administrative functions upon die latter, relating to State subjects [*Art.* 258A|.

Thus, where it is inconvenient for either Government to directly carry out its administrative functions, it may have diose functions executed through the other Government.

All-India Services.

Il has been pointed out earlier that besides persons serving under the Union and the States, there will be certain services 'common to the Union and the States'. These are called 'All-India Services', of which the Indian Administrative Service and the Indian Police Service are the existing examples *Art.* 312(2)]. But the Constitution gives the power to create additional All-India Services.[1] If the Council of States declares by a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in (lie national interests so to do, Parliament may be law provide for the creation of one or more all-India services common to the Union and the States and regulate the recruitment, and the conditions of service of persons appointed, to any such service [*Art.* 312(1)].'

As explained by Dr. Ambedkar in the Constituent Assembly, the object behind this provision for All-India Services is to impart a greater cohesion to the federal system and greater efficiency to the administration in both the Union and the States:

> "The dual policy which is inherent in a federal system is followed in all federations by a dual service. In all Federations, there is a Federal Civil Service and a Stale Civil Service. The Indian Federation, though a dual polity, will have a dual service, but with one exception. It is recognised that in everv country there are certain parts in its administrative set-up which might be called strategic from the point of view of maintaining the standard of administration... There can be no doubt dial the standard of administration depends upon the calibre of the civil servants who are appointed to these strategic posts... The Constitution provides that without depriving the States of their right to form their own civil services there shall be an all-India Service, recruited on an all-India basis with common qualifications, with uniform scale of pay and members of which alone could be appointed to these strategic posts throughout the Union."

Grant-in-Aid.

As stated earlier, Parliament is given power to make such grants as it may deem necessary to give financial assistance to any State which is in need of such assistance [*Art.* 275]

By means of the grants, the Union would be in a position to correct inter-State disparities in financial resources which are not conducive to an all-round development of the country and also to exercise control and co-ordination over the welfare schemes of the States on a national scale.

Besides this general power to make grants to the States for financial assistance, the Constitution provides for specific grants on two matters: (a) For schemes of development, for welfare of Scheduled Tribes and for raising tire level of administration of Scheduled .Areas, as may have been undertaken by a State with the approval of the Government of India. (b) To the State of Assam, for the development of the tribal .Areas in that State [*Prvoisos.* 1-2, *Art.* 275(1)].

Inter-State Council.

The President is empowered to establish an inter-State Council [*Art.* 263] if at any time it appears to him that the pUbLjc interests would be served thereby. Though the President is given the power to define the nature of the duties to be performed by the Council, the Constitution outlines the diree-fold duties that may be assigned to this body. One of these is—

"the duty of *inquiring* into and *advising* upon disputes which may have arisen between States."

The other functions of such Council would be to investigate and discuss subjects of common interest between the Union and the States or between two or more States *inter se, e.g.* research in such matters as agriculture, forestry, public health and to make recommendation for co-ordination of policy and action relating to such subject.

In exercise of this power, the President has so far established a Central Council of Health,[2] a Central Council of Local Self-Government,[3] and a Transport Development Council,[4] for the purpose of co-ordinating the policy of the States relating to these matters. In fact, the primary object of an Inter-State Council being co-ordination and federal cohesion, this object has been lost sight of, while creating fragmentary bodies to deal with specified matters relying on the statutory interpretation that the singular 'a' before the word 'Council' includes the plural.

The Sarkaria Commission has recommended the constitution of a permanent inter-State Council, which should be charged with the duties set out in (b) and (c) of Art. 263. Such a Council, consisting of six Union Cabinet Ministers and the Chief Ministers of all the States, has been created in April, 1990.[5]

Inter-State Commerce Commission.

For the purpose of enforcing the provisions of the Constitution relating to the freedom of trade, commerce and intercourse throughout the territory of India [*Arts.* 301–305], Parliament is empowered to constitute an authority similar to the Inter-State Commerce Commission in the *U.S.A.* and to confer on such authority such powers and duties as it may deem fit [*Art.* 307]. No such Commission has, however, been set up.

Agencies extra-constitutional for setting all India Problems.

Apart from the above constitutional agencies for Union control over the States, to ensure a co-ordinated development of India notwithstanding a federal system of government, there are some advisory bodies and conferences held at the Union level, which further the co-ordination of State policy and eliminate differences as between the States. The foremost of such bodies is the Planning Commission.

Planning Commission.

Though the Constitution specifically mentions several Commissions to achieve various purposes, the Planning Commission, as such, is not to be found in the Constitution. 'Economic and social planning' is a concurrent legislative power [*Entry* 20, *List* III]. Taking advantage of this Union power, the Union set up a Planning Commission in 1950, but without resorting to legislation. This extra-constitutional and non-statutory body was set up by a resolution (1950) of the Union Cabinet by Prime Minister Nehru with himself as its first Chairman, to formulate an integrated Five Year[6] Plan for economic and social development and to act as an advisory body to the Union Government, in this behalf.

