Introduction

TO THE

CONSTITUTION

OF INDIA

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INTRODUCTION
TO THE
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OF INDIA

यस्य सर्वे समारम्भाः कामसङ्कल्पवर्जिताः ।
ज्ञानाग्निदग्धकर्माणं तमाहुः पण्डितं बुधाः ॥

—श्रीमद्भागवद्गीता (४।१९)

Wise is the man
Whose efforts are
Free from desire,
Whose actions are
Tempered by Realisation
Of Truth sublime

—The Gita (IV, 19)

PREFACE

TO THE

FIFTH EDITION

The need for an up-to-date authoritative account of the Constitution to-day is all the more imperative to the citizen of India, irrespective of status and avocation, because of the multifarious proposals for amendment or revision of the existing Constitution presented by political parties of different shades, including the party in power.

The credentials of this book are that no less than 20,000 people have already read it and that it has been prescribed as a Text book by the various Universities of India, for the Under-Graduate as well as Post-Graduate courses in Political Science, Comparative Government and Law.

Owing to the multiple Amendment Acts and the volume of case-law which have intervened since the publication of the previous Edition, an increase in the price of the book has become inevitable; nevertheless, in the interests of the needier section of students, the price of the Paperback issue has been kept unchanged.

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PART ONE

NATURE OF THE CONSTITUTION

CHAPTER I

THE HISTORICAL BACKGROUND

Utility of a historical retrospect.

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

Practically the only respect in which the Constitution of 1949[1] differs from the constitutional documents of the preceding two centuries is that while the latter had been imposed by an imperial power, the Republican Constitution is made by the people themselves, through representatives assembled in a sovereign Constituent Assembly. That explains the majesty and ethical value of this new instrument and also the significance of those of its provisions which have been engrafted upon the pre-existing system.

Government of India Act, 1858.

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

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

(a) The administration of the country was not only unitary but rigidly centralised. Though the territory was divided into Provinces with a Governor or Lieutenant-Governor aided by his Executive Council at the head of each of them, the Provincial Governments were mere agents of the Government of India and had to function under the superintendence, direction and control of the Governor-General in all matters relating to the government of the Province.[3]

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

(c) The control of the Secretary of State over the Indian administration was absolute. The Act vested in him the 'superintendence, direction and control of all acts, operations and concerns which in any wise relate to the Government or revenues of India.' Subject to his ultimate responsibility to the British Parliament, he wielded the Indian administration through the Governor-General as his agent and his was the last word, whether in matters of policy or of details.[3]

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

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

Indian Councils Act, 1861.

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

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

Indian Councils Act, 1892.

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

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

The Morley-Minto Reforms and the Indian Councils Act, 1909.

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

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

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

On the other hand, the positive vice of the system of election introduced by the Act of 1909 was that it provided, for the first time, for separate representation of the Muslim community and thus sowed the seeds of separatism[4] that eventually led to the lamentable partition of the country. It can hardly be overlooked that this idea of separate electorates for the Muslims was synchronous with the formation of the Muslim League as a political party (1906[5]).

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

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

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

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

The Indian National Congress which, established in 1885, was so long

under the control of Moderates, became more active during the First World War and started its compaign for self-government (known as the 'Home Rule' movement). In response to this popular demand, the British Government made a declaration on August 20, 1917, that the policy of His Majesty's Government was that of—

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

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

Main features of the system introduced by the Act of 1919.

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

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

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

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

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

lature was empowered to present its own budget and levy its own taxes relating to the provincial sources of revenue.

At the same time, this devolution of power to the Provinces should not be mistaken for a *federal* distribution of powers. Under the Act of 1919, the Provinces got power by way of delegation from the Centre. The Central Legislature, therefore, retained power to legislate for the whole of India, relating to any subject, and it was subject to such paramount power of the Central Legislature that the Provincial Legislature got the power "to make laws for the peace and good government of the territories for the time being constituting that province."

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

III. *The Indian Legislature made more representative*—No responsibility was however, introduced at the Centre and the Governor-General in Council continued to remain responsible only to the British Parliament through the Secretary of State for India. Nevertheless, the Indian Legislature was made more representative and, for the first time, *bicameral* It was to consist of an Upper House, named the Council of State, composed of 60 members of whom 34 were elected, and a Lower House, named the Legislative Assembly, composed of about 144 members of whom 104 were elected The powers of both the Houses were equal except that the power to vote supply was given exclusively to the Legislative Assembly. The electorates were, however, arranged on a communal and sectional basis, developing the Morley-Minto device further.

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

Shortcomings of the Act of 1919

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

(i) Notwithstanding a substantial measure of devolution of power to the Provinces, the structure still remained unitary and centralised "with

the Governor-General in Council as the keystone of the whole constitutional edifice; and it is through the Governor-General in Council that the Secretary of State and, ultimately, Parliament discharged their responsibilities for the peace, order and good government of India'". It was the Governor-General and not the Courts who had the authority to decide whether a particular subject was Central or Provincial. The Provincial Legislature could not, without the previous sanction of the Governor-General, take up for consideration any bill relating to a number of subjects.

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

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

The persistent demand for further reforms, attended with the dislocation caused by the Non-co operation movement, led the British Government in 1927 to appoint a Statutory Commission, as envisaged by the Government of India Act, 1919 itself (s. 84A), to inquire into and report on the working of the Act and in 1929 to announce that Dominion Status was the goal of Indian political developments. The Commission, headed by Sir John Simon, reported in 1930. The Report was considered by a Round Table Conference consisting of the delegates of the British Government and of British India as well as of the Rulers of the Indian States (inasmuch as the scheme was to unite the Indian States with the rest of India under a federal scheme). A White Paper,

The Simon Commission.

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

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

'Communal Award'.

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

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

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

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

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

But notwithstanding the introduction of Provincial Autonomy, the Act of 1935 retained control of the Central Government over the Provinces in a certain sphere by requiring the Governor to act 'in his discretion' or in the exercise of his 'individual judgment' in certain matters. In such matters,

the Governor was to act without ministerial advice and under the control and directions of the Governor-General, and, through him, of the Secretary of State.

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

(*i*) The administration of defence, external affairs, ecclesiastical affairs, and of tribal areas, was to be made by the Governor-General in his discretion with the help of 'counsellors,' appointed by him, who were not responsible to the Legislature. (*ii*) With regard to matters other than the above reserved subjects, the Governor-General was to act on the advice of a 'Council of Ministers' who were responsible to the Legislature. But even in regard to this latter sphere, the Governor-General might act contrary to the advice so tendered by the ministers if any of his 'special responsibilities' was involved. As regards the special responsibilities, the Governor-General was to act under the control and directions of the Secretary of State.

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

(c) *The Legislature.*—The Central Legislature was bicameral, consisting of the Federal Assembly and the Council of State.

In six of the Provinces, the Legislature was bicameral, comprising a Legislative Assembly and a Legislative Council. In the rest of the Provinces, the Legislature was unicameral.

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

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

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

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

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

There were similar fetters on the Provincial Legislature.

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

(a) *Distribution of legislative powers between the Centre and the Provinces.*—Though the Indian States did not join the Federation, the federal provisions of the Government of India Act, 1935, were in fact applied as *between the Central Government and the Provinces*

The division of legislative powers between the Centre and the Provinces is of special interest to the reader in view of the fact that the division made in the Constitution between the Union and the States proceeds largely on the same lines. It was not a mere delegation of power by the Centre to the Provinces as by Rules made under the Government of India Act, 1919 (see p. 6 *ante*). As already pointed out (p. 9, *ante*), the Constitution Act of 1935 itself divided the legislative powers between the Central and Provincial Legislatures and, subject to the provisions mentioned below, neither Legisture could transgress the powers assigned to the other.

A three-fold division was made in the Act—

(*i*) There was a Federal List over which the Federal Legislature had exclusive powers of legislation. This List included matters such as external affairs; currency and coinage; naval, military and air forces; census. (*ii*) There was a Provincial List of matters over which the Provincial Legislature had exclusive jurisdiction, e.g., Police, Provincial Public Service, education. (*iii*) There was a Concurrent List of matters over which both the Federal and Provincial Legislature had competence, e.g., criminal law and procedure; civil procedure; marriage and divorce, arbitration

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

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

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

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

Changes introduced by the Indian Independence Act, 1947.

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

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

The following were the main results of such adaptations:—

(*a*) *Abolition of the Sovereignty and Responsibility of the British Parliament.*—As has been already explained (p. 3, *ante*), by the Government of India Act, 1858, the Government of India was transferred from the East India Company to the Crown. By this Act, the British Parliament became the direct guardian of India, and the office of the Secretary of State for India was created for the administration of Indian affairs,—for which the Secretary of State was to be responsible to Parliament. Notwithstanding gradual relaxation of the control, the Governor-General of India and the Provincial Governors remained substantially under the direct control of the Secretary of State until the Indian Independence Act, 1947, so that—

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

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

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

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

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

According to the adaptations under the Independence Act, there was no longer any Executive Council as under the Act of 1919 or 'counsellers' as envisaged by the Act of 1935. The Governor-General or the Provincial Governor was to act on the advice of a Council of Ministers having the confidence of the Dominion Legislature or the Provincial Legislature, as the case might be. The words "in his discretion," "acting in his discretion" and "individual judgment" were effaced from the Government of India Act, 1935, wherever they occurred, with the result that there was now no sphere in which these constitutional heads could act without or against the wishes of the Ministers. Similarly, the powers of the Governor-General to require Governors to discharge certain functions as his agents were deleted from the Act.

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

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

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

REFERENCES:

1. The Constitution of India was adopted on 26-11-49 and some of its provisions were given immediate effect. The bulk of the Constitution, however, became

operative on 26-1-50, which date is referred to in the Constitution as its 'Date of Commencement', and which date is celebrated in India as the *'Republic Day'* [see p. 20, *post*].

2. Vide Report of the Indian Statutory Commission (Simon Report), Vol. I, pp. 112 *et seq.*
3. Seton, India Office, p. 81.
4. Panikkar, Asia and Western Dominance, 1953, p. 155.
5. Nehru, Discovery of India, 1956, p. 385.
6. Simon Report, Vol. I, pp. 122-126; 148-156.
7. Report of the Joint Parliamentary Committee; Simon Report, Vol. I, pp. 232-238.
8. The effect on the Indian States will be dealt with separately.

CHAPTER II

THE MAKING OF THE CONSTITUTION

Demand for a Constitution framed by a Constituent Assembly.

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

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

The failure of the Statutory Commission and the Round Table Conference which led to the enactment of the Government of India Act, 1935, to satisfy Indian aspirations (p. 8, *ante*) accentuated the demand for a Constitution made by the people of India without outside interference, which was officially asserted by the National Congress in 1935. In 1938, Pandit Nehru definitely formulated his demand for a Constituent Assembly thus:

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

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

This demand was, however, resisted by the British Government until the outbreak of World War II when external circumstances forced them to realise the urgency of solving the Indian constitutional problem. In 1941 the Coalition Government in England recognized the principle that Indians should themselves frame a new Constitution for autonomous India, and in March 1942, when the Japanese were at the doors of India, they sent Sir Stafford Cripps, a member of the Cabinet, with a draft declaration of the proposals of the British Government which were to be adopted (at the end of the War) provided the two major political parties (Congress and the Muslim League)[1] could come to an agreement to accept them, viz.—

Cripps Mission.

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

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

(c) that there should be one Indian Union comprising all the Provinces and Indian States; but

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

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

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

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

Cabinet Delegation

After the rejection of the Cripps proposals (followed by the dynamic 'Quit India' campaign launched by the Congress), various attempts to reconcile the two parties were made, including the Simla Conference held at the instance of the Governor-General, Lord Wavell. These having failed, the British Cabinet sent three of its own members including Cripps himself, to make another serious attempt. But the Cabinet Delegation, too, failed in making the two major parties come to any agreement and were, accordingly, obliged to put forward their own proposals, which were announced simultaneously in India and in England on the 16th May, 1964.

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

The broad features of the scheme were—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The actual decision as to whether the two Provinces of the Punjab and Bengal were to be partitioned was, however, left to the vote of the members of the Legislative Assemblies of these two Provinces, meeting in two parts, according to a plan

and of June 3, 1947.

known as the 'Mounbatten Plan'. It was given a formal shape by a Statement made by the British Government on June 3, 1947, which provided, *inter alia*, that

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

It was also proposed that there would be a referendum in the North Western Frontier Province and in the Muslim majority district of Sylhet as to whether they would join India or Pakistan.

The Statement further declared H.M.G.'s intention "to introduce legislation during the current session for the transfer of power this year on a Dominion Status basis to one or two successor authorities according to decisions taken as a result of the announcement"

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

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

The Indian Independence Act, 1947

It must be said to the credit of the British Parliament that it lost no time to draft the Indian Independence Bill upon the basis of the above Plan, and this Bill was passed and placed on the Statute Book, with amazing speed, as the Indian Independence Act, 1947 (10 & 11 Geo. VI, c. 30). The Bill, which was introduced in Parliament on July 4, received the Royal Assent on July 18, 1947, and come into force from that date.

The most outstanding characteristic of the Indian Independence Act was, that while other Acts of Parliament relating to the Government of India (such as the Government of India Acts from 1858 to 1935) sought to lay down a Constitution for the governance of India by the legislative will of the British Parliament,—this Act of 1947 did not lay down any such constitution. The Act provided that as from the 15th August, 1947 (which date is referred to in the Act as the 'appointed date'), in place of 'India' as defined in the Government of India Act, 1935, there would be set up two independent Dominions, to be known as *India* and *Pakistan*, and the Constituent Assembly of each Dominion was to have unlimited power to frame

and adopt any constitution and to repeal any Act of the British Parliament, including the Indian Independence Act.

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

Constituent Assembly of India.

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

As to its composition, it should be remembered (see p. 18, *ante*), that it had been elected by indirect election by the members of the Provincial Legislative Assemblies (lower House only), according to the scheme recommended by the Cabinet Delegation The essentials of this scheme were as follows:—

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

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

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

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

As a result of the Partition under the Plan of June 3, 1947, a separate Constituent Assembly was set up for Pakistan, as stated earlier (p. 18, *ante*). The representatives of Bengal, Punjab, Sind, North Western Frontier Province, Baluchistan and the Sylhet district of Assam (which had joined Pakistan by a referendum) ceased to be members of the Constituent Assembly of India, and there was a fresh election in the new Provinces of West Bengal and East Punjab. In the result, when the Constituent Assembly reassembled on the 31st October, 1947, the membership of the House was reduced to 299, as in Table II. Of these, 284 were actually present on the 26th November, 1949, and appended their signatures to the Constitution as finally passed.

The salient principles of the proposed Constitution had been outlined by various committees of the Assembly such as the Union Constitution Committee, the Union Powers Committee, Committee on Fundamental Rights, and, after a general discussion of the reports of these Committees,

the Assembly appointed a Drafting Committee on the 29th August, 1947. The Drafting Committee, under the Chairmanship of Dr. Ambedkar, embodied the decisions of the Assembly with alternative and additional proposals in the form of a 'Draft Constitution of India' which published in February, 1948. The Constituent Assembly next met in November, 1948, to consider the provisions of the Draft, clause by clause. After several sessions, the consideration of the clauses or second reading was completed by the 17th October, 1949.

* Passing of the Constitution.

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

* Date of Commencement of the Constitution.

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

REFERENCES

1. As stated earlier (p. 5, *ante*), the Muslim League, professedly a Communal party, was formed in 1906. While its earlier objective was to secure separate representation of the Muslims in the political system, in its Lahore Resolution of 1940, it asserted its demand for the creation of a separate Muslim State in the Muslim majority areas. This idea was developed into the claim for dividing India into two independent States, when the Cripps offer was announced.

CHAPTER III

THE PHILOSOPHY OF THE CONSTITUTION

Every Constitution has a philosophy of its own.

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

The Objectives Resolution.

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

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

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

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

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

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

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

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

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

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

The Preamble.

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

JUSTICE, social, economic and political;

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

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

FRATERNITY assuring the dignity of the individual and the unity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION".

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

Independent and Sovereign.

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

Republic.

On and from the 26th of January, 1950, when the Constitution came into force, the Crown of England ceased to have any legal or constitutional authority over India and no citizen of India was to have any allegiance to the British Crown.

But though India declared herself a Republic, she did not sever all ties with the British Commonwealth of Nations as did *Eire*, by enacting the Republic of Ireland Act, 1948. In fact, the conception of the Commonwealth itself has undergone a change owing to India's decision to adhere to the Commonwealth, *without acknowledging allegiance to the Crown* which was the symbol of unity of the old British Empire and also of its successor, the 'British Commonwealth of Nations'.[8] It is this decision of India which has converted the 'British Commonwealth',—a relic of imperialism,—into a free association of independent nations under the honourable name of the Commonwealth of Nations.' This historic decision took place at the Prime Ministers' Conference at London on April 27, 1949, where our Prime Minister, Pandit Nehru declared that notwithstanding her becoming a sovereign independent Republic, India will continue—"her full membership of the Commonwealth of Nations and her acceptance of the King as the symbol of the *free* associa-

Sovereignty not inconsistent with membership of the Commonwealth.

tion of the independent nations and as such the Head of the Commonwealth."

It is to be noted that this declaration is *extra-legal* and there is no mention of it in the Constitution of India. It is a voluntary declaration and indicates a free association and no obligation.

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

"It is an agreement by free will, to be terminated by free will".[4]

Or,
Promotion of international peace.

The great magnanimity with which India took this decision in the face of a powerful opposition at home which was the natural reaction of the manifold grievances under the imperialistic rule and the great fortitude with which the association has still been maintained under the pressure of repeated disappointments and the strain of baffling international alignments speak volumes about the sincerity of India's pledge to contribute 'to the promotion of world peace' which is reiterated in Art. 51 of the Constitution:

"The State shall endeavour to—

(*a*) promote international peace and security,

(*b*) maintain just and honourable relations between nations;

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

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

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

"The only possible, real object that we, in common with other nations, can have is the object of co-operating in building up some kind of a world structure, call it one world, call it what you like".[5]

Thus, though India declares her sovereignty to manage her own affairs, in no unmistakable terms, the Constitution does not support isolationism

or 'Jingoism'. Indian sovereignty is consistent with the concept of 'one world', international peace and amity.

Democracy.

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

(a) As a form of government, the democracy which is envisaged is, of course, a representative democracy and there are in *our* Constitution no agencies of direct control by the people, such as 'referendum' or 'initiative'. The people of India are to exercise their sovereignty through a Parliament at the Centre and a Legislature in each State, which is to be elected on adult franchise and to which the real Executive, namely, the Council of Ministers, shall be responsible. Though there shall be an elected President at the head of the Union and a Governor nominated by the President at the head of each State, neither of them can exercise any political function without the advice of the Council of Ministers which is collectively responsible to the peoples' representatives in the respective Legislatures.

A representative democracy.

But though there is no direct participation of all the citizens in the administration, the Constitution holds out equality to all the citizens in the matter of choice of their representatives, who are to run the governmental machinery.

The ideal of a democratic republic enshrined in the Preamble of the Constitution can be best explained with reference to the adoption of universal suffrage (which has already been explained) and the complete equality between the sexes not only before the law but also in the political sphere. In order to ensure the 'political' justice held out by the Preamble, it was essential that every person in the territory of India, irrespective of his proprietary or educational claims should be allowed to participate in the political system like any other person. Universal adult suffrage, without any qualification, was adopted with this object in view. This means that every five years, the members of the Legislatures of the Union and of each state shall be elected by the vote of the entire adult population, according to the principle—'one man, one vote'.

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

Political Justice.

The offering of equal opportunity to men and women, irrespective of their caste and creed, in the matter of public employment also implements this democratic ideal. The treatment of the minority, even apart from the constitutional safegards, clearly brings out that the philosophy underlying the Constitution has not been overlooked by those in power. The fact that members of the Muslim community are as a rule being included in the Council of Ministers and in the Supreme Court without any constitutional reservation in that behalf amply demonstrates that those who are

working the Constitution have not missed its true spirit, namely, that every citizen must feel that this country is his own.

A democratic society.

That this democratic Republic stands for the good of *all* the people is embodied in the concept of a 'Welfare State' which inspires the Directive Principles of State Policy. The 'economic justice' assured by the Preamble can hardly be achieved if the democracy envisaged by the Constitution were confined to a 'political democracy'. In the words of Pandit Nehru,[6-7]—

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

Or, as Dr. Radhakrishnan has put it—

"Poor people who wander about, find no work, no wages and starve, whose lives are a continual round of sore affliction and pinching poverty, cannot be proud of the Constitution or its law".[8]

Economic justice.

The banishment of this poverty, not by expropriation of those who *have,* but by the multiplication of the national wealth and resources and an equitable distribution thereof amongst all who contribute towards its production is the aim of the State envisaged by the Directive Principles. Economic democracy will be installed in our sub-continent to the extent that this goal is reached.

Liberty.

Democracy, in any sense, cannot be established unless certain minimal rights, which are essential for a free and civilised existence, are assured to every member of the community. The Preamble mentions these essential individual rights as 'freedom of thought, expression, belief, faith and worship' and these are guaranteed against all the authorities of the State by Part III of the Constitution [vide Arts. 19, 25-28].

Equality.

Guaranteeing of certain rights to each individual would be meaningless unless all inequality is banished from the social structure and each individual is assured of equality of status and opportunity for the development of the best in him and the means for the enforcement of the rights guaranteed to him. This object is secured in the body of the Constitution, by making illegal all discriminations by the State between citizen and citizen, simply on the ground of religion, race, caste, sex or place of birth [Article 15]; by throwing open 'public places' to all citizens [Article 15 (2)]; by abolishing untouchability [Article 17]; by abolishing titles of honour [Article 18], by offering equality of opportunity in matters relating to employment under the State [Article 16]; by guaranteeing equality before the law and equal protection of the laws, as justiciable rights [Article 14].

In addition to the above provisions to ensure *civic* equility, the Constitution seeks to achieve *political* equality by providing for universal

adult franchise [Art. 326] and by reiterating that no person shall be either excluded from the general electoral roll or allowed to be included in any special electoral roll on grounds only of religion, race, caste, sex or any of them.

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

The realisation of so many objectives would certainly mean an expansion of the functions of the State. The goal envisaged by the Constitution, therefore, is that of a 'Welfare State' and the establishment of a 'socialistic pattern of society'. At the Avadi session in 1955, Congress explained this by a resolution—

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

How far this end has been already achieved will be explained in Chapter IX.

Need for unity of the Nation.

Unity amongst the inhabitants of this vast sub-continent, torn assunder by a multitude of problems and fissiparous forces, was the first requisite for maintaining the independence of the country as well as to make the experiment of democracy successful. But neither the integration of the people nor a democratic political system could be ensured without infusing a spirit of brotherhood amongst heterogenous population, belonging to different races, religions and cultures.

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

Fraternity.

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

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

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

It is this spirit of brotherhood that the Preamble of *our* Constitution refers to.

The unity and fraternity of the people of India, professing numerous Faiths, has been sought to be achieved by enshrining the ideal of a 'secular State', which means that the State protects all religions equally and does not itself uphold any religion as the State religion. There is no provision in the Constitution making any religion the 'established Church' as some other Constitutions do. On the other hand, the liberty of 'belief, faith and worship' promised in the Preamble is implemented by incorporating the fundamental rights of all citizens relating to 'freedom of religion' in Arts. 25-29 which guarantees to each individual freedom to profess, practice and propagate his own religion without interference and at the same time assures strict impartiality on the part of the State and its institutions towards all religions.

This itself is one of the glowing achievements of Indian democracy when her neighbours, such as Pakistan and Burma, uphold particular religions as State religions.

Dignity of the Individual.

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

A fitting commentary on the foregoing contents of the Preamble to *our Constitution* can be best offered by quoting a few lines from Prof. Earnest Barker one of the modern thinkers on democratic government:[9]

"..... there must be a *capacity* and a *passion* for the enjoyment of liberty—there must be a sense of personality in each, and of respect for personality in all, generally spread through the whole community – before the democratic State can be *truly achieved* .....Perhaps it can be fairly demanded only in a community which has achieved a *sufficient standard of material existence*, and a *sufficient degree of national homogeneity*, to devote itself to an ideal of liberty which has to be *worked out in each by the common effort of all*. If the problems of material existence are still absorbing,.....the ideal of living a common life of freedom—in other words, of attaining a particular quality of life—will seem an idle dream. If, again, the problems of national homogeneity are still insitent, and there is *no common feeling of fellowship*—if some sections of the community are regarded by others, whether on the ground of their inferior education, or on the ground of their inferior stock, or any other ground, as essentially alien and heterogenous —the ideal of the common life of freedom will seem equally illusory.....".[9]

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

".....an India, in which the poorest shall feel that it is their country in whose making they have an effective voice; .....an India in which all communities shall live perfect harmony. There can be no room in such an India for the curse of untouchability or the curse of intoxicating drinks and and drugs. Women will enjoy the same rights as men".[10]

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

"in a brief and pithy form the argument of much of the book; and it may accordingly *serve as a key-note*".[11]

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3. So called since the Imperial Conference, 1926.
4. C.A.D., 16-5-49.
5. C.A.D., 22-1-47.
6. Inaugural address of Pandit Nehru at the Seminar on Parliamentary Democracy on 25-2-56.
7. The sentiment was expressed by Dr. Ambedkar in his concluding speech in the Constituent Assembly (XI C.A.D. 977-9):
   "Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognises liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. *Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity.*"
8. Speech of the Vice-President, *ibid.*
9. Barker, Reflections on Government (Paperback), pp. 192-3.
10. M. K. Gandhi, India of My Dreams, pp 9-10.
11. Barker, Principles of Social and Political Theory (1951, Paperback), Preface, p. vi, ix.

CHAPTER IV

OUTSTANDING FEATURES OF OUR CONSTITUTION

I. Draws from different sources.

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

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

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

There were members in the Constituent Assembly[2] who criticised the Constitution which was going to be adopted as a 'slavish imitation of the West' or 'not suited to the genius' of the people. Many apprehended that it would be unworkable. But the fact that it has survived for two decades, while Constitutions have sprung up only to wither away in countries around us, such as Burma and Pakistan, belies the apprehension of the critics of the Indian Constitution. So far as the best features of the Indian Constitution and the features that have been most utilised by the people, namely, the Bill of Rights and Judicial Review, are concerned, nobody in India would lament to-day that they were imported from elsewhere. So far as the Parliamentary system of democracy is concerned, too imported from England, the peaceful working of the system at no less than four General Elections, involving over 210 million voters, testifies to the wisdom of the makers of the Constitution. They made no mistake in this behalf, because the people of India were familiar with the British political system, rather than any other, for a century. Even the adoption of unqualified universal suffrage goes to the credit of the fathers of our Constitution. If the verdict of the electors has not been initiated throughout the length and breadth of this vast sub-Continent it is no fault of the Constitution, but the fault of the political leaders who adhered to 'power politics' instead of launching into a programme of imparting political education to the masses after independence as they had promised on its eve.

The longest known Constitution.

11. The Constitution of India has the distinction of being the most lengthy and detailed constitutional document the world has so far produced. The original Constitution contained as many as 395 articles and 8 schedules (to which additions were made by subsequent amendments). Even after the repeal of several provisions it still contains 390 Articles and 9 Schedules.[3]

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

Incorporates the accumulated experience of different Constitutions

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

Detailed administrative provisions included.

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

"……it is perfectly possible to pervert the Constitution without changing the form of administration."

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

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

It was also felt that the smooth working of an infant democracy might be jeopardised[4] unless the Constitution mentioned in detail things which were left in other Constitutions to ordinary legislature. This explains why we have in our Constitution detailed provisions about the organisation of

the Judiciary, the Services, the Public Service Commissions, Election and the like. It is the same ideal of 'exhaustiveness' which explains why the provisions of the Indian Constitution as to the division of powers between the Union and the States are more numerous than perhaps the aggregate of the provisions relating to that subject in the Constitutions of the U.S.A., Australia and Canada.

The results which had been arrived at by judicial decisions in other countries were also codified in our Constitution with the object of lessening litigation for the purpose of interpreting the Constitution.

Peculiarity of the problems to be solved.

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

Constitution of the Units also included.

(*iv*) While the Constitution of the United States deals only with the Federal Government and leaves the States to draw up their own Constitutions, the Indian Constitution provides the Constitutions of both the Union and the Units (i.e., the States), with the same fullness and precision. Since the Units of the federation differed in their historical origins and their political development, special provisions for different classes of the Units[5] had to be made, such as the Part B States (representing the *former Indian States*), the Part C States (representing the Centrally Administered areas) and some smaller Territories in Part D. This also contributed to the bulk of the Constitution [See Table III].

Federal relations elaborately dealt with.

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

Both justiciable and non-justiciable rights included: Fundamental Rights and Directive Principles.

(*vi*) There is not only a Bill of Rights containing justicable fundamental rights of the individual [Part III] on the model of the Amendments to the *American* Constitution but also a Part [Part IV] containing Directive Principles, which confer no justiciable rights upon the individual but are nevertheless to be regarded as 'fundamental in the Governance of the country',—being in

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

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

More flexible than rigid.

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

It is only the amendment of a few of the provisions of the Constitution that requires ratification by the State Legislatures and even then ratification by only ½ of them would suffice (while the American Constitution requires ratification by ¾ of the States).

The rest of the Constitution may be amended by a special majority of the Union Parliament, i.e., a majority of not less than ⅔ of the members of each House present and voting, which again, must be a majority of the total membership of that House.

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

Legislation as supplementing the Constitution.

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

(*a*) In various Articles, therefore, the Constitution lays down certain basic principles and empowers Parliament to supplement these principles by legislation. Thus, (*i*) as to citizenship, Articles 5-8 only lay down the conditions for acquisition of citizenship at the commencement of the Constitution and Article 11 vests plenary powers in Parliament to legislate on this subject. In pursuance of this power, Parliament has enacted the Citi-

zenship Act, 1956, so that in order to have a full view of the law of citizenship in India, a study of the Constitution has to be supplemented by that of the Citizenship Act. (*ii*) Similarly, while laying down certain fundamental safeguards against preventive detention, Article 22 (7) empowers Parliament to legislate on some subsidiary matters relating to the subject. The Preventive Detention Act, 1950, made under this power, has therefore, to be read along with the provisions of Article 22. (*iii*) Again, while banning 'untouchability', Art. 17 provides that it shall be an offence 'punishable in accordance with law', and in exercise of this power, Parliament has enacted the Untouchability (Offences) Act, 1955, which must be referred to as supplementing the constitutional prohibition against untouchability. (*iv*) While the Constitution lays down the basic provisions relating to the election of the President and Vice-President, Art. 71 (3) empowers Parliament to supplement these constitutional provisions by legislation, and by virtue of this power Parliament has enacted the Presidential and Vice-Presidential Elections Act, 1952.

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

(*b*) Then are, again, a number of Articles in the Constitution which are of a tentative or transitional nature and they are to remain in force only so long as Parliament does not legislate on the subject. Such provisions, for instance, relate to the salaries and allowances of Ministers [Art. 75 (6)], Chairman, Speaker etc., of the two Houses of Parliament [Art. 97], Judges of the Supreme Court [Art. 125 (2)]; exemption of Union property from State taxation [Art. 285].

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

"This variety in the amending process is wise but is *rarely found*".[7]

Reconciliation of a written Constitution with Parliamentary sovereignty.

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

"While we want this Constitution to be as solid and permanent as we can make it, there is no permanence in Constitutions. There should be a certain flexibility. If you make anything rigid and permanent, you stop the nation's growth, the growth of a living, vital, organic people.....In any event, we could not make this Constitution so rigid that it cannot be *adapted* to changing conditions. When the world is in turmoil and we are passing through a very swift period of transition, what we may do to-day may not be wholly capable to-morrow".[7a]

The flexibility of *our* Constitution is illustrated by the fact that during the first nineteen years of its working, it has been amended twenty three

times. Vital changes have thus been effected by the First and Fourth Amendments to the Constitution, including amendments to the fundamental rights conferred by Arts. 19 and 31. In fact, the Fourth Amendment has radically affected the conception of the right to compensation for the acquisition of private property by the State; and all this has been possible by passing an Act of Parliament,—of course, with a special majority. The Seventh Amendment of 1956, as will be presently explained, has reorganised the States and their territories in such a manner as to redraw the political map of India, apart from introducing many other changes in the text of the Constitution.

Dr. Jennings[8] characterised *our Constitution* as rigid for two reasons; (a) that the process of amendment was complicated and difficult; (b) that matters which should have been left to ordinary legislation having been incorporated into the Constitution, no change in these matters is possible without undergoing the process of amendment. We have seen that the working of the Constitution during its first two decades has *not* justified the apprehension that the process of amendment is very difficult [See also Ch. X, *post*]. But the other part of his reasoning is obviously sound. In fact, his comments on this point have proved to be prophetic. He cited Art. 224 as an illustration of a provision which had been unnecessarily embodied in the Constitution:

"An example taken at random is Art. 224, which empowers a retired judge to sit in a High Court. Is that a provision of such constitutional importance that it needs to be constitutionally protected, and be incapable of amendment except with the approval of two-thirds of the members of each House sitting and voting in the Union Parliament".[8]

As Table IV will show, it has required an amendment of the Constitution, namely, the Seventh Amendment of 1956, to amend this Article to provide for the appointment of Additional Judges instead of recalling retired Judges. Similar amendments have been required, once to provide that a Judge of a High Court who is transferred to another High Court shall not be entitled to compensation (Art. 222) and, again, to provide for compensation. It is needless to multiply such instances since they are numerous.

Role of Conventions under the Constitution.

V. It is also remarkable that though the framers of the Constitution attempted to make an exhaustive code of organic law, room has been left for the growth of conventions to supplement the Constitution in matters where it is silent. Thus, while the Constitution imposed the doctrine of Cabinet responsibility in Art. 75, it was not possible to codify the numerous conventions which answer the problems as they arise in England, from time to time, in the working of the Cabinet system. Take, for instance, the question whether the Ministry should resign whenever there is an adverse vote against it in the House of People, or whether it is at liberty to regard an accidental defeat on a particular measure as a 'snap vote'.[9] Again, the Constitution cannot possibly give any indication as to which issue should be regarded as a 'vital issue' by a Ministry, so that on a defeat on such an

issue the Ministry should be morally bound to resign. Similarly, in what circumstances a Ministry would be justified in advising the President to dissolve Parliament instead of resigning upon an adverse vote, can only be established by convention.

Sir Ivor Jennings[7] is, therefore, justified in observing that—

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

Fundamental Rights and constitutional remedies.

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

It is through a misapprehension of these provisions that the Indian Constitution has been described by some critics as a 'lawyer's paradise'.[10] According to Sir Ivor Jennings,[8] this is due to the fact that the Constituent Assembly was dominated by 'the lawyer-politician.' It is they who thought of codifying the individual rights and the prerogative writs though none in *England* would ever cherish such an idea. In the words of Sir Ivor—

"Though no English lawyer would have thought of putting the prerogative writs into a Constitution the Constituent Assembly did so.....These various factors have given India a most complicated Constitution. Those of us who claim to be constitutional lawyers can look with equanimity on this exaltation of our profession. But Constitutions are intended to enable the process of government to work smoothly, and not to provide fees for constitutional lawyers. The more numerous the briefs the more difficult the process of government becomes. India has perhaps placed too much faith in us".[8]

With due respect to the great constitutional expert, these observations disclose a failure to appreciate the very foundation of the Indian Constitution. If I were asked to mention the best feature of *our* Constitution in two words, I would take little time to say—'Judicial Review' and this has been amply demonstrated by the working of *our* Judiciary during the last two decades. Sir Ivor omits to point out that the fathers of the Indian Constitution preferred the American doctrine of 'limited government' to the English doctrine of Parliamentary sovereignty.

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

The Founding Fathers of the American Constitution, on the other hand, had the painful experience that even a representative body might be tyrannical, particularly when they were concerned with a colonial Empire. Thus it is that the Declaration of Independence recounts the attempts of the British "Legislature to extend an unwarrantable jurisdiction over us" and how the British people had been "deaf to the voice of justice". At heavy cost had the colonists learnt about the frailty and weakness of human nature when the same Parliament which had forced Charles I to sign the Petition of Right (1628) to acknowledge that no tax could be levied without the consent of Parliament did, in 1765 and the years that followed, insist on taxing the colonies, regardless of their right of representation, and attempt to enforce such undemocratic laws through military rule.

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

As will be more fully explained in the Chapter on Fundamental Rights, the Indian experience of the application of the British Rule of Law in India was not altogether happy and there was a strong feeling that it was not administered with even hands by the foreign rulers in India as in their own land. The "Sons of Liberty" in India had known to what use the flowers of the English democratic system, viz., the Sovereignty of Parliament and the Rule of Law, could be put in trampling down the rights of man under an Imperial rule. So, in 1928, long before the dawn of Independence in India, the Nehru Committee asserted that

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

Now, judicial review is a necessary concomitant of 'fundamental rights', for, it is meaningless to enshrine individual rights in a written Constitution as 'fundamental rights' if they are not enforceable, in a Court of law, against any organ of the State, legislative or executive. Once this choice is made, one cannot help to be sorry for the litigation that ensues. Whatever apprehensions might have been entertained in some quarters in India at the time of the making of the Indian Constitution, there is hardly anybody in India to-day who is aggrieved because the Supreme Court, each year, invalidates a dozen of statutes or a like number of administrative acts on the ground of violation of the fundamental rights; on the other hand, there is invariably a clamour whenever there is any judicial pronouncement which goes to restrict the ambit of the fundamental rights or the sweep of the constitutional remedies (i.e., the 'prerogative writs' referred to by Sir Ivor). It is because of the possibility of this litigation that Indian democracy has not so far been allowed to turn itself into an autocracy while the rest of the Eastern hemisphere has succumbed to that malady.

VII. An independent Judiciary, having the power of 'judicial review', is thus another prominent feature of *our* Constitution.

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

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

Compromise between Judicial Review and Parliamentary Supremacy.

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

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

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

The *Indian* Constitution wonderfully adopts the *via media* between the American system of Judicial Supremacy and the English principle of Parliamentary Supremacy, by endowing the Judiciary with the power of declaring a law as unconstitutional if it is beyond the competence of the Legislature according to the distribution of powers provided by the Constitution, or if it is in contravention of the fundamental rights guaranteed by the Constitution; but, at the same time, depriving the Judiciary of any power of 'judicial review' of the wisdom of legislative policy. Thus, it has

avoided expressions like 'due process', and made fundamental rights such as that of liberty and property subject to regulation by the Legislature.[11] Further, the major portion of the Constitution, is liable to be amended by the Union Parliament by a special majority, if in any case the Judiciary proves too obtrusive. The theory underlying the Indian Constitution in this respect can hardly be better expressed than in the words of Pandit Nehru:

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

Our Constitution thus places the supremacy at the hands of the Legislature as much as that is possible within the bounds of a written Constitution.

But, *so long as the Constitution itself is not amended,* the Supreme Court has the final say as to what the Constitution means. Under Art. 141, its decisions are binding upon all other courts in the territory of India, and its decisions must be referred to for understanding the meaning of the Constitution in the same way as the Reports of the Supreme Court have to be consulted in the U.S.A. It may be noted that even during the first quinquennium, the number of constitutional decisions of *our* Supreme Court exceeded 150 and the volume of this source of *our* constitutional law is since increasing,—the number at present being about 100 per annum on the average.

Fundamental Rights subject to reasonable regulation of Legislature.

VIII. The above attitude is illustrated by the novel declaration of Fundamental Rights which *our* Constitution embodies.

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

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

Instead of leaving the matter to the off-chance of judicial protection in particular cases, the Indian Constitution makes each of the fundamental rights subject to legislative control under the terms of the Constitution itself. [See under the 'Seven freedoms', *post.*]

IX. Another peculiarity of the Chapter on Fundamental Rights in the Indian Constitution is that it aims at securing not merely political or legal equality, but *social* equality as well. Thus, apart from the usual guarantees that the State will not discriminate between one citizen and another merely on the ground of religion, race, caste, sex or place of birth,—in the matter of appointment, or other employment offered by the State,—the Constitution includes a prohibition of 'untouchability' in any form and lays down that no citizen may be deprived of access to any public place or of the enjoyment of any public amenity or privilege, only on the ground of religion, race, caste, sex or place of birth [see pp. 25-26, *ante*].

Social equality also guaranteed by the Constitution.

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

X. The adoption of universal adult suffrage [Art. 326], *without any qualification* either of sex, property, taxation or the like, is a 'bold experiment' in India, having regard to the vast extent of the country and its population, with an overwhelming illiteracy [to the extent of 85% (now 75%) of the total population]. The suffrage in India, it should be noted, is wider than that in England or the United States. The concept of popular sovereignty, which underlies the declaration in the Preamble that the Constitution is adopted and given by the 'people of India' unto themselves, would indeed have been hollow unless the franchise—the only effective medium of popular sovereignty in a modern democracy—were extended to the entire population which was capable of exercising the right and an independent electoral machinery (under the control of the Election Commission) was set up to ensure the free exercise of it.

Universal franchise without communal representation

That, notwithstanding the outstanding difficulties, this bold experiment has been crowned with success will be evident from some of the figures[12] relating to the first General Election held under the Constitution in 1952. Out of a total population of 356 million and an adult population of 180 million, the number of voters enrolled was 173 million and of these no less than 88 million i.e., over 50% of the enrolled voters, actually exercised their franchise. The orderliness with which this election as well as the subsequent General Elections have been conducted speaks eloquently of the political attainment of the masses, though illiterate, of this vast subcontinent. In the third General Election held in 1962, the number of persons on the electoral roll has come up to 210 million.

No less creditable for the framers of the Constitution is the abolition of communal representation, which in its trail had brought in the bloody and lamentable partition of India (see p. 17, *ante*). In the new Constitution there was no reservation of seats except for the Scheduled Castes and Tribes and Anglo-Indians, and that only, for a period of 10 years. It is to be

noted that the reservation for the Anglo-Indians has ceased to exist since 1960 (on the expiry of the ten-year period), but that the provision in favour of the Scheduled Castes and Tribes has been extended for another period of *twenty*[13] years because that community has not yet been so advanced as to justify a removal of the safeguard.

XI. It has been stated at the outset (p. 24, *ante*), that the form of government introduced by *our* Constitution both at the Union and the States is the Parliamentary government of the British type.[14] A primary reason for the choice of this system of government was that the people had a long experience of this system under the Government of India Acts,[15] though the British were very slow in importing its features to the fullest length.

The makers of *our* Constitution rejected the Presidential system of government, as it obtains in *America*, on the ground that under that system the Executive and the Legislature are separate from and independent of each other,[16] which was likely to cause conflicts between them, which *our* infant democracy could ill afford to risk.[17]

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

As in the Constitution of *Eire*, the Indian Constitution superimposes an elected President upon the Parliamentary system of responsible government. But though an elected President is the executive head of the Union he is to act on the advice of his ministers, although whether he so acts according to the advice of his ministers is not questionable in the courts and there is no mode, short of impeachment, to remove the President if he acts contrary to the Constitution.

Parliamentary government combined with an elected President at the head.

On the other hand, the principle of ministerial responsibility to the Legislature, which under the English system rests on convention, is embodied in the express provisions of *our* Constitution.

In the words of *our* Supreme Court,[18]

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

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

convention. But in the Indian Constitution there is no provision authorising the President to act 'in his discretion' on any matter. On the other hand, as to the exact relationship between the President and his Council of Ministers, the Constitution of India does not seek to codify all the conventions of the English Cabinet system but leaves them to be developed by usage and, so far, the English precedents have been broadly followed.

Broadly speaking, the system introduced by *our* Constitution differs from that of the United Kingdom only in so far as we have an elected President at the head, a codified Bill of Rights and a Judiciary to enforce the mandates of the written Constitution not only against the Executive but also against the Legislature.

XII. Perhaps the most remarkable achievement of the Indian Constitution is to confer upon a federal system the strength of a unitary government. Though *normally* the system of government is federal, the Constitution enables the federation to transform itself into a unitary state (by the assumption of the powers of States by the Union),—in *emergencies* [Part XVIII].

A federal system with a unitary bias.

Such a combination of federal and unitary systems in the same constitution is unique in the world. For a correct appreciation of this unique system it is necessary to examine the background upon which federalism has been introduced into India, in the light of the experience in other federal countries. This deserves a separate treatment [see Chapter V, *post*].

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

Integration of Indian States.

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

At the time of the constitutional reform leading to the Government of India Act, 1935, the geographical entity known as India was divided into two parts—British India and the Indian States. While British India comprised the 9 Governors' Provinces and some other areas administered by the Government of India itself, the Indian States comprised some 600 States which were mostly under the personal rule of the Rulers or proprietors. All the 600 Indian States were not of the same order. Some of them were States under the rule of hereditary Chiefs, which had political status even from before the Mahomedan invasion; others (about 300 in number) were Estates or Jagirs granted by the Muslim rulers as rewards for services or

Status of Indian States under the British Crown.

otherwise, to particular individuals or families. But the common feature that distinguished these 600 States or thereabout from British India was that the Indian States had *not* been *annexed* by the British Crown. So, while British India was under the direct rule of the Crown through its representatives and according to the statutes of Parliament and enactments of the Indian Legislatures,—the Indian States were allowed to remain under the personal rule of their Chiefs and Princes, under the 'suzerainty' of the Crown, which was assumed over the entire territory of India when the Crown took over authority from the East India Company in 1858.

Incidents of Paramountcy.

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

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

Place of Indian States in the federal scheme proposed by the Government of India Act, 1935.

The Government of India Act, 1935, envisaged a federal structure for the whole of India, in which the Indian States could figure as units, together with the Governors' Provinces. Nevertheless, the framers of the Act differentiated the Indian States from the Provinces in two material respects, and this differentiation ultimately proved fatal for the scheme itself. The two points of difference were—(a) While in the case of the Provinces accession to the Federation was compulsory or automatic,—in the case of an Indian State, it was voluntary and depended upon the option of the Ruler of the State. (b) While in the case of the Provinces, the authority of the Federation over the Provinces (executive as well as legislative) extended over the whole of the federal sphere chalked out by the Act,—in the case of the Indian States, the authority of the Federation could be limited by the Instrument of Accession and all residuary powers belonged to the State. It is needless to elaborate the details of the plan of 1935, for, as has been stated earlier (p. 9, *ante*), the accession of the Indian States to the proposed Federation never came, and this Part of that Act was finally abandoned in 1939, when World War II broke out.

When Sir Stafford Cripps came to India with his Plan (see p. 15, *ante*). it was definitely understood that the Plan proposed by him would be confined to settling the political destinies of British India and that the Indian States would be left free to retain their separate status.

Proposal of the Cabinet Mission.

But the Cabinet Mission supposed that the Indian States would be ready to co-operate with the new development in India. So, they recommended that there should be a Union of India, embracing both British India and the States, which would deal only with Foreign Affairs, Defence and Communications while the States would retain all powers other than these.

Lapse of paramountcy under Indian Independence Act.

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

"7. (1) As from the appointed day—

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

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

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

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

(A) The first objective was sought to be achieved by a three-fold process of integration (known as the 'Patel scheme' by the name of the then member in charge of Home Affairs)—

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

Integration and merger.

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

(iii) The third form of integration was the consolidation of groups of Stats into new viable units, known as Unions of States. The first Union formed was the Saurashtra Union consolidating the Kathiawar States and many other States (February 15, 1948), and the last one was the Union of Travancore-Cochin, formed on July 1, 1949. As many as 275 States were thus integrated into 5 Unions—Madhya Bharat, Patiala and East Punjab States Union, Rajasthan, Saurashtra and Travancore-Cochin. *These were included in the States in Part B* of the First Schedule. The other 3 States included in Part B were—Hyderabad, Jammu and Kashmir and Mysore. The cases of Hyderabad and Jammu and Kashmir are peculiar. Jammu and Kashmir acceded to India on October, 26, 1947, and so it was included as a State in Part B, but the Government of India agreed to take the accession subject to confirmation by the people of the State and a Constituent Assembly subsequently confirmed it, in November, 1956. Hyderabad did not formally accede to India, but the Nizam issued a Proclamation recognising the necessity of entering into a constitutional relationship with the Union of India and accepting the Constitution of India subject to ratification by the Constituent Assembly of that State, and the Constituent Assembly of that State ratified this. As a result, Hyderabad was included as a State in Part B of the First Schedule of the Constitution.

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

But the story relating to the States in Part B is not yet complete. At the time of their accession to the Dominion of India in 1947, the States had acceded only on three subjects, viz, Defence, Foreign Affairs and Communications. With the formation of the Unions and under the influence

of political events, the Rulers found it beneficial to have a closer connection with the Union of India and all the Rajpramukhs of the Unions as well as the Maharaja of Mysore, signed revised Instruments of Accession by which all these States acceded to the Dominion of India in respect of *all* matters included in the Union and Concurrent Legislative Lists, except only those relating to taxation. Thus, the States in Part B were brought at par with the States in Part A, subject only to the differences embodied in Art. 238 and the supervisory powers of the Centre for the transitional period of 10 years [Art. 371]. Special provisions were made only for Kashmir [Art. 370] in view of its special position and problems. That Article makes special provisions for the partial application of the Constitution of India to that State, with the concurrence of the Government of that State.

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

Reorganisation of States.

The process of integration has been completed by the Constitution (Seventh Amendment) Act, 1956, which has abolished Part B States as a class and included *all the States in Parts A and B in one list.*[19] The special provisions in the Constitution, relating to Part B States have, consequently, been omitted. The Indian States have thus lost their identity and become part of one uniform political organisation embodied in the Constitution of India.

REFERENCES.

1. C.A.D., Vol. VII, pp. 37-8.
2. VII C.A.D., 2, 242; XI C.A.D., 613, 616.
3. The Constitution of the United States, with all its amendments up to date consists of not more than 7,000 words.
4. Constituent Assembly Deb., Vol. XI, pp. 839-840.
5. Of course, some of these provisions have been eliminated by the Constitution (Seventh Amendment) Act, 1956, which abolished the distinction between the different classes of States.
6. Dr. Rajendra Prasad, C. A. Deb., Vol. X, p. 891.
7. Wheare, Modern Constitutions, p. 143.

7a. C.A.D., d. 8-11-48, pp 322-3.

8. Jennings, Some Characteristics of the Indian Constitution, 1953, pp. 2, 6, 25-6.
9. See Author's *Commentary* on the Constitution of India, 5th Ed., Vol. II, p. 457.
10. C.A.D., Vol. VII, p. 293.
11. *Gopalan* v. *State of Madras*, (1950) S.C.R. 88.
12. Report on the First General Elections in India (1951-52), Vol. I.
13. Vide the Constitution Twenty-third Amendment Act.
14. Prime Minister Nehru in the Lok Sabha, on 28-3-57.
15. IV C.A.D., 578 (Sardar Patel).
16. VII C.A.D., 984 (Munshi).
17. VII C.A.D., 985 (Alladi Krishnaswamy).
18. *Ram Jawaya* v. *State of Punjab*, (1955) 2 S.C.R. 225.
19. As will be more fully explained in a later Chapter (p. 59), the number of the States, all of one category, is 17, at the end of 1969. Besides, there are 10 'Union Territories'.

CHAPTER V

NATURE OF THE FEDERAL SYSTEM

India, a Union of States.

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

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

The word 'Union', of course, does not indicate any particular type of federation, inasmuch as it is used also in the Preamble of the Constitution of the United States—the model of federations; in the Preamble of the British North America Act (which, according to Lord Haldane, did not create a true federation at all); as well as in the Preamble to the Union of South Africa Act, 1909, which patently set up a unitary Constitution.

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

Different types of federal Constitutions in the modern world.

The difficulty of any treatment of federalism is that there is no agreed definition of a federal State. The other difficulty is that it is habitual with scholars on the subject to start with the model of the *United States,* the oldest (1787) of all federal Constitutions in the world, and to exclude any system that does not conform to that model from the nomenclature of 'federation.' But numerous countries in the world have, since 1787, adopted Constitutions having federal features and, if the strict historical standard of the United States be applied to all these later Constitutions, few will stand the test of federalism save perhaps Switzerland and Australia. Nothing is however gained by excluding so many recent Constitutions from the federal class, for, according to the traditional classification followed by political scientists, Constitutions are either unitary or federal. If, therefore, a Constitution partakes of some features of both types, the only alternative is to analyse those features and to ascertain whether it is *basically* unitary or federal, although it may have subsidiary variations. A liberal attitude towards the question of federalism is, therefore, inevitable particularly in view of the fact that recent experiments in the world of Constitution-making are departing more and more from the 'pure' type of either a unitary or a federal system. The

Author's views on this subject, expressed in the previous Editions of this book as well as in the *Commentary on the Constitution of India*, now find support from the categorical assertion of a recent research worker[3] on the subject of federalism (who happens to be an American himself), that the question whether a State is federal or unitary is one of degrees and the answer will depend upon "how many federal features it possesses." Another American scholar has, in the same strain,[4] observed that federation is more a 'functional' than an 'institutional' concept and that any theory which asserts that there are certain inflexible characteristics without which a political system cannot be federal ignores the fact "that institutions are not the same things in different social and cultural environments."

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

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

Essential features of a federal polity

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

Though a unitary State may create local sub-divisions, such local authorities enjoy no autonomy of their own but exercise only such powers as are from time to time delegated to them by the national government and it is competent for the national Government to revoke the delegated powers or any of them at its will.

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

(ii) *Distribution of powers.*—It follows that the very object for which a federal state is formed involves a divisions of authority between the Federal Government and the States, though the method of distribution may not be alike in the federal Constitutions.

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

(iv) *Authority of Courts.*—In a federal state the legal supremacy of

the Constitution is essential to the existence of the federal system. It is essential to maintain the division of powers not only between the co-ordinate branches of the government, but also between the Federal Government and the States themselves. This is secured by vesting in the Courts a final power to interpret the Constitution and to nullify any action on the part of the Constitution.

Not much pains need be taken to demonstrate that the political system introduced by *our* Constitution possesses all the above essentials of a federal polity. Thus, the Constitution is the supreme organic law of *our* land, and both the Union and the State Governments as well as their respective organs derive their authority from the Constitution, and it is not competent for the States to secede from the Union. There is a division of legislative and administrative powers between the Union and the State Governments and the Supreme Court stands at the head of *our* Judiciary to jealously guard this distribution of powers and to invalidate any action which violates the limitations imposed by the Constitution. This jurisdiction of the Supreme Court may be resorted to not only by a person[5] who has been affected by a Union or State law which, according to him, has violated the constitutional distribution of powers but also by the Union and the States themselves by bringing a direct action against each other, before the Original jurisdiction of the Supreme Court under Art. 131.[6] It is because of these basic federal features, that our Supreme Court has described the Constitution as 'federal'.[6a]

Peculiar features of Indian federalism.

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

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

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

As has been seen (pp. 7-9, *ante*) *India* had a thoroughly centralized unitary constitution until the Government of India Act, 1935. The Provincial Governments were virtually the agents of the Central Government, deriving powers by delegation from the latter. To appreciate the mode of formation of federation in India, we must go back to the Government of India Act, 1935, which for the first time introduced the federal concept and the Consti-

tution has simply continued the federal system so introduced by the Act of 1935, so far as the Provinces of British India are concerned.

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

By the Act of 1935, the British Parliament set up a federal system in the same manner as it had done in the case of *Canada,* viz., "by creating autonomous units and combining them into a federation by one and the same Act." All powers hitherto exercised in India were resumed by the Crown and redistributed between the Federation and the Provinces by a direct grant. Under this system, the Provinces derived their authority directly from the Crown and exercised legislative and executive powers, broadly free from Central control, within a defined sphere. Nevertheless, the Centre retained control through 'the Governor's special responsibilities' and his obligation to exercise his individual judgment and discretion in certain matters, and the power of the Centre to give directions to the Provinces.[1]

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

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

It is well worth remembering this peculiarity of the origin of the federal system in India. Neither before nor under the Act of 1935, the Provinces were in any sense 'sovereign' states like the States of the American Union. The Constitution, too, has been framed by the 'people of India' assembled in the Constituent Assembly, and the Union of India cannot be said to be the result of any *compact* or agreement between autonomous States. So far as the Provinces are concerned, the progress has been from a unitary to a federal organisation, but even then, this has happened not because the Provinces desired to become autonomous units under a federal union, as in Canada. The Provinces, as just seen, had been artificially made autonomous, within a defined sphere, by the Government of India Act, 1935. What the makers of the Constitution did was to associate the Indian States with these autonomous Provinces into a federal union, which the Indian States had refused to accede to, in 1935.

Some amount of homogeneity of the federating units is a condition for their desire to form a federal union. But in India, the position has been different. From the earliest times, the Indian States had a separate political entity, and there was little that was common between them and the Provinces which constituted the rest of India. Even under the federal scheme of 1935

the Provinces and the Indian States were treated differently; the accession of the Indian States to the system was voluntary while it was compulsory for the Provinces, and the powers exercisable by the Federation over the Indian States were also to be defined by the Instruments of Accession. It is because it was optional with the Rulers of the Indian States that they refused to join the federal system of 1935. They lacked the 'federal sentiment' (*Dicey*), that is, the desire to form a federal union with the rest of India. But, as already pointed out (p. 43, *ante*), the political situation changed with the lapse of paramountcy of the British Crown as a result of which most of the Indian States acceded to the Dominion of India on the eve of the independent of India.

The credit of the makers of the Constitution, therefore, lies not so much in bringing the Indian States under the federal system but in placing them, as much as possible, on the same footing as the other units of the federation, under the same Constitution. In short, the survivors of the old Indian States (States in Part B[8] of the First Schedule) were, with minor exceptions, placed under the same political system as the old Provinces (States in Part A). The integration of the units of the two categories has eventually been completed by eliminating the separate entities of States in Parts A and States in Parts B and replacing them by one category of States, by the Constitution (Seventh Amendment) Act, 1956.

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

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

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

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

(iii) In the matter of amendment of the Constitution, again, the part assigned to the States is minor, as compared with that of the Union. The

doctrine underlying a federation of the American type is that the union is the result of an agreement between the component units, so that no part of the Constitution which embodies the compact can be altered without the consent of the covenanting parties. This doctrine is adopted, with variations, by most of the federal systems.

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

(iv) Though there is a division of powers between the Union and the States, there is provision in *our* Constitution for control by the Union both over the administration and legislation of the States. Legislation by a State shall be subject to disallowance by the President, when reserved by the Governor [Art. 201]. Again, the Governor of a State shall be appointed by the President of the Union and shall hold office 'during the pleasure' of the President [Arts. 155-6]. These ideas are repugnant to the Constitution of the United States or of Australia, but are to be found in the Canadian Constitution.

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

It comprises two propositions—

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

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

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

But just the contrary of the second proposition has been embodied in *our* Constitution. Under *our* Constitution, it is possible for the Union Parliament to reorganise the States or to alter their bondaries, by a simple majority in the ordinary process of legislation [Art. 4(2)].[9] The Constitution does not require that the *consent* of the Legislature of the States is necessary for enabling Parliament to make such laws; only the President has to 'ascertain' the views of the Legislature of the affected State to recommend a Bill for this purpose to Parliament. Even this obligation is not mandatory in so far as the President is competent to fix a time-limit within which a State

must express its views, if at all [Proviso to Art. 3, as amended]. In the Indian federation, thus, the States are not 'indestructible' units as in the *U.S.A.* The ease with which the federal organisation may be reshaped by an ordinary legislation by the Union Parliament has been demonstrated by the enactment of the States Re-organisation Act, 1956, which reduced the number of States from 27 to 14 within a period of six years from the commencement of the Constitution. The same process of disintegration of existing States, effected by unilateral legislation by Parliament, has led to the formation, subsequently, of the new States of Nagaland and Haryana (and the sub-State Meghalaya).

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

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

One of the essential principles of *American* federalism is the equality of the component States under the Constitution, irrespective of their size or population. This principle is reflected in the equality of representation of the States in the upper House of the Federal Legislature (i.e., in the Senate),[10] which is supposed to safeguard the status and interests of the States in the federal organisation. To this is superadded the guarantee that no State may, without its consent, be deprived of its equal representation in the Senate (Art. V).

Under *our* Constitution, there is no equality of representation of the States in the Council of States. As given in the Fourth Schedule, the number of members for the several States varies from 4 to 34. In view of such composition of the upper Chamber, the federal safe guard against the interests of the lesser States being overridden by the interests of the larger or more populated States is absent under *our* Constitution. Nor can *our* Council of States be correctly described as a federal Chamber in so far as it contains a nominated element of twelve members as against 238 representatives of the States and Union Territories.

(C) *Native of the polity*—As a radical solution of the problem of reconciling national unity with 'State rights', the framers of the *American* Constitution made a logical division of everything essential to sovereignty and created a dual polity, ith a dual citizenship, a double set of officials and a double system of Courts.

(*i*) An American is a citizen not only of the State in which he resides but also of the United States, i.e., of the federation; and both the federal and State Governments, each independent of the other, operate *directly* upon the citizen who is thus *subject to two Governments, and owes allegiance to both.* But the *Indian* Constitution, like the Canadian, does not introduce any double citizenship, but one citizenship, viz.,—the citizenship of India

[Art. 5], and birth or residence in a particular State does not confer any separate State as a citizen of that State.

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

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

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

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

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

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

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

Even though there is a distribution of powers between the Union and the States as under a federal system, the distribution has a strong Central bias and the powers of the States are hedged in with various restrictions which impede their sovereignty even within the sphere limited to them by the distribution of powers basically provided by the Constitution.

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

(*c*) By empowering the President to withdraw to the Union the executive and legislative powers of a State under the Constitution if he is, *at any time*, satisfied that the administration of the State cannot be carried on in the normal manner in accordance with the provisions of Constitution, owing to political or other reasons [Art. 356]. From the federal standpoint, this seems to be anomalous inasmuch as the Constitution-makers did not consider it necessary to provide for any remedy whatever for a similar breakdown of the constitutional machinery at the Centre. Secondly, the power to suspend the constitutional machinery may be exercised by the President, not only on the report of the Governor of the State concerned but also *suo moto*, whenever he is satisfied that a situation calling for the exercise of this power has arisen. It is thus a *coercive* power available to the Union against the units of the federation.

The object of the framers of *our* Constitution was to avoid, as much as possible, the shortcomings of the typical federal system as obtains in the U.S.A. by modifying it so as to secure the strength of a unitary structure as much as possible, but it is an abnormal feature according to the traditional federal principle.

But though the above scheme seeks to avoid the demerits of the federal system, there is perhaps such an emphasis on the strength of the Union

A *critique* of the federal system.

government as affects the federal principle as it is commonly understood. Thus, a foreign critic (Prof. *Wheare*)[11] observes that the Indian Constitution provides—

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

In his later work on Modern Constitutions [12] he puts it, generically, thus—

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

Prof. Alexandrowicz[13] has taken great pains to combat the view that the Indian federation is 'quasi-federation'. He seems to agree with this Author[14] when he says that India is a case *sui generis*" This is in accord with the Author's observation that

"the Constitution of India is neither purely federal nor purely unitary but is a combination of both. It is a union or composite State of a novel type. It enshrines the principle that in spite of federalism the interest ought to be paramount".[14]

Strictly speaking, any deviation from the American model of pure federation would make a system quasi-federal, and, if so, the Canadian system, too, can hardly escape being branded as quasi-federal. The difference between the Canadian and the Indians systems lies in the degree and extent of the unitary emphasis. The real test of the federal character of a political structure is, as Prof. Wheare has himself observed[11]—

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

A survery of the actual working of *our* Constitution for the last 20 years would hardly justify the conclusion that, even though the unitary bonds have in some respects been further tightened, the federal features have altogether 'withered away'.

Some scholars in India[15] have urged that the unitary bias of *our* Constitution has been accentuated, in its actual working, by two factors so much so that very little is left of federalism. These two factors are—(a) the overwhelming financial power of the Union and the utter dependence of the States upon Union grants for discharging their functions; (d) the comprehensive sweep of the Union Planning Commission, set up under the concurrent power over planning. The criticism may be justified in point of degree, but not in principle, for two reasons—

(i) Both these controls are aimed at securing a uniform development of the country as a whole. It is true that the bigger States are not allowed to appropriate all their resources and the system of assignment and distribution of tax resources by the Union [Arts. 269, 270, 272] means the dependence of the States upon the Union to a large extent. But, let alone,

the stronger and bigger States might have left the smaller ones lagging behind, to the detriment of our national strength.

(ii) Even in a country like the United States, such factors have, in practice, strengthened the national Government to a degree which could not have been dreamt of by the fathers of the Constitution. Curiously enough, the same complaint, as in India, has been raised in the United States. Thus, of the centralising power of federal grants, an American writer[16] has observed—

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

In fact, the traditional theory of mutual independence of the two governments,—federal and State, has given way to 'co operative federalism' in most of the federal countries today.[16a]

Neither financial control nor central planning is, therefore, peculiar to India, and the autonomy of the States is not impaired because the implementation of the plans is vested in the States.

