

CONSTITUTION OF INDIA

**M. S. RAMA RAO B.Sc., M.A., M.L.
Class-room live lectures edited, enlarged
and updated**

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Textual & Reference Books

- D. D. Basu : *Commentaries on the Constitution of India*
Vol. 1 to 5
- D. D. Basu : *Shorter Constitution*
- Seervai : *Constitution of India*
- G. C. V. Rao : *Commentaries on the Constitution of India*
- Dicey : *Introduction to the study of the Law of
the Constitution*
- May : *Parliamentary Practice*
- Jennings : *Parliament*
- Cases : *A.I.R. and S.C.J.*
[Reports]

INTRODUCTION

Liberty:

What light is to the eyes, what air is to the lungs.
What love is to the heart, liberty is to the soul of
man.

—Ingersoll

Those who commented in 1950, that our Constitution is the lengthiest in the world should be shocked to see the volume of the subject today. Of course, growth there must be and change there should be, but, change with too many *Amendments*, 97 Amendments up to 2011 plus 98th in the offing in 2012] which seeks to create a National Judicial Commission]. with a plethora of cases decided by the Supreme .Court and the High Courts, has made the subject formidable to the students and the readers.

In fact, the 42nd amendment should be considered as a 'package deal' as it has, made a number of changes at one stroke. What is amusing is the head-on collision between the Judiciary and the Parliament: Cases decided by the Supreme Court are **neutralized** by the Parliament. Provisions in Part III and Art. 368 are subject to this dangerous development. To cite one illustration: In *Keshavananda Bharati's* case, the Supreme Court held that the Parliament may amend but should not affect the '*basic structure*' of the Constitution. To meet this decision, the Parliament provided in the 42nd Amendment that any Amendment to the Constitution should not be questioned in any Court of Law. This came under fire, in the *Minerva Mills* case, and the Supreme Court struck down this portion, as violative of basic structure concept.

Art. 19(1)(f) dealt with the right to property and Art. 31 with the deprivation of property. This was subject to the 1st, 4th, 17th, 25th, 29th and the 42nd Amendments! Serious dents upon dents: What was the result ? The 44th Amendment removed this fundamental right to property from Arts. 19 and 31! This is like washing the bath tub, along with the baby!

In *Kihota v Zachilhu* 1993 the Supreme Court struck down Para 7 of the 10th Schedule to the Constitution.[Anti-defection: **Bar of Jurisdiction of courts** to decide disqualification of a member of the House]

The basic structure concept may, to some extent, arrest the Parliament's spree for amendments, but time alone can decide this.

To digest our Lengthiest Constitution, one should have a strong Constitution!
...MSR

SYLLABUS

1. (i) Preamble (ii) Separation of powers (iii) Salient Features.
2. (i) Union and its territories, (ii) Citizenship.
3. Fundamental Rights: Arts. 12 to 32. : (i) Judicial Review (ii) Rule of Law (iii) Right to Equality (iv) Right to 6 freedoms (v) Right of the accused under Art. 20. Right to Life and Personal Liberty (vi) Right against exploitation (vii) Secular State (viii) Cultural and Educational Rights (ix) Right to Constitutional Remedies.
4. Welfare State : Arts. 37 to 51.
5. (i) President - Election - Tenure - Powers and functions - (ii) Vice-President - Election - Powers and functions.
6. Cabinet - Cabinet Responsibility.
7. Attorney-General for India.
8. Conduct of government business.
9. Parliament - Lok Sabha and Rajya Sabha Composition - Bills - Money Bills - Speaker and Deputy Speaker - Budget - Appropriation Act - Joint Sitting - Disqualification of Members - Privileges, Immunities of the Parliament and of the members.
10. Judiciary - Independence of the Judiciary - Composition, powers, functions and jurisdiction of the Supreme Court - Writs under Art. 32.
11. Governor - Appointment - Powers and functions - Cabinet - Cabinet responsibility - Advocate General.
12. State Legislatures.

13. Relation between the Union and the States (i) Legislative Powers (ii) Administrative Relations (iii) Distribution of Revenues.
14. Tortious and Contractual Obligations of the State (Arts. 299 and 300).
15. Right to Property : Art. 300A.
16. Trade Commerce and intercourse within the territory of India.
17. Services under the Union and states: (i) Protection of Civil Servants (ii) U.P.S.C.
18. (i) Election Commission (ii) Official Language.
19. Emergency Provisions.
20. Amendment of the Constitution.
21. Schedules, Amendments etc.

QUESTION BANK

1. What are the objectives enshrined in the Preamble of our Constitution? Write a note on the decision of the Supreme Court in *Keshavananda Bharati's* case as regards interpretation of the Preamble.

2. Who are Citizens at the time of the commencement of the Constitution? How can Citizenship be acquired under the Citizenship Act 1955? When can a person be deprived of his Citizenship?

3. (i) Discuss 'Equality before the law' and 'Equal protection of the laws'; (ii) Explain what principles govern the creation of Special Courts.

Discuss the Scope of freedom of speech and expression.

4. Discuss the Scope of the right of movement of Citizens, freely throughout the territory of India in Art. 19(1)(d). With reference to Art. 21 discuss the right to go abroad.

5. Explain the scope of the right to practise any profession or to carry on any profession, trade or calling.

7. (i) Explain *Ex post facto law*. (ii) Discuss Double Jeopardy, (iii) Discuss the right against self-incrimination.

8. Discuss the Scope of Right to Life and Personal Liberty. Refer to decided cases.

9. Write an essay on Secular State.

10. How are the linguistic and cultural minorities protected? Explain with reference to decided cases.

11. Discuss Part III Vs. Part IV. Refer to 25th and 42nd Amendments in this regard.

12. How is the President elected? What are his legislative and other powers under the Constitution? Is he a Rubber-Stamp? Refer to 42nd and 44th Amendments in this regard.

13. What is the status of a Cabinet (Council of Ministers) under the Constitution. Discuss 'Cabinet Responsibility is of three kinds'.

14. How is the Governor appointed? What are his powers and functions? Compare the powers of the Governor with that of the President.

15. What are the privileges and immunities of the Parliament and of the Members of the Parliament? Refer to decided cases.

16. (i) What is a Money Bill? What is the special procedure provided for in the Constitution? (ii) How are bills other than money bills passed in the Parliament?

17. Write an essay on the Independence of the Judiciary. Write a note on the 'transfer of judges' case.

18. Explain the Composition, Power and the Criminal,

Civil appellate jurisdictions of the Supreme Court.

Write a note on 'Special Leave' and 'advisory jurisdictions'.

19. Explain 'Prerogative writs'. Discuss the Constitutional Remedies, Habeas Corpus, Quo Warranto, Certiorari, Prohibition and Mandamus.

20. (i) What are the salient features of a federal state ? (ii) Examine how far India is federal OR, Discuss the distribution of Legislative Powers between the Union and the States (iii) Explain the doctrines of 'pith and substance' and 'occupied field'.

21. (i) Write a note on the distribution of Revenues between the Union and the State (ii) How are Administrative Relations between the Union and the State dealt with in the Constitution ?

22. Examine how far the state is liable for torts and breaches of contracts.

23. Briefly analyse the property right under Art. 300A of the Constitution.

24. Discuss 'trade, commerce and intercourse are free within the territory of India'.

25. How are Civil Servants protected under the Constitution ?

26. (i) What is National Emergency? Discuss its varied impacts. Refer to 44th Amendment (ii) What is the failure of Constitutional machinery of a State? How is it dealt with under Art. 356? What are the changes introduced by 44th Amendment?

27. How can the Constitution be amended? Explain the decisions of the Supreme Court in *Shankari Prasad's* case, *Sajjan Singh's* case, *Golaknath's* case, *Bharati's* case and *Minerva Mills* case and the 24th, 42nd and 44th Constitutional Amendments.

28. Write Short Notes on—

Separation of Powers; Doctrine of Severability; Doctrine of Eclipse; Fundamental Duties; Waiver of Fundamental Rights; Vice-President of India; Attorney-General of India; Votes of Credit, Votes on Account; Appropriation Act; Doctrine of Colourable Legislation; Finance Commission; Consolidated Fund of India; Contingency Fund of India; Union Public Service Commission; Election Commission; Financial Emergency; Changing the name of State; 52nd Constitutional Amendment (Anti-Defection) ; Reasonable Classification; State as defined in Art. 12; Freedom of Association; Welfare State; Judicial Review; Official Language; Untouchability; Speaker of the House.

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Chapter 1

PREAMBLE

(i) The Preamble indicates the **source** of the Constitution i.e., the Sovereign will of the people and also states the great objects of the Constitution (Corwin). In fact, as was observed in **Keshavananda Bharati's** case: "it is of 'extreme' importance that the Constitution should be read and interpreted in the light of the *grand and noble vision* expressed in the Preamble."

(ii) Major written Constitutions of the world have preamble to their Constitutions.

For example, the U.S. Constitution, provides as follows: "We, the people of the United States, in order to form a more perfect Union, establish Justice secure the Blessings of Liberty to ourselves and to our posterity, do ordain and establish this Constitution for the U.S.A."

Our Constitution in its Preamble declares

'We, the people of India having solemnly resolved to constitute India into a Sovereign, Socialist, Secular, Democratic Republic, and to secure all its citizens : Justice, Liberty, Equality, Fraternity and Unity and Integrity of the Nation, in our Constituent Assembly this 26th day of Nov. 1949, do hereby adopt, enact and give to ourselves this Constitution.

'We, the people of India . . . give unto ourselves this Constitution.' **This speaks to the Sovereign will of the people, which is the source of the Constitution.**

(iii) **Objectives:** (a) The major objective is to constitute India into a 'Sovereign, Socialist, Secular Democratic Republic'.

Sovereign refers to India's International Status as a Sovereign State with Sovereignty within and without.

Socialist does not mean any ism, but means absence of any 'Exploitation'. 'Secular' indicates that all religions are equal (these two were inserted by the 42nd Amendment).

Democracy is a reference to the way of life, to a system of government by discussion. It is a government by the people, of the and for the people.

Republic is a reference to the Executive Head—the President—being elected. It is opposed to a hereditary office,

(b) Certain basic values are enshrined in the Preamble.

1. Justice : Social, Economic and Political.

2. Liberty : Of thought, expression, belief, faith and worship.

3. Equality : Of status and opportunity.

4. Fraternity : Assuring the dignity of the Individual.

5. Unity and Integrity of the Nation (42nd Amendment),

(iv) **Interpretation** : The spirit of the Constitution is embodied in the Preamble and serves as a guide to interpret the Constitution. The Preamble is a useful handy instrument to the Judges in interpreting the Constitution.

(a) According to Dyer C. J., the Preamble is "the key to open the minds of the makers of the Constitution". The Supreme Court had held in **Beruberi Union case** that the preamble was not a part of the Constitution, but this has been overruled in **Bharti's** case. Hence, the preamble is part of the Constitution and if the words in the body of the Constitution are capable of two meanings—i.e., ambiguity—that which fits into the preamble is preferred by the Courts.

(b) If there are specific provisions in the Constitution, then they are not controlled by the Preamble (*Gopalan's case*).

(c) The preamble is not a source of power. It cannot restrict a power given in the Constitution.

(d) The preamble is part of the Constitution and may be amended under Art.368. But amendment should not affect the 'basic structure' of the Constitution (*Bharati's case*).

(e) The objectives enshrined in the preamble contain the basic structure of the Constitution like the Supremacy of the Constitution, Equality, Republican and democratic form of Government, Secular Character, Separation of powers, Federal character etc

[*Bharathi case* and *Excel Wear case*]

Chapter 2

CITIZENSHIP

2.1:

It deals with the membership of a person in a State and of his Civic Status. It enables him to certain rights and obligations. He owes allegiance and is entitled to the protection (S almond)

2.2 : Citizens of India as on 26-1-1950 :

Articles 5 to 8 deal with the Citizenship of India at the commencement of the Constitution.

(i) **Art. 5: Citizenship by birth and parentage:** A person, domiciled in India on 26-1-1950 and born in India, or either of his parents born in India or ordinarily resident in India for 5 years immediately before 26-1-1950 is a Citizen of India.

(ii) **Art. 6 : Migration to India from Pakistan :** A person who has migrated from Pakistan is a citizen as on 26-1-1950 if—

(a) He or either of his parents or grandparents was born in India; or

(b) Migrated to India *before* 19-7-1948 (but resident thereafter), or

(c) Migrated to India after 19-7-1948, but has duly registered his name fulfilling 6 months residential qualification.

(iii) **Art. 7 : Migrants to Pakistan but returning back :** A person who has migrated to Pakistan after 1-3-1948 is not a Citizen of India. However, if he has returned to India under a permit for resettlement or permanent return, he is a Citizen of India.

In **Kulathil V. State of Kerala**, the Supreme Court held that the word migrated is to be understood in a wider sense and hence there must be voluntary movement from Pakistan to India; and not for a specific purpose or for a short and limited purpose.

(iv) **Art. 8: Deemed Citizens resident abroad:** A person, either of whose parents was born in India, but ordinarily residing in a Foreign Country becomes a Citizen of India by registration with Indian Diplomatic or Consular office abroad. This may be before or after 26-1-1950.

(v) **Termination:** By voluntarily acquiring citizenship of a Foreign country, an Indian Citizen's citizenship is terminated.

2.3 : Citizenship under the Citizenship Act 1955 :

Art. 11 empowered the Parliament to make law governing Citizenship and the Parliament enacted the Citizenship Act in 1955, dealing with acquisition and termination of citizenship after commencement of the Constitution.

Modes of Acquisition:

(i) **By Birth** : (*Jus Soli*) Sn.3. Persons born in India after 26-1-1950 are citizens by birth.

(ii) **By Descent** : (*Jus Sanguinis*) Sn. 4. A person born outside India on or after 16-1-1950 is a Citizen if his father was a Citizen of India by birth. (But if that father was a citizen by descent, he should have registered at the Indian Consulate Office or be in Indian Government Service.)

(iii) **By Registration** : Sn.5 provides for registration as a Citizen. Application may be filed by : Women married to Indian Citizens, minor children of Indian Citizens, persons from Commonwealth Countries etc. They are registered by the prescribed authority.

(iv) **By Naturalisation** : Sn.6. Any person from any country other than the Commonwealth countries, with full age and capacity may file an application for naturalisation and if the Central Government is satisfied that the applicant is duly qualified, it may grant a Certificate of naturalisation.

(v) **Distinguished Personality** : The Central Government may waive the above conditions and grant Citizenship to any person who has rendered distinguished service to the cause of science, philosophy, art, literature, world peace or human progress.

(vi) **Incorporation of Territory**: If any territory is acquired by India, the Central Government may notify in the Official Gazette, specifying who would be citizens of India. **Termination of Citizenship:**

(i) **By Renunciation** : Sn.8. If a Citizen of India who is also a National or a Citizen of another country, makes a declaration renouncing his Indian Citizenship, it shall be registered by the prescribed authority. On such registration, that person's Indian Citizenship is terminated.

(ii) **By Termination** : By operation of law this happens when a

person voluntarily acquires citizenship of another country.

State of A. P. V. Abdul Khader.

A, born in India in 1924, went to Pakistan in 1954, returned to India with a Pakistan Passport in 1955. He outlived his stay and hence was arrested and convicted. It was held that the conviction was wrong as the Magistrate considered 'A' as a foreigner. Held, A was a Citizen by birth under Art. 5.

(iii) **By deprivation:** Sn. 10. The grounds on which a citizen may be deprived of his citizenship are as follows:

(1) Fraud, false representation etc. in obtaining the Certificate of Registration or Naturalisation;

(2) Disaffection towards the Indian Constitution;

(3) Unlawful trading or communicating with the enemy during war;

(4) Imprisonment in any foreign country for 2 years and above;

(5) Staying outside India for over 7 years without registration in Consulate's office (A student or persons in government service or in International Organizations need not register).

2.4 : 'Company' whether a citizen :

Question whether a juristic person like the 'Company' was a citizen arose in **State Trading Corporation of India V.C.T.O.** The S.T.C. was a registered company, and its sales were taxed. The company challenged this tax, as infringement of its fundamental right to do business in Art.19(1)(g). As Art 19 (1) (g) is a fundamental right available to a citizen, question arose whether the company was a citizen. Held, the company was not a citizen. The fundamental rights were available only to natural born persons, and not to companies.

The Supreme Court held in *British India Steam Navigation Company V. J. Singh* that this shipping company was not a citizen.

In **Tata Engineering & Locomotive Co. V. State of Bihar** it was argued that if all the share-holders are citizens of India, then the company's veil can be lifted and the fundamental rights of the citizens be protected. Held, with this the company would achieve indirectly what it cannot do directly. Held company was not a citizen even if all shareholders were citizens.

New **Trend** : However, the above cases are neutralised by the Supreme Court in **Bank Nationalisation Case** (1970). The reason was : Shareholders are citizens and are entitled to Fundamental rights of Art. 19. If they associate themselves, and form a Company, their rights are *not lost*. If the shareholders' rights are to be protected, it necessarily means that the company's rights

should be protected.

In *Bennette Coleman's Case* (1973), the Court held the shareholder, editor, printer etc. had a right under Art. 19(1)(a). They speak to the public through the editor. These rights are manifested and protected by the newspaper *company*. Hence, they have a locus standi through the company.

In *DC & GM V Union of India* (1983), the Court held that writ by the company was maintainable for violation of Fundamental Rights under Art. 19. Denial of right to the company would be denial to the shareholders. Hence, a company can maintain a writ petition.

Chapter 3

CENTRAL EXECUTIVE

3.1: President of India—Election:

(i) India, being a Republic has provided for an elected President as the Head of State, and has vested in him the Union Executive power.

(ii) **Qualification:** Any citizen of India, who has completed 35 years of age, not holding any office of profit and who has the qualifications to be elected to the Lok Sabha is eligible.

(iii) **Electoral College:** The President is elected by an Electoral College consisting of—

- (a) the elected members of both Houses of Parliament;
- (b) the elected members of the Legislative Assemblies of the States.

The 11th Amendment provided that an election could be held even if there are vacancies among the members of the Electoral College. The Supreme Court held *in re Presidential election* that election could be held when the Gujarat Legislative Assembly was dissolved.

(iv) **Manner of Election:** Election is held according to the system of proportional representation by means of a single transferable vote: voting is by secret ballot.

Both parity and uniformity are secured. This means the votes cast by all the elected MLAs of all Legislative Assemblies shall be equal to the total number of votes cast by the elected MPs.

Hence, the votes that can be cast by **each M.P.=**

$$\frac{\text{Total No. of votes of all M.L.A.'s together}}{\text{Total No. of elected M.P's}}$$

Also, votes cast by **each M.L.A's** of a State

$$\frac{\text{Total population of the State/}}{\text{Total number of M.L. A.s of that State}}$$

(v) **Election Disputes:** Art. 71 : All doubts and disputes are subject to the jurisdiction of the Supreme Court.