Set up with this definite object, the Commission's activities have gradually been extended over the entire sphere of the administration

excluding only defence and foreign affairs, so much so, that a critic has described it as "the economic Cabinet of the country as a whole", consisting of the Prime Minister and encroaching upon the functions of constitutional bodies, such as the Finance Commission[7] and, yet, not being accountable to Parliament. It has built up a heavy bureaucratic organisation[8] which led Pandit Nehru himself to observe[9]—

> "The Commission which was a small body of serious thinkers had turned into a government department complete with a crowd of secretaries, directors and of course a big building."

According to these critics, the Planning Commission is one of the agencies of encroachment upon the autonomy of the States under the federal system. The extent of the influence of this Commission should, however, be precisely examined before arriving at any conclusion. The function of the Commission is to prepare a plan for the "most effective and balanced utilisation of the country's resources", which would initiate "a process of development which will raise living standards and open out to the people new opportunities for a richer and more varied life". It is obvious that the business of the Commission is only to prepare the plans; the implementation of the plans rests with the States because the development relates to mostly State subjects. There is no doubt that at the Union, the Planning Commission has great weight, having the Prime Minister himself as its Chairman. But so far as the States are concerned, the role of the Commission is only advisory. Whatever influence it exerts is only *indirect*, insofar as the States vie with each other in having their requirements included in the national plan. After that is done, the Planning Commission can have no *direct* means of securing the implementation of the plan. If, at that stage, the States are obliged to follow the uniform policy laid down by the Planning Commission, that is because the States cannot do without obtaining financial assistance from the Union.[10] But, strictly speaking, taking advantage of financial assistance involves voluntary element, not coercion, and even in the *United States* the receipt of federal grants-in-aid is not considered to be a subversion of the federal system, even though it operates as an encroachment upon State autonomy, according to many critics.[10a]

But there is justification behind the criticism that there is overlapping of work and responsibility owing to the setting up of two high-powered bodies, *viz.*, the Finance Commission and the Planning Commission and the Administrative Reforms Commission has commented upon it.[11] There is, in fact, no natural division between 'plan expenditure' and 'non-plan expenditure'. The anomaly has been due to the fact that the makers of the Constitution could not, at that time, envisage the creation of a body like the Planning Commission which has subsequently been set up by executive order. Be that as it may be, the need for co-ordination between the two Commissions is patent, and, ultimately, this must be taken over by the Cabinet or a body such as the National Development Council of which we shall speak just now, unless the two Commissions are unified,—which would require an amendment of the Constitution because the Finance Commission is mentioned in the Constitution.

National Development Council.

The working of the Planning Commission, again, has led to the setting up of another extra-constitutional and extra-legal body, namely, the National Development Council.

This Council was formed in 1952, as an adjunct to the Planning Commission, to associate the States in the formulation of the Plans. The functions of the Council are "to strengthen and mobilise the efforts and resources of the nation in support of the plans; to promote common economic policies in all vital spheres and to ensure the balanced and rapid development of all parts of the country", and in particular, are—

(a) to review the working of the National Plan from time to time;

(b) to recommend measures for the achievement of the aims and targets set out in the National Plan.

Since the middle of 1967, all members of the Union Cabinet, Chief Ministers of States, the Administrators of the Union Territories and members of the Planning Commission have been members of this Council.[12]

Besides the Planning Commission, the annual conferences, whose number is legion, held under the auspices of the Union, serve to evolve co-ordination and integration even in the State sphere. Apart from conferences held on specific problems, there are annual conferences at the highest level, such as the Governors' Conference, the Chief Ministers' Conference, the Law Ministers' Conference, the Chief Justices' Conference, which are of no mean importance from the standpoint of the Union-State as well as inter-state relations. As Appleby[8] has observed, it is by means of such contacts rather than by the use of constitutional coercion, that the Union is maintaining a hold over this sub-continent, having 25 autonomous States (now 28):

"No other large and important national government... is so dependent as India on theoretically subordinate but actually rather *distinct units responsible to a different* political control, for so much of the administration of what are recognised as national programmes of great importance to the nation.

The power that is exercised organically in New Delhi is the uncertain and discontinuous power of prestige. It is influence rather than power. Its method is making plans, issuing pronouncements, holding conferences... Any real power in most of the development field is the personal power of particular leaders and the informal, extra-constitutional, extra-administrative power of a dominant party, coherent and strongly led by the same leaders. Dependence of achievement, therefore, is in some crucial ways, apart from the formal organs of governance. In forces which in the future may take quite different forms."[8]

National Integration Council.

Another non-constitutional body, the National Integration Council, was created in 1986, to deal with welfare measures for the minorities on an all-India basis. The National Front Government revived it in 1990, with a broad-based composition, including not only Union Ministers and Chief Ministers of States, but also representatives of national and regional political parties, labour, women, public figures as well as media representatives. The issues before its first meeting were—

Communal harmony, increased violence by secessionists, the problems in respect of Punjab, Kashmir, Ramjanambhoomi-Babri Masjid.

