CONSTITUTIONAL AND ADMINISTRATIVE LAW

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Contents

Preface

Constitutional and administrative law are foundational pillars of legal systems, governing the structure, powers, and operations of governmental institutions while also safeguarding the rights and liberties of individuals. Constitutional law serves as the supreme legal authority, delineating the organization of government, the distribution of powers among its branches, and the protection of fundamental rights. It provides the framework within which administrative agencies operate, ensuring that their actions are consistent with constitutional mandates and principles.

Administrative law, in turn, focuses on the rules and procedures governing the exercise of governmental authority by administrative agencies. It sets out the mechanisms for oversight, accountability, and judicial review of administrative decisions to ensure they are lawful, fair, and in accordance with constitutional norms. This area of law encompasses principles of procedural fairness, such as the right to a fair hearing and access to judicial remedies, which are essential for protecting individuals' interests in administrative proceedings.

The relationship between constitutional and administrative law is symbiotic, as administrative actions must comply with constitutional mandates and principles. Constitutional provisions often establish the legal framework within which administrative agencies operate, setting limits on their powers and imposing obligations to respect individual rights. Administrative law, in turn, provides the mechanisms for enforcing constitutional norms and ensuring governmental accountability in practice.

The interplay between constitutional and administrative law is essential for maintaining the rule of law and democratic governance. Constitutional provisions

establish the legal framework within which administrative agencies operate, limiting their powers and imposing obligations to respect individual rights. Administrative law provides the means for enforcing these constitutional norms in practice, ensuring that governmental actions are subject to legal scrutiny and accountability.

In the preface of "Constitutional and Administrative Law," readers are introduced to the dynamic relationship between constitutional principles and administrative practices. The book aims to explore this intersection, offering insights into the foundational principles and functioning of modern legal systems. Through analysis of landmark cases, examination of key doctrines, and discussion of current issues, readers gain a comprehensive understanding of the complexities of constitutional and administrative law.

Through the exploration of constitutional and administrative law, readers gain insights into the mechanisms by which governmental powers are exercised and regulated. They learn about the importance of checks and balances, separation of powers, and the protection of individual rights in maintaining the integrity and legitimacy of legal systems. Ultimately, the study of constitutional and administrative law is essential for understanding the functioning of democratic societies and the role of law in ensuring justice, fairness, and accountability within governmental institutions.

In this book, we delve into the dynamic relationship between constitutional frameworks and administrative regulations, offering insights into the foundations and functioning of modern legal systems.

–Author

1

Constitutional Law

Constitutional law is the body of law which defines the relationship of different entities within a State, namely, the executive, the legislature, and the judiciary.

Not all Nation States have codified Constitutions, though all such states have a *jus commune*, or law of the land, that may consist of a variety of imperative and consensual rules. These may include customary law, conventions, statutory law, judge-made law orinternational rules and norms.

THE GOVERNOR AND THE COUNCIL OF MINISTERS

In the exercise of all functions, expect when he is expressly required to act in his discretion, the Governor is aided and advised by a Council of Ministers headed by the Chief Minister.. But if there is a conflict of opinion between the Governor and the Ministry as to whether or not a particular matter falls within the scope of the Governor's discretionary power, the decision of the Governor in his discretion shall be final. Further, the validity of anything done by the Governor cannot be called in question on the ground that he ought or ought not to have acted in his discretion. Although the Governor has to act on the advise of the Ministers, the question whether any, and if-so what, advise was tendered by the Ministers to the Governor cannot be enquired into in any Court. The Governor appoints the Chief Minister and on the advice of the Chief Minister he appoints the other Ministers. The Ministers hold office during the pleasure of the Governor. The Ministers are collectively responsible to the Legislative Assembly of the State just as the Central Ministers are responsible to the Lok

Sabha. The Governor administers the oath of office to each Minister before he enters upon his office. The Governor can appoint as Minister a person who is not a member of the State Legislature at the time of the appointment. But such a Minister should become member of the Legislature within six months after entering upon his office.

We have already noticed that all executive action of the State Government is taken in the name of the Governor. In this connection the Governor is authorized to make rules for the more convenient transaction of the business of the State Government. He is also empowered to allocate among the Ministers the business of the Government except where he is expected to act in his discretion. It is the duty of the Chief Minister as the-head of the Council of the Ministers to communicate to the Governor all decisions of the Council relating to the administration of the affairs of the State and proposals for legislation. He has also to furnish any information, which the Governor calls for and which is connected with any administrative or legislative matter of the State. Again, it is the duty of the Chief Minister to place before the Council, if the Governor so, requires, any matter on which a decision has been taken by a Minister but which has not been considered by the Council. ' These provisions of the Constitution vest in the Governor fairly long list of powers which, if taken on their face value, will, add up to formidable proportions. Yet, as we have already seen from statements made in the Constituent Assembly, the Governor normally is only the constitutional head of the State. This means that although he is the "Chief Executive" in the exercise of his functions, the real power is in the hands of the Council of Ministers. This was pointed out again and again by authoritative spokesmen in the Constituent Assembly.

Interpreting the scope of the provision that "the Ministers shall hold office during the pleasure of the Governor", Ambedkar said: "I have no doubt, that it is the intention of this Constitution that the Ministry shall hold office during such time as it holds the confidence of the majority. It is on this principle that the Constitution will work. The reason why we I have not 'so expressly stated it is because it has not been stated in the fashion or in those terms in any of the Constitutions which lay down a Parliamentary system of government. 'During pleasure' is always understood to mean that the 'pleasure' shall not continue notwithstanding the fact that the Ministry has lost the confidence of the majority, it is presumed that the Governor will exercise his 'pleasure' in dismissing the Ministry and, therefore, it is unnecessary to differ from what I may say the stereotyped phraseology which is used in' all responsible 'governments".

It is difficult to think of a Governor under a fully responsible system of government established on the broadest possible popular basis, to have in an authoritarian manner. When a Cabinet composed of popular Ministers, collectively responsible to the Legislature, is to aid and advise the Governor in the discharge of his functions, occasions are almost non-existent for him to overrule them or act in a manner contrary to their advice. But does this mean that he is a mere figure-head, " nor a rubber-stamp of his Cabinet or a post-office between his Cabinet

and the President or between his Cabinet and the official gazette?" A careful reading of the constitutional provisions and an appreciation of them in the perspective of the totality of the constitutional scheme, will show that the Governor is neither a figure-head nor a rubber-stamp but a functionary designed to playa vital role in the administration of the affairs of the State.

The occasions which will give such an opportunity to the Governor to act in his discretion seem to be the following:

(l) The selection of a Chief Minister prior to the formation of a Council of Ministers;
(2) Dismissal of a Ministry;
(3) Dissolution of the Legislative Assembly;
(4) Asking information from the Chief Minister relating to legislative and administrative matters;
(5) Asking the Chief Minister 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;
(6) Refusing to give assent to a Bill passed by the Legislature and sending it back for reconsideration;
(7) Reserving a Bill passed by the State Legislature for the assent of the President;
(8) Seeking instructions from the President, before promulgating an Ordinance dealing with certain matters;
(9) Advising the President for the 'proclamation of an. emergency: and
(l0) In the case of the Governor of Assam, certain administrative matters connected with, the tribal areas and settling disputes between the Government of Assam and the District Council (of an autonomous district) with respect to mining royalties.

It should be pointed out however that, the Governor's discretionary powers cannot in reality be absolute. For, absolute discretion is an element of autocracy. The Governor can under no circumstances be an autocrat, so long as he functions within the framework of a democratic Constitution. What, then is the cheek on his discretionary power? Neither the Ministry nor the State Legislature can control the Governor in this respect; but the President can. This means that the Governor is not a free agent in the exercise of his discretion.

If he misuses it either as a result of personal ambitions or as a partisan in the currents and cross-currents of State politics, the President can always check him and if necessary he may even dismiss him. Thus, in the final analysis, the Governor is not a free agent. Either during normal times or abnormal times. For, in the discharge of his functions, normally he is aided and advised by the Council of Ministers. So long as the Council has the confidence of the State Legislature, the Governor will not be able to substitute his discretion for the advice of the Council. If he attempts to do that, it will lead to political complication which will ultimately lead to his dismissal. On the contrary, under abnormal conditions such as an emergency caused by war, internal rebellion or

breakdown of the constitutional machinery in the State, he will be acting as an agent of the President and not as the absolute master of the situation himself. No doubt, during such times his powers are more real than normal times when his powers are practically nominal. All things taken together, the emphasis on the Governor's office seems to be on his role as an adviser. On the one hand, he is a non-partisan adviser to the Ministry. By virtue of his position as the Head of the State he has a right to be consulted, the right to encourage and the right to warm. He is a detached spectator, from a position of vantage and authority, of what is going on in the State. Placed in that position, he maintains the dignity, the stability and the collective responsibility of the State Government. On the other, he is the agent of the President, his adviser on the affairs of the State and the "representative" of the Union in State. He is the link that fastens the Federal-State chain, the agency which regulates-the Union-State relationship. Thus, he is an essential part of the constitutional machinery, fulfilling an essential purpose and rendering an essential service. In the words of one who was privileged to know the position from inside: "A Governor can do a great deal of good if he is a good Governor and he can do a great deal of mischief, if he is a bad Governor, in spite of the very little power given to him under the Constitution we are framing." The latter part of this statement has been very much in evidence in the conduct of Governors of several States in recent times.

THE ADVOCATE-GENERAL FOR THE STATE

Like the Attorney General who is the legal adviser to the Union Government, the Constitution provides for a legal adviser to the State Government known as the Advocate-General for the State. He is appointed by the Governor and holds office during his pleasure. To be appointed as Advocate-General, a person should have the same qualifications as would make him eligible for appointment as a judge of the High Court. The Advocate-General will receive such remuneration as the Governor may determine. It is the duty of the Advocate-General to give advice to the State Government on legal matters referred to him as well as to perform certain other duties of Illegal character which are assigned to him from time to time. In the discharge of these duties he is entitled to appear before any court of law within the State or address the State Legislature as and when required.

RELATIONS BETWEEN THE UNION AND THE STATES

LEGISLATIVE RELATIONS

Distribution of Legislative Powers

245. *Extent of laws made by Parliament and by the Legislatures of States:*
(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

246. *Subject-matter of laws made by Parliament and by the Legislatures of States:*

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List"').

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

247. *Power of Parliament to provide for the establishment of certain additional courts:* Notwithstanding anything in this Chapter, Parliament may by law provide for the establishment of any additional courts for the better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List.

248. *Residuary powers of legislation:*

(1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

249. *Power of Parliament to legislate with respect to a matter in the State List in the national interest:*

(1) Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.

(2) A resolution passed under clause (1) shall remain in force for such period not exceeding one year as may be specified therein:
Provided that, if and so often as a resolution approving the continuance in force of any such resolution is passed in the manner provided in clause (1), such resolution shall continue in force for a further period of one year from the date on which under this clause it would otherwise have ceased to be in force.

(3) A law made by Parliament which Parliament would not but for the passing of a resolution under clause (1) 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.

250. *Power of Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation:*

(1) Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

(2) A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency 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 Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

251. Inconsistency between laws made by Parliament under articles 249 and 250 and laws made by the Legislatures of States. Nothing in articles 249 and 250 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has power to make, but if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament has under either of the said articles power to make, the law made by Parliament, whether passed before or after the law made by the Legislature of the State, shall prevail, and the law made by the Legislature of the State shall to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative.

252. *Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State:*

(1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.

(2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.

253. *Legislation for giving effect to international agreements:* Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

254. *Inconsistency between laws made by Parliament and laws made by the Legislatures of States:*

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

255. Requirements as to recommendations and previous sanctions to be regarded as matters of procedure only. No Act of Parliament or of the Legislature of a State, and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given-

(a) Where the recommendation required was that of the Governor, either by the Governor or by the President;

(b) Where the recommendation required was that of the Rajpramukh, either by the Rajpramukh or by the President;

(c) Where the recommendation or previous sanction required was that of the President, by the President.

STATE AND LEGAL STRUCTURE

Constitutional laws may often be considered second order rulemaking or rules about making rules to exercise power. It governs the relationships between the judiciary, the legislature and the executive with the bodies under its authority. One of the key tasks of constitutions within this context is to indicate hierarchies

and relationships of power. For example, in a unitary state, the constitution will vest ultimate authority in one central administration and legislature, and judiciary, though there is often a delegation of power or authority to local or municipal authorities. When a constitution establishes a federal state, it will identify the several levels of government coexisting with exclusive or shared areas of jurisdiction over lawmaking, application and enforcement.

HUMAN RIGHTS

Human rights or civil liberties form a crucial part of a country's constitution and govern the rights of the individual against the state. Most jurisdictions, like the United States and France, have a codified constitution, with a bill of rights. A recent example is the Charter of Fundamental Rights of the European Union which was intended to be included in the Treaty establishing a Constitution for Europe, that failed to be ratified. Perhaps the most important example is the Universal Declaration of Human Rights under the UN Charter. These are intended to ensure basic political, social and economic standards that a nation state, or intergovernmental body is obliged to provide to its citizens but many do include its governments. Some countries like the United Kingdom have no entrenched document setting out fundamental rights; in those jurisdictions the constitution is composed of statute, case law and convention. A case named *Entick v.*

Carrington is a constitutional principle deriving from the common law. John Entick's house was searched and ransacked by Sherriff Carrington. Carrington argued that a warrant from a Government minister, the Earl of Halifax was valid authority, even though there was no statutory provision or court order for it. The court, led by Lord Camden stated that, "The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. By the laws of England, every invasion of private property, be it ever so minute, is a trespass... If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment."

Inspired by John Locke, the fundamental constitutional principle is that the individual can do anything but that which is forbidden by law, while the state may do nothing but that which is authorized by law. The commonwealth and the civil law jurisdictions do not share the same constitutional law underpinnings.

STUDY OF CONSTITUTIONAL LAW

The examples and perspective in this article may not represent a worldwide view of the subject. Please improve this article and discuss the issue on the talk page. *(December 2010)*

Constitutional law is a major focus of legal studies and research. For example, most law students in the United States are required to take a class in Constitutional Law during their first year, and several law journals are devoted to the discussion of constitutional issues.