Acts done by the President during the pendency of the case are valid.

(vi) **Tenure:** The President holds the office for a term of 5 years. There is no bar on re-election.

(vii) **Impeachment:** Art. 71 : Provisions have been made to impeach the President. The President may be removed for

violation of the Constitution. The procedure is as follows:

(1) At least one fourth of the members of one House of Parliament must after giving 14 days notice, move a resolution to impeach the President.

(2) This must be passed by at least 2/3 majority of the total membership of that House.

(3) The other House of Parliament must investigate such a charge. The President has a right to be present.

(4) This House must pass a resolution by at least 2/3 majority of the total membership of the House.

The President stands removed when that resolution is passed.

3.2 : Powers and functions of the President:

The framers of the Constitution intended that the President of India, should be a nominal (titular) head like the Crown in England. Like the Crown he acts on the advice of the Council of Ministers (Cabinet). He represents the Nation but does not rule the Nation. His place in administration is that of a ceremonial device or seal by which the Nation's decisions are made known. (Constituent Assembly Debates).

The American President is a real Executive, elected directly by the people for 4 years and is advised by his Secretaries, who are not members of the Legislature and whom he can appoint or dismiss at his direction. He has the 'Pocket Veto' powers.

Our President and his office are modelled on the Eirish Constitution.

President to act on the advice of the Cabinet:

(a) Whether our President is a mere rubber stamp or is having some powers under the Constitution, remains a question often debated. However, he may exercise his considerable influence in shaping the policies. His personal dynamic participation is not limited. Dr. Rajendra Prasad wrote to the Prime Minister Mr. Nehru (1951), stating that in giving assent to Bills, he would act independently. Further he did not readily sign the Hindu Code Bill. The Attorney General's views were sought. He stated that under Art. 74(1) the President was to act according to the advice of the Cabinet. The President gave his assent.

The Supreme Court has held that Art 74(1) is mandatory. (*U.N. Rao V. Mrs.Indira Gandhi*).

(b) **42nd and 44th amendments:** The 42nd Amendment provided that the president *shall* in the exercise of his functions *act in accordance with* the advice of the Council of Ministers.

The 44th Amendment provides that the President may require

the Council of Ministers *to re-consider such* advice, either generally or otherwise, and he shall act in accordance with the advice tendered *after such reconsideration. These two amendments are based on Samsher V St of Punjab 1974.S.C .,*

Powers :

(a) **Head of State :** The Union Executive Power is vested in him (Art.53), and all Executive actions are exercised by him, in accordance with the Constitution. He represents the Nation abroad. He appoints Ambassadors & diplomatic officials. All treaties are made in his name.

(b) **Supreme Commander:** Art. 53(2). He is declared as the Supreme Commander of the Defence Forces. The exercise of this power is regulated by law.

(c) **Appointing Power :** He appoints the Judges of the Supreme Court and of the High Courts, Attorney General for India, Comptroller and Auditor General, Governors, Chairmen and Members of U.P.S.C., Finance Commission etc.

(d) **Pardoning Power :** Art 72. The President has powers to grant pardon, reprieves, (i.e., suspend temporarily), respites (to postpone), commute (reduce from rigorous to simple imprisonment), remit (to reduce), the sentence of any convicted person.

Cases covered: (1) Those coming under Court Martial (2) All those coming within the Union Executive Power (3) Cases of death penalty. (Governor has no power to grant pardon for death penalty).

In **Billa-Ranga Mercy petition case**, the Supreme Court held that the Court would not go behind the refusal of the President to grant pardon under Art. 72. In *Mrs. Indira Gandhi Murder Case*, the Supreme Court has held that pardoning power was independent and could be exercised by the President, in the exercise of his highest executive authority.

This is not controlled by the Supreme Court and also not subject to review.

(e) **Powers in relation to Cabinet:** He appoints the Prime Minister and the other Ministers. However under the concept of Cabinet responsibility, the Cabinet continues in power as long as it commands the confidence of the Lok Sabha and hence, the President has no powers to dismiss or remove the Prime Minister or any other Minister.

(f) **Legislative Powers :** **Parliament means** the President & and Two Houses (the Rajya Sabha and the Lok Sabha).

(1) He has the powers of summoning, proroguing and dissolving the Parliament. The Rajya Sabha is not subject to dissolution.

(2) He acts on the advice of Prime Minister.

(3) He has the powers to address the Houses of Parliament. At the commencement of the first session of a new Parliament he addresses a Joint Session, and, at the commencement of the first session each year.

(4) He gives assent to the Bills. (He may send to the Cabinet for reconsideration but *shall* give his assent when presented after reconsideration.)

(g) **Ordinance-making Power** : Art. 123 empower the President to issue an Ordinance. This is a Legislative power exclusive to the Parliament, but he is allowed to exercise subject to certain conditions.

The Houses of Parliament should not be in Session: he must be satisfied that circumstances exist which render it necessary to take immediate action. He must issue the Ordinance only in respect of those matters or items in which Parliament has the power to make laws. (He may withdraw the ordinance if he so desires).

Duration: The Ordinance should be laid before both the Houses of Parliament. It must be passed by both the Houses within 6 weeks from the date of such reassembling of the Parliament. It will become an Act on receiving the assent of the President. If so not passed, by the Houses, the ordinance lapses after 6 weeks of Parliament's reassembly.

Satisfaction of President: 38th Amendment had provided that the satisfaction of the President was final and shall not be questioned in any Court. The 44th Amendment has omitted this amendment.

(h) **Emergency Powers:** The President has powers to issue a Proclamation of National Emergency (Art.352), State Emergency (Art. 356) or Financial Emergency (Art.360).

For details of Emergency power ,see later chapter in this e-book.

Chapter 4

CABINET

4.1: Cabinet Responsibility:

(i) **Origin & Development:** Our Constitution has provided for a 'Council of Ministers' with the Prime Minister at the Head, to aid and advice the President. One of the essential features of the English Parliamentary System is the cabinet. It is the core of the British Constitutional System. It is the supreme directing authority that provides unity to the British System of Government

. **'It is a hyphen that joins, a buckle that binds the executive and the legislature together.'** Our Constitution has followed the British System.

Jennings in his 'Cabinet Govt.' has discussed elaborately the position and working of the Cabinet in England.

'Cabinet' has come from '**Cabin**' a secret place when the King of England used to have confidential meetings to discuss state matters with his advisors. However, George I stopped going to the Cabinet as he did not know English well. The meetings were allowed to be held without the King. These advisors (Ministers) selected one of them (the first=Prime), as the Prime Minister to preside.

Thus, started the office of the Prime Minister with the Cabinet. Cabinet responsibility developed in later years.

(ii) **Functions:** It is the Cabinet that finally determines the policy of the Nation, it has the supreme control of the National Executive, and provides continuous co-ordination to the various ministries. The powers vested in the President are exercised by the Cabinet.

(iii) **Collective & Individual Responsibility :** As Dicey pointed out 'Ministerial Responsibility means two utterly different things'.

Collective and Individual responsibilities. The Cabinet is collectively responsible to the Lok Sabha, and, hence if a no confidence motion is passed, the Prime Minister should resign. All other Ministers go out of gear. All sail or sink together. This is called the moral and political responsibility. Similarly, if a Bill is defeated on the floor of the House, the Prime Minister should resign.

Apart from the above, the individual ministers are also responsible. In the Cabinet, if a minister does not agree to the Majority decision concerning his department, he may resign. This is because, he should not blow hot and cold in the same breath. If he accepts the Cabinet decision, he must follow the same in his dept. But if he does not accept, he may resign. Sri Chagla,

resigned as Education Minister on Language issue. Smt. Tarakeswari Sinha resigned on Cabinet's non acceptance of prohibition of intoxicating liquors.

Apart from the above, each minister is individually responsible for whatever happens in his department. Sri Jagjivan Ram resigned following the Kothagudi Railway Tragedy. However, if there are cases of unpopularity or maladministration, the Prime Minister may ask the minister concerned to resign. The Defence Minister resigned in England in the famous Profuma affair. Sri Krishna Menon resigned as Defence Minister on some defence matters.

Recently, Sri Kalmadi and Sri Raja resigned due to their alleged involvement in corrupt practices.

The concept of Cabinet responsibility is a product of British conventions. India is closely following this system with great success.

4.2 : The Speaker of the House :

(i) **Origin** : 'The Speaker' was the recognized spokesman of the House in England to speak to the King on the deliberations of the House. He was elected by the House.

During the period of Charles I. on one occasion [On 4 January 1642] the King himself entered the House of Commons when it was in full session. He demanded the surrender of a few members of the House.

The Speaker **William Lenthall** replied **I have neither eyes to see, nor ears to hear except what the House commands me.** The King understood this and returned.

The office of the Speaker is held in great esteem, much dignity, honour and power.

(ii) **Speaker in India**: He is elected by the Lok Sabha. He is an elected member of the House. But, once he is elected, he must divest himself of the party character, i.e., he must become non-partisan. He may be removed after giving 14 days notice, and, by passing a resolution in the House with a majority vote.

(iii) Powers & functions:

(a) He presides over the session of the Lok Sabha. All speeches are addressed to him. As Speaker, he plays the part of an impartial and non-partisan presiding officer.

(b) He preserves and protects the rights, privileges and immunities of the House and of its members.

(c) He safeguards the rights of the minority.

(d) All points of order are decided by him. He may or may

not allow an 'adjournment motion'.

(e) He conducts the deliberations according to the procedures of the House (May's Parliamentary Practice is an authoritative work followed by the House). He preserves the orderly conduct of debate. He maintains the dignity and decorum of the House. He may expunge 'un-parliamentary' language, from the deliberations.

(f) He certifies a 'money bill'.

(g) His rulings are final and serve as good precedents to the successors.

(h) The standing orders and rules of procedure have vested a number of functions on him.

(i) With the authority of the House, he exercises the privilege of the House to punish a person for contempt of the House.

(j) He may nominate members to the various Standing Committees and Sub-Committees.

(k) Publications of debates are made with his authority.

The **33rd Amendment to the Constitution** provides the Speaker has the power to test the genuineness of letter of resignation of a Member and the termination is subject to the acceptance by the Speaker [Union of India V.Gopal 1978 S C]

(iv) **Conclusion:** The Office of our Speaker, is on the British model. The chief characteristics are his authority and of his impartiality.

4.3 : Money Bills :

(i) **Introduction:** Bills are divided into (a) money bills and (b) Bills other than money bills. The Constitution has provided a separate procedure in respect of each category. There is a special procedure for money bills in Art. 109.

The Special Status given to the money bill in respect of its initiation and of passing is predominantly due to the constitutional struggle between the two Houses in England. In 1909 attempt was made by the House of Lords to assume power over money bills. But this was resisted by the House of Commons. This struggle came to an end with the passing of the Parliament Act 1911. Major provisions of this bill are incorporated in Arts. 109 & 110.

(ii) **Definition:** Art. 110 define a money bill.

(a) It is a bill dealing with the imposition, abolition, remission, alteration or regulation of any tax.

(c) It is a money bill if it contains matter of regulation of borrowing of money, giving of guarantee by Government;

(d) Amendment of law in respect of government financial obligations. The custody of the Consolidated Fund or contingency fund, payment into it, or withdrawal from it.

- (e) Appropriation of money from the consolidated fund.
- (e) Decreasing or increasing the charges on the consolidated fund.
- (f) The receipts of the money on account of consolidated fund or public accounts. The custody and auditing thereof.
- (g) Any matter incidental thereto.

The Constitution also provides that it is not a money bill by merely including matters in the bill relating to imposition of fines or penalties, payment of licence fee or service fee etc. Further it is not a money bill if it deals with certain matters of alteration, imposition of a tax which is purely by any local body or authority for local purposes.

(iii) Procedure:

- (1) A money bill is initiated only in the Lok Sabha.
- (2) The recommendation of the President is essential before introduction.
- (3) In respect of a question whether a bill is money bill or not, the Certificate of the Speaker is final.
- (4) After passing the money bill the Lok Sabha sends it to the Rajya Sabha. The Rajya Sabha should pass within 14 days. If the bill is not returned within 14 days it is deemed to have been passed by both Houses.

The Rajya Sabha may pass and send back with recommendations. If the recommendations are rejected by the Lok Sabha partially or totally it is deemed to have been passed.

If the recommendations are accepted by Lok Sabha the bill is said to have been passed by both the Houses. The bill is then sent to the President for his assent, who shall give his assent.

The rules of the procedure of the two Houses, have provided for a detailed procedure incorporating these provisions.

4.4 : Privileges & Immunities of Parliament and of Members:

(i) **Contents:** Art. 105 of the Constitution deals with the privileges and immunities of the Parliament and of the members of the Parliament.

- (a) Freedom of Speech in Parliament.
- (b) Members are immune from any court proceedings for anything said or vote given in Parliament.

(c) Right of publication by the House.

(d) In all other respects, the privileges and immunities are, as may be defined by Parliament or those as are in vogue *before the 44th Amendment 1978*. This means as D D Basu opines until these privileges and immunities are defined by Parliament, there cannot be a vacuum and so the existing privileges and immunities would continue.

(Leading book: *May's Parliamentary Practice*)

(ii) **Historical note** : These privileges and immunities originated in England. Originally they were intended to protect the King, but later became customary rights of the commons, and, in due course crystallised into privileges, from the 15th and 16th centuries. They are based on *Lex et consuetudo Parliamenti* (Law and custom of Parliament)

(iii) **Definition** : Privileges, according to Anson, are the fundamental rights of the House of Commons and of its members, against the Prerogatives of the Crown, the authority of the ordinary courts of law and, the special authority of the House of Lords. Without these the House cannot discharge its functions effectively and efficiently. Each House has its own privileges and immunities.

(iv) **Procedure**: These are claimed as a custom, by the Speaker in England at the commencement of each new Parliament. In India, these are provided for in Arts. 105 and 194 of the Constitution.

(v) **Privileges etc. explained**: According to Anson (The Law and the Custom), Privileges are of 3 kinds.

- (a) Exclusive Jurisdiction within the walls of the House;
- (b) Certain personal privileges attached to the Members;
- (c) To punish for contempt of the House.

(a) **Exclusive Jurisdiction within the House** : (1) The House may discuss any subject of its choice and frame its own rules of procedure. It is the sole judge of its proceedings. In **Bradlaugh V. Gossetee**, B was elected but he refused to take the oath. The House barred him from sitting as a Member, and the Sergeant prevented him as per the directions of the House. B sued the Sergeant. Held, by Blackstone J., that whatever matter arises within the House ought to be examined, discussed and adjudged in the House, and not elsewhere. **All the proceedings of the House are absolute and privileged. B's case was dismissed.**

Exception : Crimes are not part of the proceedings and hence,

the House has no jurisdiction.

(2) **Freedom of Speech** : The leading case is—*Sir Eliot's case* : Eliot was convicted for seditious speeches made in the House, but the House of Lords reversed this. It said the matter must be decided in the House itself. The Bill of Rights 1688 was passed. The House is the sole judge in all cases.

In the **Searchlight case** our Supreme Court held that Art.105(1) was a special right and hence prevailed over the general right under Art.19(1)(a) freedom of speech and expression.

(3) **Right of Publication** : The House has the right to publish its debates, reports, paper etc. No proceedings can be taken to any court, for anything published under the authority of the House. This was declared in the Parliamentary Papers Act 1840, in England.

Art 361 A inserted by the 44th Amendment provides that publication of substantially true report in newspaper of the parliamentary proceedings is protected against any civil or criminal liability.. Exception publication made with malice.

The same rule applies to publication of State Legislative proceedings.

Leading Case:

Stockdale V. Hansard.

Hansard, a publisher had published the debates under the authority of the House. This contained certain defamatory matter against Stockdale. S sued and was awarded damages. Hansard published again. S sued. Held, republication was also defamatory.

This led to the *Sheriffs of the Middlesex* case. Under these circumstances, the parliamentary Papers Act 1840 was passed. Courts have no jurisdiction over the Parliamentary publications.

Expunged (removed) portions should not be published by anybody (*Searchlight case*). Such publication amounts to contempt of the House.

(b) **Privileges of the Members** : Every member of the Parliament is entitled to certain privileges and immunities.

(1) **Freedom from Arrest**: A member cannot be arrested in any civil case 40 days before, during and 40 days after the Session of the Parliament. This does not apply to arrests under Criminal Law.

(ii) **Freedom from service as Jurors**: As the jury system is abolished in India, this has no relevance.

(iii) **Exemption from attendance** as witnesses in courts during the Session.

(c) **To punish for contempt of the House:**

The power to commit is the key-stone of parliamentary privileges. The objective is to uphold and maintain the dignity of the Parliament and to defend it against disrespect and affronts.

Modes of Punishment : Censure, Admonition, Imprisonment, Expulsion from the House etc.

Leading cases: (1) **John Wilks Case** : He was expelled for writing libel against the Parliament (1764).

(2) **Garry Alighan** was expelled for selling secret information.

(3) **Mrs. Indira Gandhi** was expelled from the House for the contempt of the House in obstructing 4 officials from doing their duties in respect of Maruthi Ltd. Her seat was declared : vacant.

(4) **In re U. P. Tangle Case (1965)**, the U.P. Legislature gave 7 days' imprisonment to Keshav Singh for distributing pamphlets (committing the breach of the privilege of the House). Advocate Solomon moved a *habeas corpus* before the Division Bench. The two judges Beg and Saigal ordered the release of the petitioner. The U. P. legislature passed a resolution to admonish the Advocate and two judges. The judges moved the Full Bench of 27 judges of the Allahabad High Court which issued an order to the Speaker not to proceed further.

This created a serious situation and the President referred this question to the Supreme Court which held that the U.P. Legislature had no power to take proceedings against a judge.

(5) **Blitz Case** : Mr. Karanjia was called before the House and was admonished for his writings in his weekly against a member of the House (he had written : Kripa Loony etc.).

6. Other cases Ramalingam V.daily Tanthi 1975 Mad.. Kiran Jain V.Sanjiva Reddy 1970 S C.

Chapter 5

JUDICIARY

5.1: Independence of the Judiciary:

(i) **Meaning** : The Constitution has provided for a single hierarchy of courts with the Supreme Court at the Apex. The Supreme Court is the Guardian of and the protector and the guarantor of the rights of the individuals. It is considered as a sentinel on the '*qui vive*'.

Independence of the judiciary is one of the cardinal principles of democracy and our Constitution has placed the Supreme Court at the highest pedestal as the final interpreter of the law and of the Constitution. It's decisions are binding on all the Courts in India (Art. 141).

Independence means freedom from interference of the Legislature and the Executive. This is in contradiction to the

'Committed Judiciary', where the judges decide, subject to certain circumscribed limitation.

