CHAPTER I

CONSTITUTION

I. Historical Background

Since the Constitution of India is the product not of a political revolution but of the deliberation of a body of eminent representatives of the people who sought to improve upon the existing system of administration, a retrospect of the constitutional development is indispensable for a proper understanding of this Constitution[1]. This explains why the Instrument of 1949 adopted much from the constitutional documents which preceded and yet is not a replica of any of them. Its advance over its predecessors and the majesty of its new features is due to the fact that while the constitutional documents of the preceding two centuries had been imposed by an imperial power, the Republican Constitution is made by the people themselves, through representatives assembled in a sovereign Constituent Assembly.

We must, therefore, start with the events and circumstances which led to the convening of the Constituent Assembly for making a Constitution for independent India towards the end of 1946.

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 the British enacted the first statute for the governance of India under the direct rule of the British Government, the Government of India Act, 1858[2]. This Act may thus serve as the starting point of 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

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[1]. This chapter was written in 1975.

[2]. *The Report of Indian Statutory Commission* (Simon Commission), 1930, Vol. I, p. 112.

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 Company. The Secretary of State, who was responsible to the British Parliament, governed India through the Governor-General, assisted by an Executive Council.

The essential features of the system introduced by the Act of 1858 were :

(i) The administration of the country was not only unitary but rigidly centralized. Though the territory of British India 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.

(ii) 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 anywise related to the Government or revenue 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.

Indian Councils Act, 1861 : The Indian Councils Act of 1861 introduced a grain of popular element in so far as it provided that the Governor-General's Executive Council which was so long composed exclusively of official members, 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.

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, 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 (i) though the majority of official members was 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; (ii) the Councils were to have the power of discussing the annual statement of revenue and expenditure *i.e.*, the Budget, and of addressing questions to the executive.

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

The changes relating to the Provincial Legislative Councils were, of course, more advanced. The size of these Councils was enlarged by including elected non-official members thus ending the official majority. An element of election was also introduced in the Legislative Council at the centre but the official majority there was retained. The deliberative functions of the Legislative Councils were also increased by this Act by giving them the opportunity of influencing the policy of the administration by moving resolutions on the budget and on any matter of public interest, save certain specified subjects, such as the armed forces, foreign affairs, and the Indian states.

On the other hand, the positive vice of the system of election introduced by the Act of 1909 was that it provided, for the first time, for separate representation of the Muslim community and thus sowed the seeds of separatism that eventually led to the lamentable partition of the country.

The unrepealed provisions of the preceding Government of India Acts were consolidated by the Act of 1915.

Government of India Act, 1919 : The next landmark in the constitutional development of India is the Montagu-Chelmsford Report which led to the enactment of the Government of India Act, 1919.

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

The Indian National Congress (established in 1885) which was so long under the control of the Moderates, became more active during the First World War and started its campaign for self-government known as the Home Rule movement. In response to this popular demand, the British Government made a declaration on August 20, 1917 that the policy of "His Majesty's Government was that of increasing association of Indians in every branch of administration and the gradual development of self-governing institutions with a view to progressive realization of Responsible Government in British India

as an integral part of the British Empire".

The then Secretary of State for India (E. S. Montagu) and the Governor-General (Lord Chelmsford) were 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, by way of amendments to the Act of 1915.

The main feature of the system introduced by the Government of India Act, 1919 was that responsible government in the provinces was sought to be introduced, without imparing the responsibility of the Governor for the administration of the province, by resorting to a device known as 'Dyarchy' or dual government. The subjects of administration were to be divided by rules made under the Act into two categories—central and provincial. The central subjects were those which were exclusively kept under the control of the central government. The provincial subjects were sub-divided into 'transferred' and 'reserved' subjects. Of the matters assigned to the provinces the 'transferred subjects' were to be administered by the Governor with the aid of ministers responsible to the Legislative Council in which the proportion of elected members was raised to 70 per cent. The foundation of responsible government was thus laid on the narrow sphere of 'transferred' subjects. The 'reserved' subjects, on the other hand, were to be administered by the Governor and his Executive Council without any responsibility to the Legislature.

The Reforms of 1919, however, failed to fulfil the aspirations of the people in India, and led to an agitation by the Congress under the leadership of Mahatma Gandhi for *swaraj* or "self rule within the empire, if possible, without if necessary" to be attained through non-cooperation. The shortcomings of the 1919 system, mainly, were :

(i) Notwithstanding a substantial measure of devolution of power to the provinces, the structure still remained unitary and centralized "with the Governor-General in Council as the keystone of the whole constitutional edifice; and it is through the Governor-General in Council that the Secretary of State and, ultimately, Parliament discharge their responsibilities for the peace, order and good government of India". It was the Governor-General and not the courts who had the authority to decide whether a particular subject was central or provincial.

(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.

(iii) There was no provision for collective responsibility of the ministers to the provincial legislature. The ministers were appointed individually, acted as advisers to 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.

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, 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 Confernce, was examined by a Joint Select Committee of the British Parliament and the Government of India Bill was drafted in accordance with the recommendations of that Select Committee, and passed, with certain amendments, as the Government of India Act, 1935.

Before analyzing 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 non-Muslim communities, by prescribing separate electorates on the basis of the 'Communal Award' which was issued by 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.

Government of India Act, 1935 : While under all the previous Government of India Acts, the Government of India was unitary, the Act of 1935 prescribed a Federation, taking the provinces and the Indian states as units. But it was optional for the Indian states to join the Federation; and since the rulers of the Indian states never gave their consent, the Federation envisaged by the Act of 1935 never

came into being.

But though the Part relating to the Federation never took effect, the Part relating to Provincial Autonomy was given effect to since April 1937. The Act divided legislative powers between the provincial and central legislatures, and within their defined sphere, the provinces were no longer functioning as agents 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 governments, though the Indian states did not come into the fold to complete the scheme of federation.

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 under the Act of 1935 is of special interest 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 was effected by rules made under the Government of India Act, 1919. The Act of 1935 itself divided the legislative powers between the central and the provincial legislatures and, subject to the provisions mentioned below, neither legislature could transgress the powers assigned to the other. A threefold division was made in the Act which is as follows :

(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, military, naval and air forces and census. (ii) There was a Provincial List of matters over which the provincial legislature had exclusive jurisdiction, *e.g.*, police, provincial public service, education, etc. (iii) There was a Concurrent List of matters over which both the federal and provincial legislatures had concurrent jurisdiction, *e.g.*, criminal law and procedure, civil procedure, marriage and divorce, arbitration, etc.

The executive authority of a province was to be 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 control of the central government over the provinces was retained, by requiring the Governor to act 'in his discretion' or in the exercise of his 'individual judgement' 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.

Dominion Status, which was promised in 1929, was not conferred

by the Government of India Act, 1935. The failure of the Statutory Commission and the Round Table Conference to satisfy Indian aspirations was thus aggravated by the Act of 1935. It thus accentuated the demand for a popular constitution, which was officially asserted by the Indian National Congress in 1935. In 1938, Pandit Jawaharlal Nehru definitely formulated his demand for a Constituent Assembly thus :

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

This was reiterated by the Working Committee of the Congress in 1939.

Cripps Mission : This demand was, however, resisted by the British Government until the outbreak of World War II when external circumstances forced them to realize the urgency of solving the Indian constitutional problem. In 1940, the coalition government in England recognized the principle that Indians should themselves frame a new constitution for autonomous India, and in March 1942, when the Japanese were at the doors of India, they sent Sir Stafford Cripps, a member of the Cabinet, with a draft declaration of 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) could come to an agreement to accept them, namely :

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

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

(iii) that there should be one Indian Union comprising all the provinces and Indian states ; but

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

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

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

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

Cabinet Delegation : After the rejection of the Cripps proposals (followed by the 'Quit India' Movement of 1942 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, including Sir Stafford Cripps himself, to make another serious attempt. But the Cabinet Delegation, too, failed in making the two major parties come to any agreement and was, accordingly, obliged to put forward its own proposals, which were announced simultaneously in India and in England on May 16,1946.

The broad features of the scheme were :

(i) There would be a Union of India, comprising both British India and the states, and having jurisdiction over the subjects of foreign affairs, defence and communications, while all residuary powers would belong to the provinces and the states.

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

(iii) The provinces would be free to form groups having executives and legislatures, and each group would be competent to determine the provincial subjects which would be taken up by the group organization.

The scheme laid down by the Cabinet Mission was, however, recommendatory, and it was contemplated by the Mission that it would be adopted by agreement between the two major parties. An unforeseen situation, however, arose after the election for 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 Muslim League regarding the interpretation of the 'grouping clauses' of the proposals of the Cabinet Mission. The British Government intervened at this stage, and explained to the leaders in London that they upheld the contention of the League as correct, and on December 6, 1946, the British Government issued a statement declaring that "Should the Constitution come to be framed by the Constituent Assembly in which a large section of the Indian population had not been represented, His Majesty's Government could not, of course, contemplate—as the Congress have stated they would not contemplate—forcing such a constitution upon any unwilling part of the country",

Constituent Assembly : The result was that on December 9, 1946, when the Constituent Assembly first met, the Muslim League members did not attend, and the Constituent Assembly began to function with the non-Muslim League members. On the other hand, the British Government, by their Statement of February 20, 1947, declared :

(i) that British rule in India would end at a date not later than June, 1948, after which the British would certainly transfer authority to Indian hands; and

(ii) that if by that time a fully representative Constituent Assembly failed to work out a constitution in accordance with the proposals made by the Cabinet Delegation, "HMG will have to consider to whom the powers of the Central Government in British India should be handed over, on the due date, whether as a whole to some form of Central Government for British India, or in some areas to the existing Provincial Government, or in such other way as seems most reasonable and in the best interests of the Indian people."

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

The actual decision as to whether the two provinces of the Punjab and Bengal were to be partitioned was, however, left to the vote of the members of the Legislative Assemblies of these two provinces, meeting in two parts, according to a plan known as the 'Mountbatten Plan'. It was given a formal shape by a statement made by the British Government on June 3, 1947, which also proposed that there would be a referendum in the North-West Frontier Province and in the Muslim majority district of Sylhet as to whether they would join India or Pakistan.

The statement further declared the British Government's intention

"to introduce legislation during the current session for the transfer of power this year on a Dominion Status basis to one or two successor authorities according to decision taken as a result of this announcement."

The result of the vote according to the above plan was that the representatives of the Muslim majority areas of the two provinces (*i.e.*, West Punjab and East Bengal) voted for partition and for a new Constituent Assembly. The referendum in the North-West Frontier Province and Sylhet was in favour of Pakistan.

Indian Independence Act, 1947 : In July 1947, the Governor-General announced the setting up of a separate Constituent Assembly for Pakistan. The plan of June 3, 1947 having thus 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. The Indian Independence Bill was, accordingly, drafted on the basis of the above plan, and this Bill was passed on July 18 and placed on the statute book as the Indian Independence Act, 1947.

The most outstanding characteristics of the Indian Independence Act was that, while other Acts of Parliament relating to the Government of India 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. It simply provided that as from August 15, 1947 (which date is referred to in the Act as the 'appointed date'), in place of 'India' as defined in the Government of India Act, 1935, there would be set up two independent Dominions, to be known as India and Pakistan, and that the Constituent Assembly of each Dominion was to have unlimited power to frame and adopt any constitution and to repeal any Act of 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-West 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).