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

On the other hand, the most conclusive evidence of the survival of the federal system in India is the co-existence for some period of the Communist Government in the State of Kerala or the United Government in West Bengal with a Congress-dominated Government at the Centre and in most of the other States. Of course, the reference of the Kerala Education Bill by the President for the advisory opinion of the Supreme Court instead of giving his assent to the Bill in the usual course, has been criticised in Kerala as an undue interference with the constitutional rights of the State, but thanks to the wisdom and impartiality of the Supreme Court, the opinion delivered by the Court[17] has been dominated by a purely legalistic outlook free from any political consideration so that the federal system may reasonably be expected to remain unimpaired notwithstanding changes in the party situation so long as the Supreme Cocrt discharges its duties as a guardian of the Constitution.

The proper assessment of the federal scheme introduced by *our* Constitutson is that it introduces a system which is to *normally* work as a federal system, but there are provisions for converting it into a unitary or quasi-federal system under specified exceptional circumstances.[18] But the exceptions cannot be held to have overshadowed the basic and normal structure.

The exceptions are, no doubt, unique; but in cases where the exceptions are not attracted, the federal provisions are to be applied without being influenced by the existence of the exceptions. Thus, it will not be possible either for the Union or a State to assume powers which are assigned by the Constitution to the other Government, unless such assumption is sanctioned by some provisions of the Constitutson itself. Nor, would such usurpation or encroachment be valid by consent of the other party, for the Constitution itself provides the cases in which this is permissible by consent [e.g., Ars. 252, 258 (1), 258A]; hence, apart from these exceptional cases, the Constitution would not permit any of the units of the federation to subvert the federal structure set up by the Constitution, even by consent. Nor would this be possible by delegation of powers by one Legislature in in favour of another.

The federal background must be kept in view in interpreting relevant provisions of the Constitution. Thus, in explaining the significance of Art. 301, S. K. Das J. (as he then was) of *our* Supreme Court[19] has observed—

".... .the provisions of our Constitution must be interpreted against the historical background in which our Constitution was made; the background of problems which the Constitution-makers tried to solve according to the genius of the Indian people .....There were trade barriers raised by the Indian States in the exercise of their legislative powers and the Constitution-makers had to make provisions with regards to those trade barriers as well. The evolution of a federal structure or a quasi-federal structure necessarily involved, in the context of the conditions then prevailing, a distribution of powers and a basis part our Constitution relates to that distribution with the three legislative lists in the Seventh Schedule. The Constitution itself says by Art. 1 that India is a Union of States and in interpreting the Constitution one must keep in view *the essential structure* of a federal or quasi-federal Constitution, namely, that *the units of the Union have also certain powers as has the Union itself*....

In evolving an integrated policy on this subject our Constitution-makers seem to have kept in mind three main considerations....first in the larger interests of India there must be free flow of trade, commerce and intercourse, both inter-State and intra-State; second, *the regional interests must not be ignored altogether;* and third, there must be a power of intervention by the Union in case of crisis to deal with particular problems that may arise in any part of India.....Therefore, in interpreting the relevant articles in Part XIII we must have regard to the *general scheme* of the Constitution of India with special reference to Part III. Part XII.... and their inter-relation to Part XIII *in the context of a federal or quasi-federal Constitution* in which the States have certain powers including the power to raise revenues for their purposes by taxation".

In fine, it may be said, that the Constitution of India is neither purely federal nor purely unitary but is a combination of both. It is a union or composite State of a novel type.[20] It enshrines the principle that "in spite of federalism, the national interest ought to be paramount".[21]

REFERENCES :

1. Draft Constitution, 21-2-48, p. iv.
2. C. A. D., Vol VII, p. 43.
3. Prof. W. T. Wagner, Federal States and their Judiciary (Moulton & Co. 1959), p. 25.
4. Livingston, Federation and Constitutional Change, 1956, pp. 6-7.

5. *Cf. Gujarat University* v. *Sri Krishna*, A.I.R. 1963 S.C. 703 (*715-6*); *Waverly Mills* v. *Rayman & Co.*, A.I.R. 1963 S.C. 90 (*95*).
6. *Cf. State of West Bengal* v. *Union of India*, A.I.R. 1963 S.C. 1241.
6a. *Cf. Atiabari Tea Co.* v. *State of Assam*, (1961) 1 S.C.R. 809 (*860*); *Automobile Transport* v. *State of Rajasthan*, A.I.R. 1962 S.C. 1406 (*1416*).
7. Though the federal system as envisaged by the Government of India Act, 1935 could not fully come into being owing to the failure of the Indian States to join it, the provisions relating to the Central Government and the Provinces were given effect to as stated earlier [see p. 9, *ante*].
8. Vide Table III, col. (A).
9. Sri Santhanam (Union-State Relations in India 1960, p. 7) has expressed the view that the provision in Art. 4, which was inserted in the Constitution with the object of easily effecting a reorganisation of the States on the basis of linguistic and cultural affinity, has served its purpose by the enactment of the States Reorganisation Act, 1956 and should now be omitted by an amendment of the Constitution, in conformity with the requirements of the Proviso to Art. 368, and unilateral legislation by Parliament should not suffice.
10. Each of the 50 States of the U. S. A. has 2 (two) representatives in the Senate.
11. K. C. Wheare, 'India's New Constitution Analysed', (1950) 5 D.L.R. 25-26 (Jour); *Federal Government*, 1951, p. 28.
12. Wheare, Modern Constitutions, 2nd Ed. (1966), p. 21.
13. C. H. Alexandrowicz, Constitutional Developments in India, 1957, pp. 157-170.
14. Vide Author's Commentary on the Constitution of India, Fifth Ed., Vol. I, p. 29.
15. E.g., Santhanam, Union-State Relations in India, 1960, pp. vii; 51, 59, 63. At p. 70, the learned Author observes—
    'India has practically functioned as a Unitary State though the Union and the States have *tried* to function formally and legally as a Federation".
15. Griffith, The Impasse of Democracy, 1939 p. 196 quoted in Godshall, Government in the United States, p. 114.
16a. Cf. Birch, Federalism, pp. 305-6.
17. Re. Kerala Education Bill, A.I.R. 1958 S.C. 956.
18. As Dr. Ambedhar explained in the Constituent Assembly [VII C.A.D. 33-34], the political system adopted in the Constitution could be "both unitary as well as federal according to the requirements of time and circumstances".
19. *Automobile Transport* v. *State of Rajasthan*, A.I.R. 1962 S.C. 1406 (*1415-6*).
20. Granville Austin [The Indian Constitution (1966), p. 186] agrees with this view when he describes Indian federation as 'a *new* kind of federalism to meet India's peculiar needs'.
21. Jennings, Some Characteristics of the Indian Constitution, p. 55.

CHAPTER VI

TERRITORY OF THE UNION

As has been already stated, the political structure prescribed by the Constitution is a federal Union. The name of the Union is India or *Bharat* [Art. 1 (1)] and the members of this Union at present (since 1966)[1] are the seventeen States of Andhra Pradesh, Assam,[2] Bihar, Gujarat, Haryana, Kerala, Madhya Pradesh, Madras (renamed as 'Tamil Nadu' since 1969), Maharashtra, Mysore, Nagaland, Orissa, Punjab, Rajasthan, Uttar Pradesh, West Bengal, Jammu & Kashmir. Barring Jammu & Kashmir, which has still a special position under the Constitution (see *post*), the provisions of the Constitution relating to the States now apply to all these 17 States on the same footing.[1]

Name of the Union.

The expression 'Union of India' should be distinguished from the expression 'territory of India'. While the 'Union' includes only the States which enjoy the status of being members of the federal system and share a distribution of powers with the Union, the "territory of India" includes the entire territory over which the sovereignty of India, for the time being, extends.

Territory of India.

Thus, besides the States, there are two other classes of territories, which are included in the 'territory of India', viz.,

(i) 'Union Territories', and

(ii) Such other territories as may be acquired by India.

(i) The Union Territories are, since 1966, ten in number -

Delhi; Himachal Pradesh; Manipur; Tripura, the Andaman & Nicobar Islands; and the Laccadive, Minicoy and Amindivi Islands; Dadra & Nagar Haveli; Goa, Daman & Diu; Pondicherry, Chandigarh.[3]

The Union Territories are Centrally administrated areas, to be governed by the President, acting through an 'Administrator' appointed by him, and issuing Regulations for their good government [Art. 239-240].

(ii) Any territory which may, at any time, be acquired by India by purchase, treaty, cession or conquest, will obviously form part of the territory of India. These will be administered by the Government of India, subject to legislation by Parliament [Art. 246 (4)].

Thus, the French Settlement of Pondicherry (together with Karaikal, Mahe and Yanam), which was ceded to India by the French Government in 1954, was being administered as an acquired territory' until 1962, inasmuch as the Treaty of Cession had not yet been ratified by the French Parliament. After such ratification, the territory of these French Settlements was constituted a 'Union Territory', in December, 1962.

It has already been pointed out that the Indian federation differs from

the traditional federal system in so far as it empowers the Union Parliament to alter the territory or integrity of its units, namely, the States, without their consent or concurrence.

Formation of new States and alteration of boundaries, etc.

Where the federal system is the result of a compact or agreement between independent States, it is obvious that the agreement cannot be altered without the consent of the parties to it. This is why the American federation has been described as "an indestructible Union of indestructible States." It is not possible for the national Government to redraw the map of the United States by forming new States or by altering boundaries of the States as they existed at the time of the compact without the *consent* of the Legislatures of the States concerned. But since federation in India was not the result of any compact between independent States, there was no particular urge to maintain the initial organisation of the States as outlined in the Constitution even though interests of the nation as a whole demanded a change in this respect. The makers of *our* Constitution, therefore, empowered the Union Parliament to reorganise the States by a simple procedure, the essence of which is that the affected State or States may express their views but cannot resist the will of Parliament.

The reason why such liberal power was given to the national government to reorganise the States is that the grouping of the Provinces under the Government of India Acts was based on historical and political reasons rather than the social, cultural or linguistic divisions of the people themselves. The question of reorganizing the units according to natural alignments was indeed raised at the time of the making of the Constitution but then there was not enough time to undertake this huge task, considering the magnitude of the problem.

The provisions relating to the above subjects are contained in Arts. 3-4 of the Constitution.

Art. 3 says that—

"Parliament may by law—

(*a*) form a new State by separation of territory from State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;

(*b*) increase the area of any State;

(*c*) diminish the area of any State;

(*d*) alter the boundaries of any State;

(*e*) alter the name of any State:

Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States..... the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired."

Art. 4 provides that any such law may make supplemental, incidental

and consequential provisions for making itself effective and may amend the First and Fourth Schedules of the Constitution, without going through the special formality of a law for the amendment of the Constitution as prescribed by Art. 368. These Articles, thus, demonstrate the flexibility of our Constitution. By a simple majority and by the ordinary legislative process Parliament may form new States or alter the boundaries etc., of existing States and thereby change the political map of India. The only conditions laid down for the making of such a law are—

(a) No Bill for the purpose can be introduced except on the recommendation of the President.

(b) The President shall, before giving his recommendation, refer the Bill to the Legislature of the State which is going to be affected by the changes proposed in the Bill, for expressing its views on the changes *within the period specified by the President*. The President is not, however, bound by the views of the State Legislatures, so ascertained.

Procedure for reorganisation of States.

Here is, thus, a special feature of the Indian federation, viz., that the territories of the units of the federation may be altered or redistributed if the Union Executive and Legislature so desire.

Since the commencement of the Constitution, the foregoing power has been used by Parliament to enact the following Acts:—

1. The Assam (Alteration of Boundaries) Act, 1951 altered the boundaries of Assam by ceding a strip of territory by India to Bhutan.

2. The Andhra State Act, 1953 formed a new State named Andhra, by taking out some territory from the State of Madras as it existed at the commencement of the Constitution. This Act also made consequential provisions relating to representation, constitution and jurisdiction of High Court etc., as became necessary owing to the formation of the new State.

3. The Himachal Pradesh and Bilaspur (New State) Act, 1954 merged the two Part C States of Himachal Pradesh and Bilaspur to form one State, namely, Himachal Pradesh.

4. The Bihar and West Bengal (Transfer of Territories) Act, 1956, transferred certain territories from Bihar to West Bengal.

5. The States Reorganisation Act, 1956[1] reorganised the boundaries of the different States of India in order to meet local and linguistic demands. Apart from transferring certain territories as between the existing States, it formed the new State of Kerala and merged the former States of Madhya Bharat, Pepsu, Saurashtra, Travancore Cochin, Ajmer, Bhopal, Coorg, Kutch and Vindhya Pradesh in other adjoining States.

6. The Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959 transferred certain territories from the State of Rajasthan to that of Madhya Pradesh.

7. The Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959 made alterations in the boundaries of the States of Andhra Pradesh and Madras.

8. The Bombay Reorganisation Act, 1960[1] partitioned the State of Bombay to form the new State of Gujarat and to name the resodue of Bombay as Maharashtra.

9. The Acquired Territories (Merger) Art, 1960, provided for the merger into the State of Assam, Punjab and West Bengal of certain territories acquired by agreements entered into between the Governments of India and Pakistan, in 1958 and 1959.

[A similar transfer of certain territories from West Bengal and Assam to Pakistan under the aforesaid agreements, has been provided for by enacting the Constitution (Ninth Amendment) Act, 1960, because the Supreme Court opined that no territory can be ceded from India to a *foreign country* without amending the Constitution].[4]

10. The State of Nagaland Act, 1962 formed the State of Nagaland, comprising of the territory of the 'Naga Hills-Tuensang Area' which was previously a Tribal Area in the Sixth Schedule of the Constitution, forming part of the State of Assam.

11. The Punjab Reorganisation Act, 1966, by which the State of Punjab was split up into the State of Punjab and Haryana and the Union Territory of Chandigarh.

12. The Assam Reorganisation (Meghalaya) Act, 1969 created an autonomous sub-State named Meghalaya, within the State of Assam.

REFERENCES :

1. In the original Constitution, there were 19 States placed under three categories,—in Parts A, B and C of the First Schedule,—having different status and features (as shown in Table III, col. A). These States underwent some changes by subsequent legislation and reached a figure of 27 until the Constitution (Seventh Amendment) Act of 1956 abolished the three categories and placed all the States on the same footing (being 14 in number), as a result of the reorganisation made by the States Reorganisation Act, 1956, which was incorporated in the Constitution (Seventh) Amendment Act. By the Bombay Reorganisation Act (11 of 1960), the State of Bombay was split up into two States—Maharashtra and Gujarat. A new State, namely, Nagaland, was formed with effect from 1-2-64, by the State at Nagaland Act, 1962. The next change has been introduced by the Punjab Reorganisation Act, 1966, which has split up the State of Punjab into two States—Punjab and Haryana, with effect from 1-11-66.
2. The Twenty-second Amendment Act, 1969, was passed to form an autonomous sub-State within the State of Assam, comprising the tribal areas specified in Part A of the Table to para. 20 of the Sixth Schedule of the Constitution, to meet the demands of the Hill Tribes for a separate State for themselves, which has since been created and named *Meghalaya*.
3. The Portuguese enclaves of Dadra and Nagar Haveli, having been integrated with India, after the judgment of the International Court in India's favour, the territory of these two enclaves has been constituted a Union Territory, by the Constitution (Tenth Amendment) Act, 1961. Goa, Daman and Diu was added as a Union Territory, by the Constitution (Twelfth Amendment) Act, 1962, and Pondicherry was added by the Constitution (Fourteenth Amendment) Act, 1962. The tenth Union Territory, Chandigarh, has been added by the Punjab Reorganisation Act, 1966.

   [While these pages are going through the Press, a proposal to confer the full status of a 'State' upon some of the Union Territories, such as Manipur, Tripura, are afoot. A suggestion of merging Chandigarh with Punjab has also been accepted, on principle, by the Government of India].
4. *Re Berubari Union*, A.I.R. 1960 S.C. 845. [This cession could not be effected because the constitutionality of the transfer was challenged in the Courts. The litigation is now pending before the Supreme Court].

CHAPTER VII

CITIZENSHIP

Meaning of citizenship.

The population of a State is divided into two classes—citizens and aliens. While citizens enjoy full civil and political rights, aliens do not enjoy all of them.

The question of citizenship became particularly important at the time of the making of our Constitution because the Constitution sought to confer certain rights and privileges upon those who were entitled to Indian citizenship while they were to be denied to 'aliens'. The latter were even placed under certain disabilities.

Constitutional rights and privileges of citizens of India.

Thus, citizens of India have the following rights under the Constitution which aliens shall not have:

(i) Some of the Fundamental Rights belong to citizens alone, such as,—

(a) The right not to be discriminated against on grounds of religion, race, caste, sex or place of birth [Art. 15].

(b) The right to equality of opportunity in the matter of public employment [Art. 16].

(c) The right to the seven freedoms enumerated in Art. 19, i.e., the freedom of speech and expression; assembly; association; movement; residence; property profession.

(d) Cultural and educational rights conferred by Arts. 29-30.

(ii) Only citizens are eligible for certain offic such as those of the President [Art. 58 (1) (a)]; Vice-President [Art. 66 (3) (a)]; Judge of the Supreme Court [Art. 124 (3)] or of a High Court [Art. 217 (2)]; Attorney General [Art. 76 (1)]; Governor of a State [Art. 157]; Advocate-General [Art. 165].

(iii) The right of suffrage for election to the House of the People (of the Union) and the Legislative Assembly of every State [Art. 326] and the right to become a member of Parliament [Art. 84] and of the Legislature of a State [Art. 191 (d)] are also confined to citizens.

All the above rights are denied to aliens whether they are 'friendly' or 'enemy aliens. But *'enemy aliens'* suffer from a special disability; they are not entitled to the benefit of the procedural provisions in clauses (1)-(2) of Art. 22 relating to arrest and detention. An alien enemy includes not only subjects of a State at war with India but also Indian citizens who voluntarily reside in or trade with such a State.

The Constitution, however, did not intend to lay down a permanent or comprehensive law relating to citizenship in India. It simply described the

classes of persons who would be deemed to be the citizens of India *at the date of the commencement* of the Constitution and left the entire law of citizenship to be regulated by some future law made by Parliament. In exercise of this power, Parliament has enacted the Citizenship Act (LVII of 1955[1]), making elaborate provisions for the acquisition and termination of citizenship *subsequent ot the commencement of the* Constitution. The provisions of this Act[1] are to be read with the provisions of Part II of the Constitution, in order to get a complete picture of the law of Indian citizenship.

Constitutional and statutory basis of citizenship in India.

In view of the fact that the Act of Parliament only deals with the modes of acquisition of citizenship *subsequent* to the commencement of the Constitu- Constitution, we have now two sets of provisions relating to the acquisition of citizenship of India, and it would be convenient to deal with them separately:

A. Persons who became citizens on January, 26, 1950.

A. Under Arts 5-8 of the Constitution, the following persons became citizens of India at the commencement of the Constitution –

I. A person born as well as domiciled in the 'territory of India' (see p. 54, *ante*)—irrespective of the nationality of his parents [Arts. 5 (a)].

II. A person domiciled in the 'territory of India', either of whose parents was born in the territory of India,—irrespective of the nationality of his parents or the place of birth of such person [Art. 5 (b)]

III. A person who or whose father was not born in India, but who (a) has his domicile in the 'territory of India', and (b) has been ordinarily residing within the territory of India for not less than 5 years immediately preceding the commencement of the Constitution In this case also, the nationality of the person's parents is immaterial Thus, a subject of a Portuguese Settlement, residing in India for the 5 years preceding the commencement of the Constitution, with the intention of permanently residing in India, would become a citizen of India at the commencement of the Constitution [Art. 5 (c)].

IV. A person who had migrated from Pakistan, provided

(i) He or either of his parents or grand parents was born in 'India as defined in the Government of India Act, 1935 (as originally enacted)'; and—

(ii) (a) if he had migrated before Jul. 19, 1948, he has ordinarily resided within the "territory of India" [see p. 59, *ante*], since the date of such migration (in this case no registration of the immigrant is necessary for citizenship); or

(b) if he had migrated on or after July 19, 1948, he further makes an application before the commencement of this Constitution for registering himself as a citizen of India to an officer appointed by the Government of India, and is registered by that officer, being satisfied that the applicant has resided in the territory of India for at least 6 months before such application [Art. 6].

V. A person who migrated from India to Pakistan after the 1st March, 1947, but had subsequently *returned* to India under a permit issued under the authority of the Government of India for re-settlement or permanent return or under the authority of any law provided he gets himself registered in the same manner as under Art. 6 (b) (ii) [Art. 7].

VI. A person who, or any of whose parents or grandparents was born in 'India' as defined in the Government of India Act, 1935 (as originally enacted) but who is ordinarily residing in any country outside India (whether *before or after* the commencement of this Constitution), on application in the prescribed form, to the consular or diplomatic representative of India in the country of his residence [Art. 8] (Provision was thus made for Indians living in foreign countries at the date of commencement of the Constitution).

B Acquisition of citizenship after January 26, 1950.

B The various modes of acquisition of citizenship prescribed by the Citizenship Act, 1955 are as follows:

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

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

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

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

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

Loss of Indian citizenship.

The Citizenship Act, 1955 also lays down how the citizenship of India may be *lost*,—whether it was acquired under the Citizenship Act, 1955, or prior to it—under the provisions of the Constitution (p. 64, *ante*). It may happen in any of three ways—renunciation, termination and deprivation.

(a) Renunciation is a voluntary act by which a person holding the citizenship of India as well as that of another country may abjure one of them.[2]

(b) Termination shall take place by operation of law as soon as a citizen of India voluntarily acquires the citizenship of another country.

(c) Deprivation is a compulsory termination of the citizenship of India,

by an order of the Government of India, if it is satisfied as to the happening of certain contingencies, e.g., that Indian citizenship had been acquired by a person by fraud, or that he has shown himself to be disloyal or disaffected towards the Constitution of India.

One citizenship in India.

In fine, it should be noted that *our* Constitution, though federal, provides for one citizenship only, namely, the citizenship of India. In federal States like the *U.S.A.* and *Switzerland*, there is a dual citizenship, namely, federal or national citizenship and citizenship of the State where a person is born or permanently resides and there are distinct rights and obligations flowing from the two kinds of citizenship. In India, a person born or resident in any State can acquire only one citizenship, namely, that of India and the civic and political rights which are *conferred by the Constitution* upon the citizens of India can be equally claimed by any citizen of India irrespective of his birth and residence in any part of India.

Permanent residence within a State may, however, confer advantages in certain other matters, which should be noted in this context:

(a) So far as employments under the Union are concerned, there shall be no qualification for residence within any particular territory, but by Ar 16 (3) of the Constitution, the Union Parliament is empowered to lay dow that as regards any particular class or classes of employment *under a Stat* or Union Territory residence within that State or Territory shall be necessary qualification. The exception in the case of State employments ha been engrafted for the sake of efficiency, in so far as it depends on familiarity with local conditions.

It is to be noted that it is the Union Parliament which would be the sole authority to legislate in this matter and that State Legislatures shall have no voice. To this extent, invidious discriminations in different States is sought to be avoided. Parliament has, in the exercise of this power, enacted the Public Employment (Requirement as to Residence) Act, 1957 Prior to this enactment, some of the States had adopted various devices to exclude from their services persons who were not permanently resident in such States. By enacting the aforesaid Act in 1957, Parliament has repealed all such discriminatory State laws. By this Act, Parliament has empowered the Central Government to make rules, having force for a specified period, prescribing a residential requirement only for appointment to non-Gazetted posts in the Andhra Pradesh, Himachal Pradesh, Manipur and Tripura. Apart from this limited provision under the Act, nobody can be denied employment in any State on the ground of his being a non-resident in that State[3]

(b) As will be seen in the Chapter on Fundamental Rights, Art. 15 (1), which prohibits discrimination on grounds only of race, religion, caste, sex or place of birth, does not mention residence.[4] It is, therefore, constitutionally permissible for a State to confer special benefits upon its residents in matters other than those in respect of which rights are conferred by the

modify those 'fundamental rights' by reason of whose existence the State was experiencing difficulty in effecting agrarian and economic reforms which are envisaged by the Directive contained in Art. 39, e.g., "that the ownership and control of the material resources of the community are so distributed as best to subserve the common good."

Implementation of the Directives.

(iii) It would not be an easy task to survey the progress made by the Governments of the Union and the States in implementing such a large number of Directives over a period of one and a half decade since the promulgation of the Constitution. Nevertheless, a brief reference to some of the outstanding achievements may be made in order to illustrate that the Directives have not been taken by the Government in power as pious homilies, as was supposed by many when they were engrafted in the Constitution.

(a) The greatest progress in carrying out the Directives has taken place as regards the Directive [Art. 39 (b)] that the State should secure that the ownership and control of the material resources of the community are so distributed as best to subserve the common good." In an agrarian country like India, the main item of material resources is no doubt agricultural. Since the time of the Permanent Settlement this important source of wealth was being largely appropriated by a group of hereditary proprietors and other intermediaries known variously in different parts of the country, such as, zamindars, jagirdars, inamdars, etc., while the actual tillers of the soil were being impoverished by the operation of various economic forces, apart from high rents and exploitation by the intermediaries. The Planning Commission, in its First Plan, therefore, recommended an abolition of these intermediaries so as to bring the tillers of the soil in direct relationship with the State. This reform has, by this time, been carried out almost completely throughout India. Side by side with this, legislation has been undertaken in many of the States for the improvement of the condition of the cultivators as regards security of tenure, fair rents and the like. In order to prevent concentration of land holdings even in the actual cultivators, legislation has been enacted in many of the States, fixing a ceiling, that is to say, a maximum area of land which may be held an individual owner.

It has already been stated how these reforms have been faciliated by amending the Constitution to shield these laws from challenge in the Courts.

(b) A large number of laws have been enacted to implement the directive in Article 40 to organise village panchayats and endow them with powers of self-government. It is stated that the number of village panchayats in 1964 (over 2 millions) covers 98% of the rular population in the country.[10] Though the constitution and function of the panchayats vary according to the terms of the different State Acts, generally speaking, the panchayats, elected by the entire adult population in the villages, have been endowed with powers of civic administration, such as medical relief, maintenance of

village roads, streets, tanks and wells, provision of primary education, sanitation and the like.

Besides civic functions, the panchayats also exercise judicial powers like the old union courts and benches. The judicial wing of a panchayat thus has a civic jurisdiction to try cases of a value not exceeding rupees two hundred, and is also competent to try minor offences punishable with moderate fines. Legal practitioners are excluded from these village tribunals. Though owing to lack of proper education, narrow-mindedness and sectional interests in the rural areas, the system of panchayat administration is still under controversy, almost all the States have now enacted laws vesting various degrees of powers of self-government and of civic and criminal justice in the hands of panchayats.

(c) For the promotion of cottage industries [Art. 43], which is a State subject, the Central Government has established several Boards[11] to help the State Governments, in the matter of finance, marketing and the like. These are—All-India Khadi and Village Industries Board; All-India Handicrafts Board; All-India Handloom Board; Small-scale Industries Board; Silk Board, Chair Board. Besides, the National Small Industries Corporation has been set with certain statutory functions, and the Khadi and Village Industries Commission has been set up for the development of the Khadi and village industries.

(d) Legislation for compulsory education [Art. 45] has been enacted in most of the States and in the Union Territory of Delhi.[12]

(e) For raising the standard of living [Art. 47], particularly of the rural population, the Government of India launched its Community Development Project in 1952. The actual execution of the development programme is the responsibility of the State Governments. Over 566 thousand villages and 403 millions of people[13] are already under this programme which aims at providing better communications, better housing improved sanitation, wider education (general as well as technical).

(f) Though legislation relating to prohibition of intoxicating drink and drugs [Art. 47] had taken place in some of the Provinces long before the Constitution came into being, not much of effective work had been done until, in pursuance of the Directive in the Constitution, the Planning Commission took up the matter and drew up a comprehensive scheme through its Prohibition Enquiry Committee. Since then prohibition has been introduced in most of the States in whole or in part.[14] Among the States which have not undertaken any such legislation should be mentioned Uttar Pradesh and West Bengal.[14]

(g) As to the separation of the executive from the judiciary [Art. 50], many of the States have already implemented this directive either wholly or in part. Though the schemes adopted by the various States differ in details, the common feature of the State laws which effect such separation is that the magistrates have been classified under two heads—

judicial and non-judicial.. Legal qualifications are being insisted upon for recruitment to the judicial magistracy to whom the powers of trying criminal cases have been assigned and these judicial magistrates have been placed under the complete control of the High Court.

With the passing of the revised Criminal Procedure Code, separation would be introduced throughout India.

Besides the Directives contained in Part IV, there are certain other Directives addressed to the State in other Parts of the Constitution. Those Directives are also non-justiciable. These are—

Directives contained in other Parts of the Constitution.

(a) Art. 350A enjoins every State and every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups.

(b) Art. 351 enjoins the Union to promote the spread of the Hindi language and to develop it so that it may serve as a medium of expression of all the elements of the composite culture of India.

(c) Art. 335 enjoins that the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.

REFERENCES :

1. 'State' in this context, has the same meaning as in the Chapter on Fundamental Rights (see p. 73, *ante*). This means that not only the Union and State authorities, but also local authorities shall have a moral obligation to follow the directives, *e.g.*, the promotion of cottage industries, prohibition of consumption of intoxicants or of the slaughter of milch cattle, improvement of public health and of the level of nutrition of the people.
2. Jennings, Some Characteristics of the Indian Constitution, p. 13.
3. Hindusthan Standard, Delhi, 17-5-58, p. 7; see also Second Five Year Plan p. 22.
4. *State of Madras* v. *Champakam*, (1951) S.C.R 523 (*531*).
5. Jennings, (1950) Madras University Lectures.
6. Wheare, Modern Constitutions, p. 47.
7. Granville Austin, The Indian Constitution, pp. 50-52.
8. *State of Bombay* v. *Balsara*. A.I.R. 1951 S.C. 318; *Hanif Quareshi* v. *State of Bihar*, A.I.R. 1968 S.C. 731.

8a. *State of Bihar* v. *Kameshwar*. A.I.R. 1952 S.C. 252 (Mahajan & Aiyar JJ.).

9. Re Kerala Education Bill, A.I.R. 1958 S.C. 956.
10. India, 1969, p. 49.
11. India, 1969, p. 346.
12. *Ibid.*, p. 63.
13. *Ibid.*, p. 256.
14. *Ibid.*, p. 109.

CHAPTER X

PROCEDURE FOR AMENDMENT

Nature of the amending process.

The nature of the amending process envisaged by the makers of *our* Constitution can be best explained by referring to the observation of Pandit Nehru (quoted at p. 33, *ante*), that the Constitution should not be so rigid that it cannot be adopted to the changing needs of national development and strength.

There was also a *political* significance in adopting a 'facile procedure' for amendment, namely, that any popular demand for changing the political system should be capable of realisation, if it assumed considerable volume. In the words of Dr. Ambedkar, explaining the proposals for amendment introduced by him in the Constituent Assembly :[1]

"Those who are dissatisfied with the Constitution have only to obtain a two-thirds majority, and if they cannot obtain even a two-thirds majority in the Parliament elected on adult franchise in their favour, their dissatisfaction with the Constitution cannot be deemed to be shared by the general public".[2]

Elements of flexibility were therefore imported into a Federal Constitution which is inherently rigid in its nature. According to the traditional theory of federalism, either the process of amendment of the Constitution is entrusted to a body other than the ordinary Legislature or a special procedure is prescribed for such amendment in order to ensure that the federal compact may not be disturbed at the will of one of the parties to the federation, viz., the federal legislature.

But, as has been explained at the outset, the framers of *our* Constitution were also inspired by the need for the sovereignty of the Parliament elected by a universal suffrage to enable it to achieve a dynamic national progress. They, therefore, prescribed an easier mode for changing those provisions of the Constitution which did not primary affect the federal system. This was done in two ways :—

(a) By providing that the alteration of certain provisions of the Constitution were *'not to be deemed to be amendment of the Constitution'*. The result is that such provisions can be altered by the Union Parliament in the ordinary process of legislation, that is, by a simple majority.

Procedure for amendment.

(b) Other provision of the Constitution can be changed only by the process of 'amendment' which is prescribed in Article 368. But a differentiation has been again made in the procedure for amendment, according to the nature of the provisions sought to be amended. While in all cases of amendment of the Constitution, a Bill has to be passed by the Union Parliament by a special majority, in the case of certain provisions

which affect the *federal structure*, a further step is required, viz., a ratification by the Legislatures of at least half of the States, before the Bill is presented to the President for his assent [Art. 368]. But even in these latter group of cases, the law which eventually effects the amendment is a law made by he Union Parliament, which is the ordinary legislative organ of the Union. There is thus no separate *constituent* body provided for by *our* Constitution for the amending process. The procedure for amendment is—

I. An amendment of the Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority (i.e., more than 50%) of the total membership of that House and by a majority of not less than two-thirds of the members of that House *present and voting*, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill.

II. If, however, such amendment seeks to make any change in the following provisions, namely,—

(a) The manner of election of the President [Arts. 54, 55]; (b) Extent of the executive power of the Union and the States [Arts. 73, 162]; (c) The Supreme Court and the High Courts [Art. 241, Ch. IV of Part V Ch. V of Part VI]; (d) Distribution of legislative power between the Union and the States [Ch. I of Part XI]; (e) Any of the Lists in the Seventh Schedule; (f) Representation of the States in Parliament [Arts. 80 81, Fourth Schedule]; (g) Provisions of Art. 368 itself,—

the amendment shall also require to be ratified by the Legislatures of not less than one half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent[2] [Art. 368].

General features of the amending procedure.

It is clear from the above that the amending process prescribed by *our* Constitution has certain distinctive features as compared with the corresponding provisions in the leading Constitutions of the world. The procedure for amendment must be classed as 'rigid' in so far as it requires a special majority and, in some cases, a special procedure for amendment as compared with the procedure prescribed for ordinary legislation. But the procedure is not as complicated or difficult as in the *U. S. A.* or in any other rigid Constitution.

(*a*) Subject to the special procedure laid down in Art. 368, *our*[3] Constitution vests constituent power upon the ordinary legislature of the Union, i.e., the Parliament, (of course, acting by a special majority) and there is no separate body for amending the Constitution, as exists in some other Constitutions (e.g., a Constitutional Convention).

(*b*) The State Legislatures cannot initiate any Bill or proposal for amendment of the Constitution. The only mode of initiating a proposal

for amendment is to introduce a Bill in either House of the Union Parliament.

(*c*) *Subject to the provisions of Art. 368,* Constitution Amendment Bills are to be passed by Parliament in the same way as ordinary Bills.[2] In other words, they may be initiated in *either* House, and may be amended like other Bills, subject to the majority required by Art. 368. But for the special majority prescribed, they must be passed by both the Houses and receive the President's assent, like any other Bill. There is no requirement of a referendum or plebiscite, or a reference to constitutional convention.

(*d*) The previous sanction of the President is not required for introducing in Parliament any Bill for amendment of the Constitution.

(*e*) The requirement relating to ratification by the State Legislatures is more liberal than the corresponding provisions in the American Constitution. While the latter requires ratification by not less than three-fourths of the States, under *our* Constitution ratification by not less than half of them suffices.

Is Part III or any other Part of the Constitution unamendable?

A. Until the case of *Golak Nath,*[4] the Supreme Court had been holding that no part of our Constitution was unamendable and that Parliament might, by passing a Constitution Amendment Act, in compliance with the requirements of Art. 368, amend any provision of the Constitution, including the Fundamental Rights and Art. 368 itself.[3]

B. But, in *Golak Nath's case,*[4] a majority of six Judges of a special Bench of eleven has overruled the previous decisions[3] and taken the view that though there is no express exception from the ambit of Art. 368, the Fundamental Rights included in Part III of the Constitution cannot, by their very nature, be subject to the process of amendment provided for in Art. 368 and that if any of such Rights is to be amended, a new Constituent Assembly must be convened for making a new Constitution or radically changing it.

The Constitution Amendment Acts.

Since its 'commencement' on January 26, 1950, the Constitution of India has been amended *twenty-four times till November, 1970,* by passing Acts of Parliament in the manner prescribed by Art. 368.

The passing of these Constitution Amendment Acts illustrates the marked flexibility of our Constitution though it is written.

I. The First Amendment Act was passed in 1951, almost within a year of the commencement of the Constitution. Several provisions of the Constitution were affected by this amendment, but the amendment of Art. 19 and the insertion of two new Articles, 31A and 31B, deserve special mention. In Art. 19, clause (2), several new grounds of restriction to the freedom of speech and expression were added, such as public order incitement of an offence, interests of friendly relation with foreign States. Arts. 31A

and 31B were added with the object of facilitating the acquisition of zamindari estates and other intermediary interests without the obligation of payment of compensation.

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

III. The Constitution (Third) Amendment Act, 1954 was relatively more important, though it was confined to the amendment of one entry in the legislative Lists, viz., Entry 33 of List III. The third amendment was necessitated by the fact that while the concurrent power conferred on Union by Art. 369 in respect of certain commodities was for a temporary period ending with the 25th January, 1955, the continuance of Union control over this sphere was found to be desirable in the interest of the national economy. The contents of Art. 369 have, accordingly, been transferred to Entry 33 of List III so that Parliament has now a concurrent power to legislate as regards the trade and commerce in, and the production, supply and distribution of, the commodities mentioned in that Entry notwithstanding the fact that the temporary power conferred by Art. 369 has expired.

IV. Momentous changes were effected by the Constitution (Fourth) Amendment Act which came into force from 27-4-1955. It amended Art. 31 and substituted Art. 31A and Art. 305 almost all these changes were made with a view to superseding the decisions and observations of the Supreme Court in several cases, where a view contrary to that envisaged by the framers of the Constitution had been taken.

One of the changes made is that the amount of compensation payable under Art. 31 (2) will no longer be justiciable. The adequacy of the compensation has been left to the Legislature instead of to the courts, for, according to Government it was not possible to carry out the great schemes of social reforms which the State was undertaking and going to undertake if full market value was to be paid (as had been held by the Supreme Court) and if the adequacy of the compensation was justiciable in every case. Another amendment to Art. 31 makes it clear that the obligation to pay compensation as laid down in Art. 31 (2) is restricted only to two cases, viz., 'acquisition and requisition' of property and that it does not arise when the property is either totally destroyed or it is affected by the operation of the laws of the State, without any 'acquisition or requisition' being involved in such act. Article 31A has been amended by adding several other classes of legislation within its ambit, for example, the taking over under State management for a temporary period of all commercial or industrial undertakings or the extinguishment or modification of rights arising out of contracts or licenses for prospecting the mineral resources of the country. Not only laws relating to agrarian reforms but also such laws as stated above are now exempted from the operation of the provisions of Fundamental Rights in the Constitution, in order to pave the way for the socialistic pattern of society which has been declared to be the objective of our State.

V. The Constitution (Fifth Amendment) Act, 1955 provided for the

imposition of a time limit within which the States were to give their views for re-organisation of the State, under Art. 3.

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

VII. The Constitution (Seventh Amendment) Act, 1956 made extensive changes in the Constitution, consequent upon the re-organisation of the States (see p 56, *ante*).

This Amendment was made to implement the scheme of re-organisation of the States and was passed simultaneously with the States Reorganisation Act, 1956 It definitely advanced the movement towards the unification of India by another step.

(*a*) While under the Patel Scheme of Integration, the Indian States were integrated with India and the Rulers lost their independence, there remained the relic of the Indian States in the Part B States, which formed a separate category of States in the Constitution of 1950 The Seventh Amendment Act, 1956 abolished the Part B States altogether and those of them that retained their entity after the reorganisation, were placed on the same footing as the other States.

(*b*) Similarly, the Part C States, as a class, ceased to exist.

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

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

(*i*) Instead of three categories of States, there was now only one class of 'States' and their number, after the reorganisation, became 14 At the end of 1969, this number became 17 [see p 59, *ante*]

(*ii*) The category of 'territory in Part D' was replaced by 'Union Territories', and this class now includes not only the Andaman & Nicobar Islands which were previously included in Part D, but also some of the erstwhile Part C States. The total number of these Union Territories became 6. (At the beginning of 1970, this number was 10)

VIII. By the Eighth Amendment Act of 1959, an amendment was made in Art. 334 to prolong the reservation of seats in the Legislatures for the Scheduled Castes and Tribes and the Anglo-Indians, for another ten years.

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

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

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

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

XIII. The Thirteenth Amendment Act, 1962, inserted Art. 371A to make special provisions for the administration of the State of Nagaland.

XIV. The Fourteenth Amendment Act, 1962, added Pondicherry as a Union Territory and provided for Legislatures for the Union Territories of Himachal Pradesh; Manipur; Tripura; Goa, Daman and Diu; Pondicherry.

XV. Several Articles, including Art 311, were amended by the Fifteenth Amendment Act, 1963 The most controversial of the changes introduced by this Act are the provisions regarding the age of High Court and Supreme Court Judges.

XVI. By the Sixteenth Amendment Act, 1963, changes have been made in Arts. 19, 84, 173 and some provisions in the Schedule to ensure that any act or conduct which is prejudicial to the sovereignty and integrity of India shall not be permissible under the Constitution.

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

XVIII. The Eighteenth Amendment Act, '66 made some verbal amendments in Art. 3, to include Union Territories

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

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

XXI. The Twenty-First Amendment Act, 1967 was passed to include 'Sindhi' language within the list of Official Languages in the Eighth Schedule.

XXII. By the (Twenty-second Amendment) Act, 1969, Art. 244A was inserted in the Constitution (with consequential changes in other Articles) to empower Parliament to create an autonomous State within the State of Assam by making a law to that effect. In pursuance of this power, Parliament has enacted the Assam Reorganisation (Meghalaya) Act, 1969,

creating the sub-State of Meghalaya, which is now aspiring to attain the status of a full-fledged State.

XXIII. The Twenty-third Amendment Act, 1969 has amended Arts. 330, 332, 333 and 334 to extend the reservations prescribed by the Constitution in favour of the Scheduled Castes and Tribes and the Anglo-Indians, by another ten years.

It is evident that, instead of being rigid, as some critics supposed during the early days of the Constitution,[5] the procedure for amendment has rather proved to be too flexible in view of the ease with which as many as twenty-three amendments have been gone into during the first two decades of the working of the Constitution. So long as the party in power at the Centre has a solid majority in Parliament and in more than half of the State Legislatures, the apprehension of impartial observers should be not as to the difficulty of amendment but as to the possibility of its being used too often either to achieve political purposes or to get rid of judicial decisions[6] which may appear to be unwholesome to the party in power. Judges may, of course, err but, as has already been demonstrated, even the highest tribunal is likely to change its views in the light of further experience.[7] In the absence of serious repercussions, therefore, the process of constitutional amendment should not be resorted to for the purpose of overriding unwelcome judicial verdicts so often as would generate in the minds of the lay public an irreverence for the Judiciary which might shake the very foundation of constitutional government.

REFERENCES :

1. Const Assembly Deb., d. 25-11-49, pp. 225-6
2. See Table IV for instances where such ratification has been obtained for amending the Constitution.
3. *Shankari Prasad* v. *Union of India*, A.I R. 1951 S.C. 458; *Sajjan Singh* v. *State of Rajasthan*, A.I R. 1965 S.C. 845.
4. *Golak Nath* v *State of Punjab*, A I.R. 1967 S C. 1643.
5. *Cf.* Jennings, Some Characteristics of the Indian Constitution, pp. 9-10.
6. Cf. Ramaswami Aiyar's Foreword to Krishnaswami Aiyar's Constitution and Fundamental Rights, p ix.
7. Thus, in *Bengal Immunity Co.* v. *State of Bihar*, (1955) 2 S.C.R. 603, the Supreme Court overruled its previous majority decision in *State of Bombay* v. *United Motors*, (1953) S.C.R. 1069, as regards the power of a State in which goods are delivered for consumption to tax the sale or purchase of such goods though it is in the course of inter-State trade or commerce.
   It was observed in this case that there was no provision in the Constitution to bind the Supreme Court by its own decisions.

PART TWO

GOVERNMENT OF THE UNION

CHAPTER XI

THE UNION EXECUTIVE

1. *The President and the Vice-President*

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

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

Election of President.

The electoral college shall consist of—

(a) The elected members of both Houses of Parliament; and (b) the elected members of the Legislative Assemblies of the States [Art. 54].

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

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

(i) Direct election by an electorate of some 320 millions of people would mean a tremendous loss of time, energy and money. (ii) Under the system of responsible Government introduced by the Constitution, real power would vest in the ministry; so, it would be anomalous to elect the President directly by the people without giving him real powers.[3]

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

Qualifications for election as President.

(a) be a citizen of India;

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

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

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

But a sitting President or Vice-President of the Union or the Governor,

of any State or a Minister either for the Union or for any State is not disqualified for election as President [Art. 58].

Term of office of President.

The President's term of office is five years from the date on which he enters upon his office; but he is eligible for re-election[4] [Arts. 56-57].

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

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

(ii) By removal for violation of the Constitution, by the process of impeachment [Art. 56].

Procedure for impeachment of the President.

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

But the charge cannot be preferred by a House unless—

(a) a resolution containing the proposal is moved after a 14 days notice in writing signed by not less than ¼ of the total number of members of that House; and

(b) the resolution is then passed by a majority of not less than ⅔ of the total membership of the House.

The President shall have a right to appear and to be represented at such investigation. If, as a result of the investigation, a resolution is passed by not less than ⅔ of the total membership of the House before which the charge has been preferred declaring that the charge has been sustained, such resolution shall have the effect of removing the President from his office with effect from the date on which such resolution is passed [Art. 61].

Conditions of President's office.

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

Emoluments and allowances of President.

The President shall be entitled without payment of rent to the use of his official residence and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments,[5] allowances and privileges as are specified in the Second Schedule of the Constitution. The emoluments and allowances of the President shall not be diminished during his term of office [Art. 59 (3)].

former is given a power to send back to the Legislature a measure for ther consideration. Such a veto is not quite opposed to the principle derlying the Parliamentary system, but only ensures better legislation, interposing a check.

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

(A) *Absolute veto*—The English Crown possesses the prerogative of solute veto, and if it refuses its assent to any bill, it cannot become law, withstanding any vote of Parliament. But this veto power of the Crown become *obsolete* since 1700, owing to the development of the Cabinet m, under which all public legislation is initiated and conducted in the egislature by the Cabinet. Judged by practice and usage, thus, there is at resent no executive power of veto in England.

(B) *Qualified veto*—A veto is 'qualified' when it can be overridden by extraordinary majority of the Legislature and the Bill can be enacted as w with such majority vote, overriding the executive veto. The veto of e American President is of this class. When a Bill is presented to the resident, he may, if he does not assent to it, return the Bill within 10 ys, with a statement of his objections, to that branch of Congress in which originated. Each House of Congress then reconsiders the Bill and if it adopted again in each House, by a two-thirds vote of the members ent,—the bill becomes a law, notwithstanding the absence of the ident's signature. The qualified veto is then overridden. But if it fails obtain that two-thirds majority, the veto stands and the Bill fails to ome law. The qualified veto thus serves as a means to the Executive to nt out the defects of the legislation and to obtain a re-consideration by Legislature, but ultimately the extraordinary majority of the Legislature vails. The qualified veto is thus a useful device in the United States ere the Executive has no power of control over the Legislature, by rogation, dissolution or otherwise.

(C) *Suspensive veto*—A veto is suspensive when the executive veto be overridden by the Legislature by an *ordinary* majority. To this type ongs the veto power of the French President. If, upon a reconsideration, rliament passes the Bill again by a simple majority, the President has no ion but to promulgate it.

(D) *Pocket veto*—There is a fourth type of veto called the 'pocket veto' hich is possessed by the American President. When a Bill is presented him, he may neither sign the Bill nor return the Bill for reconsideration thin 10 days. He may simply let the Bill lie on his desk until the ten- limit has expired. But, if in the meantime, Congress has adjourned (i.e. ore expiry of the period of ten days from presentation of the Bill to President), the Bill fails to become a law. This method is known the 'pocket veto', for, by simply withholding a Bill presented to the ident during the last few days of the session of Congress the President revent the Bill to become law.

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

In India.

(i) As in *England,* there would be an end to a Bill if the President declares that he withholds his assent from it. Though such refusal has become obsolete in England since the growth of the Cabinet system under which it is the Cabinet itself which is to initiate the legislation as well as to advise a veto, such a provision was made in the Government of India Act, 1935. Again, notwithstanding the introduction of full Ministerial responsibility, the same provision has been incorporated in the new Constitution. It may be expected that this power will be exercised only in the case of 'private' members' bills. In the case of a Government Bill, a situation may, however be imagined where after the passage of a Bill the Ministry resigns and the next Council of Ministers, commanding a majority in Parliament, advises the President to use his veto power against the Bill In such a contingency, it would be constitutional on the part of the President to use his veto power even though the Bill had been duly passed by Parliament.[12]

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

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

(II) *Disallowance of State legislation.*—Besides the power to veto Union legislation, the President of India shall also have the power of disallowance or return for reconsideration of a Bill of the State Legislature, which may have been reserved for his consideration by the Governor of the State [Art. 200].

Disallowance of State legislation.

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

But *India* has adopted a federation of the Canadian type.

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

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

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

(h) The Ordinance-making power.

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

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

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

This independent power of the Executive to legislate by Ordinance is a

relic of the Government of India Act, 1935 but the provisions of the Constitution differ from that of the Act of 1935 in several material respects as follows:

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

Secondly, the Ordinance must be laid before Parliament when it reassembles, and shall automatically cease to have effect at the expiration of 6 weeks from the date of reassembly unless disapproved earlier by Parliament.

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

Any legislative power of the Executive (independent of the legislature) is unimaginable in the *U.S.A.*, owing to the doctrine of Separation of Powers underlying the American Constitution and even in *England*, since the *Case of Proclamations*, [(1610) 2 St. Tr. 723]. But the power to make Ordinances during recesses of Parliament has been justified in *India*, on the ground that the President should have the power to meet with a pressing need for legislation when either House is not in session.

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

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

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

Possibility of abuse of the Ordinance-making power.

But 'immediate action' has no necessary connection with an 'emergency' such as is referred to in Art. 352. Hence, the promulgation of an Ordinance is not dependent upon the existence of an internal or external aggression. The only test is whether the circumstances which call for the legislation are so serious and imminent that the delay involved in summoning the Legislature and getting the measure passed in the ordinary course of legislation cannot be tolerated. But the sole judge

of the question whether such a situation has arisen is the President himself and a Court cannot enquire into the propriety of his satisfaction even where it is alleged that the power was not exercised in good faith. Thus, it has been held that the Court cannot interfere even where the Legislature is prorogued for the very purpose of making an Ordinance.[14] Even where the reasons for promulgation are recited in the Ordinance itself, the Court cannot examine its sufficiency or *bona fides*.[15]

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

It is clear that there should be some safeguard against such abuse. The Courts are of no use for this purpose as they cannot go into the sufficiency of the reasons for promulgating the Ordinance or the property of the satisfaction of the President as to the need for 'immediate action'. So the corrective must be found out by Parliament itself. So far as the merits of the Ordinance are concerned, Parliament, of course, gets a chance to review the measure if the Government seeks to prolong the duration of the Ordinance introducing a Bill to replace it. It may also pass resolutions disapproving of the Ordinance, if and when the Government is obliged to summon the Parliament for other purposes [Art. 123 (2) (a)]. But the real question is how to enable Parliament to tell the Government, short of passing a vote of censure or of no-confidence, that it does not approve of the conduct of the Government in making the Ordinance instead of bringing a Bill for the purpose? The House of the People has made a Rule requiring that whenever the Government seeks to replace an Ordinance by a Bill, a statement "explaining the circumstances which necessitated immediate legislation by Ordinance" must accompany such Bill. The Rules do not, however, provide for an opportunity for a discussion or debate on the above statement. The statement merely informs the House of the

grounds advanced by the Government. A general discussion, without any vote, if permissible, would have enabled Parliament to convey its feelings to the Government without necessarily bringing about its fall.

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

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

Pardoning powers of President and Governor compared.

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

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

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

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

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

(*iii*) The *only* authority for pardoning a sentence of death is the President.

But though the Governor has no power to pardon a sentence of death, he has, under s. 54 of the Penal Code and ss. 401-2 of the Criminal Procedure Code, the power to suspend, remit or commute a sentence of death in certain circumstances. This power is left in tact by the Constitution, so that as regards suspension, remission or commutation, the Governor shall have a concurrent jurisdiction with the President.

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

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

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

(c) He has the power to refer any question of public importance for the opinion of the Supreme Court and already five such references have been made since 1950 [Art. 143; see *post*].

(d) He has the power to appoint certain Commissions for the purpose of reporting on specific matters, such as, commissions to report on the administration of Scheduled Areas and welfare of Scheduled tribes and

backward classes; the Finance Commission; Commission on Official Language; an Inter-State Council.

(e) He has some special powers relating to 'Union Territories', or territories which are directly administered by the Union. Not only is the administration of such Territories to be carried on by the President through an Administrator, responsible to the President alone, but the President has the final legislative power (to make regulations) relating to the Territories of the Andaman and Nicobar Islands; the Laccadive, Minicoy and Amindivi Islands; Dadra and Nagar Haveli;[10] and may even repeal or amend any law made by Parliament as may be applicable to such Territories [Art. 240].

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

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

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

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

(*iv*) Until a notification is issued by the Governor, with the approval of the President, in respect of any Tribal Area specified in Part B of the table in Sch. VI of any part of such area, the administration of such area or part thereof, as the case may be, shall be carried on by the President through the Governor of Assam as his agent [Sch. VI, Para. 18 (2)].

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

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

(i) Subject to modification by Parliament, the President has the power to draw up and notify the lists of Scheduled Castes and Tribes in each State and Union Territory. Consultation with the Governor is required in the case of the list relating to a State [Arts. 341-2].

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

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

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

(a) *Firstly,* the President is given the power to make "Proclamation of Emergency" on the ground of threat to the security of India or any part thereof, by war, external aggression or internal disturbance The object of this Proclamation is to maintain the security of India and the effect of the Proclamation is, *inter alia,* assumption of wider control by the Union over the affairs of the States or any of them as may be affected by internal or external aggression [Art. 352].

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

(*c*) *Thirdly,* the President is empowered to declare that a situation has arisen whereby "the financial stability or credit of India or of any part thereof is threatened" [Art 360]. The object of this Proclamation is to maintain the financial stability of India by controlling the expenditure of the States and by reducing the salaries of the public servants, and by giving directions to the States to observe canons of financial propriety, as may be necessary.[17]

3. *The Council of Ministers*

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

A body recognised by the Constitution.

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

The Constitution, thus, laid down in Art. 74 (1)—

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

Appointment of Ministers.

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

Council of Ministers and Cabinet.

The number of members of the Council of Ministers is not specified in the Constitution. It is determined according to the exigencies of the time. At the end of 1961, the strength of the Council of Ministers of the Union was 47, and at the end of 1964, it was raised to 51. All the Ministers, however, do not belong to the same rank. They are classified under three ranks: (a) Cabinet Ministers or "members of the Cabinet"; (b) Ministers of State; (c) Deputy Ministers.[19]

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

Salaries of Ministers.

The Council of Ministers is thus a composite body, consisting of different categories. At the Centre, these categories are three, as stated above. According to the Salaries and Allowances of Ministers Act, 1952, as amended, the salaries and allowances of these three ranks of Ministers are—

(a) Cabinet Minister: Rs. 2,250/- plus a sumptuary allowance of Rs. 500/-, per mensem.

(b) Minister of State: Rs. 2,250/- but no sumptuary allowance.

(c) Deputy Minister: Rs. 1,750/-.

No Minister shall be entitled to any salary or allowance as a member of Parliament in addition to the above, but each Minister shall be entitled to a residence, free of rent.

The rank of the different Ministers is determined by the Prime Minister according to whose advice the President appoints the Ministers [Art. 75 (1)], and also allocates business amongst them (Art. 77). While the Council of Ministers is collectively responsible to the House of People [Art. 75 (3)] and Art. 78 (c) enjoins the Prime Minister, when required by the President, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council,—in practice, the Council of Ministers seldom meets as a body. It is the Cabinet, an inner body within the Council, which shapes the policy of the Government. As in England, the Cabinet, as a body, is not known to the law.

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

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

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

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

By virtue of this provision, Pandit Pant, who was not a member of Parliament, was appointed Minister for the Union and, subsequently, he secured a seat in the Upper House, by election.

Ministerial responsibility to Parliament.

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

Collective responsibility.

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

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

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

Of course, instead of resigning, the Ministry shall be competent to advise the President or the Governor to exercise his power of dissolving the Legislature, which the latter would exercise in marginal cases when it may be doubtful that the House does not represent the views of the electorate faithfully.

Individual responsibility to President.

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

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

The result is, that though the Ministers are collectively responsible to the Legislature, they shall be individually responsible to the Executive head and shall be liable to dismissal even when they may have the confidence of the Legislature. But since the Prime Minister's advice will be available

in the matter of dismissing other Ministers individually, it may be expected that this power of the President will virtually be, as in England, a power of the Prime Minister against his colleagues,—to get rid of an undesirable colleague even where the Minister may still possess the confidence of the majority in the House of the People.

Legal responsibility.

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

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

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

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

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

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

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

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

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

(f) The Prime Minister stands between the Crown and the Cabinet.

Though individual Ministers have the right of access to the Crown on matters concerning their own departments, any important communication, particularly relating to policy, can be made only through the Prime Minister.

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

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

"It shall be the duty of the Prime Minister—

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

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

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

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

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

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

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

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

President compared with American President and English Crown.

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

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

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

The above observation came in contrast with the words of Dr. Rajendra Prasad himself which he uttered as the President of the Constituent Assembly, with which he summed up the relevant provisions of the Draft Constitution.[9]

Status of the President of India.

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

The question is basically political, but a student should be concerned more with the interpretation of provisions of the Constitution itself, in the light of the foreign precedents on the model of which the relevant provisions of *our* Constitution were drafted.

Dr. K. M. Munshi, one of the ardent supporters of the theory that "the President under our Constitution is not a figure-head",[21] advances the following reasons in support of his theory:

(i) The provisions of the Constitution as to the status and powers of the President were the result of a compromise. Just as the American system of Presidential government was rejected by the Constituent Assembly so was the suggestion that the Indian President must be a figure-head like the President of the old French Republics.[22] The proposal to incorporate 'instructions' that "the President *shall* be guided by the advice of ministers" was also rejected.

(ii) The hereditary system of the head of the State was not borrowed from England but it was provided that the Indian President should be a true representative of the Nation, being elected by the elected representatives of the people in the Union and State Legislatures, as distinguished from the Union Ministers who would represent only the majority party in Parliament. The States can also look to him alone for safeguarding their autonomy *vis a vis* the Union.

(iii) The Constitution did not adopt all the conventions of the British Parliamentary system from England. Wherever was intended to adopt such conventions, the Constitution expressly stated that, as in Arts. 75 (3), 75 (5), 77, 78, 105 (2).

(iv) While a Union Minister takes the oath "to discharge his duties" "in accordance with the Constitution (Third Sch.), the President has to take the oath (Art. 60) that he would "preserve, protect and *defend* the Constitution." In order that he may fulfil his obligation of defending the Constitution, the Constitution offers him the following powers and privileges:

(a) He may obtain judicial opinion from the Supreme Court (Art. 143) on any question, instead of relying solely on the advice tendered by Ministers.

(*b*) He may obtain independent advice from the Attorney-General (Art. 76) who is appointed by and holds office during the pleasure of the President.

(c) He has the power to suspend parts of the Constitution in an emergency, as to which his opinion is final (Arts. 352, 356, 360).

(d) The manifold powers and functions of the President are distributed throughout the Constitution and comprise executive as well as legislative and judicial powers, while the powers of the Council of Ministers

are executive only, being mentioned only in Arts. 74-5. The scope of ministerial advice under Art. 74 is therefore confined to the exercise only of the executive functions of the President as are mentioned in Art. 53 (1) and not to the other functions which are vested in the President by various provisions outside Chapter I of Part V of the Constitution.

(e) The word 'directly' in Art. 53 (1) indicates that the President has the power to act, without ministerial advice, in circumstances which might call for such direct action.

(f) The expression "shall be" "to aid and advise" simply casts a *duty* upon the Council of Ministers but throws no corresponding duty on the President to accept it.

(g) The bar of jurisdiction of the Courts to invalidate an act of the President for want of ministerial advice indicates that the President is under no legal obligation to act according to ministerial advice under all situations.

(*h*) The President's powers under Art. 78 to obtain information from the Prime Minister and to require him to submit a matter for consideration of the Council of Ministers suggests that he has got independent duties under the Constitution apart from acting according to ministerial advice. So also is the power of the President to veto even official Bills (Art. 111).

(i) The President's power to defend the country as the Supreme Commander of the armed forces [Art. 53 (2)] is subject only to legislation by Parliament.

It is true that there is no *'legal'* sanction behind the President's obligation to act according to the advice tendered by the Council of Ministers. *No Court* would be entitled to invalidate any act of the President on the ground that he has not taken, or has acted contrary to, ministerial advice in any matter. It may be constitutionally improper for the President to do so, but the Courts cannot interfere on the ground of such impropriety. This is, no doubt, the position also in England. But in England the absolute King has been made to be a constitutional ruler by the convention that he can *act only* through a minister responsible to Parliament and that no act of the King will have any legal validity unless countersigned by a minister. But in the Constitution of India there is no provision to that effect; on the other hand, it is the *President himself* who is empowered to make rules as to how his order should be authenticated and the validity of such rule shall not be open to question in the Courts [Art. 77 (2)]. According to the rules made under this article, orders of the President are authenticated by Secretaries of the Departments and not by Ministers. It would not, therefore, be correct to say that there is "no constitutional means"[28] at the disposal of the President "to implement any decision he might wish to take in the public interest".[29]

Relation between the President and the Council of Ministers.

How far the President is bound to act only upon Ministerial advice.

A. Nevertheless, apart from a few exceptional situations which will

be stated below, the President of India would be obliged to act according to the advice of the Council of Ministers in normal situations, even in the absence of any legal sanction, for the following reasons:

(i) The very expression 'aid and advise' has been adopted in Art. 74 (1) from systems under which the head of the Executive acts as a constitutional head,—only on the advice of ministers responsible to the Legislature. In *England*, all powers are legally vested in the Crown and yet, the convention is firmly established since the time of George III that the Crown can exercise his powers only according to the advice of ministers responsible to Parliament. This convention was adopted by the Dominion Constitutions (Australia, Canada, South Africa) by using the words 'aid and advise' and the same phraseology was adopted from the Dominion precedents, in ss. 9 and 50 of the Government of India Act, 1935 and neither under the Dominion Constitutions nor under the Government of India Act, 1935 was any question ever raised that the Governor-General or a Governor could act without the advice of his ministers, outside some specified matters which may have been expressly taken out of the sphere of ministerial advice, by the Constitution Act itself.

The above interpretation of the expression 'aid and advice', has, in fact, been accepted by *our* Supreme Court in *Ram Jawaya's* case,[10] in these words—

"Under Article 53 (1) of our Constitution the executive power of the Union is vested in the President But under Article 75 there is to be a council of Ministers with the Prime Ministers at the head to aid and advise the President in the exercise of his functions. *The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet.* The same provisions obtain in regard to the Government of States: the Governor, occupies the position of the head of the executive in the State but it is virtually the Council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the council of Ministers consisting, as it does, of the members of the legislature is like the British Cabinet, 'a hyphen which joins, a buckle which fastens, the legislative part of the State to the executive part'."

(ii) Though the same expression 'aid and advise' is used also in the State sphere, in Art 163 (1), there is some discretionary sphere left to the Governor, by the express provision in cls (1) and (2) of Art 163 that where the Constitution requires the President to discharge his functions 'in his discretion', he shall be the final authority to decide whether the function is such that he may act in his discretion under the Constitution and by the incorporation of certain provisions such as Art. 239 (2) and Paras. 9 and 18 of the Sixth Schedule, under which he is required to act in his discretion.

The absence of any such provision in the Union sphere suggests that the President must act according to ministerial advice and that the Constitution does not empower him to act according to his discretion, exception, in the abnormal situations to be mentioned below.

(iii) There are certain provisions in *our* Constitution which would indirectly prevent the President from acting contrary to the advice of the Council of Ministers.

(a) Art. 74 (1) says that "there *shall* be a Council of Ministers." It is couched in the same form as Art. 52 which says—"there *shall* be a President of India."

Hence, the President cannot help doing without Ministers as soon as one Cabinet resigns, just as the Council of Ministers cannot do without a President if the President in office resigns or dies.

Now, if the President acts against the advice of his Council of Ministers, the Council will certainly resign. The President will then be obliged to find out another Council of Ministers having a majority in the House, for, Art. 75 (3) requires that the Council of Ministers shall be collectively responsible to the lower House of the Legislature, so that none but a person having a command over the majority in the House can form a Ministry. Hence, if a Prime Minister has a solid majority in the House, this very fact will dissuade the President from acting contrary to his advice.

There is no provision in the Constitution corresponding to Art. 356 to enable the President to suspend the constitutional machinery for the Union as in a State.

(b) The risk of his violating a mandatory provision of the Constitution for the breach of which it will be competent for the Courts to nullify a duly authenticated act of the President acts as a latent sanction.