THE RULE OF LAW

The doctrine of the rule of law dictates that government must be conducted according to law.

Dicey identified three essential elements of the British Constitution which were indicative of the rule of law:

1. Absence of arbitrary power;
2. Equality before the law;
3. The Constitution is a result of the ordinary law of the land.

THE SEPARATION OF POWERS

The Separation of Powers is often regarded as a second limb functioning alongside the Rule of Law to curb the powers of the Government. In most modern nation states, power is divided and vested into three branches of government: The Executive, the Legislature and the Judiciary. The first and the second are harmonized in traditional Westminster forms of government.

CONSTITUTIONAL LAW: AN OVERVIEW

The broad topic of constitutional law deals with the interpretation and implementation of the United States Constitution. As the Constitution is the foundation of the United States, constitutional law deals with some of the fundamental relationships within our society. This includes relationships among the states, the states and the federal government, the three branches (executive, legislative, judicial) of the federal government, and the rights of the individual in relation to both federal and state government. The area of judicial review is an important subject within Constitutional Law. The Supreme Court has played a crucial role in interpreting the Constitution. Consequently, study of Constitutional Law focuses heavily on Supreme Court rulings. While the topic also covers the interpretation and implementation of state constitutions, without qualification it is usually understood as referring to the Federal Constitution.

The Constitution establishes the three branches of the federal government and enumerates their powers. Article I establishes the House of Representatives and the Senate. Section 8 enumerates the powers of Congress. Congress has specifically used its power to regulate commerce (the commerce clause) with foreign nations and among the states to enact broad and powerful legislation throughout the nation. The sixteenth Amendment gives Congress the power to collect a national income tax without apportioning it among the states. Section 9 of Article I prohibits Congress from taking certain actions.

For example, until the passage of the 16th Amendment Congress could not directly tax the people of the United States unless it was proportioned to the population of each state. Section 10 of Article I lists a number of specific actions that individual states may no longer take. Article II of the Constitution establishes the presidency and the executive branch of government. The powers of the President are not as clearly enumerated as those of the Congress. He is vested

with the "executive" power by section 1. Section 2 establishes him as the "commander in chief" and grants him power to give pardons, except in cases of impeachment, for offences against the United States. Section 3 provides the power to make treaties (with the advice and consent of two-thirds of the Senate) and the power to nominate ambassadors, ministers, Judges of the Supreme Court, and all other Officers of the United States.

The role of the Supreme Court and the rest of the judicial branch of the federal government is covered by Article III. Article V of the Constitution provides the procedures to be followed to amend the Constitution. Currently, the Constitution has been amended twenty-seven times (including the Bill of Rights). Article VI of The United States Constitution states that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made or shall be made, under the Authority of the United States, shall be the Supreme Law of the Land." Furthermore, all federal, state, and local officials must take an oath to support the Constitution. This means that state governments and officials cannot take actions or pass laws that interfere with the Constitution, laws passed by Congress, or treaties. The Constitution was interpreted, in 1819, as giving the Supreme Court the power to invalidate any state actions that interfere with the Constitution and the laws and treaties passed pursuant to it. That power is not itself explicitly set out in the Constitution but was declared to exist by the Supreme Court in the decision of McCulloch v. Maryland.

The first section of the fourth article of the Constitution contains the "full faith and credit clause." This clause provides that each state must recognize the public acts (laws), records, and judicial proceeding of the other states. The Fourth Article also guarantees that a citizen of a state be entitled to the "privileges and immunities" in every other state. The power of the federal government is not absolute. The tenth Amendment specifically states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Specific provisions of the Constitution protect the rights of the individual from interference by the federal and state governments. The first ten amendments, called the Bill of Rights, were ratified in 1791, providing a check on the new federal government. The first eight amendments provide protection of some of the most fundamental rights of the individual. For example, the First Amendment protects the fundamental civil rights of free speech, press and assembly. Subsequent amendments have also broadened the protection afforded the rights of the individual. The Thirteenth Amendment made slavery illegal. The Fourteenth Amendment prohibits the states from abridging "the rights and immunities" of any citizen without due process of law. The Supreme Court has interpreted the "due process" clause of the Fourteenth Amendment as affording citizens protection from interference by the state with almost all of the rights listed in the first eight amendments. The exceptions are the right to bear arms in the Second Amendment, the Fifth Amendment guarantee of a grand jury in

criminal prosecutions, and the right to a jury for a civil trial under the Seventh Amendment. The Fourteenth Amendment also guarantees the equal protection of the laws.

CRITICISM OF THE CONSTITUENT ASSEMBLY

The Indian Constituent Assembly, thus elected, was criticised both by some Indians and the British, as unrepresentative of the Indian people. Sri Jaya Prakash Narain referred to it as "a restricted and curbed Constituent Assembly " a creation of the British imperialism and so unable to bring freedom to the Country. Churchill said that the Assembly represented "only one major community in India"; and for Viscount Simon, it was "a body of Hindus". The working procedure, composition and status of the Constituent Assembly has been criticised on the following grounds:

Congress Domination: The Constituent Assembly was a one party body. The Assembly was the Congress and the Congress was India. The Congress had a, built-in-majority of 69 per cent in the Assembly and after partition, the congress majority jumped to 82 per cent. Prof. Shibban Lal Saxena complained that the Congress Party dominated the scene and the Constitution had very much suffered from it. "The Congress party meetings became meetings of the real Constituent Assembly, and this real Assembly became the mock Assembly where discussions arrived at by the Congress Party meetings were registered."

The Congress' overwhelming majority in the Constituent Assembly resulted from the December 1945 Provincial legislature elections and from partition, moreover, the Congress Working Committee directed the Provincial assemblies to elect some of the prominent non-congressmen so their experience and expertisation can be made available to the Assembly. Among them were A.K. Ayyar, H. K. Kunzru, N. G. Ayyangar, Ambedkar, K Santhanam, M.R. Jayakar and K.M. Munshi. In the words of K. Santhanam, "There was hardly' any shade of public opinion not represented in the Assembly." The credit goes to the Congress Party for bringing into the proceedings of the Assembly a sense of order and discipline. As Dr. Ambedkar said, "It is because of the discipline of the Congress Party that the Drafting Committee was able to pilot the Constitution in the Assembly with the sure knowledge as to the fate of each article and each amendment. The Congress Party is, therefore, entitled to all the credit for the smooth sailing of the Draft Constitution in the Assembly."

Was it a Sovereign Assembly: The Constituent Assembly was meeting with the permission of the British Government and a fourth of the nation was represented at the Assembly's deliberations. Had such a body any power or authority of its own? Could it speak and act for India? Was it sovereign? Maulana Azad, Nehru and Prasad believed that it was sovereign because the Assembly's authority came from the people of India although they recognised that the Cabinet Mission Plan placed certain limitations on its activities. The Assembly gave its own answer to these questions in its Rule when it arrogated to itself the authority to control its own being: "The Assembly shall not be dissolved except by a

resolution assented to by at least two-thirds of the whole number of members of the Assembly." The Indian Independence Act passed by the British Parliament came into effect on 15th August; 1947, giving legally to the Constituent Assembly the status it had assumed since its inception. The Cabinet Mission Plan became outmoded, and the Constituent Assembly settled down to draft free India's Constitution. The Indian Independence Act of 1947 made it "the Sovereign Constituent Assembly for India". Pt. Nehru described it, on the midnight of August 14,1947, as "a sovereign body representing the sovereign people of India."

A Hindu Dominated Body: Although the Constituent Assembly enjoyed the confidence of a vast majority of people of India, yet some uncharitable critics dubbed it as the most unrepresentative of Constituent Assembly ever created in any democratic country of the world. British leaders like Churchill and Lord Simon named it as a Hindu Body representing the interests of the Hindus alone. Dr; Rajendra Prasad condemned this charge as baseless and irrational. He pointed out that except the representatives of the Muslim League, the Constituent Assembly of India represented all the communities and interest. The minority communities were fully represented in the Assembly, usually by members of their own choosing. The Indian Christians had 7 representatives in the Assembly, the Anglo-Indians 3, the Parsis 3 and so on. After partition, when the composition of the Assembly had become settled, the minorities had 88 of the 235 seats allotted to the Provinces, or 37 per cent of the Provincial membership. Additionally, the ideological spectrum of the Assembly was broadened by the inclusion of non-congress 'experts' as well as by the diverse nature of the Congress membership.

An Unrepresentative Body: Another charge generally levelled against the Constituent Assembly was that it had not been directly elected by the people on the basis of universal adult franchise. As such, it did not reflect the aspirations of the masses. Socialist and Communist leaders of India attacked the unrepresentative character of the Constituent Assembly on this account Leaders of the Congress Party while refuting this criticism pointed out that the election of a new Constituent Assembly on the basis of universal adult franchise would have been a uphill task under the special circumstances created by the partition of the country. Otherwise, too, preparation of electoral rolls and holding of national elections in a big country like India was an impossible task. Any delay in framing a suitable constitution for India would have created unformidable problem for new India. It was further pointed out that even if there had been direct elections, the result would have been the same. The same persons who happened to be members of the Constituent Assembly would have been elected by an overwhelming majority. The general composition of the Constituent Assembly would not have changed much. The representative character of the Assembly is further proved by the fact that it included all the prominent leaders of major political parties of India. Dr. Ambedkar represented the depressed classes, Hansa Mehta represented the All-India Women Conference, the landlords

of India were represented by Maharaja Darbhanga, and the Hindu Mahasabha was represented by Dr. Shyama Prasad Mukerji. Frank Anthony represented the Anglo-Indians and Jndian Christians were represented by H.C. Mukerji. So was the case with Sikhs and the Muslims.

It should not be forgotten, however, that India was not the only country to adopt indirect election in this respect. The delegates of the U.S., Convention:were chosen without any popular awareness; the South African Convention was also elected by the Provincial Legislatures. Moreover, if the father of the Indian Constituent Assembly opposed its election through universal suffrage, it was more due to the practical difficulties than any theoretical consideration.

Dominated by the Legal Luminaries: Then another criticism which is made against the Constituent Assembly is that it was an Assembly which was "dominated only by the politicians and lawyers. It did not give much representation to other sections of Indian Society. The net result was that this domination gave the country a very bulky document. According to some critics the Constitution of India is a lawyer's paradise. All said and done, the fact remains that the Constituent Assembly was guided and directed by the top leaders of the Congress. Stalwarts like Nehru, Patel, Prasad, Azad and Munshi dominated the scene. Although indirectly elected and therefore not responsible to the mass of Indians, the Constituent Assembly was a highly representative body.

ATTITUDE OF THE CONSTITUENT ASSEMBLY

Divergent views and attitudes were seen in the framing of the Constitution. The members of the Assembly had a variety of perceptions about the future Indian polity. Their divergent views on the major issue of the political system Were quite interesting.

Adult Franchise: Should adult franchise be introduced, involving an increase in the electorate from 35 million to 170 million? Maulana Azad advocated its deferment for 15 years. Prasad and Nehru plumped for adult franchise as an act of faith. The vote favouring it was carried amidst acclamation.

Jammu and Kashmir: Nehru favoured incorporation of a section establishing a special relationship with the state of Jammu and Kashmir, thus inferentially recognising the state's right to frame its own constitution within the Indian Union. Patel wanted the state to be fully integrated with the Union. The "Cabinet was divided on the issue and the trend in the Constituent Assembly favoured Sardar's stand. But when the matter came before the Assembly, Patelput the unity and solidarity of the, Government before everything else and backed the Nehru formula.

Reservation for Minorities: The most delicate issue related to safeguards for minorities. Azad wanted reservation of seats for the Muslims and other minorities within the framework of general electorates. Patel opposed such safeguards. Nehru left it to Patel to jump the hurdle as Chairman of the Advisory Committee on Minorities. Two women members played a key role in this high-strung drama. Amrit Kaur, speaking for the Indian Christians, said that reservation of seats

and weightage based on religion or sect would lead to fragmentation of the Indian Union. The Sikhs demanded the same treatment as given to the Muslims.. After the Committee had-wrestled with the problem for weeks, Patel decided to clinch the issue at its final meeting. He called on Begum Aizaz Rasul of Lucknow to state the Muslim view. She was a zealous leader of Muslim League before partition and had even gone to the length of giving up Saree and adopting the costume worn by the Begums of Oudh. The Muslims left behind. in India, she said nervously, were an integral part of the nation and needed no safeguards.. Patel seized this crucial movement to declare that the Muslims-were unanimously in favour of joint electorates and adjourned the meeting.

Office of the President and Governors: Much heat was generated on _ whether the President of the Republic and Governors of the Constituent States should be elected by popular vote and whether they should have discretionary powers. Legal luminaries and constitutional experts had a field day, but Nehru and Patel brought a practical approach to bear on the issue. They opposed popularly elected heads. Indeed, Nehru as Prime Minister took steps to see that; the Union President even though chosen by an electoral college consisting of all the members of the Central and State Legislatures, would be a constitutional figure head. Patel as Home Minister made sure that Governor of a State was the nominee of the Union Government and had enough discretionary powers to act as the executive agent of the Centre in an emergency.

Link Language: The question of a national link language posed the most (j difficult hurdle. Swami Dayanand and Mahatma Gandhi, both from Gujarat and Tilak and Savarkar, from Maharashtra had zealously pleaded for Hindi as the symbol of nationhood. Prasad and Patel strongly supported Hindi, while Nehru left it to the Hindi lobby to work out a formula acceptable to the non-Hindi regions, especially Madras and Bengal. Finally, the formula providing for replacement of English by Hindi in fifteen years was embodied in the Constitution, along with each side did it with mental reservation.

Fundamental Rights: A great deal of excitement caused over the issue; should the Fundamental Right to be embodied in the Constitution guarantee fair payment for private property acquired by the state and should the right be made justiciable? Nehru was against making the right justiciable. Patel stood rocklike for the Fundamental Rights adopted by the Congress Party under his Presidentship in 1931 in Karachi. After a prolonged tug-of-war Patel won because he had the backing of the distinguished lawyers, who were fashioning the Constitution, and of the overwhelming majority of members of the Constituent Assembly.