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

Before we proceed further to the history of the framing of the Constitution of India by the Constituent Assembly, we should refer to the problem of unifying the Indian states with the rest of India, which had baffled the framers of the Government of India Act, 1935 and had ultimately led to the failure of the federal scheme envisaged by that Act. It goes to the credit of the makers of the Constitution

that they could solve this problem with unique success.

Constitutional Development of Indian States : At the time of the constitutional reform leading to the Government of India Act, 1935, the geographical entity known as India was divided into two parts—British India and the Indian states. While British India comprised the nine Governors' provinces and some other areas administered by the Government of India itself, the Indian states comprised some 600 states which were mostly under the personal rule of rulers. All the 600 Indian states were not of the same order. Some of them were states under the rule of hereditary chiefs, which had political status even before the Muhammadan invasion; others were estates or *Jagirs* granted by the Muslim rulers as rewards, for services or otherwise, to particular individuals or families. But the common feature that distinguished these 600 states or so from British India was that the Indian states had not been annexed by the British Crown. So, while British India was under the direct rule of the Crown through its representatives and according to the statutes of Parliament and enactments of the Indian legislatures, the Indian states were allowed to remain under the personal rule of their chiefs and princes, under the 'suzerainty' of the Crown, which was assumed over the entire territory of India when the Crown took over authority from the East India Company in 1858.

The relationship between the Crown and the Indian states since the assumption of suzerainty by the former 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. As regards internal affairs, the policy of the British Crown was normally one of non-interference with the monarchical rule of the princes, but the Crown interfered in cases of misrule and maladministration, as well as for giving effect to its international commitments. Nevertheless, the rulers of the Indian states enjoyed certain personal rights and privileges, and normally carried on their personal administration, unaffected by all political and constitutional vicissitudes within the neighbouring territories of British India.

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

But the Cabinet Mission supposed that the Indian states would be ready to cooperate with the new development in India. So, they recommended that there should be a Union of India, embracing both

British India and the Indian states, which would deal only with foreign affairs, defence and communications, while the states would retain all powers other than these.

When the Indian Independence Act, 1947, was passed it declared the lapse of suzerainty and paramountcy of the Crown. But though paramountcy lapsed and the Indian states regained their position which they had prior to the assumption of suzerainty by the Crown, most of the states soon realized 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 necessary in their own interests 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, Bhawalpur, Junagadh, Chitral, Khairpur, Dir, Swat and Amb had acceded to the Dominion of India by August 15, 1947, *i.e.*, before the 'appointed day' itself. The problem of the Government of India as regards the states after accession was two-fold—(i) shaping the Indian states into sizeable or viable administrative units and (ii) fitting them into the constitutional structure of India.

The first objective was sought to be achieved by a three-fold process of integration :

(i) 216 states were merged into the respective provinces, geographically contiguous to them.

(ii) 61 states were converted into centrally administered areas. This form of integration was resorted to in those cases in which for administrative, strategic or other special reasons, central control was considered necessary.

(iii) The third form of integration was the consolidation of groups of states into new viable units, known as Union of States. As many as 25 states were thus integrated into 5 unions—Madhya Bharat, Patiala and East Punjab States Union, Rajasthan, Saurashtra and Travancore-Cochin. When the Constitution was framed, it became easy to incorporate these integrated Indian states into a separate category called 'States' in Part B of the first Schedule, and to bring them under the federal system by placing them, as much as possible, on the same footing as the other units of the federation, namely, the erstwhile Governors' provinces.

Framing of the Constitution : As stated earlier, the Constituent Assembly which held its first sitting on December 9, 1946, reassembled on August 14, 1947, as the sovereign Constituent Assembly for India.

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

The Constituent Assembly again sat on November 14, 1949 for the third reading of the draft and finished it on November 26, 1949, on which date the Constitution received the signature of the President of the Assembly and was declared as passed. The provisions relating to citizenship, elections, provisional Parliament and temporary and transitional provisions were given immediate effect, *i.e.* from November 26, 1949. The rest of the Constitution came into force on January 26, 1950, and this date is referred to in the Constitution as the date of its commencement.

II. The Constitution

The Constitution, being a bulky document, is not capable of being condensed into any short summary, with due justice to all its provisions. The best that can be attempted is to glance through its component parts and their essential contents.

The original Constitution of 1949 contained as many as 22 parts of which two have been subsequently repealed. The more important of the provisions contained in these parts (excluding those provisions which have since been repealed) may be summarized as follows :

Preamble : Every Constitution has a philosophy of its own. For the philosophy underlying our Constitution we must look into the Preamble which reflects the historic Objectives Resolution of Jawaharlal Nehru which was adopted by the Constituent Assembly on January 22, 1947, and which inspired the shaping of the Constitution through all its subsequent stages. The Preamble to our Constitution contains much that reminds one of the French 'Declaration of the Rights of Man and Citizen' and the 'Declaration of American Independence', and even something more.

The ideal of a democratic republic enshrined in the Preamble of the Constitution can be best explained with reference to the adoption of universal suffrage and the complete equality between the sexes not only before the law but also 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 claims, should be allowed to participate in the political system like any other person. Universal adult suffrage, without any qualification, was adopted with this object in view. Every man and woman of 21 and over is an elector for the House of the People and the respective Legislative Assembly. At the fifth General Elections held in 1971, the number of persons on the electoral roll was 272 million which is more than the population of the USA or the USSR.

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 minorities, 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 community are as a rule being included in the Councils of Ministers and in the Supreme Court and even in our diplomatic corps and adorn the offices of the President and the Governors, the highest that India can offer, without any constitutional reservation in that behalf, amply demonstrates that the true spirit of the Constitution has been fully maintained namely, that every citizen must feel that this country is his own.

Another thing necessary for fostering this spirit of brotherhood is the equality of status and opportunity held out by the Preamble to all sections of the people and to every individual citizen in every public sphere. That object is secured in the body of the Constitution, by banning any discrimination by the State between citizen and citizen, simply on the ground of religion, race, sex or place of birth, by throwing open public places to all citizens ; by abolishing untouchability ; by abolishing titles of honour ; and by offering equality of opportunity in matters relating to employment under the State, as also guaranteeing equality before the law and equal protection of the laws as Justiciable rights.

Apart from these general provisions, there are special provisions in the Directive Principles 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. That this democratic Republic stands for the good of all the people is embodied in the concept of a 'Welfare State' which inspires the

Directive Principles of State Policy. The economic justice assured by the Preamble can hardly be achieved if the democracy envisaged by the Constitution were confined to a 'political democracy'. In the words of Prime Minister Jawaharlal, "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."

Union and its Territory : The territory of India, which is governed by the Constitution, as amended, comprises of :

(i) the territories of the states, as specified in the First Schedule ;

(ii) the territories of the union territories specified in the First Schedule[3] and

(iii) such other territories as may be acquired.

Space would not permit any elaborate treatment of the various reorganizations of territory of India, the constitution of new states and alterations in the areas of existing states which have been effected by a number of constitutional amendments (apart from the Seventh Amendment of 1956, just noted) as well as Acts of Parliament, such as the Punjab Reorganization Act, 1966. The best that can be done is to enumerate the states and the union territories existing at the end of May 1975, as a result of such amendments and enactments.

(i) 22 States : Andhra Pradesh, Assam, Bihar, Gujarat, Haryana, Himachal Pradesh, Jammu and Kashmir, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Manipur, Meghalaya, Nagaland, Orissa, Punjab, Rajasthan, Sikkim, Tamil Nadu, Tripura, Uttar Pradesh and West Bengal.

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3. In the original Constitution, the states which formed the Union of India were classified into three categories and enumerated in Parts A, B and C of the First Schedule. At the date of the Constitution (Seventh Amendment) Act, 1956, the number of these states was 10, 8 and 9 respectively, making a total of 27. Besides these 27 states of different categories, there was another category, *viz.*, a territory specified in Part D of the First Schedule.

The Amendment Act of 1956 reduced these four categories into two only:

(i) The three categories of states were reduced to only one class of states and their number, after the reorganization, became 14. The categories of Part B and C States were abolished and all the states remaining after the reorganization gained the status of states in Part A. Hence, no classification of the states was necessary any longer.

(ii) The category of territory in Part D was replaced by 'Union Territories', and this class now included not only the Andaman and Nicobar Islands which were previously included in Part D, but also some of the erstwhile Part C States.

(ii) 9 Union Territories : Andaman and Nicobar Islands, Arunachal Pradesh, Chandigarh, Dadra and Nagar Haveli, Delhi, Goa, Daman and Diu, Lakshadweep, Mizoram and Pondicherry.

Citizenship : The Constitution did not lay down the permanent law relating to Indian nationality or citizenship but left that matter entirely to legislation by Parliament. But until such legislation, and subject thereto, the Constitution described tentatively the classes of persons who would be deemed to be citizens of India, at the date of commencement of Constitution.

Parliament has since enacted the Citizenship Act, 1955, providing an elaborate law dealing with the acquisition and termination of citizenship on or after January 26, 1950. According to this Act, a person can become a citizen of India in one of the five modes :

(i) Citizenship by birth—Every person born in India on or after January 26, 1950 shall be a citizen of India by birth.

(ii) Citizenship by descent—Broadly speaking, a person born outside India on or after January 26, 1950 shall be a citizen of India by descent, if his father is a citizen of India at the time of the person's birth.

(iii) Citizenship by registration—Several classes of persons (who have not otherwise acquired Indian citizenship) can acquire Indian citizenship by registering themselves to that effect before the prescribed authority, *e.g.*, persons of Indian origin who are ordinarily resident in India and have been so resident for six months immediately before making the application for registration; women who are married to citizens of India.

(iv) Citizenship by naturalization—A foreigner can acquire Indian citizenship, on application for naturalization to the Government of India.

(v) Citizenship by incorporation of territory—If any new territory becomes a part of India, the Government of India shall specify the persons who shall be citizens of India.

Fundamental Rights and the Directive Principles of State Policy : One distinctive feature of the Indian Constitution is that it incorporates not only a Bill of Rights containing justiciable fundamental rights of individual (Part III) on the model of the First Ten Amendments to the American Constitution but also a part (Part IV) containing Directive Principles, which confer no justiciable rights upon the individual but are nevertheless to be regarded as 'fundamental in the governance

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

Fundamental Rights : Fundamental Rights are dealt with in Part III of the Constitution.

The Constitution of India, in short, effects a compromise between parliamentary sovereignty and judicial supremacy. The fundamental rights, of course, constitute limitations upon the powers of the legislatures in India as in the United States and in case any of these limitations are transgressed, the Supreme Court and the High Courts are competent to declare the offending law as unconstitutional and void. These superior courts are endowed with the power to issue the writs of *habeas corpus, mandamus,* prohibition and *certiorari* to nullify an action of the State which violates any fundamental right. Any person whose fundamental right is infringed has the guaranteed right to approach these superior courts for obtaining any of these constitutional writs for enforcing his fundamental right against the State which includes not only the governments and the legislatures of the union and the states, but also local and other authorities who possess subordinate law-making or administrative powers.