(ii) **Origin** : One historical incident in England which hastened the independence of the judiciary is relevant. Charles I, rushed to the House of Lords, when it was hearing a case and put three questions to the Judges. All the judges, agreed to the first two questions. Then the king **asked 'know ye thou the judges, that whatever we sayeth and do is law!'**

All Judges agreed. But, **Chief Justice Coke said that he would decide that when it came to the Bench!**. The consequence was that he was dismissed. But, this had such a tremendous impact that in the few years to come, the judiciary became free from the Executive.

(iii) **India** : The Constitution makers provided for the independence of the judiciary by making suitable provisions in the Constitution.

(a) **Appointment**: Art 124—Judges of the Supreme Court and of the High Courts are appointed by the President of India. In appointing a Supreme Court Judge, the president consults the Chief Justice of India and the Judges of the Supreme Court and of the High Courts as he may deem necessary.

(b) **Qualification**: These are prescribed in the Constitution and not left to the will of the Executive. The person must be:

- (1) a judge of a High Court for at least 5 years;
- (2) an Advocate for 10 years or,
- (3) a distinguished jurist.

(c) **Tenure:** Every judge holds his position until he reaches the age of 65 (in case of Supreme Court) and 62 (in case of High Courts).

(d) **Salaries etc. :** The salaries are fixed and prescribed in the schedule to the Constitution and are charged on the Consolidated Fund of India. This is not a subject to vote in the Parliament.

(c) **Removal:** Art. 124(4)—The procedure for removal of a judge on the ground of proved misbehaviour or incapacity is as follows. Each House of the Parliament with a 50% strength of its total membership and with a 2/3 majority must decide by presenting an address to remove the judge, and the President must issue the order for removal of the judge, *in the same session*. Parliament may make law as to how the investigation and proof of the misbehaviour or incapacity is to be proved.

(f) **Conduct** of the judge should not be discussed in any State Legislature (Art. 211), or by the Parliament (Art. 121).

(g) **Restriction:** After retirement, no judge of the Supreme Court should plead or act in any Court or before any authority in India. These provisions have made the judiciary independent. The judges may deliver judgements in a free and calm atmosphere, without aspiring for any favour of the Government.

Recent Development : The seniority-rule followed in appointing the Chief Justice of India was deviated in appointing Judge Ray as the Chief Justice, ignoring the seniority of the 3 judges of the Supreme Court (1973). The consequence was that the 3 senior most Judges Hegde, Grover and Shelat resigned. There was a nation-wide *resentment* to the attitude of the Central government in the appointment of the Chief Justice.

Transfer of Judges Case (1982) is a landmark case.

The Supreme Court interpreting Art.222 stated that the President may after consulting the Chief Justice of India, transfer a judge from one High Court to another. This must be for public interest and not by way of punishment. Personal inconvenience, language problem of the concerned Judge should be considered. Prior consent of the judge for transfer was held *not necessary*.

The Court has held that the concept of the independence of the judiciary is one of the cardinal values of our Constitution.

Hence, it has a status free from capricious and whimsical

interference from outside.

In 1977, Mr. Justice Khanna was superseded and his junior Mr. Justice Beg was appointed as Chief Justice of the Supreme Court. Criticism mounted against this. Mr. Palkivala said the judge had to pay his price for his integrity and independence. When Janata Government came to power, it revived 'seniority rule' and is followed since then.

The Lok Sabha, on March 2012 passed The Judicial Standards and Accountability Bill, [Constitutional 114th Amendment Bill, 2010,] This is yet to be passed by the Rajya Sabha

It provides for accountability of judges, and, to establish credible and expedient mechanism for investigating into individual complaints for misbehavior or incapacity of a judge of the Supreme Court or of a High Court.

It also provides to regulate the procedure for such investigation; and for the presentation of an address by parliament to the president in relation to proceeding for removal of a judge and for matters connected with such matters.

The standing Committee , recommendation that seeks to "restrain" judges from making "unwarranted comments" against other constitutional bodies or persons

The author opines that the proposed Amendment is against the independence of the Judiciary which is part of the basic structure of the Constitution.

5.2 : Jurisdiction of the Supreme Court:

The jurisdiction of the Supreme Court is the largest compared to any other Supreme Court including the U.S. Supreme Court.

Its jurisdiction:

- (i) Original jurisdiction**—Arts.32 (Writs) and 131.
- (ii) Appellate Jurisdiction:**
 - (a) Interpretation of the Constitution—Art. 132.
 - (b) Civil Appellate Jurisdiction—Art. 133.
 - (c) Criminal Appellate Jurisdiction—Art. 134.

- (d) Special Leave to appeal—Art. 136.
- (iii) Advisory Jurisdiction—Art. 143.**
- (iv) **Contempt of Court Jurisdiction—Art. 131.**

5.2.1: Original Jurisdiction: Art. 131. The Supreme Court has exclusive Original Jurisdiction in

(a) Disputes between Government of India and any one or more States.

(b) Disputes between the Government of India and any one or more States on the one side, and one or more States on the other.

(c) Disputes between two or more States.

This is confined to Inter-State disputes. *State of Bihar V Union of India*. State of Bihar had filed nine suits for short supply of Iron caused by the Railways. It had filed against Union Government as first defendant and, Hindustan Steels or Iron and Steel Co. Ltd. as second defendant.

Held, the suit would not lie to the Supreme Court under Art. 131, as it is confined only between Union and States. If one of the defendants is a person, firm or association, the suit would not lie.

State of West Bengal V. Union of India. In this case under the Coal Bearing Areas Act, the Union had the power to acquire coal bearing land including lands belonging to the States in India. The Supreme Court held the Act was valid. The suit could be entertained under this Article.

5.2.2 : Civil Appellate Jurisdiction : Art. 133.

This was amended in 1972 (30th Constitutional Amendment Act).

An appeal lies to the Supreme Court from any judgment, decree or final order in a *Civil proceeding* of a High Court, if the High Court certifies :

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

(b) that in its opinion the said case needs to be decided by the Supreme Court.

Certificate of fitness may be granted by the High Court, on its own motion, if it deems fit to do so. It may certify even *on an oral application* made by the aggrieved party, after passing the decree, judgment or final order.

The appellant may urge as *one of the grounds* that a substantial question of law as to the interpretation of the Constitution is involved.

No appeal lies to the Supreme Court from the judgment,

decree or final order of a Single Bench of the High Court.

Before 1972 : Before the 30th Amendment, the value of the subject matter was Rs.20,000/- or above. The consequence was that there was an automatic right to appeal to the Supreme Court. But now mere certification by the High Court which is discretionary and unless it certifies, no appeal is allowed under this Article. This has, in fact, reduced the number of appeals.

5.2.3 : Criminal Appellate Jurisdiction: Art. 134.

This has been enlarged by the Enlargement of Criminal Appellate Jurisdiction Act 1970.

An appeal lies to the Supreme Court from any *judgment, final order or sentence* of the High Court, in the following cases:

(a) When the Sessions Court acquits, and on appeal by the State, the High Court reverses the order of acquittal and sentences the accused to death, or life imprisonment or imprisonment for 10 years and above, an appeal lies to the Supreme Court.

(b) If the High Court has withdrawn the case for trial before itself, and has in such cases sentenced the accused to death, life imprisonment, or 10 years imprisonment and above, an appeal lies to the Supreme Court.

(c) If the High Court certifies that the case is a fit one for appeal to the Supreme Court.

Under Art.134A, the High Court may, on its own motion, issue a certificate in suitable cases. It may also issue a certificate, on an oral application of the appellant, after the passing of its decree, final order or sentence.

The Supreme Court Rules have provided for a detailed procedure.

5.2.4 : Special Leave Jurisdiction: Art. 136.: S. L. P. (Special Leave Petition)

The Supreme Court, in its discretion, may grant special leave (permission) to appeal from any judgment, decree, sentence or order in any cause or matter passed by any ***court or tribunal in India.***

Exception : Cases covered under the Armed Forces.

In *Pritam Singh's Case*, the Supreme Court laid down that special leave would be given in only exceptional circumstances and when grave injustice is done.

In this case special leave was not granted as the conviction was based on the concurrent findings of the two lower courts.

There was no violation of natural justice.

Mohinder Singh V. State (1953): M had been convicted by the Sessions and sentence confirmed by the High Court. But, the High Court had expressed doubt whether the murder was with a Gun or Rifle. Thus, there was doubt about a material evidence. Hence Special Leave was granted.

5.2.5 : **Advisory Jurisdiction : Art. 143.**

Under Art. 143(1), the President may refer a question to the Supreme Court for its Advisory Opinion, and the Court may after such hearing as it thinks fit, report its opinion to the President.

The question of law or fact which has arisen (or likely to arise), must be of such a nature and of such importance that it must be expedient to get the opinion of the Supreme Court. The Court's jurisdiction is discretionary [Art. 143(1)].

Art. 143(2): If there is any dispute arising out of any treaty, agreement, covenant or *sanad* or other similar instrument, made before the commencement of the Constitution, then the President; may ask for an advisory opinion.

The Supreme Court *shall give its opinion* in such cases [Constitution 7th Amendment 1956].

Under Clause (1), the Supreme Court has given Advisory opinions in a number of cases :

1. **In re Kerala Education Bill;**
2. **In re U. P. Tangle Case;**
3. **In re Special Courts;**
4. **In re Beruberi Union;**
5. **In re Presidential Election etc.**
- 6 **In re Keshav Singh Case 1964**
- 7 **In re Cauvery Dispute 1998**
- 8 **In re 2 G case 2012**

Nature of Advisory Opinion:

The question whether the Advisory opinion is binding on the President is not clearly answered.

The American Supreme Court does not render advisory opinions at all. The Australian High Court and Canadian Supreme Court have declined to give advisory opinions as such opinions might prejudice the rights of future litigants.

Our Supreme Court has given its advisory opinion in all cases referred to so far.

As to its binding nature it is a declaration of law per Bhagavathi J. : In *Mehta V. Gujarat Legislative Assembly*.

In re *Special Courts*, the Supreme Court said that the opinion was binding on all the Courts in India. Such a '**considered opinion**', cannot be a mere recommendation, and prudence demands that the **advice is followed**.

Chapter 6

FEDERATION

6.1: Federal Structure :

States are classified into federal and unitary. In a Unitary State, the Sovereign power to legislate is vested in one Central Legislature, i.e., the Parliament.

E.g.: The United Kingdom, France etc.

In a Federal State, the Federal State and the Federating Units share the Sovereign power of the State. The essential feature of federalism is that there is the distribution of executive legislative and judicial authority among bodies which coordinate with and are independent of each other (Dicey).

Eg. USA, Switzerland, Australia, Canada etc.

Features:

(i) **Supremacy of the Constitution** : A Federation is brought into existence with a 'Compact' among the federating units. This 'Compact' is the sheet-anchor on which the Constitution is framed. Hence, the Constitution is supreme and all acts—legislative, executive or judicial—are to be in conformity with the Constitution.

(ii) **Division of Powers**: The distribution of the Sovereign powers between the Federal State and the federating units is the second feature. Each State has provided for this, in its own way in its Constitution. The residuary powers may be vested in the States as in the U.S., Australia and Swiss Constitutions—or with the centre as in Canada and India.

(iii) **Participation in Amendment**: In amending the Constitution, there is the participation of both the Union and the States. This gives certain amount of rigidity to the Constitution. As Prof. Wheare points out, it is not the Constitution but ultimately the people who are rigid or flexible. The essence of participation of the Centre and States is that the amending power is beyond the powers of the Centre alone or States alone.

(iv) **Judicial Review** : The Supreme Court is the final interpreter of the Constitution and the law. Hence, any question of competency of the Centre or the States is decided by the Courts.

Quasi Federal Structure:

Cases : (i) In *Keshavananda Bharati's Case* the Supreme Court held, that *inter alia*, Federalism is the 'basic structure' of the Constitution.

(ii) In *State of West Bengal V Union of India* (1977) after the 1977 General Elections, the Janata government wrote to 9 chief ministers to advise the Governors to dissolve the Assemblies. This was challenged as a 'threat'. The suits were dismissed. Held, Indian Constitution is Amphibian (both Unitary and Federal) in nature.

6.2 : Distribution of Legislative Powers :

(i) One of the essential features of a federal State, is the distribution of the sovereign power to legislate between the Union and the States. The Indian Constitution is modelled on the federal structure, but there are more unitary powers than federal. This has led to hold the Indian federalism as quasi federal or Amphibian (both Unitary and Federal). This is evident from Keshavananda Bharati's Case, *State of West Bengal V. Union of India* and *State of Rajasthan V. Union*.

(ii) **Distribution** : Arts. 245 to 253 deal with distribution of legislative powers and the special circumstances when the Union may make law in the State list.

(a) Union List:

The Parliament may make law for the whole or any part of the territory of India, and has exclusive power to legislate on any matter enumerated in List 1 of 7th Schedule called the Union List :This has 97 items.

Eg.: Defence, Foreign affairs, Extradition, Railways, Airways, Census, currency, foreign exchange, War and Peace, Diplomatic and Consular representation, citizenship, aliens, Reserve Bank of India, Banking, Insurance etc.

(b) State List:

Legislatures of State may make law in the State List of the 7th Schedule and the law made by the State is applicable throughout the territory of that State. This has 66 items.

Eg. : Agriculture, Fisheries, Markets and Fairs, Theatres, Sales Tax, Land Revenue, Public Health Sanitation, Hospitals and Dispensaries Taxes on Agricultural Income, Entry Tax, Profession Tax etc.

(c) Concurrent List:

Parliament and State Legislatures may make law in the Concurrent List of the 7th Schedule. This has 47 items.

Eg. : Contracts, Trusts, Trade Unions, Charities, Price Control, Factories, etc. But Education was added from State List: 42nd Amendment.

(d) Residuary:

After distributing the Sovereign power to legislate between the Union and the State, according to Union List, State List and Concurrent List, the Constitution vests the residuary in the Union [Art. 245(4)]. This is called the Residuary.

In the U.S., Australian and Swiss Constitutions, the residuary is with the local States. As Prof. Wheare points out, in his "Federal State" the vesting of the residuary tilts the balance in favour of federalism.

But, in Canada and India, the residuary is with the Union and hence, they have more slant towards Unitary Statehood.

The leading case on residuary is *Union of India V. Dhillon* (1975). It was held that to test the Union Law, we have to find out whether that Law is encroaching any of the items of State List. If it does not, then it is within the power of the Union. The reason is, the Union List, the Concurrent List and the residuary are with the Union. Hence, Wealth tax imposed on Agricultural Land by the Parliament was upheld by the Supreme Court as this did not encroach State List.

(iii) Powers of the Parliament to Legislate in State List : There are Four circumstances when the Parliament may make law in the State List: and, in such a case, the federal structure gives way to the Unitary State. Of course, all the 4 circumstances are specific and are limited.

(1) **Art. 249 : National Interest** : If the Rajya Sabha declares with a 2/3 majority that in National Interest Parliament should make law in a particular item in the State

List, then such a law may be made by the Parliament. The life of such a resolution is one year and may be renewed if not so renewed, such a law operates for 6 months after the resolution ceases. Eg.: Essential Commodities Act.

(2) **Art. 250 Emergency** : When a proclamation of Emergency is in operation, Parliament shall have the power to make law in the State List. Such a Law will be in operation during emergency and 6 months after the emergency is lifted. Eg.: Defence of India Act and Rules.

(3) **Art. 252. States delegation**: If Two or more States, in

their legislatures pass resolution empowering the Parliament to make law in a specified item in the State list, then Parliament may make law in that item. That law is applicable to those States only. State have no power to amend such law. Eg. : Prize Competitions Act.

(4) **Art. 253. Treaties** : Parliament is empowered to make law to implement any treaty, agreement or convention with any other Country or with International Organisations.

6.3 Doctrine of 'Occupied field':

In the Concurrent list, both the Parliament and the State may make law. If there is any repugnancy or conflict between the State law and the Union law, the Union law prevails.

Parliament may make law in an item in the Concurrent list. State may also make law in the same item. In such a case, if a conflict arises the Courts have applied the doctrine of 'Occupied field'.

The leading case is *State of Orissa V. Tolloch & Co.* The Orissa Legislature made a law levying taxes on all minerals for the better development of mining areas. Later, the Parliament in 1957, made the Mines and Minerals Act. This was a comprehensive law empowering the Central Government to take measures for developing the entire Indian mineral resources. Held, the Parliament had shown its intention to cover the entire item of legislation. There was no place for Orissa law. Hence, the Orissa law is superseded and Parliament's law prevailed.

In *Forbes V. Manitoba*, (Canada) a Province and the dominion (Centre) had made income tax laws. Question was whether occupied field applied. Held, the two taxes could co-exist, without any conflict. Hence, occupied field would not apply.

6.4 Doctrine of 'Pith & Substance':

Parliament has the power to make law in the 'Union List' & the States in the 'State List'. Either Parliament or the States should not trench upon (invade) each other's field of legislation. If Parliament makes law in State list, it would be ultra vires. But, how to test the trenching? This is done by applying the doctrine of pith and substance (or pith and marrow). The court considers the true nature and character of legislation.

Case : (1) *Prafulla Kumar V. Bank of Commerce.*

Bengal Money lenders Act was passed to protect agriculturists. It was challenged on the ground that it affected promissory note. 'Money Lending' is in State List, 'Promissory Note' is Central Subject. Hence, the question was whether the State law was invading Central Subject. Applying pith and sub-

stance, the court held that the true character was Money-lending, and promissory note was incidentally affected. Hence, the law was valid.

Case : (2) *State of Rajasthan V. Chawla* (1959).

The State made a law regulating the use of amplifiers. This created a conflict between State List (public health) and Union list (Communications). Hence, there is an overlap. The Court applied 'pith and substance'. The pith was 'Noise, injurious to public health.' Hence, it came under public health. The encroachment on Union list is incidental. Hence, the Act was held valid.

Case : (3) *Gujarat University V. Srikrishna* (1963).

State List: 'Education'.

Union List : 'Standards in institutions for higher education'.

The Gujarat State prescribed Gujarati and Hindi as medium of instruction under 'Education'. This was challenged as violative of Union List.

The true essence was higher education and hence, the State law was held *Ultra Vires*.

Chapter 7

U.P.S.C. & SERVICES

7.1: The Union Public Service Commission

(Arts. 315 to 320):

(i) **Status** : The Union Public Service Commission is a constitutionally constituted independent body under the Constitution. It is an advisory body to help recruitment in Government Services. (Central)

(ii) **Composition** : It consists of a Chairman and other members appointed by the President. The total number is fixed by the President. At least half of them should be with 10 years Government Service or experience. The tenure is 6 years. Retiring age is 65 years.

(iii) **Removal**: The President may remove a member on a report of the Supreme Court given on a reference by the President to it. The grounds are Adjudged insolvency, independent engagement, or misbehaviour.

However, infirmity is not a ground. Where a professor known to be blind was appointed, a member of the Bihar State Public Service Com., the Supreme Court held he cannot be removed under infirmity. Shankar Prasad V. St of Bihar 1993.