Thus, the Constitution provides that certain acts can be done only by a law made by Parliament, e.g., taxation [Art. 265], or expenditure of money from the public revenues [Art. 266 (3)]. Hence, even though the President may possibly issue orders through some Secretary against the wishes of the Ministers, while they command a majority in Parliament, it would not be possible for the President to have from Parliament the legislation necessary for carrying on his administration, and, sooner or later, such orders are bound to be challenged before the Courts as invalid for contravention of constitutional provisions such as those just mentioned.

(c) So long as the Council of Ministers has a sure majority in the two Houses of Parliament, they can secure the impeachment of a President (Art. 61) who ventures to act in his discretion. The situation in India is somewhat different from that in the United States where the provision for impeachment of the President has practically become a dead-letter because there is no Council of Ministers supported by legislative majority to sponsor impeachment on the ground of refusal to accept ministerial advice.

(iv) In fine, it must be said that the relation between the President and his ministers is left by the Constitution to *convention* and the personal character of the leaders who occupy these offices for the time being.

B. Of course, there are certain marginal cases where the President may act without ministerial advice, as can the Crown in *England*, because in such cases *such advice may not be available, e.g.,*—

(i) In the matter of selection of a Prime Minister when the vacancy arises owing to the death of a Prime Minister, or when no party has a clear majority in the House of the People.

(*ii*) To refuse dissolution of the House of the People to a Prime Minister who has been defeated in the House, if the President is convinced that the dissolution has been asked for improperly.

(*iii*) A more critical situation may be imagined even though it may not happen at all so long as the President and the Prime Minister belong to the same party. Art. 53 obliges the President to exercise the executive power 'in accordance with this Constitution' and under Art. 60, he takes oath to 'preserve, protect and defend the Constitution'. Supposing that the President finds that some order that he is asked to sign or some Bill to which he is asked to assent, is opposed to the provisions or intent of the Constitution, even though it may have the support of the Council of Ministers or the majority in Parliament (e.g., a Bill for cession of territory). As I have already said, such a situation may be imagined when the President belongs to a party other than that in power, and when the interpretation of the provisions of the Constitution as given by that party may not appeal to the independent opinion of the President. Whether, in such a situation, a conscientious President would court the risk of impeachment by refusing to act according to ministerial advice history alone can answer.

(*iv*) Even more debatable is the question whether the President can dismiss a Prime Minister or his Council of Ministers in any case, a question which has recently cropped up in some of the States as regards the corresponding power of the Governor:

(a) If the Council of Ministers has a solid majority in the House of the People, this will be unimaginable because the President will not find another Council of Ministers to take the place of the Council of Ministers headed by the dismissed Prime Minister.[23]

(b) Even where the support of a Prime Minister in the House of the People be doubtful or shaky at any point of time, it would not be proper for the President to exercise this power of dismissal which he has under cl. (2) of Art. 75,—instead of leaving it to the House of the People to throw out the Council of Ministers by an adverse vote in the Legislature. The reason is that the Crown's power to dismiss a Prime Minister or his Cabinet has become obsolete in England[24] owing to the firm establishment of the principle of Ministerial responsibility in Parliament, and an Indian President who seeks to exercise this power in India would be acting not only contrary to the English precedent as it stands but also at his peril, in case the dismissed Prime Minister succeeds in securing a majority sufficient to secure the impeachment of the President.

5. *The Attorney-General for India.*

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

(*i*) to give advice on such legal matters and to perform such other duties of a legal character as may, from time to time, be referred or assigned

to him by the President; and (*ii*) to discharge the functions conferred on him by the Constitution or any other law for the time being in force [Art. 76].

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

The Attorney-General for India shall be appointed by the President and shall hold office during the pleasure of the President. He must have the same qualifications as are required to be a Judge of the Supreme Court. He shall receive such remuneration as the President may determine; and the President has determined that the Attorney-General shall be paid a monthly retainer of Rs. 4,000/-.

6. *The Comptroller and Auditor-General of India.*

Another pivotal office in the Government of India is that of Comptroller and Auditor-General who controls the financial system of the country [Art. 148].

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

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

Conditions of service.

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

(a) Though appointed by the President, the Comptroller and Auditor-

General may be removed only on an address from both Houses of Parliament, on the grounds of (i) 'proved misbehaviour' or (ii) 'incapacity'.

He is thus excepted from the general rule that all civil servants of the Union hold their office at the pleasure of the President [*Cf.* Art. 310 (1)].

(b) His salary and conditions of service shall be statutory i.e., as laid down by Parliament by law) and shall not be liable to variation to his disadvantage during his term of office. Under this power, Parliament has enacted the Comptroller and Auditor-General (Conditions of Service) Act, 1953, which has laid down that the normal term of office of a Comptroller and Auditor-General shall be six years but that he may at any time resign his office by writing addressed to the President. Further, he may be removed earlier, by a joint address from both Houses of Parliament, as stated already.

(c) He shall be disqualified for any further Government 'office' after retirement[25]— so that he shall have no inducement to please the Executive of the Union or of any State.

(d) The salaries etc. of the Auditor-General (Rs. 4,000/-, *per mensem*) and his staff and the administrative expenses of his office shall be charged upon the revenue of India and shall thus be non votable [Art. 148].

On the above points, thus, the position of the Comptroller and Auditor-General shall be similar to that of a Judge of the Supreme Court.[26]

Duties and powers.

The Comptroller and Auditor General shall perform such *duties* and exercise such *powers* in relation to the accounts of the Union and of the States as may be prescribed by Parliament. No such legislation has so far taken place. Until provision in that behalf is so made by Parliament, his powers and duties shall be such as were conferred on or exercisable by the Auditor-General of India immediately before the commencement of this Constitution in relation to the accounts of the Dominion of India and of the provinces respectively. These duties, in short, are--

(i) To see that a farthing of the public money is not spent otherwise than under the sanction of Parliament (or of the State Legislature, as the case may be); in other words, that the grants voted by the appropriate Legislature and embodied in the Appropriation Act are not exceeded or varied, and that no expenditure outside that Act is made.*

In connection with his duty to ensure that all Government expenditure has been in conformity with the legal authority, the Comptroller and Auditor-General not only examines the statutory authority but also sees that the financial rules and orders which have a bearing on Governmental expenditure have also been obeyed and also that those who sanction expenditure have got the powers to do so.

(ii) To ensure the above, the Comptroller and Auditor-General will audit the accounts of the Union and State Governments, prepare their respective accounts, and submit the same with his reports to the President or Governor, as the case may be.

The reports of the Comptroller and Auditor-General of India relating to the accounts of the Union shall be submitted to the President, who shall cause them to be laid before each House of Parliament. The reports of the Comptroller and Auditor-General of India relating to the accounts of a State shall be submitted to the Governor, who shall cause them to be laid before the Legislature of the State [Arts. 149-151]. In Parliament, the Report of the Comptroller and Auditor-General is scrutinised by the Public Committee.

(iii) The accounts of the Union and of the States shall be kept in such form as the Comptroller and Auditor-General of India may, with the approval of the President, prescribed.

(*iv*) Under the Government of India Act, 1935, the Auditor-General of India was also responsible for *keeping* the accounts of the Federation and the Provinces, and after the Constitution, this duty also developed upon the Comptroller and Auditor-General.

It has, however, been recently decided that the Comptroller and Auditor-General should be relieved of the duty of preparing the accounts, for it is not quite satisfactory from the standpoint of financial control that the function of preparing the accounts and of auditing them should be combined in the same hands. The function of preparing the accounts will be gradually taken over by the Administrative Departments who are responsible for the expenditure and when this is complete, the Comptroller and Auditor-General will only be the auditing authority of the Union and the States.

Compared with his British counterpart.

As has been just stated, the duty of preparing the accounts was a relic of the Government of India Act, 1935, which has no precedent in the British system, under which the accounts are prepared, not by the Comptroller and Auditor-General, but by the respective Departments. The decision to separate the function of preparation of accounts from the Comptroller and Auditor-General of India, brings this office at par with that of his counterpart in British in one respect.

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

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

The functions of the Comptroller and Auditor-General have recently been the subject of controversy, in regard to two questions:

The first is, whether in exercising his function of audit, the Comptroller and Auditor-General has the jurisdiction to comment on extravagance and suggest economy, apart from the legal authority for a particular expenditure. Even an academician like Appleby[27] has observed that the question of economy is inseparably connected with the efficiency of the administration and that, having no responsibility for the administration, the Comptroller and Auditor-General or his staff has no competence on the question of economy:

"Auditors do not know and cannot be expected to know very much about good administration; their prestige is hightest with others who do not know much about administration... Auditing is a necessary but highly pedestrian function with a *narrow prospective and very limited usefulness*".[27]

Another question is whether the audit of the Comptroller and Auditor-General should be extended to industrial and commercial undertakings carried on by the Government through private limited companies, who are governed by the Articles of their Association. It has been rightly contended by a former Comptroller and Auditor-General[28] that inasmuch as money is issued out of the Consolidated Fund of India to invest in these companies and corporations on behalf of the Government, the audit of such companies must necessarily be a right and responsibility of the Comptroller and Auditor-General, while, at present, the Comptroller and Auditor-General can have no such power unless the Articles of Association of such companies provide for audit by the Comptroller and Auditor-General. The result is that the report of the Comptroller and Auditor-General does not include the results of the scrutiny of the accounts of these corporations and the Public Accounts Committee or Parliament have little material for controlling these important bodies, spending public money. On behalf of the Government, however, this extension of the function of the Comp-

troller and Auditor-General has been resisted on the ground that the Comptroller and Auditor-General lacks the business or industrial experience which is essential for examining the accounts of these enterprises and that the application of the conventional machinery of the Comptroller and Auditor-General is likely to paralyse these enterprises which are indispensable for national development.

REFERENCES

1. For the results of the elections so far held, see Table VIIIA.
2. As to how the system of Proportional Representation would work, see Author's Commentary on the Constitution of India, Fifth Ed., Vol. II, pp. 382-4.
3. C.A.D., Vol IV, pp. 734, 816.
4. In his speech in Parliament in 1961, the Prime Minister observed that we should adopt a *convention* that no person shall be a President for more than two terms, and that no amendment of the Constitution was necessary to enjoin this.
5. Rs. 10,000/- per mensem.
6. For the results of the elections held so far, see Table VIIIA.
7. The original Constitution provided that the Vice-President would be elected by the two Houses of Parliament, assembled at *a joint meeting*. This cumbrous procedure of a joint meeting of the two Houses for this purpose has been done away with, by amending Art. 66 (1) by the Constitution (Eleventh Amendment Act, 1961. As amended, the members of both Houses will remain the voters, but they may vote by secret ballot, without assembling at a joint meeting.
8. Rs. 2,250/- per mensem.
9. *Khare* v. *Election Commission*, (1957) S.C.R. 1081 (1091).
10. *Ram Jawaya* v. *State of Punjab*, (1955) 2 S.C.R. 225 (238-239).
11. Up to 1980. This matter will be dealt with more fully in the Chapter on the Union Legislature.
12. The only instance of the exercise of the President's veto power over a Bill passed by Parliament, so far, has been in regard to the PEPSU Appropriation Bill. It was passed by Parliament under Art. 357, by virtue of the Proclamation under Art. 356. The Proclamation was, however revoked on 7-3-54, and the Bill was presented for assent of the President on 8-3-54. The President withheld his assent to the Bill on the ground that on 8-3-54, Parliament had no power to exercise the legislative powers of the PEPSU State and that, accordingly, the President could not give his assent to the Bill to enact a law which was beyond the competence of Parliament to enact on that date.

    This instance shows that the veto power is necessary to prevent the enactment of Bills which appear to be *ultra vires* or unconstitutional at the time when the Bill is ready for the President's assent. It also shows that there may be occasions when Government may have to advise the President to veto a Bill which had been introduced by the Government itself.
13. *Lakhinarayan* v. *Prov. of Bihar*, A.I.R. 1950 F.C. 59.
14. *State of Punjab* v. *Satya Pal*, A.I.R. 1969 S.C. 903 (917).
15. *Jnan Prosanna* v. *Province of West Bengal*, (1348) 53 C.W.N. 27 (72) (F.B.).
16. As regards the Union Territories of (a) Goa, Daman & Diu and (b) Pondichery, the President's power to make regulations has ceased, since the setting up of a Legislature in each of these Territories, after the Constitution (Fourteenth Amendment) Act, 1962, which amended Art. 240 (1) of the Constitution in this behalf.
17. These powers will be more fully dealt with in the Chapter on 'Emergency Provisions.'
18. C.A.D., Vol. IV, pp. 580; 734; Vol. VII, pp. 32, 974, 984.
19. At the end of 1964, their number was (*a*) Members of the Cabinet—14; (*b*) Ministers of State—15; (*c*) Deputy Ministers—22.
20. The suggestion of President Dr. Rajendra Prasad, in his speech at the Indian Law Institute, that the position of the Indian President was not identical with that of the British Crown, must be read with his quoted observation in the Constituent Assembly [C.A.D., 26-11-49] which, as a contemporaneous statement, has a great value in assessing the intent of the makers of the Constitution, and the meaning behind Art. 74(1) itself.
21. K. M. Munshi, the President under the Indian Constitution, p. viii.

22. IV C.A.D. 734.
23. VII C.A.D. 32.
24. Basu's *Commentry on the Constitution of India*, 5th Ed., Vol. II, p. 593, where it is stated—
    "Constitutional writers agree that a dismissal of the Cabinet by the Crown, would now be an unconstitutional act, except in the abnormal case of a Cabinet refusing to resign or to appeal to the electorate upon a vote of no confidence in the Commons."
25. There was a vehement public criticism that this prohibition in Art. 148 (4) was violated by the appointment of a retired Comptroller and Auditor-General as the Chairman of the Finance Commission. According to judicial decisions, an 'office' is an employment, which embraces the ideas of tenure, duration, emolument and duties Now, the Finance Commission is an office created by Art. 280 of the Constitution itself, with a definite tenure, emoluments and duties as defined by the Finance Commission (Miscellaneous Provision) Act, 1951, read with Art. 280 of the Constitution. Apparently, therefore, the membership of the Finance Commission is an office under the Government of India, which comes within the purview of Art. 148 (4).
26. But, as Dr. Ambedkar pointed out in the Constituent Assembly (C.A.D., VIII, p. 407), in one respect the independence of the Comptroller and Auditor-General falls short of that of the Supreme Court. While the power of appointment of the staff of the Supreme Court has been given to that Chief Justice of India [Art. 146 (1)], the Comptroller and Auditor-General has no power of appointment, and, consequently, no power of disciplinary control with respect to his subordinates. In the case of the Comptroller and Auditor-General, these powers have been retained by the Government of India though it is obviously derogatory to the administrative efficiency of this highly responsible functionary.
27. Appleby, A. Re-examination of India's Administrative System, p. 28.
28. Narhari Rao's statement before the Public Accounts Committee, 1952.

CHAPTER XI

THE UNION LEGISLATURE

Functions of Parliament.

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

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

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

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

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

IV. *An organ of information*—As an organ of information, Parliament is more powerful than the Press or any other private agency, for Parliament secures the information *authoritatively*, from those in the know of things. The information is collected and disseminated not only through the debates but through the specific medium of 'Questions' of Ministers.

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

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

Constitution of Parliament.

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

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

The President is a part of the Legislature, like the English Crown, for, even though he does not sit in Parliament, except for the purpose of delivering his address [see p. 141, *ante*], a *Bill passed by the House* of Parliament cannot become law without the President's assent. Even a Bill to amend the Constitution requires his assent. The other legislative functions of the President, such as the making of Ordinances while both Houses are not in sitting, have already been explained [pp. 147-8, *ante*

Composition of the Council of States.

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

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

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

(c) *Representation of Union Territories.*—The representatives of the Union Territories shall be chosen in such manner as Parliament may prescribe [Art. 80 (5)]. Under this power Parliament has prescribed[3] that the representatives of the Union Territories to the Council of States shall be

(indirectly elected by members of an electoral college for that Territory, in accordance with the system of proportional representation by means of the single transferable vote.

The Council of States thus reflects a federal character by representing the Units of the federation. But it does not follow the American principle of equality of State representation in the Second Chamber. In India, the number of representatives of the States to the Council of States varies from 4 (Jammu & Kashmir) to 34 (Utter Pradesh).

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

Composition of the House of the People.

(a) Not more[3] than 500 [Art. 81 (1) (a)] representatives of the States;

(b) Not more than 25[4] representatives of Union Territories and the North-East Frontier Tract. [S. 81 (1) (b), Sch. VI, para. 18 (2)].

(c) Not more than 2 members of the Anglo-Indian community, nominated by the President, if he is of opinion that the Anglo-Indian community is not adequately represented in the House of the People [Art. 331].

(a) The representatives of the States shall be directly elected by the people of the State (except in the States of Jammu & Kashmir) on the basis of adult suffrage. Every citizen who is not less than 21 years of age and is not otherwise disqualified, e.g., by reason of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to vote at such election [Art. 326].

There will be no reservation of seats for any minority community other than the Scheduled Castes, including backward sections of the Sikhs coming within that category, and the Scheduled Tribes [Art. 330].

The bulk of the members of the House are thus directly elected by representatives of the people.

The representatives of the State of Jammu & Kashmir are, however, to be appointed by the President on the recommendation of the Legislature of the State.[5]

(b) The members from the Union Territories and the North East Frontier Tract are to be chosen in such manner as Parliament may by law provide.

Under this power, Parliament has enacted[6] that the seats for the (i) Andaman and Nicobar Islands; (ii) Laccadive, Minicoy and Amindivi Islands; (iii) Dadra and Nagar Haveli;[7] and (iv) The North-East Frontier Tract, shall be filled by persons *nominated* by the President, while the representatives of the other Union Territories shall be chosen by direct election.

(c) Two members may be nominated from the Anglo-Indian community by the President to the House of the People if he is of opinion that the Anglo-Indian community has not been adequately represented in the House of the People [Art. 331]. (See Table VII, post).

The election to the House of the People being direct, requires that the territory of India should be divided into suitable territorial constituences, for the purpose of holding such elections. Art. 81 (2), as it stands after the Constitution (Seventh Amendment) Act, 1956, has provided for uniformity of representation in two respects—(a) as between the different States, and (b) as between the different constituencies in the same State, thus:

Territorial constituencies for election of the House of the People.

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

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

For the above purpose, the population of each State shall be ascertained as at the preceding census and upon the completion of each census, the allocation of seats in the House of the People to the States and the division of each State into territorial constituencies shall be readjusted by such authority and in such manner as Parliament may by law determine:

Provided that such readjustment shall not affect representation in the House of the People until the dissolution of the then existing House [Art. 82].

While the system of separate electorates was abandoned by the Constitution, the system of proportional representation was partially adopted for the second Chamber in the Union and State Legislatures.

Proportional Representation for Council of States.

(a) As regards the Council of States, proportional representation by single transferable vote has been adopted for the indirect election by members of the Legislatures of the States, in order to give some representation to minority communities and parties [Art. 80 (4)].

(b) Similarly, proportional representation is prescribed for election to the Legislative Council of a State by electorates consisting of municipalities, district boards and other local authorities and of graduates of three years standing resident in the State [Art 171 (4)].

As regards the House of the People [Art. 81] and the Legislative Assembly of a State, however, the system of proportional representation has been abandoned and, instead, the Constitution has adopted the single member constituency with reservation of seats (at the general election) for some minority communities, namely, the Scheduled Castes and Tribes [Art. 330, 332].

The reasons for not adopting proportional representation for the House of the People for giving representation to the minorities were thus explained in the Constituent Assembly—

(i) Proportional representation presupposes literacy on a large scale. It presupposes that every voter should be a literate at least to the extent of being in a position to know the numerals and mark them on the ballot paper. Having regard to the position of literacy in this country at present, such a presumption would be extravagant.

Why Proportional Representation not adopted for House of the People and Legislative Assembly.

(ii) Proportional representation is ill-suited to the Parliamentary system of government laid down by the Constitution. One of the disadvantages of the system of proportional representation is the fragmentation of the Legislature into a number of small groups. Although the British Parliament appointed a Royal Commission in 1910 to consider the advisability of introducing proportional representation and the Commission recommended it, Parliament did not eventually accept the recommendations of the Commission on the ground that proportional representation would not permit a stable Government. Parliament would be so divided into small groups that every time anything happened which displaced certain groups in Parliament, they would on those occasions withdraw support to the Government with the result that the Government, losing the support of certain groups, would fall to pieces

What India needed, at least in view of the existing circumstances, was a stable Government, and, therefore, proportional representation in the lower House to which the Government would be responsible could not be accepted. In this connection, Dr. Ambedkar said in the Constituent Assembly,—

"I have not the least doubt in my mind, whether the future Government provides relief to the people or not, our future Government must do one thing—they must maintain a stable Government and maintain law and order".

(a) The Council of States is not subject to dissolution. It is a permanent body, but (as nearly as possible) ⅓ of is members retire on the expiration of every second year, in accordance with provisions made by Parliament on this behalf. It follows that there will be an election of ⅓ of the membership of the Council of States at the beginning of every third year. The order of retirement of the members is governed by the Council of States (Term of Office of Members) order, 1952, made by the President in exercise of powers conferred upon him by the Representation of the People Act, 1951.

Duration of Houses of Parliament.

(b) The normal life of the House of the People is 5 years, but it may be dissolved earlier by the President.

On the other hand, the normal term may be extended by an Act passed by Parliament itself during the period when a 'Proclamation of Emergency' (made by the President under Art. 352) remains in operation. The Constitution, however, sets a limit to the power of Parliament thus to extend its own life during a period of Emergency: the extension cannot be made for a period exceeding one year at a time (i.e., by the same Act of Parliament), and, in any case, such extension cannot continue beyond a period of six months after the Proclamation of Emergency ceases to operate [Proviso to Art. 83].

Sessions of Parliament.

The President's power—(a) to summon either House, (b) to prorogue either House and (c) to disssolve the House of the People has already been noted [p. 135, *ante*].

As regards summoning, the Constitution imposes a duty upon the President, namely, that the President must summon each House at such intervals that six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session [(Art. 85 (1)]. The net result of this provision is that Parliament must meet at least twice a year and not more than six months shall elapse between the date on which a House is prorogued and the commencement of its next session.

Adjournment, prorogation and dissolution

It would, in this context, be useful to distinguish prorogation and dissolution from adjournment.

A 'session' is the period of time between the meeting of a Parliament, whether after a prorogation or dissolution The period between the prorogation of Parliament and its re-assembly in a new session is termed 'recess'.

Within a session, there are a number of daily 'sittings' separated by adjournments, which postpone the further consideration of business for a specified time—hours, days or weeks.

The sitting of a House may be terminated by (a) dissolution, (b) prorogation, or (c) adjournment:

(i) As stated already [p 174, *ante*], only the House of the People is subject to dissolution *Dissolution* may take place in either of two ways—(a) By effiux of time, i e. on the expiry of its term of five years, or the term as extended during a Proclamation of Emergen . (b) By an exercise of the President's power under Art 85 (2)

(ii) While the powers of dissolution and prorogation are exercised by the President on the advice of his Council of Ministers, to power to adjourn the daily sittings of the House of the People and the Council of States belongs to the Speaker and the Chairman, respectively

A *dissolution* brings the House of the People to an end (so that there must be a fresh election), while *prorogation* merely terminates a session. *Adjournment* does not put an end to the existence of a session of Parliament but merely postpones the further transaction of business for a specified time, hours, days or weeks.

(iii) A *dissolution* ends the very life of the existing House of the People so that *all matters* pendings before the House lapse with the dissolution. If these matters have to be pursued, they must be re-introduced in the next House after fresh election. Such pending business includes not only notices, motions, etc., but Bills, including Bills which originated in the Council and were sent to the House, as well as Bills originating in the House and transmitted to the Council which were pending in the Council on the date of dissolution. But a Bill pending in the Council which has not yet

been passed by the House shall not lapse on dissolution. A dissolution would not, however, affect a joint sitting of the two Houses summoned by the President to resolve a disagreement between the Houses if the President has notified his intention to hold a joint sitting before the dissolution [Art. 108 (5)].

Though in *England* prorogation also wipes all business pending at the date of prorogation, in *India*, all Bills pending in Parliament are expressly saved by Art. 107 (3). In the result, the only effect of a *prorogation* is that pending notices, motions and resolutions lapse, but Bills remain unaffected.

Adjournment has no such effect on pending business.

Qualifications for membership of Parliament.

In order to be chosen a member of Parliament, a person (a) must be a citizen of India; (b) must be not less than 30 years of age in the case of the Council of States and not less than 25 years of age in the case of the House of the People.

Additional qualifications may be prescribed by Parliament by law [Art. 84].

Disqualifications for membership.

A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

(a) if he holds any office of profit under the Government of India or the Government of any State *other than*—

(i) a Minister for the Union or for a State; or

(ii) an office declared by Parliament by law not to disqualify its holder;

(b) if he of unsound mind and stands so declared by a competent Court;

(c) if he is an undischarged insolvent;

(d) if he has ceased to be a citizen of India or has voluntarily acquired citizenship of a foreign State or is under acknowledgment of allegiance or adherence to a foreign power;

(e) if he is so disqualified by or under any law made by Parliament [Art. 102].

It may be noted that sex is no disqualification for membership of Parliament and that in the Third General Election, as many as 36 women secured election to the House of the People.

If any question arises as to whether a member of either House of Parliament has become subject to any of the above disqualifications, the President's decision, in accordance with the opinion of the Election Commission, shall be final [Art. 103].

A penalty of Rs. 500/- per day may be imposed upon a person who sits or votes in either House of Parliament knowing that he is not qualified or that he is disqualified for membership thereof.

Vacation of seats by members.

A member of Parliament shall *vacate* his seat in the following cases [Art. 101]:

(i) *Dual membership*—(a) If a person be chosen to membership of both Houses of Parliament he must vacate his seat in one of the two Houses, as may be prescribed by Parliament by law. (b) Similarly, if a person is elected to both the Union Parliament and a State Legislature then he must resign his seat in the State Legislature; otherwise his seat in Parliament shall fall vacant at the expiration of the period specified in the rules made by the President.

(ii) *Disqualification*—If a person incurs any of the disqualifications mentioned in Art. 102 (e.g., becoming of unsound mind), his seat will thereupon become vacant immediately.

(iii) *Resignation*—A member may resign his seat by writing addressed to the Chairman of the Council of States or the Speaker of the House of the People, as the case may be, and thereupon his seat shall be vacant.

(iv) *Absence without permission*—The House may declare a seat vacant if the member in question absents himself from all meetings of the House for a period of 60 days without permission of the House.

Salaries and allowances of Members of Parliament.

Under the Salaries and Allowances of Members of Parliament Act, 1954, as amended in 1964, a member of Parliament is entitled to a salary at the rate of Rs 500/- per mensem during the whole whole term of his office plus an allowance at the rate of Rs. 31/- for each day during any period of residence on duty at the place where any other business connected with his duties as member or Parliament is transacted. Together with this, he is entitled to travelling allowance, free transit by railways and other facilities as prescribed by rules framed under the Act.

Officers of Parliament.

Each House of Parliament has its own presiding officer and secretarial Staff.

Speaker.

There shall be a *Speaker* to preside over the House of the People. In general, his position is similar to that of the Speaker of the English House of Commons.

The House of the People will, as soon as may be after its first sitting, choose two members of the House to be, respectively, Speaker and Deputy Speaker [Art. 93]. The Speaker or the Deputy Speaker will normally hold office during the life of the House, but his office may terminate earlier in any of the following ways—(i) By his ceasing to be a member of the House. (ii) By resignation in writing, addressed to the Deputy Speaker, and vice versa. (iii) By *removal* from office by a resolution, passed by a majority of all the then members of the House [Art. 94]. Such a resolution shall not be moved unless at least 14 days' notice has been given of the intention to move the resolution. While a resolution for his removal is under consideration, the Speaker shall not preside but he shall have the right to speak in, and to take part in the proceedings of, the House, and shall also have a right of vote except in the case of equality of votes [Art. 96].

At other meetings of the House the Speaker shall preside. The Speaker will not vote in the first instance, but shall have and exercise a casting vote in the case of equality of votes. The absence of vote in the first instance will make the position of the Speaker as impartial as in England, and the casting vote is given to him only to solve a deadlock.

Powers of the Speaker.

The Speaker will hape the final power to maintain order within the House of the People and to interpret its Rules of Procedure. In the absence of a quorum, it will be the duty of the Speaker to adjourn the House or to suspend the meeting until there is a quorum.

The Speaker's conuuct in regulating the procedure or maintaining order in the House will not be subject to the jurisdiction of any Court [Art. 122].

Besides presiding over his own House, the Speaker possesses certain powers not belonging to the Chairman of the Council of States—

(a) The Speaker shall preside over a joint sitting of the two Houses of Parliament [Art. 118 (4)].

(b) When a Money Bill is transmitted from the Lower House to the Upper House, the Speaker shall endorse on the Bill his certificate that it is a Money Bill [Art. 110 (4)]. The decision of the Speaker as to whether a Bill is a Money Bill is final and once the certificate is endorsed by the Speaker on a Bill, the subsequent procedure in the passage of the Bill must be governed by the provisions relating to Money Bills

While the office of Speaker is vacant or the Speaker is absent from a sitting of the House, the Deputy Speaker presides, except when a resolution for his *own* removal is under consideration.

Deputy Speaker

While the House of the People has a Speaker elected by its members themselves, the Chairman of the Council of States (who presides over that House) performs that function *ex-officio* As has been already stated [p 130, *ante*], it is the Vice-President of India who shall *ex-officio* be the Chairman of the Council of States and shall preside over that House and shall function as the Presiding Officer of that House so long as he does not officiate as the President of India during a casual vacancy in that office When the Chairman acts as the President of India, the office of the Chairman of the Council of States falls vacant and the duties of the office of the Chairman shall be performed by the Deputy Chairman. The Chairman may be removed from his office only if he is removed from the office of the Vice-President, the procedure for which has already been stated. Under the Salaries and Allowances of Officers of Parliament Act, 1953, the salary of the Chairman is the same as that of the Speaker, viz., Rs. 2,250/- plus a sumptuary allowance of Rs. 500/- per mensem, but when the Vice-President acts as the President he shall be entitled to the emoluments and allowances of the President [Art. 65 (3)] and during that period he shall cease to earn the salary of the Chairman of the Council of States. The functions of the

Chairman

Chairman in the Council of States are similar to those of the Speaker in the House of the People except that the Speaker has certain special powers according to the Constitution, for instance, of certifying a Money Bill, or presiding over a joint sitting of the two Houses, which have been already mentioned.

Privileges are certain rights belonging to each House of Parliament collectively and some others belonging to the members individually, without which it would impossible for either House to maintain its independence of action or the dignity of its position.

Powers, Privileges and Immunities of Parliament and its Members.

Both the Houses of Parliament as well as of a State Legislature have similar *privileges* under *our* Constitution.

Cls. (1)-(2) of Arts. 105 and 194 of *our* Constitution deal only with two matters, viz., freedom of speech and right of publication. Outside the scope of these two clauses, the privileges of members of *our* Parliament shall be the same as those of members of the House of Commons (as they existed at the commencement of the Constitution), until *our* Parliament itself takes up legislation relating to privileges in whole or in part. In other words, if Parliament enacts any provision relating to any particular privilege at any time, the English precedents will to that extent be superseded in its application to *our* Parliament. No such legislation has so far been made by *our* Parliament. In the result, the privileges shall be the same as in the House of Commons, subject to such exceptions as necessarily follow from the difference in the constitutional set-up in India.[b]

In an earlier case,[b] the Supreme Court held that if there is any conflict between the existing privileges of Parliament and the fundamental rights of a citizen, the former shall prevail, for, the provisions in Arts. 105 (3) and 194 (3) of the Constitution, which confer upon the Houses of *our* Legislatures the same privileges as those of the British House of Commons, are independent provisions and are not to be construed as subject to Part III of the Constitution, guaranteeing the Fundamental Rights. For instance, if the House of a Legislature expunges a portion of its debates from its proceedings, or otherwise prohibits its publication, anybody who publishes such prohibited debate will be guilty of contempt of Parliament and punishable by the House and the Fundamental Right of freedom of expression [Art. 19 (1) (a)] will be no defence. But in a later case, the Supreme Court has held that though the existing privileges would not be fettered by Art. 19 (1) (a), they must be read subject to Arts. 20-22 and 32.

The privileges of each House may be divided into two groups—(a) those which are enjoyed by the members individually, and (b) those which belong to each House of Parliament, as a collective body.

(A) The privileges enjoyed by the members individually are (i) Freedom from arrest; (ii) Exemption from attendance as jurors and witnesses; (iii) Freedom of speeech.

(i) ***Freedom from Arrest***—S. 135A of the C. P. Code exempts a member

from arrest during the continuance of a meeting of the Chamber or Committee thereof of which he is a member or of a joint sitting of the Chambers, and during a period of 14 days before and after such meeting or sitting.[10] This immunity is, however, confined to arrest in civil cases and does not extend to arrest in a criminal case or under the Law of Preventive Detention.

(ii) *Freedom of attendance as jurors and witnesses*—Under S. 320 (aa) of the Criminal Procedure Code, a member of Parliament or of the Legislature of a State is exempt from liability to serve as juror. According to the English practice, a member cannot be summoned, without the leave of the House, to give evidence as a witness while Parliament is in session.

(iii) *Freedom of Speech*—As in England, there will be freedom of speech within the walls of each House in the sense of immunity of action for anything said therein. While an ordinary citizen's right of speech is subject to the restrictions specified in Art. 19 (*2*), such as the law relating to defamation, a member of Parliament cannot be made liable in any court of law in respect of anything said in Parliament or any Committee thereof. But this does not mean unrestricted license to speak anything that a member may like, regardless of the dignity of the House. The freedom of speech is therefore 'subject to the rules' framed by the House under its powers to regulate its internal procedure.

The Constitution itself imposes another limitation upon the freedom of speech in Parliament, namely, that no discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge [Art. 121].

(B) The privileges of the House *collectively* are—(i) The right to publish debates and proceedings and the right to restrain publication by others; (ii) The right to exclude others; (iii) The right to regulate the internal affairs of the House, and to decide matters arising within its walls; (iv) The right to publish Parliamentary misbehaviour; (v) The right to punish members and outsiders for breach of its privileges.

Thus, each House of Parliament shall have the power—

(i) To exclude strangers from the galleries at any time. Under the Rules of Procedure, the Speaker and the Chairman have the right to order the 'withdrawal of strangers from any part of the House'.

(ii) To regulate its internal affairs. Each House of Parliament has the right to control and regulate its proceedings and also to decide any matter arising within its walls, without interference from the Courts. What is said or done within the walls of Parliament cannot be inquired into in a Court of Law.

(iii) To punish members and outsiders for breach of its privileges. Each House can punish for contempt or breach of its privileges, and the punishment may take the form of admonition, reprimand or imprisonment. Thus,

in the famous *Blitz case*, the Editor of the newspaper was called to the Bar of the House of the People and reprimanded for having published an article derogatory to the dignity of a member in his capacity as member of the House. What constitutes breach of privilege or contempt of Parliament has been fairly settled by a number of precedents in England and India. Broadly speaking—

"Any act or omission which obstructs or impedes either House of Parliament in the performance of its functions or which obstructs or impedes any member or officer of such House in the discharge of his duty or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt, even though there is no precedent of the offence".[11]

No House of the Legislature has the power to create for itself any new privilege not known to the law and the Courts possess the power to determine whether the House in fact possesses a particular privilege.[12]

The different stages in the legislative procedure in Parliament relating to Bills *other than Money Bills* are as follows:

Legislative Procedure.

I. *Ordinary Bills.*

1. *Introduction*—A Bill other than Money or financial Bills may be introduced in either House of Parliament [Art. 107 (1)] and requires passage in both Houses before it can be presented for the President's assent. A Bill may be introduced either by a Minister or by a private Member. The difference in the two cases is that any Member other than a Minister desiring to introduce a Bill has to give notice of his intention and to ask for leave of the House to introduce which is, however, rarely opposed. If a Bill has been published in the official gazette before its introduction, no motion for leave to introduce the Bill is necessary. Unless published earlier, the Bill is published in the official gazette as soon as may be after it has been introduced.

2. *Motions after introduction*—After a Bill has been introduced or on some subsequent occasion, the Members in charge of the Bill may make one of the following motions in regard to the Bill, viz.—

(a) That it be taken into consideration.

(b) That it be referred to a Select Committee.

(c) That it be referred to a Joint Committee of the Houses with the concurrence of the other House.

(d) That it be circulated for the purpose of eliciting public opinion thereon.

On the day on which any of the aforesaid motions is made or on any subsequent date to which the discussion is postponed, the principles of the Bill and its general provisions may be discussed. Amendments to the Bill and clause by clause consideration of the provisions of the Bill take place when the motion that the Bill be taken into consideration is carried.

3. *Report by Select Committee*—It has already been stated that after introduction of the Bill the Member in charge or any other Member by way of an amendment may move that the Bill be referred to a Select Committee.

When such a motion is carried, a Select Committee of the House considers the provisions of the Bill (but not the principles underlying the Bill which had, in fact, been accepted by the House when the Bill was referred to the Select Committee). After the Select Committee has considered the Bill, it submits its report to the House and after the report is received, a motion that the Bill as returned by the Select Committee be taken into consideration lies. When such a motion is carried, the clauses of the Bill are open to consideration and amendments are admissible.

4. *Passing of the Bill in the House where it was introduced*—When a motion that the Bill be taken into consideration has been carried and no amendment of the Bill has been made or after the amendments are over, the Member in charge may move that the Bill be passed. This stage may be compared to the third reading of a bill in the House of Commons After the motion that the Bill may be passed is carried,[13] he Bill is taken as passed so far as that House is concerned.

5. *Passage in the House*—When a Bill is passed in one House, it is transmitted to the other House. When the Bill is received in the other House it undergoes all the stages as in the originating House subsequent to its introduction. The House which receives the Bill from another House can, therefore, take either of the following courses:

(i) It may reject the Bill altogether. In such a case the provisions of Art. 108 (1) (a) as to joint sitting may be applied by the President.

(ii) It may pass the Bill with amendments. In this case, the Bill will be returned to the originating House. If the House which originated the Bill accepts the Bill as amended by the other House, it will be presented to the President for his assent [Art. 111]. If however the originating House does not agree to the amendments made by the other House and there is final disagreement as to the amendments between the two Houses, the President may summon a joint sitting to resolve the deadlock [Art. 108 (1) (b)].

(iii) It may take no action on the Bill, i.e., keep it lying on its Table. In such a case if more than six months elapse from the date of the reception of the Bill, the President may summon a joint sitting [Art. 108 (1) (c)].

6. *President's assent*—When a Bill has been passed by both Houses of Parliament either singly or at a joint sitting as provided in Art. 108, the Bill is presented to the President for his assent. If the President withholds his assent, there is an end to the Bill. If the President gives his assent, the Bill becomes an Act from the date of his assent. Instead of either refusing assent or giving assent, the President may return the Bill for reconsideration of the Houses with a message requesting them to reconsider it. If, however, the Houses pass the Bill again with or without amendments and the Bill is presented to the President for his assent after such reconsideraion, the President shall have no power to withold his assent from the Bill.

II. *Money Bills.* A Bill is deemed to be 'Money Bill' if it contains only provisions dealing with all or any of the following matters:

• (a) the imposition, abolition, remission, alteration or regulation of any tax; (b) the regulaion of the borrowing of money by the Government; (c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such fund; (d) the appropriation of moneys out of the Consolidated Fund of India; (e) the declaring of any expenditure to be expenditure charged or the Consolidated Fund of India or the increasing of the amount of any such expenditure; (f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or (g) any matter incidental to any of the matters specified in sub-clauses (a) to (f) [Art. 110].

But a Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

If any question arises whether a Bill is a Money or not, the decision of the Speaker of the House of the People thereon shall be final. This means that the nature of a Bill which is certified by the Speaker as a Money Bill shall not be open to question either in a Court of law or in the either House or even by the President.

When a Bill is transmitted to the Council of States or is presented for the assent of the President, it shall bear the endorsement of the Speaker that it is a Money Bill. As pointed out earlier [p. 178, *ante*], this is one of the special powers of the Speaker.

The following is the procedure for the passing of Money Bills in Parliament:

A Money Bill shall not be introduced in the Council of States.

After a Money Bill has been passed by the House of the People, it shall be transmitted (with the Speaker's certificate that it is a Money Bill) to the Council of States for its recommendations. The Council of States cannot reject a Money Bill nor amend it by virtue of its own powers. It must, within a period of fourteen days from the date of its receipt of the Bill, return the Bill to the House of the People which may thereupon either accept or reject all or any of the recommendations of the Council of States.

If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Council of States and accepted by the House of the People.

If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been

passed by both Houses in the form in which it is passed by the House of the People without any of the amendments recommended by the Council of States.

If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period or fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People [Art. 109].

Money Bill and Financial Bill.

Generally speaking, a Financial Bill may be said to be any Bill which relates to revenue or expenditure. But it is in a technical sense that the expression is used in the Constitution.

I. The definition of a 'Money Bill' is given in Art. 110 and no Bill is a Money Bill unless it satisfies the requirements of this Article. It lays down that a Bill is a Money Bill if it contains *only* provisions dealing with all or any of six matters specified in that Articles or matters incidental thereto. These six specified matters have already been stated [p. 183, *ante*].

On the question whether any Bill comes under any of the sub-clauses of Art. 110, the decision of the speaker of the House of the People is final and his certificate that a particular Bill is a Money Bill is not liable to be questioned. Shortly speaking, thus, only those Financial Bills are Money Bills which bear the certificate of the Speaker as such.[14]

II. Financial Bills which do not receive the Speaker's certificate are of two classes. These are dealt with in Art. 117 of the Constitution—

(i) To the first class belongs a Bill which contains any of the matters specified in Art. 110 but does not consist *solely* of those matters, for example, a Bill which contains a taxation clause, but does not deal solely with taxation [Art. 117 (1)].

(ii) Any ordinary Bill which contains provisions involving expenditure from the Consolidated Fund is a Financial Bill of the second class [Art. 117 (3)].

III. The incidents of these three different classes of Bills are as follows—

(i) A Money Bill cannot be introduced in the Council of States nor can it be introduced except on the recommendation of the President. Again the Council of States has no power to amend or reject such a Bill. It can only recommend amendments to the House of the People.

(ii) A Financial Bill of the first class, that is to say, a Bill which contains any of the matters specified in Art. 110 but does not exclusively deal with such matters, has two features in common with a Money Bill, viz. that it cannot be introduced in the Council of States and also cannot be introduced except on the recommendation of the President. But not being a Money Bill, the Council of States has the same power to reject or amend such a Financial Bill as it has in the case of non-financial Bills subject to

the limitation that an amendment other than for reduction or abolition of a tax cannot be moved in either House without the President's recommendation. Such a bill has to be passed in the Council of States through three readings like ordinary Bills and in case of a final disagreement between the two Houses over such a Bill, the provision for joint sitting in Art. 108 is attracted. Only Money Bills are excepted out of the provisions relating to a joint sitting [Art. 108 (1)].

This is the distinction between a Money Bill and a Financial Bill of the first class.

(ii) A Bill which merely involves expenditure and does not include any of the matters specified in Art. 110, is an ordinary Bill and may be initiated in either House and the Council of States has full power to reject or amend it. But it has only *one special incident* in view of the financial provision (i.e., provision involving expenditure) contained in it, viz., that it must not be *passed* in eiher House unless the President has recommended the consideration of the Bill. In other words, the President's recommendation is not a condition precedent to its introduction as in the case of Money Bills and other Financial Bills of the first class but in this case it will be sufficient if the President's recommendation is received before the Bill is *considered*. Without such recommendation, however, the consideration of such Bill cannot take place.

But for this special incident, a Bill which merely involves expenditure is governed by the same procedure as an ordinary Bill, including the provision of a joint sitting in case of disagreement between the two Houses.

Provisions for removing deadlock between two Houses of Parliament.

It has already been made clear that any Bill, other than a Money Bill, can become a law only if it is agreed to by both Houses, with or without amendments. A machinery should then exist, for resolving a deadlock between the two Houses if they fail to agree either as to the provisions of the Bill as introduced or as to the amendments that may have been proposed by either House.

(A) As regards Money Bills, the question does not arise, since the House of the People has the final power of passing it, the other House having the power only to make recommendation for the acceptance of the House of the People [see p. 182, *ante*]. In case of disagreement, thus, the lower House has the plenary power to override the wishes of the upper House, i.e., the Council of States.

(B) As regards all other Bills (including 'financial Bills'), the machinery provided by the Constitution for resolving a disagreement between the two Houses of Parliament is a joint sitting of the two Houses.

The President may notify to the Houses his intention to summon them for a joint sitting in case of disagreement arising between the two Houses in any of the following ways:—

If, after a Bill has been passed by one House and transmitted to the other House—

(a) the Bill is rejected by the other House; or

(*b*) the Houses have finally disagreed as to the amendments to be made in the Bill; or

(*c*) more than six months have elapsed from the date of the reception of the Bill by the other House without the Bill being passed by it.

No such notification can be made by the President if the Bill has already lapsed by the dissolution of the House of the People; but once the President has notified his intention to hold a joint sitting, the subsequent dissolution of the House of the People cannot stand in the way of the joint sitting being held.

Procedure at joint sitting.

As stated earlier, the Speaker will preside at the joint sitting; in the absence of the Speaker, such person as is determined by the Rules of Procedure made by the President (in consultation with the Chairman of the Council of States and the Speaker of the House of the People) shall preside [Art. 118 (4)]. The Rules, so made, provide that

"During the absence of the Speaker from any joint sitting, the Deputy Speaker of the House or, if he is also absent, the Deputy Chairman of the Council or, if he is also absent such other person as may be determined by the Members present at the sitting, shall preside."

There are restrictions on the amendments to the Bill which may be proposed at the sitting:

(a) If, after its passage in one House, the Bill has been rejected or has not been returned by the other House, only such amendments may be proposed at the joint sitting as are made necessary by the delay in the passage of the Bill.

(b) If the deadlock has been caused because the other House has proposed amendments to which the originating House cannot agree, then (i) amendments necessary owing to the delay in the passage of the Bill, as well as (ii) other amendments as are relevant to the matters with respect to which the Houses have disagreed, may be proposed at the joint sitting.

If at the joint sitting of the two Houses the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the *total number* of members of both Houses *present and voting*, it shall be deemed for the purposes of this Constitution to have been passed by both Houses.

Financial legislation in Parliament.

At the beginning of every financial year,[18] the President shall, in respect of the financial year, cause to be laid before both the Houses of Parliament a statement of the estimated receipts and expenditure of the Government of India for that year. This is known as the "annual financial statement" (i.e., the 'Budget') [Art. 112]. It also states the ways and means of meeting the estimated expenditure.

Policy statement in the Budget.

In conformity with the usual Parliamentary practice in the United Kingdom, the Budget not only gives the estimates for the ensuing year but offers an opportunity to the Government to review and explain its financial

and economic policy and programme and to the Legislature to discuss and criticise it. The Annual Financial Statement in *our* Parliament thus contains, apart from the estimates of expenditure, the ways and means to raise the revenue,—

(a) An analysis of the actual receipts and expenditures of the closing year, and the causes of any surplus or deficit in relation to such year;

(b) An explanation of the economic policy and spending programme of the Government in the coming year and the prospects of revenue.

Votable and non-votable expenditure.

The estimates of expenditure embodied in the annual financial statement shall show separately—(a) the sums required to meet expenditure described by this Constitution as expenditure *charged upon* the Consolidated Fund of India; and (b) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of India.

(a) So much of the estimates as relates to expenditure charged upon the Consolidated Fund of India shall *not* be submitted to the vote of Parliament but each House is competent to discuss any of these estimates.

(b) So much of the estimates as relates to other expenditure shall be submitted in the form of demands for grants to the House of the People, and that House shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein. No demand for a grant shall however be made except on the recommendation of the President.

In practice, the presentation of the Annual Financial Statement is followed by a general discussion in both Houses of Parliament. The estimates of expenditure, *other than those which are charged,* are then placed before the House of the People in the form of 'demands for grants'.

No money can be withdrawn from the Consolidated Fund except under an Appropriation Act, passed as follows:

As soon as may be after the demands for grants have been voted by the House of the People, there shall be introduced a Bill to provide for the appropriation out of the Consolidated Fund of India of all moneys required to meet—

(a) the grants so made by the House of the People; and (b) the expenditure charged on the Consolidated Fund of India.

This Bill will then be passed as a Money Bill, subject to this condition that no amendment shall be proposed to any such Bill in either House of Parliament which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund.

The following expenditure shall be expenditure charged on the Consolidated Fund of India—

(a) the emoluments and allowances of the President and other expenditure relating to his office; (b) the salaries and allowances of the Chairman and the Deputy Chairman of the Council of States and the Speaker and the Deputy Speaker of the House of the

Expenditure charged on the Consolidated Fund of India.

People; (c) debt charges for which the Government of India is liable; (d) (i) the salaries, allowances and pensions payable to or in respect of Judges of the Supreme Court; (ii) the pensions payable to or in respect of Judges of the Federal Court; (iii) the pensions payable to or in respect of Judges of any High Court; (e) the salary, allowances and pension payable to or in respect of the Comptroller and Auditor-General of India; (f) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal; (g) any other expenditure declared by this Constitution or by Parliament by law to be so charged.

Relative parts played by the two Houses in Financial legislation.

As has been already explained, financial business in Parliament starts with the presenting of the Annual Financial Statement. This Statement is laid by the President before *both* Houses of Parliament [Article 112]. After the Annual Financial Statement is presented, there is a general discussion of the Statement as a whole in *either* House. This discussion is to be a general discussion relating to a policy involving a review and criticism of the administration and a valuation of the grievances of the people. No motion is moved at this stage nor is the Budget submitted to vote.

(b) The Council of States shall have *no further business* with the Annual Financial Statement beyond the above general discussion. The voting of the grants, that is, of the demands for expenditure made by Government, is an exclusive business of the House of the People. In the House of People, after the general discussion is over, the estimates are submitted in the form of demands for grants on the particular heads and it is followed by a vote of the House on each of the heads [Art. 113 (2)].

(c) After the grants are voted by the Houses of the People, the grants so made by the House of the People as well as the expenditure charged on the Consolidated Fund of India are incorporated in an Appropriation Bill. It provides the legal authority for the withdrawal of these sums from the Consolidated Fund of India.

Similarly, the taxing proposals of the budget are embodied in another Bill known as the Annual Finance Bill.

Both these Bills being Money Bills, the special procedure relating to Money Bills shall have to be followed. It means that they can be introduced *only in the House of the People* and after each Bill is passed by the House of the People, it shall be transmitted to the Council of States which shall have the power only to make *recommendations* to the House of the People within a period of 14 days but no power of amending or rejecting the Bill. It shall lie at the hands of the House of the People to accept or reject the recommendations of the Council of States. In either case, the Bill will be deemed to be passed as soon as the House of the People decides whether it would accept or reject any of the recommendations of the Council of States and thereafter the Bill becomes law on receiving the assent of the President.

The financial system consists of two branches—revenue and expenditure.

Parliament's control over the financial system.

(i) As regards revenue, it is expressly laid down by our Constitution [Art. 265] that no tax shall be levied or collected except by authority of law. The result is that the Executive cannot impose any tax without legislative sanction. If any tax is imposed without legislative authority, the aggrieved person can obtain his relief from the courts of law.

(ii) As regards expenditure, the pivot of parliamentary control is the Consolidated Fund of India. This is the reservoir into which all the revenues received by the Government of India as well as all loans raised by it are paid and the Constitution provides that no moneys shall be appropriated out of the Consolidated Fund of India except in accordance with law [Art. 296 (3)]. This law means an Act of Appropriation passed in conformity with Article 114. Whether the expenditure is charged on the Consolidated Fund of India or it is an amount voted by the House of the People, no money can be issued out of the Consolidated Fund of India unless the expenditure is authorised by an Appropriation Act. It follows, accordingly, that the executive cannot spend the public revenue without parliamentary sanction.

While an Act of Appropriation ensures that there cannot be any expenditure of the public revenues without the sanction of Parliament, Parliament's control over the expenditure cannot be complete unless it is able to ensure economy in the volume of expenditure. On this point, however, a reconciliation has to be made between two conflicting principles, namely, the need for Parliamentary control and the responsibility of the Government in power for the administration and its policies.

Committee on Estimates.

The Government has the sole initiative in formulating its policies and in presenting its demands for carrying out those policies. Parliament can hardly refuse such demands or make drastic cuts in such demands without reflecting on the policy and responsibility of the Government in power. Nor is it expedient to suggest economies in different items of the expenditure proposed by the Government when the demands are presented to the House for its vote, in view of the shortage of time at its disposal. The scrutiny of the expenditure proposed by the Government is, therefore, made by the House in the informal atmosphere of a Committee, known as the Committee on Estimates. After the Annual Financial Statement is presented before the House of the People, this Committee of the House, annually constituted, examines the estimates, in order to:

(a) report to the House what economies, *improvements in organisation, efficiency or administrative reform,* consistent with the policy underlying the estimates, may be effected;

(b) *suggest alternative polices in order to bring efficiency and economy in administration;*

(c) *examine whether the money is well laid out within the limits of the policy implied in the estimates;*

(d) suggest the form in which estimates are to be presented to Parliament.

Though the report of the Estimates Committee is not debated in the House, the fact that it carries on its examination throughout the year and places its views before the members of the House as a whole exerts a salutary influence in checking Governmental extravagance in making demands in the coming year, and in moulding its policies without involving a friction in the House.

The third factor to be considered is the system of parliamentary control to ensure that the expenditure sanctioned by Parliament has actually been spent in terms of the law of Parliament, that is, the Appropriation Act or Acts. The office of the Comptroller and Auditor-General is the fundamental agency which helps Parliament in this work. The Comptroller and Auditor-General is the guardian of the public purse and it is his function to see that not a farthing of it is spent without the authority of Parliament. It is the business of the Comptroller and Auditor-General to audit the accounts of the Union and to satisfy himself that the expenditure incurred has been sanctioned by Parliament and that it has taken place in conformity with the sanctioned by Parliament. The Comptroller and Auditor-General then submits his report of audit relating to the accounts of the Union to the President who has to lay it before each House of Parliament.

Committee on Public Accounts.

After the report of the Comptroller and Auditor-General is laid before the Parliament, it is examined by the Public Accounts Committee. Though this is a Committee of the House of the People (having 15 members from that House), by an agreement between the two Houses, seven members of the Council of States are also associated with this Committee, in order to strengthen it.

In scrutinising the Appropriation Accounts of the Government of India and the report of the Comptroller and Auditor-General thereon it shall be the duty of the Committee on Public Accounts to satisfy itself—

(*a*) that the moneys shown in the accounts as having been disbursed were legally available for and applicable to the service or purpose to which they have applied or charged;

(*b*) that the expenditure conforms to the authority which governs it; and

(*c*) that every re-appropriation has been made in accordance with the provisions made in this behalf under rules framed by competent authority.

This Committee, in short, scrutinises the report of the Comptroller and Auditor-General in details and then submits its report to the House of the People so that the irregularities noticed by it may be discussed by Parliament and effective steps taken.

All moneys received by or on behalf of the Government of India will be credited to either of two funds—the Consolidated Fund of India, or the 'public account' of India. Thus,

(a) Subject to the assignment of certain taxes to the States, all *revenues* received by the Government of India, all *loans* raised by the Government and all moneys received by that Government in *repayment of loans* shall form one consolidated fund to be called "the Consolidated Fund of India."

(b) All other public moneys received by or on behalf of the Government of India shall be credited to the Public Account of India [Art. 266], e.g., moneys received by an officer or Court in connection with affairs of the Union [Art. 284].

No money out of the Consolidated Fund of India (or of a State) shall be appropriated except in accordance with a law of Appropriation. The procedure for the passing of an Appropriation Act has been already noted.

(c) Art. 267 of the Constitution empowers Parliament and the Legislature of a State to create a 'Contingency Fund' for India or for a State, as the case may be. The 'Contingency Fund' for India has been constituted by the Contingency Fund of India Act, 1950. The Fund will be at the disposal of the executive to enable advances to be made, from time to time, for the purpose of meeting *unforeseen expenditure*, pending authorisation of such expenditure by the Legislature by supplementary, additional or excess grants. The amount of the Fund is subject to be regulated by the appropriate Legislature.

The custody of the Consolidated Fund of India and the Contingency Fund of India, the payment of moneys into such Funds, withdrawal of moneys therefrom, custody of public moneys other than those credited to such Funds, their payment into the public accounts of India and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law by Parliament, and, until provision in that behalf is so made, shall be regulated by rules made by the President [Art. 266].

Constitutional position of the Council of States as compared with that of the House of the People.

Though *our* Council of States does not occupy as important a place in the constitutional system as the American Senate, its position is not so inferior as that of the House of Lords as it stands to-day. *Barring the specific provisions with respect to which the lower House has special functions*, e.g., with respect to money Bills (*see below*), the Constitution proceeds on a theory of equality of status of the two Houses.

This equality of status has been explained by the Prime Minister Pandit Nehru himself,[10] in these words—

"Under our Constitution Parliament consists of two Houses, each functioning in the allotted sphere laid down in that Constitution. We derive authority from that Constitution. Sometimes we refer back to the practice and conventions prevailing in the House of Parliament of the United Kingdom and even refer erroneously to an Upper House and a Lower House. I do not think that is correct. Nor is it helpful always to refer back to the procedure of the British Parliament which has grown up in the course of several hundred years and as a result conflicts originally with the authority of the King and later between the Commons and the Lords. We have no such history behind us, though in making our Constitution we have profited by the experience of others.

Our guide must, therefore, be our own Constitution which has clearly specified the functions of the Council of States and the House of the People. To call either of these Houses an Upper House or a Lower House is not correct. Each House has full authority to regulate its own procedure within the limits of the Constitution. Neither House by itself, constitutes Parliament. It is the two Houses together that are the Parliament of India.....That Constitution treats the two Houses equally, except in certain financial matters which are to be the sole purview of the House of the People. In regard to what these are, the Speaker is the final authority."

The Constitution also makes no distinction between the two Houses in the matter of selection of Ministers. In fact, during a part of the quinquennium from 1952-57, there were several Cabinet Ministers from amongst the members of the Council of States, such as the Ministers for Home Affairs, Law, Railway and Transport, Production, Works, Housing and Supply and Minister without Portfolio in the Ministry for External Affairs.

The exceptional provisions which impose limitations upon the powers of the Council of States, as compared with the House of the People are:

(1) A Money Bill shall not be introduced in the Council. Even a Bill having like financial provisions cannot be introduced in the Council.

(2) The Council has no power to reject or amend a Money Bill. The only power it has with respect to Money Bills is to suggest 'recommendations' which may or may not be accepted by the House of the People, and Bill shall be deemed to have been passed by both Houses of Parliament, but the concurrence of the Council, if the Council does not return the Bill within 14 days of its receipts or makes recommendations which are not accepted by the House.

(3) The Speaker of the House has got the sole and final power of deciding whether a Bill is a Money Bill.

(4) Though the Council has the power to discuss, it has no power to vote money for the public expenditure and demands for grants are not submitted for the vote of the Council.

(5) The Council of Ministers is responsible to the House of People and not to the Council [Art. 75 (3)].

(6) Apart from this, the Council suffers, by reason of its numerical minority, in case a joint session is summoned by the President to resolve a deadlock between the two Houses.

On the other hand, the Council of States of has certain special powers which the other House does not possess and this certainly adds to the prestige of the Council:

(a) Art. 249 provides for temporary Union legislation with respect to a matter in the State List, if it is necessary in the national interest, but in this matter a special role has been assigned by the Constitution to the Council. Parliament can assume such legislative power with respect to a State subject only if the Council of States declares, by a resolution supported by not less than two-thirds of its members present and voting, that it is necessary or expedient in the national interest that Parliament should make

laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force (see *post*).

(b) Similarly, under Article 312 of the Constitution, Parliament is empowered to make laws providing for the creation of one or more All-India Services common to the Union and the States, if the Council of States has declared by a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do.

In both the above matters, the Constitution assigns a special position to the Council because of its federal character and of the fact that a resolution passed by two thirds of its members would virtually signify the consent of the States.

Notwithstanding these special functions and the theory of equality propounded by the Pandit Nehru, it is not possible for the Council of States, by reason of its verp composition, to attain a status of equality with the House of the People. Even though there is no provision in the Constitution, corresponding to Art. 169 relating to the upper Chamber in the States, fo. the abolition of the upper Chamber in Parliament, there has been, since the inauguration of the Constitution, a feeling in the House of the People that the Council serves no useful purpose and is nothing but a 'device to flout the voice of the People',[16] which has led even to the motion of a Private Member's Resolution for the abolition of the Council.[16] It was stayed for the time being only at the intervention of the Prime Minister on the ground that the working of the Council was yet too short to adjudge its usefulness.

REFERENCES:

1. The first general election under the Constitution took place in the winter of 1951-52.
   The first Lok Sabha, which held its first sitting on 13-5-52 was dissolved by the President on 4-4-57.
   The second general election was held in the winter of 1956-57, and the second Lok Sabha held its first sitting on 10-5-57.
   The third general election was held in February, 1962 and the third Lok Sabha had its first sitting on 16-4-62.
   The fourth general election was held in February, 1967 and the fourth Lok Sabha had its first sitting on 11-3-67 and was prematurely dissolved on 27-12-70.
   The Rajya Sabha was first constituted on 3-4-52 and it held its first sitting on 13-5-52, and the retirement of the first batch of the members of the Rajya Sabha took place on 2-4-54
2. Ss. 27A, 27H of Representation of the People Act, 1950.
3. The actual number of members of the two Houses at the end of 1961 is given in Table VII.
4. Raised from 20 to 25, by the Constitution (Fourteenth Amendment) Act, 1962.
5. The Constitution (Application to Jammu and Kashmir) Order, 1954.
6. Representation of the People Act, 1950 (as adapted in 1956), s. 4.
7. Dadra and Nagar Haveli was constituted a Union Territory, by the Constitution (Tenth Amendment) Act 1951 and allotted one nominated seat, by the Dadra and Nagar Haveli Act, 1961.
8. Ref. under Art. 143, A.I.R. 1965 S.C. 745 (*764*).
9. *Sharma* v. *Sri Krishna*, A.I.R. 1959 S.C. 395.

10. But so long as Parliament does not legislate under Art. 105 (3), the immunity should be for a period of *forty* days before and after a sitting, according to the privilege in the House of Commons.
11. May, Parliamentary Practice, 15th Ed. p. 109.
12. *Sharma* v. *Sri Krishna*, A.I.R. 1960 S.C. 1186 (*1191*).
13. Except in the case of Bills for the amendment of the Constitution [Art. 368], all Bills and other questions before each House are passed or carried by a simple majority [Art. 100(1)].
14. Out of 68 Bills assented to by the President in 1954, no less than 24 were certified as Money Bills.
15. The existing practice is to present the Budget to the Legislature several weeks before the close of the financial year (usually in February), so that the discussion and passing of the Budget may be completed before commencement of the ensuing financial year on the first of April.
16. Statement in the Rajya Sabha, d. 6-5-53. Similar views were reiterated in the other House [H. P. Deb, 12-5-53].

GOVERNMENT OF THE STATES

PART THREE

CHAPTER XII

THE STATE EXECUTIVE

1. *The General Structure.*

As stated at the outset, *our* Constitution provides for a federal government, having separate systems of administration for the Union and its Units, namely, the States. The Constitution contains provisions for the governance of both. It lays down a uniform structure for the State Government, in Part VI of the Constitution, which is applicable to all the States, save only the State of Jammu & Kashmir which has a separate Constitution for its State Government, for reasons which will be explained later on.

Broadly speaking, the pattern of Government in the States is the same as that for the Union, namely, a parliamentary system,—the executive head being a constitutional ruler who is to act according to the advice of Ministers responsible to the State Legislature (or its popular House, where there are two Houses).

2. *The Governor.*

Governor.

At the head of the executive power of a State is the Governor[1] just as the President stands at the head of the executive power of the Union. The executive power of the State is vested in the Governor and all executive action of the State has to be taken in the name of the Governor. Normally, there shall be a Governor for each State, but the Constitution (Seventh Amendment) Act, 1956, makes it possible to appoint the same person as the Governor for two or more States [Art. 153], and, under this provision the Governor of Assam has been appointed Governor for Nagaland and the Governor of Punjab has been appointed Governor for Haryana also.

Appointment and term of office of Governor.

The Governor of a State is not elected but is appointed by the President and holds his office at the pleasure of the President. Any citizen of India over 35 years of age is eligible for the office, but he must not hold any other office of profit, nor be a member of the Legislature of the Union or of any Union or of any State [Art. 158]. There is no bar to the selection of a Governor from amongst members of a Legislature but if a Member of a Legislature is appointed Governor, he ceases to be a Member immediately upon such appointment.

The normal term of a Governor's office shall be five years, but it may be terminated earlier, by—

(i) Dismissal by the President, at whose 'pleasure' he holds the office [Art. 156 (1)]: (ii) Resignation [Art. 156 (2)].

The grounds upon which a Governor may be removed by the President are not laid down in the Constitution, but it is obvious that this power will be sparingly used to meet with cases of gross delinquency, such as bribery, corruption, treason and the like or violation of the Constitution.

There is no bar to a person being appointed Governor more than once.[2]

Why an appointed Governor.