But the powers of the judiciary *vis-a-vis* the legislature are weaker than in the United States in two respects :

Firstly, while in the USA, the declarations in the Bill of Rights are absolute and the power of the State to impose restrictions upon the fundamental rights of the individuals in the collective interests had to be evolved by the judiciary, in India, this power has been expressly conferred upon the legislatures by the Constitution itself, of course, leaving a power to the courts to interfere where the restriction imposed is unreasonable or arbitrary.

Secondly, the major portion of the Constitution, including the Fundamental Rights, is liable to be amended by the Union Parliament in the ordinary process of legislation by a special majority, if, in any case, the judicial verdict is considered to be unduly impeding national development and progress. Some of the amendments of the Constitution so far made have thus been effected with a view to superseding judicial pronouncements which had invalidated social or economic legislation on the ground of contravention of fundamental rights. In India,

thus, the fundamental rights have no claim to permanence as in the USA, and the judiciary can act as their guardian only so long as they are not amended[4] by the Parliament of India by the required majority of votes.

The provisions included in Part III of the Constitution of India are more elaborate than those of any other existing written constitution relating to fundamental rights, and cover a wide range of topics.

The Constitution itself classifies the Fundamental Rights under seven groups as follows :

(A) **Right to Equality** : This group includes ; (i) Equality before law ; (ii) Prohibition of discrimination by the State on grounds of religion, race, caste, sex or place of birth; (iii) Equality of opportunity in matters of public employment ; (iv) Abolition of untouchability ; and (v) Abolition of titles.

(B) **Rights to Particular Freedoms** : This group contains a large number of rights : (i) Freedom of (a) speech and expression, (b) assembly, (c) association, (d) movement, (e) residence and settlement, (f) property, and (g) profession ; (ii) Protection in respect of conviction for offences under any of the prohibited conditions ; (iii) protection of life and personal liberty ; and (iv) Protection against arrest and detention in certain cases.

(C) **Right Against Exploitation :** This includes : (i) Prohibition of traffic in human beings and forced labour, and (ii) Prohibition of employment of children in factories and hazardous employments.

(D) **Right to Freedom of Religion :** This group includes : (i) Freedom of conscience and freedom of profession, practice and propagation of religion ; (ii) Freedom to manage religious affairs; (iii) Immunity from payment of taxes for the promotion of any particular religion; (iv) Immunity from attendance at religious instruction or worship in educational institutions.

(E) **Cultural and Educational Rights :** These include (i) Protection of the language, script or culture of the minorities; and (ii) Right of minorities to establish and administer educational institutions.

(F) **Right to Property** : This means that (i) the Executive cannot deprive a person of his property except under the authority of a law ; and (ii) that no law can provide for the compulsory acquisition or requisition of private property unless the acquisition or requisition is made for a public purpose and payment of amount is provided for.

(G) **Right to Constitutional Remedies** : This portion provides for the enforcement of the above-mentioned fundamental rights through

4. *Kesavananda* v. *State of Kerala*, AIR 1973 S.C. 1461 (FR).

the judicial writs of *habeas corpus, mandamus* and the like.

Particular Freedoms : Of the above, the seven freedoms guaranteed to each citizen deserve special mention, namely, the freedoms of expression, assembly, association, movement, residence, property and profession or business. Absolute individual rights cannot be guaranteed by any modern State. Some restrictions must be acknowledged to safeguard the collective interests. But, as stated earlier, while the grounds upon which such restrictions may be imposed by the State on the individual rights are not defined in the Constitution of the USA and had, therefore, to be evolved by the judiciary. In our Constitution, these limitations are enumerated in Article 19 itself, which enumerates the seven freedoms. Read with the limitations, the ambit of the seven freedoms is as follows :

(i) Every citizen has the freedom of speech and expression. But this freedom is subject to reasonable restrictions imposed by the State relating to (a) defamation, (b) contempt of court, (c) decency or morality; (d) security of the State (e) friendly relations with foreign States, (f) incitement to an offence, (g) public order, and (h) sovereignty and integrity of India. So freedom of speech and expression will not confer upon an individual a licence to commit illegal or immoral acts or to incite others to overthrow the established government by force or unlawful means.

(ii) Similarly, the freedom of assembly is subject to the qualification that the assembly must be peaceable and without arms and subject to such reasonable restrictions as may be imposed by the State in the interests of the sovereignty and integrity of India or public order. In other words, the right of meeting or assembly shall not be liable to be abused so as to create public disorder or a breach of the peace.

(iii) Again, all citizens have the right to form associations or unions, but subject to reasonable restrictions imposed by the State in the interests of the sovereignty and integrity of India or public order or morality. Thus, this freedom will not entitle any group of individuals to enter into a criminal conspiracy or to form any association dangerous to the public peace or to make illegal strikes or to commit a public disorder.

(iv) Similarly, though every citizen shall have the right to move freely throughout the territory of India or to reside and settle in any part of the country, this right shall be subject to restrictions imposed by the State in the interests of

the general public or for the protection of any scheduled tribe.

(v) The Constitution recognizes the right of private property, *i.e.*, the right of every individual to acquire, hold and dispose of property as his own. But this right too is subject to reasonable restrictions imposed by the State in the interests of the general public or for the protection of any scheduled tribe.

Safeguards Relating to Personal Liberty and Punishment : The Constitution also contains a number of safeguards to protect a citizen against arbitrary arrest, trial and detention. Briefly speaking, the Constitution prohibits :

(i) Retroactive criminal legislation, commonly known as *ex-post facto* legislation.

(ii) Double jeopardy or punishment for the same offence more than once.

(iii) Compulsion to give self-incriminating evidence.

It further provides that :

(i) No person can be deprived of his liberty except according to law.

(ii) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest.

(iii) No such person shall be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(iv) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of magistrate.

The Constitution of course, authorizes the legislature to enact a law of preventive detention for certain specified reasons, such as defence, security of the State and the like. In exercise of this power, Parliament first enacted a temporary measure, the Preventive Detention Act, 1950, which has later been replaced by a permanent enactment—the Maintenance of Internal Security Act, 1971. Under a law of this nature, an individual may be detained without trial and the constitutional safeguards mentioned above will not be available to such a detenu. But there are certain other safeguards laid down in the Constitution with a view to prevent abuse of a law of preventive detention :

(i) The government is entitled to detain such person in custody only for three months. If it seeks to detain the arrested

person for more than 3 months, it must obtain a report from an Advisory Board, who will examine the papers submitted by the government and by the accused, to the effect that the detention is justified. The Advisory Board will be composed of persons qualified to be appointed as High Court judges.

(ii) The person so detained shall, as soon as may be, be informed of the grounds of his detention but not facts which the detaining authority considers to be against the public interest to disclose.

(iii) The person detained must have the earliest opportunity of making a representation against the order of detention.

A law which violates any of the conditions imposed by Art. 22, as stated above, is liable to be declared invalid and an order of detention which violates any of these conditions will, similarly, be invalidated by the court, and the detenu shall forthwith be set free.[5]

Freedom of Religion : India, under the Constitution, is a 'secular state' *i.e.,* a State which observes an attitude of neurality and impartiality towards all religions, which is secured by the Constitution by several provisions:

Firstly, there shall be no "State religion" in India. The State will neither establish a religion of its own nor confer any special patronage upon any particular religion. It follows from this that :

(i) the State will not compel any citizen to pay any taxes for the promotion or maintenance of any particular religion or religious institution;

(ii) no religious instruction shall be provided in any educational institution wholly provided by State funds;

(iii) even though religious instruction be imparted in educational institutions recognized by or receiving aid from the State, no person attending such institution shall be compelled to receive that religious instruction without the consent of himself or of his guardian (in case the pupil be a minor). In short, while religious instruction is totally banned in State-owned educational institutions, in other denominational institutions it is not totally prohibited but it must not be imposed upon people of other religions without their consent.

Secondly, every person is guaranteed the freedom of conscience and

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5. *Durga Pada Ghosh* v. *State of West Bengal,* AIR 1972, SC 2420; *Panna* v. *State of West Bengal,* AIR 1975 SC 863; *Sekawat* v. *State of West Bengal,* AIR. 1975 SC. 64.

the freedom to profess, practise and propagate his own religion, subject only

(i) to restrictions imposed by the State in the interests of public order, morality and health (so that the freedom of religion may not be abused to commit crimes or anti-social acts);

(ii) to regulations or restrictions made by the State relating to any economic, financial, political or other secular activity which may be associated with religious practice, but do not really appertain to the freedom of conscience; and

(iii) to measures for social reform and for throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Subject to the above limitations, a person in India shall have the right not only to entertain any religious belief but also to practise the observances dictated by such belief, and to preach his views to others.

Thirdly, not only is an individual free to profess and practise his religion, there is also the right guaranteed to every religious group or denomination :

(i) to establish and maintain institutions for religious and charitable purposes;

(ii) to manage its own affairs in matters of religion;

(iii) to own and acquire moveable and immovable property; and

(iv) to administer such property in accordance with law.

Safeguards for Minorities: An account of the fundamental rights in India would be incomplete without a reference to the safeguards included in the Constitution for the protection of the minorities, whether cultural, religious or linguistic, as well as for the economically and socially backward classes of people. Though the Constitution has done away with communal representation or reservation of seats in the legislative bodies on the basis of religion, it has adopted numerous measures to prevent any oppression by the numerical majority as well as to ensure a uniform development of all sections of the community. Thus the linguistic and cultural rights guaranteed are :

(i) Any section of the citizens of India having a distinct language, script or culture of its own shall have the fundamental right to conserve the same. This means that if there is a cultural minority which wants to preserve its own language and culture, the State would not by law impose upon it any other culture belonging to the majority of the locality. This provision, thus, gives protection not only to religious minorities but also to linguistic minorities.

(ii) The Constitution directs every state to provide adequate

facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups and empowers the President to issue proper directions to any state in his behalf.

(iii) No citizen shall be denied admission into any educational institution maintained by the State or receiving State aid, on ground only of religion, race, caste, language or any of them. This means that there shall be no discrimination against any citizen on the ground of religion, race, caste or language, in the matter of admission into educational institutions maintained or aided by the State.

(iv) All minorities, whether based on religion or language, shall have the fundamental right to establish and administer educational institutions of their choice.

(v) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

(vi) Every minority community has the right not only to establish its own educational institutions, but also to impart instruction to the children of its own community in its own language.

(vii) No person can be discriminated against in the matter of public employment, on the ground of race, religion or caste.

Special Provisions for Backward Classes, Scheduled Castes and Tribes : The Constitution makes various special provisions for the protection of the interests of the scheduled castes and tribes generally identifiable with the Gandhian term *Harijan*, who form a specific category of socially depressed people.

(i) Measures for the advancement of the scheduled castes and tribes are exempted from the general ban against discrimination on the grounds of race, caste and the like, contained in Art. 15. It means that if special provisions are made by the State in favour of the members of these castes and tribes, other citizens shall not be entitled to impeach the validity of such provisions on the ground that such provisions are discriminatory against them.

(ii) While the rights of free movement and residence throughout the territory of India and of acquisition and disposition of property are guaranteed to every citizen, in the case of members of the scheduled castes and tribes, special restrictions may be imposed by the State if required for the protection of their interests. For instance, to prevent

the alienation or fragmentation of their property, the State may provide that they shall not be entitled to alienate their property except with the concurrence of a specified administrative authority or except under specified conditions.