Secular State: Another issue which the Assembly faced was about secular or non-secular character of the Constitution. There was a strong view point that after the partition of country secularism had no meaning. If the Muslims all over the world can have theocratic state, where they could preach and propagate their own faith, then why the Hindus of India cannot have their own Hindu State. On the other hand, there was predominantly Congress section in the Assembly which firmly believed that India should be a secular state.

Socialism: It was principally Patel's conservative influence that kept the Constitution from having a greater socialist content than it has; perhaps it was in deference to his wishes that Nehru omitted the world 'socialism' from the _Objective Resolutions.

Village Panchayat: The word Panchayat did not once appear in the Draft Constitution. Within a few months a reaction to this omission set in as Assembly members had time to consider the Draft. President Prasad was the most prominent among the critics. On 10 May, 1948, Prasad wrote to B. N. Rau that "I like the idea of making the Constitution begin with the village and go up to the Centre. The village has been and will ever continue to be our unit in this country." Prasad believed that the necessary articles could be redrafted, making the village Panchayats the electoral college for electing representatives to the Provinces and the Centre. But Rau rejected Prasad's suggestion. In his reply Rau said that the Assembly had already decided on direct election of Lower Houses both at the Centre and the Provinces and that he was doubtful. If the vote could be reversed a remark that indicated the general popularity of a Parliamentary constitution.

The Constituent Assembly (Legislative): When the Assembly met for purposes of ordinary law-making it was called the Legislative wing of the Constituent Assembly or the Constituent Assembly (Legislative), Presided over by the Speaker, it functioned as the Legislature of the country with the secretariat of the pre-independence Legislative Assembly as its Secretariat. The first meeting of the first session of the Constituent Assembly (Legislative) was held in the Assembly Chamber of the Council House (now called the Lok Sabha-Chamber of the Parliament House) on November 17,1947 at-11 a.m. with the I president of the. Constituent Assembly in the chair. G. V Mavalankar was declared duly elected for the office of the Speaker. Dr. Rajendra Prasad vacated the chair which was then occupied by Speaker Mavalankar. The Constituent Assembly in its capacity as Dominion Legislature was in existence for nearly two years and one month. Between November 17, 1947 and December 24, 1949 it had in all six sessions consisting of 226 days.

2

The Preamble of the Indian Constitution

The preamble to the Constitution of India is brief introductory statement that sets out the guiding purpose and principles of the document. The preamble is not an integral part of the Indian constitution in the sense that it is enforceable in a court of law. However, Supreme Court of India has, in the *Kesavananda* case, recognised that the preamble may be used to interpret ambiguous areas of the constitution where differing interpretations present themselves; However, the preamble is useful as an interpretive tool *only* if there is an ambiguity in the article itself and should not be treated as a rights bestowing part of the constitution. As originally enacted the preamble described the state as a "sovereign democratic republic". In 1976 the Forty-second Amendment changed this to read "sovereign *socialist secular* democratic republic".

FULL TEXT

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

JUSTICE, social, economic and political;

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

EQUALITY of status and of opportunity;

and to promote among them all

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

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

MEANING

Enacting Formula

The enacting words "We, the people of India...in our constituent assembly assembled...do here by adopt, enact and give to ourselves this constitution", signifies the democratic principle that power is ultimately vested in the hands of the people. It also emphasises that the constitution is made by and for the Indian people and not given to them by any outside power (such as the British Parliament). The wording is close to the preamble to the Constitution of Ireland, which had been adopted in 1937; it reads "We, the people of Éire [Ireland]...Do hereby adopt, enact, and give to ourselves this Constitution".

SOVEREIGN

The word sovereign means supreme or independent. India is internally and externally sovereign-externally free from the control of any foreign power and internally, it has a free government which is directly elected by the people and makes laws that govern the people.

SOCIALIST

The word socialist was added to the Preamble by the Forty-second Amendment. It implies social and economic equality. Social equality in this context means the absence of discrimination on the grounds only of caste, colour, creed, sex, religion, or language. Under social equality, everyone has equal status and opportunities. Economic equality in this context means that the government will endeavour to make the distribution of wealth more equal and provide a decent standard of living for all. This is in effect emphasizing a commitment towards the formation of a welfare state. India has adopted a mixed economy and the government has framed many laws to achieve the aim.

SECULAR

The word secular was also inserted into the preamble by the Forty-second Amendment. It implies equality of all religions and [religious tolerance]. India, therefore does not have an official state religion. Every person has the right to preach, practice and propagate any religion they choose. The government must not favour or discriminate against any religion. It must treat all religions with equal respect. All citizens, irrespective of their religious beliefs are equal in the eyes of law. No religious instruction is imparted in government or government-aided schools. Nevertheless, general information about all established world religions is imparted as part of the course in Sociology, without giving any importance to any one religion or the others. The content presents the basic/ fundamental information with regards to the fundamental beliefs, social values and main practices and festivals of each established world religions. The Supreme Court in *S.R Bommai v. Union of India* held that secularism was an integral part of the basic structure of the constitution.

DEMOCRATIC

India is a democracy. The people of India elect their governments at all levels (Union, State and local) by a system of universal adult suffrage; popularly known as "one man one vote". Every citizen of India, who is 18 years of age and above and not otherwise debarred by law, is entitled to vote. Every citizen enjoys this right without any discrimination on the basis of caste, creed, colour, sex, religion or education.

REPUBLIC

As opposed to a monarchy, in which the head of state is appointed on hereditary basis for a lifetime or until he abdicates from the throne, a democratic republic is an entity in which the head of state is elected, directly or indirectly, for a fixed tenure. The President of India is elected by an electoral college for a term of five years. The post of the President Of India is not hereditary. Every citizen of India is eligible to become the President of the country.

FORTY-SECOND AMENDMENT

On 18 December 1976, during the Emergency in India, the Indira Gandhi government pushed through several changes in the Forty-second Amendment of the constitution. A committee under the chairmanship of Sardar Swaran Singh recommended that this amendment be enacted after being constituted to study the question of amending the constitution in the light of past experience. Through this amendment the words "socialist" and "secular" were added between the words "sovereign" and "democratic" and the words "unity of the Nation" were changed to "unity and integrity of the Nation".

SIGNIFICANCE OF THE PREAMBLE

The preamble is of tremendous significance. It is one of the finest parts of our constitution. It determines the type of Government for India. The preamble ensures that the individual is free to think, speak and act in order to develop his personality fully. He can live in his own way without any danger to his culture.

The preamble of the constitution is one of the best of its kind. It contains the ideals and aspirations of the people of India. It is proper yardstick with which one can measure the worth of the constitution. Without the knowledge of preamble, the meaning of the constitution can not be fully understood. The Judges of the Supreme Court and High Courts have to refer to it while they are called upon interpret the constitution. The members of the Legislatures, Ministers and others have to follow the spirit of the preamble.

The preamble contains many ideals. I tries to establish a society based on democratic values. It has been described as a key to understand the motives and the intentions of the matters. According to V.N. Shukla, the preamble expresses, the political moral and religions values which the constitution is intended to promote. The preamble has been highly appreciated.

Pandit Thakurdas Bhargava a member of the Constituent Assembly had summed up the significance of the preamble in 1949. He said: the preamble is the most precious part of the constitution. It is the soul of the constitution. It is a key to the constitution. It is a proper yardstick with which one can measure the worth of the constitution. Commenting on our preamble an eminent British scholar Sir Earnest Barker lauded the political wisdom of founding fathers and said that the preamble serves as a key role. According to him the preamble included in the constitution is something more than the western. Above all the preamble has been described as a jewet set in the constitution.

ARTICLE 51A OF THE CONSTITUTION

It shall be the duty of every citizen of India:

(a) To abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;
(b) To cherish and follow the noble ideals which inspired our national struggle for freedom;
(c) To uphold and protect the sovereignty, unity and integrity of India;
(d) To defend the country and render national service when called upon to do so;
(e) To promote harmony and the spirit of common brother-hood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
(f) To value and preserve the rich heritage of our composite culture;
(g) To protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;
(h) To develop the scientific temper, humanism and the spirit of enquiry and reform;
(i) To safeguard public property and to abjure violence;
(j) To strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

RATIONALE AND SIGNIFICANCE

Fundamental Duties are the modernisation of the constitution. Fundamental duties have been incorporated in the Indian Constitution to remind every citizen that they should not only be conscious of their rights, but also of their duties. We have borrowed these duties from the constitution of Japan. Constitutions of Japan, Yugoslavia, and Republic of China contain them.

The Constitution of Soviet Union (USSR) also contains fundamental duties. Under Indian constitution, the Constitution (42nd) Amendment Act, 1976 inserted a new part IV A consisting of Article 51A has been added to the constitution. Article 51 A lays down the following ten Fundamental Duties:

The various clauses of Article 51 A express fine sentiments. Some of the duties are already being enforced through ordinary law for example there are laws making any activity disrupting the sovereignty and territorial integrity of India illegal and penal. But some of the other duties appear to be legally unenforceable for they are vague and imprecise.

These can at best be regarded as „directory. As regards enforceability of these duties, it has been held1 that these duties being duties of individual citizens cannot be enforced through mandamus as they cast no public duties. The duties can be promoted by constitutional means.

Even though, the significance of the Article 51 A lies in the fact that these clauses can be taken in to consideration in relation to interpretation of statutes and Acts of the parliament or state legislature, especially an ambiguous statutes.

It has been aptly observed that:

- "Fundamental duties though not enforceable by a writ of the court, yet provide a valuable guide and aid to interpretation of constitutional and legal issues. In case of doubt or choice of people's wish as manifested through Article 51 A can serve as a guide not only for resolving the issues but also for constructing or moulding the relief to he given by the Courts. Constitutional enactment of fundamental duties if it has to have any meaning must be used by courts as a tool to tap, even a taboo, on state action drifting away from constitutional values, the judges declared."

The present research is going to stress on the aspect of importance of the research theme in the governance of the country, by focusing on the responsibilities given to the *citizens* as well as *state* to follow and implement these respectively. Here, the present Article if it has to have any meaning also needed to be seen applied by the *judiciary* as and when occasion demands for the purpose of interpretation of the constitutional and legal issues.

The fundamental duties are not made enforceable like fundamental rights but it cannot overlook as "duties" in Part IV A is prefixed by the same word "fundamental" which was prefixed by the founding fathers of the Constitution to "right" in Part III. Though Article 51A does not cast any fundamental duty on the state, the fact remains that the duty of every citizen is the collective duty of the State.

Researcher is going to concentrate on the need of the duties in the context of governance of the country. Since rights and duties are correlative, the fundamental duties, are, therefore, intended to serve as a constant reminder to every citizen that while the Constitution specifically conferred on them certain fundamental rights, it also requires citizens to observe certain basic norms of democratic conduct and democratic behaviour.

AIMS AND OBJECTIVES

- Firstly, the study is going to focus on the aspect of enforceability of these duties, since these duties are not justifiable. But it can enforceable

through the Law made by the Parliament by providing some penalties to be imposed for failure to fulfill those duties and obligations. But has proven that Parliament has failed to enforce these through the legislations. The present research is going to see how and why parliament has failed in this obligation to enforce. Secondly the citizens of the nation have also failed to follow these duties. Indian Constitution confers ample fundamental rights to the citizens of the nation, and as such we *obsessed* to utilise these rights only. Only having a Law on a particular point does not suffice the purpose unless and until there is a *sense of obligation* on the part of the citizens. For the proper enforceability of these duties, it is necessary that it should be known to all. This should be done by a systematic and intensive education of the people that is by publicity or by making it a part of the syllabi and curriculum of education.

- Secondly, as we have seen above that these duties will provide guide or becomes an aid in the interpretation of any provision of a statute or even a constitutional issue also.
- Thirdly, the present research would of course deal with the responsibility aspect of the Sate as well as of the citizen as it was mainly target for them, at the same time the researcher also going to emphasis on the responsibility of the judiciary, in the wake of non-justifiability of this Article 51A. Because the „citizen as well as „state both have failed to give effect to these duties. So in the wake of apathy of both of them, it is ultimately for the judiciary to see how these duties can be enforced through the method of judicial process. So the Researcher is going to analyse the possible function or responsibility of the judiciary in this regard. Ultimately, the Supreme Court of India, being armed with such provisions or powers, with the help of which it can justify the enforcement of these duties.
- Fourthly, it is not clear whether a law made for enforcement of a basic duty can infringe a Fundamental Right or not. There is no provision clarifying the relationship between Fundamental Duties and Fundamental Rights. Perhaps the idea is that these precepts should become a part and parcel of every Indians thoughts and actions.
- Fifthly, there is much controversy as to use of the words in this article and implementation of it accordingly. The words like “citizen”, “shall”, “fundamental” used in the article creates controversies. At one hand it is being argued that these are non-justifiable duties at the other hand the use of the word “shall” and “fundamental” conveys other. If the intention of the Parliament is to implement it effectively then why is it that these duties are not being enforced properly? Researcher in this regard going to analyse will try to clarify the legal position in this regard. Again, the word “citizen” is not enough to deal with rationale lies behind the enactment of the fundamental duties, since many institution

which are there in the society (not being individual and thereby citizen), do not possess a sense of responsibilities and their functioning is having several implications. In the wake of it there is a need to construe the word "citizen" to include legal persons for the purposes of this Article 51A. For example, Companies or Corporations, being economic institutions of the society, their functioning is having ample implications. So they should become a socially responsible "corporate citizen". So, the present research would deal with this aspect by taking into consideration implications of this interpretation and its feasibility.

- Lastly, the researcher is going to see the feasibility of addition some more duties which are really "fundamental" in nature and which are instrumental in the public as well as private life of the citizens. Since the present list should not become exhaustive one. In the wake of development of modern jurisprudence, this is more necessary to think of some duties as being binding on the citizens in the wake of respect for *individual* liberties as well of *public* or *national* interests.