The original plan in the Draft Constitution was to have elected Governors. But in the Constituent Assembly, it was replaced by the method of appointment by the President, upon the following arguments[3]:

(*a*) It would save the country from the evil consequences of still another election, run on personal issues. To sink every province into the vortex of an election with millions of primary voters but with no possible issue other than personal, would be highly detrimental to the country's progress.

(*b*) If the Governor were to be elected by direct vote, then he might consider himself to be superior to the Chief Minister, who was merely returned from a single constituency, and this might lead to frequent *friction* between the Governor and the Chief Minister.

But under the Parliamentary system of government prescribed by the Constitution, the Governor was to be the constitutional head of the province,—the real executive power being vested in the Ministry responsible to the Legislature.

"When the whole of the executive power is vested in the Council of Ministers, if there is another person who believes that he has got the backing of the province behind him and therefore, at his discretion he can come forward and intervene in the governance of the province, it would really amount to a surrender of democracy."

(*c*) The expenses involved and the elaborate machinery of election would be out of proportion to the powers vested in this Governor who was to act as a mere constitutional head.

(*d*) A Governor elected to adult franchise to be at the top of the political life in the province would soon prefer to be the Chief Minister or a Minister with effective powers. The party in power during the election would naturally put up for Governorship a person who was not as outstanding as the future Prime Minister with the result that the Province would not be able to get the best man of the party. All the process of election would have to be gone through only to get a second rate man of the party elected as Governor. Being subsidiary in importance to the Chief Minister, he would be the nominee of the Chief Minister of the Province, which was not a desirable thing.

(*e*) Through the procedure of appointment by the President, the Union Government would be able to maintain in tact its control over the States.

(*f*) The method of election would encourage separatist tendencies. The Governor would be the nominee of the Government of that particular province to stand for the Governorship. The stability and unity of the Governmental machinery of the country as a whole could be achieved only by adopting the system of nomination.

"He should be a more detached figure acceptable to the province, otherwise he could not function, and yet may not be a part of the party machine of the province. On the whole it would probably be desirable to have people from outside, eminent in something, education or other fields of life who would naturally co-operate fully with the Government in carrying out the policy of the Government and yet represent before the public something above politics."

The arguments which were advanced, in the Constituent Assembly, *against* nomination are also worthy of consideration:

(*i*) A nominated Governor would not be able to work for the welfare of a State because he would be a foreigner to that State and would not be able to understand its special needs.

(*ii*) There was a chance of friction between the Governor and the Chief Minister of the State no less under the system of nomination, if the Premier of the State did not belong to the same party as the nominated Governor.

(*iii*) The argument that the system of election would not be compatible with the Parliamentary or Cabinet system of Government is not strong enough in view of the fact that even at the Centre there is an elected President to be advised by a Council of Ministers. Of course, the election of the President is not direct but indirect.

(*iv*) An appointed Governor under the instruction of the Centre might like to run the administration in a certain way contrary to the wishes of the Cabinet. In this tussle, the Cabinet would prevail and the President-appointed Governor would have to be recalled. The system of election, therefore, was far more compatible with good, better and efficient government plus the right of self-government.

(*v*) The method of appointment of the head of e State executive by the federal executive is repugnant to the strict federal system as it obtains in the *U.S.A.*, and *Australia*.

In actual working, it may be said that in States where one party has a clear majority, the part played by the Governor has been that of a constitutional and impartial head, but in those States where there are multiple parties with uncertain command over the Legislature, the Governor has acted as a mere agent of the Centre in various matters, such as inviting a person to form a Ministry, because he belonged to the ruling party at the Centre, even though he had no clear following (as in the case of Sri Rajagopalachari in Madras, after the General Election in 1952) or bringing about the removal of a Ministry having the confidence of the Legislature, by means of a report under Art. 356 (as happened in Kerala in 1959, in the case of the Communist Ministry headed by Sri Namboodiripad). Nevertheless, there is one aspect in which the system of appointing an outsider by the Centre has proved to be beneficial, and that is the prevention of disruptive and separatist forces from impairing the national unity and strength as might otherwise have been possible without the knowledge of the Centre, under a locally elected Governor.

It is from this standpoint alone that one can tolerate the patently undemocratic instances of appointing a retiring or retired member of the Indian Civil Service (who is obviously a veteran bureaucrat) or of the Armed Forces as the Governor.

Conditions of Governor's Office.

A Governor gets a monthly emolument of Rs. 5,500/, together with the use of an official residence free of rent and also such allowances and privileges as were enjoyed by a Provincial Governor at the commencement of the Constitution. Power is given to Parliament to make a law relating to these matters, subject to the condition that the emolument and allowances of a Governor shall not be diminished during his term of office [Art. 158 (3) (4)].

Powers of the Governor.

The Governor has no diplomatic or military powers like the President, but he possesses executive, legislative and judicial powers analogous to those of the President.

1. *Executive.*—Apart from the power to appoint his Council of Ministers, the Governor has the power to appoint the Advocate-General and the Members of the State Public Service Commission. The Ministers as well as the Advocate-General hold office during the pleasure of the Governor, but the Members of the State Public Service Commission cannot be removed by him: they can be removed only by the President on the report of the Supreme Court and, in some cases, on the happening of certain disqualifications [Art. 317].

The Governor has no power to appoint Judges of the State High Court but he is entitled to be consulted by the President in the matter [Art. 217 (i)].

Like the President, the Governor has the power to nominate members of the Anglo-Indian community to the Legislative Assembly of his State, if he is satisfied that they are not adequately represented in the Assembly; but while the President's corresponding power with regard to the House of the People is limited to a maximum of two members only, in the case of the Governor the Constitution does not specify any maximum number but leaves it to the discretion of the Governor to nominate "such number of members of the community as he considers appropriate" [Art. 333].

As regards the upper Chamber of the State Legislature (in States where the Legislature is bicameral), namely, the Legislative Council, the Governor has a power of nomination of members corresponding to the power of the President in relation to the Council of States, and the power is similarly exercisable in respect of "persons having special knowledge or practical experience in respect of matters such as literature, science, art, co-operative movement and social service" [Art. 171 (5)]. It is to be noted that 'co-operative movement' is not included in the corresponding list relating to the Council of States.

II. *Legislative.*—As regards, *legislative* powers, the Governor is a part of the State Legislature [Art. 164] just as the President is a part of Parliament. Again, he has a right of addressing and sending messages to,

and of summoning, proroguing and dissolving, the State Legislature, just as the President has in relation to Parliament. He also possesses a similar power of causing to be laid before the State Legislature the annual financial statement [Art. 202] and of making demands for grants and recommending 'Money Bills' [Art. 207].

His powers of 'veto' over State legislation and of making Ordinances are being dealt with separately.

III. *Judicial.*—The Governor has the power to grant pardons reprieves, respites, or remission of punishments or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends [Art. 161].

IV. *Emergency Power.*—The Governor has no emergency powers to meet the situation arising from external or internal aggression as the President has, but he has the power to make a report to the President whenever he is satisfied that a situation has arisen in which government of the State cannot be carried on in accordance with the provisions of the Constitution [Art 356], thereby inviting the President to assume to himself the functions of the Government of the State or any of them.

3. *The Council of Ministers.*

As has already been stated, the Governor is a constitutional head of the State executive, and has, therefore, to act on the advice of a Council of Ministers [Art. 163]. The provisions relating to the Council of Ministers of the Governor are, therefore, subject to exceptions to be stated presently, similar to those relating to the Council of Ministers of the President.

Appointment of Council of Ministers.

At the head of State Council of Ministers the *Chief* Minister (corresponding to the *Prime* Minister of the Union). The Chief Minister is appointed by the Governor, while the other Ministers are appointed by the Governor on the advice of the Chief Minister. The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State and individually responsible to the Governor. Any person may be appointed a Minister (provided he has the confidence of the Legislative Assembly), but he ceases to be a Minister if he is not or does not remain, for a period of six consecutive months, a Member of the State Legislature. The salaries and allowances of Ministers are governed by laws made by the State Legislature [Art. 164].

Relationship between the Governor and his Ministers.

It may be said that, in general, the relation between the Governor and his ministers is the same as that between the President and his ministers [see *ante*], with this important difference that while the Constitution does not empower the President to exercise any function in his discretion it authorises the Governor to exercise some functions in his discretion. In this respect, the principle of Cabinet responsibility in the States differs from that in Union.

Article 163 (a) says—

"There shall be a Council of Ministers ....to aid and advise the Governor in exercise of his functions, except in so far as he is or under this Constitution required to exercise his functions or any of them in his discretion."

In the exercise of the functions which the Governor is empowered to exercise in his discretion, he will not be required to act according to the advice of his ministers or even to seek such advice. Again, if any question arises whether any matter is or is not a matter as regards which the Governor is not required by the Constitution to act in his discretion, the decision of the Governor shall be final, and the validity of anything done by the Governor shall not be called into question on the ground that he ought or ought not to have acted in this discretion [Art. 163].

A. The functions which are specially required by the Constitution to be exercised by the Governor are—

Discretionary functions of Governor.

(a) Paras. 9 and 18 of the 6th Schedule provide that until a notification is issued under those paragraphs, the Governor of Assam shall carry on the administration of a tribal area specified in Part B4, as the 'agent' of the President, and acting in his discretion. He will also determine certain disputes, acting in his discretion.

(b) Article 239 (2) authorises the President to appoint the Governor of a State as an Administrator of an adjoining Union Territory and provides that where a Governor is so appointed, he shall exercise his functions as such Administrator "independently of his Council of Ministers".

Special Responsibilities.

B. Besides the above functions to be exercised by the Governor 'in his discretion', there are certain functions under the amended Constitution which are to be exercised by the Governor 'on his special responsibility' which practically means the same thing as 'in his discretion', because though in cases of special responsibility, he is no *consult* has Council of Ministers, the final decision shall be 'in his individual judgment', which no court can question. Such functions are—

(i) Under Art. 371, as amended in 1956 and 1960[6], the President may direct that the Governor of Bombay shall have a special responsibility for taking steps for the development of certain areas in the State, such as Vidarbha, and the Governors of Andhra Pradesh and Punjab shall have similar special responsibility for the proper functioning of the Regional Committees' of the Legislative Assemblies in those States.

(ii) The Governor of Nagaland shall, under Art. 371A (introduced in 1962), have similar responsibility with respect to law and order in that State so long as internal disturbances caused by the hostile Nagas in that State continue.

Discretion, in practice, in certain matters.

C. In view of the responsibility of the Governor to the President and of the fact that the Governor's decision as to whether he should act in his discretion in any particular matter is final, it would be possible for a Governor

to act without ministerial advice in certain other matters, according to the circumstances, even though they are not specifically mentioned in the Constitution as discretionary functions.

(i) As an instance to the point may be mentioned the making of a report to the President under Art. 356, that a situation has arisen in which the Government of State cannot be carried on in accordance with the provisions of the Constitution. Such a report, may possibly be made against a Ministry in power,—for instance, if it attempts to misuse its powers to subvert the Constitution. It is obvious that in such a case the report cannot be made according to ministerial advice. No such advice, again, will be available where one Ministry has resigned and another alternative Ministry cannot be formed. The making of a report under Art. 356, thus, must be regarded as a function to be exercised by the Governor in the exercise of his discretion.

Obviously, the Governor is also the medium through whom the Union keeps itself informed as to whether the State is complying with the Directives issued by the Union from time to time.

(ii) Further, after such a Proclamation as to failure of the constitutional machinery in the State is made by the President, the Governor acts as the agent of the President as regards those functions of the State Government which have been assumed by the President under the Proclamation [Art. 356(1)(a)].

(iii) In some other matters, such as the reservation of a Bill for consideration of the President, the Governor may not always be in agreement with his Council of Ministers, particularly when the Governor happens to belong to a party other than that of the Ministry. In such cases, the Governor may, in particular situations, be justified in acting without ministerial advice, if he considers that the Bill in question would affect the powers of the Union or contravene any of the provisions of the Constitution even though his Ministry may be of a different opinion.[6]

President's control over the Governor.

It is obvious that as regards matters on which the Governor is empowered to act in his discretion or on his 'special responsibility', the Governor will be under the complete control of the President.

As regards other matters, however, though the President will have a personal control over the Governor through his power of appointment and removal, it does not seem that the President will be entitled to exercise any effective control over the State Government against the wishes of a Chief Minister who enjoys the confidence of the State Legislature, though, of course, the President may keep himself informed of the affairs in the State through the reports of the Governor, which may even lead to the removal of the Ministry, under Art. 356, as stated above.

Whether Governor competent to dismiss a Chief Minister.

A sharp controversy has of late arisen upon the question whether a Governor has the power to dismiss a Council of Ministers, headed by the Chief Minister on the assumption that the Chief Minister and his Cabinet has lost their majority in the popular House of

the Legislature. The controversy has been particularly intriguing inasmuch as two Governors have acted in contrary directions under similar circumstances. In West Bengal, in 1967, Governor Dharma Vira, being of the view that the United Front Ministry, led by Ajoy Mukherjee, had lost majority in the Legislative Assembly, owing to defections from their party, asked the Chief Minister to call a meeting of the Assembly at a short notice, and, on the latter's refusal to do so, dismissed the Chief Minister with his Ministry. On the other hand, in Uttar Pradesh in 1970, Governor Gopala Reddy dismissed Chief Minister Charan Singh, on a similar assumption, without even waiting for the verdict of the Assembly which was scheduled to meet only a few days later.

Before answering the question with reference to the preceding instances, it should be noted that the Cabinet system of government has been adopted in our Constitution from the United Kingdom and some of the salient conventions underlying the British system have been codified in our Constitution. In the absence of anything to the contrary in the context, therefore, it must be concluded that the position under our Constitution is the same as in the United Kingdom.

In England, the Ministers being legally the servants of the Crown, at law the Crown has the power to dismiss each Minister, individually or collectively. But upon the growth of the Parliamentary system, it has been established that the Ministers, *collectively*, hold their office so long as they command a majority in the House of Commons. This is known as the 'collective responsibility' of Ministers. The legal responsibility of the Ministers, as a collective body, to the Crown has thus been replaced by the political responsibility of the Ministry to Parliament, and the Crown's power to dismiss a Prime Minister or his Cabinet has become obsolete, the last instance being 1783. The Crown retains, however, his power to dismiss a Minister individually and, in practice, this power is exercised by the Crown on the Prime Minister himself, when he seeks to weed out an undesirable colleague.

Be that as it may, the above two propositions as they exist to-day in England, have been codified in cls. (1) and (2) of Art. 164 of our Constitution as follows:

"(1).....and the *Ministers* shall hold office at the pleasure of the Governor ;

(2) The *Council* of Ministers shall be *collectively* responsible to the Legislative Assembly of the State".

In the above context, the legitimate conclusion that can be drawn is that—

(a) While the Governor has the power to dismiss an individual Minister at any time ;

(b) He can dismiss a Council of Ministers or the Chief Minister, whose dismissal means a fall of the Council of Ministers, only when the Legislative Assembly has expressed its want of confidence in the Council of Ministers, either by a direct vote of no-confidence or censure or by defeat-

ing an important measure or the like. The Governor cannot do so at his pleasure on the subjective estimate of the strength of the Chief Minister in the Assembly at any point of time.

4. *The Advocate-General.*

Advocate-General.

Each State shall have an Advocate-General for the State, an official corresponding to the Attorney-General of India, and having similar functions for the State. He shall be appointed by the Governor of the State and shall hold office during the pleasure of the Governor. Only a person who is qualified to be a Judge of a High Court can be appointed Advocate-General. He receives such remuneration as the Governor may determine.

He shall have the right to speak and to take part in the proceedings of, but no right to vote in, the Houses of the Legislature of the State [Art. 165].

REFERENCES :

1 In the case of Jammu and Kashmir, the head of the State is called *Sadar-i-Riyasat.*

2 Thus, Sri V. V. Giri, who was appointed Governor of U. P. in 1958, was appointed Governor of Kerala in 1960 for the unexpired portion of his term and in June 1962, he was re-appointed Governor of Kerala for a second term, limited up to June 1964 [Statesman, 10-6-62]. Srimati Padwaja Naidu, Governor of West Bengal, also got a second term.

3. C.A.D., Vol. VIII, p. 455.

4. The Naga Hills-Tuensang Area has been taken out of this discretionary sphere, by making it a separate State, named Nagaland.

5. That is, as amended by the Constitution (Seventh Amendment) Act, 1956 and the Bombay Reorganisaton Act, 1960. As will be more fully explained in Chapter XXIV, *post*, to meet the special linguistic and cultural problems of certain areas in the States of Andhra Pradesh and Punjab, Art. 371 of the Constitution was substituted, in 1956, in pursuance of the recommendations of the States Reorganisation Commission, to provide for the setting up Regional Committees in the Legislative Assembues of these two States. Such Committees were set up by the President by promulgating the Punjab Regional Committees Order, 1957 and the Andhra Pradesh Regional Committees Order, 1958. Briefly speaking, the function of these Regional Committees was to make recommendations to the Legislative Assembly with respect to Bills affecting the respective regions, specially. Subsequently, the Punjab Regional Committee has been abolished by the Punjab Reorganisation Act, 1966.

6. This happened in the case of the Kerala Education Bill [*vide* In re. Kerala Education Bill, A.I.R. 1958 S.C. 956].

CHAPTER XIII

THE STATE LEGISLATURE

The bicameral and unicameral States.

Though a uniform pattern of Government is prescribed for the States, in the matter of the composition of the Legislature the Constitution makes a distinction between the bigger and the smaller States. While the Legislature of every State shall consist of the Governor and the House or Houses of the State Legislature, in some of the States, the Legislature shall consist of two Houses, namely, the Legislative Assembly and the Legislative Council, while in the rest, there shall be only one House, i.e., the Legislative Assembly [Art. 168].

Owing to changes introduced since the inauguration of the Constitution, in accordance with the procedure laid down in Art. 169, the States having two Houses, at the end of 1969, are Andhra Pradesh; Bihar; Madhya Pradesh[1]; Madras; Maharastra[2]; Mysore; Uttar Pradesh[3] [Art. 168]. To these must be added Jammu & Kashmir, which has adopted a bicameral Legislature, by her own State Constitution (see *post*).

Creation and abolition of Second Chambers in States.

It follows that in the remaining States of Assam, Gujarat, Kerala, Orissa and Rajasthan, the Legislature will be unicameral, that is, consisting of the Legislative Assembly only [Art. 168]. But the above list is not permanent in the sense that the Constitution provides for the *abolition* of the Second Chamber (that is, the Legislative Council) in a State where it exists as well as for the *creation* of such a Chamber in a State where there is none at present, by a simple procedure which does not involve an amendment of the Constitution. The procedure prescribed is a resolution of the Legislative Assembly of the State concerned passed by a special majority (that is, a majority of the total membership of the Assembly not being less than two-thirds of the members actually present and voting), followed by an Act of Parliament.

This apparently extraordinary provision was made for the States (while there was none corresponding to it for the Union Legislature) in order to meet the criticism, at the time of the making of the Constitution, that some of *our* States being of poorer resources, could ill afford to have the extravagance of two Chambers. This device was, accordingly, prescribed to enable each State to have a second Chamber or not according to its own wishes. It is interesting to note that, taking advantage of this provision, the State of Andhra Pradesh has, in 1957, *created* a Legislative Council, leading to the enactment of the Legislative Council Act, 1957, by Parliament.

On the other hand, West Bengal and Punjab have abolished their Second Chambers, pursuing the same procedure.[4]

Composition of the Legislative Council.

The size of the Legislative Council shall vary with that of the Legislative Assembly,—the membership of the Council being not more than one-third of the membership of the Legislative Assembly but not less than 40. This provision has been adopted so that the Upper House (the Council) may not get a predominance in the Legislature [Art. 171(1)].

The system of composition of the Council as laid down in the Constitution is not final. The final power of providing the composition of this Chamber of the State Legislature is given to the Union Parliament [Art. 171(2)]. But until Parliament legislates on the matter, the composition shall be as given in the Constitution, which is as follows: It will be a partly nominated and partly elected body,—the election being an indirect one and in accordance with the principle of proportional representation by the single transferable vote. The members being drawn from various sources, the Council shall have a variegated composition.

Broadly speaking, 5/6 of the total number of members of the Council shall be indirectly elected and 1/6 will be nominated by the Governor. Thus,—

(a) 1/3 of the total number of members of the Council shall be elected by electorates consisting of members of *local bodies,* such as municipalities, district boards.

(b) 1/12 shall be elected by electors consisting of *graduates* of three years' standing residing in that State.

(c) 1/12 shall be elected by electorates consisting of persons engaged for at least three years in *teaching* in educational institutions within the State, not lower in standard than secondary schools.

(d) 1/3 shall be elected by members of the Legislative Assembly from amongst persons who are *not members* of the Assembly.

(e) The remainder shall be nominated by the Governor from persons having knowledge or practical experience in respect of such matters as literature, science, art, co-operative movement and social service. (The courts cannot question the *bona fides* or propriety of the Governor's nomination in any case).

Composition of the Legislative Assembly.

The Legislative Assembly of each State shall be composed of members chosen by *direct* election on the basis of adult suffrage from territorial constituencies. The number of members of the Assembly shall be not more than 500 less than 60.

There shall be a proportionately equal representation according to population in respect of each territorial constituency within a State. There will be a readjustment by law or Parliament, upon the completion of each census [Art. 170].

As stated already, the Governor has the power to nominate such number of members of the Anglo-Indian community as he deems fit, if he is of opinion that they are not adequately represented in the Assembly

[Art. 334]. Such reservation will cease on the expiration of thirty years from the commencement of the Constitution [Art. 334].

Duration of the Legislative Assembly. The duration of the Legislative Assembly is five years, but—

(i) It may be dissolved sooner than five years, by the Governor.

(ii) The term of five years may be extended in case of a Proclamation of Emergency by the President. In such a case, the Union Parliament shall have the power to extend the life of the Legislative Assembly up to a period not exceeding six months after the Proclamation ceases to have effect. subject to the condition that such extension shall not exceed one year at a time [Art. 172(1)].

Duration of the Legislative Council. The Legislative Council shall not be subject to dissolution. But one-third of its members shall retire on the expiry of every second year [Art. 172(2)]. It will thus be a permanent body like the Council of States, only a fraction of its membership being changed every third year.

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

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

(a) is a citizen of India;

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

(c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament [Art. 173].

Thus, the Representation of the People Act, 1951 has provided that a person shall not be elected either to the Legislative Assembly or the Council, unless he is himself an elector for any Legislative Assembly constituency in that State.

Disqualifications for membership. The disqualifications for membership of a State Legislature as laid down in Art. 191 of the Constitution are analogous to the disqualifications laid down in Art. 102 relating to membership of either House of Parliament. Thus,—

A person shall be disqualified for being chosen as, and for being a member of the Legislative Assembly or Legislative Council of a State if he—

(a) holds any office of profit under the Government of India or the Government of any State, other than that of a Minister for the Indian Union or for a State or an office declared by a law of the State not to disqualify its holder (many States have passed such laws declaring offices

offices to be offices the holding of which will not disqualify its holder for being a member of the Legislature of that State);

(b) is of unsound mind as declared by a competent court;

(c) is an undischarged insolvent;

(d) is not a citizen of India or has voluntarily acquired the citizenship of a foreign State or is under any acknowledgment of allegiance of adherence to a foreign State;

(e) is so disqualified by or under any law made by Parliament (in other words, the law of Parliament may disqualify a person for membership even of a State Legislature, on such grounds as may be laid down in such law). Thus, the Representation of the People Act, 1951 has laid down some grounds of disqualification, e.g., conviction by a court, having been found guilty of a corrupt or illegal practice in relation to election, being a director or managing agent of a corporation in which Government has a financial interest (under conditions laid down in that Act).

Art. 192 lays down that if any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned above, the question shall be referred to the Governor of that State for decision who will act according to the opinion of the Election Commission. His decision shall be final and not liable to be questioned in any court of law.

Legislative procedure in a State having bicameral Legislature, as compared with that in Parliament.

The legislative procedure in a State Legislature having two Chambers is broadly similar to that in Parliament, save for differences on certain points to be explained presently.

1. *As regards Money Bills*, the position is the same. The Legislative Council shall have no power save to make recommendations to the Assembly for amendments or to withhold the Bill for a period of 14 days from the date of its receipt of the Bill. In any case, the will of the Assembly shall prevail, and the Assembly is not bound to accept any such recommendations.

It follows that there cannot be any deadlock between the two Houses at all as regards Money Bills.

II. *As regards Bills other than Money Bills*, too, the only power of the Council is to interpose some *delay* in the passage of the Bill for a period of time (3 months) which is, of course, larger than in the case of Money Bills. The Legislative Council of a State, thus, shall not be a revising but mere *advisory* or *dilatory* Chamber. If it disagrees to such a Bill, the Bill must have *second journey* from the Assembly to the Council, but ultimately the view of the Assembly shall prevail and in the second journey, the Council shall have no power to withhold the Bill for more than a month.

Legislative Council compared with Council of States.

Herein the procedure in a State Legislature differs from that in the Union Parliament, and it renders the position of the Legislative Council

even weaker than that of the Council of the States. The difference is as follows:

Provisions for resolving deadlock between two Houses.

While disagreement between the two Houses of the Union Parliament is to be resolved by a *joint sitting*, there is no such provision for solving differences between the two Houses of the State Legislature,—in this latter case, the will of the lower House, *viz.*, the Assembly shall ultimately prevail and the Council shall have no more power than to interpose some delay in the passage of the Bill to which it disagrees.

This difference of treatment in the two cases is due to the adoption of two different principles as regards the Union and the State Legislatures. (*a*) As to the Union Parliament,—it has been said that since the Upper House represents the federal character of the Constitution, it should have a *status* better than that of a mere dilatory body. Hence, the Constitution provides for a joint sitting of both Houses in case of disagreement between the House of the People and the Council of States, though of course, the House will ultimately have an upper hand, owing to its numerial majority at the joint sitting. (*b*) As regards the two Houses of the State Legislature however, the Constitution of India adopts the English system founded on the Parliament Act, 1911, *viz*, that the Upper House must eventually give way to the Lower House which represents the will of the people. Under this system, the Upper House has no power to obstruct the popular House other than to effect some delay. This democratic provision has been adopted in *our* Constitution in the case of the State Legislature in as much as in this case, no question of federal importance of the Upper House arises.

The provisions as regards Bills *other than Money Bills* may now be summarised:

(a) *Union Parliament*—If a Bill (other than a Money Bill) is passed by one House and (i) the other House rejects it or does not return it within 6 months or (ii) the two Houses disagree as to amendments, the President may convene a joint sitting of the Houses, for the purpose of finally deliberating and voting on the Bill. At such joint sitting, the vote of the *majority of both Houses present and voting shall prevail* and the Bill shall be deemed to have been passed by both Houses with such amendments as are agreed to by such majority; and the Bill shall then be presented for his assent [Art. 108].

Comparison of procedure in Parliament and State Legislature.

(b) *State Legislature*—(i) If a Bill (other than a Money Bill) is passed by the Legislative Assembly and the Council (i) rejects the Bill, or (ii) passes it with such amendments as are not agreeable to the Assembly or (iii) does not pass the Bill within *3 months* from the time when it is laid before the Council,—the Legislative Assembly may again pass the Bill with or without further amendments, and transmit the Bill to the Council again.

If on this second occasion, the Council—(a) again rejects the Bill, or (b) proposes amendments, or (c) does not pass it *within one month* of the

date on which it is laid before the Council the Bill shall be deemed to have been passed by both Houses, and then presented to the Governor for his assent.

In short, in the State Legislature, a Bill, as regards which the Council does not agree with the Assembly, shall have two journeys from the Assembly to the Council. In the first journey, the Council shall not have the power to withhold the Bill for more than 3 months and in the second journey, not more than 1 month, and at the end of this period, the Bill shall become law over the head of the Council, even though it remains altogether inert [Art. 197].

(ii) The foregoing provision of the Constitution is applicable only as regards Bills *originating in the Assembly*. There is no corresponding provision for Bills originating in the Council. If, therefore, a Bill passed by the Council is transmitted to the Assembly and rejected by the latter, there is an end to the Bill.

The relative positions of the two Houses of the Union Parliament and of a State Legislature may be graphically shown as follows:

Parliament. *State Legislature.*

1. As regards *Money Bills, the position* is similar at the Union and the States:

(a) A Money Bill cannot originate in the Second Chamber or Upper House (i.e., the Council of States or the Legislative Council).

(b) The Upper House (i.e., the Council of States or the Legislative Council) has no power to amend or reject such Bills. In either case, the Council can only make recommendations when a Bill passed by the lower House (i.e., the House of the People or the Legislative Assembly, as the case may be) is transmitted to it. If finally rests with the lower House to accept or reject the recommendations made by the Upper House. If the House of the People or the Legislative Assembly (as the case may be) does not accept any of the recommendations, the Bill is deemed to have been passed by the Legislature in the form in which it was passed by the lower House and then presented to the President or the Governor (as the case may be), for his assent. If the lower House, on the other hand, accepts any of the recommendations of the Upper House, then the Bill shall be deemed to have been passed by the Legislature in the form in which it stands after acceptance of such recommendations.

On the other hand, if the Upper House does not return the Money Bill transmitted by the lower House, within a period of 14 days from the date of its receipt in the Upper House, the Bill shall be deemed to have been passed by the

Parliament.	*State Legislature.*
Legislature, at the expiry of the period of 14 days, and then presented to the President or the Governor, as the case may be, even though the Upper House has not either given its assent or made any recommendations.	
(c) There is no provision for resolving any deadlock as between the two Houses, as regards Money Bills, because no deadlock can possibly arise. Whether in Parliament or in a State Legislature, the will of the lower House (House of the People or the Legislative Assembly) shall prevail, in case the Upper House does not agree to the Bill as passed by the lower House.	

II. *As regards Bills other than Money Bills*:

Parliament.	*State Legislature.*
(a) Such Bills may be introduced in either House of Parliament or a State Legislature.	
(b) A Bill is deemed to have been passed by Parliament only if both Houses have agreed to the Bill in its original form or with amendments agreed to by both Houses.	(b) The Legislative Council has no co-ordinate power, and in case of disagreement between the two Houses, the will of the Legislative Assembly shall ultimately prevail. Hence, there is no provision for a joint sitting for resolving a deadlock between the two Houses.
(c) In case of disagreement between the two Houses in any of the following manner, the deadlock may be solved only by a joint sitting of the two Houses, if summoned by the President. The disagreement may take place if a House, on receipt of a Bill passed by the other House— (i) rejects the Bill; or (ii) proposes amendments as are not agreeable to the Assembly; or (iii) does not pass the Bill within 3 months of its receipts of the Bill.	(c) A disagreement between the two Houses may take place if the Legislative Council, *on receipt of a Bill passed by the Assembly*— (i) rejects the Bill ; or (ii) makes amendments to the Bill, which are not agreed to by the originating House; or (iii) does not pass the Bill within 6 months from the date of its receipt from the originating House. While the period for passing a Bill received from the lower House is six months in the case of the Council of States, it is three months only in the case of the Legislative Council.
(d) In case of disagreement, a passing of the Bill by the House of the People, a second time, cannot	(d) In case of such disagreement, a passing of the Bill by the Assembly for a second time is sufficient

Parliament.

override the Council of States. The only means of resolving the deadlock is a joint sitting of the two Houses. But if the President, in his discretion, does not summon a joint sitting, there is an end of the Bill and, thus, the Council of States has effective power, subject to a joint sitting, of preventing the passing of a Bill.

State Legislature.

for the passing of the Bill by the Legislature, and if the Bill is so passed and transmitted to the Legislative Council again, the only thing that the Council may do is to withhold it for a period of 1 month from the date of its receipt of the Bill on its second journey. If the Council either rejects the Bill again, or proposes amendments not agreeable to the Assembly or allows one month to elapse without passing the Bill, the Bill shall be deemed to have been passed by the State Legislature in the form in which it is passed by the Assembly for the second time, with such amendments, if any, as have been made by the Council and as are agreed to by the Assembly.

(e) The foregoing procedure applies *only* in the case of disagreement relating to a Bill *originating in the Legislative Assembly.*

In the case of a Bill originating in the Council of States and transmitted to the Assembly, after its passage in the Council, if the Legislative Assembly either rejects the Bill or makes amendments which are not agreed to by the Council, there is an immediate end of the Bill, and no question of its passage by the Assembly would arise.

Utility of the Second Chamber in a State.

It has been clear that the position of Legislative Council is inferior to that of the Legislative Assembly so much so that it may well be considered as a surplusage

(a) The very composition of the Legislative Council [p. 198, *ante*], renders its position weak, being partly elected and partly nominated, and representing various intertsts.

(b) Its very existence depends upon the will of the Legislative Assembly, because the latter has the power to pass a resolution for the abolition of the second Chamber by making an Act of Parliament.

(c) The Council of Ministers shall be responsible only to the Assembly.

(d) The Council cannot reject or amend a Money Bill. It can only withhold the Bill for a period not exceeding 14 days or make recommendations for amendments.

(e) As regards ordinary legislation (i.e., with respect to Bills other than Money Bills), too, the position of the Council is nothing but subordinate to the Assembly, for it can at most interpose a delay of four months (in two journeys) in the passage of a Bill originating in the Assembly and, in case of disagreement, the Assembly will have its way without the concurrence of the Council.

In the case of a Bill originating in the Council, on the other hand, the Assembly has the power of rejecting and putting an end to the Bill forthwith.

It will thus be seen that the second Chamber in a State is not even a revising body like the second Chamber in the Union Parliament which can, by its dissent, bring about a deadlock, necessitating a joint sitting of both Houses to effect the passage of the bill (other than a Money Bill). Nevertheless, by reason of its composition by indirect election and nomination of persons having special knowledge, the Legislative Council commands a better calibre and even by its dilatory power, it serves to check hasty legislation by bringing to light the shortcomings or defects of any ill-considered measure.

In pursuance of the power conferred by Art. 169, the Legislative Assembly in one State (viz., Andhra Pradesh) has moved for and obtained a second Chamber, which has been sanctioned by the Legislative Councils Act, 1957. On the other hand, the Legislative Assembly of West Bengal and Punjab have moved for the abolition of the Council.[8]

When a bill is presented before the Governor after its passage by the Houses of the Legislature, it will be open to the Governor to take any of the following steps:

Governor's power of veto.

(a) He may declare his *assent* to the Bill, in which case, it would become law at once; or,

(b) He may declare that he withholds his assent to the Bill, in which case the Bill fails to become a law; or.

(c) He may, in the case of a Bill other than a Money Bill, return the Bill with a message.

(d) The Governor may reserve a Bill for the consideration of the President. In one case reservation is compulsory, *viz.*, where the law in question would derogate from the powers of the High Court under the Constitution.

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

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

It should also be noted that there is a third alternative for the President which was demonstrated in the case of the Kerala Education Bill, viz., that when a reserved Bill is presented to the President he may, for the purpose of deciding whether he should assent to, or return the Bill, refer to the Supreme Court, under Article 143, for its advisory opinion where any doubts as to the constitutionality of the Bill arise in the President's mind.

Veto powers of President and Governor, compared.

The veto powers of the President and Governor may be presented graphically, as follows:

President.	*Governor*
(A) 1 May assent to the Bill passed by the Houses of Parliament.	1. May assent to the Bill passed by the State Legislature.
2. May declare that he withholds his assent, in which case, the Union Bill fails to become law.	2 May declare that he withholds his assent, in which case, it fails to become law.
3. In case of a Bill other than a Money Bill, may return it for reconsideration by Parliament, with a message to both Houses If the Bill is again passed by Parliament, with or without amendments, and again presented to President, the President shall have no other alternative than to declare his assent to it.	3 In case of a Bill other than a Money Bill, may return it for consideration by the State Legislature, with a message If the Legislature again passes the Bill with or without amendments, Governor shall have no other alternative than to declare his assent to it.
	4 Instead of either assenting to, withholding assent from, or returning the Bill for reconsideration by the State Legislature, Governor may *reserve* a Bill for consideration of the President, in any case he thinks fit.
	Such reservation is, however, obligatory if the Bill is so much derogatory to the powers of the High Court that it would endanger the constitutional position of the High Court, if the Bill became law.

President.	*Governor.*
(B) In the case of a State Bill reserved by the Governor for the President's consideration (as stated in para. 4 of col. 2).	
(a) If it is a Money Bill, the President may either declare that he assents to it or withholds his assent to it.	
(b) If it is a Bill other than a Money Bill, the President may—	
(i) declare that he assents to it or that he withholds his assent from it, or	
(ii) return the Bill to the State Legislature with a message for reconsideration, in which case, the State Legislature must reconsider the Bill within six months, and if it is passed again, with or without amendments, it must be again presented, *direct*, to the President for his assent, but the President is *not* bound to give his assent, even though the Bill has been passed by the State Legislature, for a second time.	Once the Governor reserves a Bill for the President's consideration, the subsequent enactment of the Bill is in the hands of the President and the Governor shall have no further part in its career.

The Governor's power to make Ordinances [Art 213], having the force of an Act of the State Legislature, is similar to the Ordinance-making power of the President, in the following respects:

Ordinance-making power of Governor.

(a) The Governor shall have this power only when the Legislature, or both Houses thereof, are not in session;

(b) It is not a discretionary power, but must be exercised with the aid and advice of ministers;

(c) The Ordinance must be laid before the State Legislature when it re-assembles, and shall automatically cease to have effect at the expiration of 6 weeks from the date of re-assembly, unless disapproved earlier by that Legislature.

(d) The Governor himself shall be competent to withdraw the Ordinance at any time.

(e) The scope of the Ordinance-making power of the Governor is co-extensive with the legislative powers of the State Legislature, and shall be confined to the subjects in Lists II and III of Sch. VII.

But as regards repugnancy with a Union law relating to a *concurrent* subject the Governor's Ordinance will prevail notwithstanding repugnancy,

if the Ordinance had been made in pursuance of 'instructions' of the President.

The peculiarity of the Ordinance-making power of the Governor is that he cannot make Ordinances without 'instructions' from the President if—

(a) a Bill containing the same provisions would under the Constitution have required the previous sanction of the President for the introduction thereof into the Legislature;[7] or (b) the Governor would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President;[8] or, (c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President[9] [Art. 213].

Ordinance-making power of President and Governor, compared.

The Ordinance-making powers of the President and a Governor may be graphically presented as follows:

President.	*Governor.*
1. Can make Ordinance only when either of the two Houses of Parliament is not in session.	1. Can make Ordinance only when the State Legislature or either of the two Houses (where the State Legislature is bicameral) is not in session.
The President/Governor must be satisfied that circumstances exist which render it necessary for him to take immediate action.	
	But Governor cannot make an Ordinance relating to three specified matters, without instructions from President (see above).
2. Ordinance has the same force and is subject to the same limitations as an Act of Parliament.	2. Ordinance has the same force as and is subject to the same limitations as an Act of the State Legislature.
	But as regards repugnancy with a Union law relating to a Concurrent subject, if the Governor's Ordinance has been made in pursuance of instructions of the President', the Governor's Ordinance shall prevail as if it were an Act of the State Legislature which had been reserved for the consideration of the President and assented to by him.
3. (a) Must be laid before both Houses of Parliament when it reassembles.	3. (a) Must be laid before the Legislative Assembly or before both Houses of the State Legislature

President.	*Governor.*
	(where it is bicameral), when the Legislature reassembles.
(b) Shall cease to operate on the expiry of the reassembly of Parliament or, if, before that period, resolutions disapproving the Ordinance are passed by both Houses, from the date of the second of such resolutions.	(b) Shall cease to operate on the expiry of 6 weeks from the reassembly of the State Legislature or, if before the expiry of that period, resolutions disapproving the Ordinance are passed by the Assembly or, where there are two Houses the resolution passed by the Assembly is agreed to by the Council, from the date of the passing of the resolution by the Assembly in the first case, and of the agreement of the Council in the second case.

Privileges of a State Legislature.

The privileges of the Legislature of a State are similar to those of the Union Parliament inasmuch as the constitutional provisions [Arts. 105 and 149] are identical. The question of the privileges of a State Legislature has been brought to the notice of the public, particularly in relation to the power of the Legislature to punish for contempt and the jurisdiction of the Courts in respect thereof. Though all aspects of this question have not yet been settled, the following propositions may be formulated from the decisions of the Supreme Court—

(a) Each House of the State Legislature has the power to punish for breach of its privileges or for contempt.

(b) Each House is the sole judge of the question whether any of its privileges has, in a particular case, been infringed, and the Courts have no jurisdiction to interfere with the decision of the House on this point.

The Court cannot interfere with any action taken for contempt unless the Legislature or its duly authorised officer is seeking to assert a privilege not known to the law of Parliament; or the notice issued or the action taken was without jurisdiction.

(c) No House of the Legislature has, however, the power to create for itself any new privilege not known to the law and the Courts possess the power to determine whether the House in fact possesses a particular privilege.

(d) It is also competent for a High Court to entertain a petition for *habeas corpus* under Art. 226 or for the Supreme Court, under Art. 32, challenging the legality of a sentence imposed by a Legislature for contempt on the ground that it has violated a fundamental right of the Petitioner and to release the prisoner on bail, pending disposal of that petition.

(e) But once a privilege is held to exist, it is for the House to judge the occasion and its manner of exercise. The Court cannot interfere with an *erroneous* decision by the House or its Speaker in respect of a breach of its privilege.

The State of Nagaland and Meghalaya.

I. The State of Nagaland was created by the State of Nagaland Act, 1962, and inserted into the First Schedule to the Constitution by that Act as the 16th State of the Union of India, with effect from 1963.

The territory comprising this State is that of the Naga Hills-Tuensang Area. By the constitution of a separate State, this territory has been excluded from the State of Assam.

II. Meghalaya is not a separate State of the Union of India but is a 'sub-State' which the State of Assam, the possibility for the creation of which was made by the insertion of Arts. 244A and 371A by the Constitution (Twenty-Second Amendment) Act, 1969.

These Articles provided that notwithstanding anything in the Constitution to the contrary, an 'autonomous State' might be created within the State of Assam, comprising of the territory specified in Part A of the Table appended to Paragraph 20 of the 6th Schedule to the Constitution.

This amendment of the Constitution has been followed by the passing of the Meghalaya Act, 1969, by Parliament, constituting the 'autonomous State' of Meghalaya, comprising the territories of the United Khasi-Jaintia Hills District and the Garo Hills District within the State of Assam. This step was necessitated by the demand for the hill tribes inhabiting this territory for having a separate State of their own. The Government of India did not consider the creation of a separate State as feasible, but sought to meet the demand half-way, by making this interim arrangement which was not contemplated in the original Constitution or at the time of the Sixth Amendment to the Constitution by which a reorganisation of the States was effected.

As a result of the Meghalaya Act, there shall be a Legislature for this autonomous State with a Council of Ministers responsible to that Legislature. But the State shall be under the Governor for the State of Assam and Nagaland.

The sub-State would function as a full-fledged State in matters entrusted to it in the scheme of the Bill. Similarly, wherever the new sub-State had legislative powers, it would also have executive powers to back it up with.

It should be noted that, subsequent to the creation of the sub-State of Meghalaya, the status of a full-fledged State has been promised to it by the Government of India.

The State of Haryana.

By the Punjab Reorganisation Act, 1966, the State of Punjab was split up and the 17th State of the Union of India was constituted by the name of Haryana, by carving out a part of the territory of the State of Punjab.

The State of Himachal Pradesh.

Some of the Union Territories have, of late, demanded promotion to the status of a State. Of these, Himachal Pradesh has become the forerunner on the enactment of the State of Himachal Pradesh Act, 1970, by which Himachal Pradesh has been added as the 18th State in the list of State, and it has been omitted from the list of Union Territories, in the First Schedule of he Constitution, with effect from 25-1-71.

REFERENCES:

1. By reason of s 8 (2) of the Constitution (Seventh Amendment) Act, 1956 Madhya Pradesh shall have a second House (Legislative Council) only after a notification to this effect has been made by President.
   No such notification having been made so far, Madhya Pradesh is still having one Chamber.
2. Maharashtra has been established in place of Bombay, by the Bombay Reorganisation Act, 1960.
3. West Bengal has abolished its Legislative Council w.e.f. 1-8-69 by a notification under the West Bengal Legislative Council (Abolition) Act, 1969 and Punjab has abolished its Legislative Council, under the Punjab Legislative Council (Abolition) Act, 1969.
4. See Table XII for membership of the State Legislatures.
5. The number of Anglo-Indian members so nominated by the Governor of the several States as in January, 1965, is as follows: Andhra 1; Bihar 1; Kerala 1; Madhya Pradesh 1; Madras 1; Maharashtra 1; Mysore 1; Uttar Pradesh 1; West Bengal 4.
6. The original period of ten years has been extended to thirty years, by the Constitution (Eighth Amendment) Act, 1959, and the Twenty-Third Amendment Act, 1969.
7. E.g., An Ordinance imposing reasonable restrictions upon inter-State trade or commerce [Art 304, Proviso].
8. E.g., An Ordinance which might affect the powers of the Union [Art. 220].
9. E.g., An Ordinance providing for compulsory acquisition of property [Art. 31 (3)].

CHAPTER XV

THE STATE OF JAMMU & KASHMIR

Peculiar position of the State.

The State of Jammu & Kashmir holds a peculiar position under the Constitution of India. It forms a part of the 'territory of India', as defined in Art. 1 of the Constitution (p 54, *ante*), being the fifteenth State included in the First Schedule of the Constitution, as it stands amended. In the original Constitution, Jammu & Kashmir was specified as a Part B State. The States Reorganisation Act, 1956, abolished the category of Part B States and the Constitution (Seventh Amendment) Act, 1956, which implemented the changes introduced by the former Act, included Jammu & Kashmir in the list of the 'States' of the Union of India, all of which were now included in one category.

Nevertheless, the special constitutional position which Jammu & Kashmir enjoyed under the original Constitution has been maintained even after the above reorganisation of States, so that all the provisions of the Constitution of India relating to the States in the First Schedule are *not* applicable to Jammu & Kashmir even though it is one of the States specified in that Schedule.

To understand why Jammu & Kashmir, being a State included in the First Schedule of the Constitution of India, should still be accorded a separate treatment, a retrospect of the development of the constitutional relationship of the State with India becomes necessary. Under the British regime, Jammu and Kashmir was an Indian State ruled by a hereditary Maharaja. On the 26th of October, 1947 when the State was attacked by Azad Kashmir Forces with the support of Pakistan, the Maharaja (Sir Hari Singh) was obliged to seek the help of India, after executing an Instrument of Accession similar to that executed by the Rules of other Indian States. By the Accession the Dominion of India acquired jurisdiction over the State with respect to the subjects of Defence, External Affairs and Communications, and like other Indian States which survived as political units at the time of the making of the Constitution of India, the State of Jammu and Kashmir was included as a Part B State in the first Schedule of the Constitution of India, as it was promulgated in 1950.

History of the integration of Jammu and Kashmir with India

But though the State was included as a Part B State, all the provisions of the Constitution applicable to Part B States were not extended to Jammu and Kashmir. This peculiar position was due to the fact that having regard to the circumstances in which the State acceded to India, the Government of India had declared that it was the people of the State of Jammu

Position of the State under the original Constitution.

and Kashmir, acting through their Constituent Assembly, who were to finally determine the Constitution of the State and the jurisdiction of the Union of India and the applicability of the provisions of the Constitution regarding this State were, accordingly, to be in the nature of an interim arrangement.

Implications of the Accession.

Since the liberality of the Government of India has been misunderstood and misinterpreted in interested quarters, overlooking the *legal* implications of the Accession of the State to India, we should pause for a moment to explain these legal implications lest they be lost sight of in the turmoil of political events which have clouded the patent fact of the Accession. The first thing to be noted is that the Instrument of Accession signed by Maharaja Hari Singh on the 26th October, 1947 was in the *same form*[1] as was executed by the Rulers of the numerous other States which had acceded to India following the enactment of the Indian Independence Act, 1947. The legal consequences of the execution of the Instrument of Accession by the Ruler of Jammu & Kashmir cannot, accordingly, be in any way different from those arising from the same fact in the case of the other Indian States. It may be recalled[2] that owing to the lapse of paramountcy under s. 7 (1) (b) of the Indian Independence Act, 1947, the Indian States regained the position of absolute sovereignty which they had enjoyed prior to the assumption of suzerainty by the British Crown. The Rulers of the Indian States thus became unquestionably competent to accede to either of the newly created Dominions of India and Pakistan, in exercise of their sovereignty. The legal basis[3] as well as the form of Accession were the same in the case of those States which acceded to Pakistan and those which acceded to India. There is, therefore, no doubt that by the act of Accession the State of Jammu & Kashmir became legally and irrevocably a part of the territory of India and that the Government of India was entitled to exercise jurisdiction over the State with respect to those matters to which the Instrument of Accession extended. If, in spite of this, the Government of India had given an assurance to the effect that the accession or the constitutional relationship between India and the State would be subject to confirmation by the people of the State, under no circumstances can any *third party* take advantage of such extra-legal assurances and claim that the legal act had not been completed.

Articles of the Constitution which apply of their own force to the State.

When India made her Constitution in 1949, it is natural that this dual attitude of the Government of India should be reflected in the position offered to the State of Jammu & Kashmir within the framework of that Constitution. So far as the legal effect of the act of Accession was concerned, it was unequivocally given effect to by declaring Jammu & Kashmir a part of the territory of India [Art. 1]. But the application of the other provisions of the Constitution of India to Jammu & Kashmir was placed on a tentative basis, subject to the eventual approval of the Constituent Assembly of the State. The Constitution thus provided

that the only Articles of the Constitution which would apply of their own force to Jammu & Kashmir were—Arts. 1 and 370. The application of the other Articles was to be determined by the President in consultation with the Government of the State [Art. 370]. The legislative authority of Parliament over the State, again, would be confined to those items of the Union and Concurrent Lists as correspond to matters specified in the Instrument of Accession. The above interim arrangement would continue until the Constituent Assembly for Jammu & Kashmir made its decision. It would then communicate its recommendations to the President, who would either abrogate Art. 370 or make such modification as might be recommended by that Constituent Assembly.

The Constitution Order of 1950.

In pursuance of the above provisions of the Constitution, the President made the Constitution (Application to Jammu & Kashmir) Order, 1950, in consultation with the Government of the State of Jammu & Kashmir, specifying the matters with respect to which the Union Parliament would be competent to make laws for Jammu & Kashmir, relating to the three subjects of Defence, Foreign Affairs and Communications with respect to which Jammu & Kashmir had acceded to India.

Subsequent Orders.

Next, there was an Agreement between the Government of India and of the State at Delhi in June, 1952 as to the subjects over which the Union should have jurisdiction over the State subject to the decision of the Constituent Assembly. The Constituent Assembly of Jammu & Kashmir ratified the accession to India and also the decision arrived at by the Delhi Agreement as regards the future relationship of the State with India, early in 1954. In pursuance of this, the President, in consultation with the State Government, make the *Constitution (Application to Jammu & Kashmir) Order, 1954*, which came into force on the 14th of May, 1954. This Order implemented the Delhi Agreement as ratified by the Constituent Assembly and also superseded the Order of 1950. According to this Order, in short, the jurisdiction of the Union extended to *all* Union subjects under the Constitution of India (subject to certain slight alterations) instead of only the three subjects of Defence, Foreign Affairs and Communications with respect to which the State had acceded to India in 1947. The Order deals with the entire constitutional position of the State within the framework of the Constitution of India, excepting only the internal Constitution of the State Government, which was to be framed by the Constituent Assembly of the State.

Constitution Seventh Amendment Act.

As stated earlier, the category of Part B States was later abolished by the Constitution (Seventh Amendment) Act, 1956 and as a result of this Jammu & Kashmir came to be included within the list of the fourteen (since then the number has been raised to sixteen) 'States' of the Union of India. But though, *prima facie*, its status became similar to those of the other States such as Assam, Bihar or Bombay, the separate constitutional relationship between the Union and the State of Jammu & Kashmir remained unaffected.

This relationship rests on the provisions of the Constitution (Application to Jammu & Kashmir) Order, 1954, which has subsequently been amended in 1956, 1958, 1959, 1960, 1961, 1963, 1964, 1965.

Provisions of the Constitution of India which are not applicable to Jammu and Kashmir.

The important points of difference, following from this Order of 1954 (as amended), as to the jurisdiction of the Union over the State of Jammu & Kashmir, as compared with the other States of the Union of India, are as follows:—

(*i*) The State List shall have no application to Jammu and Kashmir. The legislative powers of Parliament over that State, again, will be confined to the matters enumerated in the Union List and *a few* matters of the Concurrent List,[4] subject to modifications.

(*ii*) Any law of the State which is repugnant to a law of Parliament, whether passed before or after the State law shall, to the extent of such repugnancy, be void.

(*iii*) The *residuary* power of legislation shall belong not to Parliament but to the State Legislature which shall have power with respect to any matter which is not enumerated in favour of the Union.

(*iv*) Parliament shall have no power to legislate with respect to the State subjects of Jammu & Kashmir in the national interest, in the manner provided in Art. 249, or to legislate with respect to State subjects during a Proclamation of Emergency, under Art. 250.

(*v*) No action can be taken by the Union without the *consent* of the State Legislature, in the following matters:—

(*a*) Alteration of the name or boundaries of the State.

(*b*) International agreement affecting the disposition of the State.

(*vi*) No Proclamation of Emergency on the ground of *internal* disturbance shall have effect in relation to the State, unless it is made at the request or with the concurrence of the Government of the State.[5]

(*vii*) The legislative power of Parliament with respect to preventive detention will not extend to the State.

(*viii*) The representatives of the State of Jammu and Kashmir in the House of the People shall be appointed by the President on the recommendation of the Legislature of that State, instead of being directly elected by the people of that State.

(*ix*) The Governor of the State will be known as the *Sadar-i-Riyasat*. He will be a person elected by the Legislative Assembly of the State, but subject to recognition by the President of India [*Expl.* to Art. 370].

(*x*) The High Court of the State of Jammu & Kashmir shall have no power to issue writs for any purpose *other than* the enforcement of the Fundamental Rights.

(*xi*) Special treatment has been provided for the 'permanent residents' of the State of Jammu & Kashmir in the matter of employment, residence, acquisition of immovable property in the State and of the right to State-aid.

(*xii*) There will be no judicial review of the reasonableness of the restrictions imposed by the Legislature of the State of Jammu & Kashmir upon the Fundamental Rights of speech and expression, assembly, association, movement, residence and property, for the next twenty years (*i c*, up to 13th May, 1974).

The process of integration of the State of Jammu & Kashmir has not, however, come to a rest. By amendments made to the Constitution Order in 1956 and 1958, the jurisdiction of the Comptroller and Auditor-General of India (which was excluded by the Order of 1954), has been extended to the State, and the provision relating to the all-India Services has also been extended.

By the Amendment Orders of 1959-60, again, the jurisdiction of the Election Commission as well as the special leave jurisdiction of the Supreme Court of India (which had been excluded by the Order of 1954), have been extended to the State and a day may come when the status of the State of Jammu & Kashmir within the Union of India will not be different from that of any other State, even though its internal constitution may be incorporated in a separate document, to which we shall now advert. There have been further amendments in 1963-64[4,5]

Making of the State Constitution.

It has already been explained how from the beginning it was declared by the Government of India that, notwithstanding the accession of the State of Jammu & Kashmir to India by the then Ruler, the future constitution of the State as well as its relationship with India were to be finally determined by an elected Constituent Assembly of the State. With these objects in view, the people of the State elected a sovereign Constituent Assembly which met for the first time on October 31, 1951.

The Constitution (Application to Jammu & Kashmir) Order, 1954, which settled the constitutional relationship of the State of Jammu & Kashmir, did not disturb the previous assurances as regards the framing of the *internal* constitution of the State by its own people. While the Constitution of the other Part B States was laid down in Part VII of the Constitution of India (as promulgated in 1950), the State Constitution of Jammu & Kashmir was to be framed by the Constituent Assembly of that State. In other words, the provisions governing the Executive, Legislature and Judiciary of the State of Jammu & Kashmir were to be found in the Constitution drawn up by the people of the State and the corresponding provisions of the Constitution of India were not applicable to that State.

The first official act of the Constituent Assembly of the State was to put an end to the hereditary princely rule of the Maharaja. It was one of the conditions of the acceptance of the accession by the Government of India that the Maharaja would introduce popular government in the State.

In pursuance of this understanding, immediately after the Accession, the Maharaja invited Sheikh Mohammand Abdulla, President of the All Jammu and Kashmir National Conference, to form an interim Government, and to carry on the administration of the State. The interim Government later changed into a full-fledged Cabinet, with Sheikh Abdulla as the first Prime Minister. The Abdulla Cabinet, however, would not rest content with anything short of the abdication of the ruling Maharaja Sri Hari Singh. In June 1949, thus, Maharaja Hari Singh was obliged to abdication in favour of his son Yuvaraj Karan Singh. The Yuvaraj was later *elected* by the Constituent Assembly of the State (which came into existence on October, 31, 1951) as the *'Sadar-i-Riyasat'*. Thus, came to all end the princely rule in the State of Jammu & Kashmir and the head of the State was henceforth to be an elected person. The Government of India accepted this position by making a Declaration of the President under Art. 370 (3) of the Constitution (15th November, 1952) to the effect that for the purposes of the Constitution, 'Government' of the State of Jammu & Kashmir—

"means the person for the time being recognised by the President on the recommendation of the Legislative Assembly for the State as the *Sadar-i-Riyasat* of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office."

We have already seen that in February, 1954, the Constituent Assembly of Jammu & Kashmir ratified the State's accession to India, thus fulfilling the moral assurance given in this behalf by the Government of India, and also that this act of the Constituent Assembly was followed up by the promulgation by the President of India of the Constitution (Application to Jammu & Kashmir) Order, 1954, placing on a final footing the applicability of the provisions of the Constitution of India governing the relationship between the Union and a State.

The making of the State Constitution for the internal governance of the State was now the only task left to the Constituent Assembly. As early as November, 1951, the Constituent Assembly had made the Jammu & Kashmir Constitution (Amendment) Act, which gave legal recognition to the transfer of power from the hereditary Maharaja to the popular government headed by an elected *Sadar-i-Riyasat*. For the making of the permanent Constitution of the State, the Constituent Assembly set up several Committees and in October, 1956, the Drafting Committee presented the Draft Constitution, which after discussion, was finally adopted on November 17, 1957 and given effect to from *January 26, 1957*. The State of Jammu & Kashmir thus acquired the distinction of having *a separate Constitution for the administration of the State*, in place of the provision of Part VI of the Constitution of India which govern all the other States of the Union.

Important provisions of the State Constitution. The more important provisions of the State Constitution of Jammu & Kashmir are as follows:

The Constitution declares the State of Jammu and Kashmir to be "an intergral part of Union of India."

The territory of the State will comprise all the territories which, on August 15, 1947, were under the sovereignty or suzerainty of the Ruler of

the State (i.e., including the Pakistan-occupied area of Jammu & Kashmir). This provision is immune from amendment.

The executive and legislative power of the State will extend to all matters except those with respect to which Parliament has powers to make laws for the State under the provisions of Constitution of India.

The Directive Principles of the Constitution lay down that the prime object of the State should be the promotion of the welfare of the mass of the people by establishing and preserving a socialist order of society wherein all exploitation of man has been abolished and wherein justice—social, economic and political—shall inform all the institutions national life.

Every person who is, or is deemed to be, a citizen of India shall be a permanent resident of the State, if on the 14th of May, 1954 he was a State subject of Class I or of Class II, or, having lawfully acquired immovable property in the State, he has been ordinarily resident in the State for not less than 10 years prior to that date. Any person who, before the fourteenth day of May, 1954, was a State subject of Class I or of Class II and who, having migrated after the first day of March, 1947, to the territory now included in Pakistan, returns to the State under a permit for resettlement in the State or for permanent return issued by or under the authority or any law made by the State Legislature will on such return be a permanent resident of the State. The permanent residents will have all rights guaranteed to them under the Constitution of India.

The head of the Executive of the State shall be the *Sadar-i-Riyasat* who will be elected by a majority of the total membership of the Legislative Assembly. He will hold office during the pleasure of the President. The executive power of the State will be vested in him and shall be exercised by him. The *Sadar-i-Riyasat* will hold office for a term of five years.

The Council of Ministers will be collectively responsible to the Legislative Assembly. The Prime Minister will be the head of Council of Ministers.

The Legislature of the State will consist of the *Sadar-i-Riyasat* and two Houses, to be known respectively as the Legislative Assembly and the Legislative Council. The Legislative Assembly will consist of one hundred members chosen by direct election from territorial constituencies in the State. Twenty-five seats in the Legislative Assembly will remain vacant to be filled by representatives of people living in Pakistan-occupied areas of the State. The Legislative Council will consist of 36 members. Eleven members will be elected by the members of the Legislative Assembly from amongst persons who are residents of the Provinces of Kashmir, provided that of the members so elected at least one shall be a resident of Tehsil Ladakh and at least one a resident of Tehsil Kargil, the two outlying areas of the State. Eleven members will be elected by the members of the Legislative Assembly from amongst persons who are residents of the Jammu Province. Of the remaining 14 members, 6 will be elected by various electorates, such as municipal councils, educational institutions, etc., 2 will be elected by Panchayats and such other local bodies and 6 will be nominated by the *Sadar-i-Riyasat*.

The High Court of the State will consist of a Chief Justice and two or more than Judges. Every Judge of the High Court will be appointed by the President after consultation with the Chief Justice of India and the *Sadar-i-Riyasat*, and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court.

There will be a Public Service Commission for the State. The Commission along with its Chairman will be appointed by the *Sadar-i-Riyasat*.

Every member of the civil service or one holding a civil post will hold office under the pleasure of the *Sadar-i Riyasat*.

The official language of the State will be Urdu, but English will, unless the Legislature by law otherwise provides, continue to be used for all official purposes of the State.

The State Constitution may be amended by introducing a Bill in the Legislative Assembly and getting it passed in each House by a majority of not less than two-thirds of the total membership of that House. But no Bill or amendment seeking to make any change in the provisions relating to the relationship of the State with the Union of India, the extent of executive and legislative powers of the State or the provisions of the Constitution of India as applicable in relation to the State shall be introduced or moved in either House of the Legislature.

The salient features of the constitutional position of the State of Jammu & Kashmir in relation to the Union may now be summarised.

(a) *Jurisdiction of Parliament* The jurisdiction of Parliament in relation to Jammu & Kashmir shall be confined to the matters enumerated in the Union List, and some specified items in the Concurrent List,[1] subject to certain modifications, while it shall have no jurisdiction as regards most of the matters enumerated in the Concurrent List. While in relation to the other States, the residuary power of legislation belongs to Parliament, in the case of Jammu & Kashmir, the residuary power shall belong to the Legislature of that State. Nor can the jurisdiction of Parliament to extended in the national interest as declared by a resolution of the Council of States under Art. 249.

Recapitulation of the Constitutional position of Jammu & Kashmir *vis a vis* the Union.

The power to legislate with respect to preventive detention in Jammu & Kashmir, under Art. 22 (7), shall belong to the Legislature of the State instead of Parliament, so that no law of preventive detention made by Parliament will extend to that State.

(b) *Autonomy of the State in certain matters.*—The plenary power of the Indian Parliament is also curbed in certain other matters, with respect to which Parliament cannot make any law without the consent of the Legislature of the State of Jammu & Kashmir, where that State is to be affected by such legislation, e.g., (i) alteration of the name or territories of the State; (ii) international treaty or agreement affecting the disposition of any part of the territory of the State.

Similar fetters have been imposed upon the executive power of the Union to safeguard the autonomy of the State of Jammu & Kashmir, a privilege which is not enjoyed by the other States of the Union. Thus,

(i) No Proclamation of Emergency made by the President under Art. 352 on the ground of *internal* disturbance shall have effect in the State of Jammu & Kashmir, without the concurrence of the Government of the State.

(ii) Similarly, no decision affecting the disposition of the State can be made by the Government of India, without the consent of the Government of the State.

(iii) The Union shall have *no* power to suspend the Constitution of the State either on the ground of failure of constitutional machinery under Art. 356 or on the ground of failure to comply with the directions given by the Union under Art. 365.

In the event of a breakdown of the constitutional machinery in the State, it is the *Sadar-i-Riyasat* who shall have the power, with the concurrence of the President, to assume to himself all or any of the functions of the Government of the State, except those of the High Court.

(iv) The Union shall have no power to make a Proclamation of Financial Emergency with respect to the State of Jammu & Kashmir under Art. 360.

In other words, the federal relationship between the Union and the State of Jammu & Kashmir respects 'State rights' more than in the case of the other States of the Union.

(c) *Fundamental Rights and the Directive Principles.*—The provisions of Part IV of the Constitution of India relating to the Directive Principles of State Policy do not apply to the State of Jammu & Kashmir, and the provisions of Art. 19 are subject to special restrictions for a period of fifteen years.

(d) *Representation in Parliament.*—While in the case of each of the other States, the representatives of the State to the House of the People are directly elected by the people of the State, the representatives of Jammu & Kashmir shall be appointed by the President on the recommendation of the Legislature of that State.