(iii) Apart from the foregoing fundamental rights, for a temporary period of thirty years[6] from the commencement of the Constitution, seats shall be reserved in the House of the People for (a) the scheduled castes and (b) the scheduled tribes except the scheduled tribes in the tribal areas of Assam, Nagaland, Meghalaya, Arunachal Pradesh and Mizoram.

Seats shall also be reserved for the scheduled castes and the scheduled tribes (excepting scheduled tribes in the tribal areas of Assam, Meghalaya and Nagaland) in the Legislative Assembly of every state.

(iv) The claims of the members of the scheduled castes and the scheduled tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the union or of a state.

A most remarkable feature of the Fundamental Rights in the Constitution of India is that not only are the substantive rights guaranteed against State action, the very right to approach the highest tribunal of the land to enforce such rights is also guaranteed by the Constitution (Art. 32). One of the traditional criticisms against constitutional guarantee of fundamental rights, levelled by British publicists since Dicey, is that abstract declarations of fundamental rights in a constitution are useless, unless there is a means to make them effective. The Indian Constitution has obviated this criticism by making the procedural or remedial right to enforce the fundamental rights itself a guaranteed right which cannot be taken away by ordinary legislation, short of an amendment of the Constitution. In the words of the Supreme Court, this remedial right has constituted that court 'the guarantor and protector of the fundamental rights', as a result of which the Supreme Court cannot reject a petition under Art. 32 for enforcement of a fundamental right on technical grounds nor would it tolerate indirect devices of the legislature to make this remedial right illusory.

Directive Principles : The Directive Principles of State Policy are contained in Part IV of the Constitution (Arts. 36-51).

These Directives lay down the lines on which the State of India

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6 Arts. 330-334 as amended by the Constitution (23rd Amendment) Act, 1969.

should work under this Constitution, to attain the goal of social and economic justice, in particular, which is enshrined in the Preamble to the Constitution. The Directives are addressed not only to the legislative and executive authorities of the union and the states but also to all local or other authorities within the territory of India.

Their contents may be divided under the following groups :

(i) Certain ideals, particularly economic, which the framers of the Constitution desired that the State should strive for.

(ii) Certain directions to the legislature and the executive as to the manner in which they should exercise their legislative and executive powers.

(iii) Certain rights of the citizens which shall not be enforceable by the courts like the 'Fundamental Rights', but which the State shall nevertheless aim at securing, by so shaping its legislative and administrative policy.

As classified under the above heads, the Directives are—

(A) Directives in the nature of ideals of the State :

(i) The State shall strive to promote the welfare of the people by securing a social order permeated by social, economic and political justice.

(ii) The State shall endeavour to secure just and humane conditions of work, a living wage, a decent standard of living and social and cultural opportunities for all workers.

(iii) The State shall endeavour to raise the level of nutrition and standard of living and to improve the health of the people.

(iv) The State shall endeavour to promote international peace and amity.

(v) The State shall direct its policy towards securing equitable distribution of the material resources of the community and prevention of concentration of wealth and means of production.

(B) Directives shaping the policy of the State :

(i) To establish economic democracy and justice by securing certain economic rights (to be enumerated under the next head).

(ii) To secure a uniform civil code for the citizens.

(iii) To provide free and compulsory primary education.

(iv) To prohibit consumption of liquor and intoxicating drugs except for medicinal purposes.

(v) To develop cottage industries.

(vi) To organize agriculture and animal husbandry on modern lines.

(vii) To prevent slaughter of useful cattle, *i.e.*, cows, calves, and other milch and draught cattle.

(viii) To organize village *panchayats* as units of self-government.

(ix) To protect and maintain places of historic or artistic interest.

(x) To separate the judiciary from the executive.

(C) Directives in the nature of non-justiciable rights of every citizen:

(i) Right to adequate means of livelihood.

(ii) Right of both sexes to equal pay for equal work.

(iii) Right against economic exploitation.

(iv) Right to work.

(v) Right to education.

(vi) Right to public assistance in case of unemployment, old age, sickness and other cases of undeserved want.

Federal System : Though there is a strong unitary bias and the exceptions from the traditional federal scheme are many, the Constitution introduces a federal system as the basic structure of government of the country. The union is composed of states and both the union and the states derive their authority from the Constitution which divides all powers, legislative, executive and financial between them. (The judicial powers, however, are not divided and there is a common judiciary for the union and the states). The result is that the states are not delegates of the union and that, though there are agencies and devices for union control over the states in many matters, both the union and the states are equally subject to the limitations imposed by the Constitution.

Thus, neither the 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 Constitution effecting the distribution of legislative powers as between them, apart from the Fundamental Rights and other specific provisions restraining their powers as regards 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 state legislature with regard to legislation relating to trade and commerce). If any of these constitutional limitations is violated, the law of either legislature is liable to be declared invalid by the courts.

Distribution of Powers : As regards the subjects of legislation, the Constitution adopts from the Government of India Act, 1935 a three-fold distribution of legislative powers between the union and the states.

List I or the Union List includes subjects over which the union shall have exclusive power of legislation, including 97 items or subjects. These include defence, foreign affairs, banking, currency and coinage,

union duties and taxes.

List II or the State List comprises 65 items or entries over which the state legislature shall have exclusive power of legislation, such as public order and police, local government, public health and sanitation, agriculture, forests and fisheries, education, state taxes and duties.

List III gives concurrent powers to the union and the state legislatures over 47 items, such as criminal law and procedure, civil procedure, marriage, contracts, ports, trusts, welfare of labour, insurance, economic and social planning.

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

The vesting of residual power under the Constitution follows the precedent of Canada, for, it is given to the union instead of the states.

Expansion of the Legislative Powers of the Union : 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 either suspended or the powers of the union Parliament are extended over state subjects. These exceptional or extraordinary circumstances are :

(i) 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 (The upper chamber of Parliament which reflects the federal principle to some extent) declares by a resolution of two-thirds of its members present and voting, that it is necessary in the national interest that Parliament should have power to legislate over such matter. Each such resolution will give a lease of one year to the law in question.

(ii) While a Proclamation of Emergency made by the President is in operation, Parliament shall have similar power to legislate with respect to state subjects.

(iii) When a Proclamation of Emergency 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.

(iv) If the legislatures of two or more states resolve that it shall be lawful for Parliament to make laws with respect to any matters included in the State List relating to those states, Parliament shall have such powers as regards such states.

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

(v) Parliament shall have the power to legislate with respect to any subject for the purpose of implementing treaties or international agreements and conventions. In other words, the normal distribution of powers will not stand in the way of Parliament enacting legislation for carrying out its international obligations, even though such legislation may be related to a state subject.

The distribution of executive powers between the union and the states, in general, follows the scheme of distribution of the legislative powers, which means that the executive power of a state shall extend only to its own territory and with respect to those subjects over which it has legislative competence. Thus, the union shall have exclusive executive power over (i) the matters with respect to which Parliament has exclusive power to make laws *i.e.,* matters in the Union List and (ii) the exercise of its powers conferred by any treaty or agreement. On the other hand, a state shall have exclusive power over matters included in the State List.

It is in the concurrent sphere that some novelty has been introduced. As regards matters included in the Concurrent Legislative List, the executive function shall ordinarily remain with the states, but subject to the provisions of the Constitution or of any law of Parliament conferring such function expressly upon the union.

Power of Union to Give Directions to States Relating to Executive Power : The Union has the power to give directions to the state governments as regards the exercise of their executive power, in certain matters :

(A) In normal times, the power may be exercised, *inter alia,* to ensure due compliance with union laws and existing laws which apply in that state, to ensure that the exercise of the executive power of the state does not interfere with the exercise of the executive power of the union.

(B) (i) During a Proclamation of Emergency, the power of the union to give direction extends to the giving of directions as to the manner in which the executive power of the state is to be exercised, relating to any matter, so as to bring the state government under the complete control of the union, without suspending it.

(ii) Upon a Proclamation of failure of constitutional machinery in a state, the President shall be entitled to assume to

himself all or any of the executive powers of the state.

Structure of Government : The system of government adopted in the Constitution is of the parliamentary or Cabinet type, with minor variations. As stated earlier, since the structure is federal, it has two branches, one for the union and another for the state, except for the judiciary, which is not bifurcated.

The executive and legislature of the union and the states, may be briefly described as follows :

Executive of the Union : At the head of the executive of the union is the President, elected for a term of five years, by an electoral college. There is a Council of Ministers to aid and advise the President in the exercise of his functions. The President is liable to removal for violation of the Constitution, by the process of impeachment.

There is a Vice-President of India who ordinarily presides over the Upper Chamber of the union Parliament, but acts as the President during a temporary vacancy in the office of the President.

Executive of the States : The executive head of a state is the Governor, appointed by the President for a term of five years and holding office at his pleasure. Like the President, he also acts with the aid and advice of a Council of Ministers, except in regard to a few specified matters. Since the Constitution vests all executive powers of the union and the states in the heads of state, *i.e.,* the President (in the case of the union) and the Governor (in the case of a state), and there is no express provision either to oblige the President or a Governor to take the advice of his Council of Ministers on all matters nor to make their advice binding on him, a question had been raised almost since the inception of the Constitution as to whether the President or the Governor was a mere constitutional head like the British Crown or was a real executive as under the Presidential system of government of the American type. Whatever might be the view of political parties or bodies, it is now firmly established by several decisions of the Supreme Court[7] that all the executive functions vested in the President or a Governor are to be exercised with the aid and advice of the respective Council of Ministers excepting those functions which the Constitution itself empowers a Governor to exercise 'in his discretion'. The position under the Constitution of India is thus substantially the same as in the United Kingdom but for the fact that what is established by history, conventions and usage in the UK is deduced in India by the court from the terms of the written Constitution, from the technical expression 'aid and advice' in Arts. 74(1) and 163

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7 *Ram Jawaya* v. *State of Punjab,* (1955) 2 SVR 225; *Sanjeevi* v. *State of Madras* AIR. 1970 SC 1102 (1106); *Rao* v. *Indira,* AIR 1971 SC 1002 (1005); *Samsher* v. *State of Punjab,* AIR 1974 SC 2192 (2209).

(1) which expression had been borrowed from Dominion Constitutions which had adopted the British Cabinet system as evolved by convention.

The functions which are required by the Constitution to be exercised by a Governor 'in his discretion' are to be found in Arts. 239(2) and Para. 9(2) of the Sixth Schedule (in the case of Assam). The 'special responsibility' conferred on a Governor by the provisions in Arts. 371, 371A(b) and 371C to safeguard certain regional interests in some states also means the same thing, in effect.

The Council of Ministers, both of the union and of the states, are collectively responsible to the Lower House of the legislature.

Legislature of the Union : The legislature of the union is called Parliament, consisting of the President and two Houses, known as the Council of States (Rajya Sabha) and the House of the People (Lok Sabha). The House of the People is the popular body, chosen by universal adult franchise by the entire population of the union (excepting a few seats), while the Council of States consists of nominated members and representatives of the states who are elected by the elected members of the Legislative Assembly of each state.

The House of the People : The House of the People is composed of 545[8] members. Of the 545 elected members, 525 will be from the states and 20 from the union territories.

The representatives of the states are directly elected by the people of the states on the basis of adult suffrage. Every citizen who is not less than 21 years of age and is not otherwise disqualified, *e.g.*, by reason of non-residence, unsoundness of mind, crime or corrupt or illegal practice, is entitled to vote at such election.