In fact the utility of the research is that there will be a more participation, of the citizens, by creating a sense of obligation, in the national life and thereby to contribute to the development of the nation, since the nature of the present fundamental duties and would fundamental duties are more in the nature of "public" interest. So this wills definitely going to contribute to the development of the modern jurisprudence of India.

GENESIS

The development of constitutionally guaranteed fundamental human rights in India was inspired by historical examples such as England's Bill of Rights (1689), the United States Bill of Rights (approved on 17 September 1787, final ratification on 15 December 1791) and France's Declaration of the Rights of Man (created during the revolution of 1789, and ratified on 26 August 1789). Under the educational system of British Raj, students were exposed to ideas of democracy, human rights and European political history. The Indian student community in England was further inspired by the workings of parliamentary democracy and Britishers political parties.

In 1919, the Rowlatt Act gave extensive powers to the British government and police, and allowed indefinite arrest and detention of individuals, warrant-less searches and seizures, restrictions on public gatherings, and intensive censorship of media and publications. The public opposition to this act eventually led to mass campaigns of non-violent civil disobedience throughout the country demanding guaranteed civil freedoms, and limitations on government power.

Indians, who were seeking independence and their own government, were particularly influenced by the independence of Ireland and the development of the Irish constitution. Also, the directive principles of state policy in Irish constitution were looked upon by the people of India as an inspiration for the independent India's government to comprehensively tackle complex social

and economic challenges across a vast, diverse nation and population. In 1928, the Nehru Commission composing of representatives of Indian political parties proposed constitutional reforms for India that apart from calling for dominion status for India and elections under universal suffrage, would guarantee rights deemed fundamental, representation for religious and ethnic minorities, and limit the powers of the government.

In 1931, the Indian National Congress (the largest Indian political party of the time) adopted resolutions committing itself to the defence of fundamental civil rights, as well as socio-economic rights such as the minimum wage and the abolition of untouchability and serfdom. Committing themselves to socialism in 1936, the Congress leaders took examples from the constitution of the erstwhile USSR, which inspired the fundamental duties of citizens as a means of collective patriotic responsibility for national interests and challenges.

When India obtained independence on 15 August 1947, the task of developing a constitution for the nation was undertaken by the Constituent Assembly of India, composing of elected representatives under the presidency of Rajendra Prasad. While members of Congress composed of a large majority, Congress leaders appointed persons from diverse political backgrounds to responsibilities of developing the constitution and national laws.

Notably, Bhimrao Ramji Ambedkar became the chairperson of the drafting committee, while Jawaharlal Nehru and Sardar Vallabhbhai Patel became chairpersons of committees and sub-committees responsible for different subjects. A notable develop-ment during that period having significant effect on the Indian constitution took place on 10 December 1948 when the United Nations General Assembly adopted the Universal Declaration of Human Rights and called upon all member states to adopt these rights in their respective constitutions.

The fundamental rights were included in the First Draft Constitution (February 1948), the Second Draft Constitution (17 October 1948) and final Third Draft Constitution (26 November 1949) prepared by the Drafting Committee.

SIGNIFICANCE AND CHARACTERISTICS

The fundamental rights were included in the constitution because they were considered essential for the development of the personality of every individual and to preserve human dignity. The writers of the constitution regarded democracy of no avail if civil liberties, like freedom of speech and religion were not recognised and protected by the State.

"Democracy" is, in essence, a government by opinion and therefore, the means of formulating public opinion should be secured to the people of a democratic nation. For this purpose, the constitution guaranteed to all the citizens of India the freedom of speech and expression and various other freedoms in the form of the fundamental rights.

All people, irrespective of race, religion, caste or sex, have been given the right to move the Supreme Court and the High Courts for the enforcement of their fundamental rights. It is not necessary that the aggrieved party has to be

the one to do so. Poverty stricken people may not have the means to do so and therefore, in the public interest, anyone can commence litigation in the court on their behalf. This is known as "Public interest litigation". In some cases, High Court judges have acted on their own on the basis of newspaper reports.

These fundamental rights help not only in protection but also the prevention of gross violations of human rights. They emphasise on the fundamental unity of India by guaranteeing to all citizens the access and use of the same facilities, irrespective of background. Some fundamental rights apply for persons of any nationality whereas others are available only to the citizens of India.

The right to life and personal liberty is available to all people and so is the right to freedom of religion. On the other hand, freedoms of speech and expression and freedom to reside and settle in any part of the country are reserved to citizens alone, including non-resident Indian citizens. The right to equality in matters of public employment cannot be conferred to overseas citizens of India.

Fundamental rights primarily protect individuals from any arbitrary state actions, but some rights are enforceable against individuals. For instance, the Constitution abolishes untouchability and also prohibits *begar*. These provisions act as a check both on state action as well as the action of private individuals. However, these rights are not absolute or uncontrolled and are subject to reasonable restrictions as necessary for the protection of general welfare.

They can also be selectively curtailed. The Supreme Court has ruled that all provisions of the Constitution, including fundamental rights can be amended. However, the Parliament cannot alter the basic structure of the constitution. Features such as secularism and democracy fall under this category. Since the fundamental rights can only be altered by a constitutional amendment, their inclusion is a check not only on the executive branch, but also on the Parliament and state legislatures.

A state of national emergency has an adverse effect on these rights. Under such a state, the rights conferred by Article 19 (freedoms of speech, assembly and movement, *etc.*) remain suspended. Hence, in such a situation, the legislature may make laws which go against the rights given in Article 19. Also, the President may by order suspend the right to move court for the enforcement of other rights as well.

RIGHT TO EQUALITY

Right to equality is an important right provided for in Articles 14, 15, 16, 17 and 18 of the constitution.

It is the principal foundation of all other rights and liberties, and guarantees the following:

- *Equality before Law:* Article 14 of the constitution guarantees that all citizens shall be equally protected by the laws of the country. It means that the State cannot discriminate any of the Indian citizens on the basis of their caste, creed, colour, sex,gender, religion or place of birth:

- *Social Equality and Equal Access to Public Areas*: Article 15 of the constitution states that no person shall be discriminated on the basis of caste, colour, language, *etc.* Every person shall have equal access to public places like public parks, museums, wells, bathing ghats and temples, *etc.* However, the State may make any special provision for women and children. Special provisions may be made for the advancements of any socially or educationally backward class or scheduled castes or scheduled tribes.
- *Equality in Matters of Public Employment*: Article 16 of the constitution lays down that the State cannot discriminate against anyone in the matters of employment. All citizens can apply for government jobs. There are some exceptions. The Parliament may enact a law stating that certain jobs can only be filled by applicants who are domiciled in the area. This may be meant for posts that require knowledge of the locality and language of the area. The State may also reserve posts for members of backward classes, scheduled castes or scheduled tribes which are not adequately represented in the services under the State to bring up the weaker sections of the society. Also, there a law may be passed which requires that the holder of an office of any religious institution shall also be a person professing that particular religion. According to the *Citizenship (Amendment) Bill*, 2003, this right shall not be conferred to Overseas citizens of India.
- *Abolition of Untouchability*: Article 17 of the constitution abolishes the practice of untouchability. Practice of untouchability is an offence and anyone doing so is punishable by law. The *Untouchability Offences Act* of 1955 (renamed to *Protection of Civil Rights Act* in 1976) provided penalties for preventing a person from entering a place of worship or from taking water from a tank or well.
- *Abolition of Titles*: Article 18 of the constitution prohibits the State from conferring any titles. Citizens of India cannot accept titles from a foreign State. The British government had created an aristocratic class known as *Rai Bahadurs* and *Khan Bahadurs* in India—these titles were also abolished. However, Military and academic distinctions can be conferred on the citizens of India. The awards of *Bharat Ratna* and *Padma Vibhushan* cannot be used by the recipient as a title and do not, accordingly, come within the constitutional prohibition". The Supreme Court, on 15 December 1995, upheld the validity of such awards.

RIGHT AGAINST EXPLOITATION

The right against exploitation, given in Articles 23 and 24, provides for two provisions, namely the abolition of trafficking in human beings and *Begar* (forced labour), and abolition of employment of children below the age of 14 years in dangerous jobs like factories and mines. Child labour is considered a gross

violation of the spirit and provisions of the constitution. *Begar*, practised in the past by landlords, has been declared a crime and is punishable by law. Trafficking in humans for the purpose of slave trade or prostitution is also prohibited by law. An exception is made in employment without payment for compulsory services for public purposes. Compulsory military conscription is covered by this provision.

RIGHT TO FREEDOM OF RELIGION

Right to freedom of religion, covered in Articles 25, 26, 27 and 28, provides religious freedom to all citizens of India. The objective of this right is to sustain the principle of secularism in India. According to the Constitution, all religions are equal before the State and no religion shall be given preference over the other. Citizens are free to preach, practice and propagate any religion of their choice. Religious communities can set up charitable institutions of their own. However, activities in such institutions which are not religious are performed according to the laws laid down by the government. Establishing a charitable institution can also be restricted in the interest of public order, morality and health. No person shall be compelled to pay taxes for the promotion of a particular religion. A State run institution cannot impart education that is pro-religion. Also, nothing in this article shall affect the operation of any existing law or prevent the State from making any further law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice, or providing for social welfare and reform.

CULTURAL AND EDUCATIONAL RIGHTS

As India is a country of many languages, religions, and cultures, the Constitution provides special measures, in Articles 29 and 30, to protect the rights of the minorities. Any community which has a language and a script of its own has the right to conserve and develop it. No citizen can be discriminated against for admission in State or State aided institutions.

All minorities, religious or linguistic, can set up their own educational institutions to preserve and develop their own culture. In granting aid to institutions, the State cannot discriminate against any institution on the basis of the fact that it is administered by a minority institution. But the right to administer does not mean that the State can not interfere in case of maladministration.

In a precedent-setting judgement in 1980, the Supreme Court held that the State can certainly take regulatory measures to promote the efficiency and excellence of educational standards. It can also issue guidelines for ensuring the security of the services of the teachers or other employees of the institution.

In another landmark judgement delivered on 31 October 2002, the Supreme Court ruled that in case of aided minority institutions offering professional courses, admission could only be through a common entrance test conducted by State or a university. Even an unaided minority institution ought not to ignore the merit of the students for admission.

RIGHT TO CONSTITUTIONAL REMEDIES

Right to constitutional remedies empowers the citizens to move a court of law in case of any denial of the fundamental rights. For instance, in case of imprisonment, the citizen can ask the court to see if it is according to the provisions of the law of the country. If the court finds that it is not, the person will have to be freed.

This procedure of asking the courts to preserve or safeguard the citizens' fundamental rights can be done in various ways. The courts can issue various kinds of *writs*. These writs are *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*. When a national or state emergency is declared, this right is suspended by the central government.

CRITICAL ANALYSIS

The fundamental rights have been revised for many reasons. Political groups have demanded that the right to work, the right to economic assistance in case of unemployment, old age, and similar rights be enshrined as constitutional guarantees to address issues of poverty and economic insecurity, though these provisions have been enshrined in the Directive Principles of state policy.

The right to freedom and personal liberty has a number of limiting clauses, and thus has been criticised for failing to check the sanctioning of powers often deemed "excessive". There is also the provision of preventive detention and suspension of funda-mental rights in times of Emergency.

The provisions of acts like the Maintenance of Internal Security Act (MISA) and the National Security Act (NSA) are a means of countering the fundamental rights, because they sanction excessive powers with the aim of fighting internal and cross-border terrorism and political violence, without safeguards for civil rights. The phrases "security of State", "public order" and "morality" are of wide implication.

People of alternate sexuality is criminalised in India with prison term up to 10 years. The meaning of phrases like "reasonable restrictions" and "the interest of public order" have not been explicitly stated in the constitution, and this ambiguity leads to unnecessary litigation. The freedom to assemble peaceably and without arms is exercised, but in some cases, these meetings are broken up by the police through the use of non-fatal methods.

"Freedom of press" has not been included in the right to freedom, which is necessary for formulating public opinion and to make freedom of expression more legitimate. Employment of child labour in hazardous job environments has been reduced, but their employment even in non-hazardous jobs, including their prevalent employment as domestic help violates the spirit and ideals of the constitution.

More than 16.5 million children are employed and working in India. India was ranked 88 out of 159 in 2005, according to the degree to which corruption is perceived to exist among public officials and politicians worldwide. The

right to equality in matters regarding public employment shall not be conferred to Overseas citizens of India, according to the *Citizenship (Amendment) Bill", 2003*.

GOVERNMENT OF INDIA ACT 1858

The Government of India Act 1858 is an Act of the Parliament of the United Kingdom (21 & 22 Vict. c. 106) passed on August 2, 1858. Its provisions called for the liquidation of the British East India Company (who had up to this point been ruling British India under the auspices of Parliament) and the transference of its functions to the British Crown. Lord Palmerston, then-Prime Minister of the United Kingdom, introduced a bill for the transfer of control of the Government of India from the East India Company to the Crown, referring to the grave defects in the existing system of the government of India.

The main provisions of the bill were:

- The Company's territories in India were to be vested in the Queen, the Company ceasing to exercise its power and control over these territories. India was to be governed in the Queen's name.
- The Queen's Principal Secretary of State received the powers and duties of the Company's Court of Directors. A council of fifteen members was appointed to assist the Secretary of State for India. The council became an advisory body in India affairs. For all the communications between Britain and India, the Secretary of State became the real channel.
- The Secretary of State for India was empowered to send some secret despatches to India directly without consulting the Council. He was also authorised to constitute special committees of his Council.
- The Crown was empowered to appoint a Governor-General and the Governors of the Presidencies.
- Provision for the creation of an Indian Civil Service under the control of the Secretary of State.
- All the property of the East India Company was transferred to the Crown. The Crown also assumed the responsibilities of the Company as they related to treaties, contracts, and so forth.

The Act ushered in a new period of Indian history, bringing about the end of Company rule in India. The era of the new British Raj would last until Partition of India in August 1947, at which time all of the territory of the Raj was granted dominion status within the Dominion of Pakistan and the Union of India.