(e) *Separate Constitution for the State.*—While the constitution for any of the other States of the Union of India is laid down in Part VI of the Constitution of India, the State of Jammu & Kashmir has its own Constitution (made by a separate Constitutent Assembly and promulgated in 1957).

(f) *Procedure for amendment of State Constitution.*—As stated already, the provisions of Art. 368 of the Constitution of India are not applicable for the amendment of the State Constitution of Jammu & Kashmir. While an Act of Parliament is required for the amendment of any of the provisions of the Constitution of India, the provisions of the

State Constitution of Jammu & Kashmir (excepting those relating to the relationship of the State with the Union of India) may be amended by an Act of the Legislative Assembly of the State, passed by a majority of not less than two-thirds of its membership.

It is also to be noted that no amendment of the Constitution of India shall extend to Jammu & Kashmir unless it is so extended by an Order of the President under Art. 370(1).

(g) *Governor.*—While the Governor of any other State is appointed by the President, the Governor of the State of Jammu & Kashmir (called *'Sadar-i-Riyasat'*) shall be elected by the Legislature Assembly of the State, subject to 'recognition' by the President. He shall also hold office subject to the pleasure of the President.

(h) *Jurisdiction of the High Court.*—While the other High Courts in India have the power to issue the writs for the enforcement of fundamental rights as well as for 'other purposes', the High Court of Jammu & Kashmir shall have the power to issue the writs for the enforcement of fundamental rights only, and *not* the enforcement of ordinary rights.

REFERENCES :

1. Vide White Paper on Indian States (MS.) 6, pp. 111, 165.
2. Vide Author's *Commentary* on the Constitution of India, 5th ed., Vol 4, p. 38.
3. Ss. 5-6 of the Government of India Act, 1935, read with s. 7 (1) (b) of the Indian Independence Act, 1947.
4. Until the amendment of the Order in 1963, the Concurrent List was altogether inapplicable to Jammu & Kashmir. Its application has been extended by the Amendment Order of 1964.
5. Arts. 356-7 relating to suspension of the constitutional machinery in the State has been extended to the State, by the Amendment Order of 1964.

PART FOUR

ADMINISTRATION OF UNION TERRITORIES AND SPECIAL AREAS

CHAPTER XVI

ADMINISTRATION OF UNION TERRITORIES AND ACQUIRED TERRITORIES

Genesis of Union Territories.

As stated earlier, in the original Constitution of 1949, States were divided into three categories and included in Parts A, B and C of the First Schedule of the Constitution.

Part C States were 10 in number, namely,—Ajmer, Bhopal, Bilaspur Coorg, Delhi, Himachal Pradesh, Kutch, Manipur, Tripura and Vindhya Pradesh. Of these, Himachal Pradesh, Bhopal, Bilaspur, Kutch, Manipur, Tripura and Vindhya Pradesh had been formed by the integration of some of the smaller Indian States. The remaining States of Ajmer, Coorg and Delhi were Chief Commissioner's Provinces under the Government of India Acts, 1919 and 1935, and were thus administered by the Centre even from before the Constitution.

The special feature of these Part C States was that they were administered by the President through a Chief Commissioner or a Lieutenant Governor, acting as his agent. Parliament had legislative power relating to *any* subject as regards the Part C States, but the Constitution empowered Parliament to create a Legislature as well as a Council of Advisers of Ministers, for a Part C State. In exercise of this power, Parliament enacted the Government of Part C States Act, 1951, by which a Council of Advisers or Ministers was set up in each Part C State, to advise the Chief Commissioner, under the overall control of the President, and also a Legislative Assembly to function as the Legislature of the State, without derogation to the plenary powers of Parliament.

In place of these Centrally administered Part C States, the Constitution (Seventh Amendment) Act, 1956 substituted the category of 'Union Territories' which are also similarly administered by the Union. As a result of the reorganisation of the States by the States Reorganisation Act, 1956, the Part C States of Ajmer, Bhopal, Coorg, Kutch and Vindhya Pradesh were merged into other adjoining States.

Union Territories.

The list of Union Territories, accordingly, included the remaining Part C States of Delhi; Himachal Pradesh[1] (which included Bilaspur); Manipur; and Tripura. To these were added the Andaman and Nicobar Islands; and the Laccadive and Amindivi Islands. Under the original Constitution, the Andaman and Nicobar Islands were included in Part D of the First Schedule. The Laccadive, Minicoy and Amindivi Islands, on the other hand, were included in the territory of the State of Madras. The States Reorganisation Act and the Constitution (Seventh Amendment) Act, 1956 abolished Part D of the First Schedule and constituted it a separate Union Territory.

By the Constitution (Tenth, Twelfth and Fourteenth) Amendment Acts, the following have been added to the list of Union Territories:

(a) Dadra & Nagar Haveli;
(b) Goa, Daman and Diu;
(c) Pondicherry;

The latest addition to the list in Chandigarh, by the Punjab Reorganisation Act, 1966. At the begining of 1971, thus, the number of Union Territories was ten.

Though all these Union Territories belong to one category, there are some differences in the actual system of administration as between the several Union Territories owing to the provisions of the Constitution as well as of the Acts of Parliament which have been made in pursuance of the Constitution provisions.

Administrator.

Article 239 (1) provides that save as otherwise provided by Parliament by law, every Union territory shall be administered by the President acting, to such extent as he thinks fit, through an Administrator to be appointed by him with such designation as he may specify[2] Instead of appointing an Administrator from outside, the President may appoint the Governor of a State as the Administrator of an adjoining Union territory; and where a Governor is so appointed, he shall exercise his functions as such Administrator independently of his Council of Ministers [Art. 239 (2)].

All the Union Territories are thus administered by an administrator as the agent of the President and not by a Governor acting as the head of a State.

In 1962, however, Art. 239A has been introduced in the Constitution, by the Fourteenth Amendment Act, to empower Parliament to create a Legislature or Council of ministers or both for the Union Territories of Himachal Pradesh, Manipur, Tripura, Goa, Daman & Diu and Pondichery. By virtue of this power, Parliament has enacted the Government of Union Territories Act, 1963,[1] providing for a Legislative Assembly as well as a Council of Ministers to advise the Administrator, in each of these States.

Legislative power.

Parliament has exclusive legislative power over a Union Territory, including matters which are enumerated in the State List [Art. 246 (4)]. But so far as the two groups of Island Territories Dadra and Nagar Haveli; Goa. Daman and Diu; and Pondicherry are concerned, the President has got a legislative power, namely, to make regulations for the peace, progress and good government of these Territories. This power of the President overrides the legislative power of Parliament in as much as a regulation made by the President as regards these Territories may repeal or amend any Act of Parliament which is for the time being applicable to the Union Territory [Art. 240 (2)].

President's power to make regulations as regards the Andaman and Nicobar Island; Laccadive and other Islands.

Parliament may by law constitute a High Court for a Union Territory

or declare any court in any such Territory to be a High Court for all or any of the purposes of this Constitution [Art. 241]. Until such legislation is made the existing High Courts relating to such territories shall continue to exercise their jurisdiction. In the result, the Punjab and Haryana High Court acts as the High Court of Delhi as well as Chandigarh; the Laccadive, Minicoy and Amindivi Islands are under the jurisdiction of the Kerala High Court; the Calcutta High Court has got jurisdiction over the Andaman and Nicobar Islands [*vide* Table XIV], and the Madras High Court has jurisdiction over Pondicherry. The Territories of Himachal Pradesh, Manipur, Tripura and Goa, Daman and Diu each have a Judicial Commissioner [*vide* Table XIII] who has the powers of a High Court for certain purposes, according to the provisions of the Judicial Commissioner's Courts (Declaration as High Courts) Act, 1950.

High Courts for Union Territories.

Para. 18(2) of the Sixth Schedule of the Constitution says that until the provisions relating to Part A Areas of the Schedule are applied to the Part B Area, the latter Area, now consisting of the North-East Frontier Tract only,[3] shall be administered by the Governor of Assam (acting in his discretion), as the agent of the President and the President shall have the power to make Regulation under Art. 240.

NEFA.

There are no separate provisions in the Constitution relating to the administration of Acquired Territories but the provisions relating to Union Territories will extend by virtue of the definition of 'Union Territory' [Art. 366 (30)], as including "any other territory comprised within the territory of India but not specified in that Schedule". Thus, the Territory of Pondicherry, Karaikal, Yanam and Mahe, was being administered by the President of India through a Chief Commissioner until it was made a Union Territory, in 1962. Parliament has plenary power of legislation regarding such territory as in the case of the Union Territories [Art. 246 (4)].

Acquired Territories.

REFERENCES :

1. Himachal Pradesh has been transferred to the category of States, by the State of Himachal Pradesh Act, 1970.
2. Heterogenous designations have been specified by the President in the case of the different Union Territories :
   (a) Chief Commissioner– Andaman and Nicobar Islands; Chandigarh; Manipur; Tripura.
   (b) Lieutenant Governor—Delhi; Goa; Daman and Diu; Himachal Pradesh; Pondicherry.
   (c) Administrator—Dadra and Nagar Haveli; Laccadive; Minicoy and Amindivi Islands. [India, 1969, pp 514-519].
3. The other Area in Part B of the 6th Schedule, namely, the Naga Hills—Tuensang Areas, has since been transformed into the State of Nagaland.

CHAPTER XVII

ADMINISTRATION OF SCHEDULED AND TRIBAL AREAS

The Constitution makes special provisions for the administration of certain areas called 'Scheduled Areas' and areas inhabited by the 'Sheduled Tribes' even though such areas are situated within a State or Union Territory [Art. 244], presumably because of the backwardness of the people of these Areas.

Subject to legislation by Parliament, the power to declare any area as a 'Scheduled Area' is given to the President [Fifth Schedule, paras. 6-7] and the President has made the Scheduled Areas Order, 1950, in pursuance of this power.

Scheduled Areas.

A similar power to declare any tribal community or part thereof as a Scheduled Tribe in a State or Union Territory has been vested in the President, subject to legislation by Parliament [Art. 342]. In the case of a State, the President has to consult the Governor in making such list. The list of Scheduled Tribes is now contained in the Constitution (Scheduled Tribes) Order, 1950 (made by the President), as amended by the Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1956.

Scheduled Tribes.

1. The Fifth Schedule of the Constitution deals with the administration and control of Scheduled Areas as well as of Scheduled Tribes *in States other than Assam*. The main features of the administration provided in this Schedule are as follows:

Administration of Scheduled Areas and Scheduled Tribes in States *other than Assam*

The executive power of the Union shall extend to giving directions to the States regarding the administration of the Scheduled Areas [Art. 339 (2)] Tribes Advisory Councils are to be constituted to give advice on such matters as welfare and advancement of the Scheduled Tribes in the States as may be referred to them by the Governor.

The Governor is authorised to direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or shall apply, only subject to exceptions or modifications. The Governor is also authorised to make regulations to prohibit or restrict the transfer of land by, or among members of, the Scheduled Tribes, regulate the allotment of land, and regulate the business of money-lending. All such regulations made by the Governor must have the assent of the President.

The foregoing provisions of the Constitution relating to the administration of the Scheduled Areas and Tribes may be altered by Parliament by ordinary legislation, without being required to go through the formalities relating to the amendment of the Constitution [Sch. V, para. 7 (2)].

The Constitution provides for the appointment of a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States. The President may appoint such Commission at any time, but the appointment of such Commission at the end of 10 years from the commencement of the Constitution is obligatory [Art. 329 (1)]. A Commission was accordingly appointed (with Shri Dhebar as Chairman) in 1960 and it submitted its report to the President towards the end of 1961.

Tribal Areas in Assam.

II. The Tribal Areas *in Assam* are specified in the Table appended to the Sixth Scheduled in the Constitution, which consists of two parts. Part A includes—1. The United Khasi-Jaintia Hills District. 2. The Garo Hills District. 3. The Mizo District. 4. The North Cachar Hills. 5. The Mikir Hills.

Part B includes—The North East Frontier Tract including Balipara Frontier Tract, Tirap Frontier Tract, Abor Hills District and Misimi Hills District.

Administration of Tribal Areas *in Assam*.

Provisions for the administration of tribal areas *in Assam* are contained in the Sixth Schedule of the Constitution read with Art. 244 (2).

Part A.—The areas in Part A shall be autonomous districts. These autonomous districts are not outside the executive authority of the Government of Assam but provision is made for the creation of District Councils and Regional Councils for the exercise of certain legislative and judicial functions. These Councils are primarily representative bodies and they have got the power of law-making in certain specified fields such as management of a forest other than a reserve forest, inheritance of property, marriage and social customs, and the Governor may also confer upon these Councils the power to try certain suits or offences. These Councils have also the power to assess and collect land revenue and to impose certain specified taxes. The laws made by the Councils shall have, however, no effect unless assented to by the Governor. Apart from the special legislative jurisdiction, created in favour of these Councils, the legislative authority of Parliament as well as that of the Assam Legislature shall extend to these areas unless the Governor by notification directs to the contrary.

Part B.—The areas in Part B, on the other hand, shall in the first instance be governed by the Governor of Assam acting as the agent of the President, and in his discretion.

The President's power to make regulations for the Union Territories under Art. 240 [see p. 244, *ante*] shall also extend to these Part B Areas.

By a notification issued by the Governor with the previous approval of the President the provisions summarised above relating to the autonomous districts in Part A may be applied in whole or in part to any area included in Part B. Upon the making of such notification, the Governor shall cease to act in his discretion or as an agent of the President and the executive

authority of the Governor shall extend over this area as with respect to other areas of Assam, to be exercised with the advice of the Council of Ministers.

Post-Constitution changes.

As stated earlier, one of the areas which were included in Part B of the Sixth Schedule in the original Constitution, has, in 1962, been transformed into a separate State, namely, the State of Nagaland, by the State of Nagaland Act, 1962.

The second change is the creation of the autonomous State of Meghalaya. It is not a separate State like Nagaland, but an 'autonomous State' within the State of Assam, constituted of the territories of the United Khasi-Jaintia Hills and the Garo Hills District. The creation of this sub-State was made possible by the insertion of Art. 244A in the Constitution by the Constitution (Twenty-Second) Amendment Act, 1969,[1] which has been implemented by the Assam Reorganisaton (Meghalaya) Act, 1969. By reason of these Acts, though Meghalaya is a part of the territory of Assam and shall be administered by the Governor of Assam, in the exercise of his functions relating to Meghalaya, the Governor shall be aided by the advice of a separate Council of Ministers, which will be responsible, not to the Legislature of Assam, but to a separate Legislative Assembly elected by the people of Meghalaya.

It is interesting to note that no sooner had this sub-State been formed, the people of Meghalaya have been pressing their demand for a full-fledged State, and the Government of India has conceded to that demand, so that 1971 may see the creation of another new State under the First Schedule of the Constitution of India, namely, the State of Meghalaya.

PART FIVE

THE JUDICATURE

CHAPTER XVIII

ORGANISATION OF THE JUDICIARY IN GENERAL

No federal distribution of judicial powers.

It has already been pointed out (p. 53, ante), that notwithstanding the adoption of a federal system, the Constitution of India has not provided for a double system of Courts as in the *United States*. Under *our* Constitution there is a single integrated system of Courts for the Union as well as the States which will administer both Union and State laws, and at the head of the entire system stands the Supreme Court of India. Below the Supreme Court stands the High Courts of the different States and under the High Court there is a hierarchy of other Courts which are referred to in the Constitution as 'subordinate courts', i.e., courts subordinate to and under the control of the High Court [Arts. 233-7].

The organisation of the subordinate judiciary varies slightly from State to State, but the essential features may be explained with reference to Table XIII which has been drawn with reference to the system obtaining in the majority of the States.

The hierarchy of Courts.

At the lowest stage, the two branches of justice, civil and criminal, are bifurcated. The Union Courts and the Bench Courts, constituted under the Village Self-Government Acts, which constituted the lowest civil and criminal Courts respectively, have been substituted by Panchayat Courts set up under recent State legislation. The Panchayat Courts also function on two sides, civil and criminal, under various indigenous names, such as the *Nyaya Panchayat, Panchayat Adalat, Gram Kutchery*, and the like. In some States, the Panchayat Courts, in respect of petty cases, the Criminal Court of the lowest jurisdiction.

The Munsiff's Courts are the next higher Civil Courts, having jurisdiction over claims up to Rs. 1,000/- to Rs. 5,000/- (in some specially empowered cases). Above the Munsiffs are Subordinate Judges who have got unlimited pecuniary jurisdiction over civil suits and hear first appeals from the judgments of Munsiffs. The District Judge hears first appeals from the decisions of Subordinate Judges and also from the Munsiffs (unless they are transferred to a Subordinate Judge) and himself possesses unlimited original jurisdiction, both civil and criminal. Suits of a small value are tried by the Provincial Small Causes Courts.

The District Judge is the highest judicial authority (civil and criminal) in the district. He hears appeals from the decisions of the superior Magistrates and also tries the more serious criminal cases, known as the Sessions cases. A Subordinate Judge is sometimes vested also with the powers of an Assistant Sessions Judge, in which case he combines in his hands both civil and criminal powers like a District Judge.

The criminal law is administered by Magistrates, both salaried and honorary. The District Magistrate is the head of the Criminal Courts within the district. In those districts where separation of the Judiciary from the Executive has been effected, the trying Magistrates are called 'Judicial Magistrates' and they are under the control of the High Court.

There are special arrangements for judicial administration in the Presidency towns. The Original Side of the High Court tries the bigger civil suits and the sessions cases arising within the area of the Presidency town. The High Courts of Bombay and Madras have ceased to have their original criminal jurisdiction. Below them there are Presidency Magistrates for criminal cases and Presidency Small Causes Courts for civil suits of limited value. The Original side of the Calcutta High Court has been curtailed by the creation of City Civil and Sessions Courts, but it has not been totally abolished.

The High Court is the supreme judicial tribunal of the State,—having both Original and Appellate jurisdiction. It exercises appellate jurisdiction over the District and Sessions Judge, the Presidency Magistrates and the Original Side of the High Court itself (where the Original Side still continues). There is a High Court for each of the States, except Nagaland which has the High Court of Assam as its common High Court, and Harvana which is under the common High Court of Punjab. The Union Territory of Himachal Pradesh, which has been conferred the status of a State since January, 1970, has its own High Court.

In the Union Territories of Manipur and Tripura, the Judicial Commissioner stands at the head of the Judiciary. For purposes of appeal to the Supreme Court and for certain other purposes under the Constitution, a Judicial Commissioner's Court is treated as a High Court. The other Union Territories are under the jurisdiction of the neighbouring High Courts (see p. 235, *ante*).

The Supreme Court has appellate jurisdiction over the High Courts and is the highest tribunal of the land. The Supreme Court also possesses original and advisory jurisdictions which will be fully explained hereafter.

CHAPTER XIX

THE SUPREME COURT

Constitution of the Supreme Court.

Parliament has the power to make laws regulating the constitution organisation, jurisdiction and powers of the Supreme Court. Subject to such legisiation, the Supreme Court consists of the Chief Justice of India and not more than *thirteen*[1] other judges [Art. 124].

Besides, the Chief Justice of India has the power, with the previous consent of the President, to request a retired Supreme Court Judge to act as a Judge of the Supreme Court of a temporary period. Similarly, a High Court Judge may be appointed *ad hoc* Judge of the Supreme Court for a temporary period if there is a lack of quorum of the permanent Judges [Arts. 127-8].

Appointment of Judges.

Every Judge of the Supreme Court shall be appointed by the President of India. The President shall, in this matter, consult other persons besides taking the advice of his Ministers. In the matter of appointment of the Chief Justice of India, he shall consult such Judges of the Supreme Court and of the High Courts as he may deem necessary. And in the case of appointment of other Judges of the Supreme Court, consultation with the Chief Justice of India, in addition to the above, is obligatory [Art. 124]. The above provision, thus, modifies the mode of appointment of Judges by the Executive—by providing that the Executive should consult members of the Judiciary itself, who are well-qualified to give their opinion in this matter.

Qualifications for appointment as Judge.

A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is (a) a citizen of India; and (b) either,—(i) a distinguished jurist; or, (ii) has been a High Court Judge for at least 5 years; or, (iii) has been an Advocate of a High Court (or two or more such Courts in succession) for at least 10 years [Art. 124 (3)].

Tenure of Judges.

No minimum age is prescribed for appointment as a Judge of the Supreme Court, nor any fixed period of office. Once appointed, Judge of the Supreme Court may cease to be so, on the happening of any one of the following contingencies (other than death):

(a) On attaining the age of 65 years; (b) On resigning his office by writing addressed to the President; (c) On being removed by the President upon an address to that effect being passed by a special majority of each House of Parliament (viz., a majority of the total membership of that House and by majority of not less than two-thirds of the members of that House present and voting).

The only grounds upon which such removal may take place are (1) 'proved misbehaviour' and (2) 'incapacity' [Art. 124(4)].

A Judge of the Supreme Court gets a salary of Rs. 4,000 *per mensem* and the use of an official residence free of rent.[1] The salary of the Chief Justice is Rs. 5,000.

Salaries etc.

Independence of Supreme Court Judges, how secured.

The independence of the Judges of the Supreme Court is sought to be secured by the Constitution in a number of ways:

(a) Though the appointing authority is the President, acting with the advice of his Council of Ministers, the appointment of a Supreme Court Judge has been lifted from the realm of pure politics by requiring the President to consult the Chief Justice of India in the matter.[2]

(b) By laying down that a Judge of the Supreme Court shall not be removed by the President, except on a joint address by both Houses of Parliament (supported by a majority of the total membership and a majority of the total membership and a majority of not less than two-thirds of the members present and voting, in each House), on ground of proved misbehaviour or incapacity of the Judge in question [Art. 124(4)].

This provision is similar to the rule prevailing in England since the Act of Settlement, 1701, to the effect that though Judges of the Superior Courts are appointed by the Crown, they do not hold office during his pleasure, but hold their office 'on good behaviour' and the Crown may remove them only upon a joint address from both Houses of Parliament.

(c) By fixing the salaries of the Judges by the Constitution and providing that though the allowances, leave and pension may be determined by law made by Parliament, these shall not be varied to the disadvantage of a Judge during his term of office. In other words, he will not be affected adversely by any changes made by law since his appointment [Art. 125(2)].

But it will be competent for the President to override this guarantee, under a Proclamation of 'Financial Emergency' [Art. 360 (4) (b)].

(d) By providing that the administrative expenses of the Supreme Court, the salaries and allowances etc. of the Judges as well as of the staff of the Supreme Court shall be 'charged upon the revenues of India', i.e., shall not be subject to vote in Parliament [Art. 146(3)].

(e) By forbidding the discussion of the conduct of a Judge of the Supreme Court (or of a High Court) in Parliament, except upon a motion for an address to the President for the removed of the Judge [Art. 121].

(f) By laying down that after retirement, a Judge of the Supreme Court shall not plead or act in any Court or before any authority within the territory of India[3] [Art. 124(7)].

[It is to noted that there are analogous provisions in the case of High Court Judges; see *post*].

Position of the Supreme Court under the Constitution.

It has been rightly said that the jurisdiction and powers of our Supreme Court are in their nature and extent wider than those exercised by the highest Court of any other country.[4] It is at once a federal Court, a Court of appeal and a guardian of the Constitution, and

the law declared by it, in the exercise of any of its jurisdictions under the Constitution, is binding on all other Courts within the territory of India [Art. 141].

Compared with the American Supreme Court.

Our Supreme Court possesses larger powers than the American Supreme Court in several respects—

Firstly, the American Supreme Court's appellate jurisdiction is confined to cases arising out of the federal relationship or those relating to the constitutional validity of laws and treaties. But *our* Supreme Court is the highest court of appeal in the land, relating to civil and criminal cases [Arts. 133-5], apart from cases relating to the interpretation of the Constitution.

Secondly, our Supreme Court has an extraordinary power to entertain appeal, without any limitation upon its discretion, from the decision not only of any court but also of any tribunal within the territory of India. No such power belongs to the American Supreme Court [Art. 136].

Thirdly, while the American Supreme Court has denied to itself any power to advise the Government and confined itself only to the determination of actual controversies between parties to a litigation, *our* Supreme Court is vested by the Constitution itself with the power to deliver advisory opinion on any question of fact or law that may be referred to it by the President [Art. 143].

(i) As a Federal Court.

Every federal Constitution, whatever the degree of cohesion it aims at, involves a distribution of powers between the Union and the units composing the Union, and both Union and State Government derive their authority from, and are limited by the same Constitution. In a unitary Constitution, like that of England, the local administrative or legislative bodies are mere subordinate bodies under the central authority. Hence, there is no problem of judicially determining disputes between the central and local authorities. But in a federal Constitution, the powers are divided between the national and State Governments, and it becomes necessary that there must be some authority to determine disputes between the Union and the States or the States *inter se* and to maintain the distribution of powers as made by the Constitution.

Though *our* federation is not in the nature of a treaty or compact between the component units, there is, nevertheless, a division of legislative as well as administrative power between the Union and the States. Article 131 of *our* Constitution, therefore, vests the Supreme Court with original and exclusive jurisdiction to determine justiciable disputes between the Union and the States or between the States *inter se*.

(ii) As a Court of Appeal.

Like the House of Lords in England, the Supreme Court of India is the final appellate tribunal of the land, and in some respects, the jurisdiction of the Supreme Court is even wider than that of the House of Lords. For, while *civil* appeals from the decisions of the Court of Appeal now lie to the

House of Lords only by leave of the Court of Appeal or of the House of Lords itself,—in cases of higher value, under Article 133(1)(*a*-*b*) of *our* Constitution where the High Court has reversed the judgment appealed from, there will lie an appeal as of right to the Supreme Court, once the certificate as to value is obtained from the High Court. On the other hand, as regards *criminal* appeals, an appeal lies to the House of Lords only if the Attorney-General certifies that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance and that it is desirable in the public interest that a further appeal should be brought. But in cases specified in clauses (*a*) and (*b*) of Article 134 (1) of *our* Constitution (death sentence), an appeal will lie to the Supreme Court as of right. Further, the right of the Supreme Court to entertain appeal, by special, leave, in any cause of matter determined by any Court of tribunal in India save military tribunals, is unlimited [Article 136].

(iii) As a Guardian of the Constitution.

As against unconstitutional acts of the Executive the jurisdiction of the Courts is nearly the same under all constitutional systems. But not so is the control of the Judiciary over the Legislature.

It is true that there is no express provision in *our* Constitution empowering the *Courts* to invalidate laws; but the Constitution has imposed definite limitations upon each of the organs, and any transgression of those limitations would make the law *void*. It is for the Courts to decide whether any of the constitutional limitations has been transgressed or not,[5] because the Constitution is the organic law subject to which ordinary laws are made by the Legislature which is set up by the Constitution itself.

Thus, Article 13 declares that any law which contravenes any of the provisions of the Part on Fundamental Rights, shall be *void*. But, as *our* Supreme Court has observed,[6] even without the specific provision in Art. 13 (which has been inserted only by way of abundant caution), the Court would have the powers to declare any enactment which transgresses a fundamental right as invalid.

Similarly, Article 254 says that in case of inconsistency between Union and State laws in certain cases, the State law shall be *void*.

The limitations imposed by *our* Constitution upon the powers of Legislatures are—(*a*) Fundamental rights conferred by Part III. (*b*) Legislative competence. (*c*) Specific provisions of the Constitution imposing limitations relating to particular matters.

It is clear from the above that [apart from the jurisdiction to issue the writs to enforce the fundamental rights, which has been explained earlier] the jurisdiction of the Supreme Court is three-fold: (a) Original; (b) Appellate; and (c) Advisory.

A. Original jurisdiction of Supreme Court.

The Original jurisdiction of the Supreme Court is dealt with in Art. 131 of the Constitution. The functions of the Supreme Court under Art. 131 are purely of a federal character and are confined to disputes between the Government of India and any of the States of the Union, the Government of

India and any State on one side and any other State or States on the other side, or between two or more States *inter se*. In short, these are disputes between different units of the federation which will be within the exclusive original jurisdiction of the Supreme Court. The Original Jurisdiction of the Supreme Court will be *exclusive*, which means that on other court in India shall have the power to entertain any such suit. On the other hand, the Supreme Court in its original jurisdiction will not be entitled to entertain any suit where both the parties are not units of the federation. If any suit is brought either against the State or the Government of India by a private citizen, that will *not* lie within the original jurisdiction of the Supreme Court but will be brought in the ordinary courts under the ordinary law.

Again, one class of disputes, though of a federal nature, is excluded from this original jurisdiction of the Supreme Court, namely, a dispute arising out of any treaty, agreement, covenant, engagement; 'sanad' or other similar instrument which, having been entered into or executed before the commencement of this Constitutions continues in operation after such commencement or which provides that the said jurisdition shall not extend to such a dispute.[6] But these disputes may be referred by the President to the Supreme Court for its *advisory* opinion [see *post*].

It may be noted that until 1962, no suit in the original jurisdiction had been decided by the Supreme Court. It seems that the disputes, if any, between the Union and the units or between the units *inter se* had so far been settled by negotiation or agreement rather than by adjudication. The first suit, brought by the State of West Bengal against the Union of India in 1961, to declare the unconstitutionality of the Coal Bearing Areas (Acquisition and Development) Act, 1957, was dismissed by the Supreme Court.[7]

B Writ jurisdiction.

The jurisdiction of the Supreme Court to entertain an application under Art. 32 for the issue of a constitutional writ for the enforcement of Fundamental rights (p. 99, *ante*) is sometimes treated as an 'original' jurisdiction of the Supreme Court. It is no doubt original in the sense that the party aggrieved has the right to directly move the Supreme Court by presenting a petition, instead of coming through a High Court by way of appeal. Nevertheless, it should be treated as a separate jurisdiction since the dispute in such cases is not between the units of the Union but an aggrieved individual and the Government or any of it agencies. Hence, the jurisdiction under Art. 32 has no analogy to the jurisdiction under Art. 131.

C. Appellate jurisdiction of Supreme Court.

The Supreme Court is the highest court of appeal from all courts in the territory of India, the jurisdiction of the Judicial Committee of the Privy Council to hear appeals from India having been abolished on the eve of the Constitution. The *Appellate* jurisdiction of the Supreme Court may be divided under three heads:

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

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

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

Apart from appeals to the Supreme Court by special leave of that Court under Art. 136 (see p. 249, *below*), an appeal lies to the Supreme Court from any judgment, decree of final order in a civil proceeding of a High Court in two classes of cases—

(A) Where the case involves a substantial question of law as to the *interpretation of the Constitution*, an appeal shall lie to the Supreme Court on the certificate of the High Court that such a question is involved or on the leave of the Supreme Court where the High Court has refused to grant such a certificate but the Supreme Court is satisfied that a substantial question of law as to the interpretation of the Constitution is involved in the case.

(B) In cases where no *constitutional* question is involved, appeal shall lie to the Supreme Court if the High Court certifies that any of the following three conditions are satisfied—

(*i*) that the amount or value of the subject matter of the dispute is not less than Rs. 20,000/-; or

(*ii*) that the judgment, decree or final order involves directly or indirectly some claim or question respecting the property of the value of Rs. 20,000/-; or

(*iii*) that the case is a fit one for appeal to the Supreme Court irrespective of value.

The certificate granted by the High Court is, however, not conclusive. Thus, where a certificate has been granted by the High Court, the Supreme Court would not be precluded from entertaining a preliminary objection that the conditions of Art. 133 have not been satisfied. On the other hand, it is open to the appellant to support the certificate on grounds other than those on which it has been given and the Supreme Court may entertain the appeal if there are other grounds within the scope of Art. 133 even though the grounds mentioned by the High Court in the certificate did not exist.

Prior to the Constitution, there was no court of criminal appeal over the High Courts. It was only in a limited sphere that the Privy Council entertained appeals in criminal cases from the High Courts *by special leave* but there was no appeal *as of right*.

(ii) *Criminal.*

Art. 134 of the Constitution for the first time provides for an appeal to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court, as of right, in two specified classes of cases—

(*a*) where the High Court has on an appeal reversed an order of acquittal of an accused person and sentenced him to death;

(*b*) where the High Court has withdrawn for trial before itself any cases from any court subordinate to its authority and has in such trial convicted the accused and sentenced him to death.

In these two classes of cases relating to a sentence of death by the High Court, appeal lies to the Supreme Court as of right.

Besides the above two classes of cases, an appeal may lie to the Supreme Court in *any* criminal case if the High Court certifies that the case is a fit one for appeal to the Supreme Court. The certificate of the High Court would, of course, be granted only where some substantial question of law or some matter of great public importance or the infringement of some essential principles of justice are involved. Appeal may also lie to the Supreme Court (under Art. 132) from a criminal proceeding if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution.

Except in the above cases, no appeal lies from a criminal proceeding of the High Court to the Supreme Court under the Constitution but Parliament has been empowered to make any law conferring on the Supreme Court further powers to hear appeals from criminal matters.

While the Constitution provides for regular appeals to the Supreme Court from decisions of the High Courts in Arts. 132 to 134, there may still remain some cases where justice might require the interference of the Supreme Court with decisions not only of the High Courts outside the purview of Arts. 132-34 but also of any other or tribunal within the territory of India. Such residuary power outside the ordinary law relating to appeal is conferred upon the Supreme Court by Art. 136. This Article is worded in the widest term possible—

(iii) *Appeal by special leave.*

"135. (1) Notwithstanding anything in this Chapter the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by a court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."

It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals, by granting special leave, against any kind of judgment or order made by any court or tribunal (except a military tribunal) in any proceeding and the exercise of the power is left entirely to the *discretion* of the Supreme Court unfettered by any restrictions and this power cannot be curtailed by any legislation short of amending the Article itself. This wide power is not, however, to be exercised by the Supreme Court so as to entertain an appeal in *any* case where no appeal is otherwise provided by the law or the Constitution. It is a special power which is to be exercised only under *exceptional circumstances* and the Supreme Court has already laid down the principles according to which this extraordinary power shall be used, e.g., where there has been a violation of the principles of natural justice. Thus, in *civil cases* the special leave to appeal under this Article would not be granted unless there is some substantial question of law or general public interest involved in the case.

Similarly, in *criminal* cases the Supreme Court will not interfere under Art. 136 unless it is shown that exceptional and special circumstances exist that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decisions appealed against.[8] Similarly, it will not substitute its own decision for the determination of a *tribunal* but it would interfere to quash the decision of a quasi-judicial tribunal under its extraordinary powers conferred by Art. 136 when the tribunal has either exceeded its jurisdiction or has approached the question referred to in a manner which is likely to result in injustice or has adopted a procedure which runs counter to the established rules of natural justice.[9]

D. Advisory jurisdiction.

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

Article 143 of the Constitution lays down that the Supreme Court may be required to express its opinion in two classes of matters, in an advisory capacity as distinguished from its judicial capacity;

(*a*) In the first class, any question of law may be referred to the Supreme Court for its opinion if the President considers that the question is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court. It differs from a regular adjudication before the Supreme Court in this sense that there is no litigation between two parties in such a case and that the opinion given by the Supreme Court on such a reference is not binding upon the Government itself and further that the opinion is not executable as a judgment of the Supreme Court. The opinion is only advisory and the Government may take it into consideration in taking any action in the matter but it is not bound to act in conformity with the opinion so received. The chief utility of such an advisory judicial opinion is to enable the Government to secure an authoritative opinion either as to the validity of a legislative measure before it is enacted or as to some other matter which may not go to the courts in the ordinary course and yet the Government is anxious to have authoritative legal opinion before taking any action.

Up to 1970 there have been *five* cases of reference of this class made by the President.[10-14] It may be mentioned that though the opinion of the Surpeme Court on such a reference may not be binding on the Government, the propositions of law declared by the Supreme Court even on such a reference are binding on the subordinate courts. In fact, the propositions laid down in the *Delhi Laws Act case*[14a] have been frequently referred to and followed since then by the subordinate courts.

(*b*) The second class of cases belong to the disputes arising out of pre-Constitution treaties and agreements which are excluded by Art. 131, Proviso 1, from the Original Jurisdiction of the Supreme Court, as we have already seen (p. 247, *ante*). In other words, though such disputes cannot

come to the Supreme Court as a litigation under its Original jurisdiction, the subject-matter of such disputes may be referred to by the President for the opinion of the Supreme Court in its advisory capacity.

REFERENCES

1. The Constitution provided for seven Judges besides the Chief Justice, subject to legislation by Parliament. Parliament enacted the Supreme Court (Number of Judges) Act 1956, raising this number to ten and has again raised it to 13, by encating the Supreme Court (Number of Judges) Amendment Act, 1960.
2. VIII C.A.D. 258.
3. But, curiously, there is no bar against a retired Judge from being appointed to any office under the Government [as there is in the case of the Comptroller and Auditor-General (Art. 148 (4)]; and the expectation of such employment after retirement indirectly detracts from the independence of the Judges from executive influence. In fact, retired Judges have been appointed to hold offices such as that of Governor, Admassador and the like, apart from membership of numerous Commissions or Boards.
4. Attorney-General of India, (1956) S.C.R. 8; A. K. Aiyar, The Constitution and Fundamental Rights, 1955, p. 15.
5. *Gopalan* v. *State of Madras*, (1950) S.C.R. 88 (*100*).
6. Art. 131, Proviso, a amended by the Constitution (Seventh Amendment) Act, 1956.
7. *State of West Bengal* v. *Union of India*, A.I.R. 1963 S.C. 1241.
8. *Pritam Singh* v. *State*, A.I.R. 1950 S.C. 169.
9. *D. C. Mills* v. *Commr. of I. T.*, A.I.R. 1955 S.C. 65.
10. *In re Delhi Laws Act*, 1912, (1951) S.C.R 747 [regarding the validity of the Delhi Laws Act, 1921].
11. *Re Kerala Education Bill*, A.I.R. 1958 S.C 956 [regarding the constitutionality of the Kerala Education Bill].
12. *Re Berubari Union*, (1960) 3 S.C.R. 250 [regarding the procedure for implementation of the Indo-Pakistan Agreement relating to the Berubari Union].
13. *In re Sea Customs* A.I.R. 1963 S.C 1760 [regarding the constitutionality of the Sea Customs Amendment Bill, with reference to article 289 of the Constitution].
14. Special Reference I of 1964 (re. U. P Legislature), A.I.R. 1965 S.C. 745.

CHAPTER XX

THE HIGH COURT

The High Court of a State.

There shall be a High Court in each State [Art. 214] but Parliament has the power to establish a common High Court for two or more States[1] [Art. 231]. The High Court stands at the head of the Judiciary in the State.

Constitution of High Courts.

(*a*) Every High Court shall consist of a Chief Justice and such other Judges as the President of India may from time to time appoint [see Table XIII].

(*b*) Besides, the President has the power to appoint (*i*) *additional* Judges for a temporary period not exceeding two years, for the clearance of arrears of work in a High Court; (*ii*) an acting Judge, when a permanent Judge of a High Court (other than a Chief Justice) is temporarily absent or unable to perform his duties or is appionted to act temporarily as Chief Justice. The acting Judge holds office until the permanent Judge resumes his office. But neither an additional nor an acting Judge can hold office beyond the age of 62[2] years.

Appointment and conditions of the office of a Judge of a High Court.

Every Judge of a High Court shall be appointed by the President. In making the appointment, the President shall consult the Chief Justice of India, the Governor of the State (and also the Chief Justice of that High Court in the matter of appointment of a Judge other than the Chief Justice).

A Judge of the High Court shall hold office until the age of 62 years.[3]

Eevey Judge,—permanent, additional or acting,—may vacate his office earlier in any of the following ways—

(i) By resignation in writing addressed to the President.

(ii) By being appointed a Judge of the Supreme Court or being transferred to any other High Court, by the President.

(iii) By removal by the President on an address of both Houses of Parliament (supported by the vote of 2/3 of the members present), on the ground of proved misbehaviour or incapacity. The mode of removal of a Judge of the High Court shall thus be the same as that of a Judge of the Supreme Court, and both shall hold office during 'good behaviour' [Art. 217].

Salaries etc.

A Judge of a High Court gets a salary of Rs. 3500/- per mensem, while the Chief Justice gets Rs. 4000/- per mensem. He is also entitled to such allowances and rights in respect of leave and pension as Parliament may from time to time determine, but such allowances and rights cannot be varied by Parliament to the disadvantage of a Judge after his appointment [Art. 221].

Qualifications for appointment as High Court Judge.

The qualifications laid down in the Constitution for being eligible for appointment as a Judge of the High Court are that—

(*a*) he must be a citizen of India, not being over 62 years; and must have

(*b*) (i) held a judicial office in the territory of India; or

(ii) been an advocate of a High Court or of two more such Courts in succession.

The glaring anomaly that becomes evident when the above qualifications are compared with those for Judgeship of the Supreme Court [p. 243, *ante*], is that a distinguished jurist is fit for appointment to the Supreme Court but has no place in the High Court, which also is, in the main, an appellate tribunal dealing with the principles of law at the highest level in a State.

Independence of the Judges.

As in the case of the Judges of the Supreme Court, the Constitution seeks to maintain the independence of the Judges of the High Courts by a number of provisions:

(*a*) By laying down that a Judge of the High Court shall not be removed, except in the manner provided for the removal of a Judge of the Supreme Court, that is, upon an address of each House of Parliament (passed by a special majority) to the President, on the ground of proved misbehaviour or incapacity [Art. 218].

(*b*) By providing that the expenditure in respect of the salaries and allowances of the Judges shall be charged on the Consolidated Fund of the State [Art. 203 (3) (d)];

(*c*) By specifying in the Constitution the salaries payable to the Judges and providing that the allowances of a Judge or his rights in respect of absence or pension shall not be varied by Parliament to his disadvantage after his appointment [Art. 221], except under a Proclamation of financial emergency [Art. 360 (4)(b)];

(*d*) By laying down that after retirement a permanent Judge of a High Court shall not plead or act in a Court or before any authority in India, except the Supreme Court and a High Court other than the High Court in which he had held his office [Art. 220].

Control of the Union over High Courts.

As Sir Alladi Krishnaswami explained in the Constituent Assembly,[3] while ensuring the independence of the Judiciary, the Constitution placed the High Court under the control of the Union in certain important matters, in order to keep them outside the range of 'provincial politics'. Thus, even though the High Court stands at the head of the State Judiciary, it is not so sharply separated from the federal Government as the highest Court of an American State (called the State Supreme Court) is. The control of the Union over a High Court in India is exercised in the following matters:

(*a*) Appointment [Art. 217], transfer from one High Court to another [Art. 222] and removal [Art. 217 (1), Prov. (b)] of Judges of High Courts.

(*b*) The constitution and organisation of High Courts and the power to establish a common High Court for two or more States and to extend the jurisdiction of a High Court to, or to exclude its jurisdiction from, a Union Territory, are all exclusive powers of the Union Parliament.

Territorial jurisdiction of a High Court.

Except where Parliament establishes a common High Court for two or more States [Art. 231] or extends the jurisdiction of a High Court to a Union Territory, the jurisdiction of the High Court of a State is co-terminous with the territorial limits of that State.

As has already been stated, Parliament has extended the jurisdiction of some of the High Courts to their adjoining Union Territories, by enacting the States Reorganisation Act, 1956. Thus, the jurisdiction of the Calcutta High Court extends to the Andaman and Nicobar Islands; that of the Kerala High Court extends to the Laccadive, Minicoy and Amindivi Islands.

Ordinary jurisdiction of High Courts.

The Constitution does not make any provision relating to the general jurisdiction of the High Courts, but maintains their jurisdiction as it existed at the commencement of the Constitution, with this improvement that any restrictions upon their jurisdiction as to revenue matters that existed prior to the Constitution shall no longer exist [Art. 225].

The existing jurisdictions of the High Courts are governed by the Letters Patent and Central and State Acts; in particular, their civil and criminal jurisdictions are primarily governed by the two Codes of Civil and Criminal Procedure.

(a) Original.

(a) The High Courts at the three Presidency towns of Calcutta, Bombay and Madras had an original jurisdiction, both civil and criminal, over cases arising within the respective Presidency towns. The original *criminal* jurisdiction of the Bombay and Madras High Courts has, however, been taken away recently by City Sessions Courts established by the State Legislatures to take up the Sessions cases arising within the Presidency towns of Bombay and Madras, respectively. Though City Civil Courts have also been set up to try civil cases within the same area, the original civil jurisdiction of these High Court has not altogether been abolished but retained in respect of actions of higher value. In West Bengal, though a City Sessions Court and a City Civil Court have been established, the jurisdiction of the High Court, on either side, has been affected only partially, and the High Court retains its jurisdictions over the more serious cases.

(b) The appellate jurisdiction of the High Court, similarly, is both civil and criminal.

(b) Appellate.

(1) On the civil side, an appeal to the High Court is either a First appeal or a Second Appeal.

(i) Appeal from the decisions of District Judges and from those of Subordinate Judges in cases of a higher value (broadly speaking), lie direct to the High Court, on questions of fact as well as of law.

(ii) When any Court subordinate to the High Court (i.e., the District Judge or Subordinate Judge) decides an appeal from the decision of an inferior Court, a second appeal lies to the High Court from the decision of the lower appellate Court, but only on question of law and procedure, as distinguished from questions of fact [s. 100, C. P. Code].

(iii) Besides, there is a provision for appeal under the Letters Patent of the Allahabad, Bombay, Calcutta, Madras and Patna High Courts. These appeals lie to the Appellate Side of the High Court from the decision of a single Judge of the High Court itself, whether made by such Judge in the exercise of the original or appellate jurisdiction of the High Court.

(II) The criminal appellate jurisdiction of the High Court is not less complicated. It consists of appeals from the decisions of—

(a) The High Court, exercising original criminal jurisdiction [s. 411A, Cr.P.C.].

(b) A Sessions Judge or an Additional Sessions Judge.

(c) An Assistant Sessions Judge and a Magistrate specially empowered, where the sentence passed by him exceeds imprisonment for 4 years.

(d) A Presidency Magistrate.

(e) A District Magistrate, in case of conviction under s 124A of the Indian Penal Code.

High Court's power of superintendence

Every High Court has a power of superintendence over all Courts and tribunals throughout the territory in relation to which it exercises jurisdiction, excepting military tribunals [Art. 227]. This power of superintendence is a very wide power in as much as it extends to all Courts as well as tribunals within the State, whether such Court or tribunal is subject to the *appellate* jurisdiction of the High Court or not. Further, this power of superindence would include a revisional jurisdiction to intervene in cases of gross injustice or non-exercise or abuse of jurisdiction, even though no appeal or revision against the orders of such tribunal was otherwise available.

Jurisdiction over administrative tribunals.

By reason of the extension of Government activities and the complicated nature of issues to be dealt with by the administration, many modern statutes have entrusted administrative bodies with the function of deciding disputes and quasi-judicial issues that arise in connection with the administration of such laws, either because the ordinary courts are already overburdened to take up these new matters or the disputes are of such a technical nature that they can be decided only by persons who have an intimate knowledge of the working of the Act under which it arises. Thus, in India, quasi-judicial powers have been vested in administrative authorities such as the Custodian of Evacuee Property, under the Administration of Evacuee Property Act, 1950; the Transport Authorities under the Motor Vehicles Act, 1930; the Rent Controller under the State

Rent Control Acts. Besides, there are special tribunals which are not a part of the judicial administration but have all the "trappings" of a court. Nevertheless, they are not courts in the proper sense of the term, in view of the special procedure followed by them. All these tribunals have one feature in common viz., that they determine questions affecting the rights of the citizens and their decisions are binding upon them.

Since the decisions of such tribunals have the force or effect of a judicial decision upon the parties, and yet the tribunals do not follow the the exact procedure adopted by courts of justice, the need arises to place them under the control of superior courts to keep them within the proper limits of their jurisdiction and also to prevent them from committing any act of gross injustice.

In *England*, judicial review over the decisions of the quasi-judicial tribunals is done by the High Court in the exercise of its power to issue the prerogative writs.

In *India*, there are several provisions in the Constitution which place these tribunals under the control and supervision of the superior courts of the land, viz., the Supreme Court and the High Courts.

(*i*) If the tribunal makes an order which infringes a fundamental right of a person, he can obtain relief by applying for a writ of *certiorari* to quash that decision, either by applying for it to the Supreme Court under Art. 32 or to the High Court under Art. 226. Even apart from the infringement of the fundamental right, a High Court is competent to grant a writ of *certiorari*, if the tribunal either acts without jurisdiction or in excess of its jurisdiction as conferred by the statutes by which it was created or it makes an order contrary to the rules of natural justice or where there is some error apparent on the face of its record.

(*ii*) Besides the power of issuing the writs, every High Court has a general power of superintendence over all the tribunals functioning within its jurisdiction under Art. 227 and this superintendence has been interpreted as both administrative and judicial superintendence. Hence even where the writ of *certiorari* is not available but a flagrant injustice has been committed or is going to be committed, the High Court may interfere and quash the order of a tribunal under Art. 227.

(*iii*) Above all, the Supreme Court may grant special leave to appeal from any determination made by any tribunal in India, under Art. 136 wherever there exist extraordinary circumstances calling for interference of the Supreme Court. Broadly speaking, the Supreme Court can exercise this power under Art. 136 over a tribunal wherever a writ for *certiorari* would lie against the tribunal; for example, where the tribunal has either exceeded its jurisdiction or has approached the question referred to it in a manner which is likely to result in injustice or has adopted a procedure which runs counter to the established rules of natural justice. The extraordinary power would, however, be exercised by the Supreme Court in rare and exceptional circumstances and not to interfere with the decisions, of such tribunals as a court of appeal [see p. 249, *ante*].

Besides the above, the Supreme Court as well as the High Courts possess what may be called an extraordinary jurisdiction, under Arts. 32 and 226 of the Constitution, respectively. The peculiarity of this jurisdiction is that, being conferred by the Constitution, it cannot be taken away or abridged by anything short of a amendment of the Constitution itself. As has already been pointed out, the jurisdiction to issue writs under these Articles is larger in the case of the High Court inasmuch as while the Supreme Court can issue them only where a fundamental right has been infringed, a High Court can issue them not only in such cases but also where an ordinary legal right has been infringed, provided a writ is a proper remedy in such cases, according to well-established principles.

The writ jurisdiction of Supreme Court and High Court.

As the head of the Judiciary in the State, the High Court has got an administrative control over the subordinate judiciary in the State in respect of certain matters, besides its appellate and supervisory jurisdiction over them. The Subordinate Courts include District Judges, including Judges of the City Civil Courts as well as the Presidency Magistrates (where they exist) and members of the judicial service of the State.

Control over Subordinate Courts.

The control over the Judges of these subordinate Courts is exercised by the High Courts in the following matters—

(a) The High Court is to be consulted by the Governor in the matter of appointing, posting and promoting district judges [Art. 233].

(b) The High Court is consulted, along with the State Public Service Commission, by the Governor, in appointing persons (other than district judges) to the judicial service of the State [Art. 234].

(c) The control over district courts and courts subordinate thereto, including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service and holding any post inferior to the post of a district judge is vested in the High Court [Art. 235].

REFERENCES :

1. Under this provision, the High Court of Assam has been made the common High Court for Assam and Nagaland
2. By the Constitution (Fifteenth Amendment) Act, 1963, the age of retirement of High Court Judges has been raised from 60 to 62.
3. C.A.D., dated 22-11-48.
4. See Table VIII-A as to the territorial jurisdiction of the several High Courts. Delhi which was under the jurisdiction of the Punjab High Court has now its own High Court.

PART SIX

THE FEDERAL SYSTEM

CHAPTER XXI

DISTRIBUTION OF LEGISLATIVE AND EXECUTIVE POWERS

Nature of the Union.

The nature of the federal system introduced by *our* Constitution has been fully explained earlier.

To recapitulate its essential features: Though there is a strong admixture of unitary bias and the exceptions from the traditional federal scheme are many, the Constitution introduces a federal system as the basic structure of government of the country. The Union at the end of 1970, is composed of 17 States and both the Union and the States derive their authority from the Constitution which divides all powers,—legislative executive and financial, as between them. (The judicial powers, as already pointed out earlier, are not divided and there is a common Judiciary for the Union and the States). The result is that the States are not delegates of the Union and that, though there are agencies and devices for Union control over the States in many matters, subject to such exceptions, the States are autonomous within their own spheres as allotted by the Constitution, and both the Union and the States are equally subject to the limitations imposed by the Constitution, say, for instance, the exercise of legislative powers being limited by Fundamental Rights.

Thus, neither the Union Legislature (Parliament) nor a State Legislature can be said to be 'sovereign' in the Austinistic sense, each being limited by the provisions of the Constitution effecting the distribution of legislative powers as between them, apart from the Fundamental Rights and other specific provisions restraining their powers in certain matters, e.g., Art. 276 (2) [limiting the power of a State Legislature to impose a tax on professions]; Art. 303 [limiting the powers of both Parliament and a State Legislature with regard to legislation relating to trade and commerce]. If any of these constitutional limitations as violated, the law of the Legislature concerned is liable to be declared invalid by the Courts.

The scheme of distribution of legislative powers.

As has been pointed out at the outset, a federal system postulates a distribution of powers between the federation and the units. Though the nature of distribution varies according to the local and political background in each country, the division, obviously, proceeds on two lines—

(a) The *territory* over which the Federation and the Units shall, respectively, have their jurisdiction.

(b) The *subjects* to which their respective jurisdiction shall extend.

The distribution of legislative powers under *our* Constitution under both heads is as follows:

Territorial extent of Union and State legislation.

I. As regards the territory with respect to which the Legislature may legislate, the State Legislature naturally suffers from a limitation to which Parliament is not subject, namely, that the territory of the Union being divided amongst the States, the jurisdiction of each State must be confined

to its own territory. When, therefore, a State Legislature makes a law relating to a subject within its competence, it must be read as referring to persons or objects situate within the territory of the State concerned. A State Legislature can make laws for the whole or any part of the State to which it belongs [Art. 245 (1)].

It is not possible for a State Legislature to enlarge its territorial jurisdiction under any circumstances except when the boundaries of the State itself are widened by an Act of Parliament, in the manner explained at p. 254, *post*.

The Union Parliament has, on the other hand, the power to legislate for 'the whole or any part of the territory of India', which includes not only the States but also the Union Territories or any other area, for the time being, included in the territory of India [Art. 246 (4)]. It also possesses the power 'extra-territorial legislation' [Art. 245 (2)], which no State Legislature possesses. This means that laws made by the Union Parliament will govern not only persons and property within the territory of India but also Indian subjects resident and their property situate *anywhere* in the world. No such power to affect persons or porperty outside the borders of its own State can be claimed by a State Legislature in India.

Limitations to the territorial jurisdiction of Parliament.

The plenary territorial jurisdiction of Parliament is, however, subject to some special provisions of the Constitution—

(i) As regards some of the Union Territories, such as the Andaman and Laccadive group of Islands, Regulations may be made by the President to have the same force as Acts of Parliament and such Regulations may repeal or amend a law made by Parliament in relation to such Territory [Art. 240 (2)].

(ii) The application of Acts of Parliament to any Scheduled Area may be barred or modified by notifications made by the Governor [Para. 5 of the Fifth Schedule].

(iii) The Governor of Assam may, by public notification, direct that an Act of Parliament shall not apply to an autonomous district or an autonomous region in the State of Assam or shall apply to such district or region or part thereof subject to such exceptions or modifications as he may specify in the notification [Para. 12 of the Schedule].

It is obvious that the foregoing special provisions have been inserted in view of the backwardness of the specified areas to which the indiscriminate application of the general laws might cause hardship or other injurious consequences.

II. As regards the *subjects* of legislation, the Constitution adopts from the Government of India Act, 1935 a *threefold* distribution of legislative powers between the Union and the States [Art. 246]. While in the *United States* and *Australia*, there is only a single enumeration of powers,—only the powers of the Federal Legislature being enumerated,—

Distribution of legislative subjects.

in *Canada* there is a double enumeration, and the Government of India Act, 1935, introduced a scheme of threefold enumeration, namely Federal, Provincial and Concurrent. The Constitution adopts this scheme from the Act of 1935 by enumerating possible subjects of legislation under three Legislative Lists in Schedule VII of the Constitution (see Table XV).[1]

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

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

List III gives *concurrent* powers to the Union and the State Legislatures over 47 items, such as Criminal law and procedure, Civil procedure, marriage, contracts, torts, trusts, welfare of labour, insurance, economic and social planning.

In case of *overlapping* of a matter as between the three Lists, predominance has been given to the Union Legislature, as under the Government of India Act, 1935. Thus, the power of the State Legislature to legislate with respect to matters enumerated in the State List has been made subject to the power of the Union Parliament to legislate in respect of matters enumerated in the Union and Concurrent Lists, and the entries in the State List have to be interpreted accordingly.

In the *concurrent* sphere, in case of repugnancy between a Union and a State law relating to the *same* subject, the former prevails. If, however, the State law was reserved for the assent of the President and has received such assent, the State law may prevail notwithstanding such repugnancy, but it would still be competent for Parliament override such State law by subsequent legislation [Art. 254 (2)].

Residuary powers.

The vesting of residual power under the Constitution follows the precedent of *Canada*, for, it is given to the Union instead of the States (as in the *U. S. A.* and *Australia*). In this respect, the Constitution differs from the Government of India Act, 1935, for, under that Act, the residual powers were vested neither in the Federal nor in the State Legislature, but were placed in the hands of the Governor-General; the Constitution vests the residuary power, i.e., the power to legislate with respect to any matter *not* enumerated in any one of the three Lists,—in the Union Legislature [Art. 248], and the final determination as to whether a particular matter falls under the residuary power or not is that of the Courts.

It should be noted, however, that since the three Lists attempt at an exhaustive enumeration of all possible subjects of legislation, and the Courts interpret the ambit of the enumerated powers liberally, the scope for the application of the residuary power will be very narrow. It is not strange

therefore that during the twenty years of the working of the Constitution there have not been many reported decisions where a Union legislation has been attributed solely to the residuary power.[2]

Expansion of the legislative powers of the Union under different circumstances.

While the foregoing may be said to be an account of the normal distribution of the legislative powers, there are certain exceptional circumstances under which the above system of distribution is either suspended or the powers of the Union Parliament are extended over State subjects. These exceptional or extraordinary circumstances are—

(*a*) In the *national interest*—Parliament shall have the power to make laws with respect to any matter included in the State List, for a temporay period, if the Council of States declares by a resolution of ⅔ of its members present and voting, that it is necessary in the *national* interest that Parliament shall have power to legislate over such matters. Each such resolution will give a lease of one year to the law in question.

A law made by Parliament, which Parliament would not but for the passing of such resolution have been competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period [Art. 249].

The resolution of the Council of States may be renewed for a period of one year at a time.

(*b*) Under a *Proclamation of Emergency*—While a Proclamation of 'Emergency' made by the President is in operation, Parliament shall have similar power to legislate with respect to State subjects.

A law made by Parliament, which Parliament would not but for the issue of such Proclamation have been competent to make, shall, to the extent of incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period [Art. 250].

(*c*) *By agreement between States*—If the Legislatures of two or more States resolve that it shall be lawful for Parliament to make laws with respect to any matters included in the State List relating to those States, Parliament shall have such power as regards such States. It shall also be open to any other State to adopt such Union legislation in relation to itself by a resolution passed in that behalf in the Legislature of the State. In short, this is an extension of the jurisdiction of the Union Parliament by consent of the State Legislatures [Art. 252].

Thus, though Parliament has no competence to impose an estate duty with respect to *agricultural* lands, Parliament has, in the Estate Duty Act, 1953, included the agricultural lands situated in certain States, by virtue of

resolutions passed by the Legislatures of such States, under Art. 252, to confer such power upon Parliament.

(*d*) To *implement treaties*—Parliament shall have the power to legislate with respect to *any* subject for the purpose of implementing treaties or international agreements and conventions. In other words, the normal distribution of powers will not stand in the way of Parliament to enact legislation for carrying out its international obligations, even though such legislation may be necessary in relation to a State subject [Art. 253].

(*e*) *Under a Proclamation of failure of constitutional machinery in the States*—When such a Proclamation is made by the President, the President may declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament [Art. 356 (b)].

Interpretation of the Legislative Lists.

The interpretation of over 200 Entries in the three Legislative Lists is no easy task for the Courts and the Courts have to apply various judicial principles to reconcile the different Entries, a discussion of which would be beyond the scope of the present work.[3] Suffice it to say that—

(*a*) Each Entry is given the widest importance that its words are capable of, without rendering another Entry nugatory.[4]

(*b*) In order to determine whether a particular enactment falls under one Entry or the other, it is the 'pith and substance' of such enactment and not its legislative label that is taken account of.[5] If the enactment substantially falls under an Entry over which the Legislature has jurisdiction, an incidental encroachment upon another Entry over which it had no competence will not invalidate the law.[4]

(*c*) On the other hand, where a Legislature has no power to legislate with respect to a matter, the Courts will not permit such Legislature to transgress its own powers or to encroach upon those of another Legislature by resorting to any device or 'colourable legislation'.[6]

(*d*) The motives of the Legislature are, otherwise, irrelevant for determining whether it has transgressed the constitutional limits of its legislative power.[6]

Distribution of executive powers.

The distribution of executive powers between the Union and the States is somewhat more complicated than that of the legislative powers.

I. In general, it follows the scheme of distribution of the legislative powers. In the result, the executive power of a State is, in the main, co-extensive with its legislative power,—which means that the executive power of a State shall extent only to its own territory and with respect to those subjects over which it has legislative competence [Art. 162]. Conversely, the *Union* shall have exclusive executive power over (*a*) the matters with respect to which Parliament has exclusive power to make laws (*i.e.*, matters in List I of Sch. VII) and (*b*) the exercise of its powers conferred by any treaty or agreement [Art. 73]. On the other hand, a

State shall have exclusive executive power over matters included in List II [Art. 162].

II. It is in the *concurrent* sphere that some novelty has been introduced. As regards matters included in the Concurrent Legislative List (i.e., List III), the executive function shall *ordinarily* remain with the States, but subject to the provisions of the Constitution or of any law of Parliament conferring such function expressly upon the Union. Under the Government of India Act, 1935, the Centre had only a power to give directions to a Provincial Executive to execute a Central law relating to a Concurrent subject. But this power of giving directions proved ineffective; so, the Constitution provides that the Union may, whenever it thinks fit, itself take up the administration of Union laws relating to any Concurrent subject.

In the result, the executive power relating to concurrent subjects remains with the States, except in two cases—

(*a*) Where a law of Parliament relating to such subject vests some executive function specifically in the Union e.g., the Land Acquisition Act, 1894; the Industrial Disputes Act, 1947 [Proviso to Art. 73 (1)]. So far as these functions specified in such Union law are concerned, it is the Union and not the States which shall have the executive power while the rest of the executive power relating to the subject shall remain with the States.

(*b*) Where the provisions of the Constitution itself vest some executive functions upon the Union. Thus,

(i) The executive power to implement any treaty or international agreement belongs exclusively to the Union, whether the subject appertains to the Union, State or Concurrent List [Art. 73 (1) (b)].

(ii) The Union has the power to give directions to the State Governments as regards the exercise of their executive power, in certain matters—

(A) *In normal times*:

(*a*) To ensure due compliance with Union laws and existing laws which apply in that State [Art. 256].

(*b*) To ensure that the exercise of the executive power of the State does not interfere with the exercise of the executive power of the Union [Art. 257 (1)].

(*c*) To secure the construction and maintenance of the means of communication of national or military importance by the State [Art. 257 (2)].

(*d*) To ensure protection of railways within the State [Art. 257 (3)].

(*e*) To ensure drawing and execution of schemes specified in the directions to be essential for the welfare of the Scheduled Tribes in the State [Art. 339 (2)].

(*f*) To secure the provision of adequate facilities for instruction in the mother-tongue at the primary stage of education to children belong to linguistic minority groups [Art. 350A].

(*g*) To ensure the development of the Hindi language [Art. 351].

(B) *In Emergencies*:

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

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

(C) *During a Proclamation of Financial Emergency*:

(i) To observe canons of financial propriety, as may be specified in the directions [Art. 360 (3)];

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

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

III. While as regards the legislative powers, it is not competent for the Union [apart from Art. 252, see *ante*] and a State to encroach upon each other's exclusive jurisdiction by mutual consent, this is possible as regards executive power. Thus, with the consent of the Government of a State, the Union may entrust its own executive functions relating to any matter to such State Government or its officers [Art. 258 (1)]. Conversely, with the consent of the Union Government, it is competent for a State Government to entrust any of its executive functions to the former [Art. 258A].

IV. On the other hand, under Art. 258 (2) a law made by Parliament relating to a Union subject may *authorise* the Central Government to delegate its functions or duties to the State Government or its officers (irrespective of the consent of such State Government).

REFERENCES:

1. As already stated, the distribution does not apply to the Union Territories, as regards which Territories Parliament is competent to legislate with respect to any subject, including those which are enumerated in the 'State List'.
2. See second *Gift Tax Officer* v. *Hazareth*, A.I.R. 1970 S.C. 999.
3. Vide Author's *Commentary on the Constitution of India*, Fourth Ed., Vol. III: and *Shorter Constitution of India*, 4th Ed., pp. 491 *et seq.*
4. *State of Bombay* v. *Balsara*, (1951) S.C.R. 682; *Ramakrishna* v. *Municipal Committee*, (1950) S.C.R. 15 (*25*).
5. *Amar Singh* v. *State of Rajasthan*, (1955) 2 S.C.R. 303 (*325*).
6. *K. C. G. Narayana Deo* v. *State of Orissa*, (1954) S.C.R. 1.