The representatives of Arunachal Pradesh are nominated by the President, while the representatives of the other union territories are chosen by direct election.

Besides the above, two members may be nominated from the Anglo-Indian community by the President to the House of the People (up to 1980), if he is of opinion that the Anglo-Indian community has not been adequately represented in the House of the People.

The Council of States: The Council of States is composed of not more than 250 members, of whom (a) 12 are nominated by the President ; and (b) the remainder *i.e.* 238 are representatives of the states and the territories, elected by the method of indirect election :

(i) The 12 nominated members are chosen by the President from amongst persons having 'special knowledge or practical experience in literature, science, art, and social service[8]. The Constitution thus adopts the principle of nomination for giving distinguished persons a place in the

[8] The Constitution (31st Amendment) Act, 1973.

Upper Chamber.

(ii) The representatives of the states are elected by the elected members of the Legislative Assembly of the states in accordance with the system of proportional representation by means of a single transferable vote ; while the representatives of the union territories are elected by the members of an electoral college excepting Arunachal Pradesh for which a member is nominated by the President.

The Council of States is not subject to dissolution. It is a permanent body, but one-third of its members retire on the expiration of every second year, in accordance with provisions made by Parliament in this behalf. It follows that there will be an election of one-third of the membership of the Council of States at the beginning of every third year.

Duration and Sessions of the Two Houses: The normal life of the House of the People is five years, but it may be dissolved earlier by the President.

On the other hand, the President has also the power to extend the normal duration of Parliament (*i.e.,* the period of five years) in case of a Proclamation of Emergency, for a period of one year at a time and not extending beyond 6 months after the Proclamation ceases to operate.

The President has the power to :

(i) summon either or both Houses of Parliament to meet at such time and place as he thinks fit, subject to the condition that not more than six months shall intervene between the last sitting of one session and the first sitting of another;

(ii) prorogue the Houses; and

(iii) dissolve the House of the People.

These powers will, of course, be exercised by the President on the advice of the Council of Ministers or, more accurately, of the Prime Minister, as in England.

Control of Parliament over Financial System : The financial system consists of two branches—revenue and expenditure.

As regards revenues, it is laid down by the Constitution that no tax shall be levied or collected except by authority of law. The result is that the executive cannot impose any tax without legislative sanction. If any tax is imposed without legislative authority, the aggrieved person can obtain relief from the courts of law.

As regards expenditure, the pivot of parliamentary control is the Consolidated Fund of India. This is the reservoir into which all the

revenues are received by the Government of India as well as all loans raised by it are paid and the Constitution provides that no sum shall be appropriated out of the Consolidated Fund of India except in accordance with law. Whether the expenditure is charged on the Consolidated Fund of India or it is an amount voted by the House of the People, no money can be issued out of the Consolidated Fund of India unless the expenditure is authorized by an Appropriation Act. It follows, accordingly, that the executive cannot spend the public revenue without parliamentary sanction.

Comptroller and Auditor-General : 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 farthing of it is spent without the authority of Parliament. He is independent of control by the government of the day inasmuch as he may be removed only on an address from both Houses of Parliament on the ground of proved misbehaviour or incapacity. 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 sanction of Parliament. The Comptroller and Auditor-General then submits his report of audit relating to the accounts of the union to the President who has to lay it before each House of Parliament.

Legislature of a State : The legislature of a state consists of the Governor and a popular house elected by universal adult franchise. In some of the states there is a second chamber called the Legislative Council, consisting of nominated and indirectly elected members.

It is left to the resolution of a special majority of the Legislative Assembly of a state, followed by an Act of Parliament, either to abolish the second chamber where it exists under the Constitution, or to create a second chamber where it is not provided for by the Constitution. There is a second chamber only in six of the twenty-two states of the union.

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 is not to be more than 500 nor less than 60. There shall be a proportionately equal representation according to population in respect of each territorial constituency within a state.

The size of the Legislative Council varies with that of the Legislative Assembly, the membership of the Council being 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.

The system of composition of the Legislative Council as laid down in the Constitution is not final. The final power providing the composition of this chamber of the state legislature is given to the union Parliament. But until Parliament legislates on the matter, the composition will be as given in the Constitution. It will be a partly nominated and partly elected body, the election being an indirect one and in accordance with the principle of proportional representation by a single transferable vote.

Broadly speaking, five-sixth of the total number of members of the Council are indirectly elected and one-sixth are nominated by the Governor. Thus—

- (i) one-third of the total number of members of the Council are elected electorates consisting of members of local bodies such as municipalities and district boards;
- (ii) one-twelfth are elected by electorates consisting of graduates of three years' standing residing in the state;
- (iii) one-twelfth are 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;
- (iv) one-third are elected by members of the Legislative Assembly from amongst persons who are not members of the Assembly ;
- (v) The remainder are 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 services;

The duration of the Legislative Assembly is five years (from the date appointed for its first meeting), but—

- (i) it may be dissolved sooner than five years, by the Governor, and
- (ii) the term of five years may be extended in case of 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.

The Legislative Council shall not be subject to dissolution. But

one-third of its members shall retire on the expiry of every second year. It will thus be a permanent body like the Union Council of States.

Though the Indian states have lost their separate entity since the Constitution (Seventh Amendment) Act, 1956, which abolished Part B states as a class and included all states—which had been enumerated in the original Constitution in two Parts (A and B)—in one list, the state of Jammu and Kashmir still retains a special status under the Constitution owing to historical reasons and, accordingly, deserves a special mention.

Special Status of the State of Jammu and Kashmir : The state of Jammu and Kashmir was one of the former princely states which at the time of the partition in 1947 acceded to the union of India. The Instrument of Accession (which was the same as in the case of other states according to India) conferred on the union the power to legislate with respect to the three subjects of defence, external affairs and communications. By the time the Constitution of India was adopted in November, 1949, practically all such other former princely states which acceded to India had decided to adopt the whole of the Indian Constitution. The state of Jammu and Kashmir was, no doubt, an integral part of the union at the commencement of the Constitution but all the provisions of the Constitution could not be adopted by that state due to certain special circumstances which existed at that time. Part of the territory of the state was occupied by aliens as a result of the invasion of the territory in 1947 supported by Pakistan and the matter had been taken to the United Nations. It was then considered appropriate that the people of the state should through their own Constituent Assembly determine the internal Constitution of the state and the extent of central jurisdiction. As this work of constitution-making could not be completed before the adoption of the Constitution of India, a temporary and transitional provision was made in Article 370 to spell out the relationship between the centre and the state. The Constituent Assembly for the state, which completed its work on November 17, 1956, adopted a constitution which affirmed that the state was an integral part of the Union of India and made other provisions with regard to internal administration, practically on the same lines as in the Constitution of India. It recommended no change in Article 370 of the Constitution of India which thereafter became as permanent as any other provision of the Constitution of India.

Article 370, apart from indicating the constitutional relationship between the centre and the state, as it existed at that time, in effect provides for two matters. Firstly, it provides for the issue of a Presidential Order in consultation with the state government, to specify

matters in the legislative lists which correspond to the three matters specified in the Instrument of Accession, namely, defence, foreign affairs and communications. This was accomplished in the first Presidential Order issued on January 26, 1950. The second part of Article 370 provides a procedure for the extension of the other provisions of the Constitution to the state by means of Presidential Order, and the specific requirement is that such order can be issued only with the concurrence of the state government. The Constituent Assembly for that state also had a say on this matter, so long as it functioned.

In pursuance of this provision and with the concurrence of the state government, a number of provisions of the Constitution of India were extended to the state from time to time. As early as 1952, under what is known as the Delhi Agreement, the state government agreed to the application of a number of provisions relating to important matters like citizenship, Supreme Court's jurisdiction, emergency powers, etc. with some modifications. All these were included in an Order of the President issued on May 14, 1954. Subsequently, many more provisions were extended to the state with its concurrence. The residuary powers in Article 248 and Entry 97 of the List have not yet been applied in full.

Judiciary : Notwithstanding the adoption of a federal system, the Constitution of India has not provided for a double system of courts as in the United States. Under our Constitution there is a single integrated system of courts for the union as well as the states which will administer both union and state laws, and at the head of the entire system stands the Supreme Court of India. Below the Supreme Court are the High Courts of the different states and under a High Court there is a hierarchy of other courts which are referred to in the Constitution as 'subordinate courts', *i.e.*, courts subordinate to and under the control of the High Court.

Supreme Court : The Supreme Court stands at the head of the judicial system of India. Parliament has the power to make laws regulating the constitution, organization, jurisdiction and powers of Supreme Court. Subject to such legislation, the Supreme Court consists of the Chief Justice of India and not more than thirteen other judges.

The Supreme Court of India has more powers than the highest tribunal of any other country in the world; for, it is the 'guardian of the Constitution' in the sense that expression is used in a federal country, to maintain the distribution of powers between the union and the units, and in interpreting and enforcing the provisions of the written Constitution upon all the constituent bodies of the state. It is also the highest court of appeal in the country, to hear appeals from all causes,

subject of course, to certain limitations. It has, further, an advisory jurisdiction.

The original jurisdiction of the Supreme Court is purely of a federal character and is confined to disputes between the Government of India and any of the states of the union, the governments of India and any state on one side and any other state or states on the other side; or between two or more states *inter se*. The original jurisdiction of the Supreme Court will be exclusive, which means that no other court in India shall have the power to entertain any such suit.

The Supreme Court is the final court of appeal from the courts and tribunals in India, the appellate jurisdiction of the Privy Council having been abolished, on the eve of the Constitution, by the Abolition of the Privy Council Jurisdiction Act, 1949.

The appellate jurisdiction of the Supreme Court may be divided under two heads—(i) as of right and (ii) by special leave.

Under the former head, appeals lie to the Supreme Court from decisions of the High Courts provided certain conditions are fulfilled. Such appeals may relate to :

(i) Cases involving interpretation of the Constitution—civil, criminal or otherwise.

(ii) Civil cases, irrespective of any constitutional question.

(iii) Criminal cases, irrespective of any constitutional question.

While the Constitution provides for regular appeals to the Supreme Court from decisions of the High Courts as above, there may still remain some cases where justice might require the interference of the Supreme Court with decisions not only of the High Courts but also of any other court or tribunal within the territory of India. The Constitution, accordingly, vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals, by granting special leave, against any kind of judgement 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 any restrictions, though, of course, the Supreme Court has judicially laid down the broad principles according to which it will exercise this extraordinary jurisdiction.

Besides the above, the Supreme Court has an advisory jurisdiction, to give its opinion, on any question of law or fact of public importance as may be referred to its consideration by the President.

High Courts : There is a High Court in each state, but Parliament has the power to establish a common High Court for two or more states, and, in exercise of this power, Parliament has made the High Court of Assam the High Court for the state of Nagaland as well.

As the highest court of a state, a High Court has appellate

jurisdiction over the subordinate courts, in civil and criminal cases, subject to certain conditions. It has also a constitutional jurisdiction to try cases involving interpretation of the Constitution and also to issue the writs of *habeas corpus*, etc., not only for the enforcement of fundamental rights but also for other purposes. The High Court has also a power of superintendence over all courts and tribunals throughout the territory in relation to which it exercises jurisdiction, excepting military tribunals.