INDIAN COUNCILS ACT 1861

The Indian Councils Act 1861 was an Act of the Parliament of the United Kingdom that transformed the Viceroy of India's executive council into a cabinet run on the portfolio system. This cabinet had six "ordinary members" who each took charge of a separate department in Calcutta's government: home, revenue, government, law, finance, and (after 1874) public works. The military

Commander-in-Chief sat in with the council as an extraordinary member. The Viceroy was allowed, under the provisions of the Act, to overrule the council on affairs if he deemed it necessary - as was the case in 1879, during the tenure of Lord Lytton. The Secretary of State for India at the time the Act was passed, Sir Charles Wood, believed that the Act was of immense importance: "the act is a great experiment. That everything is changing in India is obvious enough, and that the old autocratic government cannot stand unmodified is indisputable." The 1861 Act restored the legislative power taken away by the Charter Act of 1833. The legislative council at Calcutta was given extensive authority to pass laws for British India as a whole, while the legislative councils at Bombay and Madras were given the power to make laws for the "Peace and good Government" of their respective presidencies.

INDIAN COUNCILS ACT 1892

The Indian Councils Act 1892 was an Act of the Parliament of the United Kingdom that authorised an increase in the size of the various legislative councils in British India. Enacted due to the demand of the Indian National Congress to expand legislative council, the number of non-official members was increased both in central and provincial legislative councils. The universities, district board, municipalities, zamindars and chambers of commerce were empowered to recommend members to provincial councils. Thus was introduced the principle of representation. It also relaxed restrictions imposed by the Indian Councils Act 1861, thus allowing the councils to discuss each year's annual financial statement. They coud also put questions within certain limts to the government on the matter of public interest after giving six days' notice. Thus it prepared the base of Indian Democracy.

GOVERNMENT OF INDIA ACT 1935

The Government of India Act 1935 was originally passed in August 1935 (25 & 26 Geo. 5 c. 42), and is said to have been the longest (British) Act of Parliament ever enacted by that time.

Because of its length, the Act was retroactively split by the Government of India (Reprinting) Act 1935 (26 Geo. 5 & 1 Edw. 8 c. 1) into two separate Acts:

1. The Government of India Act 1935 (26 Geo. 5 & 1 Edw. 8 c. 2)
2. The Government of Burma Act 1935 (26 Geo. 5 & 1 Edw. 8 c. 3)

References in literature on Indian political and constitutional history are usually to the shortened Government of India Act 1935 (*i.e.*, 26 Geo. 5 & 1 Edw. 8 c. 2), rather than to the text of the Act as originally enacted.

OVERVIEW

The most significant aspects of the Act were:

- The grant of a large measure of autonomy to the provinces of British India (ending the system of dyarchy introduced by the Government of India Act 1919)

- Provision for the establishment of a "Federation of India", to be made up of both British India and some or all of the "princely states"
- The introduction of direct elections, thus increasing the franchise from seven million to thirty-five million people
- A partial reorganization of the provinces:
  - Sind was separated from Bombay
  - Bihar and Orissa was split into the separate provinces of Bihar and Orissa
  - Burma was completely separated from India
  - Aden was also detached from India, and established as a separate colony
- Membership of the provincial assemblies was altered so as to include more elected Indian representatives, who were now able to form majorities and be appointed to form governments
- The establishment of a Federal Court.

However, the degree of autonomy introduced at the provincial level was subject to important limitations: the provincial Governors retained important reserve powers, and the British authorities also retained a right to suspend responsible government.

The parts of the Act intended to establish the Federation of India never came into operation, due to opposition from rulers of the princely states. The remaining parts of the Act came into force in 1937, when the first elections under the Act were also held.

THE ACT

BACKGROUND TO THE ACT

Indians had increasingly been demanding a greater role in the government of their country since the late 19th century. The Indian contribution to the British war effort during the First World War meant that even the more conservative elements in the British political establishment felt the necessity of constitutional change, resulting in the Government of India Act 1919.

That Act introduced a novel system of government known as provincial "dyarchy", *i.e.*, certain areas of government (such as education) were placed in the hands of ministers responsible to the provincial legislature, while others (such as public order and finance) were retained in the hands of officials responsible to the British-appointed provincial Governor. While the Act was a reflection of the demand for a greater role in government by Indians, it was also very much a reflection of British fears about what that role might mean in practice for India (and of course for British interests there).

The experiment with dyarchy proved unsatisfactory. A particular frustration for Indian politicians was that even for those areas over which they had gained nominal control, the "purse strings" were still in the hands of British officialdom.

The intention had been that a review of India's constitutional arrangements and those princely states that were willing to accede to it. However, division between Congress and Muslim representatives proved to be a major factor in preventing agreement as to much of the important detail of how federation would work in practice. Against this practice, the new Conservative-dominated National Government in London decided to go ahead with drafting its own proposals (the white paper). A joint parliamentary select committee, chaired by Lord Linlithgow, reviewed the white paper proposals at great length. On the basis of this white paper, the Government of India Bill was framed. At the committee stage and later, to appease the diehards, the "safeguards" were strengthened, and indirect elections were reinstated for the Central Legislative Assembly (the central legislature's lower house). The bill duly passed into law in August 1935.

As a result of this process, although the Government of India Act 1935 was intended to go some way towards meeting Indian demands, both the detail of the bill and the lack of Indian involvement in drafting its contents meant that the Act met with a lukewarm response at best in India, while still proving too radical for a significant element in Britain.

SOME FEATURES OF THE ACT

NO PREAMBLE – THE AMBIGUITY OF THE BRITISH COMMITMENT TO DOMINION STATUS

While it had become uncommon for British Acts of Parliament to contain a preamble, the absence of one from the Government of India Act 1935 contrasts sharply with the 1919 Act, which set out the broad philosophy of that Act's aims in relation to Indian political development. The 1919 Act's preamble quoted, and centered on, the statement of the Secretary of State for India, Edwin Montagu (17 July 1917 – 19 March 1922) to the House of Commons on 20 August 1917, which pledged: …the gradual development of self-governing institutions, with a view to the progressive realization of responsible government in India as an integral Part of the British Empire.

Indian demands were by now centering on British India achieving constitutional parity with the existing Dominions such as Canada and Australia, which would have meant complete autonomy within the British Commonwealth.

A significant element in British political circles doubted that Indians were capable of running their country on this basis, and saw Dominion status as something that might, perhaps, be aimed for after a long period of gradual constitutional development, with sufficient "safeguards". This tension between and within Indian and British views resulted in the clumsy compromise of the 1935 Act having no preamble of its own, but keeping in place the 1919 Act's preamble even while repealing the remainder of that Act. Unsurprisingly, this was seen in India as yet more mixed messages from the British, suggesting at best a lukewarm attitude and at worst suggesting a "minimum necessary" approach towards satisfying Indian desires.

NO BILL OF RIGHTS

In contrast with most modern constitutions, but in common with Commonwealth constitutional legislation of the time, the Act does not include a "bill of rights" within the new system that it aimed to establish. However, in the case of the proposed Federation of India there was a further complication in incorporating such a set of rights, as the new entity would have included nominally sovereign (and generally autocratic) princely states. A different approach was considered by some, though, as the draft outline constitution in the Nehru Report included such a bill of rights.

RELATIONSHIP TO A DOMINION CONSTITUTION

In 1947, a relatively few amendments in the Act made it the functioning interim constitutions of India and Pakistan.

SAFEGUARDS

The Act was not only extremely detailed, but it was riddled with 'safeguards' designed to enable the British Government to intervene whenever it saw the need in order to maintain British responsibilities and interests. To achieve this, in the face of a gradually increasing Indianization of the institutions of the Government of India, the Act concentrated the decision for the use and the actual administration of the safeguards in the hands of the British-appointed Viceroy and provincial governors who were subject to the control of the Secretary of State for India.

'In view of the enormous powers and responsibilities which the Governor-General must exercise in his discretion or according to his individual judgment, it is obvious that he (the Viceroy) is expected to be a kind of superman. He must have tact, courage, and ability and be endowed with an infinite capacity for hard work. "We have put into this Bill many safeguards," said Sir Robert Horne… "but all of those safeguards revolve about a single individual, and that is the Viceroy. He is the linch-pin of the whole system…. If the Viceroy fails, nothing can save the system you have set up." This speech reflected the point of view of the die-hard Tories who were horrified by the prospect that some day there might be a Viceroy appointed by a Labour government.'

REALITY OF RESPONSIBLE GOVERNMENT UNDER THE ACT

A close reading of the Act reveals that the British Government equipped itself with the legal instruments to take back total control at any time they considered this to be desirable. However, doing so without good reason would totally sink their credibility with groups in India whose support the act was aimed at securing. Some contrasting views:

"In the federal government… the semblance of responsible government is presented. But the reality is lacking, for the powers in defence and external affairs necessarily, as matters stand, given to the governor-general limit vitally the scope of ministerial activity, and the measure of representation given to the

rulers of the Indian States negatives any possibility of even the beginnings of democratic control. It will be a matter of the utmost interest to watch the development of a form of government so unique; certainly, if it operates successfully, the highest credit will be due to the political capacity of Indian leaders, who have infinitely more serious difficulties to face than had the colonial statesmen who evolved the system of self-government which has now culminated in Dominion status."

Lord Lothian, in a talk lasting forty-five minutes, came straight out with his view on the Bill: "I agree with the diehards that it has been a surrender. You who are not used to any constitution cannot realise what great power you are going to wield. If you look at the constitution it looks as if all the powers are vested in the Governor-General and the Governor. But is not every power here vested in the King? Everything is done in the name of the King but does the King ever interfere? Once the power passes into the hands of the legislature, the Governor or the Governor-General is never going to interfere. …The Civil Service will be helpful.

You too will realise this. Once a policy is laid down they will carry it out loyally and faithfully… We could not help it. We had to fight the diehards here. You could not realise what great courage has been shown by Mr. Baldwin and Sir Samuel Hoare.

We did not want to spare the diehards as we had to talk in a different language… These various meetings — and in due course G.D. (Birla), before his return in September, met virtually everyone of importance in Anglo-Indian affairs — confirmed G.D.'s original opinion that the differences between the two countries were largely psychological, the same proposals open to diametrically opposed interpretations. He had not, probably, taken in before his visit how considerable, in the eyes of British conservatives, the concessions had been… If nothing else, successive conversations made clear to G.D. that the agents of the Bill had at least as heavy odds against them at home as they had in India.

FALSE EQUIVALENCES

"The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." Under the Act, British citizens resident in the UK and British companies registered in the UK must be treated on the same basis as Indian citizens and Indian registered companies unless UK law denies reciprocal treatment. The unfairness of this arrangement is clear when one considers the dominant position of British capital in much of the Indian modern sector and the complete dominance, maintained through unfair commercial practices, of UK shipping interests in India's international and coastal shipping traffic and the utter insignificance of Indian capital in Britain and the non-existence of Indian involvement in shipping to or within the UK. There are very detailed provisions requiring the Viceroy to intervene if, in his unappealable view, any India law or regulation is intended to, or will in fact, discriminate against UK resident British subjects, British registered

companies and, particularly, British shipping interests. "The Joint Committee considered a suggestion that trade with foreign countries should be made by the Minister of Commerce, but it decided that all negotiations with foreign countries should be conducted by the Foreign Office or Department of External Affairs as they are in the United Kingdom. In concluding agreements of this character, the Foreign Secretary always consults the Board of Trade and it was assumed that the Governor-General would in like manner consult the Minister of Commerce in India. This may be true, but the analogy itself is false. In the United Kingdom, both departments are subject to the same legislative control, whereas in India one is responsible to the federal legislature and the other to the Imperial Parliament."

BRITISH POLITICAL NEEDS VS. INDIAN CONSTITUTIONAL NEEDS

From the moment of the Montagu statement of 1917, it was vital that the reform process stay ahead of the curve if the British were to hold the strategic initiative. However, imperialist sentiment, and a lack of realism, in British political circles made this impossible. Thus the grudging conditional concessions of power in the Acts of 1919 and 1935 caused more resentment and signally failed to win the Raj the backing of influential groups in India which it desperately needed. In 1919 the Act of 1935, or even the Simon Commission plan would have been well received. There is evidence that Montagu would have backed something of this sort but his cabinet colleagues would not have considered it. By 1935, a constitution establishing a Dominion of India, comprising the British Indian provinces might have been acceptable in India though it would not have passed the British Parliament. 'Considering the balance of power in the Conservative party at the time, the passing of a Bill more liberal than that which was enacted in 1935 is inconceivable.'

PROVINCIAL PART OF THE ACT

The provincial part of the Act, which went into effect automatically, basically followed the recommendations of the Simon Commission. Provincial dyarchy was abolished; that is, all provincial portfolios were to be placed in charge of ministers enjoying the support of the provincial legislatures. The British-appointed provincial governors, who were responsible to the British Government via the Viceroy and Secretary of State for India, were to accept the recommendations of the ministers unless, in their view, they negatively affected his areas of statutory "special responsibilities" such as the prevention of any grave menace to the peace or tranquility of a province and the safeguarding of the legitimate interests of minorities. In the event of political breakdown, the governor, under the supervision of the Viceroy, could take over total control of the provincial government. This, in fact, allowed the governors a more untrammeled control than any British official had enjoyed in the history of the Raj. After the resignation of the congress provincial ministries in 1939, the

governors did directly rule the ex-Congress provinces throughout the war. It was generally recognized, that the provincial part of the Act, conferred a great deal of power and patronage on provincial politicians as long as both British officials and Indian politicians played by the rules. However, the paternalistic threat of the intervention by the British governor rankled.

FEDERAL PART OF THE ACT

Unlike the provincial portion of the Act, the Federal portion was to go into effect only when half the States by weight agreed to federate. This never happened and the establishment of the Federation was indefinitely postponed after the outbreak of the Second World War.