CHAPTER XXII

DISTRIBUTION OF FINANCIAL POWERS

Need for distribution of financial resources.

No system of federation can be successful unless both the Union and the States have at their disposal adequate financial resources to enable them to discharge their respective responsibilities under the Constitution.

To achieve this object, *our* Constitution has made elaborate provisions, mainly following the lines of the Government of India Act, 1935, relating to the distribution of the taxes as well as non-tax revenues and the power of borrowing, supplemented by provisions for grants-in-aid by the Union to the States.

Before entering into these elaborate provisions which set up a complicated arrangement for the distribution of the financial resources of the country, it has to be noted that the object of this complicated machinery is an equitable distribution of the financial resources between the two units of the federation, instead of dividing the resources into two watertight compartments, as under the usual federal system. A fitting introduction to this arrangement has been given by our Supreme Court,[1] in these words:

"Sources of revenue which have been allocated to the Union are not meant entirely for the purposes of the Union but have to be distributed according to the principles laid down by Parliamentary legislation as contemplated by the Articles aforesaid. Thus all the taxes and duties levied by the Union .....do not form part of the Consolidated Fund of India but many of these taxes and duties are distributed amongst the States and form part of the Consolidated Fund of the States. Even those taxes and duties which constitute the Consolidated Fund of India may be used for the purposes of supplementing the revenues of the States in accordance with their needs. The question of distribution of the aforesaid taxes and duties amongst the States and the principles governing them, as also the principles governing grants-in-aid.....are matters which have to be decided by a high-powered Finance Commission, which is a responsible body designated to determine those matters in an objective way.....The Constitution-makers realised the fact that those sources of revenue allocated to the States may not be sufficient for their purposes and that the Government of India would have to subsidise their welfare activities.....Realising the limitations on the financial resources of the States and the growing needs of the community in a welfare State, the Constitution has made.....specific provisions empowering Parliament to set aside a portion of its revenues..... for the benefit of the States, not in stated proportions but according to their needs.....The resources of the Union Government are not meant exclusively for the benefit of the Union activities.....In other words, *the Union and the States together form one organic whole* for the purposes of utilisation of the resources of the territories of India as a whole."

Principles underlying distribution of tax revenues.

The Constitution makes a distinction between the legislative power to levy a tax and the power to *appropriate* the proceeds of a tax so levied. In *India*, the powers of a Legislature in these two respects are not identical.

(A) The legislative power to make a law for imposing a tax is divided as between the Union and the States by means of specific Entries in the Union and State Legislative Lists in Sch. VIII (*vide* Table XV). Thus, while the State Legislature has the power to levy an estate duty in respect of agricultural lands [Entry 48 of List II], the power to levy an estate duty in respect of non-agricultural land belongs to Parliament [Entry 87 of List I]. Similarly, it is the State Legislature which is competent to levy a tax on agricultural income [Entry 46 of List II], while Parliament has the power to levy income tax on all incomes other than agricultural [Entry 82 of List I].

Distribution of legislative power to levy taxes.

The residuary power as regards taxation (as in general legislation) belongs to Parliament [Entry 97 of List I] and the Gift tax and Expenditure tax, have been held to derive their authority from this residuary power. There is no concurrent sphere in the matter of tax legislation.

Before leaving this topic, it should be pointed out that though a State Legislature has the power to levy any of the taxes enumerated in the State Legislative List, in the case of certain taxes, this power is subject to certain limitations imposed by the substantive provisions of the Constitution. Thus—

(a) While Entry 60 of List II of Sch. VII authorises a State Legislature to levy a tax on profession, trade, calling or employment, the total amount payable in respect of any one person to the State or any other authority in the State by way of such tax shall not exceed Rs. 250/- *per annum* [Art. 276 (2)].

(a) Professions tax.

(b) The power to impose taxes on 'sale or purchase of goods other than newspapers' belongs to the State (Entry 54, List II). But 'taxes on imports and exports' [Entry 84, List I] and 'taxes on sales in the course of inter-State trade and commerce' [Entry 92A, List I] are exclusive Union subjects. Art. 286 is intended to ensure that sales taxes imposed by States do not interfere with imports and exports or inter-State trade and commerce, which are matters of national concern, and should, therefore, be beyond the competence of the States. Hence, certain limitations have been laid down by Art. 286 upon the power of the States to enact sales tax legislation.

(b) Sales tax.

The limitations upon the power of a State Legislature to impose a tax on sale or purchase are—

1. (a) No tax shall be imposed on sale or purchase which takes place *outside the State.*

(b) No tax shall be imposed on sale or purchase which takes place *in the course of import* into or *export* out of India.

2. In connection with inter-State trade and commerce, there are two limitations—

(i) The power to tax sales taking place 'in the course of inter-State trade and commerce' is within the exclusive competence of Parliament.

(ii) Even though a sale does not take place 'in the course of' inter-State trade or commerce, State taxation would be subject to restrictions and conditions imposed by Parliament if the sale relates to 'goods declared by Parliament to be of *special importance* in inter-State trade and commerce'. In pursuance of this power, Parliament has declared sugar, tobacco, cotton, silk and woollen fabrics to be goods of special importance in inter-State trade and commerce, by enacting the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (s. 7), and imposed special restrictions upon the States to levy tax on the sales of these goods.

(c) Tax on consumption or sale of electricity.

(c) Save in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the consumption or sale of electricity (whether produced by a Government or other person) which is—

(i) consumed by the Government of India, or sold to the Government of India for consumption by that Government; or

(ii) consumed in the construction, maintenance or operation of any railway company operating that railway, or sold to that Government or any such railway company for consumption in the construction, maintenance or operation of any railway.

(d) Exemption of Union and State properties from mutual taxation.

(d) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State [Art. 285 (1)].

Conversely, the property and income of a State shall be exempt from Union taxation [Art. 289 (1)]. There is, however, one exception in this case. If a State enters into a trade or business, other than a trade or business which is declared by Parliament to be incidental to the ordinary business of government, it shall not be exempt from Union taxation [Art. 289 (2)]. The immunity, again, relates to a tax on property. Hence, the property of a State is not immune from customs duty.[1]

Distribution of proceeds of taxes.

(B) Even though a Legislature may have been given the power to levy a tax because of its affinity to the subject-matter of taxation, the yield of the different taxes coming within the State legislative sphere may not be large enough to serve the purposes of a State. To meet this situation, the Constitution makes special provisions:

(i) Some duties are leviable by the Union; but they are to be collected and entirely appropriated by the States after collection.

(ii) There are some taxes which are both levied and collected by the Union, but the proceeds are then assigned by the Union to those States within which they have been levied.

(iii) Again, there are taxes which are levied and collected by the Union but the proceeds are distributed between the Union and the State.

The distribution of the tax-revenue between the Union and the States, according to the foregoing principles, stands as follows:

(A) *Taxes belonging to the Union exclusively*:

1. Customs. 2. Corporation tax. 3. Taxes on capital value of assets of individuals and Companies. 4. Surcharge on income tax etc. 5. Fees in respect of matters in the Union List (List I).

(B) *Taxes belonging to the States exclusively*:

1. Land Revenue. 2. Stamp duty except in documents included in the Union List. 3. Succession duty, Estate duty, and Income tax on *agricultural land*. 4. Taxes on passengers and goods carried on inland waterways. 5. Taxes on lands and building, mineral rights. 6. Taxes on animals and boats, on road vehicles, on advertisements, on consumption of electricity, on luxuries and amusements etc. 7. Taxes on entry of goods into a local area. 8. Sales Tax. 9. Tolls. 10. Fees in respect of matters in the State List. 11. Taxes on professions, trades etc. not exceeding Rs. 250/- per annum (List II).

(C) *Duties levied by the Union but collected and appropriated by the States*:

Stamp duties on Bills of Exchange etc. and Excise duties on medicinal and toilet preparations containing alcohol, though they are included in the Union List and *levied* by the Union, shall be collected by the States in so far as leviable within their respective territories, and shall form part of the States by whom they are collected [Art. 268].

(D) *Taxes levied as well as collected by the Union, but assigned to the States within which they are leviable*:

(*a*) Duties on succession to property other than agricultural land. (*b*) Estate duty in respect of property other than agricultural land. (*c*) Terminal taxes on goods or passengers carried by railway, air or sea. (*d*) Taxes on railway fares and freights. (*e*) Taxes on sales of and advertisements in newspapers. (*f*) Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes in the course of inter-State trade or commerce [Art. 269].

(E) *Taxes levied and collected by the Union and distributed between Union and the States.*

Certain taxes shall be levied as well as collected by the Union, but their proceeds shall be divided between the Union and the States in a certain proportion, in order to effect an equitable division of the financial resources. These are—

(a) Taxes on income *other than on agricultural income* [*Art.* 270].

(b) Duties of excise as are included in the Union List, excepting medicinal and toilet preparations may also be distributed, if Parliament by law so provides [Art. 272].

(A) The principal sources of non-tax revenues of the Union are the receipts from—

Distribution of non-tax revenues.

Railways; Posts and Telegraphs; Broadcasting; Opium; Currency and Mint; Industrial and Commercial Undertakings of the Central Government relating to the subjects over which the Union has jurisdiction.

Of the Industrial and Commercial Undertakings relating to Central subjects may be mentioned—

The Industrial Finance Corporation; The Air Corporations; Industries in which the Government of India have made investments, such as the Sindri Fertilisers and Chemical Ltd.; the Hindusthan Shipyard Ltd.; the Indian Telephone Industries Ltd.

(B) The States, similarly, have their receipts from—

Forests, Irrigation, and commercial enterprises (like electricity, road transport) and Industrial undertakings (such as Soap, Sandalwood, Iron and Steel in Mysore, Paper in Madhya Pradesh, Milk Supply in Bombay, Deep-sea Fishing and Silk in West Bengal).

Grants-in-aid.

Even after the assignment to the States of a share of the Central taxes, the resources of all the States may not be adequate enough. The Constitution, therefore, provides that grants-in-aid shall be made in each year by the Union to such States as Parliament may determine to be in need of assistance; particularly, for the promotion of welfare of tribal Areas, including special grants to Assam in this respect [Art. 275].

Constitution and Functions of the Finance Commission.

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

The constitution of the Finance Commission is laid down in Art. 280, which has to be read with the Finance Commission (Miscellaneous Provisions) Act of 1951, which has supplemented the provisions of the Constitution. Briefly speaking, the Commission has to be constituted by the President, every five years. The Chairman must be a person having 'experience in public affairs'; and the other four members must be appointed from amongst the following—

(a) A High Court Judge or one qualified to be appointed as such; (b) a person having special knowledge of the finances and accounts of the Government; (c) a person having wide experience in financial matters and administration; (d) a person having special knowledge of economics.

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

(*a*) the distribution between the Union and the States of the net proceeds of taxes which are to be or may be, divided between them under this Chapter and the allocation between the States of the respective shares of such proceeds;

(*b*) the principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India;

(*c*) any other matter referred to the Commission by the President in the intersts of sound finance.

The first Finance Commission.

The First Finance Commission was constituted in 1951, with Shri Neogy as the Chairman, and it submitted its report in 1953. Government accepted its recommendations which, *inter alia,* were that—

(*a*) 55% of the net proceeds of income-tax shall be assigned by the Union to the States and that it shall be distributed among the States in the shares prescribed by the Commission.

(*b*) The Commission laid down the principles for guidance of the Government of India in the matter of making general grants-in-aid to States which require financial assistance and also recommended specific sums to be given to certain States such as West Bengal, Punjab, Assam, during the five years from 1952 to 1957.

The second Finance Commission.

A second Finance Commission, with Shri Santhanam as the Chairman, was constituted in 1956. Its report was submitted to Government in September, 1957 and its recommendations were given effect to for the quinquennium commencing from April, 1957. Broadly speaking, the following changes resulted from the Second Finance Commission's report—

(*a*) The share of the net proceeds of income tax to be assigned to the States was increased.

(*b*) 90% of the Union excise duties was to be distributed amongst the States on the basis of population.

(*c*) The proceeds of Estate Duty relating to immovable property were to be distributed among the States in proportion to the gross value of the immovable property located in each State.

(*d*) Grants-in-aid by way of financial assistance from the Union were to be made to all the States save Bombay, Madras and Uttar Pradesh.

The third Finance Commission.

A third Finance Commission, with Sir A. K. Chanda as its Chairman, was appointed in December, 1960. It submitted its report in 1962, with the following recommendations, *inter alia*—

1. *Estate Duty*:

For a period of four years with effect from April 1, 1962:

(*a*) out of the net proceeds in each financial year of estate duty in respect of property other than agricultural land, a sum equal to 1 (one) per cent to be retained by the Union as proceeds attributable to Union territories;

(*b*) the balance of the net proceeds to be apportioned between immovable property and other property in the ratio of the gross value of all such properties brought into assessment in that year;

(*c*) the sum thus apportioned to immovable property to be distributed among the States in proportion to the gross value of the immovable property located in each State; and

2. *Income Tax*:

For a period of four years with effect from April 1, 1962:

(a) the percentage of the net proceeds in any financial year of taxes on income other than agricultural income, except in so far as those proceeds represent proceeds attributable to Union territories or to taxes payable in respect of Union emoluments, to be assigned to the States be 66⅔ (sixty-six and two-thirds);

(*b*) the percentage of the net proceeds of taxes on income which shall be deemed to represent proceeds attributable to Union territories shall be 2½ (two and a half);

(*c*) the percentage of the net proceeds assigned to the States shall be distributed as shown in table 98.

3. *Union Excise Duties*:

For a period of four years with effect from April 1, 1962, a sum equal to 20 (twenty) per cent of the net proceeds of the Union duties of excise on certain articles, such as sugar, coffee, tea, shall be paid out of the Consolidated Fund of India to the States and distributed among them.

4. *Additional Duties of Excise*:

For a period of four years with effect from April 1, 1962, out of the total net proceeds of the additional duties of excise levied in replacement of sales tax on cotton fabrics, rayon or artificial silk fabrics, silk fabrics, woollen fabrics, sugar and tobacco (including manufactured tobacco), a certain percentage shall be distributed among the States.

The fourth Finance Commission.

The Fourth Finance Commission, with Dr. Rajamannar, retired Chief Justice of the Madras High Court, was constituted in May, 1964.

Its principal recommendation was—

While the 'States' share of the divisible pool of income-tax has been raised from 66⅔% to 75% the share of each State will continue to be determined on the basis of 80% on population and 20% on collection.

A fifth Finance Commission, headed by Sri Mahavir Tyagi, has been constituted in March, 1968, with respect to the quinquennium commencing from 1-4-69.

The Fifth Finance Commission.

It submitted an interim report in October, 1968, an its final report, in July, 1969. It has recommended that the States share of income-tax should be raised to 75% and of Union Excise duties should be raised to 20%.

Safeguarding the interests of the States in the shared taxes.

By way of safeguarding the interests of the States in the Union taxes which are divisible according to the foregoing provisions, it is provided by the Constitution [Art. 274] that no Bill or amendment which —

(*d*) varies the rate of any tax or duty in which the States are interested; or

(*b*) affects the principles on which moneys are distributable according to the foregoing provisions of the Constitution; or

(*c*) imposes any surcharge on any such tax or duty for the purposes of the Union,

shall be introduced or moved in Parliament except on the recommendation of the President.

Subject to the above condition, however, it is competent for Parliament to increase the rate of any such tax or duty for purposes of the Union [Art. 271].

Financial control by the Union in Emergencies.

As in the legislative and administrative sphere, so in financial matters, the normal relation between the Union and the States (under Arts. 268-279) is liable to be modified in different kinds of emergencies. Thus,

(*a*) While a Proclamation of Emergency [Art. 352(1)] is in operation, the President may by order direct that, for a period not extending beyond the expiration of the financial year in which he Proclamation cases to operate, all or any of the provisions relating to the division of the taxes between the Union and the States and grants-in-aid shall be suspended [Art. 354]. In the result, if any such order is made by the President, the States will be left to their narrow resources from the revenues under the State List, without any augmentation by contributions from the Union.

(*b*) While a Proclamation of Financial Emergency [Art. 360 (1)[is made by the President, it shall be competent for the Union to give directions to the States—

(i) to observe such canons of financial propriety and other safeguards as may be specified in the directions;

(ii) to reduce the salaries and allowances of all persons serving in connection with the affairs of the State, including High Court Judges;

(iii) to reserve for the consideration of the President all money and financial Bills, after they are passed by the Legislature of the State [Art. 360].

The Union shall have unlimited power of borrowing, upon the security

of the revenues of India either within India or outside. The Union Executive shall exercise the power subject only to such limits as may be fixed by Parliament from time to time [Art. 292].

Borrowing powers of the Union and the States.

The borrowing power of a State is, however, subject to a number of constitutional limitations:

(i) It cannot borrow outside India. Under the *Act of 1935* the States had the power to borrow outside India with the consent of the Centre. But this power is totally denied to the States by the Constitution; the Union shall have the sole right to enter into the international money market in the matter of borrowing.

(ii) The State Executives shall have the power to borrow, within the territory of India upon the security of the revenues of the State, subject to the following conditions:

(*a*) Limitations as may be imposed by the State Legislature.

(*b*) If the Union has guaranteed an outstanding loan of the State, no fresh loan can be raised by the State without consent of the Union Government.

(*c*) The Government of India may itself offer a loan to a State, under a law made by Parliament. So long as such a loan or any part thereof remains outstanding, no fresh loan can be raised by the State without the consent of the Government of India. The Government of India may impose terms in giving its consent as above [Art. 293].

REFERENCE :

1. In re Sea Customs Act, A I.R. 1963 S.C. 1760 (*1771*).

CHAPTER XXIII

ADMINISTRATIVE RELATIONS BETWEEN THE UNION AND THE STATES

Need for co-ordination between the Units of the Federation.

Any federal scheme involves the setting up of dual governments and division of powers. But the success and strength of the federal polity depends upon the maximum of co-operation and co-ordination between the governments. The topic may be discussed under two heads:

(*a*) Relation between the Union and the States;

(*b*) Relation betwten the States *inter se*.

In the present Chapter the former aspect will be discussed and the inter-State relations will be dealt with in the next Chapter.

(A) Techniques of Union Council Over States.

It would be convenient to discuss this matter under two heads—(i) in emergencies; (ii) in normal times.

I. In emergencies.

It has already been pointed out [p. 49, *ante*] that in 'emergencies' the Government under the Indian Constitution will work as if it were a Unitary government. This aspect will be more fully discussed in the next Chapter.

II. In normal times.

Even for normal times, the Constitution has devised techniques of control over the States by the Union to ensure that the State governments do not interfere with the legislative and executive policies of the Union and also to ensure the efficiency and strength of each individual unit which is essential for the strength of the Union.

These methods and agencies of Union control over the States under the Indian Constitution are—

(*i*) Directions to the State government.
(*ii*) Delegation of Union functions.
(*iii*) All India Services.
(*iv*) Grants-in-aid.
(*v*) Inter-State Councils.
(*vi*) Inter State Commerce Commission [Art. 307].

Directions by the Union to State Governments.

The idea of the Union giving directions to the States is foreign and repugnant to a truly federal system. But this idea was taken by the framers of *our* Constitution from the Government of India Act, 1935, in view

of the peculiar conditions of this country and, particularly, the circumstances out of which the federation emerged.

The circumstances under which and the matters relating to which it shall be competent for the Union to give directions to a State have already been stated [p. 256, *ante*]. The sanction prescribed by the Constitution to secure compliance with such directions remains to be discussed.

It is to be noted that the Constitution prescribes a coercive sanction for the enforcement of the directions issued under any of the foregoing powers, namely, the power of the President to make a Proclamation under Art. 356. This is provided in Art. 365 as follows:

Sanction for enforcement of directions.

"Where any State has failed to comply with, or to give effect to any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution."

And as soon as a Proclamation under Art. 356 is made by the President he will be entitled to assume to himself any of the functions of the State Government as are specified in that Article carried out.

It has already been stated [p. 257, *ante*] that with the consent of the Government of a State, President may entrust to that Government executive functions of the Union relating to any matter [Art. 258 (1)]. While legislating on a Union subject, Parliament may delegate powers to the State Governments and their officers in so far as the statute is applicable in the respective States [Art. 258 (2)].

Delegation of functions.

Conversely, a State Government may, with the consent of the Government of India, confer administrative functions upon the latter, relating to State subjects [Art. 258A].

Thus, where it is inconvenient for either Government to directly carry out its administrative functions, it may have those functions executed through the other Government.

It has been pointed out earlier that besides persons serving under the Union and the States, there will be certain services 'common to the Union and the States.' These are called 'All-India Services', of which the Indian Administrative Service and the Indian Police Service are the existing examples. But the Constitution gives the power to create additional All-India Services.[1] If the Council of States has declared by a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interests so to do, Parliament may by law provide for the creation of one or more all-India services common to the Union and the States and regulate the recruitment, and the conditions of service of persons appointed, to any such service [Art. 312].

All-India Services.

As exaplained by Dr. Ambedkar in the Constituent Assembly, the object behind this provision for all-India services is to impart a greater cohesion

to the federal system and greater efficiency to the administration in both the Union and the States:

"The dual polity which is inherent in a federal system in followed in all federation by a dual service. In all Federations, there is a Federal Civil Service and a State Civil Service. The Indian Federation, though a dual polity, will have a dual service, but with one exception. It is recognised that in every country there are certain parts in its administrative set-up which might be called strategic from the point of view of maintaining the standard of administration.....There can be no doubt that the standard of administration depends upon the calibre of the civil servants who are appointed to these strategic posts.....The Constitution provides that without depriving the States of their right to form their own civil services there shall be an all-India Service recruited on an all India basis with common qualifications, with uniform scale of pay and members of which alone could be appointed to these strategic posts throughout the Union."

Grants-in-aid.

As stated earlier, Parliament is given power to make such grants as it may deem necessary to give financial assistance to any State which is in need of such assistance [Art. 275].

By means of the grants, the Union would be in a position to correct inter-State disparities in financial resources which are not conducive to an all-round development of the country and also to exercise control and co-ordination over the welfare schemes of the States on a national scale.

Besides this general power to make grants to the States for financial assistance, the Constitution provides for specific grants on two matters: (*a*) For schemes of development, for welfare of Scheduled Tribes and for raising the level of administration of Scheduled Areas, as may have been undertaken by a State with the approval of the Government of India. (*b*) To the State of Assam, for the development of the tribal Areas in that State.

Inter-State Council.

The President is empowered to establish an Inter-State Council of at any time it appears to him that the public interests would be served thereby. Though the President is given the power to define the nature of the duties to be performed by the Council, the Constitution outlines the three-fold duties that may be assigned to this body. One of these is—

"the duty of *inquiring* into and *advising* upon disputes which may have arisen between States."

The other functions of such Council would be to investigate and discuss subjects of common interest between the Union and the States or between two or more States *inter se, e.g.*, research in such matters as agriculture, forestry, public health and to make recommendation for co-ordination of policy and action relating to such subject.

In exercise of this power, the President has already established a Central Council of Health,[3] and a Central Council of Local Self-Government,[4] for the purpose of co-ordinating the policy of the States relating to these matters. Apart from these fractional bodies, an all-embracing

Inter-State Council should be established, as recommended by the Administrative Reforms Commission.

Inter-State Commerce Commission.

For the purpose of enforcing the provisions of the Constitution relating to the freedom of trade, commerce and intercourse throughout the territory of India [Arts. 301-305], Parliament is empowered to constitute an authority similar to the Inter-State Commerce Commission in the *U.S.A.* and to confer on such authority such powers and duties as it may deem fit [Art. 307]. No such Commission has, however, been set up by the end of 1970.

Extra-constitutional agencies for settling all-India problems.

Apart from the above constitutional agencies for Union control over the States, provided to ensure a co-ordinated development of India notwithstanding a federal system of government, there are some advisory bodies and conferences held at the Union level, which further the co-ordination of State policy and eliminate differences as between the States. The foremost of such bodies is the Planning Commission.

Planning Commission.

Though the Constitution specifically mentions several Commissions to achieve various purposes, the Planning Commission, as such is not to be found in the Constitution. 'Economic and social planning' is a concurrent legislative power [Entry 20, List III]. Taking advantage of this Union power, the Union has set-up a Planning Commission in 1950, but without resorting to legislation. This extra-constitutional and non-statutory body was set up by a resolution (1950) of the Union Cabinet by Prime Minister Nehru, with himself as its first Chairman, to formulate an integrated Five Year Plan for economic and social development and to act as an advisory body to the Union Government, in this behalf.

Set up with this definite object, the Commission's activities have gradually been extended over the entire sphere of the administration excluding only defence and foreign affairs, so much so, that a critic has described it as "the economic Cabinet of the country as a whole", constituted of the Prime Minister and important Cabinet Ministers of the Union and encroaching upon the functions of constitutional bodies, such as the Finance Commission[4] and, yet, not being accountable to Parliament It has built up a heavy bureaucratic organisation[5] which led Pandit Nehru himself to observe[6]—

> "The Commission which was a small body of serious thinkers had turned into a government department complete with a crowd of secretaries, directors and of course a big building."

According to these critics, the Planning Commission is one of the agencies of encroachment upon the autonomy of the States under the federal system. The extent of the influence of this Commission should, however, be precisely examined before arriving at any conclusion. The function of the Commission is to prepare a plan for the "most effective and balanced utilisation of the country's resources", which would initiate

"a process of development which will raise living standards and open out to the people new opportunites for a richer and more varied life". It is obvious that the business of the Commission is only to prepare the plans; the implementation of the Plans rests with the States because the development relates to mostly State subjects. There is no doubt that at the Union, the Planning Commission has great weight, having the Prime Minister himself as its Chairman. But so for as the States are concerned, the role of the Commission is only advisory. Whatever influence it exerts is only *indirect,* in so far as the State vie with each other in having its requirements included in the national plan. After that is done, the Planning Commission can have no *direct* means of securing the implementation of the plan. If, at that stage, the States are obliged to follow the uniform policy laid down by the Planning Commission, that is because the States cannot do without obtaining financial assistance from the Union.[6] But, strictly speaking, taking advantage of financial assistance involves a voluntary element, not coercion, and even in the *United States* the receipt of federal grants-in-aid is not considered to be a subversion of the federal system, even though it operates as an encroachment upon State autonomy, according to many critics.[7]

But there is justification behind the criticism that there is overlapping of work and responsibility owing to the setting up of two high-powered bodies, viz. the Finance Commission and the Planning Commission and the Administrative Reforms Commission has commented upon it.[8] There is, in fact, no natural division between 'plan expenditure' and 'non-plan expenditure. The anomaly has been due to the fact that the makers of the Constitution could not, at that time envisage the creation of a body like the Planning Commission which has subsequently been set up by executive order. Be that as it may be, the need for co-ordination between the two Commissions is patent, and, ultimately, this must be taken over by the Cabinet or a body such as the National Development Council of which we shall speak just now, unless the two Commission are unified, which would require an amendment of the Constitution because the Finance Commission is mentioned in the Constitution.

National Development Council.

The working of the Planning Commission, again, has led to the setting up of another extra-constitutional and extra-legal body, namely, the National Development Council.

This Council was formed in 1952 as an adjunct to the Planning Commission, to associate the States in the formulation of the Plans. Constituted of the Union Prime Minister and the Chief Ministers of States, the functions of the Council are "to strengthen and mobilise the efforts and resources of the nation in support of the plans; to promote common economic policies in all vital spheres and to ensure the balanced and rapid development of all parts of the country," and in particular, are—

(a) to review the working of the National Plan from time to time;

(b) to recommend measures for the achievement of the aims and targets set out in the National Plan.

Since the middle of 1967, all members of the Union Cabinet and the Administrators of the Union Territories have been more members of this Council.[4]

Besides the Planning Commission, the annual conferences, whose number is legion, held under the auspices of the Union, serve to evolve co-ordination and integration even in the State sphere. Apart from conferences held on specific problems, there are annual conferences at the highest level, such as the Governors' Conference, the Chief Ministers' Conference, the Law Ministers' Conference, the Chief Justices' Conference, which are of no mean importance from the standpoint of the Union-State as well as inter-State relations. As Appleby[5] has observed, it is by means of such contacts rather than by the use of constitutional coercion, but the Union is maintaining a hold over this sub-continent, having sixteen autonomous States:

"No other large and important national government . . is so dependent as India on theoretically subordinate but actually rather *distinct units responsible to a different* political control, for so much of the administration of what are recognised as national programme of great importance to the nation.

The power that is exercised organically in New Delhi is the uncertain and discontinuous power of prestige. It is *influence rather than power.* Its method is making plans, issuing pronouncements, holding conferences Any real power in most of the development field is the personal power of particular leaders and the informal, extra-constitutional, extra-administrative power of a dominant party, coherent and strongly led by the same leaders. Dependence of achievement, therefore, in some crucial ways, apart from the formal organs of governance in forces which in the future may take quite different forms."

(B) Co-operation between the Union and the States

Apart from the agencies of federal control, there are certain provisions which tend towards a smooth working of both the Union and State Governments, without any unnecessary conflict of jurisdiction. These are—

(i) Mutual delegation of functions.

(ii) Immunity from mutual taxation.

Mutual delegation of functions.

(*i*) As explained already our Constitution distributes between the Union and the States not only the legislative power but also the executive power, more or less on the same lines [Arts. 73, 162].

The result is that it is not competent for a State to exercise administrative power with respect to Union subjects, or for the Union to take up the administration of any State function, unless authorised in that behalf by any provision in the Constitution. In administrative matters, a rigid division like this may lead to occasional deadlocks. To avoid such a situation, the Constitution has engrafted provisions enabling the Union as well as a State to make a mutual delegation of their respective administrative functions:

(*a*) As to the delegation of Union functions, there are two methods:

i. With the *consent* of the State Government, the *President* may, with-

out any legislative sanction, entrust any executive function to that State [Art. 258 (1)].

ii. Irrespective of any consent of the State concerned, *Parliament* may, while legislating with respect to Union subject, confer powers upon a State or its officers, relating to such subject [Art. 258 (2)]. Such delegation has, in short, a statutory basis.

(*b*) Conversely, with the *consent* of the Government of India, the *Governor* of a State may entrust of the Union Government of its officers, functions relating to a State subject, so far as that State is concerned [Art. 258A].

(C) Immunity from Mutual Taxation.

Need for mutual immunity for proper working of federal system.

The system of double government set-up by a federal Constitution requires, for its smooth working, the immunity of the property of one Government from taxation by another. Though there is some difference between federal Constitution as to the extent up to which this immunity should go, there is an agreement on the principle that mutual immunity from taxation would save a good deal of fruitless labour in assessment and calculation and cross-accounting of taxes between the two governments (Union and State).

This matter is dealt with in Arts. 285 and 289 of our Constitution, relating to the immunity of the Union and a State, respectively.

Immunity of Union property from State taxation.

The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State [Art. 285 (i)].

Exemption of property and income of a State from Union taxation.

Similarly, the property of a State is immune from Union taxation Art. 289 (1). The immunity, however, does not extend to all Union taxes, as held by *our* Supreme Court,[10] but is confined only such taxes as are levied *on* property. A State is, therefore, not immune from customs duty, which is imposed, not on property, but on the act of import or export of goods.

Not only the 'property' but also the 'income' of a State is exempted from Union taxation. The exemption is, however, confined to the State Government and does not extend to any local authority situated within a State. The above immunity of the income of a State is, again, subject to an overriding power of Parliament as regards any income derived from a commercial activity. Thus—

(*a*) Ordinarily, the income derived by a State from commerical activities shall be immune from income-tax levied by the Union.

(*b*) Parliament is, however, competent to tax the income of a State derived from a commercial activity.

(*c*) If, however, Parliament declares any apparently trading functions as functions 'incidental to the ordinary functions of government, the income from such functions shall be no longer taxable, so long as such declaration stands.

REFERENCES :

1. Until 1961, no additional all-India Services were created, but several new All-India Services have recently been created [vide footnote under Ch. XXVII, *post*].
2. S.R.O. 1418, dated 9-8-52; India, 1959, p. 146.
3. India 1957, p. 398.
4. Chandra, Federation in India, pp. 275 *et seq.*
5. Appleby, Public Administration in India, p 22.
6. Under the Second Five Year Plan, 70% of the 'revenue expenditure' and nearly the whole of the 'capital expenditure' on the State Plans have been financed by grants from the Union (under Art. 282 of the Constitution), known as 'matching grants'.
7. Vide *Basu's Commentary on the Constitution of India*, 5th Ed. Vol. IV, p. 304.
8. Rep. of the Administrative Reforms Commission, Vol. I, pp. 18-19, 26-39.
9. Statesman, 18-7-67, p. 1.
10. Re Customs Act, A.I.R. 1963 S.C. 1760.

CHAPTER XXIV

INTER-STATE RELATIONS

1. Inter-State Comity

Inter-State comity.

Though a federal Constitution involves the sovereignty of the Units within their respective territorial limits, it is not possible for them to remain in complete isolation from each other and the very exercise of internal sovereignty by a Unit would require its recognition by, and co-operation of, the other Units of the federation. All federal Constitutions, therefore, lay down certain rules of comity which the Units are required to observe, in their treatment of each other. These rules and agencies relate to such matters as—

(*a*) Recognition of the public acts, records and proceedings of each other.

(*b*) Extra-judicial settlement of disputes.

(*c*) Co-ordination between States.

(*d*) Freedom of inter-State, trade, commerce and intercourse.

Full faith and credit.

(A) *Recognition of public acts etc*—Since the jurisdiction of each State is confined to its own territory [Arts. (1)], the acts and records of one State might have been refused to be recognised in another State, without a provision to compel such recognition. The Constitution therefore, provides that—

"Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and every State" [Art. 261 (1)].

This means that duly authenticated copies of statutes or statutory instruments, judgments or orders of one State shall be given recognition in another State in the same manner as the statutes etc. of the latter State itself. Parliament has the power to legislate as to the mode of proof of such acts and records or the effects thereof [Art. 261 (2)].

Prevention and settlement of disputes.

(B) *Extra-judicial settlement of disputes.*—Since the States, in every federation, normally act as independent units in the exercise of their internal sovereignty, conflicts of interest between the units are sure to arise. Hence, in order to maintain the strength of the Union, it is essential that there should be adequate provision for judicial determination of disputes between the units and for settlement of disputes by extra-judicial bodies as well as their prevention by consultation and joint action. While Art. 131 provides for the judicial determination of disputes between States by vesting the Supreme Court with exclusive jurisdication in the matter, Art. 262 provides for the adjudication of *one class* of such disputes by an extra-

judicial tribunal, while Art. 263 provides for the prevention of inter-State disputes by investigation and recommendation by an administrative body. Thus—

(*i*) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley and also provide for the exclusion of the jurisdiction of all Courts, including the Supreme Court, to entertain such disputes [Art. 262 (1)].

In exercise of this power, Parliament has enacted the Inter-State Water Disputes Act, 1956, providing for the constitution of an *ad hoc* Tribunal for the adjudication of any dispute arising between two or more States with regard to the waters of any inter-State river or river valley.

(*ii*) The President can establish an inter-State Council for enquiring into and advising upon inter-State disputes, if at any time it appears to him that the public interests would be served by the establishment of such Council [Art. 263].

(C) *Co-ordination between States.*

Inter-State Councils.

The power of the President to set up inter-State Councils may be exercised not only for advising upon disputes, but also for the purpose of investigating and discussing subjects in which some or all of the States or the Union and one or more of the States have a common interest.

In exercise of this power, the President has already constituted the Central Council of Health, the Central of Local Self-Government (see p., *ante*).

In this connection, it should be mentioned that advisory bodies to advise on inter-State matters have also been established under statutory authority:

Zonal Councils.

(*a*) Zonal Councils have been established by the States Reorganisation Act, 1956 to *advise* on matters of common interest to each of the five zones into which the territory of India has been divided.

It should be remembered that these Zonal Councils do not owe their origin to the Constitution but to an Act of Parliament, having been introduced by the States Reorganisation Act, as a part of the scheme of reorganisation of the States with a view to securing co-operation and co-ordination as between the States, the Union Territories and the Union, particularly in respect of economic and social development. The creation of the Zonal Councils was a logical outcome of the reorganisation of the States on a linguistic basis. For, if the cultural and economic affinity of linguistic States with their contiguous States was to be maintained and their common interests were to be served by co-operative action, a common meeting ground of some sort was indispensable. The object of these

Councils as Pandit Nehru envisaged it, is to "develop the habit of co-operative working." The presence of the Union Minister in each of these Councils (as will be seen just now) also furthers co-ordination and national integration through an extra-constitutional advisory organisation, without undermining the autonomy of the States. If properly worked, these Councils would thus foster the 'federal sentiment' by resisting the separatist tendencies of linguism and provincialism.

(*i*) The *Central* Zone, comprising the States of Uttar Pradesh and Madhya Pradesh.

(*ii*) The *Nothern* Zone, comprising the States of Punjab, Rajasthan, Jammu & Kashmir, and the Union Territories of Delhi & Himachal Pradesh.

(*iii*) The *Eastern* Zone, comprising the States of Bihar, West Bengal, Orissa and Assam and the Union Territories of Manipur Tripura.

(*iv*) The *Western* Zone, comprising the States of Bombay and Mysore.

(*v*) The *Southern* Zone, comprising the States of Andhra Pradesh, Madras and Kerala.

Each Zonal Council consists of the Chief Minister and two other Ministers of each of the States in the Zone and the Administrator in the case of a Union Territory. There is also provision for holding joint meetings of two or more Zonal Councils. The Union Home Minister has been nominated to be the common chairman of all the Zonal Councils.

The Zonal Councils, as already stated, discuss matters of common concern to the States and Territories comprised in each Zone, such as, economic and social planning, border disputes, inter-State transport, matters arising out of the reorganisation of States and the like, and give advice to the Governments of the States concerned as well as the Government of India.

Regional Committee of State Legislature in Andhra Pradesh.

The Zonal Councils, referred to above, are to be distinguished from the Regional Committees which were set up in the Legislative Assembly of the States of Andhra Pradesh and Punjab. Since the Regional Committee in Punjab has been abolished by the Punjab Reorganisation Act, 1966, it now exists *only in Andhra Pradesh.*

While the Zonal Councils are *inter*-State organisations, the Regional Committee is an *inter*-State institution which was been in only two of the States, in view of their special linguistic and cultural problems, namely, Andhra Pradesh and Punjab. In Andhra Pradesh, 'Telangana' area, which originally belonged to Hyderabad and has been added to Andhra Pradesh by the States Reorganisation Act, 1956, constitutes a unit distinct from the rest of Andhra Pradesh. For safeguarding the special interests of these regions, the system of Regional Committees has been set up in the Legislative Assembly of these States, in exercise of the power conferred by Art. 371, which was substituted by the Constitution (Seventh Amendment) Act, 1956. Cl. (1) of Art. 371 deals with Regional Committees as follows—

"(1) Notwithstanding anything in this Constitution, the President may, by order made with respect to the State of Andhra Pradesh or Punjab, provide for the constitu-

tion and functions of regional committees of the Legislative Assembly of the State, for the modifications to be made in the rules of business of the Government and in the rules of procedure of the Legislative Assembly of the State and for any special responsibility of the Governor in order to secure the proper functioning of the regional committees."

In exercise of the power conferred by the above provision the President has made the Andhra Pradesh Regional Committee Order, 1958. It is to be noted that the Regional Committee set up under the above Orders is not mere advisory bodies but are to exercise some of the *constitutional powers* belonging to the Legislative Assembly of the State. In short, Art. 371 (1), together with the Order made thereunder, has modified the provisions of Part VI of the Constitution, so far as the State of Andhra Pradesh is concerned.

The Regional Committee is composed of those members of the Assembly who belong to the Region concerned. Briefly speaking, the jurisdiction of Regional Committee is confined to 'regional matters', such as local self-government, health, primary and secondary education, as scheduled in the Order. Whenever any Bill (other than a Money Bill), relating to a 'regional matter' is introduced in the Legislative Assembly, it shall be referred to the Regional Committee concerned for consideration and report to the Assembly for recommendations as to the variations as may be considered necessary by the Regional Committee, in the application of the Bill to the particular region in question, and the Assembly, in passing the Bill may take into consideration such recommendations. Similarly, a Regional Committee shall be competent to pass resolutions as to any legislative or executive action, not involving any financial commitments, and it shall be the duty of the Council of Ministers to comply with such resolutions, unless, in particular cases, the Chief Minister refers the matter to the Governor, whose decision shall be final.

It shall be a special *responsibility* of the Governor "for securing the proper functioning of regional committees in accordance with the provisions of this Order."

(*b*) The River Boards Act, 1956 provides for the establishment of a River Board for the purpose of advising the Governments interested in relation to the regulation or development of an inter-State river or river valley.

River Board.

(*c*) The Water Disputes Act, 1956 provides for the reference of an *inter-State* river dispute for arbitration by a Water Disputes Tribunal, whose award would be final.

Water Disputes Tribunal.

II. Freedom of inter-State Trade and Commerce.

The great problem of any federal structure is to minimise inter-State barriers as much as possible, so that the people may feel that they are members of one nation, though they may, individually, be residents of any of the Units of the Union. One of the means to achieve this object is to guarantee to every citizen the freedom of movement and residence throughout the country. Our Constitution guarantees this right by Art. 19 (1) (d)-(e),

No less important is the freedom of movement or passage of commodities and of commercial transactions between one part of the country and another. The progress of the country as a whole also requires free flow of commerce aid intercourse as between different parts, without any barrier. This is particularly essential in a federal system. This freedom is sought to be secured by the provisions [Arts. 301-307] contained in Part XIII of our Constitution. These provisions, however, are not confined to *inter-State* freedom but include *intra*-State freedom as well. In other words, subject to the exceptions laid down in this Part, no restrictions can be imposed upon the flow of trade, commerce and intercourse, not only as between one State and another but as between any two points within the territory of India whether any State border has to be crossed or not.

Need for the freedom of trade and commerce

Art. 301 thus declares—

"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

The limitations imposed upon the above freedom by the other provisions of Part XIII are—

(*a*) Non-discriminatory restrictions may be imposed by Parliament, in the public interest [Art. 302].

By virtue of this power, Parliament has enacted the Essential Commodities Act, 1955, which empowers, 'in the interest of the general public', the Central Government to control the production, supply and distribution of certain 'essential commodities', such as coal, cotton, iron and steel, petroleum.

(*b*) Even discriminatory or preferential provisions may be made by Parliament, for the purpose of dealing with a scarcity of goods arising in any part of India [Art. 303 (2)].

(*c*) Reasonable restrictions may be imposed by a State "in the public interest" [Art. 304 (b)]

(*d*) Non-discriminatory taxes may be imposed by a State on goods imported from other States or Union Territories, similarly as on *intra*-State goods [Art. 304(*a*)]

(*e*) The power of the Union or a State Legislature to make a law [under Art 19 (6) (*ii*)] for the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

Before leaving this topic, we should notice the difference in the scope of the provisions in Arts 19 (1) (g) and 301 both of which guarantee the freedom of trade and commerce.

Freedoms under Arts 19(1)(g) and 301.

Though this question has not been finally settled, it may be stated broadly that Art. 19 (1) (*g*) looks at the freedom from the standpoint of the *individual* who seeks to carry on a trade or profession and guarantees such

freedom throughout the territory of India subject to reasonable restrictions, as indicated in Art. 19 (5). Art. 301, on the other hand, looks at the freedom from the standpoint of the movement or passage of commodities or the carrying on of commercial transactions between one place and another, irrespective of the individuals who may be engaged in such trade or commerce The only restrictions that can be imposed on the freedom declared by Art 301 are to be found in Arts. 302-305. But if either of these freedoms be restricted, the aggrevied individual[1] or even a State[2] may challenge the constitutionality of the restriction, whether imposed by an executive order or by legislation.[1]

REFERENCES

1. *Atiabari Tea Co.* v *State of Assam*, AIR 1961 SC 232. *Automobile Transport* v. *State of Rajasthan*, AIR 1962 SC 1406.
2. *State of Rajasthan* v *Mangilal* (1969) 2 SCC 710 (*713*), *State of Assam* v. *Labanya Prabha* AIR 1967 SC. 1574 (*1578*)

CHAPTER XXV

EMERGENCY PROVISIONS

Federal government, according to *Bryce*, means weak government because it involves a division of power. Every modern federation, however, has sought to avoid this weakness by providing for the assumption of larger powers by the federal government whenever unified action is necessary by reason of emergent circumstances, internal or external. But while in countries like the *United States* this expansion of federal power takes place through the wisdom of judicial interpretation, in *India*, the Constitution itself provides for conferring extraordinary powers upon the Union in case of different kinds of emergencies. As has been stated earlier [p. 41, *ante*], the Emergency provisions of *our* Constitution enable the federal government to acquire the strength of a unitary system whenever the exigencies of the situation so demand.

Different kinds of emergencies.

The Constitution provides for *three different kinds* of 'emergencies' or abnormal situations which call for a departure from the normal governmental machinery set up by the Constitution:—viz., (i) An emergency due to external or internal aggression [Art. 352]. (ii) Failure of constitutional machinery in the States [Art. 356] (iii) Financial emergency [Art. 360].

I. A 'Proclamation of Emergency' may be made by the President at any time he is satisfied that the security of India or any part thereof has been threatened by war, external aggression or internal disturbance. It may be made even before the *actual occurrence* of any such disturbance, *i.e.*, when external aggression is apprehended.

Proclamation of Emergency.

An 'Emergency' means the existence of a condition whereby the security of India or any part thereof is threatened by war or external aggression or internal disturbance. A state of emergency exists under the Constitution when the President makes a 'Proclamation of Emergency'. The actual occurrence of war or of any internal violence is not necessary to justify a Proclamation of Emergency by the President. The President may make such a Proclamation if he is satisfied that there is an imminent danger of such external or internal aggression, and the Courts have no jurisdiction to enquire whether the security of India has in fact been threatened or not. In other words, the Courts cannot enquire into the validity of a Proclamation by the President on the ground that no emergency did exist in fact.

Every Proclamation of Emergency must be laid before each House of Parliament. The ordinary duration of a Proclamation is two months, unless before the expiry of that period it is approved by resolutions of both Houses of Parliament. But if such Proclamation has been issued at a time when the House of the People has been dissolved or if the dissolution takes place

during the period of two months referred to above, the Proclamation shall cease to operate at the expiration of 30 days from the date on which the House of the People first sits after its reconstitution, unless before the expiry of that period it has been approved by both Houses of Parliament.

The Executive and Legislature of the Union shall have extraordinary powers during an emergency.

The effects of a Proclamation of Emergency may be discussed under four heads—(*i*) Executive; (*ii*) Legislative; (*iii*) Financial; (*iv*) As to Fundamental Rights.

(i) *Executive*: When a Proclamation of Emergency has been made, the executive power of the Union shall, during the operation of the Proclamation, extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised [Art. 353 (*a*)].

In normal times, the Union Executive has the power to give directions to a State, which includes only the matters specified in Arts. 256-7 [p. 287, *ante*].

But under a Proclamation of Emergency, the Government of India shall acquire the power to give directions to a State on *'any'* matter, so that though the State Government will not be suspended, it will be under the complete *control* of the Union Executive, and the administration of the country, in so far as the Proclamation goes, will function as under a unitary system with local sub-divisions.

Effect of Proclamation of Emergency.

(ii) *Legislative*: (*a*) While a Proclamation of Emergency is in operation, Parliament may, by law, extend the normal life of the House of the People (5 years) for a period not exceeding one year at a time and not extending in any case beyond a period of 6 months after the Proclamation has ceased to operate [Proviso to Art. 83 (2), *ante*].

(*b*) As soon as a Proclamation of Emergency is made, the legislative competence of the Union Parliament shall be automatically widened and the limitation imposed as regards List II, by Article 246 (3), shall be removed. In other words, during the operation of the Proclamation of Emergency, Parliament shall have the power to legislate as regards List II (State List) as well [Article 250 (1); p. 254, *ante*]. Though the Proclamation ***shall not suspend the State*** Legislature, it will suspend the distribution of legislative powers between the Union and the State, so far as the Union is concerned,—so that the Union Parliament may meet the emergency by legislation over any subject as may be necessary, as if the Constitution were unitary.

(*c*) In order to carry out the laws made by the Union Parliament under its extended jurisdiction as outlined above, Parliament shall also have the power to make laws conferring powers, or imposing duties (as may be necessary for the purpose), upon the Executive of the Union [Art. 353 (b)].

(iii) **Financial: During the operation of the Proclamation of Emer-**

gency, the President shall have the constitutional power to modify the provisions of the Constitution relating to the allocation of financial relations between the Union and the States, by his own Order. But no such Order shall have effect beyond the financial year in which the Proclamation itself ceases to operate, and, further, such Order of the President shall be subject to approval by Parliament [Art. 354].

(iv) *As regards Fundamental Rights*: Articles 358-9, lay down the effects of a Proclamation of Emergency upon fundamental rights.

While Art. 358 provides that the State would be free from the limitations imposed by Art. 19, so that these *rights* would be non-existent against the State during the operation of a Proclamation of Emergency, under Art. 359, the rights themselves would not be suspended but the right to *move the Courts* for the enforcement of the rights or any of them, would remain suspended, by Order of the President. On the other hand, while the suspension under Art. 358 will continue during the operation of the Proclamation, the duration of the suspension under Art. 359 may be made shorter by the President's Order, so that it may not continue beyond the necessities of the case.

The peculiarity of these emergency provisions of *our* Constitution relating to suspension of fundamental rights is that no distinction is herein made between times of war and times of peace for, a Proclamation of Emergency may be made even in cases of external aggression or internal disturbances and that not only when they have actually taken place but also when there is 'imminent danger' thereof, according to the President's satisfaction, which is final on the point.

Use of the power.

A Proclamation of Emergency under Art. 352 was made by the President on October 26, 1962 in view of the Chinese aggression in the NEFA. Simultaneously, an Ordinance was promulgated, namely, the Defence of India Ordinance, which was later replaced by the Defence of India Act, 1962. It was also provided by a Presidential Order, issued under Art. 359, that a person arrested or imprisoned under the Defence of India Act would not be entitled to move any Court for the enforcement of any of his Fundamental Rights under Art. 14, 19 or 21.

This Proclamation of Emergency was revoked by an order made by the President on January 10, 1968.[1]

II. The Constitution provides for carrying on the administration of a State in case of a failure of the constitutional machinery.

(*a*) It is a duty of the Union to ensure that the government of every State is carried on in accordance with the provisions of the Constitution [Art. 355]. So, the President is empowered to make a Proclamation, when he is satisfied that the government of a State cannot be carried on in accordance with the provisions of the Constitution, either on the report of the Governor of the State or otherwise [Art. 356 (1)].

Proclamation of failure of constitutional machinery in States.

(*b*) Such Proclamation may also be made by the President where any State has failed to comply with, or to give effect to, any directions given by the Union, in the exercise of its executive power to the State [Art. 365].

By such Proclamation, the President may—

(a) assume to himself all or any of the functions of the Executive of the State or of any other authority save the High Court; and

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament. In short, by such Proclamation, the Union would assume control over all functions in the State administration, except judicial.

When the State Legislature is thus suspended by the Proclamation, it shall be competent—

(a) for Parliament to delegate the power to make laws for the State to the President or any other authority specified by him; (*b*) for the President to authorise, when the House of the People is not in session, expenditure from the Consolidated Fund of the State pending the sanction of such expenditure from Parliament and (c) for the President to promulgate Ordinances for the administration of the State when Parliament is not in session [Art. 357].

The duration of such Proclamation shall ordinarily be for two months. If, however, the Proclamation was issued when the House of the People was dissolved or dissolution took place during the period of the two months above-mentioned, the Proclamation would cease to operate on the expiry of 30 days from the date on which the House of the People first met, unless the Proclamation is approved by Parliament.

The two month's duration of such Proclamation can be extended by Parliament for a period of 6 months at a time, subject to a maximum duration of three years [Art. 356 (3)-(4)].

The Proclamation in case of failure of the constitutional machinery differs from a Proclamation of 'Emergency' on the following points:

(i) A Proclamation of Emergency may be made by the President only when the *security* of India or any part thereof is threatened by war or internal disturbance. A Proclamation in respect of failure of the constitutional machinery may be made by the President when the constitutional government of State cannot be carried on for any reasons, not necessarily connected with *war or internal disturbance.*

(ii) When a Proclamation of Emergency is made, the Centre shall get no power to *suspend* the State Constitution or any part thereof. The State Executive and Legislature would continue in operation and retain their powers. All that the Centre would get are *concurrent* powers of legislation and administration of the State.

But under a Proclamation in case of failure of the constitutional machinery, the State Legislature would be suspended and the executive authority of the State would be assumed by the President in whole or in part.

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

(iv) In the case of a Proclamation of failure of constitutional machinery, there is a maximum limitation to the power of Parliament to extend the operation of the Proclamation, namely, three years [Art. 356 (4), Proviso 1], but in the case of a Proclamation of Emergency, there is no such limitation upon the power of Parliament to extend the duration of the Proclamation.

Use of the power.

It is clear that the power to declare a Proclamation of failure of constitutional machinery in a State has nothing to do with any external or internal aggression; it is an extraordinary power of the Union to meet a political breakdown in any of the units of the federation [or the failure by such Unit to comply with the federal directives (Art. 365)], which would affect the national strength. It is one of the coercive powers at the hands of the Union to maintain the democratic form of government, and to prevent factional strifes from paralysing the governmental machinery, in the States, and, the power being vested in the President, acting on his satisfaction, its exercise cannot be the subject of judicial review. The importance of this power in the political system of India can hardly be overlooked in view of the fact that it has been used not less than twenty times during the first twenty years of the working of the Constitution:

(a) In 1951, in the Punjab,—when an alternative Ministry could not be formed after the resignation of Dr. Gopichand Bhargava's Ministry.

(b) On 4-3-53, in Pepsu (Patiala and East Punjab States Union) after successive Ministries failed to establish a stable government in the State.

(c) On 23-9-53, in Travancore-Cochin,—on the fall of the John Ministry.

(d) On 15-11-54, in Andhra,—when the Prakasam Ministry was defeated on the question of Prohibition by an alliance between the Communist and the P.S.P. parties, and there was no single party in the State which could command a majority in the Legislature, while the defeated Ministry refused to carry on the administration, as a care-taker government, till a fresh election could be held.

(e) In 1956, in Travancore-Cochin,—which was renewed on the formation of the new State of Kerala,—owing to the difficulty in forming a Ministry, after the defeat of the Congress Ministry. The Proclamation was revoked in April, 1957, on the formation of the Communist Ministry by Shri Namboodiripad.

(f) In July 1959, in Kerala,—when the Namboodiripad Ministry was virtually dismissed while still in power,—on the ground that owing to maladministration leading to a 'mass upsurge' against the government in power it was not possible to carry on the administration of the State in

accordance with the provisions of the Constitution, and the State Ministry refused to accept any of the alternatives suggested by the Centre, including the holding of a mid-term election to test the confidence in the Ministry.[3]

(g) In January 1961, in Orissa,—when the Coalition Ministry led by Dr. Mahtab resigned and the Governor reported that no party in the Legislature was in a position to form a Government.

(h) In Kerala, again, on the 10th September, 1964,—on the fall of the Congress Ministry led by Sri Shankar, as a result of a censure motion, which was backed by dissident Congressmen.[4] This Proclamation was continued, having been approved by resolutions of both Houses of Parliament under Art. 356 (4),—the last of such resolutions having been passed by the Houses on November 8, 1965.[5]

(i) After the revocation just mentioned, there was a mid-term election but Congress failed to secure a majority at that election and Art. 356 was resorted to, for the fourth time, in Kerala, towards the end of 1965.

(j) In Punjab (for the second time), in 1966, July, pending the separation of the State into the two States of Punjab and Haryana.[6]

(k) This power was next used in Goa, in December, 1966, for the purpose of holding an opinion poll, to determine whether it would merge with Maharashtra or continue as Union Territory.

(l) In Rajasthan, after the Fourth General Election, (on 13-3-67) owing to popular resistance against the formation of a Ministry by the Congress Party (under Mr. Sukhadia), who were in a numerical majority as a single party. The Proclamation was revoked on 25-4-67.

(m) In Haryana, on 26-11-67,—dissolving the State Assembly.

(n) In West Bengal, on 20-2-68, after the resignation of the P. C. Ghosh Ministry.[7]

(o) In the Uttar Pradesh, on 25-2-68, on the ground of political instability after the resignation of Charan Singh, the S.D.V. Chief Minister.[8] It continued till after the mid-term election in February, 1969.

(p) In Bihar on 29-6-68, after the resignation of Bhola Paswan, the U.F. Chief Minister, owing to political instability as the Opposition Congress Party was unable to form a Government..[9]

(q) In Punjab, for the third time, in August, 1968.[10]

(r) In West Bengal, for the second time, on 20-3-70, on the resignation of Sri Ajay Mukherji, Chief Minister of the United Front Ministry.

(s) In U.P., for the second time, on 2-10-70, when the Chief Minister Charan Singh refused to resign at the request of the Governor on the ground that he had lost the support of the Legislative Assembly,—Charan Singh having earlier advised the Governor to dismiss as many as 14 of his colleagues in the BKD—led Coalition Ministry.[11]

(t) In Orissa, for the second time, on 11-1-71, following the resignation of Chief Minister R. N. Singh, his advice for dissolution of Assembly not being accepted by the Governor.

The propriety of the use of the power on several occasions, has been the subject of criticism from many quarters. It has been strongly urged that the power under Art. 356 cannot be used to dismiss a Ministry so long as it commands the confidence of the majority in the State Legislature. But since the use of the power rests on the subjective satisfaction of the President its propriety cannot be questioned by the Courts. In other words, the Courts cannot investigate whether the circumstances justifying the making of the Proclamaion did in fact exist. Naturally, therefore, there is little chance of the question being authoritatively determined by the Judiciary, and it must continue to be agitated in the *political* arena. It may, however, be pointed out that under Art 356, the Union has the constitutional obligation to ensure that the Government of a State 'is carried on in accordance with the Constitution'. Again, the action under Art. 356 may be taken by the President even without the Governor's report (as indicated by the word 'otherwise' in Art. 356 (1). If, therefore, the President, from knowledge derived from any source, is satisfied that the Government of a State is violating any provision of the Constitution and he fails to make that Government correct itself by proper warning, he may have no alternative, in view of his constitutional obligation under Art. 355, than to use the power under Art 356 But, as Dr. Ambedkar observed in the Constituent Assembly,[12] the use of this drastic power in such circumstances, must be a matter of the last resort:

" "the proper thing we ought to expect is that such articles will never be called into operation[4] and that they would remain a dead-letter. If at all they are brought into operation, I hope the President who is endowed with this power *will take proper precautions* before actually suspending the administration of the Province."[13]

Proclamation of financial emergency.

'III. If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory there is threatened, he may by a Proclamation make a declaration to that effect [Art. 360 (1)].

The consequences of such a declaration are:

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

(b) Any such direction may also include—

(*i*) a provision requiring the reduction of salaries and allowances of all or any class of person serving in connection with the affairs of a State;

(*ii*) a provision requiring all Money Bills or other financial Bills to be reserved for the consideration of the President after they are passed by the Legislature of the State.

(c) It shall be competent for the President during the period any such Proclamation is in operation to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the

affairs of the Union including the Judges of the Supreme Court and the High Court [Art. 360 (3)-(4)].

The duration of such Proclamation will be similar to that of a Proclamation of Emergency, that is to say, it shall ordinarily remain in force for a period of two months, unless before the expiry of that period, it is approved by resolutions of both Houses of Parliament. If the House of the People is dissolved within the aforesaid period of two months, the Proclamation shall cease to operate on the expiry of 30 days from the date on which the House of the People first sits after its reconstitution, unless before the expiry of that period of 30 days it has been approved by both Houses of Parliament. It may by revoked by the President at any time, by making another Proclamation.

REFERENCES :

1. Vide Min of Home Affairs Notn. no. G.S.R. 93/10-1-68: Gaz. of India Extraordinary, d 10-1-68, Part II, Sec. 3, sub-sec. 1; Statesman, 11-1-68 [Though the Proclamation of Emergency was revoked w.e.f. 10-1-68, the Defence of India Act was allowed to continue for another six months.]
2. The failure of the President to apply this power to meet the anti-Bengali violence in Assam in 1960 has fortified the critics who held that the power is liable to be used, and has been used in the case of Kerala, on political grounds. For in Assam too, apart from the allegation that the particular Government had sympathies with the anti-Bengali sentiments which ultimately led to a mass massacre, it was fairly established that the insurgence could spread because of non-interference or indifference on the part of the local administration According to the crities the difference lay in the fact that while in Kerala the State Government belonged to a party other than the party at the Centre, in Assam it was the same.
3. The Home Minister's speech in the House of the People.
4. Statesman, 11-9-64, p. 1.
5. Statesman, 9-11-65, p. 1.
6. Statesman, 6-7-66, p. 1.
7. Statesman, 20-2-68, p. 1.
8. Statesman, 25-2-68, p 1.
9. Statesman, 30-6-68, p. 1
10. Amrita Bazar Patrika, 24-8-68, p. 1.
11. Statesman, 3-10-70, p. 1.
12. C. A. Deb. IX, p. 177.
13. This expectation has been belied by the use of the power not less than twenty times during the first two decades of the Constitution.

PART SEVEN

MISCELLANEOUS

CHAPTER XXVI

RIGHTS AND LIABILITIES OF THE GOVERNMENT AND PUBLIC SERVANTS

Property of the Union and the States.

Our Constitution views the Union and the States as juristic persons, capable of owning and acquiring property, making contracts, carrying on trade or business, bringing and defending legal actions, just as private persons, subject to modifications specified in the Constitution itself.

The Union and a State can acquire property in several ways—

(a) *Succession.*—Broadly speaking, the property, assets, rights and liabilities that belonged to the Dominion of India or a Governor's Province or an Indian State at the commencement of the Constitution devolved by virtue of the Constitution, on the Union or the corresponding State under the Constitution [Arts. 294-5].

The test for determining whether any given property (or liability) would devolve upon the Union or a State was the *purpose* for which the property was being held at the commencement of the Constitution. If such purpose relates to any of the matters included in the Union List of Sch. VII of the Constitution, it devolved upon the Union. In other cases, it passed to the corresponding State.

(b) *Bona Vacantia.*—Any property in the territory of India which, if this Constitution had not come into operation, would have accrued to His Majesty or as the case may be, to the Ruler of an Indian State by escheat or lapse, or as *bona vacantia* for want of a rightful owner, shall, if it is property situate in a State, vest in such State, and shall in any other case, vest in the Union [Art. 296].

(c) *Things underlying the Ocean.*—All lands, minerals and other things of value underlying the ocean within the territorial waters of India shall vest only in the Union [Art. 297].

(d) *Compulsory acquisition or requisition by law.*—Both the Union and State Legislatures shall be competent to compulsorily acquire or requisition property by making law, subject to the provisions of Art. 31(2) [see p. 102, *ante*].

(e) *Acquisition under executive power.*—The Government of India or of a State may make contracts and acquire property, say by purchase or exchange, just as a private individual, in exercise of their respective powers, and for the purposes of their respective Governments [Art. 298].

Power to carry on trade.

The Union or a State Government is competent to carry on *any* trade or business and make contracts for that purpose, in exercise of its executive power. Such business shall, however, be subject to regulation by the competent Legislature. That is to say, if the Union Government takes up a business

relating to a subject (say, agriculture) which is included in the State List, the business will be subject to the legislative jurisdiction of the State Legislature [Art. 298].

The Union or a State, while legislating with respect to a trade or business carried on by itself, is immune from a constitutional limitation to which it would have been otherwise subject. If an ordinary law excludes a citizen from carrying on a particular business, wholly or partially, the *reasonableness* of such law has to be tested under Art. 19(6). Thus, if the State creates a monopoly in favour of a private trader without any reasonable justification, such law is liable to be held unconstitutional by the Courts. But if a law creates a monopoly in favour of the State itself as a trader, whether to the partial or complete exclusion of citizens,[1] the reasonableness of such law cannot be questioned by the Courts [Exception to Art. 19(6)].

In short, it is competent for the Union or a State not only to enter into a trade but also to create a monopoly in its own favour in respect of such trade. This is what is popularly known as the 'nationalisation' of a trade.

Power to borrow money.

The power of either Government to make loans has already been dealt with.

Formalities for Government contracts.

As stated already, both the Union and State Governments have the power to enter into contracts like private individuals, in relation to the respective spheres of their executive power. But this contractual power of the Government is subject to some special formalities required by the Constitution, in addition to those laid down by the Law of Contract which governs any contract made in India.

The reason for imposing these special conditions is that contracts by Government raise some problems which do not or cannot possibly arise in the case of contracts entered into by private persons. Thus, there, should be a definite procedure according to which contracts must be made by its agents, in order to bind the Government; otherwise public funds may be depleted by clandestine contracts made by any and every public servant. The formalities for contracts made in the exercise of the executive power of the Union or of a State, as laid down in Art. 299 are that the contract—

(*a*) must be executed by a person duly authorised by the President or Governors, as the case may be;

(*b*) must be executed by such person 'on behalf of' the President or Governor, as the case may be;

(*c*) must be 'expressed to be made by' the President or Governor, as the case may be.