Emergency Provisions : Instead of leaving it to judicial interpretation, the Indian Constitution makes elaborate provisions for meeting emergencies or abnormal situations which call for a departure from the normal governmental machinery set up by the Constitution. The use of the emergency provisions, as will be seen, operates *pro-facto* to silence the other relevant provisions of the Constitution. Such emergencies envisaged by the framers of the Constitution are of three kinds :

(i) an emergency due to external aggression or internal disturbance ;
(ii) failure of constitutional machinery in the states ; and
(iii) financial emergency.

Emergency owing to External Aggression or Internal Disturbance : A Proclamation of Emergency may be made by the President at any time he is satisfied that the security of India or any part thereof has been threatened by war, external aggression or internal disturbance. It may be made even before the actual occurrence of any such disturbance, *i.e.*, when external or internal aggression is apprehended. The courts cannot enquire into the validity of the Proclamation by the President on the ground that no emergency did exist in fact.

Every such Proclamation of Emergency must be laid before each House of Parliament. The ordinary duration of a Proclamation is two months, unless before the expiry of that period it is approved by resolutions of both Houses of Parliament. But if such Proclamation has been issued at a time when the House of the People has been dissolved or if the dissolution takes place during the period of two months referred to above, the Proclamation shall cease to operate at the expiration of 30 days from the date on which the House of the People first sits after its reconstitution, unless before the expiry of that period it has been approved by both Houses of Parliament.

The effects of a Proclamation of Emergency may be discussed under four heads—(i) executive ; (ii) legislative ; (iii) financial ; (iv) fundamental rights.

(i) **Executive :** In normal times, the union executive has the power to give directions to a state, only with respect to specified matters

(which have been noted earlier). But under a Proclamation of Emergency, the Government of India shall acquire the power to give directions to a state on any matter, so that 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, in so far as the Proclamation goes, will function as under a unitary system with local sub-divisions.

(ii) **Legislative :** While a Proclamation of Emergency is in operation, Parliament may by law extend the normal life of the House of the People for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation ceases to operate.

As soon as a Proclamation of Emergency is made, the legislative competence of the union Parliament shall be automatically widened and Parliament shall have the power to legislate as regards List II (State List) as well. In other words, though the Proclamation shall not suspend the state legislature, it will suspend the distribution of legislative powers between the union and the state, so far as the union is concerned, so that the union Parliament may meet the emergency by legislating over any subject as may be necessary, as if the Constitution were unitary.

(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 between the union and the states by his own Order. But no such Order shall have effect beyond the financial year in which the Proclamation itself ceases to operate, and, further, such Order of the President shall be subject to approval by Parliament.

(iv) **Fundamental Right** : The impact of a Proclamation of Emergency will be two-fold :

(a) The seven freedoms conferred by Article 19 would *ipso facto* remain suspended, so that these rights would be non-existent and the executive or legislature would be free to take any action regardless of the limitations imposed by these Articles, so long as the Proclamation of Emergency subsists.

(b) The other fundamental rights included in Part III will not remain suspended but the right to move the courts for the enforcement of any of them may be suspended if the President makes an Order specifying the particular rights and the period for which they shall remain suspended.

Breakdown of Constitutional Machinery in a State : The Constitution provides for carrying on the administration of a state in case of a failure of the constitutional machinery.

(i) It is a duty of the union to ensure that the government of every state is carried on in accordance with the provisions of the Constitution. So, the President is empowered to make a Proclamation that the government of a specified state cannot be carried on in accordance with the provisions of the Constitution, *e.g.*, where after the fall of one ministry, the opposition parties are not in a position to form an alternative government which commands a majority in the Legislative Assembly.

(ii) 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 the exercise of its executive power to the state.

By such Proclamation, the President may 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 declare that the powers of the legislature of the state shall be exercisable by or under the authority of Parliament. In short, by such Proclamation, the union would assume control over all functions in the state administration, except judicial.

The provisions relating to the duration of a Proclamation of failure of constitutional machinery in a state are similar to those relating to a Proclamation of Emergency which have been referred to earlier. But the points of distinction between the two kinds of Proclamations should be carefully noted :

(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 or internal disturbance. A Proclamation in respect of a failure of the constitutional machinery may be made by the President when the constitutional government of a state cannot be carried on for any reasons, not necessarily connected with, war or internal disturbance.

(ii) When a Proclamation of Emergency is made, the centre shall get no power to suspend the provisions of the Constitution relating to state or any part thereof. The state 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 a failure of the constitutional machinery in a state, the state legislature would be suspended, and the executive authority of the state would be assumed by the President in whole or in part.

(iii) Under a Proclamatiton of Emergency, Parliament can legislate in respect of state subjects only by itself; but under a Proclamation of the other kind, it can delegate its powers to legislate for the state to the President or any other authority specified by him.

(iv) A Proclamation as to failure of the constitutional machinery has no impact on fundamental rights.

Financial Emergency : If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect.

The consequences of such a declaration are :

(i) During the period any such Proclamation is in operation, the executive authority of the union shall extend to the giving of directions to any state to observe such canons of financial propriety as may be specified in the directions.

(ii) Any such direction may also include 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 ; 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.

(iii) It shall be competent for the President during the period any such Proclamation is in operation to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the union including the judges of the Supreme Court and the High Courts.

The duration of such Proclamation and the requirement as to laying before Parliament are similar to those of a Proclamation of Emergency.

III. Amendments to the Constitution

Nature of the Amending Process : A distinctive feature of the Indian Constitution is that it seeks to impart flexibility to a written federal constitution.

It is only a few of the provisions of the Constitution which are federal in their impact, that require ratification by the state legislatures and even then ratification by only half of them would suffice. The rest of the Constitution may be amended by a special majority of the union Parliament, *i.e.*, a majority of not less than two-thirds of the members of each House present and voting, which again, must be a majority of the total membership of that House. Even the Fundamental Rights can be amended in this way.

No provision of the Constitution is unamendable. There is, however, a serious judicial controversy as to whether there is any implied limitation upon the amending power in respect of these provisions or features which are supposed to be 'basic' or 'essential'. The procedure

for amendment[9], in short is that an amendment to the Constitution may be initiated by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House, in the ordinary legislative procedure, by a majority *i.e.* more than 50 per cent of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill.

There is, thus, no separate constituent body for amending the Constitution of India. The amending power is vested in the union legislature itself, to be exercised according to the ordinary legislative procedure, subject only to a special majority. But for the special majority prescribed, a Constitution Amendment Bill must be passed by both the Houses and receive the President's assent as any other Bill. Of course, by an amendment of 1971, it has been made clear that though in the case of ordinary legislation, the President is not bound to give his assent, it will be obligatory for him to give his assent to a Bill for amendment of the Constitution. In short, there is no veto power vested in the President as regards a Constitution amendment duly passed in accordance with the procedure prescribed in Art. 368. There is no requirement of a referendum or plebiscite, or a reference to a constitutional convention. The previous sanction of the President is not required for introducing in Parliament any Bill for amendment of the Constitution.

For amending some specific provisions of the Constitution, broadly relating to the federal structure, an additional requirement is prescribed, namely, that after the Amending Bill has been passed by the two Houses of Parliament, the amendment is also required to be ratified by the legislatures of not less than one-half of the states by resolutions to that effect passed by those legislatures before the Bill making provision for such amendment is presented to the President for his assent.

The provisions for the amendment of which ratification by the states is thus required by the Constitution are—(i) the manner of election of the President ; (ii) the extent of the executive power of the union and the states ; (iii) the Supreme Court and the High Courts ; (iv) the distribution of the legislative powers between the union and

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9. This leaves out of account those provisions of the Constitution which may be changed by ordinary legislation of the Union Parliament, by a simple majority without resorting to the amending procedure as outlined above. Such changes, the Constitution itself says, "shall not be deemed to be amendment of the Constitution". One of such matters, for instance, is whether a state should or should not have a second Chamber.

the states ; (v) the representation of the states in Parliament ; (vi) the provision relating to the amending process itself.

The Constitution Amendment Acts : Since its commencement on January 26, 1950, the Constitution has been amended thirty-seven times till May 1975.

The First Amendment Act was passed in 1951, almost within a year of the commencement of the Constitution. Several provisions of the Constitution were affected by this amendment, but the amendment of Art. 19 and the insertion of two new Articles, 31A and 31B, deserve special mention. In Art. 19, clause (2), several new grounds of restriction to the freedom of speech and expression were added, such as public order, incitement of an offence, interests of friendly relations with foreign states. Arts. 31A and 31B were added with the object of facilitating the acquisition of *zamindari* estates and other intermediary interests without the obligation of payment of compensation.

The Constitution (Second) Amendment Act was passed in 1952. It was a minor amendment dealing with the size of a constituency for parliamentary election in Art. 81(1)(b).

The Constitution (Third) Amendment Act, 1954 was relatively more important, though it was confined to the amendment of only one entry in the legislative lists, *viz.*, Entry 33 of List III. The third amendment was necessitated by the fact that while the concurrent power conferred on the union by Art. 369 in respect of the trade and commerce in the supply and distribution relating to certain commodities was for a temporary period, the continuance of union control over this sphere was found to be desirable in the interest of the national economy.

Momentous changes were effected by the Constitution (Fourth) Amendment Act, 1955. It amended Art. 31 and substituted Arts. 31A and 305. Almost all these changes were made with a view to superseding the decisions and observations of the Supreme Court in several cases, where a view contrary to that envisaged by the framers of the Constitution had been taken.

One of the changes made was that the amount of compensation payable for compulsory acquisition or requisitioning of any property would no longer be justiciable. The adequacy of the compensation has been left to the legislature instead of to the courts, for, according to government it was not possible to carry out the great schemes of social reform which the state was undertaking and going to undertake it full market value was to be paid (as had been held by the Supreme Court) and if the adequacy of the compensation was justiciable in every case. Article 31A was amended by adding several other clauses of law within its ambit, for example, the taking over under State management

for a temporary period of all commercial or industrial undertakings or the extinguishment or modification of rights arising out of contracts or licences for prospecting the mineral resources of the country. Not only laws relating to agrarian reform but also such laws as just stated are now exempted from the challenge of unconstitutionality, in order to pave the way for the socialistic pattern of society which has been declared to be the objective of our State.

The Constitution (Fifth) Amendment Act, 1955 provided for the imposition of a time-limit within which the states were to give their views for any reorganization of the states under Art. 3.

The Constitution (sixth) Amendment Act, 1956 made certain changes in Arts. 269 and 286, relating to the taxation of sales.

The Constitution (Seventh Amendment) Act, 1956 made extensive changes in the Constitution, consequent upon the reorganization of the states.

By the Eighth Amendment Act of 1959, an amendment was made in Art. 334 to prolong the reservation of seats in the legislatures for the scheduled castes and tribes and the Anglo-Indians for another ten years.

The Ninth Amendment Act was passed in 1960 to amend the First Schedule to implement the Indo-Pakistan Agreement to transfer certain territories, including the transfer of Berubari to Pakistan.

By the Tenth Amendment Act of 1961, Art. 240 and the First Schedule were amended in order to incorporate Dadra and Nagar Haveli as a union territory.

The Eleventh Amendment Act of 1961 narrowed down the grounds for challenging the validity of election of the President and the Vice-President, by amending Arts. 66 and 71.

The Twelfth Amendment of 1962 amended Art. 240 and the First Schedule to incorporate Goa, Daman and Diu as a union territory.