TERMS OF THE ACT

The Act provided for Dyarchy at the Centre. The British Government, in the person of the Secretary of State for India, through the Governor-General of India – Viceroy of India, would continue to control India's financial obligations, defence, foreign affairs and the British Indian Army and would make the key appointments to the Reserve Bank of India (exchange rates) and Railway Board and the Act stipulated that no finance bill could be placed in the Central Legislature without the consent of the Governor General. The funding for the British responsibilities and foreign obligations (*e.g.*, loan repayments, pensions), at least 80 percent of the federal expenditures, would be non-votable and be taken off the top before any claims could be considered for (for example) social or economic development programmes. The Viceroy, under the supervision of the Secretary of State for India, was provided with overriding and certifying powers that could, theoretically, have allowed him to rule autocratically.

OBJECTIVES OF THE BRITISH GOVERNMENT

The federal part of the Act was designed to meet the aims of the Conservative Party. Over the very long term, the Conservative leadership expected the Act to lead to a nominally dominion status India, conservative in outlook, dominated by an alliance of Hindu princes and right-wing Hindus which would be well disposed to place itself under the guidance and protection of the United Kingdom.

In the medium term, the Act was expected to (in rough order of importance):

- Win the support of moderate nationalists since its formal aim was to lead eventually to a Dominion of India which, as defined under the Statute of Westminster 1931 virtually equalled independence;
- Retain British of control of the Indian Army, Indian finances and India's foreign relations for another generation;
- Win Muslim support by conceding most of Jinnah's Fourteen Points;
- Convince the Princes to join the Federation by giving the Princes conditions for entry never likely to be equaled. It was expected that enough would join to allow the establishment of the Federation. The terms offered to the Princes included:

  - — The Princes would select their state's representatives in the Federal Legislature. There would be no pressure for them to democratize their administrations or allow elections for state's representatives in the Federal Legislature;
  - — The Princes would enjoy heavy weightage. The Princely States represented about a quarter of the population of India and produced well under a quarter of its wealth. Under the Act:
    - – The Upper House of the Federal Legislature, the Council of State, would consist of 260 members (156 (60%) elected from the British India and 104 (40%) nominated by the rulers of the princely states) and,
    - – The Lower House, the Federal Assembly, would consist of 375 members (250 (67%) elected by the Legislative Assemblies of the British Indian provinces; 125 (33%) nominated by the rulers of the princely states.)
- Ensuring that the Congress could never rule alone or gain enough seats to bring down the government

This was done by over-representing the Princes, giving every possible minority, the right to separately vote for candidates belonging to their respective communities, and by making the executive theoretically, but not practically, removable by the legislature.

GAMBLES TAKEN BY THE BRITISH GOVERNMENT

- *Viability of the proposed Federation:* It was hoped that the gerrymandered federation, encompassing units of such hugely different sizes, sophistication and varying in forms of government from autocratic Princely States to democratic provinces, could provide the basis for a viable state. However, this was not a realistic possibility. In reality, the Federation, as planned in the Act, almost certainly was not viable and would have rapidly broken down with the British left to pick up the pieces without any viable alternative.
- *Princes Seeing and Acting in Their Own Long-Range Best Interests:* That the Princes would see that their best hope for a future would lie in rapidly joining and becoming a united block without which no group could hope, mathematically, to wield power. However, the princes did not join, and thus exercising the veto provided by the Act prevented the Federation from coming into existence. Among the reasons for the Princes staying out were the following:
  - — They did not have the foresight to realize that this was their only chance for a future.
  - — Congress had begun, and would continue, agitating for democratic reforms within the Princely States. Since the one common concern of the 600 or so Princes was their desire to continue to rule their states without interference, this was indeed a mortal threat. It was

on the cards that this would lead eventually to more democratic state regimes and the election of states' representatives in the Federal Legislature. In all likelihood, these representatives would be largely Congressmen. Had the Federation been established, the election of states' representatives in the Federal Legislature would amount to a Congress coup from the inside. Thus, contrary to their official position that the British would look favourably on the democratization of the Princely States, their plan required that the States remain autocratic. This reflects a deep contradiction on British views of India and its future.

'At a banquet in the princely state of Benares Hailey observed that although the new federal constitution would protect their position in the central government, the internal evolution of the states themselves remained uncertain. Most people seemed to expect them to develop representative institutions. Whether those alien grafts from Westminster would succeed in British India, however, itself remained in doubt.

Autocracy was "a principle which is firmly seated in the Indian States," he pointed out; "round it burn the sacred fires of an age-long tradition," and it should be given a fair chance first.

Autocratic rule, "informed by wisdom, exercised in moderation, and vitalized by a spirit of service to the interests of the subject, may well prove that it can make an appeal in India as strong as that of representative and responsible institutions."

This spirited defence brings to mind Nehru's classic paradox of how the representatives of the advanced, dynamic West allied themselves with the most reactionary forces of the backward, stagnant East.'

Under the Act, 'There are a number of restrictions on the freedom of discussion in the federal legislature. For example the act forbids... any discussion of, or the asking of questions about, a matter connected with an Indian State, other than a matter with respect to which the federal legislature has power to make laws for that state, unless the Governor-General in his discretion is satisfied that the matter affects federal interests or affects a British subject, and has given his consent to the matter being discussed or the question being asked.'

- They were not a cohesive group and probably realized that they would never act as one.
- Each Prince seemed consumed by the desire to gain the best deal for himself were his state to join the Federation: the most money, the most autonomy.
- That enough was being offered at the Centre to win the support of moderate nationalist Hindu and Muslim support. In fact, so little was offered that all significant groups in British India rejected and denounced the proposed Federation. A major contributing factor was the continuing distrust of British intentions for which there was considerable basis in fact. In this vital area the Act failed Irwin's test:

'I don't believe that… it is impossible to present the problem in such a form as would make the shop window look respectable from an Indian point of view, which is really what they care about, while keeping your hand pretty firmly on the things that matter.' (Irwin to Stonehaven, 12 November 1928).

- That the wider electorate would turn against the Congress. In fact, the 1937 elections showed overwhelming support for Congress among the Hindu electorate.
- That by giving Indian politicians a great deal of power at the provincial level, while denying them responsibility at the Centre, it was hoped that Congress, the only national party, would disintegrate into a series of provincial fiefdoms. In fact, the congress High Command was able to control the provincial ministries and to force their resignation in 1939. The Act showed the strength and cohesion of Congress and probably strengthened it. This does not imply that Congress was not made up of and found its support in various sometimes competing interests and groups. Rather, it recognizes the ability of Congress, unlike the British Raj, to maintain the cooperation and support of most of these groups even if, for example in the forced resignation of Congress provincial ministries in 1939 and the rejection of the Cripps Offer in 1942, this required a negative policy that was harmful, in the long run, to the prospects for an independent India that would be both united and democratic.

INDIAN REACTION TO THE PROPOSED FEDERATION

No significant group in India accepted the Federal portion of the Act. A typical response was: 'After all, there are five aspects of every Government worth the name: (a) The right of external and internal defence and all measures for that purpose; (b) The right to control our external relations; (c) The right to control our currency and exchange; (d) The right to control our fiscal policy; (e) the day-to-day administration of the land…. (Under the Act) You shall have nothing to do with external affairs. You shall have nothing to do with defence. You shall have nothing to do, or, for all practical purposes in future, you shall have nothing to do with your currency and exchange, for indeed the Reserve Bank Bill just passed has a further reservation in the Constitution that no legislation may be undertaken with a view to substantially alter the provisions of that Act except with the consent of the Governor-General…. there is no real power conferred in the Centre.' (Speech by Mr Bhulabhai DESAI on the Report of the Joint Parliamentary Committee on Indian Constitutional Reform, 4 February 1935.

However, the Liberals, and even elements in the Congress were tepidly willing to give it a go: "Linlithgow asked Sapru whether he thought there was a satisfactory alternative to the scheme of the 1935 Act. Sapru replied that they should stand fast on the Act and the federal plan embodied in it. It was not ideal but at this stage it was the only thing…. A few days after Sapru's visit Birla

came to see the Viceroy. He thought that Congress was moving towards acceptance of Federation. Gandhi was not over-worried, said Birla, by the reservation of defence and external affairs to the centre, but was concentrating on the method of choosing the States' representatives. Birla wanted the Viceroy to help Gandhi by persuading a number of Princes to move towards democratic election of representatives. …Birla then said that the only chance for Federation lay in agreement between Government and Congress and the best hope of this lay in discussion between the Viceroy and Gandhi."

THE WORKING OF THE ACT

The British government sent out Lord Linlithgow as the new viceroy with the remit of bringing the Act into effect. Linlithgow was intelligent, extremely hard working, honest, serious and determined to make a success out of the Act. However, he was also unimaginative, stolid, legalistic and found it very difficult to "get on terms" with people outside his immediate circle. In 1937, after a great deal of confrontation, Provincial Autonomy commenced. From that point until the declaration of war in 1939, Linlithgow tirelessly tried to get enough of the Princes to accede to launch the Federation. In this he received only the weakest backing from the Home Government and in the end the Princes rejected the Federation *en masse*. In September 1939, Linlithgow simply declared that India was at war with Germany. Though Linlithgow's behaviour was constitutionally correct it was also offensive to much of Indian opinion. This led directly to the resignation of the Congress provincial ministries which undermined Indian unity. From 1939, Linlithgow concentrated on supporting the war effort.

CONSTITUTIONAL DEVELOPMENT IN INDIA

CONSTITUTION

- Constitution is a legally sanctified document, considering of the basic governing principles of the State and sets out the framework and the principal functions of the organs of the Government of a State.
- There are various forms of Government prevalent across the world. Constitution of a country gives idea about the basic structure of the political system under which its people are to be governed.
- The idea of Constitutionalism suggests way and means to work out a governmental form, which exercises power and ensures, at the same time, individual freedom and liberty.
- Constitutionalism suggests a way for reconciling the power of the State with individual liberty, by prescribing the principles of organizing the State
- It defines the powers of the main organ of the State, demarcates their responsibilities and regular their relationships with each other and with the people.
- Constitution serves as the "Fundamental Law" of a country; any other laws made must be in conformity with it, in order to be legally endorsed.

IS THE CONSTITUTION STATIC?

- A Constitution is an extension of the philosophical and organizational frameworks into the future.
- But a State has to face the challenges of changing social, economic and political conditions in the society
- All living constitutions provide for procedures for introducing changes in the them by means of amendments. So, the constitution is not static.

WRITTEN AND UNWRITTEN CONSTITUTIONS

- Constitutions of most countries came into existence as a result of a conscious decision to have such a document. These are the 'written' Constitution, which provide institutional arrangements and procedures.
- But, the laws and institutions of British Constitution have gradually evolved over the centuries. The British Constitution is an 'unwritten' Constitution. It comprises the constitutional conventions that act as precedents for the working of institutions and other documents such as the statutes and Acts of Parliament. Here the Parliament is supreme, unlike the 'written' Constitution where, the Constitution is supreme.
- In Britain, any change in the Constitution is possible by means of laws passed by the Parliament. There is no distinction between an ordinary law and a constitutional law. This is an example of the most flexible form of Constitution.

SIGNIFICANCE OF THE CONSTITUTION

- The philosophy embodied in a nation's Constitution determines the kind of Government present there
- A Constitution outlines the vision of the State and is its most important document
- A Constitution ensure certain rights to its citizens as well as defines their duties.
- A Constitution is an expression of faith and hopes, that people have from the State, and the promises that they wish to make for the future.

CONSTITUTIONAL DEVELOPMENTS

The Indian administrative structure is largely a legacy of the British rule. The various functional aspects such as public services, education system, political set-up, recruitment, training, office procedures, districts administration, local administration, police system, revenue administration, budgeting, auditing, and so on, have their roots in the British rule.

The British rule in India can be divided into two phases- the Company rule till 1858 and the Crown's rule from 1858 to 1947.

LANDMARKS

The landmarks in the development of the Constitution are:
Milestones:

- *1687:* The first Municipal Corporation in India was set up in Madras
- *1772:* Lord Warren Hastings created the office of District Collector.
- *1829:* The office of the Divisional Commissioner was created by Lord William Bentick.
- *1859:* The portfolio system was introduced by Lord Canning.
- *1860:* A system of Budget was introduced.
- *1870:* Lord Mayo's resolution on financial decentralization visualized the development of local self-government institutions in India.
- *1872:* First census in India was conducted during Lord Mayo's period.
- *1881:* First regular census was conducted during the period of Lord Ripon.
- *1882:* Lord Ripon's resolution was hailed as the 'Magna Carta' of local self government. He is regarded as the 'Father of local self-government in India'.
- *1905:* The tenure system was introduced by Lord Curzen.
- *1905:* The Railway Board was set up by a resolution of the Government of India.
- *1921:* Public Accounts Committee was created at the Centre
- *1921:* Railway Budget was separated from the General Budget.
- *1935:* Reserve Bank of India was established by an Act of the Central Legislature.

REGULATING ACT OF 1773

This was the first step taken by the British Government to control and regulate the affairs of the East India Company in India.

- It designated the Governor of Bengal as the Governor-General of Bengal
- The first Governor-General was Lord Warren Hastings
- It subordinated the Governors of Bombay and Madras to the Governor-General of Bengal
- The Supreme Court was established at Fort William (Calcutta) as the Apex Court in 1774.

PITT'S INDIA ACT OF 1784

- It was introduced to remove the drawbacks of the Regulating Act.
- Was named after the then British Prime Minister.
- Placed the Indian affairs under the direct control of the British Government
- Established a Board of Control over the Court of Directors.

CHARTER ACT OF 1833

- It made the Governor-General of Bengal as the Governor-General of India.
- First Governor-General of India was Lord William Bentick
- All civil and military powers were vested in him
- Governments of Bombay and Madras were deprived of their legislative powers
- This was the final step towards centralization in the British India.
- The Act ended the activities of the East India Company as a commercial body.

GOVERNMENT OF INDIA ACT OF 1858

- This Act transferred the Government, territories and revenues of India from the East India Company to the British Crown.
- In other words, the rule of Company was replaced by the rule of the Crown in India.
- The powers of the British Crown were to be exercised by the Secretary of State for India
- The Secretary of State was a member of the British Cabinet
- He was assisted by the Council of India, having 15 members
- He was vested with complete authority and control over the Indian administration through the Governor-General as his agent
- He was responsible ultimately to the British Parliament.
- The Governor-General was made the Viceroy of India.
- Lord Canning was the first Viceroy of India.