If *any* of these conditions are not complied with, the contract is not binding on or enforceable *against* the Government,[2] though a suit may lie against the officer who made the contract, in his personal capacity.

Suability of the Union and State.

The right of the Government to sue and its liability to be sued, like a private individual in the ordinary Courts, is also subject to certain special considerations.

Art. 300(1) of the Constitution says—

"The Government of India may sue or be sued by the name of the Union of India and the Govesnment of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted."

This Article, however, does not give rise to any cause of action, but merely says that the State can sue or be sued, as a juristic personality, in matters where a suit would lie against the Government had not the Constitution been enacted, subject to legislation by the appropriate Legislature. No such legislation has, however, been undertaken so far. For the substantive law as to the liability of the State, therefore, we have to refer to the law as it stood before the commencement of the Constitution.

I. Right to sue.

So far as the right to sue is concerned, the Union may sue by the name of the 'Government of India', while a State may sue by the name of that State, e.g., 'State of Bombay.' Either Government may sue not only a private person but also another Government. Thus, the Union may bring a suit against one or more States; while a State may sue another State or the Union [Art. 131; see p. 237, *ante*]. It is to be noted that when the suit is against a private individual, the suit will have to be instituted in the Court of the lowest jurisdiction, according to the law of procedure; but in the case of a suit between two Governments, it must be instituted in the highest tribunal, namely, the Supreme Court, which has exclusive original jurisdiction over such federal litigation [see *ante*].

II. *Liability to be sued.*

In this matter, a distinction is to be made between contractual liability and the liability for torts or civil wrongs, because such distinction has been observed in India since the days of the East India Company, up to the commencement of the Constitution, and that position is maintained by Art. 300 of the Constitution, subject to legislation by Parliament.

(a) *Contract.*

In India, direct suit had been allowed against the East India Company, the Secretary of State or the existing Governments in matters of contract, instead of a petition of right by which a British subject sought relief from the Crown, as a matter of grace. The Government of India Acts expressly empowered the Government to enter into contracts with private individuals and the corresponding provision in the Constitution in Art. 299(1) maintains that position.

Subject to the formalities prescribed by Art. 299 [see p. 290, *ante*] and to statutory conditions or limits thus, the contractual liability of the State,

under *our* Constitution, is the same as that of an individual under the ordinary law of contract.

(b) *Torts.*

The liability of the State under the existing law, for actionable wrongs committed by its servants, cannot be so simply stated as in the case of contracts. As will appear from below, the state of the law is unnecesarily complicated by reason of its being founded on the position of the British Crown under the Common Law and of the East India Company upon its supposed representation of the sovereignty of the Crown, both of which have become archaic, owing to changes in history and in law.

Even in England, the Common Law maxim that the 'King can do no wrong' has been superseded by the Crown Proceedings Act, 1947. Nevertheless, in the absence of any such corresponding legislation, Courts in India have no other alternative than to follow the existing case-law which is founded on the old English theory of immunity of the State, founded on the maxim 'King can do no wrong'.

The existing law in India, thus, draws a distinction between the sovereign and non-sovereign functions of the Government and holds that Government cannot be sued for torts committed by the Government or its officers in the exercise of its 'sovereign' functions.

Thus, it has been held—

(A) No action lies against the Government for injury done to an individual *in the course of* exercise of the *sovereign functions* of the Government, such as the following:

(*i*) Commandeering goods during war; (*ii*) making or repairing a military road; (*iii*) administration of justice; (*iv*) improper arrest, negligence or trespass by Police officers; (*v*) wrongs committed by officers in the performance of duties imposed upon them by the Legislature, unless, of course, the statute itself prescribes the limits or conditions under which the executive acts are to be performed; or the wrongful act was expressly authorised or ratified by the State; (*vi*) loss of movables from Government custody owing to negligence of officers; (*vii*) payment of money in custody of Government to a person other than the rightful owner, owing to negligence of an officer in the exercise of statutory affairs, where Government does not derive any benefit from such transaction *e.g.*, by a Treasury Officer paying money to a wrong person on a forged cheque owing to negligence in performing his statutory duty to compare the signature.

(B) 1. On the other hand, a suit lies against the Government for wrongs done by public servants in the course of transactions which a trading company or a private person could engage in, such as the following:

(*i*) Injury due to the negligence of servants of the Government employed in a dockyard or a railway; (*ii*) trespass upon or damage done to private property in the course of a dispute as to right to land between Government and the private owner, even though committed in the course of a colourable exercise of statutory powers; (*iii*) the State is liable to be

used for *restitution of* the profits unlawfully made, just as a private owner, *e.g.*, where Government retains property or moneys unlawfully seized by its officers, a suit lies against the Government for its recovery, with interest; (*iv*) defamation contained in a resolution issued by Government; (*v*) injury caused by a Government vehicle while such vehicle was not being engaged in carrying out any sovereign function.[3]

Though the State itself is immune from liability in certain cases already noted owing to historical reasons, *our* Constitution does not grant any immunity to a public servant for his official acts which are unlawful under the ordinary law of the land. The only exception to this rule is a limited immunity granted to the heads of State, namely, the President and a Governor, both for their political and personal acts, while in office [Art. 361].

Suiability of heads of State.

I. *Official acts.*—The immunity given for official acts of the President or the Governor is absolute but it is limited only to the President and the Governor personally, and no other person can shield himself from legal liability on the plea that it was done under orders of the President or a Governor.

Immunity of President or Governor for official acts.

The President or a Governor is immune from legal action and cannot be sued in a Court, whether during office or thereafter, for any act done or purported to be done by them or for any contract made [Art. 299 (2)] in exercise of their powers and duties as laid down by the Constitution or by any law made thereunder [Art. 361 (1)]. Though the President is liable to be impeached under Art. 61 [see p. 134, *ante*] and the Governor may be dismissed by the President [*ante*],—for any unconstitutional act done in exercise of their official powers, no action lies in the Courts.

It follows from the rule of personal immunity that no Court can compel the President or the Governor to exercise any power or to perform any duty nor can a Court compel him to forbear from exercising his power or performing his duties. He is not amenable to the writs or directions issued by any Court.

The remedy to an individual for wrongful official acts of the President or a Governor is twofold—

(i) To bring appropriate proceedings against the respective Government itself, where such proceedings lie [Art. 361 (1), Prov. 2].

(ii) To bring an action against the public servant, individually, who has executed the wrongful order of the President or Governor, and must, therefore, answer to the aggrieved individual, under the ordinary law of crimes or civil wrongs, subject to limitations, to be explained shortly.

In this connection, it should be noted that while the Constitution grants personal immunity to the President or a Governor for official acts, no such immunity is granted to their Ministers. But by virtue of the peculiar position of Ministers as regards official acts of the President or the Governor, as the case may be, it is

Position of Ministers.

not possible to make a Minister liable in a court of law, for any official act done in the name of the President or Governor. As pointed out earlier, the position in this respect in India differs from that in the United Kingdom. In *England*, every official act of the Crown must be countersigned by a Minister who is responsible to the law and the Courts for that act. But though the principle of ministerial responsibility has been adopted in *our* Constitution, both at the Centre and in the States, the principle of legal responsibility has not been introduced in the English sense. There is no requirement that the acts of the President or of the Governor must be countersigned by a Minister. Further, the Courts are precluded from enquiring what advice was tendered by the Ministers to the President or the Governor. It is clear, therefore, that the Ministers shall not be liable for official acts done on their advice.

II. *Personal acts.*—The immunity of the President or a Governor for unlawful personal acts committed by him during the term of his office is limited to the duration of such term.

Personal acts during terms of office.

(a) As regards crimes, no proceedings can be brought against them or continued while they are in office: but there is nothing to prevent such proceedings after their office has terminated by expiry of term, dismissal or otherwise.

(b) As regards civil proceedings, there is no such immunity, but the Constitution imposes a procedural condition:

Civil proceedings may be brought against the President or a Governor, in respect of their *personal* acts, but only if two months' notice in writing has been delivered to the President or Governor.

Needless to state again, there is no corresponding immunity in favour of a Minister, either in respect of civil or criminal proceedings for their personal acts done during their term of office.

As stated before, the Constitution makes no distinction in favour of Government servants as to their personal liability for any unlawful act done by them whether in their official or personal capacity. There is only one provision in the Constitution relating to the liability of public servants; but the general law imposes certain conditions as regards their liability for official acts, in view of their peculiar position. These may be analysed as follows:

Suiability of public officials.

(i) *Contract.*—If a contract made by a Government servant in his official capacity complies with the formalities laid down in Art. 299 [see p. 302, *ante*], it is the Government concerned which will be liable in respect of the contract and not the officer who executed the contract [Art. 299(2)].

If, however, the contract is not made in terms of Art. 299 (2), the officer who executed it would be *personally* liable under it, even though he may not have derived any personal benefit.

(ii) *Torts.*—As stated earlier [p. 304, *ante*], in India, the Government

is not liable to answer in damages for its 'sovereign' acts. In such cases, the officer through whom such act is done is also immune.

In other cases, action will lie against the Government as well as the officer personally, unless—

(a) the act has been done, *bona fide*, in the performance of duties imposed by a statute;

(b) he is a judicial officer, within the meaning of the Judicial Officers' Protection Act, 1850. This Act gives absolute immunity from a civil proceeding to a judicial officer for acts done in the discharge of his official duty.[3]

But any civil action, whether in contract or in torts, against a public officer "in respect of any act *purported* to be done by such public officer in his official capacity", is subject to the procedural limitations in ss. 80-82 of the Code of Civil Procedure which includes a two months' notice as a condition precedent to a suit.[3]

(iii) *Crimes.*—The criminal liability of a public servant is the same as that of an ordinary citizen except that—

(a) There is no liability for judicial acts or for acts done in pursuance of judicial orders [ss. 77-8, Indian Penal Code].[4]

(b) Officers, other than judicial, are also immune for any act which they, by reason of some mistake of law or fact, in good faith, believed themselves to be bound by law to do [s. 76, I.P.C.].[4]

(c) Where a public servant who is not removable from his office save by or with the sanction of the Central or State Government is accused of an offence, committed by him while acting or purporting to act in the discharge of his official duty, no Court can take cognizance of such offence without the previous sanction of the President or the Gove. or, as the case may be [s. 197, Criminal Procedure Code].[4]

For acts done for the maintenance or restoration of order in an area where martial law was in force, Parliament may exempt the officers concerned from liability by validating such acts by making an Act of Indemnity [Art. 34].

REFERENCES :

1. *Narayanappa* v. *State of Mysore*, A.I.R. 1960 S.C. 1073 (1078); *Parbhani Transport Society* v. *R. T. A.*, A. 1960 S.C. 801.
2. *Chaturbhuj* v. *Maheswar*, (1954) S.C.R. 817; *Bhikraj* v. *Union of India*, A.I.R. 1962 S.C. 118; *Chaudhury* v. *State of M. P.*, A.I.R. 1967 S.C. 203.
3. *State of Rajasthan* v. *Vidyawati*, A.I.R. 1962 S.C. 933 (935).
4. Author's *Commentary on the Constitution of India*, 8th Ed., Vol. V, p. 453.

CHAPTER XXVII

THE SERVICES AND PUBLIC SERVICE COMMISSIONS

One of the matters which do not usually find place in a constitutional document but have been included in *our* Constitution is the Public Services.

Position of civil servants in a Parliamentary system of Government.

The wisdom of the makers of *our* Constitution in giving a constitutional basis to such matters as are left to ordinary legislation and administrative regulations under other Constitutions may be appreciated if we properly assess the importance of public servants in a modern democratic government.

A notable feature of the Parliamentary system of government is that while the policy of the administration is determined and laid down by ministers responsible to the Legislature, the policy is carried out and the administration of the country is actually run by a large body of officials who have no concern with politics. In the language of Political Science, the officials form the 'permanent' Executive as distinguished from the Ministers who constitute the 'political' Executive. While the political Executive is chosen from the party in majority in the Legislature and loses office as soon as that party loses its majority, the permanent Executive is appointed by a different procedure and does not necessarily belong to the party in power. It maintains the continuity of the administration irrespective of the neutrality in politics that characterises the civil servants who constitute the permanent Executive and accounts for their efficiency. While the Ministers, generally, cannot claim any expert knowledge about the technique of administration and the details of the administrative departments, the civil servants, as a body, are supposed to be experts in the detailed working of government. One inherent vice in this system of carrying on the administration with the help of these 'permanent' civil servants is that they tend to be more and more tied to red-tape and routine and to lack that responsiveness to fresh ideas which the political Executive is sure to maintain owing to their responsibility to the Legislature. But with all this inherent vice, the civil servants are *indispensable* to the Parliamentary form of Government.

As the Joint Select Committee on Indian Constitutional Reforms[1] observed—

"The system of responsible Government, to be successful in practical working, requires the existence of a competent and independent Civil Service staffed by persons capable of giving to successive Ministers advice based on long administrative experience, secure in their positions, during good behaviour, but required to carry out the policy upon which the Government and Legislature eventually decide."

The reason is that in the modern age, government is not only an art but also a science and, to that extent a business for experts. It has, therefore, naturally fallen into the hands of a very large army of people who have

taken up the business of government, being in service of the Government itself,—as their professional career. Since they cannot be dispensed with, the problem of a modern democracy is how to prevent them from converting the democratic system into a 'bureaucracy' or officialdom. The remedy lies not in the assumption of the work of government by the Legislature, for a direct democracy as prevailed in the ancient State is an impossibility under modern conditions. Nor does remedy lie in the assumption of the actual work of administration, as distinguished from the laying down of policies, by the Ministers or the political heads of the Departments, for, as has been already stated, the task is not only technical but enormous, and the Ministers might lose sight of the broader and serious questions of national urgency if they were to enter into the details of the day-to-day administration.

Matters which call for regulation.

The proper solution of the problem, therefore, is—firstly, to select the right type of men, who shall be not only efficient but also honest and who can be trusted with confidence that they would not abuse their position and would be strictly impartial, having no personal or political bias of their own and would be ready to faithfully carry out the policy once it is formulated by the government for the time being in power; secondly, to keep them under proper discipline so that they maintain the proper relationship with their employer, viz., the State, and thirdly, to ensure that for breaches of the rules of discipline, they can be brought under proper departmental action and, for breaches of the law, they can be effectively brought before the Courts of law. Once the interests of the State are thus secured, it is equally essential that the security of tenure of public servants who do not contravene the foregoing principles should be ensured. For, the best available talents would never be attracted unless there is a reasonable security against arbitrary action by superior officials who exercise the governmental power as to removal and discipline.

All the aforesaid objects can be achieved only if there are definite rules and proper safeguards in respect of what is broadly known as the 'conditions of service' of public servants and *our* Constitution seeks to lay down some basic principles in this behalf.

Power to prescribe conditions of service.

It is not that *our* Constitution seeks to make detailed provisions relating to every matter concerning the Public Service. The makers of the Constitution realised that was not practicable and therefore left the recruitment and conditions of service of the public servants of the Union and of the States to be regulated by Acts of the appropriate Legislatures. Pending such legislation, however, these matters were to be regulated by Rules made by the President or by the Governor in connection with the services under the Union and the States respectively. Though already some Acts have been passed, for instance, the All-India Services Act, 1951, the larger part of the field is still covered by Rules made by the Government, not only under the Constitution, but also those existing from before (that

is, made under the Government of India Acts), which are to continue to be in force until superseded by the appropriate authority. It is to be noted, however, that neither a Rule nor any Act of the Legislature made in this behalf can have any validity if its provisions are contrary to those of the Constitution. As a matter of fact, our courts have already annulled a number of Service Rules on the ground of contravention of some of the constitutional provisions. For instance, if any rule or order enables the Government to dismiss a Government servant without giving him an opportunity to be heard, such rule would be struck down as unconstitutional owing to contravention of the requirement in Art. 311 (2).[2]

The two matters which are substantively dealt with by our Constitution are—

(*a*) tenure of office of the public servants and disciplinary action against them;

(*b*) the constitution and functions of the Public Service Commissions, which are independent bodies to advise the Government on some of the vital matters relating to Services.

Tenure of office.

We have inherited from the British system the maxim that all service is at the pleasure of the Crown, and *our* Constitution, therefore, primarily declares that anybody who holds a post (civil or military) under the Union or a State holds his office during the pleasure of the President or the Governor, as the case may be [Art. 310].

Service at pleasure.

This means that any Government employee may be dismissed at *any* time and on *any* ground, without giving rise to any cause of action for wrongful dismissal, except where the dismissal is in contravention of the constitutional safeguards to be mentioned just now.

This right of the Government to dismiss a Government servant at its pleasure cannot be fettered by any contract and any contract made to this effect would be void, for contravention of Art. 310 (1) of the Constitution which embodies the principle of service at pleasure. This rule is, however, subject to one exception specified in Art. 310 (2), namely, that where Government is obliged to secure the services of technical personnel or specialists, not belonging to the regular Services, by entering into a special contract, without which such persons would not be available for employment under the Government. In such cases, compensation would be payable for premature termination of the service if the contract provides for such payment. But even in such cases, no compensation would be payable under the clause if the service is terminated within the contractual period, on the ground of his *misconduct*. It will be payable only—

Cannot be fettered by contract.

(*a*) if the post is abolished before the expiration of the contractual period; or,

(*b*) if the person is required to vacate his post before the expiry of the contractual period, for reasons *unconnected with misconduct*.

Limitations upon exercise of the pleasure.

While, however, the pleasure of the Crown in England is absolutely unfettered, the Constitution of India subjects the above pleasure to certain exceptions and limitations:

A. In the case of certain high officials, the Constitution lays down specific procedures as to how their service may be terminated. Thus, as has been noted in their proper places earlier, the Supreme Court Judges, the Auditor-General, the High Court Judges and the Chief Election Commissioner shall not be removed from their offices except in the manner laid down in Arts. 124, 148, 218, 324, respectively. These offices thus constitute exceptions to the general rule of tenure 'during pleasure' of Government servants.

Exceptions in the case of some high officials.

B. Though all other Government servants hold office during the pleasure of the President or the Governor (as the case may be), two procedural safeguards are provided for the security of tenure of *'civil'* servants as *distinguished from military personnel*, namely, that—

Safeguards for civil servants.

(*a*) A civil servant shall not be dismissed or removed by any authority subordinate to that by which he was appointed. In other words, if he is to be removed from service, he is entitled to the consideration of his appointing authority or any other officer of corresponding rank before he is so removed. The object of this provision [Art. 311 (1)] is to save a public servant from the caprices of officers of inferior rank.

(*b*) The other security which is guaranteed by the Constitution is that no dismissal, removal or reduction in rank shall be ordered against a civil servant unless an inquiry is held where "he has been given a *reasonable opportunity of being heard in respect of the charges*"[3] brought against him and of *"making representation on the penalty proposed"*[3] on the basis of the inquiry [Art. 311 (2)].

What 'reasonable opportunity' implies.

According to the Supreme Court,[4] the expression 'reasonable opportunity' implies an obligation on the part of the Government or other authority proceeding against a civil servant, to give him—

(*i*) an opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;

(*ii*) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and, finally,

(*iii*) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the inquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the Government servant, tentatively proposes to inflict one of the three punishments and communicates the same to the Government servant.

It is now *settled*[5] that the person charged has ordinarily the right to reasonable opportunity of showing cause *twice*, before the order of dismissal, etc., is passed. There are two stages in a proceeding under the present Article: the first being when the charges are inquired into and at this stage, the person required to meet the charges should be given a reasonable opportunity to enter into his defence; and the second stage is when after the inquiring authority has come to its conclusion on the charges and there arises the question of the proper punishment to be awarded. An opportunity has then again to be given to make representation against the punishment proposed.[6]

Opportunity at two stages.

Hence, an order of dismissal, removal or reduction would contravene Art. 311 (2), if—

(*a*) At the inquiry stage, the Petitioner is not given 'reasonable opportunity' to defend himself.

(*b*) After the inquiry,—a further opportunity to make representation against the punishment proposed is not given.

(A) *At the inquiry stage*: 'Reasonable opportunity' at this stage requires that (*a*) the authority must (*i*) frame specific charges with full particularity, (*ii*) intimate those charges to the Government servant concerned, (*iii*) give him an opportunity to answer those charges, and (*iv*) after considering his answers take its decision; (*b*) the rules of natural justice should be observed in coming to the finding against the accused.

(B) *After the inquiry*: A further opportunity to show cause against the punishment proposed must be given.

1. This requires not only notification of the action proposed but of the grounds on which the authority is proposing that the action should be taken and that the person concerned must then be given a reasonable time to make his representations against the proposed action and the grounds on which it is proposed to be taken. Hence, the authority requiring the Government servant to show cause should communicate to him not only (*a*) the punishment proposed but (*b*) the reasons for coming to that conclusion, including the findings on the charges held proved, indicating the punishment proposed on each of such charges.

A copy of the findings of the inquiring officer must, therefore, be supplied to the person concerned to punish him *on the results* of the inquiry, or *on the findings* contained in any report.[7] Broadly speaking, the rules of natural justice require that the person discharged must be apprised of all the statements or reports upon which the order of dismissal is based.

In which cases the opportunity must be given.

The inquiry must be held and the opportunity to make representation must be given if two conditions are satisfied:

(*i*) The employee is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State.

(*ii*) Such employee is sought to be dismissed, removed or 'reduced in rank'.

While a person "dismissed" is ineligible for re-employment under the Government, no such disqualification attaches to a person 'removed'. But two elements are common to 'dismissal' and 'removal':

(*a*) Both the *penalties* are awarded on the ground that the conduct of the Government servant is blameworthy or deficient in some respect.

(*b*) Both entail penal consequences, such as the forfeiture of the right to salary, allowances or pension already acquired, for past services.

What constitutes dismissal, removal and reduction in rank.

Where no such penal consequence is involved, it would not constitute 'dismissal' or 'removal', e.g., where a Government servant is 'compulsorily retired',[8] without any further penal consequence attached to such order.[9]

As would appear from the decision of the Supreme Court,[10] the term actually used in the order terminating the officer's services is not conclusive. Words such as 'discharged' or 'retrenched' may constitute 'dismissal' or 'removal', if the order entails *penal consequences*, as referred to above.

It is also clear that in order attract Art. 311 (2), the termination of the services must be *against the will* of the civil servant. Hence, the following orders of termination of service have been held *not* to constitute 'dismissal' or 'removal':

(*a*) Termination in accordance with the terms of the contract of employment.[11]

(*b*) Termination in terms of the conditions of service as embodied in the relevant Department Rules applicable to the Government servant,[12] provided such conditions are not inconsistent with the provisions of the Constitution.[3]

Reduction in rank means the degradation in rank or status of the officer, directed by way of penalty. It thus involves two elements—(*a*) reduction in the physical sense, meaning degradation; (*b*) such degradation or demotion must be by way of penalty.

(*a*) Reduction in rank in the *physical sense* takes place where the Government servant is reduced to a lower post or to a lower pay-scale. Even reduction to a lower stage in the pay-scale (ordered by way of penalty) would involve a reduction in rank, for the officer loses his rank or seniority in the gradation list of his substantive rank.

(*b*) As regards the *penal nature* of the reduction, the Supreme Court has applied the test of 'right to the rank' in question, in the same manner as the 'right to the post' test has been applied in the case of dismissal or removal. Reduction in rank takes place only when a person is reduced from his substantive rank. Hence,

(*i*) Where a Government servant has a *right* to a particular rank, the very reduction from that rank will be deemed to be by way of penalty and Art. 311 (2) will be attracted, without more. Thus,

An officer who holds a permanent post in a substantive capacity, cannot be transferred to a lower post, without complying with Art. 311 (2).

(*ii*) On the other hand, where a Government servant has no title to a particular rank, under the contract of his employment or conditions of service,—there will ordinarily be no reduction in rank within the meaning of Art. 311 (2).[13]

Exceptions to the requirement of giving opportunity.

It is to be noted that even where a person holding a civil post is dismissed, removed or reduced in rank, no inquiry need be held and no opportunity need be given in three classes of cases, which themselves explain the reasons for the exceptions—

(*a*) Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge;

(*b*) Where an authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(*c*) Where the President or Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry [Proviso to Art. 311 (2)].

Public Service Commissions for the Union and the States.

There shall be a Public Service Commission for the Union; and a Public Service Commission for each State or a Joint Public Service Commission for a group of States if the Union Parliament provides for the establishment of such a joint Public Service Commission in pursuance of a resolution to that effect being passed by the State Legislatures concerned. The Union Public Service Commission also may, with the approval of the President, agree to serve the needs of a State, if so requested by the Governor of that State [Art. 315].

The number[14] of members of the Commission and their conditions of service shall be determined (*a*) by the President in the case of the Union or a Joint Commission, and (b) by the Governor of the State in the case of a State Commission; provided that the conditions of service of a member of a Commission shall not be altered to his disadvantage after his appointment.

Appointment and term of office of members.

The *appointment* of the Chairman and members of the Commission shall be made—(*a*) in the case of the Union or a Joint Commission, by the President; and (*b*) in the case of a State Commission, by the Governor of the State. Half of the members of a Commission shall be persons who have held office under the Government of India or of a State for at least 10 years [Art. 316].

The *term of service* of a member of a Commission shall be 6 years from the date of his entering upon office, or until he attains the age of 65 years in the case of the Union Commission or of 60 years in the case of a State or a Joint Commission. But a member's office may be terminated earlier, in any of the following ways:

(*i*) By *resignation* in writing addressed to—the President in the case of the Union or a Joint Commission, or the Governor in the case of a State Commission.

(*ii*) By *removal* by the President—(*a*) if the member is adjudged insolvent; or engages himself during his term in paid employment outside the duties of his office; or is in the opinion of the President infirm in mind or body; (*b*) on the ground of misbehaviour according to the report of the Supreme Court which shall hold an enquiry on this matter on a reference being made by the President.

Thus, even in the case of a State Commission, it is only the President who can make a reference to the Supreme Court and make an order of removal in pursuance of the report of the Supreme Court. The Governor has only the power to pass an interim order of suspension pending the final order of the President on receipt of the report of the Supreme Court [Art. 317 (1)-(2)].

A member shall be deemed to be guilty of misbehaviour—(*i*) if he is in any way concerned or interested in any contract made on behalf of the Government of India or of a State; or (*ii*) if he participates in any way in the profit of such contract or agreement or in any benefit therefrom in common with other members of an incorporated company [Art. 317 (3)].

The Constitution seeks to maintain the independence of the Public Service Commission from the Executive in several ways—

Independence of the Commissions.

(*a*) The Chairman or a member of a Commission can be removed from office only in the manner and for the grounds specified in the Constitution (see above).

(*b*) The conditions of service of a member of the Public Service Commission shall not be varied to his disadvantage after his appointment [Proviso to Art. 318].

(*c*) The expenses of the Commission are charged on the Consolidated Fund of India or of the State (as the case may be) [Art. 322].

(*d*) Certain disabilities are imposed upon the Chairman and members of the Commission with respect to future employment under the Government [Art. 319]. Thus, on ceasing to hold office—

Prohibition as to the holding of offices by members of Commission on ceasing to be such members.

(a) the Chairman of the Union Public Service Commission shall be ineligible for further employment either under the Government of India or under the Government of a State;

(b) the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State;

(c) a member other than the Chairman of the Union Public Service

Commission shall be eligible for appointment as the Chairman of the Union Public Service Commission or as the Chairman of a State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State;

(d) a member other than the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of that or any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State.

In short, the bar against employment under the Government is *absolute* in the case of the Chairman of the Union Public Service Commission; while in the case of the Chairman of a State Public Service Commission or of the other members of the Union or State Commissions, there is scope of employment in a higher post within the Public Service Commission but not outside.

The Public Service Commissions are *advisory* bodies.[15]

The following are the duties of the Union and the State Public Service Commissions—

Functions of Public Service Commissions.

(*a*) To conduct examination for appointments to the services of the Union and the services of the State respectively.

(*b*) To advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor of a State may refer to the appropriate Commission [Art. 320].

(*c*) To exercise such additional functions as may be provided for by an Act of Parliament or of the Legislature of a State—as respects the services of the Union or the State and also as respects the services of any local authority or other body corporate constituted by law or of any public institution [Art. 321].

(*d*) To present annually to the President or the Governor a report as to the work done by the Union or the State Commission, as the case may be [Art. 323].

(*e*) It shall be the duty of the Union Public Service Commission, if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required [Art. 320 (2)].

(*f*) The Public Service Commission for the Union, if requested so to do by the Governor of a State, *may*, with the approval of the President *agree* to serve all or any of the needs of the State.

The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted—

(*a*) on all matters relating to methods of recruitment to civil services and for civil posts;

(*b*) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;

(*c*) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;

(*d*) on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consilidated Fund of the State;

(*e*) on any *claim* for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award [Art. 320 (3)].

But—

(*i*) The President or the Governor, as the case may be, as respects the services and posts in connection with the affairs of the Union, specify the matters in which either generally, or in any particular class of cases, or in any particular circumstances, it shall *not be necessary for* a Public Service Commission to be consulted. But all such regulations must be laid before the appropriate Legislature and be subject to such modifications as may be made by the Legislature.

(*ii*) It has been held by the Supreme Court that the obligation of the Government to consult the Public Service Commission in any of the matters specified above does confer any *right* upon any individual who may be affected by any act of the Government does without consulting the appropriate Commission as required by the Constitution. The reason assigned by the Court is that the consultation prescribed by the Constitution is to afford proper assistance to the Government, in the matter of assessing the guilt of a delinquent officer, the merits of a claim for reimbursement of legal expenses and the like; and that the function of the Commission being purely advisory,[15] if the Government fails to consult the Commission with respect to any of the specified matters, the resulting act of the Government is not invalidated by reason of such omission and no individual who is affected by such act can seek redress in a Court of law against the Government for such irregularity or omission.[16]

Report of Public Service Commissions.

As stated already, it shall be the duty of the Union Commission to present annually to the President a report as to the work done by the Commission and on receipt of such report the President shall cause a copy thereof together with a memorandum explaining, as respects the cases,

if any, where the advice of the Commission was not accepted, the reason for such non-acceptance, shall be laid before each House of Parliament [Art. 323 (1)]. A State Public Service Commission has a similar duty to submit an annual report to the Governor and the latter has a duty to lay a copy of such report before the State Legislature with a memorandum explaining the cases, if any, where the advice of the Commission was not accepted by the Government [Art. 323 (2)].

How far Commission's advice binding on the Government.

As stated earlier, the function of the Public Service Commissions is only advisory and the Constitution has no provision to make it obligatory upon the Government to act upon the advice of the Commission in any case.[16] The reason is, that under the Parliamentary system of government, it is the Cabinet which is responsible for the proper administration of the country and its responsibility is to Parliament. They cannot, therefore, adjure this ultimate responsibility by binding themselves by the opinion of any other body of persons. On the other hand, in matters relating to the recruitment to the Services and the like, it would be profitable for the Ministers to take the advice of a body of experts. It is in this light that Sir Samuel Hoare[17] justified the parallel provisions as to the Public Service Commissions in the Government of India Act, 1935—

"Experience goes to show that they are likely to have more influence if they are advisory than if they have mandatory powers. The danger is that if you give them mandatory powers you then set up two governments."

But, though the Simon Commission[18] was conscious of the fact that let alone the Ministers might use their position "to promote family or communal interests at the expense of the efficiency or just administration of the services", no safeguard was prescribed in the Government of India Act, 1935 against a flagrant disregard of the recommendations of the Commissions by the Government. In view of the possibility of such abuse, the Constitution has provided the safeguard (referred to above) of the Commission's Report being laid before Parliament, through the President or the Governor, as the case may be. The Government is under an obligation, while presenting such Report, to explain the reasons why in any particular case the recommendation of the Commission has been overridden by the Government. In view of this obligation to submit to Parliament an explanation for non-acceptance of the advice of the Commission, the number of such cases may be said to have been kept at a minimum. Thus, in the tenth Report of the Union Public Service Commission, for the year 1959-60, only one case of such non-acceptance is mentioned.

Notwithstanding the above safeguard, there is criticism from certain quarters that patronage is still exercised by the Government by resorting to some devices—

(a) One of these is the system of making *ad hoc* appointments for a temporary period without consulting the Public Service Commission, and then approaching the Commission to approve of the appointment at a time when the person appointed has already been in service for some time and

the recommendations of his superiors are available to him, in addition to the experience already gained by him in the work, which puts him at an advantage over the new candidates.

(b) Sometimes the rules laying down the qualifications for the office to which such appointment has been made is changed retrospectively to fit in the appointee.

(c) Another complaint is that sometimes the Reports are presented before Parliament long after the year under review. This, however, does not appear to be permissible under the Constitution. So far as the duty of the Commission to report to the President or the Governor is concerned, the Constitution says that it must be done 'annually'. Hence, his obligation cannot be postponed for more than a few months from the end of the period under Report. The duty of the President or the Governor is to present the Report to Parliament or the State Legislature "on receipt of such Report." Though no specific time-limit is imposed, it is clear that it must be done as soon as possible after the receipt of the annual Report and it cannot be construed that the obligation is discharged by presenting the Report two or three years after the receipt or by presenting the Reports for 2 or 3 years in a lump. The presentation before the Legislature must also be an annual affair, and, if the President or the Governor makes delay, it should be the concern of the appropriate Legislature to demand an explanation for such delayed presentation, apart from anything else. If the Legislature slumbers, the entire machinery of Parliamentary government will succumb, not to speak of any particular object of scrutiny by the Legislature.

All-India Services.

Another matter relating to the Services which is dealt with by the Constitution is the creation of All-India Services. The All-India Services should be distinguished from Central Services. The 'Central Services' is an expression which refers to certain Services under the Union, maintained on an all-India basis, for service throughout the country—for instance the Indian Foreign Service, the Indian Audit and Accounts Service, the Indian Customs and Excise Service and the like. The expression "All-India Service", on the other hand, is a technical one, used by the Constitution to indicate only the Indian Administrative Service and the Indian Police Service and such other Services[19] which may be included in this category in the manner provided by Article 312 of the Constitution. That Article provides that if the Council of States declares by a resolution, supported by not less than two-thirds of the members present and voting, that it is necessary and expedient in the national interest to create an All-India Service, common to the Union and the States, Parliament may provide for its creation by making a law. The practical incident of an All-India Service thus is that the recruitment to it and the conditions of service under it can be regulated only by an Act of the Union Parliament. It must be noted that it is by virtue of this power that Parliament has made the All-India Services Act, 1951 and that the conditions of service, recruitment, conduct, discipline and appeal of the members of the All-India Services are now regulated by Rules made under this Act.

Since these Rules provide that the officers of the All-India Services shall be appointed and controlled by the Union Government, these Services constitute an additional agency of control of the Union over the States, in so far as members of these Services are posted in the key-posts in the States.

Fundamental rights of civil servants.

I. Subject to the power of Parliament, under Art. 33, to modify the fundamental rights in their application to members of the Armed Forces and the Police Forces, the fundamental rights guaranteed by the Constitution are in favour of all 'citizens', which obviously include public servants.[20]

II. It follows, therefore, that a civil employee of the Government is entitled to the protection of a fundamental right such as Arts. 14, 15, 16, 20 in the same manner as a private citizen. Thus,—

If two sets of rules relating to disciplinary proceedings were in operation at the time when the inquiry was directed against a Government servant, and the inquiry was directed under the set of Rules which was more drastic and prejudicial to the interests of such Government servant, the proceeding against him are liable to be struck off as infringing Art. 14. In other words, if against two public servants similarly circumstanced enquiries may be directed according to procedure substantially different, at the discretion of the Executive authority, exercise whereof is not governed by any principles having any rational relation to the purpose to be achieved by the inquiry, the order selecting a prejudicial procedure, out of the two open for selection, is hit by Art. 14.[21]

III. Restrictions upon the rights of the public servants under Art. 19 can, therefore, be imposed only on the grounds specified in cls. (2)-(6), and to the extent that the restriction is reasonable.[20]

But while a public servant possesses the fundamental rights as a citizen, the State also possesses, under the Proviso to Art. 309, the power to regulate their 'conditions of service'. Now, the interests of service under the State require efficiency, honesty, impartiality and discipline and like qualities on the part of the public servant. The State has thus the constitutional power to ensure that every public servant possesses these qualities and to prevent any person who lacks these qualities from being in the public service. It seems, therefore, that State regulation of the conditions of service of public servants so as to restrict their fundamental rights will be valid only to the extent that such restriction is reasonably necessary in the interests of efficiency, integrity, impartiality, discipline, responsibility and the like which have a 'direct, proximate and rational' relation to the conditions of public service as well as the general grounds (*e.g.*, public order under Art. 19) upon which the fundamental rights of all citizens may be restricted.[20]

References :

1. (1933-34) J. P. C. Report, Vol. I, para. 274.
2. *Moti Ram* v. *N. E. F. Ry.*, A.I.R. 1964 S.C. 600 (*610*).
3. The words in italics indicate the changes introduced by the Constitution

(Fifteenth Amendment) Act, 1963, which, however, do not introduce any substantive change in the law.

4. *Khem Chand* v. *Union of India*, A.I.R. 1958 S.C. 300.
5. *Union of India* v. *Verma*, A.I.R. 1957 S.C. 882.
6. This proposition, laid down by judicial decisions, is now embodied in the Article itself, by the Amendment of 1963.
7. *State of Assam* v. *Bimal*, A.I.R. 1963 S.C. 1612 (*1618*).
8. *State of Bombay* v. *Doshi*, A.I.R. 1957 S.C. 892.
9. *Saxena* v. *State of M. P.*, A.I.R. 1967 S.C. 1264 (*1266*); *State of Bombay* v. *Nurul Latif*, A.I.R. 1966 S.C. 269.
10. *Parshottom* v. *Union of India*, A.I.R. 1958 S.C. 36.
11. *Satish* v. *Union of India*, A.I.R. 1953 S.C. 250.
12. *Hartwell* v. *U. P. Government*, A.I.R. 1957 S.C. 886.
13. *Shitla* v. *N. E. Ry.*, A.I.R. 1966 S.C. 1197.
14. At the end of 1965, the number of members of the Union Public Service Commission was 6, including the Chairman.
15. *D' Silva* v. *Union of India*, A.I.R. 1962 S.C. 1130.
16. *State of U. P.* v. *Srivastava*, A.I.R. 19577 S.C. 912.
17. 370 Parl. Deb., c. 858.
18. Simon Commission Rep., Vol. I.
19. Several new services have been added to the list of All-India Services, namely, the Indian Engineering Service, the Indian Forest Service and the Indian Medical Service [the All-India Services (Amendment) Act, 1963]; the Indian Economic Service, the Indian Statistical Service, the Indian Agricultural Service, the Indian Education Service ['Statesman', 30-3-65].
20. *Kameshwar* v. *State of Bihar*, A.I.R. 1962 S.C. 1160; *Ghosh* v. *Joseph*, A.I.R. 1963 S.C. 812.
21. *State of Orissa* v. *Dhirendranath*, A.I.R. 1961 S.C. 1715.

CHAPTER XXVIII

ELECTIONS

While the Constitution lays down the procedure for the election of the President[1] [Article 54] and the Vice-President[1] [Art. 66], the procedure for election to the Legislatures of the Union and the States is left to legislation, the Constitution itself providing certain basic principles. These principles are—

Elections.

(*a*) There is no provision for communal representation. There shall be one electoral roll for every territorial constituency for election to either House of Parliament or to the State Legislature and no person shall be excluded from such roll on grounds only of religion, race caste, sex or any of them [Art. 325].

(*b*) The election shall be on the basis of adult suffrage, i.e., every person who is a citizen of India and who is not less than 21 years of age shall be entitled to vote at the election provided he is not disqualified by any provision of the Constitution or of any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime, or corrupt or illegal practice [Art. 326].

Subject to the above principles and the other provisions of the Constitution, the power to make laws relating to all matters in connection with the election not only to the Houses of Parliament, but also to the Houses of the Legislature of a State belongs to the Union Parliament [Art. 327]. The State Legislature has, however, a subsidiary power in this respect. It can legislate on all electoral matters relating to the State Legislature in so far as such matters are not covered by legislation by Parliament. The laws of the State Legislature shall, in other words, be valid only if they are not repugnant to laws made by Parliament and, of course, to the provisions of the Constitution [Art. 328]. Parliament has enacted the Representation of the People Acts, 1950, 1951, as well as the Delimitation Commission Act, 1962 to prescribe the mode of election, and the formation and delimitation of the constituencies relating to election.

Power of legislature.

The procedure prescribed by these Acts is voting based on single-member territorial constituencies. While proportional representation has been prescribed for election to the office of the President and the Vice-President, that system has not been adopted for election to the Legislature of the Union and the States.

Single-member territorial constituencies.

Disputes are bound to arise in the matter of such a big-scale election on various points, such as, whether the procedure for election was properly followed or whether any candidate returned as member suffered from any disqualification under the law or the Constitution, or whether a candidate

Decision of disputes relating to election.

who ought to have been returned has been, in fact, declared not elected. For the decision of such disputes, the Constitution provides [Art. 329] that the ordinary courts of the land will have no jurisdiction and that any question relating to an election can be agitated only by an election petition presented to the High Court.[2] Appeal lies to the Supreme Court from the decisions of the High Court.

Art. 329 provides—

"Notwithstanding anything in this Constitution—

(*b*) No election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

Jurisdiction of Courts in election matters.

This clause excludes the jurisdiction of all Courts other than the High Court[2] to entertain any matter relating to 'election' which can be questioned only by an election petition under the law prescribed by the appropriate Legislature.

Election Commission.

In order to supervise the entire procedure and machinery for election and to appoint Election Tribunals and for some other ancillary matters, the Constitution provides for an independent body, namely, the Election Commission [Art. 324]. The provisions for the removal of the Election Commissioners make them independent of executive control and ensure an election free from the control of the party in power for the time being.

The Election Commission shall consist of a Chief Election Commissioner and such other Commissioners as the President may, from time, fix. (So far the Election Commission has been constituted by the Chief Election Commissioner only and no other Election Commissioner has been appointed as a member of the Commission). The conditions of service and tenure of officer of the Election Commissioner shall be such as Parliament may by law prescribe: Provided that the Chief Election Commissioner cannot be removed from his office except in like manner and on like grounds as a Judge of the Supreme Court. In other words, the Chief Election Commissioner can only be removed by each House of Parliament, by a special majority and on the ground of proved misbehaviour or incapacity; and the other Election Commissioners shall not be removed by the President except on the recommendation of the Chief Election Commissioner.

The Election Commission shall have the power of superintendence, direction and control of all elections to Parliament and the State Legislatures and of elections to the offices of the President and Vice-President, including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to Parliament [Art. 324].

Regional Commissioners may also be appointed by the President, in consultation with the Election Commission, on the eve of a general election

to the House of the people or to the State Legislature, for assisting the Election Commission.

REFERENCES :

1. See pp. 127, 129, *ante*.
2. Prior to 1966, election disputes were determined by Election Tribunals. By an amendment of the Representation of the People Act, in 1966, election petitions have been made triable by the High Court [Basu, *Shorter* Constitution of India, 6th Ed., 1970, p. 793, *Commentary* an the Constitution of India, 5th Ed., Vol. V, p. 359].

CHAPTER XXIX

MINORITIES, SCHEDULED CASTES AND TRIBES

It was pointed out at the outset that *our* Constitution is consecrated by the ideals of equality and justice both in the social and political fields and, accordingly, abolishes any discrimination either against or in favour of any class of persons on the grounds of religion, race or place of birth. It is in pursuance of this ideal that the Constitution did away with communal representation or reservation of seats in the Legislature or in the offices on the basis of religion.

It would have been a blunder on the part of the makers of *our* Constitution if, on a logical application of the above principle, they had omitted to make any special provisions for the advancement of those sections of the community who are socially and economically backward, for, the democratic march of a nation would be impossible if those who are handicapped are not aided at the start. The principle of democratic equality, indeed, can work only if the nation as a whole is brought on the same level, as far as that is practicable. *Our* Constitution, therefore, prescribes certain temporary measures to help the backward sections to come up to the same level with the rest of the nation, as well as certain permanent safeguards for the protection of the cultural, linguistic and similar rights of any section of the community who might be said to constitute a 'minority' from the numerical, not communal, point of view, in order to prevent the democratic machine from being used as an engine of oppression by the numerical majority.

Provisions for protection of minorities.

Any discussion of the provisions of *our* Constitution for the protection of the interests of the minorities can hardly fail to take notice of the palpably unfair comments of Sir Ivor Jennings[1] on this point:

> "Indeed, the most complete disregard of minority claims is one of the most remarkable features of Indian federalism. The existence of competing claims on religious and ethnic grounds was one of the reason given *for the refusal of Indian independence before 1940*. By reaction the Congress politicians, who were above all nationalists, tended to minimize the importance of minority interests and emotions".

It is obvious that Sir Ivor would have been satisfied if the framers of our Constitution had perpetuated communal representation even after the country had been partitioned on the basis of a two-Nation slogan carried to the point of fanaticism, leading to a well-planned mass massacre. It is somewhat painful to point out to an Englishman that communal representation was not a natural limb of the Indian political system which was 'blindly' amputated by the nationalist Congress leaders but was an artificial growth which had been grafted upon our body politic by the Morley-Minto plan in the name of 'reform'.[2] An impartial student of Indian history may be expected to testify how, once the malignant growth had been implanted

into our political life, every opportunity was seized by the imperialistic power to develop it as a wedge to separate the Indian people into two hostile camps so much so that it could eventually be advanced "as one of the reasons for the refusal of Indian independence." After those who were allured by the separatist vision had succeeded in dividing the mother-land to create an exclusive home of their own, it must be presumed that those belonging to that very community who elected to remain in their birth-place should prefer to live with the other children of the soil as one family, after giving up all claims to separate treatment in the political *sphere*. That the majority community has not abolished communal representation with any selfish motives will be apparent from the very fact that notwithstanding the abolition of reservation, members of the minority community have been appointed to the highest offices of ministers, ambassadors and judges of the superior courts in such numbers as can hardly be overlooked by an impartial observer. There is no reasonable ground for apprehending that the interests or development of the minority community have suffered because of the abolition of separate electorates on a communal basis.

The real injustice done by Sir Ivor, above all, is the omission to mention the religious, cultural and educational safeguards incorporated in the Constitution to protect the interests of *all minority groups*, whether they are religious, linguistic or cultural minorities. Thus,

(*i*) Though the provisions guaranteeing religious freedom to every individual cannot, strictly speaking, be said to be specific safeguards in favour of the minorities, they do protect the religious minorities if we contrast the provisions of the Islamic Constitution of Pakistan of 1956 or 1962.[3] *Our* Constitution does not contain any provision for the furtherance of any particular religion as may raise legitimate apprehensions in the minds of those who do not belong to that religion.

Religious freedom.

(*ii*) Any section of the citizens of India having a distinct language, script or culture of its own shall have the fundamental right to conserve the same [Art. 29 (1)]. This means that if there is a cultural minority which wanted to preserve its own language and culture, the State would not by law impose upon it any other culture belonging to the majority or the locality. This provison, thus, gives protection not only to religious minorities but also to linguistic minorities.

Linguistic and cultural rights guaranteed.

(*iii*) The Constitution directs every State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups and empowers the President to issue proper direction to any State in this behalf [Art. 350A].

Facilities for instruction in mother-tongue.

(*iv*) A Special Officer for linguistic minorities shall be appointed by the President to investigate all matters relating to the safeguards provided for linguistic minorities under the Constitution and report to the President [Art. 350B].

Special officer for linguistic minorities.

(*v*) No citizen shall be denied admission into any educational institution maintained by the State or receiving State aid, on grounds only of religion race, caste, language or any of them [Art. 29 (2)]. This means that there shall be no discrimination against any citizen on the ground of religion, race, caste or language, in the matter of admission into educational institutions maintained or aided by the State. It is a very wide provision intended for the protection not only of the religious minorities but also of 'local' or linguistic minorities, and the provsion is attracted as soon as the discrimination is immediately based only on the ground of religion, race, caste, language or any of them. Thus,

No discrimination in State educational institutions.

The Government of Bombay issued an Order which directed that, subject to certain exceptions, no primary or secondary school receiving aid from Government should admit to a class where English was the medium of instruction any pupil other than a pupil belonging to a section of the citizens the language of which was English, namely, Anglo-Indians and citizens of non-Asiatic descent. An Indian citizen, other than an Anglo-Indian citizen, was denied admission to a State-aided school, in pursuance of the above Order. The Supreme Court *held* that the immediate ground for denial of admission of a pupil to such a School where English was the medium of instruction was that the mother-tongue of the pupil was *not* English. It was, thus, a denial of the right conferred by Art. 29 (2), only on the ground of the language of the pupil. The argument that the object of the denial was to promote the introduction of Hindi or any other Indian language as the medium of instruction in the Schools was immaterial in determining whether Art. 29 (2) had been contravened.[8]

(*vi*) All minorities, whether based on religion or language, shall have the fundamental right to establish and administer educational institutions of their choice [Art. 30 (1)]. While Art. 29 (1) enables the minority to maintain its language or script, the present clause enables them to run their own educational institution, so that the State cannot compel them to attend any other institutions, not to their liking.

Right to establish educational institutions of their choice.

(*vii*) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language [Art. 30 (2)].

No discrimination in State aid to educational institutions.

The ambit of the above educational safeguards of all minority communities, whether religious, linguistic, or otherwise, can be understood only if we notice the propositions evolved by the Supreme Court out of the above guarantees:

(a) Every minority community has the right not only to establish its own educational institutions, but also to impart instruction to the children of its own community in its own language.[8]

(b) Even though Hindi is the national language of India and Art. 351

provides a special directive upon the State to promote the spread of Hindi, nevertheless, the object cannot be achieved by any means which contravenes the rights guaranteed by Art. 29 or 30.[8]

(c) In making primary education compulsory (Art. 45), the State cannot compel that such education must take place only in the schools owned, aided or recognised by the State so as to defeat the guarantee that a person belonging to a linguistic minority has the right to attend institutions run by the community, to the exclusion of any other school.[8]

(d) Even though there is no constitutional right to receive State aid, if the State does in fact grant aid to educational institutions, it cannot impose such conditions upon the right to receive such aid as would, virtually drive the members of a religious or linguistic community of their right under Art. 30 (1). While the State has the right to impose reasonable conditions, it cannot impose such conditions as will substantially deprive the minority community of its rights guranteed by Art. 30 (1). Surrender of fundamental rights cannot be exacted as the price of aid doled out by the State. Thus, the State cannot prescribe that if an institution, including one entitled to the protection of Art. 30 (1), seeks to receive State aid, it must subject itself to the condition that the State may take over the management of the institution or to acquire it on its subjective satisfaction as of certain matters,—for such condition would completely destroy the right of the community to administer the institution.[9]

(e) Similarly, in the matter of the right to establish an institution in relation to recognition by the State, though there is no constitutional or other right for an institution to receive State recognition and though the State is entitled to impose reasonable conditions for receiving State recognition, e.g., as to qualifications the acceptance of which would virtually deprive a minority community of their right guaranteed by Art. 30 (1).[9]

Where, therefore, the State regulations debar scholars of unrecognised educational institutions from receiving higher education or from entering into the public services, the right to establish an institution under Art. 30(1) cannot be effectively exercised without obtained State recognition. In such circumstances, the State cannot impose it as a condition precedent to State recognition that the institution must not receive any fees for tuition in the primary classes. For, if there is no provision in the State law or regulation as to how this financial loss is to be recouped, institutions, solely or primarily dependent upon the fees charged in the primary classes, cannot exist at all.[9]

No discrimination in public employment.

(*vii*) No person can be discriminated against in the matter of public employment, on the ground of race, religion or caste [Art. 16 (2)].

While the Constitution has abolished representation on *communal* lines, it has included safeguards for the advancement of the *backward* classes amongst the residents of India (irrespective of their *religious* affiliations), so that the country may be ensured of an all-round development. These provisions fulfil the assurance of "Justice, social,

Provisions for upliftment of the Scheduled Castes and Tribes, and other backward classes.

economic and political" which has been held out by the very Preamble of the Constitution. A major section of such backward classes have been specified in the Constitution as Scheduled Castes and Scheduled Tribes because their backwardness is patent.

There is no definition of Scheduled Castes and Tribes in the Constitution itself. But the President is empowered to draw up a list in consultation with the Governor of each State, subject to revision by Parliament [Art. 341-2]. The President has already made Orders, specifying the Scheduled Castes and Tribes in the different States in India. These Orders have since been amended by the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1956.

Scheduled Castes and Tribes.

A. Special provisions for Scheduled Castes and Tribes.

The Constitution makes various special provisions for the protection of the interests of the Scheduled Castes and Tribes. Thus,

(*i*) Measures for the advancement of the Scheduled Castes and Tribes are exempted [Art. 15 (4)] from the general ban against discrimination on the grounds of race, caste and the like, contained in Art. 15. It means that if special provisions are made by the State in favour of the members of these Castes and Tribes, other citizen shall not be entitled to impeach the validity of such provisions on the ground that such provisions are discriminatory against them.

(*ii*) On the other hand, while the rights of free movement and residence throughout the territory of India and of acquisition and disposition of property are guaranteed to every citizen in the case of members of the Scheduled Castes and Tribes, special restrictions may be imposed by the State as may be required for the protection of their interests. For instance, to prevent the alienation or fragmentation of their property, the State may provide that they shall not be entitled to alienate their property except with the concurrence of a specified administrative authority or except under specified conditions [Art. 19 (5)].

(*iii*) The Constitution makes special provisions for (*a*) representation of the Scheduled Castes and Tribes in the House of the People and in the Legislative Assemblies of the States, and also for (*b*) the consideration of their special claim in the matter of appointments.

(*a*) Seats shall be reserved in the House of the People[10] for—(*a*) The Scheduled Castes; (*b*) The Scheduled Tribes except the Scheduled Tribes in the tribal areas of Assam; and (*c*) The Scheduled Tribes in the autonomous districts of Assam [Art. 330].

Seats shall also be reserved for the Scheduled Castes and the Scheduled Tribes, except the Scheduled Tribes in the tribal areas of Assam, in the Legislative Assembly[10] of every State [Art. 332]. Such reservation will cease on the expiration of thirty years[11] from the commencement of the Constitution *i.e.*, in 1970 [Art. 334].

(*b*) The claims of the members of the Scheduled Castes and the

Scheduled Tribes shall be taken into consideration, consistently with the maintenance of administration, in the making of appointments[12] to services and posts in connection with the affairs of the Union or of a State [Art. 335].

(*iv*) There shall be a Special Officer for the Scheduled Castes and Scheduled Tribes to be appointed by the President. It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under this Constitution and to report to the President upon the working of those safeguards at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament. [Such an officer was appointed in November, 1950, and he has already submitted several annual reports[13]].

(*v*) The President may, at any time, and shall, at the expiration of ten years from the commencement of this Constitution, by Order appoint a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States. The Order may define the composition, powers and procedure of the Commission and may contain such incidental or ancillary provisions as the President may consider necessary or desirable [Art 339 (1)].

(*vi*) The executive power of the Union shall extend to the giving of directions to any such State as to the drawing up and execution of scheme specified in the direction to be essential for the welfare of the Scheduled Tribes in the State [Art. 339 (2)].

With a view to associate members of Parliament and other members of the public in the due discharge of the above functions by the Government of India, two Central Advisory Boards (one for the Scheduled Caste, and the other for the Scheduled Tribes) have been set up.[13] Their function is to formulate and review the working of schemes for the welfare of the Scheduled Castes and Tribes and to advise the Government of India on matters relating to these classes and tribes.

(*vii*) Financial aid for the implementation of these welfare schemes is provided for in Art. 275 (1) which requires the Union to give grants-in-aid to the States for meeting the costs of schemes of welfare of the Scheduled Tribes and for raising the level of administration of the Scheduled Areas in a State to that of the administration of the areas of that State.

(*viii*) The Proviso to Art. 164 lays down that in the States of Bihar, Madhya Pradesh and Orissa, there shall be a Minister in charge of tribal welfare, who may also be in charge of the welfare of the Scheduled Castes and other backward classes.

In practice, such Welfare Departments have been set up not only in these three States as required by the Constitution, but also in other States.[13]

(*ix*) Special provisions are laid down in the Fifth and Sixth Schedules of the Constitution, read with Art. 244, for the administration of areas inhabited by Scheduled Tribes (see pp. 226 *et seq.*, *ante*).

Over and above all these, there is a general Directive in Art. 46 that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitations.

B. For Backward Classes, generally.

Not contented with making special provisions for the Scheduled Castes, who form a specific category of socially depressed people (generally identifiable with the Gandhian term *'harijan'*), the Constitution has made separate provisions of the amelioration and advancement of all 'backward classes', in general.

Of course, the Constitution does not define 'backward classes'. The Scheduled Castes and Tribes are not doubt backward classes, but the fact that the Scheduled Castes and Tribes are mentioned together with the expression 'backward classes' in the foregoing provisions shows that there may be other backward classes of people besides the Scheduled Castes and Tribes. The Constitution provides for the appointment of a 'Commission to investigate the conditions of backward classes' [Art. 340]. Such a Commission was appointed in 1953 (with Kaka Saheb Kalelkar as Chairman), according to the following terms of appointment—

(*a*) To determine the tests by which any particular class or group of people can be called 'backward'.

(*b*) To prepare a list of such backward communities for the whole of India.

(*c*) To examine the difficultits of backward classes and to recommend steps to be taken for their amelioration.

This Commission submitted its report to the Government in 1955, but the tests recommended by the Commission appeared to the Government to be too vague and wide to be of much practical value; hence, further investigation by the State Governments have been authorised to give assistance to the backward classes according to the lists prepared by the State Governments themselves.

The simple test for classifying a class as backward may be had from Art. 15 (4), *viz.*, whether the members of such class are *'socially and educationally'* worse off than the rest of the citizens, whether they belong to the Scheduled Castes or not.[14] Once a class conforms to this test, Government would be obliged to include it in their list and then any member of such class would be entitled to the safeguards and privileges held out by the Constitution.

(*i*) Art. 15 prohibits discrimination against any citizen on grounds only of religion, caste or the like (see p. 78, *ante*). But this does not prevent the State from making special provisions for the advancement of any socially or educationally backward classes of citizens or for the Scheduled Castes and Tribes. In other words, if any special provision is made for the benefit of these classes of citizens, such provision will not be liable to be attacked on the ground that it is discriminatory.

(*ii*) Art. 29 (2), similarly, guarantees that no citizen shall be denied admission into any State-owned or State-aided educational institution on grounds only of religion, caste or the like. But this provision would not prevent the State from making special provisions for the advancement of backward classes, Scheduled Castes and Tribes.

(*iii*) Art. 16 guarantees equality of opportunity to all citizens in the matter of employment under the State (see p. 80, *ante*). But nothing in the Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(*iv*) It has already been pointed out that the Proviso to Art. 164 (1) provides for a Minister in charge of the welfare of backward classes and that departments for such welfare have, in fact, been opened in all the States.

Even apart from the foregoing safeguards, temporary provisions were made in the Constitution in the interests of the Anglo-Indian community, in view of their peculiar position in Indian society.

Special provisions for the Anglo-Indian community.

An Anglo-Indian is defined in Art. 366 (2) as—

"a person whose father or any of whose other male progenitors in the male line is or was of European descent but who is domiciled within the territory of India and is or was born within such territory of parents habitually resident therein and not established there for temporary purposes only."

These special provisions in the interests of the Anglo-Indians are:—

(a) The President may, if he is of opinion that the Anglo-Indian community is not adequately represented in the House of the People, nominate not more than 2 members of that community to the House of the People [Art. 331]. The Governor has a similar power in respect of the Legislative Assembly of the State, but in the case of a Governor, the maximum quota of such nomination is not fixed by the Constitution. He has power to "nominate such number of members of the community to the Assembly as he considers appropriate." Such power shall cease after *thirty* years[11] from the commencement of the Constitution. Of course, the sitting members will continue till the dissolution of the then existing House or Assembly, as the case may be [Art. 334].

(*b*) The Special Officer for Scheduled Castes and Scheduled Tribes shall also investigate into and report on the working of the foregoing safeguards relating to the Anglo-Indian community [Art. 338 (3)].

There were two other safeguards which have ceased to exist since 1960 because the period of ten years has *not*, in these two cases, been extended by the Amendment of 1956—

(*i*) The existing reservation for the Anglo-Indian community in the Railway, Customs, Postal and Telegraph Services of the Union [Art. 336].

(*ii*) The existing system of educational grants for the Anglo-Indian community [Art. 337].

REFERENCES :

1. Some Characteristics of the Indian Constitution, 1953, p. 64.
2. Thanks are due to Prof. Gledhill that he does not fail to notice this [(1959) Journal of Indian Law Institute, p. 406].
3. The Constitution of 1962 is no better in this respect.
4. Of which Sir Ivor Jennings was the architect.
5. Art. 197 (1) of the Constitution of Pakistan, 1956; Principles of Policy in Art. 8 of the Constitution of 1962.
6. Art. 25, ibid
7. Art. 198 (1), ibid.
8. *State of Bombay* v. *Bombay Education Society*, (1955) 1 S.C.R. 568.
9. Re Kerala Education Bill, A.I.R. 1968 S.C. 956.
10. In 1959, out of 520 seats in the House of the People, 76 were reserved for representatives of the Scheduled Castes and 31 for representatives of the Scheduled Tribes. In the Legislative Assemblies, on the other hand, out of an aggregate of 3431 seats, 470 were reserved for the Scheduled Castes and 221 for the Scheduled Tribes.
11. The period of ten years prescribed in the original Constitution has been extended to twenty years by the Constitution (Eighth Amendment) Act, 1959, and, then, to thirty years, by the Constitution (Twenty-third Amendment) Act, 1969, on the ground that the object of the safeguard has not yet been fulfilled.
12. The Government of India has issued an administrative order reserving for the Scheduled Castes and Tribes a percentage of vacancies for which recruitment is made by open competition [India 1961, p. 144].
13. Vide India 1959, p. 166.
14. *Balaji* v. *State of Mysore*, A 1963 S.C. 649 (*656, 658*).

CHAPTER XXX

LANGUAGES

Languages.

Languages offered a special problem to the makers of the Constitution simply because of the plurality of languages used by the vast population 356 million. It is somewhat bewildering to think that no less than 845 languages, including 63 non-Indian languages, are current in this sub-Continent.

Need for an official language.

The makers of the Constitution had, therefore, to select some of these languages as the recognised medium of official communication in order to save the country from a hopeless confusion. Fortunately for them, the number of people speaking each of these 845 languages was not anything like proportionate and some 14 languages [included in the 8th Schedule of the Constitution, see Table XVII] could easily be picked up as the major languages of India, used by 91% of the total population of the country, and out of them, Hindi, including its kindred variants Urdu and Hindustani, could claim 46%. Hindi was accordingly prescribed as the official language of the Union (subject to the continuance of English for the same purpose for the limited period of 15 years), and, for the development of the Hindi language as a medium of expression for all the elements of the composite culture of India, the assimilation of the expressions used in the other thirteen of the major languages was recommended [Art. 351].

But though one language was thus prescribed for the official purposes of the Union, and the makers of the Constitution sought to afford relief to regional linguistic groups by allowing the respective State Legislatures [Art. 345] and the President [Art 347] to recognise some language or languages other than Hindi as the language for intra-State official transactions or any of them. These provisions thus recognise the right of the majority of the State Legislature or a substantial section of the population of a State to have the language spoken by them to be recognised for official purposes within the State.

In the result, the provisions of the Constitution relating Official Language have come to be somewhat complicated [Arts. 343-351].

Official Language.

The Official language of the *Union* shall be Hindi in Devanagri script. But, for a period of fifteen years from the commencement of this Constitution, the English language shall continue to be used for all the official purposes of the Union for which it was being used immediately before such commencement. Even after the expiry of the above period of 15 years, Parliament may by law provide for the use of—

A. *Of the Union.*

(a) the English language, or

(b) the Devanagri form of numerals, for such purposes as may be specified in the law [Art. 343].

In short, English would continue to be the official language of the Union side by side with Hindi, until 1965, and thereafter the use of English for any purpose will depend on Parliamentary legislation. Parliament has made this law by enacting the Official Languages Act, 1963, which will be noted below.

Official Language Commission.

The Constitution provides for the appointment of a Commission as well as a Committee of Parliament to advise the president as to certain matters relating to the official language [Art. 344]. The Official Language Commission is to be appointed at the expiration of 5 years, and again at the expiration of 10 years, from the commencement of the Constitution. The President shall constitute the Commission with the representatives of the 14 recognised languages (specified in the Eighth Schedule). It shall be the duty of the Commission to make recommendations to the President as to—

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

(b) restrictions on the use of the English language for any of the official purpose of the Union;

(c) the language to be used for proceedings in the Supreme Court and the High Courts and the texts of legislative enactments of the Union and the States as well as subordinate legislation made thereunder;

(d) the form of numerals to be used for any of the official purposes of the Union;

(e) any other matters referred to the Commission by the President as regards—

(1) the official language of the Union, and

(2) the language for communication between the Union and the State or between one State and another.