(iv) **Independence**: The Union Public Service Commission is independent because:

(a) Its members cannot be removed except under a special procedure - by an enquiry conducted by a Supreme Court judge.

(b) The service conditions of members should not be varied.

(c) Its expenses are charged on the Consolidated Fund.

(d) Future appointments are restricted to the members,

(v) **Duties** : (a) It is the duty of the Commission to conduct examinations for appointments to Union Services.

(b) To advise on any matter referred to it by the President.

(c) To exercise statutory functions.

(d) To present the annual report to the President who shall place it before the Parliament.

(vi) **Consultative Functions** : The Union Public Service Commission shall be consulted :

(a) On all matters relating to methods of recruitment to Civil Services.

(b) On the principles to be followed in making appointments, transfers, promotions etc.

(c) On all disciplinary proceedings.

(d) On any claims relating to expenses spent by an official in defending legal proceedings of the Government.

(vii) **Binding nature of Commission's advice** : (a) The Supreme Court has held in *D'Silva V. Union of India* (1962) that the recommendations of the U.P.S.C. are *not binding*. The President is to place the annual report before the Parliament. If any of the recommendations are not followed the Government should give specific reasons. This has kept the non-acceptance of the recommendation at a minimum.

In respect of recruitment, if a list of merited candidates is submitted to the Government., such a list is not absolutely binding. On grounds of health, police report etc., even a merited person's name may be omitted, at the discretion of the Government. The Supreme Court has made it clear that the recommendations should not be taken in a light vein. They must be respected and followed.

Other leading cases: *State of U.P. V. Srivatsava*; *Ram Gopal V. State of M.P.*

(b) According to Art.320(c), the U.P.S.C. should be consulted by the Government. The Supreme Court, in *U.P. V. M.Lai* has held that this was not mandatory.

7.2 : Constitutional Safeguards of Civil Servants :

(i) **Introduction** : In a Parliamentary System of Government, the policy is decided by the Cabinet. It is a body of officials—the Civil Servants—who actually put the policy of the State into operation. These are 'Permanent' officials when compared to the political heads, the ministers, whose tenure is 'temporary' (maximum : 5 years). As the Civil Servants system has a tendency to be tied to 'red-tape' and to routine work, and also lacking in responding to fresh ideas, the political head, the minister is expected to cure these evils, as he is responsible to the Legislature.

(ii) **Rules and Safeguards** : Civil servants are the backbone of the Administration. The success lies in selecting the right type of men, who are honest, impartial, efficient, sincere and disciplined. The best available talents can be attracted by offering security of service and safeguards against arbitrary dismissals or terminations. The Constitution aims at this objective. Articles 309 to 311 have provided for the safeguards which are beyond the ordinary powers of the Parliament.

(iii) **Art. 309** : Recruitment and Conditions of Service of the Union and State Civil Servants may be regulated by the Acts of Parliament or State Legislatures. Until then, the President and the Governor may make rules regulating the recruitment and conditions of service.

(iv) **Tenure** : Art. 310 provides that the Civil Servants, Union or State, hold their jobs *during the pleasure of the President or the Governor* as the case may be. This is the *doctrine of pleasure* having its origin in England. 'The pleasure of the Crown' means that Crown is not subject to any

restrictions and hence such a person can be terminated, at any time without giving any reasons. This doctrine has undergone some changes in England. Our Constitution has imposed some limitations in Arts. 310 and 311.

Contract Services : The President or the Governor may appoint persons with special qualifications under contract of service: compensation is to be paid if the post is abolished or the person is made to vacate.

(v) **Dismissal, Removal or Reduction in Rank** : These are major penalties. Protection is given only against them. (Minor Penalties like censure, admonition etc. are not within Art.311. Similarly "suspension order" is not a penalty and is not within Art.311)

Two conditions have been imposed.

(a) Under Art. 311 (1), no Civil Servant should be dismissed or removed by an authority subordinate to the appointing authority.

In *Rangachary 's Case*, the Sub-Inspector had been appointed by the I.G.P., but was dismissed by the D.I.G. Held, Dismissal was bad.

(b) Procedural Safeguards : Art. 311(2). A Civil Servant may be dismissed, removed or reduced in Rank, but the procedure to be followed is :

1. He should be given a show cause notice stating clearly the charges;

2. An Enquiry is to be conducted;

3. He must be given an opportunity to defend himself. This requires that *the principle of natural justice* must be followed, i.e., there should be *no BIAS*, and the *rule audi alterem partens* (Hear and decide) must be followed. Otherwise, the enquiry becomes *ultra vires*.

42nd Amendment: After the above enquiry, if a penalty was proposed against the Civil servant, he was given the opportunity of being heard against such proposed penalty. This second opportunity is dropped by the 42nd Amendment.

Exceptions : (1) The protection under Art. 311 will not

apply to a Civil servant who has been convicted on a criminal charge.

(2) Where the concerned authority is satisfied that for some recorded reason it is not reasonably practicable to conduct the enquiry, he may not conduct the enquiry.

(3) Where the President (or Governor) is satisfied that in the interests of the Security of the State it is not expedient to hold the enquiry.

In these three circumstances, Art. 311 may not be followed. In *Union of India V. Tulsiram Patel*, the Supreme Court held that these were Constitutionally prohibitory injunctions and no enquiry need be held. These were made in public interest and for public good. Hence, enquiry need not be conducted and principles of natural justice need not be followed.

Leading Cases : *Shyamlal V. State of U.P.* S, an Engineer in Government service was compulsorily retired on completion of 25 years of qualifying service, as per rules. S contended that this was removal. Held, compulsory retirement did not amount to removal.

Moti Ram V. Frontier Railway. A permanent railway employee under Rule 149(3) of the Railway Code could be terminated without following the procedure of Art.311(2). The Supreme Court struck down this rule.

Dingra V. Union. D was a Class III employee. He was allowed to *officiate* in Class II. Subsequently, he was reverted to Class III. Held, Art. 311 did not apply. It applies, if the reduction in rank is by way of punishment. Appeal dismissed.

State of Punjab V. Raj Bahadur. A probationer comes within Art. 311, if his termination is by way of punishment (Stigma Doctrine).

Chapter 8

EMERGENCIES

8.1: Emergencies:

There are three types of Emergencies contemplated under the Constitution. These are :

- (1) National Emergency Art. 352.
- (2) State Emergency Art. 356.
- (3) Financial Emergency Art. 360.

8.2 : National Emergency—Art.352 :

(i) **Proclamation** : The President, if he is satisfied that a grave emergency exists, or there is an imminent danger thereof, whereby the Security of India (or any part) is threatened by war, external aggression or *armed rebellion*, may issue a proclamation of National Emergency. This may extend to the whole or *any part of India*.

The President may vary or revoke by a subsequent proclamation.

(ii) **Conditions** : (a) The President should not issue the proclamation unless the Union Cabinet communicates its decision to him *in writing*. (Union Cabinet includes the Prime Minister and other Cabinet Ministers.)

(b) The proclamation has one month's duration. It must be placed before each House of Parliament and must be approved by both Houses: otherwise, it ceases to operate on the expiry of one month. The proclamation must be approved by the Rajya Sabha and Lok Sabha within one month (by the Lok Sabha within one month of its reconstitution, if it had been dissolved).

(iii) **Special Majority** : The proclamation must be approved by the Houses with at least 50% of total membership and 2/3 majority in both the Houses (as in the

case of Amendment).

(iv) **Duration** :

Such an approved proclamation would be in force for 6 months. It may be continued for 6 months at a time (no maximum duration is fixed).

(v) **Revocation**:

(a) The President may revoke the proclamation which he has issued under Art. 352(1).

(b) He may revoke, if the Lok Sabha disapproves the proclamation or of its continuation.

(vi) **Initiation for Revocation** :

A special provision is made—

(a) At least 1/10th of the total members of the Lok Sabha, may give notice in writing to the Speaker (if the House is in Session) or to the President (if the House is not in Session).

(b) The notice must express the intention to move a resolution, disapproving the proclamation or of its continuation.

(c) A special sitting of the House must be held within 14 days of such notice.

(d) This enables the House, to make an appraisal of the circumstances, and to pass a resolution to continue or discontinue the Emergency.

(vii) **Amendments :**

42nd and 44th Amendments have ultimately given Art. 352, a final shape. These changes were largely due to the experience we had during the emergencies, especially the National emergency declared on 25-6-1975.

(viii) **Proclamations issued :**

(a) Chinese aggression, 1962; (b) Pakistani aggression, 1971; (c) Internal disturbance, 1975.

(ix) **Effect of Proclamation:**

(a) Extension of Executive Power :

The Executive Power of the Union extends to the giving of directions to the States, as to the manner of exercise of the executive power.

(b) Extension of Parliament's Power :

The power of the Parliament extends to make laws conferring powers and imposing duties, in any matter *including those in State list*.

(c) Suspension of Art. 19 : Art. 358

—When the proclamation is in regard to *War or external aggression* only, Art. 19 is suspended and *not* with respect to Armed rebellion.

Parliament may make law and the Executive may operate, uncontrolled by Art. 19, but there must be a recital (reference) to the Emergency.

(d) Suspension of Remedy: Art. 359—

The President may by order suspend the remedy for any of the Fundamental Rights stated therein in Part III *except Arts. 20 and 21*. The order is operative only during the pendency of the Emergency.

(c) Habeas Corpus :

44th Amendment prohibits the suspension of Habeas Corpus and Arts. 20 and 21 (Life and Personal Liberty). Hence, the evils of the Habeas Corpus Case (*A.D.M. Jabbalpur V. Shukla*) cannot be repeated (34,630 persons

had been detained in the 1975 Emergency without a remedy).

(x) **Leading Cases :**

(a) *Makhan Singh V. State of Punjab*; (b) *The Habeas Corpus Case*; (c) *Bennett Coleman V. Union of India*.

8.3 : State Emergency : Failure of Constitutional Machinery : Art. 356 :

(i) **Duty :**

One of the duties fixed on the Union by the Constitution (under Art.355) is to protect the States against *internal disturbance* and *to ensure* that the government is carried on according to the Constitution.

(ii) **Proclamation :**

The President may issue a Proclamation of State Emergency on the report of the Governor of the State or otherwise. In order to issue such a proclamation a situation must have arisen, in which the government of that state may not be in a position to run according to the Constitution.

(iii) **Nature :**

(a) The President assumes to himself all or any of the functions of the State Government and the powers vested in the Governor or any other authority.

(b) He declares that the power of the legislature become vested in the Parliament.

(c) He may make any incidental or consequential provisions as he deems necessary.

Exception :

The President has no powers to assume to himself any powers vested in the High Court or to suspend them.

(iv) **Duration :**

(a) The President may revoke the proclamation at any time.

(b) If not so revoked, it must be passed by the two Houses of Parliament *within 2 months*. Otherwise it lapses. (If the Lok Sabha had been dissolved, the proclamation must be approved by it within 30 days of its reconstitution).

(c) The duration is 6 months from the date of proclamation.

(d) The duration may be extended, 6 months at a time by the Parliament, but the maximum **duration is 3 years**.

(v) **Limits on Duration:** The Parliament *should not* extend the proclamation **beyond one year from the date of issue**,

If it is to be extended

a) there must be the National emergency in the whole of India. or in the State. and

b) the Election Commission **should certify** that on account of difficulties conducting election to that State Assembly, is not possible.

Effect of Proclamation

- i) The Parliament may confer on the President the power of the State Legislature to make Laws. ii) It may authorize him to delegate such power on any other authority.
- iii) The Parliament or the President may by law confer powers on other officers
- iv) If the Lok Sabha is not in session, the President may authorize the expenditure on the Consolidated Fund of the State pending sanction of the Parliament.

Operation of State Emergency Law: Any law made during State Emergency continues until it is amended by a competent legislature.

(viii) **Instances :** There are scores of instances when Art. 356 has been pressed into service. State Emergency was proclaimed in Punjab (1951), Pepsu (1952), Andhra (1954), Travancore-Cochin (1956), Orissa (1961) etc.

(ix) **Courts Interpretation :** In *Rao Virendra Singh V. India* (1968), the Supreme Court held that the power given to the President is not discretionary but he must act according to the advice of the Cabinet. This was approved in *Jyotirmoy Basu V India* (1971).

8.4 : Financial Emergency :

(i) Introduction :

The framers of the Constitution visualised a possibility of financial depression requiring Central Government's intervention. The experience of U.S. in 1930's depression was recalled by some members. Suitable provisions were made in Art. 360, to meet such situations.

(ii) Proclamation :

If the President is satisfied, that a situation has arisen whereby the financial stability, or credit of India is threatened, he may issue a proclamation of financial emergency.

(iii) Satisfaction :

The President's satisfaction cannot be questioned in any Court (31st Amendment.)

(iv) **Duration :**

(a) The President may revoke the proclamation at any time.

(b) It operates for *two months* from the date of proclamation. But, within this period, it must be placed before each House of Parliament and duly approved. (If the Lok Sabha is dissolved, it must be approved within 30 days of its reconstitution).

(c) Maximum duration is not fixed by the Constitution,

(v) **Effect :**

Union Executive power becomes enlarged. It may give direction to the States to follow rules of financial propriety. It may give other necessary directions. These directions include : (a) The reduction of salaries and allowances of the Civil servants of the State.

(b) A proviso to reserve for consideration of the President all Money Bills after they are passed by legislatures of the States.

(c) The President may give directions for the reduction of salaries of Union Civil servants, and, also the Judges of the Supreme Court and the High Courts.

This article has not been pressed into service at any time so far.

Chapter 9

AMENDMENTS

Amendment of the Constitution: Art.368 :

(i) **Introduction** : A Constitution may be rigid or flexible. It is flexible when the procedure is simple and capable of being changed easily. It is rigid when there is a special procedure and hard to achieve in practice.

As Prof. Wheare points out, it is ultimately the people who are rigid or flexible, and hence, it is they who determine the nature of the Constitution.

There are some Articles like 5, 6 & 239A which can be amended by a simple majority of Parliament. But, these are not strictly amendments under Art. 368, which has prescribed a different procedure.

(ii) **Power to Amend**: Art. 368 deals with the power of the Parliament to Amend the Constitution.

(i) **Initiation** : Art. 368 (1): A Bill to amend the Constitution may be initiated in either of the Houses of Parliament. But, it must be passed by a majority of the total strength of each House, with 2/3 majority of the members present and voting. The President shall give his assent to such a Bill. Thereupon, the Constitution stands amended.

(ii) **Entrenched Provisions** : Art. 368 (2): This incorporates the federal principle of participation of State in amending the Constitution. If the amending Bill is in respect of the following provisions, it should be passed as above, and also approved by at least half of the total number of States in India.

(a) Election of the President Arts. 54, 55.

(b) Executive power of the President or the Governor Arts.73, 162 & 241.

(c) Provisions relating to the Supreme Court and the High Court of India.

(d) Distribution of Legislative Powers and any of the Lists in the 7th schedule.

(e) The representation of States in Parliament.

(f) Article 368 itself.

The Bill is then sent to the President who **shall** give his assent.

24th Amendment—Art. 368 (3):

Nothing in Art. 13 shall apply to any amendment under this Article (i.e., Law does not include Constitutional Amendment Act). **This has been upheld in *Bharathi's Case*.**

42nd Amendment—Art. 368 (4) & (5) provided that

(4) No Amendment shall be questioned in any Court of law, on any ground;

(5) There is no limitation on the Power of Parliament to amend, repeal any provision of the Constitution.

Both Arts. 368 (4) and (5) have been struck down by the Supreme Court in *Minerva Mills Case* (1980).

Non-amendability of Basic Structure :

The leading cases dealing with the interpretation of Art. 368 may be briefly summarised.

1. *Shankari Prasad V. Union* (1951). The 1st Amendment was challenged in this case. The Supreme Court held that the Parliament was empowered under Art. 368 to amend the Constitution.

(ii) ***Sajjan Singh V. State of Rajasthan* (1965).** The 17th Amendment was challenged. The Supreme Court held that the Parliament had the 'constitutional power' and hence, it could amend.

(iii) ***Golaknath V. State of Punjab* (1967).** Law in Art. 13 was held to include Constitution Amendment Act. As Law against the Constitution was void, it held the Amendment was against Art. 31 (property) and hence void. 1st, 4th and 17th Constitution Amendment Acts were *held void*. (Court applied prospective overruling to save the situation.) Held, Parliament has no power to amend Part III of the Constitution.

But 24th Amendment declared that Parliament has the power to amend any part of the Constitution including Part III.

(vi) ***Keshavananda Bharati 's Case* (1973).**

Held, 24th, 25th Amendments were valid. ***Golaknath's case was overruled.***

Held, Parliament has the power to amend any Article in the Constitution but subject to **'Basic Structure' principle**.

This means the supremacy of the Constitution, Republican and Democratic form of Government, Federal character etc.

The court has the power to decide what basic structure includes.

42nd Amendment (1976) introduced 368(4) and (5).

(v) *Minerva Mills Case (1980)*. The Supreme Court struck down Art. 368(4) and (5) as against the 'basic structure' principle.

Art. 368(4) damaged the basic structure, as it reduced the power of Judicial review of the Supreme Court.

Under Art. 368(5), the Parliament has **arrogated to itself the power to abrogate or even to destroy the Constitution**. Hence both these were *ultra vires* and unconstitutional.

(vi) *Keshavananda Bharati's Case* : Facts : The Swamiji who was affected as a result of Kerala Land Reforms act challenged this Act. Further, 24th, 25th and 29th Constitutional Amendments were also challenged by him before the Supreme Court.

(i) The Supreme Court overruled **Golak Nath's Case**.

(ii) It held that Art. 368 (Amending provision) does not enable Parliament to alter **the basic structure or the framework** of the Constitution.

(iii) 24th Amendment (Parliament's power to amend Part IE and any other provision) was held valid.

(iv) 25th Amendment, First Part—that Art. 39(b) and (c) of Directive Principles prevail over Part III (Fundamental Rights) was valid, it declared.

Second Part—which made the law based on the policy of Part IV-the Directive Principles of State Policy non-justiciable, was held bad.

Therefore 31(c) was held invalid.

(v) 29th Amendment, which included 9th Schedule, Kerala Land Reforms Act was valid, it held.

(vi) **Amending Power:**

The Supreme Court held that Constitution so as to **destroy Art. 368 does not include the power to abrogate or take away any Fundamental Right or to completely change**

the fundamental features of the its identity. The basic theory of our Constitution is that it is *Poulvir Constituent* (**Constituent power**) which is **vested in the people** and this was exercised by the Constituent Assembly in framing the Constitution.

(vii) No narrow or wide interpretation can be given as regards the amending power. Certain checks and balances are built within the Constitution. **Hence there are implied limitations on the power of the Parliament to amend.**

(viii) The 'basic essentials' of the Constitution should not be Amended. Art. 368 contains the power to amend. To amend is the 'Change', change for the **better.**

It does not include the power to destroy or abrogate the basic essentials or the basic structure of the Constitution.