INDIAN COUNCIL ACT OF 1861

- It introduced for the first time the repetitive institutions of India
- It provided that the Governor-General's Executive Council should have some Indians as the non-official members while transacting the legislative businesses.
- Initiated the process of decentralisation by restoring the legislative powers to the Bombay and the Madras President
- It accorded statutory recognition to the portfolio system.

INDIA COUNCIL ACT OF 1892

- Introduced the principle of elections but in an indirect manner
- Enlarge the functions of the Legislative Councils and gave them the power of discussing the Budget and addressing questions to the Executive.

INDIAN COUNCILS ACT OF 1909

- This Act is also known as the Morley- Minto Reforms (Lord Morley was the then Secretary of State for India and Lord Minto was the then Governor-General of India).

- It changed the name of the Central Legislative Council to the Imperial Legislative Council
- Introduced a system of communal representation for Muslims by accepting the concept of 'separate electorate'.
- Lord Minto came to be known as the 'Father of Communal Electorate'.

GOVERNMENT OF INDIA ACT OF 1909

- This Act is also known as the Montague- Chelmsford Reforms.
- Montague was the then Secretary of State and lord Chelmsford was the then Governor-General of India.
- The Central subjects were demarcated and separated from those of the Provincial subjects
- The scheme of dual governance, 'Dyarchy', was introduced in the Provincial subjects
- The Act introduced, for the first time, bicameralism and direct elections in the country
- The Act also required that the three of the six members of the Governor-General's Council (other than Commander-in-Chief) were to be Indians.

GOVERNMENT OF INDIA ACT OF 1935

- The Act provided for the establishment of an All-India Federation consisting of the Provinces and the Princely States as units
- The Act divided the powers between the Centre and the units in items of three lists, namely the Federal List, the Provincial List and the Concurrent List.
- The Federal List for the Centre consisted of 59 items, the Provincial List for the provinces consisted of 54 items and the Concurrent List for both consisted of 36 items
- The residuary powers were vested with the Governor-General.
- The Act abolished the Dyarchy in the Provinces and introduced 'Provincial Autonomy'.
- It provided for the adoption of Dyarchy at the Centre.
- Introduced bicameralism in 6 out of 11 Provinces.
- These six Provinces were Assam, Bengal, Bombay, Bihar, Madras and the United Province.

INDIAN INDEPENDENCE ACT OF 1947

- Till 1947, the Government of India functioned under the provinces of the 1919 Act only. The provisions of 1935 Act relating to Federation and Dyarchy were never implemented.
- The Executive Council provided by the 1919 Act continued to advice the Governor-General till 1947.
- It declared India as an Independent and Sovereign State.
- Established responsible Governments at both the Centre and the Provinces.

- Designated the Governor-General of India and the provincial Governors as the Constitutional Heads(normal heads).
- It assigned dual functions (Constituent and Legislative) to the Constituent Assembly and declared this dominion legislature as a sovereign body.

3

The Implementation of a Constructive Trust

THE INDIAN TRUST ACT

1. The Law relating to Trust is contained in Act II of 1882.
2. It is an Act which defines and amends—that means that it does not introduce any new principle.
3. The Act does not consolidate the Law—That means that it is not an Exhaustive Code.
4. The object of the Act was to group in one to enact the legal provisions relating to trusts. Before the Act of 1882 the statutory law relating to trust was contained in 29 *Car II. C. 31 sections 7— II.*
   Act XXVII of 1866 Act XXVIII of l866: There were also few isolated provisions scattered through the Penal Code, Specific Relief, C. P. Code Stamp Act, Limitation, Government Securities Act, Companies Act, Presidency Banks Act.
5. As originally passed, the Act did not apply to the whole of British India. For instance, it did not apply to Bombay. But provision was made to extend it by notification by local Government.
6. It is unnecessary to discuss here whether the Hindu Law and Mohammedan Law recognised trust as defined in the Trust Act. That may be dealt with by others.

THE NATURE OF A TRUST

1. Trust is defined in section 3. A trust involves three things:
   (1) A person who is the *owner* of some property.
   (2) Ownership burden with an obligation.
   (3) Obligation to use the property for the benefit of another or of another and himself.
2. It is ownership without beneficial enjoyment. It involves separation of ownership and beneficial enjoyment.
3. A trust arises out of a confidence reposed in and accepted by the owner.
4. The owner in the eye of the law is the trustee. After the trust is created the author of the trust ceases to be the owner of the property.

What is a Trust

1. The terms Trust and Trustee are defined in various enactments of the Indian Legislature.
   (i) *Definition in Specific Relief Act I of 1877. Section 3:*
      (1) *Obligation* includes every duty enforceable by law.
      (2) *Trust* includes every species of express, implied or constructive fiduciary ownership.
      (3) *Trustee* includes every person holding expressly, by implication, or constructively a fiduciary ownership.
   (ii) *Definition in the Indian Trustees Act XXVII of 1866. Section 2:* "Trust shall not mean the duties incident to an estate conveyed by way of mortgage; but with this exception, the words *trust* and *trustee* shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of executor or administrator of a deceased person.
   (iii) *Definition in Limitation Act IX of 1908. Section 2 (ii)— Trustee* does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied or a wrongdoer in possession without title.
   (iv) *Indian Trusts Act II of 1872.*
      (1) *Section 3:* A trust is an obligation annexed to the ownership of property...
      (2) Ingredients of a Trust (i) A Trust in an *obligation.* (ii) The obligation must be annexed to the *ownership* of property. (iii) The ownership must arise out of *confidence* reposed in and accepted by the owner. (iv) The ownership must be for the benefit of another (*i.e.*, a person other than the owner) or of another and the owner.

EXPLANATION OF TERMS

I. There must be obligation.
II. Obligation must be annexed to ownership property.
    1. There may be an obligation to which a person is subject although there is no property to which it is annexed.
       E.g., *Torts* assault—
    2. There may be property without there being any obligation attached to it. *E.g.*, *Full* and *complete* ownership—sale of property.
III. The ownership of property may befounded in confidence or it may not.
    Illus.: A person may transfer ownership to another with the intention of conferring upon him the right to enjoy the property.
    A person may transfer ownership to another without the intention of conferring upon him the right to enjoy the property. The difference between ownership founded in confidence and ownership not founded in confidence consists in this—
    (i) In the latter there is *a jus in re* (a complete and full right to a thing) *or jus ad rem* (an inchoate and imperfect right).
    (ii) In the former there is not. *E.g.*, Bailment.
    (iii) The nature of a trust can be better understood by contracting it with other transactions resembling a trust.

TRUST DISTINGUISHED FROM AGENCY

1. Where there is a trust, the ownership of the trust property is in the trustee. The trustee is personally liable on all contracts entered into by him in reference to the trust, although he may have a right of recourse against the trust funds or against the beneficiary.
2. An agent has no ownership in law in the goods entrusted to him. If an agent enters into a contract as agent, he is not personally liable. The contract is with the principal.

TRUST DISTINGUISHED FROM CONDITION

1. *Cases of condition differ from cases of trust in two respects:*
   First. A trust of property cannot be created by any one except the owner. But A may dispose of his property to B upon condition express or implied that B shall dispose of his own property in a particular way indicated by A.
   Second. The obligation of the person on whom the condition is imposed is not limited by the value of the property he receives, *e.g.*, if A makes a bequest to B, on condition of B paying A's debts, and B accepts the gift, he will be compelled in equity to discharge the debts although the exceed the value of the property.

2. But the words "upon condition" may create a real trust. Thus a gift of an estate to A on condition of paying the rents and profits to B constitutes a trust because it is clear that no beneficial interest was intended to remain in A.
   A may dispose of his property to B upon condition express or implied that B shall dispose of his property to C. There is a condition in favour of C.

IS THIS A TRUST? TRUST DISTINGUISHED FROM BAILMENT

1. Bailment is a deposit of chattel and may in a sense be described as a species of trust. But there is this great difference between a bailment and a trust, that the general property in the case of a trust, is in the trustee, whereas a bailee has only a special property, the general property remaining in the bailor.
2. The result of this difference is that an unauthorised sale by a trustee will confer a good title upon a *bonafide* purchaser who acquires the legal interest without notice of the trust, whereas such a sale by a bailee confers as a rule no title as against the bailor.
3. Bailee does not become the owner of the property as a result of the bailment. But a trustee does in law become the owner of the property as a result of the trust notwithstanding he is under an obligation to deal with the property in a certain specified manner.

TRUST DISTINGUISHED FROM GIFT

Ordinary contract differs from a trust. Contract which confers a benefit on a third party closely resembles a trust.

1. There is a similarity between a Trust and a Gift inasmuch as in both the transfer results in ownership. The Trustee and the Donee both become owners of the property.
2. But there is a difference between the two. In a gift the donee is free to deal with the property in any way he likes. In a Trust the trustee is under an obligation to use the property in a particular manner and for a particular purpose.

TRUST DISTINGUISHED FROM CONTRACT

1. *That there is a distinction between trust and contract is evident from the existence of differing legal consequences attached to a trust and to a contract:*
   (i) A trust, if executed, may be enforced by a beneficiary who is not a party to it whilst only the actual parties to a contract can, as a rule, sue upon it
   (ii) An executed voluntary trust is fully enforceable while a contract lacking consideration is not.

2. However, the determination of the question whether a given set of facts gives rise to a trust or a contract is not easy. What is the test?
   Keetan—-pp. 5-6 (1919) A. C. 801 |38 Bom. S. R. 610.
   (1926) A. C. 108
   It is a question of intention.

TRUST DISTINGUISHED FROM POWER

1. The term "power" in its widest sense includes every authority given to a person (called the donee of the power) to act on behalf of or exercise rights belonging to the person giving him the authority (called the donor of the power).
2. Powers are of many kinds *e.g.*
   (i) The common law power of an agent to act for his principal, given sometimes by a formal "power of attorney".
   (ii) Statutory power such as the power of sale given to a mortgagee.
   (iii) The various express and implied equitable powers possessed by trustees and executors.
   (iv) Powers to appoint trusts so as to create equitable interests.
3. The power of appointment is a transaction which resembles a trust and it is this which must be distinguished from a trust.

The word appointment means-pointing out, indicating-the act of declaring the destination of specific property, in exercise of an authority conferred for that purpose-the act of nominating to an office.

The last class *termed, powers of appointment* are made use of where it is desired to make provision for the *creation* of future interests, but to postpone their complete declaration.

Thus in a marriage settlement, property may be given to trustees upon trust for the husband and wife for their lives and, after the death of the survivor upon trust for (i) *Such of the children* of the marriage as the survivor shall appoint, or (ii) *All the children* of the marriage in such shares as the survivors shall appoint.

In such a case, upon appointment being made, the child to whom it is made takes exactly as if a limitation to the same effect had been made in the original instrument.

A power of this kind, where there is a restriction as to its objects (*i.e.*, persons in whose favour it may be exercised) is termed a *special power of appointment.* But there may be a *general power* of appointment when there is no such restriction, so that the donee may appoint to himself. In such a case the donee having the same powers of disposition as an owner, is for most purposes treated as the owner of the property:

(i) A power may give a mere discretion and therefore is distinct from a trust, which creates an obligation or
(ii) A power may impose an obligation to exercise the discretion.
   In the former case there is no trust. In the latter case there is. The former is called *mere power.* The latter is called power in the nature of a trust *or power coupled with trust.*

(iii) There is also a third category of cases which arc cases of a *trust coupled with a power.*

These are cases where a trustee of a property though under an obligation to apply it for the benefit of certain individuals or purposes, may have a *discretion* as to whether he will or will not do certain specified acts, or as to the amount to be applied for any one individual or purpose or as to the time and manner of its application.

In such cases, the Court will prevent the trustee from exercising the power unreasonably, it will not compel him to do such acts or attempt to control the proper exercise of his discretion.

1. Power resembles a trust and also differs from it.
   (i) It resembles a trust inasmuch as a power is an authority to dispose of some interest in land, but confers no right to enjoyment of land.
   (ii) It differs from a trust inasmuch as a power is discretionary, whereas a trust is imperative; the trustee if he accepts must necessarily do as the settlor directs.

New Trustees:

(1) Survivorship of the office and estate or trustee on death.
(2) Devolution of the office and estate on Death of the survivor.
(3) Retirement or Removal of a Trustee.
(4) Appointment of New Trustees.

Appointment of a Judicial Trustee.

The Public Trustee.

(1) Nature and Function.
(2) Appointment of a Public Trustee as an ordinary Trustee.
(3) Appointment and Removal of the Public Trustee.
(4) Duties, Rights and Liability of the Custodian Trustee and Managing Trustee.
(5) Special Rules relating to the Public Trustee.

The Rights of the Trustee:

(1) Right to Reimbursement and Indemnity.
(2) Right to discharge on completion of Trusteeship.
(3) Right to pay Trust Funds into Court.

Right of trustees and beneficiaries to seek the assistance of public trustee or court.

(1) Right of Official audit.
(2) Right to take direction of Court.
(3) Right to have Trust administered by Court.
(4) Right to take direction of Court.
(5) Right to have Trust administered by Court.

Consequences of a Breach of Trust.

Definition of Breach of Trusts: Breach of trust is defined in section 3, a breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called a breach of trust.

Under the English Law: Any act or neglect on the part of a trustee which is not authorised or excused by the terms of the trust instrument, or by law, is called a breach of trust.

Breach of Duty: A trustee has Duties, Right, Powers and disabilities. Only breach of duty is breach of trust.

1. The measure of liability is the loss caused to the trust property.
2. Is he liable to pay interest? Only in the following cases:
   (a) Where he has actually received interest.
   (b) Where the breach consists in unreasonable delay in paying trust-money to the beneficiary.
   (c) Where the trustee ought to have received interest, but has not done so.
   (d) Where he may be fairly presumed to have received interest.
   (e) Where the breach consists in failure to invest trust-money and to accumulate the interest or dividends.
   (f) Where the breach consists in the employment of trust property or the proceeds thereof in trade or business.
3. Is he entitled to set off a gain from breach of trust against a loss from breach of trust.