The Thirteenth Amendment of 1962 inserts Art. 371A to make special provisions for the administration of the state of Nagaland.

The Fourteenth Amendment of 1962 provides for legislatures for the union territories of Himachal Pradesh, Manipur, Tripura, Goa, Daman and Diu and Pondicherry.

The Fifteenth Amendment of 1963 affected a number of Articles. The more important of the changes introduced are the raising of the age of the High Court judges from 60 to 62; the extension of the jurisdiction of a High Court to issue writs under Art. 226 to a government or authority situated outside its territorial jurisdiction where the cause of action arises within such jurisdiction; modyfying the procedural limitations imposed by Article 311 upon the pleasure of the President or a Governor to dismiss a civil servant.

The Sixteenth Amendment Act, 1963, amended Article 19 to enable

Parliament to make laws providing for penalty for any person questioning the sovereignty or integrity of the Union of India, with consequential changes in some other articles.

The Seventeenth Amendment Act, 1964, has amended Art. 31A to make it more extensive and added a number of State Acts to the Ninth Schedule, thereby saving them from being challenged as offending against the Fundamental Rights.

The Eighteenth Amendment Act, 1966, made some verbal amendments in Art. 3 to include union territories.

The Nineteenth Amendment Act, 1966, amended Art. 324 to enable High Courts to decide election petitions disputing elections to Parliament and the state legislature in place of election tribunals.

The Twentieth Amendment Act, 1966, inserted Art. 233A, in order to validate certain appointments to the post of district judges, which had been declared invalid by the Supreme Court as being in contravention of the provisions of Arts. 233 and 235.

The Twenty-first Amendment Act, 1967, was passed to include Sindhi language within the list of official languages in the Eighth Schedule.

The Twenty-second Amendment Act, 1969, was passed to insert Arts. 244 A and 371 B to form an autonomous state within the state of Assam, comprising the tribal areas specified in Part I of the Table to para 20 of the Sixth Schedule to meet the demands of the hill tribes for a separate state for themselves, which has since been named Meghalaya.

The Twenty-third Amendment Act, 1969, has amended Arts. 330, 332, 333 and 334 to extend the reservations prescribed by the Constitution in favour of the scheduled castes and tribes and the Anglo-Indians, by another ten years, *i.e.,* up to 1980.

By the Twenty-fourth Amendment Act, 1971, Arts. 13 and 368 were amended to make it clear that Fundamental Rights were amendable under the procedure laid down in Art. 368, thus overriding the majority decision of the Supreme Court in *Golak Nath* v *State of Punjab* (1967) 2 SCR 762.

Art. 31(2) was further amended, and Art. 31 C was inserted, by the Constitution (Twenty-fifth Amendment) Act, 1971. The amendment of Art. 31(2) was to substitute the word 'compensation' by the word 'amount', in order to obviate the Supreme Court's interpretation that the full monetary equivalent of the property acquired must be paid in a case of compulsory acquisition.

The Twenty-sixth Amendment Act, 1971, omitted Arts. 291 and 362 and inserted Art. 363 A, in order to abolish privy purse and other privileges of the erstwhile rulers of Indian states.

By the Twenty-seventh Amendment Act, 1971, Arts. 239 A and 240 were amended and Arts. 239 B and 371 C were inserted in order to add Mizoram and Arunachal Pradesh as union territories and empower the Administrator of union territories to make Ordinances.

The Twenty-eighth Amendment Act, 1972, inserted Art., 312 A and omitted Art. 314 in order to revoke certain privileges of the members of the Indian Civil Service.

The Twenty-ninth Amendment Act of 1972 added two Kerala Acts to the Ninth Schedule.

The Thirtieth Amendment Act of 1972 amended Art. 133 (1) to do away with the right of appeal to the Supreme Court in civil cases, on the basis of the monetary value of the litigation.

The Thirty-first Amendment Act, 1973, has *inter alia,* enlarged the composition of the House of the People from 525 to 545 members by amending Art. 81.

By the Thirty-second Amendment Act, 1973, special provisions were introduced for safeguarding certain interests in the state of Andhra Pradesh, by inserting Arts. 371D-371E.

The Thirty-third Amendment Act, 1974, was passed to ensure that the resignation tendered by a member of the union or a state legislature would be effective only where the appropriate Speaker or Chairman was satisfied, on enquiry, that the resignation was voluntary or genuine and not under duress or undue influence from any interested person or party.

The Thirty-fourth Amendment Act, 1974, added some twenty more Acts to the Ninth Schedule, in order to shield them from judicial review on the ground of contravention of Fundamental Rights.

By the Thirty-fifth Amendment Act, passed in February, 1975 some provisions were inserted in the Constitution to confer the status of as 'associate state' upon Sikkim, an erstwhile Protectorate. These were however, soon replaced by other provisions introduced by the Thirty-sixth Amendment Act (passed on May 16, 1975), admitting Sikkim as a full-fledged state under the Union of India.

The Thirty-seventh Amendment Act, 1975, made changes in Arts. 239A-240, to improve the status of the union territory of Arunachal Pradesh.

IV. Working Of The Constitution

Since the Indian Constitution was promulgated in November, 1949, momentous changes have been introduced not only by over three dozen of Amendment Acts which we have noticed in the preceding

section but by scores of judicial decisions emanating from the highest tribunal of the land. Nearly every provision of the original Constitution has acquired a gloss either from the legislative amendment or from judicial interpretation and an account of the working of the Constitution, over and above this, would in itself be a formidable one. The broad trends can only be indicated.

At the first instance, the passing of thirty-seven Amendment Acts in a period of twenty-five years can hardly be passed over unnoticed.

Multiple Amendments of the Constitution : In the American Constitution, the process of formal amendment prescribed by the Constitution being rigid, the task of adapting the Constitution to changes in social conditions has fallen into the hands of the judiciary even though it ostensibly exercises the function only of interpreting the Constitution. Instead of leaving the matter to the slow machinery of judicial interpretation, our Constitution has vested the power in the people's representatives and, though the final power of interpretation of the Constitution as it stands at any moment belongs to the courts, the power of changing the instrument itself has been given to Parliament (with or without ratification by the state legislatures) and, if Parliament, acting as the constituent body, considers that the interests of the country so require, it can amend the Constitution as often as it likes. The case with which these amendments have been enacted demonstrates that our Constitution contains the potentiality of peacefully adopting changes some of which would be considered as revolutionary in other countries.

The real question involved in this context is whether it is the judiciary or a constituent body which should be entrusted with this task of introducing changes in order to keep pace with the exigencies of national and social progress. For reasons good or bad, the framers of our Constitution have preferred the legislature as the machinery for introducing changes into the Constitution, but the need for change is acknowledged even in countries like the USA where the task has been assumed by the judiciary taking advantage of the fact that the amending machinery provided in the Constitution was too heavy and unwieldy for practical purposes. This basic fact is overlooked by some of the critics who have commented on the frequent amendments which have been imposed upon the Constitution of India.

A little reflection will show that some of these changes, the need for which must be admitted even by critics, could not have been introduced by the courts by the application of the canons of statutory interpretation which are firmly embedded in our courts. An instance to the point is the insertion of the word 'reasonable' to qualify the word 'restrictions' in Clause (2) of Art. 19 (by the First Amendment). With-

out such a qualification, the process of judicial review would have been altogether excluded from the field of legislative encroachment upon the freedom of expression, for, it was not open to any court, unless it was determined to do violence to the canons of interpretation, to supply the word 'reasonable' which had been inserted by the makers of the Constitution in all the other Clauses of Article 19 but omitted in Clause (2). Similar is the case with the subject-matter of the Third Amendment. When the Constitution was framed, it was considered essential that the union Parliament should have a concurrent power to regulate production, supply and distribution of, and trade and commerce in, certain essential goods and raw products, in order to prevent their scarcity in any part of the country. This power of Parliament was, however, reserved for a temporary period. A few years' working demonstrated that such concurrent control was necessary on a permanent basis. Provided one agrees that the change was necessary in the interests of the nation, the conclusion is inevitable that a formal amendment of the Constitution was the only solution, for a court could, by no means, transform a temporary provision of the Constitution into a permanent one. Exactly similar is the position in regard to the Eighth Amendment which prolonged the duration of the reservation made for the scheduled castes and tribes and the Anglo-Indians. Nor can it be urged that the several amendments made to incorporate territorial changes were unnecessary or uncalled for. The Seventh Amendment, patently, furthered the territorial consolidation of the erstwhile Indian states with the rest of India, completing the process of integration which started with Sardar Patel. Owing to potent historical reasons, the territorial reorganization effected by this Amendment Act could not be made by the makers of the Constitution before promulgating it in 1949. Similarly, the Tenth, Twelfth, Thirteenth and Fourteenth Amendments have been necessitated by the acquisition of new territories or the upliftment of the political status of existing territories, which are obviously beneficial to the nation.

Upon a perusal of the various arguments on either side, the following broad observations may be made.

So far as the working of the Constitution in a period of emergency is concerned, no reasonable critic would urge that in view of the dangers to which India is exposed from foreign aggression all over her borders, events during the Chinese and Pakistani aggressions have justified the unique plan of the Constitution to transform itself to a unitary system against a common enemy who threatens the existence of the nation itself. There has been little complaint against the working of the relevant provisions in this behalf except that a proclamation

of national emergency, once made, is continued for an inordinate length of time; thus, the emergency which was declared in December, 1971 to meet aggression, has not been withdrawn even in 1975. The critics overlook the fact, however, that once Parliament gives its approval to a Proclamation of Emergency under Art. 352 (2)(c), there is no other objective means to revoke the Proclamation of Emergency other than the subjective satisfaction of the executive, which must necessarily be in possession of full information of facts affecting the safety of the nation. The Constitution itself has provided no device for bringing about the termination of a Proclamation of Emergency. The remedy lies in providing such a machinery in the Constitution to effectuate the voice of the nation, if it is sufficiently articulate. But so long as the majority of the representatives of the people in Parliament tolerate its continuance, it is difficult to sustain any criticism of abuse of the existing provisions of the Constitution on this score.

Outside the sphere of emergencies, it should be remembered that the fathers of our Constitution did not intend to adopt a replica of the American model of federalism. Their object was to ensure as much national strength as was consistent with state autonomy within the field demarcated by the distribution of powers laid down in the Constitution. They also intended to build up that 'cooperative federalism' which has, over the years, replaced the water-tight compartmentalism which had been prescribed by the American Constitution in 1787.

At the same time the union should resort to consultation and try to carry the states along with its decisions by persuasion, rather than authority, at least in matters not connected with the integrity or sovereignty of India. An instance to the point is offered by the Proviso to Art. 3. In the original Constitution, the President was bound to ascertain the views of the state or states which would be affected by a law made by Parliament to alter its boundaries. By an amendment of 1955, a mere reference is enough and the union may proceed if the state concerned is unable to communicate its views within the time specified in the reference. No consent of the affected state or states is necessary except in the case of Jammu and Kashmir which stands on a separate constitutional footing. Even though the union be given final authority to act in matters requiring cession or reorganization of the territory appertaining to a state, a machinery for adequate consultation and evaluation of the views of the affected state may be useful even though the formal procedure prescribed by the Proviso be allowed to remain as it is. Absence of such consultation negatives 'cooperative federalism'.