The limited amending power is a basic feature. Parliament cannot arrogate more or absolute powers to destroy the essential features of the Constitution.

Basic Essentials : Examples—(a) Republican form of Government; (b) Democratic rights like Civil right to vote; (c) Office of the President; (d) Judiciary; (e) Federal Structure; (f) Rights of the State, Rule of Law, Judicial Review etc, are basic and form part of the structure.

Hence these cannot be abrogated or changed by the Parliament.

In *Indira Gandhi V. Raj Narain* (1975), the Supreme Court held that **Equality** (Art. 14) and free and fair elections were **basic essentials.**

In *Waman Rao V. Union* (1981) it held that Acts included in the 9th Schedule of the Constitution before 1973 (*Bharati's case*) were **valid;**

but, those added after 1973 were *ultra vires* if they are against the basic structure.

In Kihota v Zochilhu 1992, the Supreme Court struck down Para 7 of the 10th Schedule, which had ousted the jurisdiction of the courts to decide disqualification of members of the House.

Chapter 10

MISCELLANEOUS

10.1: Privy Purse Case :

The President by means of an Executive order derecognised the Princely rulers in India and also abolished their 'Privy Purse'. The Supreme Court struck down this order as *ultra vires* the Constitution.

(i) It held that Art. 363 did not bar the jurisdiction of the Court. In case of disputed succession of a ruler, the President could decide the heir.

(ii) The Supreme Court held that the right to derecognise was vested in the 'Crown' itself. This power was not handed over to the Indian people when the Paramountcy lapsed in 1947. Hence, the Court held that the President had no power to derecognise the Princes.

The Privy Purse was part of the agreement or *sanad* made between the Government of India and the Princely States and hence this cannot be denounced by the Government. Hence, there would be violation of the agreement.

(iii) It further held that the Princes, as citizens are entitled to their property in Art. 19(1)(f). Privy Purse is a property and hence the princes have a right to their privy purse. 'This cannot be abolished by the President', the Supreme Court declared.

The 26th Amendment (1971) has changed this position. Arts. 291 and 362 have been omitted. Art. 363A is introduced. It provides that from the date of the commencement of 26th Amendment, the rulers cease to be recognised (therefore, it abolishes the institution of rulership). Clause (b) provides for the abolition of the Privy Purse.

The 26th Amendment is challenged and the case is pending in the Supreme Court since 1972.

10.2 : Finance Commission : Arts. 210 & 281

(i) **Objectives** : The Finance Commission is the creation of the Constitution. The federal character requires sound economic principles in the distribution of taxes between the Union and the States, and the grants from the Centre to the States. No 'Permanent' rules were made in the Constitution as socio economic changes might require a flexible scheme to the needs without creating any friction. The Constitution makers were guided by Canadian and Australian methods. New bases and principles could be evolved by appointing a 'non-political body' to make inter-governmental financial

adjustments. This is achieved through the Finance Commission. The Financial Commission Act 1951 has made detailed provisions.

(ii) **Composition** : It consists of the Chairman and four other members, appointed by the President.

(iii) **Qualifications**: Parliament has prescribed the qualifications of the Members, and the manner of selection, in the Finance Commission Act. An ex-minister or ex-Comptroller and Auditor General cannot hold office.

(iv) **Tenure**: The First Commission was appointed in 1952.

The Commission's tenure is 5 years generally. It may be constituted for less than 5 years, if the President so desires.

(v) **Duties** : It is its duty to make recommendation to the President as to—

(a) The distribution of the net proceeds of taxes divisible between the Union and States. Eg. Income Tax;

(b) The principles governing the grants-in-aid to the revenues of the State out of the consolidated fund of India;

(c) The continuance or modifications of terms of agreement with the Government of India and Government of any State;

(d) Any other matter referred to it by the President under the Constitution.

(vi) **Powers** : The Commission has power to determine its procedure and shall have additional powers as prescribed by the Parliament.

(vii) **Report**: Report is submitted by the Commission to the President. It shall be laid before the Parliament. The Report may contain explanatory memorandum as to the action taken.

10.3 : Consolidated Fund of India : Art. 266 :

(i) The Consolidated Fund is the foundation stone of the system of Parliamentary supervision or control over finances in England. According to **Dicey** the control is three-fold:

As regards—(a) the source of Public Revenue; (b) the authority for expending the revenue and (c) the securities for the appropriation of the Revenue.

In our Constitution, the consolidated fund is an innovation. The Union as well as the States have such funds.

(ii) **Sources**: (a) All revenues, received by the Government of India. Eg. Taxes; (b) All loans raised by it by issuing treasury bills; (c) Loans and ways and means advances and all moneys received by it in repayment of loans.

The other public moneys like deposits, remittances and

service funds are included in the Public Accounts of India.

(iii) **Authority to Spend** : Appropriation from out of the consolidated fund must be in accordance with law and for the purposes and in the manner provided in the Constitution. The 'Law' is the Appropriation Act which authorises the payment. The Act simply authorises the payment of money but it does not sanction the activity of the State.

The Consolidated Fund is different from a contingency fund. The Contingency Fund is an imprest sum kept at the disposal of the President.

In the annual budget, the expenditure charged on the Consolidated Fund is not subject to voting.

The Constitution itself provides various items of expenditure charged on the Consolidated Fund. Salary of Judges, Comptroller and Auditor General, Attorney General etc.

(iv) **Inspection : The Comptroller and Auditor General** sees to it that moneys which were granted are spent duly for the specified purposes.

10.4 : Contingency Fund : Art. 267 :

According to the Constitution, Parliament has established a 'Contingency Fund'.

This is an imprest fund, and amounts as may be determined from time to time is paid into it.

The Fund is placed at the disposal of the President. He may make advances from this Fund to meet *unforeseen* expenditure. This is to be ratified by the Parliament (Arts. 115 and 116).

There is also a State Contingency Fund in each State and the Governor is authorised to spend for unforeseen events subject to ratification by State Legislature.

10.5 : Election Commission : Art.324

(i) It is an Independent Commission vested with the superintendence, direction and control of the preparation of the electoral rolls, and of conducting election to Parliament, State Legislatures, Presidency and Vice-Presidency.

(ii) The Election Commission consists of the Chief Election Commissioner and other Election Commissioners. They are appointed by the President.[Now there are **two** Election Commissioners]

The Chief Election Commissioner can be removed by the President, in the same manner as a judge of the Supreme Court may be removed. The others may be removed in consultation

with the Chief Election Commissioner. [In **Dhamoa V Union of India 1991** the Supreme Court held it was not obligatory to appoint the Election Commissioners, and hence abolition of such office gave rise to no cause of action and hence removal of an Election Commissioner was not invalid.]

(iii) In preparing electoral rolls, no person is to be disqualified on grounds of religion, race, caste or sex. There is adult suffrage. Delimitation of constituencies is done by the Election Commission.

Courts have no jurisdiction in respect of matters like preparation of electoral rolls and delimitation of constituencies.

(iv) **Amendment and Changes** : 19th Amendment (1966) took away the power of the Election Commission to appoint Election Tribunals.

39th Amendment (1975) provided for a Special Forum to decide election disputes of President, Vice-President, Prime Minister and Speaker. The **44th Amendment omitted this**.

42nd Amendment has provided for Election Tribunals to be set up by law by the State Legislatures. There was no appeal to High Court. The 44th Amendment omitted this. But, this portion was *not approved* by the Rajya Sabha.

(v) The present position is that the election petitions are entertained by the High Court. In respect of Presidential and Vice-Presidential elections, the Supreme Court has jurisdiction.

10.6 : Attorney General for India :

(i) He is the Chief Law Officer to the Government of India. He is appointed by the President and holds office during the pleasure of the President.

(ii) **Qualification** : He shall be a person who is qualified to be appointed as the Judge of the Supreme Court.

(iii) **Duties** : It is his duty to tender service to the Government on all legal matters. He must perform such other duties of legal character as assigned to him by the President to appear on behalf of the Government in all cases to represent the Government of India before the Supreme Court. He should not hold briefs against the Government or defend an accused without the permission of the Government. He is however allowed private practice but not adverse to the interest of the Government. He has a right to speak in the Parliament or in any Committee, without the right to vote. He is entitled to privileges of a member of Parliament.

(iv) **Right of audience** : He has a right of audience in all the courts in India.

10.7 : Comptroller and Auditor General (Arts. 148 to 151)

(i) The Comptroller and Auditor General is an independent authority and one of the most vital and key-posts under the Constitution.

(ii) **Appointment** : He is appointed by the President of India. Before entering office, he must take Oath of Office as per the Constitution.

(iii) **Salary and Conditions** : (a) The salary and other conditions of service are prescribed. Parliament may make a law in this regard but there should be no variation of the

conditions to his disadvantage;

(b) After retirement he is ineligible for reappointment under the Union or State Governments.

(iv) **Powers and Functions** : (a) The Administrative powers are prescribed by rules by the President in consultation with the Comptroller and Auditor General. All expenses of this office are charged on the Consolidated Fund of India;

(b) To watch our finances, to see that moneys are spent with due authority and to keep and maintain the accounts of the Union and of the States are his main functions;

(c) His functions are dual—(1) to control Union and State Governments' withdrawal of Funds on the accounts side;

(2)

to subject all accounts to scrutiny on the auditing side (The Accounts have been separated from Auditing under Art. 150).

(d) Other functions may be prescribed by the Parliament;

(v) **Reports** : He submits the reports to the President (or the Governor in respect of States), which should be laid before the Parliament or State Legislature as the case may be.

10.8 : Fundamental Duties—Art. 51 A :

(i) The 42nd Amendment has introduced a new chapter named 'Fundamental Duties'. The inspiration is the USSR Constitution.

(ii) **Contents** : The duties are fixed on the citizens—(1) to abide by the Constitution and to respect the National Flag and the National Anthem; (2) to cherish and follow the noble ideals of our National freedom struggle; (3) to uphold and project sovereignty, unity and integrity of India; (4) to defend the Country; (5) to respect women, to develop brotherhood; (6) to preserve cultural heritage; (7) to protect environments; (8) to develop scientific approach; (9) to protect public property and to avoid violence; (10) to strive towards excellence in all spheres.

(iii) **Sanction**: There is no sanction and a person who does not follow these duties cannot be punished. They are imperfect duties. The duties serve as a code of moral conduct to the Citizens of India.

Chapter 11

FUNDAMENTAL RIGHTS

(Part III of the Constitution)

11.1: 'State' as defined in Art. 12 :

(i) **Definition :**

State includes the Government and Parliament of India, and the Government and Legislatures of the State and *all local and other authorities* within the territory of India or under the control of the Government of India.

The definition is important as the Fundamental rights are enforceable by writs against the 'State'. Hence, no writ can be issued against any person or authority which does not come within this definition.

(ii) 'State' includes the Union and State Executives, and also the Parliament and the State Legislatures and hence under judicial review, executive acts and the 'Acts' made by Parliament or State Legislatures can be declared *ultra vires* by the Supreme Court or the High Courts.

(iii) **Local and other authorities:**

(a) University is covered under 'other authorities'. The Supreme Court in *Rajasthan Electricity Board V. Mohan Lai*, overruled *Shanta Bai's* case and held that University was under 'Other Authorities'.

(b) Municipalities, Corporations and other Local Self Government institutions are 'State'. In *Sukhdev Singh V. Bhagatram* the Supreme Court has given a wide interpretation. 'Other authorities' includes LIC, Oil and Natural Gas Commission, Industrial Finance Corporation etc. If the authority has Constitutional or Statutory powers it is a State whether it is discharging Sovereign functions or not. If it is an agency or instrumentality of the State or is discharging the functions of the State then it is within the definition of 'State'.

(iv) **Not a State:**

(a) Private persons, Private Associations, Cooperative Societies, Societies covered under Societies Registration Act, Companies etc. are not 'State'.

(b) Courts are not within the definition of State for purposes of Art. 12.

11.2 : Doctrine of Eclipse :

Meaning : According to the concept of 'Judicial Review', a law which is against the Constitution is void and *ultra vires* the Constitution.

Our Constitution became operative from 26-1-1950. Hence, any law existing prior to the Constitution (Pre-Constitutional Law) and any law made subsequently (Post-Constitutional Law) would be void if the law is against the Constitution.

Hence, a question arises. If a Pre-Constitutional Law is held void by the Court as against a provision in the Constitution, and subsequently, if that provision in the Constitution itself is amended by the Parliament, will the 'void law' become operative or not?

The Supreme Court has held that in such cases, the 'void law' will become operative automatically after the amendment is made. The reason is the Constitution will have 'eclipsed' or darkened that 'law', but when the Constitution is amended, the eclipse is removed and hence *proprio vigore*, the law becomes operative. This is called the Doctrine of Eclipse.

Case: *Bhikaji Narayan V. State of Madhya Pradesh* (1955). The Motor Vehicles Act was amended by the State and provided for monopoly of Road Transport by the State. In view of Art.19 (1)(g), Right of Trade or Business, this law became operative from 26-1-1950 (the date of commencement of the Constitution). Hence, it became eclipsed by the Constitution. However, on 18th June 1951, Art. 19 (1)(g) was itself amended providing for Nationalisation etc. With this amendment the eclipse was removed, and the monopoly law revived.

Post Constitution Law : *Deep Chand V. State of U.P.* (1959). The U.P. Transport Act came into operation in 1950. It provided for Nationalisation. But, as there was no proper provision for compensation, this law was held bad. But the 4th Amendment made inadequacy of compensation not questionable in any Court. Question was whether the bad monopoly law became operative after the Amendment. The Supreme Court held that the doctrine of eclipse was not applicable. The reason, was the law was made in 1955. It became void *ab initio*. It was a still born law and hence dead. Hence no revival. A new law is to be enacted, if required by the State.

Doctrine applied to Post-Constitutional Law : in *D. Lodh V. District Judge* the Supreme Court applied to Post-Constitutional Law. In this case, a suit for ejection was decided in favour of the landlord, but due to U.P. Civil law, this was inexecutable. The law was amended in 1976 to remove such injustice. Held, the doctrine of eclipse applied and the decree was executable.

Chapter 12

EQUALITY

12.1: Right to Equality :

(i) Art. 14 : Art. 14 of the Constitution States as follows :
The State shall not deny to any person, 'equality before the

law', or 'equal protection of the laws', within the territory of India.

(ii) **Equality before the Law** : (a) This is a negative concept taken from the English Constitution. It implies the absence of any privilege in favour of any person. It means that among equals the law should be equal and should be equally administered and that *'like should be treated alike'* (Jennings). It also means the right to sue and to be sued, to prosecute and to be prosecuted for the same kind of action should be the same for all without distinction of race, religion, wealth, social status or political influence (Jennings).

(b) Dicey's concept of Rule of law has equality as its central core. According to him it means the '**Supremacy of Law**'. Equality requires that *Justice must be available to all*. Hence, Justice should not be denied to the accused who on grounds of poverty is not in a position to maintain an advocate to defend him ..

Legal aid is provided in England under the Poor Prisoners Defence Act, and, Legal Aid and Advice Act. In the U.S, the Supreme Court held in *Powell V. Alabama* that under "due process of law", the State was under a *duty* to meet the expenses of defence. In this case, 6 negroes had been accused of ravishing a white girl to death. There was no defence. The Supreme Court declared that the state should pay for the defence.

In India, in *Tara Singh's Case*, it was held that opportunity should be provided to such accused as per Art. 22. In *Hasinara Khatoon V. State of Bihar*, the Supreme Court has held that Justice required that accused should be defended or State should ensure such legal defence, at its own cost. If legal defence is not provided, the trial would be vitiated. High Court Rules have however provided for defence as a 'must*' when the accused has no means. 'Legal Aid Clinics' are now protecting the interests of such persons in Lower Courts.

(c) Equal Subjection to Courts : According to Dicey, equality before the law means that no man should be made to suffer in body or goods except for a distinct breach of law ; It also means that no man is above the law and that all are amenable to the jurisdiction of the ordinary courts.

Dicey was against the Administrative tribunals as they differed fundamentally from the Ordinary courts. The tribunals do not follow the court procedures (Civil and Criminal) and also the law relating to Evidence. But, these tribunals had come to stay. Hence, the courts have imposed a duty on these tribunals that they should follow the principles of natural justice.

(iii) **Equal protection of the Laws** :(a) This is a dynamic concept taken from the U.S. Constitution (14th Amendment). It implies equality of treatment in equal circumstances. The essence of it is that *when persons are similarly placed they must be similarly treated*.

In the U.S. in *Plussey V. Ferguson*, separate accommodation provided to the Negroes and Whites in the Railways was upheld by the Supreme Court. This was the 'Separate but equal' concept.

This was overruled in *Brown V. Board of Education* 1954. Separate schools had been provided for Negroes and Whites. A Negro's application was rejected by a White School. Held, this segregation was Ultra Vires, as violative of 'Equal protection of the Laws'.

12.2 : Doctrine of Reasonable Classification :

The leading case is *Kathi Raning V. St. of Suarashtra* (1952). In this case, Das, J, stated the two tests for reasonable Classification :

- (i) The classification must be founded on an intelligible differentia which distinguishes one group from the other, and
- (ii) The differentia must have a rational relation to the

object sought to be achieved by legislation.

Art. 14 forbids *class legislation*, but does not forbid *reasonable classification*.

This means, the differentia must not be arbitrary. It must be based on some qualities or characteristics found in one group. These must be absent in the group left out. What is essential is that there must be a nexus between the differentia and the object of legislation.

State of Bombay V. Balsara : The Bombay Prohibition Act, made it an offence to manufacture, sell or consume intoxicating liquor. Military canteens had been exempted. Balsara

challenged this. Held, Military officials form a separate class or group by themselves. Civilians are different. This had a reasonable relationship with the object of legislation. The Military officers had special duties and responsibilities and this justified a separate treatment to them.

Chiranji Lai V. Union of India (1951) : The Sholapur Spinning Co. was taken over by the Central Govt. This was challenged as violative of Art. 14. Held, Companies under mal-administration formed a class ; and the object of legislation was to protect the shareholders. Held, legislation was valid.

In the *Bank Nationalisation* case, the Supreme Court struck down the Banking Companies Act. There was hostile discrimination between 14 nationalised Banks and other Indian and Foreign Banks. Even new banks could be started and could do business. But, the 14 Banks had been taken over and hence prevented from doing business. Held, discriminatory. (The Act was suitably amended by Parliament later).

Widened Meaning of Equality : In *Maneka Gandhi's* Case, the Govt. had impounded the passport, and this was held as "not justified". The Supreme Court held that equality was not limited to the "*judicial formula*" of reasonable classification. It was *much wider*. The Legislative Act should not

only pass the two tests of reasonable classification, but also be NOT ARBITRARY. Accordingly, impounding a passport without hearing was "not fair". (The petitioner was heard & passport issued.)