In making its recommendations, the Commission shall have due regard to the industrial, cultural and scientific advancement of India and the just claims and interests of persons belonging to the non-Hindi speaking areas in regard to Public Services. The recommendations of the Commission shall be examined by a joint Committee of the two Houses of Parliament consisting of 20 Members of the House of People and 10 Members of the Council of States, elected in accordance with the system of proportional representation by means of the single transferable vote. This Committee will again report to the President and in consideration of such report, the President may issue directions for the implementation of such of the recommendations as he thinks fit.

Implementation of the recommendations of the first Official Language Commission.

The first Official Language Commission was, accordingly, appointed in 1955 with Shri B. G. Kher as Chairman, and it submitted its Report in 1956, which was presented to Parliament in 1957 and examined by a joint Parliamentary Committee. The recommendations

of the Parliamentary Committee upon a consideration of the Report of the Official Language Commission were as follows—

(a) The Constitution contains an integrated scheme of official language and its approach to the question is flexible and admits of appropriate adjustment being made within the framework of the scheme.

(b) Different regional languages are rapidly replacing English as a medium of instruction and of official work in the States. The use of an Indian language for the purposes of the Union has thus become a matter of practical necessity, but there *need be no rigid date-line for the change-over.* It should be a natural transition over a period of time effected smoothly and with the minimum of incovenience.

(c) English should be the principal official language and Hindi the subsidiary official language till 1965. After 1965, when Hindi becomes the principal official language of the Union, *English should continue as the subsidiary official language.*

(d) No restriction should be imposed for the present on the use of English for any of the purposes of the Union and provision should be made in terms of Cl. (3) of Art. 343 for the continued use of English even after 1965 for purposes to be specified by Parliament by law as long as may be necessary.

(e) Considerable importance attaches to the provision in Art. 351 that Hindi should be so developed that it may serve as a medium of expression for all elements of the composite culture of India, and every encouragement should be given to the use of *easy* and *simple* diction.

Standing Official Language Commission.

In pursuance of the above recommendations of the Parliamentary Committee, the President issued an Order[1] on April 27, 1960, containing directions by way of implementing the above recommendations. The main direction was as regards the evolution of Hindi terminology for scientific, administrative and legal literature and the translation of English literature on administrative and procedural matters into Hindi. For the evolution of such terminology, the Official Language Commission recommended the constitution of a *Standing Commission.* The Standing Commission on Official Language has since been constituted in 1961, with Shri C. P. N. Sinha, retired Chief Justice, as Chairman.

Of the other recommendations of the Official Language Commission, the following, *inter alia*, were adopted in the President's Order:[1]

(i) English shall continue to be the medium of examination for the recruitment through the Union Public Service Commission but, after some time, Hindi may be admitted as an alternative medium, both Hindi and English being available as the media at the opinion of the candidate.

(ii) Parliamentary legislation may continue to be in English but an authorised translation should be provided in Hindi. For this purpose, the Ministry of Law has been directed to provide for such translation and also

to initiate legislation to provide for an authorised Hindi translation of the text of Acts passed by Parliament.

(iii) Where the original text of Bills introduced or Acts passed by a State Legislature is in a language other than Hindi, a Hindi translation may be published with it besides an English translation as provided in Cl. (3) of Art. 348.

(iv) When the time comes for the change-over, Hindi shall be the language of the Supreme Court.

(v) Similarly, when the time for change-over comes, Hindi shall ordinarily be the language of judgments, decrees or orders of Hindi Courts, *in all regions;* but, by undertaking necessary legislation, the use of a regional official language may be made optional instead of Hindi, with the previous consent of the President.

B. Of inter-State Communications.

The Constitution further provides that the language for the time being authorised for use in the Union for official purposes (i.e., English) shall be the Official language of communication between one State and another State and between a State and the Union. If, however, two or more States agree that the Hindi language should be the official language for communication between such States, that language may be used for such communication instead of English [Art. 346].

C. Of a State.

The Legislature of a State may by law adopt any one or more of the languages in use in the State or Hindi as the language to be used for all or any of the official purposes of that State: Provided that, until the Legislature of the State otherwise provides by law, the English language shall continue to be used for those official purposes within the State for which it was being used immediately before the commencement of this Constitution.

There is also a provision for the recognition of any other language for the official purposes of a State or any part thereof, upon a substantial popular demand for it being made to the President [Art. 347].

D. Language to be used in the Supreme Court and in the High Courts and for Acts, Bills, etc.

Until Parliament by law otherwise provides—

(*a*) all proceedings in the Supreme Court and in every High Court,

(*b*) the authoritative texts—

(*i*) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament or in House or either House of the Legislature of a State,

(*ii*) of all Acts passed by Parliament or the Legislature of a State and of all Ordinances promulgated by the President or the Governor of a State, and

(*iii*) of all orders, rules, regulations and bye-laws issued under this Constitution or under any law made by Parliament or the Legislature of a State,

shall be in the English language.

A State Legislature may, however, prescribe the use of any language other than English for Bills and Acts passed by itself, or subordinate legislation made thereunder, but then, it is an English translation of the Bill or Act, duly published, which shall be deemed to be the 'authoritative text' of the same. It follows, therefore, that in case of conflict between the State language and the English translation, the latter shall prevail. Similarly, the Governor of a State may, with the previous consent of the President, authorise the use of Hindi or any other language used for official purposes of the State, in proceedings in the High Court of the State, but not in judgments, decrees or orders (which must continue to be in English until Parliament by law otherwise provides) [Art. 348].

The foregoing provisions of the Constitution *are now to be read subject to* the modifications made by the Official Languages Act, 1963 (as amended in 1967), which are—

Official Languages Act, 1963.

I. *Continuance of English language for official purposes of the Union and for use in Parliament*:—Notwithstanding the expiration of the period of fifteen years from the commencement of the Constitution, the English language may, as from the appointed day, continue to be used, *in addition to Hindi*,—

(*a*) for all the official purposes of the Union for which it was being used immediately before that day; and

(*b*) for the transaction of business in Parliament.

II. *Authorised Hindi translation of Central Acts, etc* :—(1) A translation in Hindi published under the authority of the President in the Official Gazette on and after the appointed day,—

(*a*) of any Central Act or of any Ordinance promulgated by the President, or

(*b*) of any order, regulation or bye-law issued under the Constitution or under any Central Act,

shall be deemed to be authoritative text thereof in Hindi.

(2) As from the appointed day, the authoritative text in the English language of all Bills to be introduced or amendments thereto to be moved in either House of Parliament shall be accompanied by a translation of the same in Hindi authorised in such manner as may be prescribed by rules made under this Act.

III. *Authorised Hindi translation of State Acts in certain cases*:—Where the Legislature of a State has prescribed any language other than Hindi for use in Acts passed by the Legislature of the State or in Ordinances promulgated by the Governor of the State, a translation of the same in Hindi, in addition to a translation thereof in the English language as required by clause (3) of article 348 of the Constitution, may be published on or after the appointed day under the authority of the Governor of the

State in the Official Gazette of that State and in such a case, the translation in Hindi of any such Act or Ordinance shall be deemed to be the authoritative text thereof in the Hindi language.

IV. *Optional use of Hindi or other official language in judgments, etc., of High Courts*:—As from the appointed day or any day thereafter, the Governor of a State may, with the previous consent of the President, authorise the use of Hindi or the official language of the State, in addition to the English language, for the purposes of any judgment, decree or order passed or made by the High Court for that State and where any judgment, decree or order is passed or made in any such language (other than the English language), it shall be accompanied by a translation of the same in the English language issued under the authority of the High Court.

V. *Inter-State communications*.—(a) English shall be used for purposes of communication between the Union and a State which has *not* adopted Hindi as its official language. (b) Where Hindi is used for purposes of communication between one State and another which has *not* adopted Hindi as its official language, such communication in Hindi shall be accompanied by an English translation thereof.

Special directives relating to languages.

The Constitution lays down certain special directives in respect of not only the official language but also the other languages in use in the different parts of the country, in order to protect the interests of the linguistic minorities.

A. As regards the *official* language—the directive is, of course, for the promotion and development of the Hindi language so that it may serve as a medium of expression for all the elements of the composite culture of India and this is laid down as a duty of the Union ; and the Union is further directed to secure the enrichment of Hindi, without interfering with its genius, the forms, style and expressions used in Hindustani languages (specified in the English Schedule) and by giving primary importance to Sanskrit in this respect [Art. 351]. The Government of India has already implemented this directive by taking a number of steps for the popularisation of Hindi amongst the non-Hindi speaking people, particularly, its own employees.[1]

B. For the protection of the *other* languages in use, the following directives are provided—

(*i*) For the submission of a representation for the redress of any grievance to any officer or authority of the Union or a State, the petitioner is authorised to use any of the languages used in the Union or in the State, as the case may be [Art. 350]. In other words, a representation cannot be rejected on the ground that it is not in Hindi.

(*ii*) Every State and other local authority within a State is directed to provide adequate facilities for instruction in the mother-tongue at the preliminary stage of education to children belonging to linguistic minority

groups and the President is authorised to issue such directions to any State as he may consider necessary for the securing of such facilities [Art. 350A].

(*iii*) A Special Officer for linguistic minorities shall be appointed by the President to investigate all matters relating to the safeguards provided by the Constitution for linguistic minorities and to report to the President upon those matters. It shall be the duty of the President to cause all such reports to be laid before each House of Parliament and also to be sent to the Government of the State concerned [Art. 350B].

REFERENCES :

1. India, p. 547.
2. India, 1961, pp. 102-3.

CHAPTER XXXI

HOW THE CONSTITUTION HAS WORKED

One who has to study the Indian Constitution to-day may come to grief if he has in his hand only a text of the Constitution as it was promulgated in November, 1949, for, momentous changes have since been introduced not only by about two dozen Amendment Acts but by scores of judicial decisions emanating from the highest tribunal of the land. Nearly every provision of the original Constitution has acquired a gloss either from formal amendment or from judicial interpretation, and an account of the working of the Constitution, over and above this, would in itself be a formidable one.

Multiple amendments of the Constitution.

At the first instance, the passing of twenty-three Amendment Acts in a period of twenty years can hardly be passed over unnoticed. In the American Constitution, the process of formal amendment prescribed by the Constitution being rigid, the task of adapting the Constitution to changes in social conditions has fallen into the hands of the Judiciary even though it ostensibly exercises the function only of interpreting the Constitution. Instead of leaving the matter to the slow machinery of judicial interpretation, *our* Constitution has vested the power in the peoples' representatives and, though the final power of interpretation of the Constitution as it stands at any moment belongs to the Courts, the power of changing the instrument itself has been given to Parliament (with or without ratification by the State Legislatures) and, if Parliament, acting as the constituent body, considers that the interests of the country so require, it can amend the Constitution as often as it likes. The ease with which these Amendments have been enacted demonstrates that our Constitution contains the potentiality of peacefully adopting changes some of which would be considered as revolutionary in other countries.

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

A little reflection will show that some of these changes the need for

which must be admitted even by critics, could not have been introduced by the Courts, by the application of the canons of statutory interpretation which are firmly embedded in our Courts. An instance to the point is the insertion of the word 'reasonable' to qualify the word 'restrictions' in Cl. (2) of Art. 19 (by the First Amendment). Without such a qualification, the engine of judicial review would have been altogether excluded from the field of legislative encorachment upon the freedom of expression, for, it was not open to any Court, unless it was determined to do violence to the canons of interpretation, to supply the word 'reasonable' which had been inserted by the makers of the Contitution in all other Clauses of the Article but omitted from Clause (2). Similar is the case with the subject-mater of the Third Amendment. When the Constitution was framed, it was considered essential that the Union Parliament should have a concurrent power to regulate production, supply and distribution of, and trade and commerce in, certain essential goods and raw products, in order to prevent their scarcity in any part of the country. This power of Parliament was, however, reserved for a temporary period. A few years' working demonstrated that such concurrent control was necessary on a permanent basis, and this was effected by the Third Amendment. The Seventh Amendment, again, was necessary to provide for the territorial reorganisation of the country which could not be made by the makers of the Constitution before promulgating it in 1949. Similarly, the Tenth Twelfth, Thirteenth and Fourteenth Amendments have been necessitated by the acquisition of new territories or the upliftment of the political status of existing territories, which are obviously for the benefit of the nation.

At the same time, one cannot help observing that so frequent and multiple amendments of the Constitution, some of which might have been avoided or consolidated, have undermined the sanctity of the Constitution as an organisation instrument.

Of the achievements of the Executive and the Legislature in the working the Constitution, one cannot fail to refer to the progress made in the implementation of the Directive Principles of State Policy (see pp. 121-3, *ante*), which shows that the Government in power has not taken them as 'pious homilies' as was apprehended by critics when they were engrafted into the Constitution. Though the implementation of these Directives mostly falls within the province of the States, the Union has offered its guidance and assistance through the Planning Commission. The Constitution of India, it should be remembered, was not intended to serve merely as a charter of government but as a means to achieve the social and economic transformation of the country peacefully and this goal has been achieved to the extent that the Government has succeeded in implementing the Directive Principles.

Implementation of the Directive Principles.

In the federal sphere, it may be stated that most of the formal and informal changes which have taken place since the commencement of the

Trend towards the unitary system.

Constitution is to strengthen Central control over the States more and more. While the federal system, by its nature, has generated State consciousness more than under the British regime, the Centre has been endeavouring more and more to assume control over the States not only by Constitutional amendment and legislation but also by setting up extra-Constitutional bodies like the Planning Commission[1], the National Development Council[2] and numerous Conferences. As regards the predominant position of the Planning Commission, a learned author[3] observed—

"The emergence of the Planning Commission as a super-government has disturbed the concept of the autonomy of the States. It has also impinged on the authority of the States in matters vital to its administration such as education, health and other welfare services."

The grip of the Planning Commission has, however, been lessened as a result of the recommendations of the Administrative Reforms Commission. The Government have, since July, 1967, recognised the Planning Commission.[4] Constituted of whole-time members (and headed by the Prime Minister, as before) the Commission will cease to have any executive functions and will confine itself to the formulation of plans and the evaluation of their performance. There would be no Minister for Planning and the issues concerning the Commission would be dealt with in Parliament by the Prime Minister or the Finance Minister and questions would be answered by the Minister in charge of the respective subjects.

No less momentous is the encreasing dependence of the States upon the Union in the matter of finance. Not only is the financial strength of a State dependent upon the share of the taxes and grants-in-aid as may be allotted to it by the Union upon the recommendations of the Finance Commission, but there is a general sense of irresponsibility in financial matters in the States founded upon the assumption that the Union will ultimately come to its aid or, else, the National Plan will fail.

But, notwithstanding this unitary trend, federation has not yet proved to be a failure in India, particularly because the Supreme Court has steadfastly enforced the distribution of powers laid down in the Constitution,[5] without acknowledging any pre-eminence of the Union so as to obliterate that federal distribution, except in one solitary instance so far.[6]

The trend towards greater cohesion is, in fact, an index not of the failure but of the success of the federal system in India. One of the defects of a federation, according to classical writers, is its weakness. Credit must go to India if it succeeds in attaining unitary strength upon the foundation of a federal government system over an unwieldy territory inhabited by heterogenous elements with radically conflicting ideologies. The founders of *our* Constitution had realised that a federal system was the only system suitable to a country like ours, consisting of so many heterogenous elements. But, in view of our external dangers, existing and potential, they sought to impart into the federal system the elements of adjustment by resorting to which the system might acquire the strength of a unitary

system in case of external or internal aggression. That it has succeeded in attaining this objective[7] has been demonstrated by the working of our governmental system since the ominous aggression which had been set in motion by China in October, 1962 and is still being driven hard by the unholy China-Pakistan axis. Any sacrifice of autonomy by the States in any direction, at such critical juncture, will be a homage to national security and prestige and not an abandonment of the federal norm, which after all, is a means, not an end.

Judicial review.

The most remarkable achievement in post-Constitution India is the exercise of the power of judicial review by the superior Courts. So long as this power is wielded by the Courts effectively and fearlessly, Democracy will remain ensured in India and, with all its shortcomings, the Constitution will survive. The numerous applications for the constitutional writs before the High Courts and the Supreme Court and their results testify to the establishment in India of 'limited Government', or, 'the Government of laws, not of men', as they call it in the United States of America. The Supreme Court has well performed its task of protecting the rights of the individual against the Executive, against oppressive legislation and even against the Legislature which may at times be overzealous in asserting its privileges not only against the individual but even against the Judges.[8]

At the same time, there has been vehement protest not only from the Government in power but also from a considerable section of the public that the Supreme Court itself has overdone its part in holding that the Fundamental Rights enumerated in Part III of the Constitution are altogether immune from the process of amendment in Art. 368 of the Constitution, though Art. 368 itself does not say so[9] and two unanimous Benches had previously held to the contrary. It is not the purpose of mentioning this in the present context to enter into the merits of such decisions, but for pointing out that owing to some such decisions, including those in *the Bank Nationalisation Case*[10] and *the Privy Purse Case*,[11] the Supreme Court has incurred hostility so much so that, while these pages are being written attempts are afoot to curb the powers of the Supreme Court, either directly or indirectly. There has been a dissolution of Parliament to appeal to the electorate to obtain their verdict on certain basic issues on which the decision of the Supreme Court has been contrary to the policies pursued by the Government.

The greatest danger to the Constitution, however, to-day, is not from those who want its amendment or revision but from those who advocate its total extinction as a prelude to a social and political revolution. History alone can say whether the system of government founded on the existing Constitution will survive the onslaughts coming from so many diverse directions.

REFERENCES :

1. India 1965, p. 164.
2. Chanda, Federal Finance, pp. 279, *et seq.*
3. Ibid., p. 186.
4. Statesman, 18-7-67, p. 1.
5. See, for instance, *Atiabari Tea Co.* v. *State of Assam*, (1961) 1 S.C.R. 809 (860); *Automobile Transport* v. *State of Rajasthan*, A.I.R. 1962 S.C. 1406 (*1416*).
6. *State of West Bengal* v. *Union of India*, A.I R. 1963 S.C. 1241.
7. It would have been impossible to achieve this strength over-night if the unitary elements in the Constitution had not been utilised by the Union in times of peace to make the country understand that strength lay in greater cohesion and unity. The Author is thus unable to agree that "the most surprising thing about Indian politics during the last ten years is that, while keeping intact the formal legal relations, the distribution of functions, powers and finances between the Union and the States has been altered to an extent that was *not at all contemplated by the Constituent Assembly*" (Santhanam, Union-State Relations, 1960, vii).
8. Cf. Reference under Art. 143, A.I.R. 1965 S.C. 745.
9. *Golak Nath* v. *State of Punjab*, A.I.R. 1961 S.C. 1643 (see p. 71, *ante*).
10. *R. C. Capoor* v. *Union of India*, (1970) 1 S.C.C. 248.
11. *Madhavrao* v. *Union of India*, (1970) S.C. [decided on 15-12-70].

APPENDIX

TABLE I

FACTS TO START WITH

(Figures rounded up)

India has (1969)—

an area of 1261,000 sq. miles (32,68,080 sq. k.m.) of which 103,069 sq. miles are included in the Union Territories and the rest in the States:

566 thousand villages as against 2 thousand seven hundred towns; and 82% of the population live in villages;

a population of over 43.9 crores or 439 million (1961 census),—of whom Hindus constitute 85%, Muslims 10%, and other religions together 10%; who speak as many as 845 languages of which 14 languages are spoken by over a lakh of people each and these 14 have, accordingly, been included in the Eighth Schedule of the Constitution;

a per capita annual income of Rs. 293 (1960-61).

a literacy of 24% of the population (1961 census).

Every man and woman of 21 and over is an elector for the House of the People and respective Legislative Assembly. At the fourth general election held in 1967, the number of persons on the electoral roll was 250 m., which is more than the population of the U.S.A. or the U.S.S.R. General elections have been held in 1952, 1957, 1962 and 1967. The fifth General election is due to be held in March, 1971, owing to the premature dissolution of the fourth *Lok Sabha* (House of the People) on 27-12-70.

India spends per annum Rs. 3,262 crores, of which Defence includes 985 crores (1969-70).

The Constituent Assembly had its first sitting on 9-12-46.

The Draft Constitution of India, which was prepared by the Drafting Committee of the Constituent Assembly and presented by it to the President of the Constituent Assembly on 21-2-48, contained 315 Articles and 8 Schedules.

The Constitution of India, as adopted on 26-11-49, contained 395 Articles and 8 Schedules. After subsequent amendments, the Constitution as it stood at the beginning of 1971, contained 388 Articles and 9 Schedules.

Up to January, 1971, the Constitution has been amended twenty-three times by Constitution Amendment Acts passed in conformity with Art. 368 of the Constitution (See Table IV).

TABLE II

STATEWISE MEMBERSHIP OF THE CONSTITUENT ASSEMBLY OF INDIA AS ON 31ST DECEMBER, 1947

PROVINCES—229

		No. of members			No. of members
1.	Madras	49	7.	C. P. and Berar ..	17
2.	Bombay	21	8.	Assam	8
3.	West Bengal	19	9.	Orissa	9
4.	United Provinces ..	55	10.	Delhi	1
5.	East Punjab	12	11.	Ajmer-Merwara ..	1
6.	Bihar ..	36	12.	Coorg ..	1

INDIAN STATES—70

1.	Alwar	1	19.	Tripura, Manipur and Khasi States Group ..	1
2.	Baroda ..	3	20.	U. P. States Group	1
3.	Bhopal	1	21.	Eastern Rajputana States Group	3
4.	Bikaner	1	22.	Central India States Group (including Bundelkhand and Malwa)	3
5.	Cochin	1	23.	Western India States Group	4
6.	Gwalior	4	24.	Gujerat States Group ..	2
7.	Indore	1	25.	Deccan and Madras States Group	2
8.	Jaipur	3	26.	Punjab States Group ..	3
9.	Jodhpur	2	27.	Eastern States Group I ..	4
10.	Kolhapur	1	28.	Eastern States Group II ..	3
11.	Kotah	1	29.	Residuary States Group ..	4
12.	Mayurbhanj	1			299
13.	Mysore	7			
14.	Patiala	2			
15.	Rewa	2			
16.	Travancore	6			
17.	Udaipur	2			
18.	Sikkim and Cooch Behar Group	1			

TABLE III

TERRITORY OF INDIA

(A) *As in the original Constitution* (1949)

UNION

States in Part A	*States in Part B*	*States in Part C*	*Territories in Part D*
1. Assam	1. Hyderabad	1. Ajmer	1. The Andaman and Nicobar Islands
2. Bihar	2. Jammu and Kashmir	2. Bhopal	2. Acquired Territories (if, any)
3. Bombay	3. Madhya Bharat	3. Bilaspur	
4. Madhya Pradesh	4. Mysore	4. Cooch-Behar	
5. Madras	5. Patiala and East Punjab	5. Coorg	
6. Orissa			
7. Punjab			
8. The United Provinces			
9. West Bengal			

(B *After the Seventh Amendment*, 1956 *up to* 1971.

UNION

States[1]	*Union Territories*[1]	*Other territories as may be acquired.*
1. Andhra Pradesh	1. *Delhi*	
2. Assam	2. Manipur	
3. Bihar	3. Tripura	
4. *Gujarat*[2]	4. The Andaman and Nicobar Islands	
5. Kerala	5. The Laccadive Minicoy and Amindivi Islands	
6. Madhya Pradesh	6. *Dadra & Nagar Haveli*[7]	
7. *Tamil Nadu*[3]	7. *Goa, Daman & Diu*[8]	
8. *Maharashtra*[2]	8. *Pondicherry*[9]	
9. Mysore	9. *Chandigarh*[10]	
10. Orissa		
11. Punjab		
12. Rajasthan		
13. Uttar Pradesh		
14. West Bengal		
15. Jammu and Kashmir		
16. *Nagaland*[4]		
17. *Haryana*[5]		
18. *Himachal Pradesh*[6]		

1. The capital cities are: Andhra Pradesh—Hyderabad; Assam—Shillong; Bihar—Patna; Gujarat—Ahmedabad; Haryana—Chandigarh; Jammu & Kashmir—Srinagar; Kerala—Trivandrum, Madhya Pradesh—Bhopal; Maharashtra—Bombay; Mysore—Bangalore; Nagaland—Kohima; Orissa—Bhubaneswar; Punjab—Chandigarh; Rajasthan—Jaipur; Tamil Nadu—Madras; Uttar Pradesh—Lucknow; West Bengal—Calcutta; Dadra & Nagar Haveli—Silvassa; Goa, Daman & Diu—Panaji; Delhi—Delhi; Himachal Pradesh—Simla; Manipur—Imphal; Tripura—Agartala; Andaman & Nicobar Island—Port Blair; Laccadive, Minicoy & Amindivi Islands—Kozhikode; Pondicherry—Pondicherry.
2. Substituted for Bombay by the Bombay Reorganisation Act (11 of 1960).
3. The name of 'Madras' changed to 'Tamil Nadu' by the Madras State (Alteration of Name) Act, 1968.
4. Inserted by the State of Nagaland Act, 1962.
5. Inserted by the Punjab Reorganisation Act, 1966.
6. Inserted by the State of Himachal Pradesh Act, 1970.
7. Inserted by the Constitution (Tenth Amendment) Act, 1961.
8. Inserted by the Constitution (Twelfth Amendment) Act, 1962.
9. Inserted by the Constitution (Fourteenth Amendment) Act, 1963.
10. Inserted by the Constitution (Twelfth Amendment) Act, 1961, with effect from 20-12-61.

TABLE IV

THE CONSTITUTION AMENDMENT ACTS

Sl. No.	Act	Date of assent by President	Date of commencement	Whether ratified by more than half of State Legislatures, as required by the Proviso to Art. 368	Amendment made
1.	The Constitution (First Amendment) Act, 1951	18- 6-51	18- 6-51 (retrospective in part)		Articles amended—15, 19, 85, 87, 174, 176, 341, 342, 376. Articles inserted—31A, 31B. Schedule added—Ninth.
2.	The (Second Amendment) Act, 1952	1- 5-53	1- 5-53	Since the Amendment Bill sought to make a change in the representation of States in Parliament, it had to be referred to the Legislatures of the States in Parts A and B for their ratification. The Bill was accordingly passed in Parliament on 19-12-52, and then referred to the States. On receiving the ratification of not less than one-half of the State Legislatures, the President gave his assent on 1-5-53.	Article amended—81.
3.	The (Third Amendment) Act, 1954	22- 2-55	22- 2-55	The Bill was passed by Parliament on 28-9-54. Since the Bill sought to amend a List of the Seventh Schedule, it required ratification by the Legislatures of not less than one-half of the States specified in Parts A and B of the First Schedule. After having received such ratification, the President gave his assent on 22-2-55.	Schedule amended—Seventh Schedule —List III, Entry 33.
4.	The (Fourth Amendment) Act, 1955	27- 4-55	27- 4-55		Articles amended—31, 31A, 305. Schedule amended—Ninth.
5.	The (Fifth Amendment) Act, 1955	24-12-55	24-12-55		Article amended—3.

TABLE IV—*Contd.*

Sl. No.	Act	Date of assent by President	Date of commencement	Whether ratified by more than half of State Legislatures, as required by the Proviso to Art. 368	Amendment made
6.	The (Sixth Amendment) Act, 1956	11- 9-56	11- 9-56	The Bill was passed by Parliament on 31-5-56. It required to ratification by not than half of the State Legislatures because it sought to amend the Legislative Lists. Having received such ratification the Bill was assented to by the President on 11-9-56.	Articles amended—269, 286. Schedule amended—Seventh Schedule —List II, Entry 54; List I, Entry 92A *inserted*.
7.	The (Seventh Amendment) Act, 1956	19-10-56	1-11-56	For obvious reasons, this Bill required ratification. Hence it was referred to the State Legislatures, having been passed by Parliament on 11-9-56. After obtaining the required ratification, the President gave his assent.	Articles amended—49, 80, 81, 82, 131, 153, 158, 168, 170, 171, 216, 217, 220, 222, 224, 230, 231, 232, 239, 240, 298, 371. Articles inserted—258, 290A, 350A, 350B, 372A, 378A. Schedules amended—First, Second, Fourth, Seventh—List I, Entries 42, 67; List II, Entries 12, 24; List III, Entry 40. Articles omitted—238, 242, 243, 259, 278, 306, 379-391. Schedule omitted—Second, Part B. Consequential amendments in numerous provisions.
8.	The (Eighth Amendment) Act, 1959	5- 1-60	5- 1-60	....	Art. 334 amended—20 years' substituted for '10 years'.
9.	The (Ninth Amendment) Act, 1960.	28-12-60	Transfer to take effect on 'appointed day'.	Views of the Legislature of the State of W. B. ascertained, under Art. 3, but ratification was not required as mere territorial change was not a matter specified in the Proviso to Art. 368.	First Schedule amended—to transfer certain territories from the States of Assam, Punjab, West Bengal and the Union Territory of Tripura to Pakistan, implementing the Indo-Pakistan agreements of different dates.

TABLE IV—*Contd.*

S No.	Act	Date of assent by President	Date of commencement	Whether ratified by more than half of State Legislatures, as required by the Proviso to Art. 368	Amendment made
10.	The (Tenth Amendment) Act, 1961	16- 8-61	11- 8-61 (with retrospective effect).	....	Art. 240 and First Schedule amended —to incorporate Dadra and Nagar Haveli as a Union Territory.
11.	The (Eleventh Amendment) Act, 1961	19-12-61	19-12-61	....	Arts. 66(1) and 71(3)—to narrow down grounds for challenging validity of election of President or Vice-President
12.	The (Twelfth Amendment) Act, 1962	27- 3-62	20-12-61 (retrospectively).	....	Art. 240 and First Schedule amended —to incorporate Goa, Daman & Diu as a Union Territory.
13.	The (Thirteenth Amendment) Act, 1962	28-12-62	1-12-63	Yes.	Art. 371A inserted—to make special provisions for the administration of the State of Nagaland.
14.	The (Fourteenth Amendment) Act, 1962	28-12-62	28-12-62 But ss. 3 & 5 (a) came into force on 16-8-62, retrospectively)	Yes.	Provided that Pondicherry, Karaikal, Mahe and Yanam, the former French territories, should be specified in the Constitution as the Union Territory of Pondicherry. Enabled the Union Territories of Himachal Pradesh; Manipur, Tripura; Goa, Daman and Diu and Pondicherry to have Legislatures and Councils of Ministers on the same pattern as in some of the Part C States before the States' reorganization. The Act also provided that the maximum representation for Union Territories in the Lok Sabha should be

TABLE IV—*Contd.*

Sl. No.	Act	Date of assent by President	Date of commencement	Whether ratified by more than half of State Legislatures, as required by the Proviso to Art. 368	Amendment made
					raised from 20 to 25, to enable the Union Territory of Pondicherry to be represented adequately.
15.	The (Fifteenth Amendment) Act, 1963	5-10-63	5-10-63	Yes.	Amends a number of Arts. 124, 128, 217, 222, 224, 224A, 226, 297, 311, 316, Entry 78, List I. The more important of these changes are—the raising of the age of retirement of a High Court Judge from 60 to 62; the extension of the jurisdiction of a High Court to issue writs under Art. 226 to a Government or authority situate outside its territorial jurisdiction where the cause of action arises within such jurisdiction; modifying the procedure imposed by Art. 311 upon the pleasure of the President or Governor to dismiss a civil servant.
16.	The (Sixteenth Amendment) Act, 1963	5-10-63	5-10-63	Yes.	Amends Art. 19 to enable Parliament to make laws providing restrictions upon the freedom of expression questioning the sovereignty or integrity of the Union of India, with consequential changes in Arts. 84, 173, Third Sch.
17.	The (Seventeenth Amendment) Act, 1964	20- 6-64	20- 6-64	....	.... Amends Art. 31A (definition of 'estate' amended with retrospective effect); Entries 21—64 added to the Ninth Schedule.

TABLE IV—*Contd.*

Sl. No.	Act	Date of commencement	Date of assent by President	Whether ratified by more than half of State Legislatures, as required by the Proviso to Art. 368	Amendment made
18.	The (Eighteenth Amendment) Act, 1966	27- 8-66	27- 8-66	....	Adding Explanations to Art. 3.
19.	The (Nineteenth Amendment) Act, 1966	11-12-66	11-12-66	....	Amending Art. 324
20.	The (Twentieth Amendment) Act, 1966	22-12-66	22-12-66	....	Inserting Art. 233A.
21.	The (Twenty-first Amendment) Act, 1967	10- 4-67	10- 4-67	....	Includes 'Sindhi' in the List of Official Languages in the 8th Schedule.
22.	The (Twenty-second Amendment) Act, 1969	25- 9-69	25- 9-69	Yes.	Inserts Arts. 244A, 371B and Cl. (1A) in Art. 275, to constitute an autonomous State within the State of Assam,[1] comprising certain areas specified in Part A of the 6th Sch.
23.	The (Twenty-third Amendment) Act, 1970	23- 1-70	23- 1-70	Yes.	Amending Arts. 330, 332, 333, 334 (to extend the period of reservation for Scheduled Castes and Tribes).

1. This sub-State has been named Meghalaya.

TABLE V

FUNDAMENTAL RIGHTS

Right to Equality	*Right to particular freedom*	*Right against exploitation*	*Right to freedom of religion*	*Cultural and educational rights of minorities*	*Right to property*	*Right to constitutional remedies*
1. Equality before law and Equal protection before law [Art. 14].	1. Freedom of speech & expression; assembly; association; movement; residence & settlement; property; profession [Art. 19].	1. Prohibition of traffic in human beings and forced labour [Art. 25].	1. Freedom of conscience and free profession [Art. 25].	1. Protection of language, script or culture of minorities [Art. 29].	1. No deprivation of property except under authority of law [Art. 31(1)].	Remedies for enforcement of the fundamental rights conferred by this Part,—writs of habeas corpus, mandamus, prohibition, certiorari and quo warranto [Art. 32].
2. Prohibition of discrimination on ground of religion etc. [Art. 15].	2. Protection in respect of condition for offence [Art. 20].	2. Prohibition of employment of children in hazardous employment [Art. 24].	2. Freedom to manage religious affairs [Art. 26].	2. Right of minorities to establish and administer educational institutions [Art. 30].	2. No compulsory acquisition or requisition of property unless made for public purpose and payment of compensation provided for [Art. 31(2)].	
3. Equality of opportunity re. employment [Art. 16].	3. Protection of life & personal liberty [Art. 21].		3. Freedom as to payment of taxes for promotion of any particular region [Art. 27].			
4. Abolition of untouchability [Art. 17].	4. Protection against arrest and detention in certain cases [Art. 22].		4. Freedom as to attendance at religious instruction in certain educational institutions [Art. 28].			
5. Abolition of titles [Art. 18].						

TABLE VI

DIRECTIVE PRINCIPLES OF STATE POLICY

Directives in the nature of ideals of the State:

1. The State shall strive to promote the welfare of the people by securing a social order permeated by social, economic and political justice [Art. 38].
2. The State shall endeavour to secure just and human conditions of work, a living wage, a decent standard of living and social and cultural opportunities for all workers [Art. 43].
3. The State shall endeavour to raise the level of nutrition and standard of living and to improve public health [Art. 47].
4. The State shall endeavour to promote international peace and amity [Art. 51].
5. The State shall direct its policy towards securing equitable distribution of the material resources of the community and prevention of concentration of wealth and means of production [Art. 39].

Directives shaping the policy of the States:

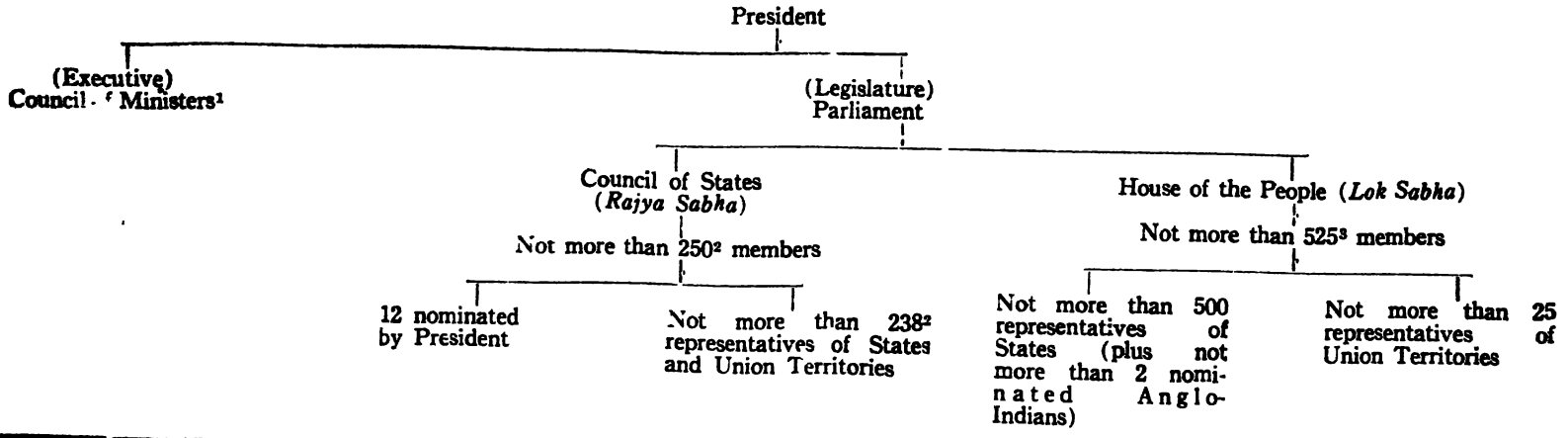
1. To establish economic democrary and justice by securing certain economic rights (to be enumerated under the next heading).
2. To secure a uniform civil code for the citizens [Art. 44].
3. To provide free and compulsory primary education [Art. 45].
4. To prohibit consumption of liquor and intoxicating drugs except for medical purposes [Art. 47].
5. To develop cottage industries [Art. 43].
6. To organise agriculture and animal husbandry on modern lines [Art. 48].
7. To prevent slaughter of useful cattle, *i.e.*, cows, calves, and other milch and draught cattle [Art. 48].
8. To organise Village Panchayats as units of self-government [Art. 40].
9. To protect and maintain places of historic or artistic interest [Art. 49].
10. To separate the Judiciary from the Executive [Art. 50].

Non-justicable rights of citizens:

1. Right to adequate means of livelihood [Art. 39(a)].
2. Right of both sexes to equal pay for equal work [Art. 39(d)].
3. Right against economic exploitation [Art. 39(e), (f)].
4. Right to work [Art. 41].
6. Right to public assistance in case of unemployment, old age, sickness and other cases of undeserved want [Art. 42].

TABLE VII

GOVERNMENT OF THE UNION



1. In March, 1969, there were in the Council of Ministers—
   (a) 17 Ministers of the Cabinet, including the Prime Minister;
   (b) 19 Ministers of State.
   Besides, there were 17 Deputy Ministers.
2. In May, 1969, the actual number of Members of the Council of States was 240, of whom 228 were representatives of the States and Union Territories, and 12 nominated by the President.
3. In May, 1969, the actual number of Members of the House of the People was 523, consisting of—
   496 representatives of States (including 6 from Jammu and Kashmir appointed by the President on the recommendation of the Legislature of that State).
   24 representatives of Union Territories of Delhi, H. P., Manipur, Tripura, Pondicherry, Chandigarh, Andaman, Nicobar Islands, Laccadive, Minicoy, Amindivi Islands, Dadra, Nagar Haveli, Goa, Daman and Diu.
   1 nominated by the President to represent the North East Frontier Tract.
   2 nominated Anglo-Indians.

TABLE VIII

OFFICES OF PRESIDENT AND VICE-PRESIDENT COMPARED.

President	*Vice-President*
Election :	
Elected by electoral college consisting of the elected members of (a) both Houses of Parliament; (b) Legislative Assemblies of States.	Elected by an electoral college consisting of members of both Houses of Parliament.
Both elections to be in accordance with the system of proportional representation by single transferable vote.	
Qualifications for election :	
(a) Must be a citizen of India;	
(b) Must have completed the age of 35 years, and	
(c) Must be qualified for election of House of the People.	(c) Must be qualified for election to Council of States.
(d) Must not hold any office of profit under the Government of India or of a State or any other authority under the control of either Government, excepting the offices of President, Vice-President, Governor of a State or Minister of the Union or of a State.	
Term of office :	
Five years from the date of entering office.	
(a) May resign earlier, by writing addressed to Vice-President.	(a) May resign earlier, by writing addressed to President.
(b) May be removed by the process of impeachment.	(b) May be removed by a resolution passed by a majority of members of Council of States and agreed to by House of the People.
Both eligible for re-election, any number of times	
Salary :	
Rs. 10,000/- per mensem.	Rs. 2250/- per mensem; but when he acts as President, gets the emoluments of the President, i.e., Rs. 10,000/-.
Functions :	
The executive power in the Union is vested in him, and he exercises it, on the advice of the Council of Ministers of the Union.	Has no functions as Vice-President except that when a vacancy arises in the office of President, he has to act as President until a new President is elected and enters upon office. Except when a vacancy arises in office of President, the Vice-President acts as *ex officio* Chairman of Council of States.

TABLE VIII-A

A. Presidents of India

Dr. Rajendra Prasad (12-5-52—1957).
Dr. Rajendra Prasad (re-elected) (13-5-57—1962).
Dr. S. Radhakrishnan (1962—67).
Dr. Zakir Hussain (1967—3-5-69).
V. V. Giri (3-5-69—*Actg.*).
V. V. Giri (24-8-69—*Elected*).

B. Prime Ministers of India

1. Pandit Jawaharlal Nehru (26-1-50).
2. Sri Lal Bahadur Shastri (June, 1964).
3. Mrs. Indira Gandhi (13-3-67).

TABLE IX

Representation of States and Union Territories in the Council of States.[1]

1.	*Andhra Pradesh*	18
2.	*Assam*	7
3.	*Bihar*	22
4.	*Gujarat*	11[2]
5.	*Haryana*	5[3]
6.	*Kerala*	9
7.	*Madhya Pradesh*	16
8.	*Tamil Nadu*	18[2]
9.	*Maharashtra*	19[4]
10.	*Mysore*	12
11.	*Orissa*	10
12.	*Punjab*	7[3]
13.	*Rajasthan*	10
14.	*Uttar Pradesh*	34
15.	*West Bengal*	16
16.	*Jammu and Kashmir*	4
17.	*Nagaland*	1[5]
18.	*Himachal Pradesh*	3[7]
19.	*Delhi*	3
20.	*Manipur*	1
21.	*Tripura*	1
22.	*Pondicherry*	1[6]
	TOTAL	228[6]

1. Substituted by the Constitution (Seventh Amendment) Act, 1956.
2. Substituted by the Bombay Reorganisation Act, 1960.
3. Inserted by the Punjab Reorganisation Act, 1966.
4. Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959.
5. Inserted by the State of Nagaland Act, 1962.
6. Inserted by the Constitution (Fourteenth Amendment) Act, 1962.
7. Amended by the State of Himachal Pradesh Act, 1970.

TABLE X

REPRESENTATION OF STATES AND UNION TERRITORIES IN THE HOUSE OF THE PEOPLE.

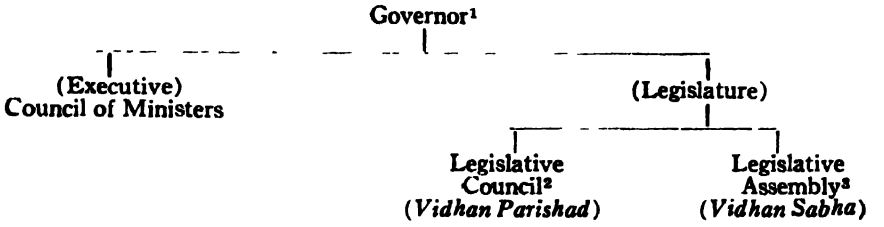
(As in May, 1969)

Andhra Pradesh	41
Assam	14
Bihar	53
Gujarat	24[1]
Haryana	9[2]
Himachal Pradesh[3]	6[4]
Kerala	19
Madhya Pradesh	37
Maharashtra	45[1]
Mysore	27
Nagaland	1[5]
Orissa	20
Punjab	13[4]
Rajasthan	23
Tamil Nadu	39
Uttar Pradesh	85
West Bengal	40
Jammu and Kashmir	6
Delhi	7
Manipur	2
Tripura	2
Dadra and Nagar Haveli	1
Goa, Daman & Diu	2
Andaman and Nicobar Islands	1
Laccadive, Minicoy and Amindivi Islands	1
Pondicherry	1
North-East Frontier Tract	1
Chandigarh	1[2]
TOTAL	520

1. Changes made by the Bombay Reorganisation Act, 1960.
2. Inserted by the Punjab Reorganisation Act, 1966.
3. Himachal Pradesh is now a State, since the State of Himachal Pradesh Act, 1970.
4. Substituted by *ibid.*
5. Inserted by the State of Nagaland Act, 1962.

TABLE XI

GOVERNMENT OF STATES



1. The designation of the head of the State of Jammu and Kashmir is *Sadar-i-Riyasat*.
2. The total number of seats in the ten States (including Jammu and Kashmir) which had a Legislative Council, in May, 1969, was 570.
3. The total number of seats in the Legislative Assemblies of the States in May, 1969, was 3,575.

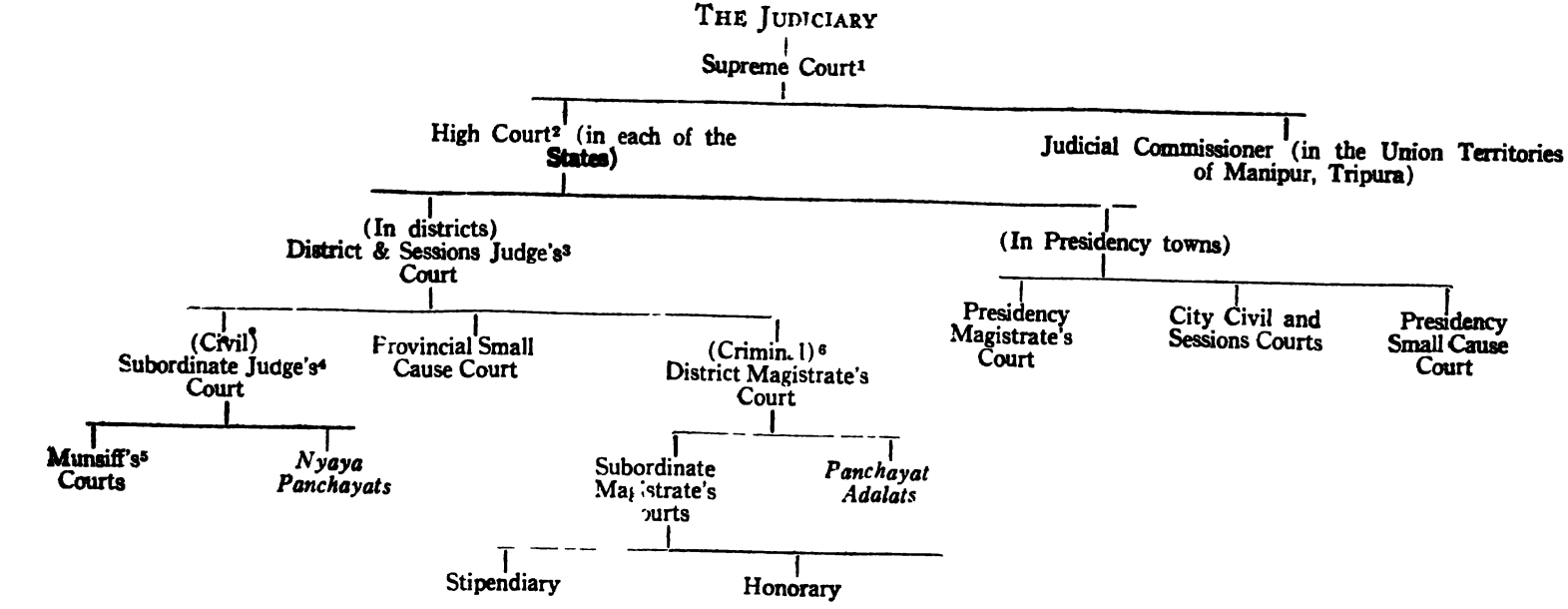
TABLE XII

MEMBERSHIP OF LEGISLATIVE ASSEMBLIES AND LEGISLATIVE COUNCILS

(as in 1969)

	Legislative Assembly	*Legislative Council*
Andhra	*288* ..	90
Assam	*126* ..	Nil
Bihar	318 ..	96
Gujarat	*168* ..	Nil
Haryana	*81*[1] ..	Nil
Himachal Pradesh	*63* ..	Nil
Kerala	*134* ..	Nil
Madhya Pradesh	*297* ..	Nil
Maharashtra	*271* ..	*81*
Mysore	*217*	63
Nagaland	41 .	Nil
Orissa	140 ..	Nil
Punjab	*104* ..	40
Rajasthan	*184* ..	Nil
Tamil Nadu	*235* ..	63
Uttar Pradesh . ..	*426* ..	108
West Bengal	*280* ..	*Nil*
Jammu & Kashmir . ..	75 ..	36
Goa, Daman & Diu	32 ..	Nil
Manipur	33 ..	Nil
Pondicherry	30 ..	Nil
Tripura	33 ..	Nil
	3575 ..	*577*

TABLE XIII



1. Chief Justice and 13 other Judges.
2. At the end of 1969, there were some 286 Judges in the 17 High Courts.
3. „ about 400 District Judges.
4. „ about 450 Subordinate Judges.
5. „ about 1,400 Munsifs.
6. „ about 2,100 civil and over 4,200 criminal courts.

TABLE XIV

HIGH COURTS AND THEIR TERRITORIAL JURISDICTION

Name of High Court	*Territorial jurisdiction*
1. Allahabad ..	.. State of Uttar Pradesh.
2. Andhra Pradesh ..	.. State of Andhra Pradesh.
3. Assam ..	.. States of Assam and Nagaland.
4. Bombay ..	.. State of Maharashtra.
5. Calcutta ..	.. State of West Bengal; Union Territory of Andaman and Nicobar Islands.
6. Delhi ..	.. Union Territories of Delhi & Himachal Pradesh.
7. Gujarat ..	.. State of Gujarat.
7A. Himachal Pradesh[1] ..	.. State of Himachal Pradesh.
8. Jammu & Kashmir ..	.. State of Jammu & Kashmir.
9. Kerala ..	.. State of Kerala; Union Territory of Laccadive, Minicoy & Amindivi Islands.
10. Madhya Pradesh ..	.. State of Madhya Pradesh.
11. *Tamil Nadu* ..	.. State of Madras and Union Territory of Pondicherry.
12. Mysore ..	.. State of Mysore.
13. Orissa ..	.. State of Orissa.
14. Patna ..	.. State of Bihar.
15. Punjab ..	.. States of Punjab and *Haryana*[2] and Union Territory of *Chandigarh*.[2]
16. Rajasthan ..	.. State of Rajasthan.

1. Himachal Pradesh became a State and got a separate High Court, under the State of Himachal Pradesh Act, 1970.
2. Inserted by the Punjab Reorganisation Act, 1966.

TABLE XV

DISTRIBUTION OF LEGISLATIVE POWER

List I– Union List.

1. Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation.

2. Naval, military and air forces; any other armed forces of the Union.

3. Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.

4. Naval, military and air force works.

5. Arms, firearms, ammunition and explosives.

6. Atomic energy and mineral resources necessary for its production.

7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.

8. Central Bureau of Intelligence and Investigation.

9. Preventive detention for reasons connected with Defence, Foreign Affairs or the security of India: persons subjected to such detention.

10. Foreign Affairs; all matters which bring the Union into relation with any foreign country.

11. Diplomatic, consular and trade representation.

12. United Nations Organisation.

13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat.

List II—State List.

1. Public order (but not including the use of naval, military or air forces or any other armed forces of the Union in aid of civil power).

2. Police, including railway and village Police.

3. Administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Court; officers and servants of the High Court; procedure in rent and revenue Courts; fees taken in all courts except the Supreme Court.

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other States for the use of prisons and other institutions.

5. Local government, that is to say, the constitution and powers of municipal corporation, improvement trusts, district boards, mining settlement authorities and other Local authorities for the purpose of local self-government or village administration.

6. Public health and sanitation, hospitals and dispensaries.

7. Pilgrimages, other than pilgrimages to places outside India.

8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

9. Relief of the disabled and unemployable.

10. Burials and burial grounds; cremations and cremation grounds.

11. Education including universities, subject to the provisions of entries 63, 64, 65 and 66 of List I and entry 25 of List III.

List III—Concurrent List.

1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.

2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.

3. Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.

4. Removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in entry 3 of this List.

5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

6. Transfer of property other than agricultural land; registration of deeds and documents.

7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.

8. Actionable wrongs.

9. Bankruptcy and insolvency.

TABLE XV—*Contd.*

List I—Union List.

14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.
15. War and peace.
16. Foreign jurisdiction.
17. Citizenship, naturalisation and aliens.
18. Extradition.
19. Admission into, and emigration and expulsion from India; passports and visas.
20. Pilgrimages to places outside India.
21. Piracies and crimes committed on the high seas or in the air; offences against the law of nations committed on land or the high seas or in the air.
22. Railways.
23. Highways declared by or under law made by Parliament to the national highways.
24. Shipping and navigation on inland waterways, declared by Parliament by law to be national waterways, as regards mechanically propelled vessels; the rule of the road on such waterways.
25. Maritime shipping and navigation, including shipping and navigation on tidal waters; provision of education and training for the mercantile marine and regulation of such education and training provided by States and other agencies.
26. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.
27. Ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation, and the constitution and powers of port authorities therein.

List II—State List.

12. Libraries, museums and other similar institutions controlled or financed by the State; ancient and historical monuments and records other than those declared *by or under law made by Parliament*[1] to be of national importance.
13. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways, ropeways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles.
14. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.
15. Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice.
16. Pounds and the prevention of cattle trespass.
17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I.
18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; and improvements and agricultural loans; colonization.
19. Forests.
20. Protection of wild animals and birds.
21. Fisheries.

[1]Substituted by the Constitution (Seventh Amendment) Act, 1956.

List III—Concurrent List.

10. Trust and Trustees.
11. Administrators-general and official trustees.
12. Evidence and oaths; recognition of laws, public acts and records, and judicial proceedings.
13. Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.
14. Contempt of Court, but not including contempt of the Supreme Court.
15. Vagrancy; nomadic and migratory tribes.
16. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficients.
17. Prevention of cruelty to animals.
18. Adulteration of foodstuffs and other goods.
19. Drugs and poisons, subject to the provisions of entry 59 of the List I with respect to opium.
20. Economic and social planning.
21. Commercial and industrial monopolies, combines and trusts.
22. Trade unions; industrial and labour disputes.
23. Social security and social insurance; employment and unemployment.
24. Welfare of labour including conditions of work, provident funds, employers, liability, workmen's compensation, invalidity and old age pensions and maternity benefits.
25. Vocational and technical training of labour.
26. Legal, medical and other professions.
27. Relief and rehabilitation of persons dis-

List I—Union List.

28. Port quarantine, including hospitals connected therewith; seamen's and marine hospitals.

29. Airways; aircraft and air navigation; provision of aerodromes; regulation and organisation of air traffic and of aerodromes; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies.

30. Carriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels.

31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.

32. Property of the Union and the revenue therefrom, but as regards property situated in a State.... subject to legislation by the State, save in so far as Parliament by law otherwise provides.

33. *Omitted.*[1]

34. Courts of wards for the estates of Rulers of Indian States.

35. Public debt of the Union.

36. Currency, coinage and legal tender; foreign exchange.

37. Foreign loans.

38. Reserve Bank of India.

39. Post Office Savings Bank.

40. Lotteries organised by the Government of India or the Government of a State.

41. Trade and commence with foreign countries; import and export across customs frontiers; definition of customs frontiers.

42. Inter-State trade and commence.

[1]Omitted by the Constitution (Seventh Amendment) Act, 1956.

List II—State List.

22. Courts of wards subject to the provisions of entry 34 of List I; encumbered and attached estates.

23. Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union

24. Industries subject to the provisions of *entries 7 and 52*[1] of List I.

25. Gas and gas-works.

26. Trade and commerce within the State subject to the provisions of entry 33 of List III.

27. Production, supply and distribution of goods subject to the provisions of entry 33 of List III

28. Markets and fairs.

29. Weights and measures except establishments of standards.

30. Money-lending and money-lendors; relief of agricultural indebtedness.

31. Inns and inn-keepers.

32. Incorporation, regulation and winding up of corporations, other than those specified in List I; universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies

33. Theatres and dramatic performances; cinemas subject to the provisions of entry 60 of List I; sports, entertainments and amusements.

34. Betting and gambling.

35. Works, lands and buildings vested in or the possession of the State.

36. *Omitted.*[2]

[1]Substituted by the Constitution (Seventh Amendment) Act, 1956.

[2]Omitted by *ibid.*

List III—Concurrent List.

placed from their original place of residence by reason of the setting up of the Dominions of India and Pakistan.

28. Charities and charitable institutions, charitable and religious endowments and religious institutions.

29. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.

30. Vital statistics including registration of births and deaths.

31. Ports other than those declared by or under law made by Parliament or existing laaw to be major ports.

32. Shipping and navigation on inland waterways as regards mechanically propellel vessels and the rule of the road on such waterways, and the carriage of passengers and goods on and waterways subject to the provisions of List I with respect to national waterways.

33. Trade and commerce in, and the production, supply and distribution of,—

(*a*) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, *and imported goods of the same kind as such products;*

(*b*) *foodstuffs, including edible oilseeds and oils;*

(*c*) *cattle fodder, including oilcakes and other concentrates;*

(*d*) *raw cotton, whether ginned or unginned, and cotton seed; and*

TABLE XV—*Contd.*

List I—Union List.

43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies.

44. Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities.

45. Banking.

46. Bills of exchange, cheques, promissory notes and other like instruments.

47. Insurance.

48. Stock exchanges and futures markets.

49. Patents, inventions and designs; copyright; trade-marks and merchandise marks.

50. Establishment of standards of quality for goods to be exported out of India or transported from one State to another.

52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

53. Regulation and development of oilfields and mineral oil resources, petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable.

54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

55. Regulation of labour and safety in mines and oilfields.

56. Regulation and development of inter-State river valleys to the extent to which such regulation and development under the control

List II—State List.

37. Elections to the Legislature of the State subject to the provisions of any law made by Parliament.

38. Salaries and allowances of members of the Legislature of the State, of the Speaker and Deputy Speaker of the Legislative Assembly and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof.

39. Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof and if there is a Legislative council, of that Council and of the members and the committees thereof, enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the State.

40. Salaries and allowances of Ministers for the State.

41. State public services; State Public Service Commission.

42 State pensions, that is to say, pensions payable by the State or out of the Consolidated Fund of the State.

43. Public debt of the State.

44. Treasure trove.

45. Land revenue, including the assessment and collection for revenue, the maintenance of land records, survey for revenue purposes and records, survey for revenue purposes and records of rights, and alienation of revenues.

46. Taxes on agricultural income.

47. Duties in respect of succession to agricultural land.

48. Estate duty in respect of Agricultural land.

49. Taxes on lands and buildings.

50. Taxes on mineral rights subject to any

List III—Concurrent List.

(e) *raw jute.*[1]

34. Price control.

35. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied.

36. Factories.

37. Boilers.

38. Electricity.

39. Newspapers, books and printing presses.

40. Archaeological sites and remains other than those declared by or under law made by Parliament to be of national importance.

41. Custody, management and disposal of property (including agricultural land) declared by law to be evacuee property.

42. *Acquisition and requisitioning of property.*[2]

43. Recovery in a State of claims in respect of taxes and other public demands, including arrears of land-revenue and sums recoverable as such arrears, arising outside that State.

44. Stamp duties other than duties on fees collected by means of judicial stamps, but not including rates of stamp duty.

45 Inquiries and statistics for the purposes of any of the matters specified in List II or List III.

46. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.

47. Fees in respect of any of the matters in

[1]Substituted by the Constitution (Third Amendment) Act, 1954.

[2]Substituted by the Constitution (Seventh Amendment) Act, 1956.

List I—Union List.

of the Union is declared by Parliament by law to be expedient in the public interest.

57. Fishing and fisheries beyond territorial waters.

58. Manufacture, supply and distribution of salt by Union agencies; regulation and control of manufacture, supply and distribution of salt by other agencies.

59. Cultivation, manufacture, and sale for export, of opium.

60. Sanctioning of cinematograph films for exhibition.

61. Industrial disputes concerning Union employees.

62. The institutions known at the commencement of this Constitution as the National Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian War Memorial, and any other like institution financed by the Government of India wholly or in part and declared by Parliament by law to be an institution of national importance.

63. The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the Delhi University, and any other institution declared by Parliament by law to be an institution of national importance.

64. Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.

65. Union agencies and institutions for—

(*a*) professional, vocational or technical training, including the training of police officers; or

List II—State List.

limitations imposed by Parliament by law relating to mineral development.

51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:—

(*a*) alcoholic liquors for human consumption;

(*b*) opium, Indian hemp and other narcotic drugs and narcotics;

but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (*b*) of this entry.

52. Taxes on the entry of goods into a local area for consumption, use or sale therein.

53. Taxes on the consumption or sale of electricity.

54. Taxes on the sale or purchase of goods other than newspapers, *subject to the provisions of entry 92A of List I.*[3]

55. Taxes on advertisements other than advertisements published in the newspapers.

56. Taxes on goods and passengers carried by road or on inland waterways.

57. Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of entry 35 of List III.

58. Taxes on animals and boats.

59. Tolls.

60. Taxes on professions, trades, callings and employments.

61. Capitation taxes.

62. Taxes on luxuries, including taxes on

List III—Concurrent List.

this List, but not including fees taken in any court.

[3] Substituted by the Constitution (Sixth Amendment) Act, 1956.

TABLE XV—*Contd.*

List I—Union List.	*List II—State List.*	*List III—Concurrent List.*
(*b*) the promotion of special studies or research; or (c) scientific or technical assistance in the investigation or detection of crime. 66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions. 67. Ancient and historical monuments and records, and archæological sites and remains, declared by *or under law made by Parliament*[1] to be of national importance. 68. The Survey of India, the Geological, Botanical, Zoological and Anthropological Surveys of India; Meteorological organisations. 69. Census. 70. Union public services; all-India services; Union Public Service Commission. 71. Union pensions, that is to say, pensions payable by the Government of India or out of the Consolidated Fund of India 72. Elections to Parliament, to the Legislatures of States and to the offices of President and Vice-President; the Election Commission. 73. Salaries and allowances of members of Parliament, the Chairman and Deputy Chairman of the Council of States and the Speaker and Deputy Speaker of the House of the People. 74. Powers, privileges and immunities of each House of Parliament and of the members and the Committees of each House; enforcement of attendance of persons for giving evidence or producing documents before committees of Parliament or commissions appointed by Parliament.	entertainments, amusements, betting and gambling. 63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty. 64 Offences against laws with respect to any of the matters in this List. 65. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List. 66. Fees in respect of any of the matters in this List, but not including fees taken in any court.	

[1] Substituted by the Constitution (Seventh Amendment) Act, 1956.

TABLE XV—*Contd.*

List I—Union List.	*List II—State List.*	*List III—Concurrent List.*

75. Emoluments, allowances, privileges, and rights in respect of leave of absence, of the President and Governors; salaries and allowances of the Ministers for the Union; the salaries, allowances, and rights in respect of leave of absence and other conditions of service of the Comptroller and Auditor-General.

76. Audit of the accounts of the Union and of the States.

77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practise before the Supreme Court.

78. Constitution and organisation *including vacations*[1] of the High Courts except provisions as to Officers and servants of High Courts; persons entitled to practise before the High Courts.

79. Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any *Union territory*.[2]

80. Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated; extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State.

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[1] Inserted by the Constitution (Fifteenth Amendment) Act, 1963.

[2] Substituted by the Constitution (Seventh Amendment) Act, 1956.

TABLE XV—*Contd.*

List I—Union List.	*List II—State List.*	*List III—Concurrent List.*
81. Inter-State migration; inter-State quarantine. 82. Taxes on income other than agricultural income. 83. Duties of customs including export duties. 84. Duties of excise on tobacco and other goods manufactured or produced in India except— (*a*) alcoholic liquors for human consumption; (*b*) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substances included in sub-paragraph (*b*) of this entry. 85. Corporation tax. 86. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies. 87. Estate duty in respect of property other than agricultural land. 88. Duties in respect of succession to property other than agricultural land. 89. Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights. 90. Taxes other than stamp duties on transactions in stock exchanges and futures markets. 91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts. 92. Taxes on the sale or purchase of news-		

List I—Union List.

papers and on advertisements published therein.

[1]92A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purc- se takes place in the course of inter-State trade or commerce.

93. Offences against laws with respect to any of the matters in this List.

94. Inquiries, surveys and statistics for the purpose of any of the matters in this List.

95. Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in this List; admiralty jurisdiction.

96. Fees in respect of any of the matters in this List, but not inc ding fees taken any Court.

97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists

List II—State List.

List III—Concurrent List.

[1] Inserted by the Constitution Sixth Amendment) Act, 1956.

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