(B) CO-OPERATION BETWEEN THE UNION AND THE STATES

Apart from the agencies of federal control, there are certain provisions which tend towards a smooth working of both the Union and State Governments, without any unnecessary conflict jurisdiction. These are—

(i) Mutual delegation of functions.

(ii) Immunity from mutual taxation.

Mutual Delegation of Functions.

(a) As explained already *our* Constitution distributes between die Union and the States not only the legislative power but also the executive power, more or less on die same lines [*Arts.* 73, 162].

The result is that it is not competent for a State to exercise administrative power with respect to Un.an subjects, or for die Union to lake up die administration of any State function, unless authorised in that behalf by any provision in the Constitution. In administrative matters, a rigid division like this may lead to occasional deadlocks. To avoid such a situation, the Constitution has engrafted provisions enabling the Union as well as a State to make a mutual delegation of dieir respective administrative functions:

(b) As to die delegation of Union functions, there are two methods:

(i) With the *consent* of the State Government, the *President* may, without any legislative sanction, entrust any executive function to that State [*Art.* 258(1)].

(ii) Irrespective of any consent of the State concerned, *Parliament* may, while legislating with respect to Union subject confer powers upon a State or its officers, relating to such subject [*Art.* 258(2)]. Such delegation has, in short, a statutory basis.

(c) Conversely, with the *consent* of the Government of India, the *Governor* of a Stale may entrust on die Union Government or its officers, functions relating to a State subject, so far as that State is concerned [*Art.* 258A].

(C) IMMUNITY FROM MUTUAL TAXATION

Need for Mutual immunity for Proper Workin* of Federal System.

The system of double government set up by a federal Constitution requires, for its smoodi working, the immunity of the property of one Government from taxation by mother. Though diere is some difference between federal Constitutions as to the extent to which this immunity should go, there is an agreement on the principle that mutual immunity from taxation would save a good deal of fruitless labour in assessment and calculation and cross-accounting of taxes between the two governments (Union and State).

This matter is dealt with in Arts. 285 and 28!1 of *our* Constitution, relating to the immunity of the Union and a State, respectively.

Immunity of Unkin Property from State Taxation.

The property of the Union shall, save insofar as Parl:ament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a state [*Art.* 285(1)].

Exemption of Property and Income of a State from Union Taxation.

Similarly the property of a State is immune from Union taxation [*Art.* 28d(1)]. The immunity, however, does not extend to all Union taxes, as held by *our* Supreme Court,[11] but is confined only to such taxes as

are levied *on* propern. A Slate is, therefore, not immune from customs duty, which is imposed, not on property, but on the act of import or export of goods.

Not only the 'property' but also the 'income' of a State is exempted from Union taxation. The exemption is, however, confined to the State Government and does not extend to any local authority situated widtin a Slate. The above immunity of the income of a Stale is, again, subject to an overriding power of Parliament as regards any income derived from a commercial activity. Titus—

(a) Ordinarily, the income derived by a State from commercial activities shall be immune from income-tax levied by the Union.

(b) Parliament is, however, competent to tax the income of a State derived from a commercial activity.

(c) If, however, Parliament declares any apparently trading functions as functions 'incidental to the ordinary functions of government', the income from such funcdons shall be no longer taxable, so long as such declaration stands.[14]

REFERENCES

1. Until lSMil, no additional All-India Services were created, but later on several new All-India Services were created \uuit footnote no. 45 under Chap. 30. *Post*)
2. S R O 1418, dated <48-1052; *India, 1953*, p. 145
3. *huha, 1357*, p 308
4. *India, 1373*, p. 353 Also Central Council of Indian Medicine, Central Family Wellare Council [*India, 1332*, pp. 101, 108).
5. *Rep. of iht Administrative Reforms Commission* (1060), Vol. I, pp 32-34; *the Report of the Sarkana Commission on Inter-State Relations*, Part 1, paras 9.3.0506.
6. The current Plan is the 10th Five Year Plan (200207)
7. CHANDRA, *Federation in India*, pp 213 *rt seq*.
8. APPLEItY. *Public Administration in India*, p 22
9. Under die Second Five Year Plan, 70 per cent of the 'revenue expenditure' and nearly the whole of the 'capital expenditure' on the State Plans were financed by grants from the Union (under An. 275 of die Constitution), known as 'matching grants'.
10. *Vide* BASE'S *Commentary on the Constitution of India*, 5th Ed., Vol. IV, p 304; *Steward Machine Co. v. Davis*, (1037) 301 U S 548
11. *Rep. of the Administrative Reforms Commission*, Vol. I, pp. 16-19, 26-39.
12. *Statesman*, 167 1976, p I
13. In re. *Sea Customs Art*, AIR 1003 S.C. 1760
14. *A PS R FC v. I TU.*, AIK 1004 S.C. 1481 (*1431, 143.1*).

PART in
Government of the States

PART V
Local Government

PART VIII
The Federal System

PART II

Government of the Union

PART VII
The Judicature

PART VI
Administration of Special Areas

PART IV

Administration of Union Territories