In *International Airport Authority Case*, the court held that equality had an "activist magnitude" and embodied guarantee against arbitrariness. In *Air India V. Meerza*, the regulation that air-hostess should retire on attaining 35 years, or upon marriage, or upon first pregnancy, was held *ultra vires*, as this classification was arbitrary.

In *Mithu V. State of Punjab*, Sn. 303. I.P.C. was struck down. In this case, if a person is guilty of murder under Sn. 302 I.P.C., the court in its discretion may award death penalty, but under Sn. 303 I.P.C. if the person, a prisoner (under life imprisonment), commits murder, then the court shall give death penalty. This classification was held bad as under Sn. 302, there was judicial discretion but there was no such discretion under Sn. 303. Hence Sn., 303 was arbitrary and bad.

Basis of Classification:

Reasonable classification may be based on different grounds:

(i) **Geographical basis** : Depending on the peculiar circumstances and situations, the classification may be based on territorial grounds.

Thus, in *Ram Chandra V. State of Orissa*, two Nationalisations Acts, to take over road transport for different areas in the State of Orissa were held valid, as there were material differences peculiar to the two Acts. But, districtwise distribution of seats in the Medical College was held bad in *Rajendran V. Tamilnadu*. Law providing for different fees in Medical and Engineering Colleges between residents and non-residents was held valid in *Joshi V. State of M.P.*

(ii) **Historical basis**: Merger, State reorganisation etc. may be grounds for reorganisation. In *Pavitra Kumar V. State of W.B.*, the different categories of Advocates into Barrister-advocates and non-barrister advocates was held valid for "historical reasons". (Now Under Advocates Act 1962 there is no such classification). Special immunity to Ex-Rulers in C.P.C. was held valid on historical grounds.

(iii) **Time as the basis** : The basis of classification may be based on date of operation of law. For instance, an enhanced tax rate may be imposed from a particular date. Pending cases may be taxed at old rates. This is not hit by Art. 14.

(iv) **Nature of persons, trade, calling or business**: Classification of persons, on the basis of age, for instance is valid (Sn. 11 Contract Act).

Small Scale Industries, may be classified as one group for favoured treatment;

Classification of News papers into Small, Medium and Big for levying customs duty on newsprint was held valid (Express Newspaper Case).

(v) **Special Courts and Special Procedure**: Leading case: *Kathi Ranning V. State of Saurashtra*. In re Special Courts Bill the Supreme Court has held that Special Courts and Special Procedures were valid if the law *clearly* lays down the guiding principles e.g. public safety, maintenance of public order etc. The offences must be properly classified in relation to the objective to be achieved.

(vi) **Tax basis** : The basis of tax must pass the test of

classification under Art. 14. Hence, tax on Virginia tobacco but no tax on country tobacco was held valid in E-I-Tobacco Case.

(vii) **Individual or group** may be classified, if it is not arbitrary and answers the two tests.

Eg. *Ameerunisa V. Mehboob*: There were continuous court litigations between two claimants. The Hyderabad Legislature passed the Walud Dowla Succession Act and gave the property of the deceased Nawab of Hyderabad to one party. The other party challenged this law as it denied its right to claim the property, just as any other citizen, in a court. Held, classification was bad.

The essence of Art. 14 is that not only that there must be a reasonable classification having a relation to the objective to be achieved, but that such a classification itself should not be arbitrary.

12.3 : Art. 14 and Special Courts :

Whether Special Courts may be constituted by the Legislature to try certain types of offences, was discussed in detail by the Supreme Court in '*in re Special Courts*' case. The Court held that the Bill was valid. The classification of offences during Emergency had been defined. The duration had been specified. There were no unguided and uncontrolled powers to the Executive. The guide lines were clear.

Art. 14 guarantees to all persons (1) Equality before the law and (2) Equal protection of the Laws, within the territory of India.

Equality before the law means that among equals, law should be equal and should be equally administered, and that like should be treated alike.

It includes the right to sue and to be sued, to prosecute and to be prosecuted without any distinction of religion race, Wealth, Social Status or Political Influence.

This includes the concept of "**Rule of Law**". According to Dicey, this means the **supremacy of law**, and, that **no man is above the Law; It means that no person shall suffer in body or goods except for a distinct breach of law, and, that all persons are amenable to the jurisdiction of the ordinary Courts.**

What Dicey meant by this was that every official from the Prime Minister, down to a constable, is under the same responsibility, for every act done without legal justification, as an ordinary citizen is. Further, he is subject to the jurisdiction of the same courts as are available to citizens.

In *State of West Bengal VanwarAli*, the Act had provided for special courts to conduct "speedier trial of certain offences". The Govt. could select the offences for speedy trial. The Supreme Court held that this was an arbitrary Power and violated Art. 14. No guidelines were given by the Act to classify the offences. Further, the procedure for trial also varied from the general procedure provided in the Cr.P.C. This was also held bad.

However, in *Kathai Raning V.State of Saurashtra*, the law had given proper guidelines and also had specified the categories of offence that could be selected for special trial. Hence, the law was held good.

In its advisory opinion, in "In re special courts case ", the Supreme Court held that special courts set up to try offences committed during national emergency of 1975-77, did not violate Art. 14. and the procedure provided therein, was held not against the Constitution.

Hence, in India ,Special Courts may be constituted by law, but the law should classify the offences or provide clear guidelines to the Govt. to classify. There should be no room for any arbitrary discretion of the executive. The procedure should not be substantially different from the one prescribed by ordinary law.

Chapter 13

FREEDOM OF SPEECH AND EXPRESSION

Art. 19 (1)(a) of the Constitution guarantees to every Citizen freedom of speech and expression.

Nowhere in the world, freedom of speech is guaranteed in absolute terms. The U.S. Constitution in its 1st Amendment stated : 'Congress shall make no law abridging the freedom of speech or of the Press'. The Supreme Court stated in *Schenck V. United States* : 'Free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic'. The Court formulated the 'clear and present danger test' as a restriction in *Dennis Vs. United States*. The Smith Act was challenged in this case.(Teaching etc. of overthrowing of Government by force was made an offence in this Act). This was held good. Similarly, Censorship restrictions have been upheld. (*Don Juonfilm case*).

Instead of leaving to the Courts as in the U.S.to define the scope, our Constitution has provided that reasonable restrictions could be imposed by the Parliament and State Legislatures on the following grounds: Art. 19 (2):

- (a) Sovereignty and Integrity of India.
- (b) Security of the State.
- (c) Friendly relations with Foreign States.
- (d) Public Order.
- (e) Decency or Morality.
- (f) Contempt of Court.
- (g) Defamation.
- (h) Incitement to an offence.

Scope : The freedom of speech and 'expression':

The freedom is comprehensive and includes not only words spoken, but also *the freedom of the Press*, which is the basic essential of political liberty for proper functioning of democracy. The basic principle behind this freedom is the right of the people to know the truth.

(i) *Ramesh Thaper V. State of Madras* 1950 : Madras Govt's, ban order of entry and circulation of 'Cross Roads' a Bombay Weekly, was held *ultra vires*.

(ii) *Brij Bhushan V. Delhi*: Precensorship of 'Organiser' was held Ultra Vires the Constitution. Held, the 'Security of the State, in Act 19(2) did not empower the State to impose restrictions to control 'Public Order'. This led to the First Amendment which introduced three grounds: 'public Order' 'Friendly relationship with Foreign Countries' and 'incitement to an offence.'

(iii) In *Shailabala Devi's Case*, the Supreme Court allowed publication of 'Sangram' as it contained only meaningless words, though high sounding and bombastic.

(iv) *Bennett Coleman V. India*: The G.O. prescribing the number of pages, at 10 to all newspapers under Newsprint Control Order was held *ultra vires* as it affected the circulation of newspapers.

In *Sakal Papers V. Union*, the restriction on prices of newspapers with reference to pages and sizes, was held bad, by the Supreme Court as it affected publication of supplements etc.

(v) *Lady Chatterly's lover* : This book was banned as obscene. A book seller challenged this, but the Supreme Court held that the ban was within permissible limits of Decency and Morality and hence valid. He was convicted (*Ranjit V. State of Maharashtra*).

(vi) *K.A. Abbas V. Union of India* : Film censorship was upheld in this case as motion picture stirs up emotions than any other media. For the film 'The Tale of four cities' 'U' Certificate was not granted. The Court upheld the action of the Govt. The classification of films into "A" (for adults only) and 'U' (for all) was held valid.

(vii) In *Namboodripad's Case*, the Supreme Court upheld his conviction and held that his attack on the judiciary, calculated to lower the prestige of the judges amounted to contempt of Court.

Conclusion:

The Courts in India have upheld the freedom of speech and expression as a precious right and as the quint-essence of democracy.

Chapter 14

PERSONAL FREEDOMS

14.1: Rule against Retrospective Criminal Law :

Art. 20 (1):

(i) One of the cardinal principles of Criminal Law is that "no *ex post facto* " Criminal Law shall be made by the State. This means the law must be prospective only. If the law is to have effect from an anterior date, that would be against this concept. This reason is the act is innocent when it is done, but, a law made subsequently has made the innocent act punishable with retrospective effect. This rule available in England and U.S. is embodied in Art. 20 (1).

(ii) The U.S. Constitution [Art. 1 Sn. 9 (3)] declares 'no ex post facto law shall be passed'. The leading case in *Colder V. Bull*. In this Case, the U.S. Supreme Court explained ex post facto law:

(a) Making an act punishable which act was innocent at the time of commission, (b) Imposing a greater penalty in such cases, than what is already provided: or (c) Changing the procedure to the prejudice of the accused.

(iii) Art. 20 (1): Provides that no person should be convicted of any offence, except for violation of law in force at the time of the commission of the offence. Further, it states that no person should be subject to a greater penalty than that which might be inflicted for the offence at the time of commission of the offence.

But, in respect of procedure to be followed, the Supreme Court has held that there is *no right to the accused to any particular procedure* to be followed. The reason is all that procedural law are prospective.

Shiv Bahadur V. St. of Vindhya Pradesh. The I.P.C. was extended to Vindhya Pradesh from Sept. 1949, but a Minister was charge-sheeted for a bribe taken in April 1949. It was contended that the extension of law was ex post facto law. Held, *in fact*, law was in operation in Vindhya Pradesh from 1921. The prosecution was held valid.

Kedar Nath V. State of West Bengal. K was convicted for an offence committed in 1947. In addition he was put a fine of Rs. 50,000/- under Criminal Law Amendment Act 1949. (A fine equal to the money received as a bride could be imposed under this.) Held, the Act of 1949 was ex post facto law and hence, *could not be* applied to K.

In *Berai V. Henry*, the prevention of Food Adulteration Act had provided life imprisonment and the accused was undergoing trial when the law was amended and punishment

reduced to 3 years. Accused could claim this, as it was beneficial to him.

14.2 : Right against Double jeopardy :

One basic principle of Criminal Law is that no person who has been accused of an offence shall be prosecuted and punished for the same offence more than once. This principle is contained in Art. 20 (2) of our Constitution and also in S. 300Cr.P.C.

The origin of this is in the English Law *Nemo dabet Bis vaxari* (no one shall be vexed twice). This has two rules namely:

- (i) *Autrefois acquit* (previous acquittal);
- (ii) *Autrefois convict* (previous conviction).

According to this if a person has been prosecuted and either

convicted or acquitted, the accused should not &e tried ag;
by any Court in India for the same offence. ^

In *Venkata Raman V. Union of India*, V was subjected to a departmental inquiry and was dismissed from Central Government Services on grounds of bribery. The police arrested him under 1611.P.C. for bribery. He contended that he should not be tried again. The Supreme Court held that the departmental proceeding was not a prosecution and therefore he could not get the benefit.

In *Maqbul Hussain V. State of Bombay*—M was subject to an inquiry by the custom authorities who confiscated the goods from him and also fined him. Held Custom proceeding as not a prosecution.

According to the Supreme Court, prosecution and punishment must be read in a conjunctive sense. That is, if a person is prosecuted and punished, he should not be tried again. Hence if a person is prosecuted and acquitted, the constitution is silent about this. But S. 300 Cr. P.C. provides that if a person is prosecuted and convicted or acquitted he should not be tried again for the same offence.

Exceptions : Sn. 300 has provided for four exceptions.

- (a) Lack of Jurisdiction of the Court.
- (b) Distinct and separate offence than the one tried.
- (c) Consequences of an act resulting in a different

offence

altogether, e.g.: A is punished for grievous hurt but the injured

person dies as a result of the injuries, A may be tried for culpable homicide.

- (d) Does not apply to execution proceedings.

In *State of Bombay V. Apte* : A was convicted for Criminal Breach of Trust under I.P.C. and under Insurance

Act. The Sessions convicted on the first, but acquitted as the necessary permission had not been taken under the Insurance Act, in the second. Thereupon, sanction was obtained and a fresh complaint was filed. Held, in the second prosecution the ingre-

redients of the offence was different. Hence, in the second prosecution and ingredients of the offence were different. Hence, Art. 20 (2) did not apply. He could be tried.

14.3 : Right against Self-Incrimination : Art. 20 (3) :

(i) One fundamental principle of Criminal Law is the right against Self-Incrimination.

(ii) **Origin:** The Principle has its origin in England where it developed as a rule of evidence as a revolt against inquisitorial and unjust methods of interrogating the accused persons. This found its Constitutional Status in the 5th Amendment in the U. S. Constitution. The rationale for the right is that of protection to the innocent, and a safeguard against tyrannical prosecution.

(iii) **Art. 20 (3) :** No person accused of an offence shall be compelled to be a witness against himself.

This is also called as rule against testimonial compulsion.

According to the Evidence Act, the burden of proving the guilt of the accused is on the prosecution. The accused cannot be compelled to give evidence against himself.

Certain conditions must be satisfied to get the benefit:

(a) **'Accused of an offence'** : The protection is given to only an accused. A person is accused when the First Information Report (F.I.R.) is filed against him, or a Complaint is made to a Magistrate. Hence, statements made by a person before the custom officials, are, without accusation and hence not within Art. 20(3).

(b) The protection is not available to a witness under this article.

(c) Confessions made under Sn.164 Cr.P.C. before the Magistrate are valid, as there is 'no compulsion' (*Kalavati V. Himachal Pradesh*).

(d) Testimony may be oral or documentary. Documents got under compulsion cannot be used against the accused. In

Sharma V. Sathish Chandra the Supreme Court held that documents seized under a search warrant, (without any compulsion) were not hit by Art. 20(3). The leading case is *State of Bombay V. Kathi Kalu Oghad*. The Supreme Court disposed of a batch of four appeals. In the Bombay appeal, specimen handwriting had been taken from the prisoner; in the Punjab appeal the confession of the prisoner led to the discovery of stolen property, guns and rifles. Impressions of palms and fingers were taken in the presence of the magistrate in another appeal. In the West Bengal appeal, opium had been received by the prisoner through Railways and to compare his signature on the Railway Way Bill, the police had taken the specimen signature.

Eleven Judges of the Supreme Court disposed of the case.

It was held that **material evidence** i.e., the taking of specimen signatures, thumb impression, handwriting, foot or palm print, for the purpose of identification is *not against* Art. 20(3). Similarly demonstration or parade for identification is also not hit by Art. 20(3). But there should be no duress. For example, if 'A' the accused gives information to the police about weapons used in the commission of an offence, and if in pursuance of it the police discover the said weapons, then *the fact* of discovery is allowed. This is valid under Art. 20(3).

(e) **Compulsion is Prohibited** : Compulsion means 'duress'. It includes physical or mental torture, or 'third degree' methods. Art. 20(3) safeguards against investigating officers who 'sit comfortably in the Shade, rubbing red pepper into a poor devil's (accused) eyes, rather than go about in the sun hunting up for evidence'.

However, mere statement made in police custody does not infer duress, but, it must be proved as a fact in the

circumstances of each case.

In *Nandini Satpathy* (Ex-Chief Minister of Orissa) case, the accused was called to Police Station to answer questions on charges of corruption. She refused to answer and claimed protection under Art. 20(3). Held, accused is entitled to keep her mouth shut, if the questions were of such a nature as to implicate her in this or in any other offence. Tape-recorded statements (taken without duress) were allowed in *YusufAli case*. In *Kuttan Pillai 's case*, a document recovered on search of house of accused was held not under duress.

14.4 : Right to life and Personal Liberty : Art. 21:

(i) Art. 21 of our Constitution declares : "No person shall be deprived of his life or Personal Liberty except according to *procedure established by law*".

The drafting committee, added the word "personal", to restrict the wide meaning of liberty. Though there was much discussion to adopt "*due process of law*" of U. S. Constitution (5th and 14th Amendments), it ultimately preferred the Japanese expression "procedure established by law".

In England, the **Magna Carta** (1215) declared "No man shall be taken or imprisoned save by law of the land".

(ii) **Right to life** : The Constitution guarantees the right to life but subject to procedure established by law. Life can be taken away by the State according to law. In *Jagmohan Singh V. State of U. P.* it was held that "death sentence" was not violative of Art. 21.

Life does not mean the mere animal existence of man, but, "extends to protection of every limb of the body through which the soul communicates with the outer world".

(iii) **Personal liberty** : According to Blackstone, this means "the power of locomotion, or moving of one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due process of law".

Wider Meaning to include Arts. 21 and 19 :

The Supreme Court had held in *Gopalan's* case, that Arts. 21 and 19 were mutually exclusive, and hence, preventive detention which was covered under Art. 21, could not be tested with the freedoms of Art. 19. This has been overruled in *S. N. Sarkar V. State of West Bengal*. Hence, the Preventive Detention Law, or any such law, may be tested under Art. 19. Hence the position is that while Art. 19(1) deals with a species of rights, or freedoms, Art. 21 *takes in and comprises the residue*.

In *Kharak Singh V State of U.P.* (1963), the petitioner was tried for dacoity but was released. The police opened a history sheet and put him under surveillance. They made domiciliary visits during nights, and the Supreme Court held that such visits were without the authority of law and hence, void. But in *Govind V. State of M.P.* there was a *Clear Law* for domiciliary visits, and the Supreme Court upheld such visits.

(iv) **Procedure established by law:** "Procedure" refers to the manner and form of enforcing law. The word "law" was understood to mean enacted law and hence, procedure established by law meant procedure prescribed by the Legislature. Such a law could not be tested as to its reasonableness (*Gopalan 's case*). This was changed by the Supreme Court in *Hoskot V State of Maharashtra* where it was held that 'law' must be 'reasonable'. Here a Reader of a college was sentenced to 3 years imprisonment; he served the sentence. He had not been given a copy of the judgment. Held, procedure established by law means 'fair and reasonable procedure'. A copy should have been given

to him.

This was confirmed further in *Menaka Gandhi V. Union of India*.

Thus in procedure established by law the 'law' should be valid as per Arts. 21 and 22 and must be reasonable. It must pass the tests of reasonableness under Art. 19. This wide interpretation has raised the standards of liberty to almost match with the American concept of 'due process of law'.