Implementation of the Directive Principles : Of the achievements of the executive and the legislature in the working of the Constitution, one cannot fail to refer to the progress made in the implementation of the Directive Principles of State Policy which shows that the government in power has not taken them as 'pious homilies' as apprehended by critics when they were engrafted into the Constitution. Though the implementation of these Directives mostly falls within the sphere of the states, the union has offered its guidance and assistance through its Planning Commission.

(a) The greatest progress has taken place as regards the Directive that the state should secure that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. In an agrarian country like India, the main item of material resources is no doubt agriculture. Since the time of the Permanent Settlement this important source of wealth was being largely appropriated by a group of hereditary proprietors and other intermediaries known variously in different parts of the country, such as, *zamindars, jagirdars, inamdars,* etc., while the actual tillers of the soil were being impoverished by the operation of various economic forces, apart from high rents and exploitation by the intermediaries. The Planning Commission in its First Plan, therefore, recommended an abolition of these intermediaries so as to bring the tillers of the soil in direct relationship with the State. This reform has by this time been carried out almost completely throughout India. It has already been stated how this reform has been facilitated by the amendments to the Constitution which have shielded these reform laws from challenge in the courts. Legislation has been undertaken in many of the states for the improvement of the condition of the cultivators as regards security of tenure, fair rents and the like. A concentration of land holdings even in the hands of the actual cultivators, has been sought to be prevented by legislation fixing a ceiling, that is to say, a maximum area of land which may be held by an individual owner.

(b) A large number of states have enacted laws to implement the Directive to organize village *panchayats* and endow them with powers of self-government. It is stated that the village *panchayats* now cover 98 per cent of the rural population in the country. Though the constitution and functions of the *panchayats* vary according to the terms of the different state Acts, generally speaking, the *panchayats*, elected by the entire adult population in the villages, have been endowed with powers of civic administration, such as medical relief, maintenance of village roads, streets, tanks and wells, provision of primary education, sanitation and the like.

Besides civic functions, the *panchayats* also exercise judicial powers like the old courts and benches. The judicial wing of a *panchayat,* thus, has a civil jurisdiction to try cases of a value not exceeding rupees two hundred, and is also competent to try minor offences punishable with moderate fines. Legal practitioners are excluded from the village tribunals.

(c) For the promotion of cottage industries, the central government has established several boards to help the state governments, in the matter of finance, marketing and the like, *e.g.,* the All-India Khadi and Village Industries Board, the All-India Handicrafts Board, the All-India Handloom Board, the Small-Scale Industries Board, and the Silk Board. Besides, the National Small Industries Corporation has been set up with certain statutory functions, and the Khadi and Village Industries Commission has been set up for the development of the *khadi* and village industries.

(d) Legislation for compulsory primary education has been enacted in most states and in the union territory of Delhi, and the percentage of literacy, it may be noted, has risen from 16 per cent to 29 per cent in twenty years (1951—71).

(e) For raising the standard of living, particularly of the rural population, the Government of India launched its Community Development Project in 1952. The actual execution of the development programme is the responsibility of the state governments. Over 600 thousand villages and 450 million people are already under this programme which aims at providing better communications, better housing, improved sanitation, and wider education (general as well as technical).

(f) Though legislation relating to prohibition of intoxicating drinks and drugs had been passed in some of the provinces long before the Constitution came into being, not much of the effective work had been done until, in pursuance of the Directive in the Constitution, the Planning Commission took up the matter and drew up a comprehensive scheme through its Prohibition Enquiry Committee. Since then prohibition has been introduced in most of the states in whole or in part.

(g) Separation of the executive from the judiciary has been effected throughout the territory of India by an enactment by Parliament, of the Criminal Procedure Code, 1973 which has provided for the exercise of all judicial functions in criminal proceedings by judicial magistrates in place of executive magistrates.

Judicial Review : That the judiciary has, on the whole played its part as the guardian of the Constitution faithfully and effectively is evidenced by the fact that numerous statutes and statutory instruments

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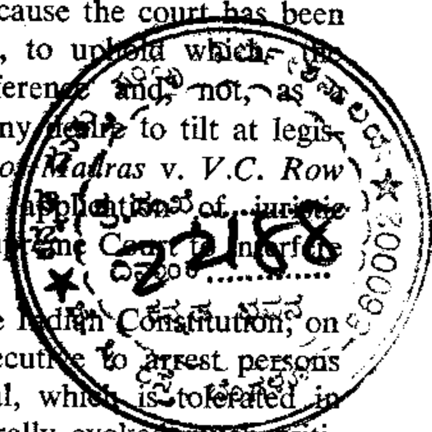
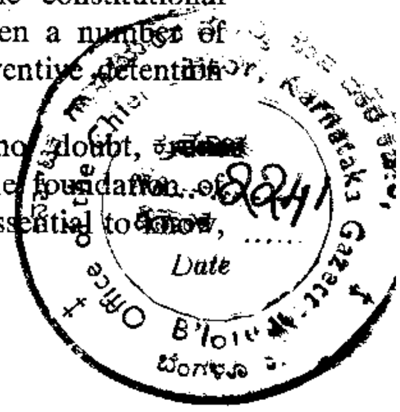
have been invalidated by the Supreme Court and the High Courts on the ground of their inconsistency with the justiciable provisions of the Constitution. The writ jurisdiction of these superior courts (under Arts. 32 and 226) covers a considerable portion of the total volume of litigation in these courts.



Wherever the court has interfered, it is because the court has been convinced that the letter of the Constitution, to uphold which, the judges have taken oath, calls for such interference and, not, as a former Chief Justice had explained, "out of any desire to tilt at legislative authority in a crusader's spirit" (*State of Madras* v. *V.C. Row* (1952) SCR 597(605). And yet, by the application of juristic principles alone, it has been possible for the Supreme Court to interfere in cases of preventive detention.

Preventive Detention : The adoption by the Indian Constitution, on a permanent footing, of the power of the executive to arrest persons on suspicion and to detain them without trial, which is tolerated in other countries only in emergencies, has naturally evoked much criticism from foreign observers. But no proper assessment of this apparently regressive provision of our Constitution and its working is possible without taking note of certain circumstances.

A constitution which ignores the needs of the land cannot function in the air. It is common knowledge that detention without trial was in existence since the days of the British regime and was considered necessary to maintain the security of India during the World Wars. The framers of the Constitution simply made such power available under the Constitution, subject to certain safeguards laid down therein, because they painfully visualized that the circumstances which had necessitated such abnormal legislation in the past had not disappeared at the birth of India's independence. It is common knowledge that the Republic had its birth amidst anti-social and subversive forces and the ravages of communal madness, involving colossal loss of lives and property. In order to save the infant Republic from the inroads of any such subversive elements, this power had to be conferred upon the State. But the framers of the Constitution improved upon the existing law by subjecting the power of detention to certain constitutional safeguards upon the violation of which the individual could have a right to approach the superior courts, the safeguards being fundamental rights for the enforcement of which the constitutional remedies would lie. As stated earlier, there have been a number of cases in which the courts have nullified orders of preventive detention in proceedings for *habeas corpus*.



The detention without trial of a single person, no doubt, runs counter to the basic juristic principles which lie at the foundation of democracy in the Anglo-Saxon world. It is, therefore, essential to know,

why the Constitution of India after professing to be democratic and promising to all citizens equal justice and 'dignity of the individual', would at the same time authorize the detention without trial of a person, on certain grounds, even in times of peace or why this drastic power is being used even a quarter of a century since the adoption of the democratic Constitution.

Preventive detention is an extraordinary exception to Rule of Law, which may be justified only by the abnormality of the situation in which the Rule of Law, which warrants the deprivation of the liberty of a person only on proof of his guilt on a specified charge before a court of law, appears to be inadequate or ineffective to ensure the security of the State itself. That a war emergency or purposes of defence afford such an extraordinary exigency is acknowledged both in the UK and the USA. In the UK, Parliament itself authorizes such detention during a war emergency by passing statutes like the Defence of the Realm Act, as is demonstrated by the history of World Wars I and II, and courts have denied judicial review as to the suspicion or subjective satisfaction of the executive on the basis of which persons are apprehended and detained without trial. That the laws remain silent amidst the clash of arms is not a rusty adage of the Roman publicist Cicero has been demonstrated by modern English decisions such as *R.* v. *Halliday* (1917) A.C. 260 and *Liversidge* v. *Anderson* (1952) AC 206, where the validity of such detention has been upheld. The absence of any such legislation in the USA till 1950 is explained by the fact that she has been spared by providence from problems arising out of an engagement with an enemy on her own soil. But in 1950, even when there was no actual warfare, the American Congress passed the Internal Security Act (otherwise known as the Subversive Activities Control Act, 1950). By this Act, Congress authorized the President to apprehend and detain without a trial in court "each person as to whom there is reasonable ground to believe that such person *probably* will engage in, or *probably* will conspire with others to engage in, acts of *espionage* or *sabotage*". This power could be exercised by the President after declaring an 'Internal Security Emergency' in the following contingencies—(i) invasion of the territory of the USA, (ii) declaration of war by Congress and (iii) insurrection within the United States in aid of a foreign enemy. Evidently this legislation was inspired by the dangers of communist activities in the USA and it was removed from the statute book in 1971, when the apprehensions of espionage or sabotage from 'fifth columns' had abated.

That no such legislation has been necessary in the UK or in the USA in times of peace is patently due to the fact that these countries

never had to face such colossal problems and dangers to public peace and safety as those which India has had to face since the dawn of her independence. The communal problem is one which emerges out of the peculiar historical and ethnic background of India, and which can hardly be imagined in those countries. Even the magnitude of economic offences, such as hoarding, smuggling, blackmarketing and the like are so colossal in India, owing to the very expanse of its territory, nature of its borders and the heterogeneity of its population, that legal evidence of such activities as would be necessary to secure conviction of each of the individuals involved in a court of law cannot be available.

If India has to face such problems and to establish that much of law and order which is essential to maintain her existence as a viable nation and to develop her resources and productivity which is necessary to banish poverty, a minimum use of such extraordinary power may be called for even though there is no actual warfare with a foreign state. The safeguard of the peace-loving individual lies in (i) the keeping of its use to the minimum, and (ii) the judicial review. It cannot be overlooked that the number of persons detained under the Preventive Detention Act, 1950, came down from 10,000 in 1950 to less than 100 in 1960, and that Act was allowed to lapse (being a temporary statute) in 1969. It was replaced by the Maintenance of Internal Security Act, 1971 primarily induced by a spate of political murders and anti-social economic activities threatening the supplies and services essential to the community. The number of persons actually detained under this Act at any given moment should always be weighed in the background of the fact that the population of India exceeds 600 million. As regards the other safeguard of judicial review, it should be noted that Clauses (4)-(5) of Art. 22, which enable the courts to insert the wedge of judicial review in individual cases, have not so far been repealed or amended.

It is clear that the virtues of the Indian Constitution are being tested on the touchstone of adversity. It has survived quarter of a century ruffled with frequent foreign aggressions from all possible corners, destructive communal and political agitations and anti-social activities on a grand scale. If it overcomes such colossal hurdles, it will be a glorious success not only of democracy in this multi-racial and multi-lingual sub-continent, beset with endless problems, but a triumph of the unique Constitution, composed of variegated elements drawn from heterogeneous sources.

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