Passport Cases : (a) In *Satwant Singh V. A.P.O.* (1967),

the passport was not renewed to the petitioner to go abroad. The Supreme Court held that to go abroad was a fundamental right, and Satwant was entitled to his passport. To meet this case the Passport Act 1967 was enacted by the Parliament.

(b) In *Maneka Gandhi V. Union of India* (1978), the impounding of the passport was questioned. The Supreme Court, overruled Satwant Singh's case and held, that to go abroad was not a fundamental right. But, it held under (Art. 21) "procedure established by law," the law must be reasonable and must answer the tests of Art. 19. Hence, the denial of passport may affect the right to profession abroad etc. Passport was issued to the petitioner.

(v) **Art. 21 and National Emergency:** When the National Emergency is proclaimed (Art. 352), the President may suspend Art. 14, 21 and 22. In the Habeas Corpus Case (*Shukla V. A.D.M., Jabbalpur*, 1976), the Supreme Court held that as the remedy had been suspended the Court could not go into the validity of the detention order.

To meet this decision, the 44th Amendment has provided that Art. 21 cannot be suspended during national emergency.

(vi) **Extension of Art. 21 :** Art. 21 has been extended to give protection to—(1) Under-trial prisoners; (2) Prisoners serving a sentence; (3) Prisoners subject to ill-treatment or inhuman treatment; (4) Persons against whom no trial is

launched for years (*Pahadia V. State of Bihar*), (5) Person, who was kept in prison for years even after order of release by courts [Supreme Court has ordered for payment of compensation]; (6) Case of blinding of under-trials (*Khatri V. State of Bihar*); (7) Cases of abuse of young prisoners or under-trials etc.; (8) Free legal aid to indigent accused (*Khatoon V. State of Bihar*); (9) Cases of 'leg iron chains' to prisoner (*Sunil Batra V. Delhi Administration*); (10) Consultation with a lawyer in the prison, without the custom officer being present within the hearing distance (*Francis V. Delhi*); (11) Prisoners' right to publish books (*State of Maharashtra V. Panduranga*).

(vii) **Relationship between Arts. 21 and 22** : In *Gopalan V. State of Madras*, Gopalan who had been detained under the Preventive Detention Act, challenged the Act as violative of Art. 21. The contention of the State that Art. 21 did not apply as there was Art. 22 for arrest or detention, was rejected by the Supreme Court.

It held that Art. 21 dealt with the substantive aspect, whereas Art. 22 dealt with the procedural aspect. In view of *Maneka Gandhi's case*, 'the law' must be 'reasonable' also (Art. 19).

14.4 A **Right to Education Act 2009**

– **Article 45** states “The State shall *endeavour* to provide, within a period of ten years, from the commencement of the Constitution, for free and compulsory education for all children until they complete the age of 14 years.”

In 2002, the 86th Constitutional Amendment was passed by the Parliament adding Article 21A, to Article 21.

Thus it became a **fundamental Right like Right to life**.

New Article:

Article 21 A states:

"the state shall provide free and compulsory education to all children of the age of 6 to 14 years as the state may, by law determine".

Pursuant to this amendment, the Parliament passed the Right to Free and Compulsory Education Act (RTE) which is effective from April 1, 2010

Salient features of the RTE Act

1. Free Elementary Education for ALL children in age group 6-14 years in a neighborhood school.

There should be no financial constraints can "prevent" a child from a **enrolling, attending and completing** elementary education. Elementary education is 8 years of education from classes 1-8. children between 6-14 years, The neighborhood within 3 km from home of child

2. Compulsory Elementary Education. .

There is a duty of the parent to send their children to school (Article 15k) and it is the obligation of the government to ensure enrolment, attendance and completion of elementary education. If parents are reluctant, the government should find a way to convince, without use of force/violence/pressure.

3. Age Appropriate Education. etc

Children are to be enrolled in the class that corresponds to their **age**. Hence, if a 10 year

old is a drop out he will be enrolled in class 5 and “special training” is to be provided to bring up to the class 5 level.

4. Quality Norms for Schools and Qualifications for Teachers are given in detail.
5. Curriculum in line with **Constitution**.
The curriculum, syllabus and books must conform to Constitutional values. Hence, communal and harmful agendas cannot be part of the materials used and taught in the schools of the country.
6. Evaluation system to be based on principle of Continuous and Comprehensive Evaluation (CCE).
7. 25% Reservation in Private Schools
All private schools are required to admit in their incoming class 25% children from weaker sections and socially disadvantaged groups from their neighbourhood.

Case law :
Society for Un-aided Private Schools of Rajasthan V Union of India 2011

The **Supreme Court** upheld the constitutional validity of the R T E Act, through a majority of chief justice SH

Kapadia and Justice Swatanter Kumar. [Justice Radhakrishnan dissented]

The Supreme Court has brought all educational institutions within RTE's ambit **except unaided minority institutions**

It has held that the Act is operative from the academic year 2012-2013 itself and would **not apply retrospectively** to any admissions or to resident students in boarding schools.

The private schools' contention that such mandatory reservation would drain their resources was answered by the government, which promised reimbursement of money to the **extent of the reservation**.

The Court held:

. Article 21A requires non-state actors to achieve the socio-economic rights of children in the sense that they shall not destroy or impair those rights and also owe a duty of care.

The State, however, cannot free itself from obligations under Article 21A by offloading or outsourcing its obligation to private State actors like unaided private educational institutions or to coerce them to act on the State's dictate.

Private educational institutions have to empower the children, through developing their skills, learning and other capacities, human dignity, self-esteem and self-confidence and to respect their constitutional rights.

Article 21 read with 21A, therefore, cast an obligation on the State and State alone. . I am, therefore, of the considered view that Article 21A, as such, does not cast

any obligation on the private unaided educational institutions to provide free and compulsory education to children of the age 6 to 14 years.

Article 21A casts constitutional obligation on the State to provide free and compulsory education to children of the age 6 to 14 years.

14.5 : Right against Arrest and Detention: Art.22:

(i) **Protection** : Art.22(1) to (3) deal with the protection given to an arrested person.

(a) Any person, who is arrested, shall not be detained in custody without being informed, as soon as may be, of the grounds of arrest;

(b) Every person who is arrested should be produced before the Magistrate within 24 hours of his arrest, excluding the journey time;

(c) Every arrested person, shall not be denied the right to consult and to be defended by a legal practitioner of his choice.

(ii) Preventive Detention Law :

There are two types of detention—(1) Punitive and (2) Preventive. It is punitive if the detention is according to the sentence given by the Court, but in preventive detention, the person is detained *not for any proved guilt*, but to prevent him from the possibility of committing an offence. The objective is 'prevention is better than cure'.

Safeguards:

The preventive detention law must be according to Art. 22(4) to (7) and also Arts. 14,19, 21 and Seventh Schedule.

The provisions may be summarised as follows (with 44th Amendment):

(a) The preventive detention law may provide for detention up to 2 months;

(b) The grounds of detention must be communicated to

the detainee, as soon as may be;

(c) If the Advisory Board gives its opinion that there are no sufficient reasons, the detention made after 2 months is void (*S. D. Prasad V. State of Bihar*);

(d) The Advisory Board shall consist of a chairman, a serving High Court Judge and two other members (may be retired judges), it should be constituted according to the direction of the concerned High Court Chief Justice;

(e) Parliament is empowered to prescribe the maximum period of detention in any class or classes of cases;

(f) The detaining authority, may not disclose the facts of detention, if it considers that it would be against the public interest to disclose.

Recent legislation :

The Preventive Detention Act 1950, which was being renewed from year to year, lapsed in 1969.

But, in its place the MIS A (Maintenance of Internal Security Act 1971) was made.

Sn.17A of this Act, was struck down by the Supreme Court, as it provided for 21 months detention without consulting the Board (*Sarkar V. State of W.B.*).

In 1974, the Parliament enacted COFEPOSA (Conservation of Foreign Exchange and Prevention of Smuggling Act), 1974.

The Parliament repealed the MIS A in 1978.

In its place, it has passed the Essential Services Maintenance Act (ESMA).

Chapter 15

SECULAR STATE

Arts. 25 to 28 :

(i) The Framers of our Constitution incorporated the Freedom of religion which is the hall mark of Secularism in Arts.25 to 28. They were inspired by the U.S. Constitution, where according to Jefferson there is a wall of separation between *the Church and the State*. (First Amendment to U.S. Constitution).

In our constitution, 42nd Amendment added "secular" to the preamble. Secular is opposed to "religious state (Theocratic State) " and "Irreligious state ". The State should be neutral, and, treat all religions equally. Religious practises, worshipping of God etc. are left to the dictates of every individuals conscience.

The State should not interfere.It should not aid one religion or prefer one religion over another. It should not collect any religious taxes.This is the essence of separation of the church from the State.

(ii) **Freedom of Conscience** : Art. 25. All persons are equally entitled to the freedom of conscience and the right to freely profess, practise and propagate religion,

(a) This is subject to public order, morality health and other provisions of part III.

(b) State may by law regulate or restrict any economic, financial, political or other secular activity of the religion.

(c) State may provide for (1) Social Welfare and reform or (2) Throwing open of Public Hindu religious institutions to all classes of Hindus. (Hindu includes a Sikh, Jain or

Buddhist. A Sikh may wear a Kirpan).

In "Anand Marg" case, a ban imposed under Sn. 144 Cr.P.C. on Tandava dance with daggers, trisul, skulls etc.in *public places* was held valid on grounds of public order.

(iii) **Freedom of Religious Institutions** : Art. 26 . Every religious denomination has the right:

(a) To establish and maintain religious and charitable institutions.

(b) To manage its religious affairs.

(c) To own and acquire property, and

(d) To administer such property.

(iv) These two Articles deal with the basic essentials of our Secularism. Art. 25 refers to persons whereas Art. 26 guarantees freedom to Religious Institutions. These are subject to certain restrictions. The limit and scope of these have been discussed by the Supreme Court in a number of cases :

Commissioner of H.R. Endowments V. Laxmindra Thirtha Swamiar (Sirur Mutt Case) : The Madras Hindu Religious and Charitable Endowment Act had provided for provisions to deprive the mahant of his right to administer the property. It enabled the Commissioner to enter the premises and also the sanctum sanctorum of the temple. The Supreme Court struck down these provisions. It declared that 'A religion is not only a code of ethical rules, but it contains rituals, ceremonies, modes of worship and also observances regarding dress, food etc. There is internal autonomy and *no outside authority has jurisdiction to interfere.*'

In *Venkataramana Devaru V. State of Mysore*, the Madras Temple Entry Authorisation Act, provided for the entry of Harijans to any Hindu temple. This was challenged by the trustees of the temple belonging to Gowda Saraswaths. They claimed under Art. 26 (1), that they had the rights to manage the affairs of the temple and hence, they could bar the entry of any person. Held, Art. 25(2), to throw open Hindu temples

to all Hindus prevailed over Art. 26(1). The law was held valid.

In *Saifuddin V State of Bombay*, the right of a religious head to excommunicate a member from the community was held valid.

In *Ratilal V. State of Bombay*, the Charity Commissioner was authorised to deviate the funds of public trust for purposes other than what the donors had indicated. Held, this violated Art. 26.

State of Rajasthan V. Sajjanlal. The temple of Lord Jagannath at Puri is a denominational temple. If a law provided for a non-member of the denomination to be a member or chairman of the Managing Committee, then it would be violative of Arts. 25 and 26. As the Rajasthan Public Trust Act did not have such an effect, it was held valid.

In "National Anthem" case our Supreme Court held that "religious objectors" (Jehovas) could not be compelled to salute the national flag.

Three children, who stood up respectfully, but *refused to sing national anthem* were expelled from school.

The court followed the American Supreme Court (Barnette's Case), and held that standing respectfully but not singing national anthem, was not violative of any law.

The expulsion order was quashed.

In Archaka's Case, the Supreme Court held that the office of Archaka is secular, and, hence a Hindu, who is qualified in Agamas etc. as required by the Hindu Temple, should not be denied of his opportunity in appointment on grounds of caste.

(v) **Freedom from religious taxes :**

Art. 27 declares that no person should be compelled to

pay any taxes or tolls to promote or maintain any particular religion or its denomination.

In *Sri Jagannath V. State of Orissa*, the Supreme Court held valid a fee levied by the Orissa H.R.E. Act, as there was no favour to any particular religion or religious denomination.

In *Swamiar's Case*, the Supreme Court held, a fee 5% of the total income of the religious institution per annum was a 'tax' and hence the Madras Legislature was incompetent. The levy was held *ultra vires*.

(vi) Art. 28 states that religious instructions shall not be provided in Educational Institutions wholly maintained out of State Funds.

(a) a State may administer an Educational institution created under a trust or endowment which requires imparting of religious instruction.

(b)

(c) In State recognised or aided public educational institutions if there is any religious instruction or worship, compulsory attendance of any person is barred. But, voluntary attendance is not barred. Similarly a minor may attend if his guardian has given consent.

Chapter 16

WRITS

16.1 : Writs :

The prerogative writs, are the 'Supreme remedies' available in England. Our Supreme Court and the High Courts are empowered to issue them, at their discretion. These are issued against the 'State' as defined in Art. 12. There are five such writs: Habeas Corpus, Mandamus, Certiorari, Prohibition and Quo Warranto.

16.2 : Habeas Corpus (means To have the body):

(i) It is in the nature of a call to the detaining authority to produce the detainee before the court in order to let the court know on what grounds the detainee has been detained. If there are no legal grounds for detention, the detainee is to be released. The writ may be addressed to anybody or authority who has detained.

The Supreme Court in *K. Sanyal V. District Magistrate Darjeeling*, held that the production of the detainee before the Court was not necessary.

(ii) The Supreme Court under Art. 32 and the High Courts under Art. 226 are empowered to issue the writ of Habeas Corpus for enforcement of Fundamental Rights :

(Eg.: Art. 21). The detention is valid, if it is according to Art. 21 or 22 of the constitution. A writ will be issued if the arrested person is not produced before the court within 24 hours as per Art. 22.

(iii) Any person who has been detained or his 'next friend' may move the writ of Habeas Corpus. The burden is on the detainee to prove that the detention is without legal authority or with *mala fides* or in excess of authority.

(iv) According to 44th Amendment, **even during National Emergency, Arts.21&22 cannot be suspended.**

Hence, this supersedes the Habeas Corpus case (*A.D.M. Jabbalpur V. Shukla*).

The position now compares well with England, where even during I & II World Wars Habeas Corpus was not suspended. (*Liversidge V. Anderson and in re Halley* : Leading English Cases on this).

(v) Writ may be issued against detention under contempt of the Parliament (*In re V.P.Legislature tangle*).

Andhra Pradesh Legislature Case (1989) :

The Supreme Court issued a Writ of Habeas Corpus to release 30 persons who had been detained under the orders of the Speaker.

(vi) **Preventive Detention** : A person may be detained under any law made under this, but Art.22 (2) to (7) must be followed. Otherwise the detention law becomes bad. Writ may be issued.

Khudiram Das V.St.of West Bengal.

(vii) Leading Cases : (Supreme Court).

(a) *In re Madhu Limaye* 1969.

(b) *Dr. Ram Manohar Lohia V. Supt.* 1955.

16.2 : Writ of Mandamus :

Literally mandamus means 'Command'. It is a peremptory remedy.

It demands *masterly activity* on the authority or body or person to whom it is addressed. It commands him to perform some public or quasi public legal duty.

When the doing of a duty is by wilful means, the writ of mandamus may be sought after.

It is issued in India to the State (Art. 12), against Govt. and the public officers and others who are bound to do a public duty or statutory duty. It may be issued to court and other judicial bodies when they have refused to exercise their jurisdiction.

Purpose:

(a) To enforce fundamental rights,

A Communal Govt.order of Madras which infringed the right of the petitioner was held ultra vires by the Supreme Court, and the Government was ordered to consider and dispose of the petitioners application for the job on merit, without the government order. (*Venkataramana V State of Madras*).

(b) To enforce statutory duties.

(c) To enforce an authority to perform a public duty imposed by a statute.

(d) To compel the court to exercise jurisdiction.

(e) To direct a public official or government not to enforce an unconstitutional law.

(f) It may be granted against the President (i) *Privy Purse Case* ; (ii) *Sawyers Case* (United States) (iii) *Board of Education V. Rice*.

This cannot be issued against Private Bodies or Organizations.

It cannot be issued to the executive when the duty is merely discretionary.

16.3: Prohibition :

Is issued in *pending cases*. This writ is issued by the

Supreme Court or High Court to an inferior court. The prohibition is against the inferior court continuing its proceedings in excess of its jurisdiction or usurping jurisdiction which is not legally vested in it. Hence the inferior courts may be compelled to limit themselves to their jurisdiction.

Prohibition commands *masterly inactivity*. It is available against inferior courts, judicial and *quasi* judicial authority.

Grounds for issue of the Writ:

- (1) Excess of Jurisdiction or without Jurisdiction.
- (2) Violation of the principle of natural justice.
- (3) Lower court acting under an unconstitutional law.
- (4) Violation of fundamental rights.

The object of this writ is to prevent the defect, whereas certiorari cures the defect.

16.4: Certiorari:

It comes from 'Certified' (to inform). This is issued by the Supreme Court or the High Courts **only to the** inferior courts and tribunals. The conditions are :

- (i) The lower court or tribunal must have legal authority to decide questions touching the rights of an individual.
- (ii) It must have acted (a) without jurisdiction (b) in excess of jurisdiction or (c) there must be an *error apparent on the face of the record*.

That is:

- (1) Improperly constituted tribunals.
- (2) Subject matter of enquiry is beyond the tribunal's jurisdiction.
- (3) The tribunals acting in violation of **principles of natural justice**.
i.e., Rule against Bias, and Audi alterem partens.

This means, no one should be a judge in his own cause and that reasonable opportunity must be given to defend (Hear and decide).

Leading Cases:

- (1) *Gallapalli Nageswara Rao's Case.*
- (2) *Khushal Das Advani's Case.*
- (3) *Hari Vishnu V. Syed Ahmed:* Error apparent on the face of the record.

The Election Tribunal had decided a petition, allowing votes which would be invalid as per the Representation of People Act.

Held, this was an error apparent on the face of the record and hence a certiorari was issued by the Supreme Court.

This writ is not issued against private bodies or organisations.

[For more details refer MSR's e-book on Administrative Law .]

16.5 : Quo Warranto :

Means *by what Authority ?*

This writ was issued in England and in India to persons who *claimed or usurped any office*, franchise, liberty or privilege belonging to the State.

The object was to enquire by what authority such claim or usurpation, was done and to decide who had the right to the office etc.

Conditions:

- (i) The office must be public, statutory or constitutional.
- (ii) It must be a substantive one.

The basis of the writ is to see that by an unlawful claim a person does not usurp a public office. The writ is discretionary and, the court may refuse to issue if there is an alternative

remedy. This writ is a very powerful instrument for safeguarding against usurpation of public office.

This writ can be moved by any person (public Interest Litigation). In Karkare's Case, a private individual moved a writ against the Advocate General of MR Writ was issued.

University of Mysore V. Govinda Rao: G who was a reader in English, petitioned for a Quo Warranto writ against Sri Anniah Gowda who was appointed as Professor of English.

The Supreme Court held that as per the law, the University could prescribe the qualifications, and the court would not go into the nature of qualification required. It held that the qualifications were fulfilled by Sri Annaiah Gowda. Hence, Quo Warranto was not issued against the University.

Chapter 17

WELFARE STATE : DIRECTIVE PRINCIPLES

(i) **Objectives** : Part IV of the Constitution aims at the establishment of a Welfare State in contradiction to a Police State. It contains Bentham's major principles of Fabian socialism and Guild Socialism.

The fathers of the Constitution were influenced by the **Irish Constitution** and 'The Instrument of Instruction of Government of India Act of 1935'.

According to Dr. Ambedkar the 'Directives' are the Instructions, and whoever exercises power shall respect them, and shall not ignore them.

The village Panchayats, Cottage Industry, etc. are essentially Indian. Gandhiji had fought for their recognition.

The Directive Principles are directives to the Government and Government agencies and are to be followed as fundamental in the governance of the Country. It shall be the duty of the legislature to apply them in making law.

The Constitution has provided for a *code of conduct*. It has placed an ideal before the legislatures. The directives guide the path of the people to achieve social, economic and political justice enshrined in the preamble to the Constitution.

They are *not pious obligations*. They are not a lip service.

(ii) **Contents** : The Directives are enumerated in Art. 37 to 51. The State must strive to promote the welfare of the people by informing in all the institutions of

National life,

justice, social economic and political. The directives, inter alia provide for (a) Adequate means of livelihood, (b) proper distribution of material resources to subserve the common good 39 (b); (c) prevention of concentration of wealth. Art. 39 (c). (d) Equal pay for equal work. (e) protection of health and strength of workers. (f) prevention of exploitation of youth and children etc.

The other Directives are in relation to :

- (1) Organisation of work, etc. of Village Panchayats.
- (2) Provide for work, education and public assistance.
- (3) To provide for just and humane conditions of work.
- (4) To secure work, a living wage and a decent standard of living.
- (5) To provide for compulsory free education to children upto 14 years.
- (6) Prohibition of intoxicating drinks. (Art. 47)
- (7) To promote International peace and security (Art. 51) etc.

(iii) Supreme Court Decisions : Conflict between Parts III and part IV

State of Bombay V. Balsara: Prohibition of intoxicating liquors (Art. 47) against Art. 19 (Freedom of Trade).

Directive

(Art. 47) prevailed.

(a) *Kureshi V. State of Bihar* : Cow slaughter Prohibition (Art. 48) against Art. 19. Held Art. 48 prevailed.

(b) *State of Bihar V. Kameswara Singh* : Public purpose under Art. 39 against Art. 31 (property right) Held Art. 39 prevailed.

(c) *State of Madras V. Champakam Dorairajan* : Promo

tion of Schedule Caste Backward Classes etc.(Art.46) against Art. 15 (Equality). Held Art. 15 prevailed.

Other leading cases:

1. *In re Kerala Education Bill.*
2. *Kochunni's Case.*
3. *Golaknath's Case.*

(iv) **Constitutional Amendments** : The Supreme Court had held that in case of conflict between part in and part IV, Part HI Fundamental Rights prevailed. (*Champakam's Case*).

25th Amendment: Stated Art. 39 (b) & (c) prevailed over fundamental rights.

42nd Amendment: Provided that Part IV prevailed over the Fundamental Rights, and that such a law under Directives should not be questioned in any Court of law.

This has been quashed in the Minerva Mills Case, by the Supreme Court, as violative of basic structure of the Constitution.

Chapter 18

ADDITIONAL TOPICS

18.1: Anti-defection Law : 10th Schedule to the Constitution added by the 42nd Amendment 1985.

Provisions as to disqualification of MPs and MLAs on grounds of DEFECTION.

The Anti-defection Bill was passed, unanimously, by the Lok Sabha on 31 January 1985. The Bill was later passed by the Rajya Sabha and assented to by the President. This is the 42nd Amendment Act.

The main objective of this Amendment is to outlaw political defections and to cleanse public life to some extent.

Salient Features :

By the 42nd Amendment

(i) Arts. 101, 102, 190 and 191 and the 9th Schedule of the Constitution have been suitably amended. The major changes are in Art. 121 and the 9th Schedule.

(ii) One controversial clause in the Bill provided for disqualification of the members of the Parliament or of State

Legislatures, on the basis of their conduct outside their respective legislatures. This clause was omitted by the government which had piloted the Bill.

(iii) The Amendment applies to Members of Parliament and the Members of State Legislatures only.

(iv) An elected member of a House shall be deemed to belong to the Political Party by which he was set up as a candidate for election. In respect of a nominated member, he shall be considered as a member of that Party which he represented as on date of nomination.

(v) 'Defection' from his party disqualifies the Member according to the 9th and 10th Schedules. 'Disqualification' means—

- (a) Voluntarily giving up his membership;
- (b) Voting or abstaining in the House, contrary to the whip. (But, prior permission or condoning will not disqualify.)

(vi) **Does not apply to Split:** 1/3 of the members of the Legislature party may split from the main Political Party. From the time of such split such a faction or group may be deemed to be a Political Party.

(vii) **Does not apply to Mergers :** A Political party may merge with another Political Party or may form a new party if 2/3 of the Members of each of such Political Parties have agreed to such merger.

(viii) Rules relating to defection do not apply to the Speaker, Deputy Speaker, Chairman or Deputy Chairman, who may *by virtue of his office* voluntarily give up his Political Party.

(ix) **Decisions on disqualifications :**

As the proceedings to decide the question of disqualification are considered as "Proceedings of the House", **no court has any jurisdiction in respect of any matter connected with disqualification of member of the Parliament or State Legislature. This part of the Amendment was struck down as void and ultra vires by the Supreme Court in Kihoto V zachilhu 1992.**

(x) **Conclusion :** Although this Amendment is not a

panacea to cure the ills of defection and of changing of colours—like a chameleon—by the politicians, still, the step taken to cleanse the public life is a welcome feature. Suitable amendments will have to be made to peg-up the loop-holes (especially to cover cases when the Houses are not in session). By itself, the Amendment is a bold step forward

to arrest the spree of defections.

18.2 : 'State' as defined in Art. 12 :

"State" is defined in Art. 12 of the Constitution. It includes (1) the Government and Parliament of India; (2) the Government and State Legislatures and (3) all *local or other authorities* within the territory of India or under the control of the Government of India.

This definition is for purposes of Part III as writs can be issued only against the State, and, not against private or other bodies not included in the definition.

The Supreme Court has widened the scope of 'local or other authorities' in its recent decisions.

(i) in *Shanta Bai's case*, the Madras High Court had held that the University was not within "other authorities" and hence, was not within the definition, no writ could be issued. This was overruled by the Supreme Court in *Rajasthan Electricity Board case*.

It held that 'other authorities' included the Electricity Board, University etc.

(ii) in *Sukhdev V. Bhagatram*, the Supreme Court held that Oil and Natural Gas Commission (ONGC), LIC, Industrial Financial Corporation were within Art. 12.

(iii) in *Airport Authorities Case*, the Court held that to be an authority within Art. 12, it must be *an agency or instrumentality of the Government*. The tests are—

- (a) Financial resources (must be by government);
- (b) Deep State Control;
- (c) Functional Character must be government;
- (d) Department of Government transferred to Corporation;
- (e) Corporation, with State control or monopoly.

(iv) in *Ajay Hasia's case* the Supreme Court further en-

larged the scope of Art. 12.

It held a government-owned society registered under Societies Registration Act, was an 'instrumentality' and hence, 'State'. It has been held that the Indian Statistical Society, Indian Council of Agricultural Research, Food Corporation of India, Steel Authority of India, the Central Inland Water Transport Corporation, and Bombay Children's Aid Society are within the definition of 'State'.

Exceptions :

- (1) Judiciary is not within the definition for purposes of Part III;
- (2) Private Bodies, or authorities or Companies.

18.3 : Judicial Review :

The doctrine of Judicial Review can be traced to *Marbury V. Madison* of the U.S. Supreme Court. It was held by Chief Justice Marshall that the Judicial Act of 1789 was *ultra vires* the Constitution.

This concept is in Art. 13 of our Constitution. Art. 13 states as follows:

(i) **Pre-Constitution Law** : Art. 13 (1). All laws in force in India as on 26-1-1950 which are inconsistent with Part III of the Constitution shall be void to the extent of the inconsistency.

(ii) **Post-Constitution Law**: Any law made by the 'State', which takes away or abridges the fundamental rights, shall be void to the extent of the contravention.

(iii) The term law is also defined in broad terms to include any rules, regulations, ordinances, bye-laws, notifications, G.O., custom or usage.

Thus the Supreme Court and the High Courts may issue writs to declare law as *ultra vires* the Constitution if it is not according to the Constitution.

(iii) **Basic Structure** : The Supreme Court in *Keshava-*

nanda Bharati's case has held that judicial review was part of the basic structure of the Constitution.

(v) **Constitutional Amendment:** For purposes of Art. 13, Law does not include a Constitutional Amendment Act.

(vi) **Not Retrospective :** In *Keshava Madhava Menon V State of Bombay*, the Supreme Court held that Art. 13 was not retrospective i.e., it is operative from 26-1-1950. Hence, a trial for offence under a pre-Constitutional Law which is inconsistent with the Constitution, is not wiped out on 26-1-1950, but may be continued. However, all procedural law is held to be prospective.

18.4 : Doctrine of Severability :

Under Judicial Review, the Supreme Court and the High Courts may declare a law as void if it is against the Constitution. The question is whether the whole of the law (or Statute) is void, or only that portion which is unconstitutional. To answer this, the Supreme Court has evolved the 'Doctrine of Severability'.

This means if a statute has offending and also valid provisions and, it is possible to separate the offensive from the valid provisions, then the offensive provisions alone are declared void and unconstitutional. The entire Statute or Act will not be quashed.

(i) *A. K. Gopalan V. State of Madras*. Sn. 14 of the Preventive Detention Act was declared void. As this provision could be severed from the other sections, the court applied the doctrine of Severability and held Sn. 14 void. This doctrine was applied in *Balsara's Case* and *R.M.D.C. Case*.

In *R.M.D.C. Case*, the Prize Competition Act was challenged. The Court held that competitions where success depended on 'Chance', could be severed from those dependent on SKILL. Hence, doctrine was applied and provisions relating to chance were quashed. The others were held valid.

If the offensive and other provisions are inextricably bound

up and cannot be severed, the entire Statute will be void.

(ii) *Chintman Rao V. State of M.P.* The object of the M.P. Legislature was to encourage agriculture under its 'Grow More Food' policy, and to prevent agricultural labour being engaged elsewhere during seasons. The Act enabled the Government to notify all those persons who could be so employed. The court held that the Act was void as it included women, children, the weak and the infirm. Further, as this could not be severed from the other parts, the entire Act was quashed by the court.

This was applied in *Kunhi Koman V. State of Kerala* (Kerala Agrarian Relations Act was quashed) and *Bank Nationalisation cases*.

(iii) Further, if the Act has provided for a Scheme containing valid and offensive provisions, and if it is not possible to implement the valid without the offensive provisions, the entire Act is void.

18.5: Vice-President:

According to Art.63, there shall be a Vice-President of India.

Election: The Vice-President is elected by both the Houses of Parliament, by secret ballot with the system of proportional representation by means of the single transferable vote. Joint meeting of two Houses is not necessary (11th Amendment).

Qualification : To contest, he must be a Citizen of India, above 35 years and must have the qualification to contest for Rajya Sabha. He should not hold any office of profit under Government or local authority. On election, he should take Oath, before entering office.

Tenure : The tenure is 5 years. He may resign, by giving notice to the President. He may be removed (after giving 14

days' notice) by a resolution of the Rajya Sabha agreed to by the Lok Sabha.

Functions : He is the ex-officio Chairman of the Rajya Sabha. He acts as the President, where there is a vacancy due to death, resignation or impeachment or otherwise of the President. Also in such circumstances as illness, absence etc. of the President, he acts as President. He in such cases entitled to such allowances and privileges etc. as are due to the President.

18.6 : Abolition of Untouchability :

(i) Art. 17 of our Constitution states : "Untouchability is abolished and its practice in any form is forbidden."

Mahatma Gandhi, in his *Vision of Ramrajya* had desired total abolition of untouchability and hence, Art. 17 was added. Gandhiji called these untouchables 'Harijans'.

Untouchability is not defined in the Constitution. It is a practice that developed historically in the Hindu Caste system. It is in various forms in different parts of India. Art. 17 has declared that its practice (in any form) is an offence punishable according to law.

(ii) **The Protection of Civil Rights Act:** The Parliament enacted the Untouchability Act in 1955 and has renamed it as the Protection of Civil Rights Act 1955. According to this, "Civil Right" is any right which a person gets as a result of abolition of Untouchability.

Example : Preventing such a person from entering a temple, shops, public places of entertainment, hotels, etc. or refusing to sell goods or render services in hospitals etc.

(iii) **Punishment:** The Act provides for stringent punishment with fine and imprisonment.

18.7 : Abolition of Titles : Art. 18 :

According to Art. 18, “No title shall be conferred by the State”, but for military or academic distinctions, titles may be given. Hence, Bharat Ratna, Padma Vibhushana, Padma Sri etc. may be given for distinct work. Similarly, military titles like Param Vir Chakra, Mahavir Chakra, Vir Chakra or Ashok Chakra may be given.

Objective: Equality in India demands equal treatment and hence, Art. 18 prevents the creation of any “noble class” which may corrupt public life. However, for growth and development of the State, persons who render distinct services may be awarded titles in appreciation of their work, in any field of endeavour—military, scientific or technical fields, social services etc.

Prohibits foreign titles : Art. 18 prohibits any Citizen of India from accepting any foreign titles. No foreigner who is in Government of India services should accept any foreign title, any present, emolument or office of any foreign state.

Parliament has not made any Act, to prohibit such titles so far.

18.8 : Governor:

According to the Constitution, there should be a Governor for each State (Art. 153) and the Executive Power of the State is vested in him (Art. 154). He is the Constitutional Head of the State and exercises his powers either directly or through officers subordinate to him. He acts according to the advice of the cabinet.

Appointment: Any Indian Citizen who has completed 35 years of age, may be appointed as the Governor by the President. Though there is a convention to consult the Chief Minister of the State before appointing the Governor of the State, still this is not followed in all cases. On appointment, the Governor takes an oath, before entering on his office.

He is appointed by the President and holds the job during the pleasure of the President. He may be removed or dismissed, and the Presidential “pleasure” or action is not justiciable (*Surya Narain V Union*). Mr. P. Patwari, the Governor of Tamilnadu was dismissed in 1980; Mr. Raghukul Tilak, Governor of Rajasthan was dismissed in 1981. These dismissals have been much criticised.

Of course, the Governor may resign at any time (e.g. : Mr. Ray, Governor of Punjab).

Powers and Functions:

Executive Powers : All executive actions are taken in the name of the Governor.

He acts according to the advice of the Cabinet headed by the Chief Minister. The advice so tendered by the cabinet or ministers cannot be inquired into by any courts.

He appoints the Chief Minister, and, on the advice of the Chief Minister, other ministers. The Chief Minister and other ministers hold their office during the pleasure of the Governor. According to the doctrine of Cabinet responsibility, the chief minister and other ministers hold their office so long as they command the confidence of the Assembly. In practice, however, the role of the Governors is not uniform :

(i) in 1970, Sri Charan Singh as Chief Minister of UP was not given an opportunity to prove his majority in the Assembly but the Governor asked him to resign. On refusal, he wrote to Mr. Giri, the President to invoke Art. 356, which he did and President’s rule was imposed. This has been much criticized.

(ii) In 1988, the chief minister of Karnataka Sri Bommai was dismissed and President’s rule was imposed. No opportunity to prove majority was given.

(iii) In 1972, when Smt. Nandini Satpathy resigned as chief minister of Orissa, Sri B. Patnaik claimed a majority but instead of giving an opportunity, the Governor recommended

President's Rule and dissolved the assembly.

(iv) In Andhra Pradesh, Sri N. T. Rama Rao was dismissed by the Governor, and refused to give permission for 2 days to prove his majority. Sri N.T.R. paraded his supporters before the President at New Delhi. The Governor resigned. The new governor asked Sri Bhaskar Rao to prove his majority, but he failed. Sri N.T.R. proved his majority in 4 days and formed his ministry.

Financial Powers : Money Bills are to be introduced only on the recommendation of the Governor. He has the contingency Fund at his disposal. He causes the Budget to be placed before the Houses.

Legislative Powers : The Governor has the powers to summon the Houses, to prorogue or to dissolve the assembly. He has a right to address the Houses, to send messages etc

In regard to Bills passed by both the Houses and sent to him, he may give his assent, or send to the Legislature for reconsideration. If the Bill is passed again with or without these recommendations, he should give his assent.

Ordinance Making Powers—Art. 213: This is an important legislative power of the Governor, similar to President's power under Art. 123 of the Constitution. He can issue an ordinance (1) when the Houses are not in session; (2) when he is satisfied that circumstances exist which require him to take *immediate action*. However, in cases where the Bill requires the consideration of the President, he cannot issue an ordinance.

Every ordinance should be laid before both houses and should be passed, within 6 weeks from the date of re-

assembling of the Legislature, otherwise, it ceases to have effect. Of course, the Governor may withdraw the ordinance at any time before 6 weeks. The ordinance is valid as an Act of Legislature. The leading case is *Wadhava V State of Bihar* where the Governor had issued 256 Ordinances, including re-promulgations. **The Supreme Court held that this was a fraud on the Constitution.**

Pardoning Powers : The governor has the powers to pardon, to reprieve, to respite or remit punishment; or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to matter to which the power of the State extends.

The President's power under Art. 72 is extensive and can grant pardon in case of death sentence. The Governor *has no such power*. He can suspend, remit or commute a sentence of death.

In Nanavati V State of Bombay, N was convicted for murder of Ahuja and was sentenced to life imprisonment by the Bombay High Court. N was in Naval custody. He moved the Special Leave Petition to Supreme Court. On the same day the Governor suspended the sentence to enable him to remain in Naval custody. Held, the Governor has no power to suspend a sentence, when the case is *subjudice* in the Supreme Court.

Miscellaneous: The Governor has, as per the Constitution, other powers, **but has no powers in the following** : (1) Emergency Powers; (2) Military Powers; (3) Appointing Powers of Judges, Attorney General etc.

The End

but no end to amendments !!

.....MSR