What is the nature of the Law of Limitation?

1. *There are various ways in which a time-limit enters into a course of litigation:* (1) Cases where the law says action shall be taken within a stated period:
   Illus.—Order 6 Rule 18.—Amendment of a Plaint. Party obtaining leave to amend must amend within the time fixed by the Court for amendment and if no time is fixed then within 14 days. (2) Cases where the law says action shall not be taken before a certain period has elapsed.
   Illus.—Section 80 of the C. P. C.—Suit against Secretary of State. No suit shall be instituted against the Secretary of State for India in Council or against any public officer in respect of any Act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been given. (3) Cases in which the law prescribes that action shall not be taken *after* a certain period has elapsed.
2. It is the *third* class of cases which strictly speaking constitute the subject-matter of the Law of Limitation.

Distinction between Limitation—Estoppel—Acquiescence and Laches: All these have the effect of denying to an aggrieved party a remedy for the wrong done to him. That being so it is necessary to distinguish them from Limitation as such.

LIMITATION AND ESTOPPEL

1. By Limitation a person is prevented from getting relief because of his having brought the action after the time prescribed for bringing his suit.
2. By Estoppel a person fails to get relief because he is prevented by law from adducing evidence to prove his case.

LIMITATION AND ACQUIESCENCE

1. Limitation defeats a suitor in the matter of obtaining relief for a wrong because he has *consented* to the doing of the wrong because his suit is beyond time.
2. Acquiescence defeats a suitor in the matter of obtaining relief for a wrong because he has *consented* to the doing of the wrong.

LIMITATION AND LACHES

1. Both have one common feature—relief is denied on the sole ground that action is not brought within time.
2. The distinction lies in this—In limitation time within which action shall not be brought is prescribed by Law. In laches there is no time prescribed and the Court, therefore, in granting relief works on the principle of unreasonable delay.
3. In India the doctrine of laches has not much scope because of the Law of Limitation which has prescribed a definite time limit for almost all actions. It does not, therefore, matter whether a man brings his suit on the first day or the last day of the period prescribed by law for his action.

The doctrine of laches applies in India only in the following cases:

(1) Where the relief to be granted by the Court is *discretionary.*
This is so (i) In cases falling under specific relief. (ii) In cases falling under interlocutory relief.

(2) Where the Law of Limitation does not apply *e.g.*, Matrimonial suits. Delay would mean that the offence was condoned.

THE OBJECT OF LIMITATION

1. Two things are necessary for a well-ordered community (i) Wrongs must be remedied. (ii) Peace must be maintained.
2. To secure peace of the community it is necessary that titles to property and matters of right in general should not be in a state of constant uncertainty, doubt and suspense.
3. Consequently, if persons are to be permitted to claim relief for what they think are wrongs done to them, then they must be compelled to seek relief within a certain time. There is nothing unjust in denying relief to a person who has tolerated the wrong done to him beyond a certain period.
4. The Law of Limitation is based upon this principle.
5. That being the underlying principle, the Law of Limitation is absolute in its operation and is not subject to agreement or conduct of the parties. That is to say it is not subject to (1) Waiver. (2) Custom. (3) Estoppel. (4) Variation in respect of enlargement or abridgement of time by agreement of parties sections 28 and 23 of the Contract Act.

6. In this respect the Law of Limitation differs from the Law of Negotiable Instruments.
7. Limitation and the onus of Proof.
    1. The onus of proof is upon the Plaintiff. He must prove that his suit is within time.
    37. Bom. S. R. 471-A.I.R.. 1935 September.
    A by a registered lease, dated 8th July 1922, gave certain lands to B on a rental for a period of 25 years. Subsequently, A dispossessed B alleging that the lease was taken by undue influence. B brought a suit against A for an injunction restraining A from interfering in any way with his possession and enjoyment and for possession of land.
    It was contended on behalf of B that A was precluded from challenging the validity of the lease, on the ground that if he had sued to have the lease set aside the suit would have been barred by Limitation. In other words, it was contended that the plea of the Defendant was barred of the Limitation.
    Question is: Is Defendant bound by the Law of Limitation?
    The answer is No. —Section 3 refers to Plaintiff and not to Defendant.

4

The State Legislature

GENERAL

168. *Constitution of Legislatures in States:*

(1) *For every State there shall be a Legislature which shall consist of the Governor, and:*

(a) In the States of Bihar, Maharashtra, Karnataka and Uttar Pradesh, two Houses;

(b) In other States, one House.

(2) Where there are two Houses of the Legislature of a State, one shall be known as the Legislative Council and the other as the Legislative Assembly, and where there is only one House, it shall be known as the Legislative Assembly.

169. *Abolition or creation of Legislative Councils in States:*

(1) Notwithstanding anything in article 168, Parliament may by law provide for the abolition of the Legislative Council of a State having such a Council or for the creation of such a Council in a State having no such Council, if the Legislative Assembly of the State passes a resolution to that effect by a majority of the total membership of the Assembly and by a majority of not less than two-thirds of the members of the Assembly present and voting.

(2) Any law referred to in clause (1) shall contain such provisions for the amendment of this Constitution as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions as Parliament may deem necessary.

(3) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of article 368.

170. *Composition of the Legislative Assemblies:*

(1) Subject to the provisions of article 333, the Legislative Assembly of each State shall consist of not more than five hundred, and not less than sixty, members chosen by direct election from territorial constituencies in the State.

(2) For the purposes of clause (1), 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 shall, so far as practicable, be the same throughout the State.

Explanation.-In this clause, the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published:

Provided that the reference in this Explanation to the last preceding census of which the relevant figures have been published shall, until the relevant figures for the first census taken after the year 2026 have been published, be construed as a reference to the 2001 census.

(3) Upon the completion of each census, the total number of seats in the Legislative Assembly of each State 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 Legislative Assembly until the dissolution of the then existing Assembly:

Provided further that such readjustment shall take effect from such date as the President may, by order, specify and until such readjustment takes effect, any election to the Legislative Assembly may be held on the basis of the territorial constituencies existing before such readjustment:

Provided also that until the relevant figures for the first census taken after the year 2026 have been published, it shall not be necessary to readjust:

(i) The total number of seats in the Legislative Assembly of each State as readjusted on the basis of the 1971 census; and

(ii) The division of such State into territorial constituencies as may be readjusted on the basis of the 2001 census, under this clause.

171. *Composition of the Legislative Councils:*

(1) The total number of members in the Legislative Council of a State having such a Council shall not exceed one third of the total number of members in the Legislative Assembly of that State:

Provided that the total number of members in the Legislative Council of a State shall in no case be less than forty.

(2) Until Parliament by law otherwise provides, the composition of the Legislative Council of a State shall be as provided in clause (3).

(3) *Of the total number of members of the Legislative Council of a State:*

(a) As nearly as may be, one-third shall be elected by electorates consisting of members of municipalities, district boards and such other local authorities in the State as Parliament may by law specify;
(b) As nearly as may be, one-twelfth shall be elected by electorates consisting of persons residing in the State who have been for at least three years graduates of any university in the territory of India or have been for at least three years in possession of qualifications prescribed by or under any law made by Parliament as equivalent to that of a graduate of any such university;
(c) As nearly as may be, one-twelfth shall be elected by electorates consisting of persons who have been for at least three years engaged in teaching in such educational institutions within the State, not lower in standard than that of a secondary school, as may be prescribed by or under any law made by Parliament;
(d) As nearly as may be, one-third shall be elected by the members of the Legislative Assembly of the State from amongst persons who are not members of the Assembly;
(e) The remainder shall be nominated by the Governor in accordance with the provisions of clause (5).

(4) The members to be elected under sub-clauses (a), (b) and (c) of clause (3) shall be chosen in such territorial constituencies as may be prescribed by or under any law made by Parliament, and the elections under the said sub-clauses and under sub-clause (d) of the said clause shall be held in accordance with the system of proportional representation by means of the single transferable vote.

(5) The members to be nominated by the Governor under sub-clause (e) of clause (3) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely:-

Literature, science, art, cooperative movement and social service.

172. *Duration of State Legislatures:*

(1) Every Legislative Assembly of every State, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the Assembly:
Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

(2) The Legislative Council of a State shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

173. *Qualification 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, and makes and subscribes before some person authorised in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule;

(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.

174. *Sessions of the State Legislature, prorogation and dissolution:*

(1) The Governor shall from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.

(2) The Governor may from time to time-

(a) Prorogue the House or either House;

(b) Dissolve the Legislative Assembly.

175. *Right of Governor to address and send messages to the House or Houses:*

(1) The Governor may address the Legislative Assembly or, in the case of a State having a Legislative Council, either House of the Legislature of the State, or both Houses assembled together, and may for that purpose require the attendance of members.

(2) The Governor may send messages to the House or Houses of the Legislature of the State, whether with respect to a Bill then pending in the Legislature or otherwise, and a House to which any message is so sent shall with all convenient despatch consider any matter required by the message to be taken into consideration.

176. *Special address by the Governor.*

(1) At the commencement of the first session after each general election to the Legislative Assembly and at the commencement of the first session of each year, the Governor shall address the Legislative Assembly or, in the case of a State having a Legislative Council, both Houses assembled together and inform the Legislature of the causes of its summons.

(2) Provision shall be made by the rules regulating the procedure of the House or either House for the allotment of time for discussion of the matters referred to in such address.

177. *Rights of Ministers and Advocate-General as respects the Houses*: Every Minister and the Advocate-General for a State shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Assembly of the State or, in the case of a State having a Legislative Council, both Houses, and to speak in, and otherwise to take part in the proceedings of, any committee of the Legislature of which he may be named a member, but shall not, by virtue of this article, be entitled to vote.

OFFICERS OF THE STATE LEGISLATURE

178. The Speaker and Deputy Speaker of the Legislative Assembly.-Every Legislative Assembly of a State shall, as soon as may be, choose two members of the Assembly to be respectively Speaker and Deputy Speaker thereof and, so often as the office of Speaker or Deputy Speaker becomes vacant, the Assembly shall choose another member to be Speaker or Deputy Speaker, as the case may be.

179. *Vacation and resignation of, and removal from, the offices of Speaker and Deputy Speaker. A member holding office as Speaker or Deputy Speaker of an Assembly:*

(a) Shall vacate his office if he ceases to be a member of the Assembly;

(b) May at any time by writing under his hand addressed, if such member is the Speaker, to the Deputy Speaker, and if such member is the Deputy Speaker, to the Speaker, resign his office; and

(c) May be removed from his office by a resolution of the Assembly passed by a majority of all the then members of the Assembly:
Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution:
Provided further that, whenever the Assembly is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the Assembly after the dissolution.

180. *Power of the Deputy Speaker or other person to perform the duties of the office of, or to act as, Speaker:*

(1) While the office of Speaker is vacant, the duties of the office shall be performed by the Deputy Speaker or, if the office of Deputy Speaker is also vacant, by such member of the Assembly as the Governor may appoint for the purpose.

(2) During the absence of the Speaker from any sitting of the Assembly the Deputy Speaker or, if he is also absent, such person as may be determined by the rules of procedure of the Assembly, or, if no such person is present, such other person as may be determined by the Assembly, shall act as Speaker.

181. *The Speaker or the Deputy Speaker not to preside while a resolution for his removal from office is under consideration:*

(1) At any sitting of the Legislative Assembly, while any resolution for the removal of the Speaker from his office is under consideration, the Speaker, or while any resolution for the removal of the Deputy Speaker from his office is under consideration, the Deputy Speaker, shall not, though he is present, preside, and the provisions of clause (2) of article 180 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Speaker or, as the case may be, the Deputy Speaker, is absent.

(2) The Speaker shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Assembly while any resolution for his removal from office is under consideration in the Assembly and shall, notwithstanding anything in article 189, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

182. The Chairman and Deputy Chairman of the Legislative Council.- The Legislative Council of every State having such Council shall, as soon as may be, choose two members of the Council to be respectively Chairman and Deputy Chairman thereof and, so often as the office of Chairman or Deputy Chairman becomes vacant, the Council shall choose another member to be Chairman or Deputy Chairman, as the case may be.

183. *Vacation and resignation of, and removal from, the offices of Chairman and Deputy Chairman.-A member holding office as Chairman or Deputy Chairman of a Legislative Council:*

(a) Shall vacate his office if he ceases to be a member of the Council;

(b) May at any time by writing under his hand addressed, if such member is the Chairman, to the Deputy Chairman, and if such member is the Deputy Chairman, to the Chairman, resign his office; and

(c) May be removed from his office by a resolution of the Council passed by a majority of all the then members of the Council:
Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution.

184. *Power of the Deputy Chairman or other person to perform the duties of the office of, or to act as, Chairman:*

(1) While the office of Chairman is vacant, the duties of the office shall be performed by the Deputy Chairman or, if the office of Deputy Chairman is also vacant, by such member of the Council as the Governor may appoint for the purpose.

(2) During the absence of the Chairman from any sitting of the Council the Deputy Chairman or, if he is also absent, such person as may be determined by the rules of procedure of the Council, or, if no such person is present, such other person as may be determined by the Council, shall act as Chairman.

185. *The Chairman or the Deputy Chairman not to preside while a resolution for his removal from office is under consideration:*

(1) At any sitting of the Legislative Council, while any resolution for the removal of the Chairman from his office is under consideration, the Chairman, or while any resolution for the removal of the Deputy Chairman from his office is under consideration, the Deputy Chairman, shall not, though he is present, preside, and the provisions of clause (2) of article 184 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Chairman or, as the case may be, the Deputy Chairman is absent.

(2) The Chairman shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Council while any resolution for his removal from office is under consideration in the Council and shall, notwithstanding anything in article 189, be entitled to vote only in the first instance on such resolution or on any other matter during such proceedings but not in the case of an equality of votes.

186. *Salaries and allowances of the Speaker and Deputy Speaker and the Chairman and Deputy Chairman:* There shall be paid to the Speaker and the Deputy Speaker of the Legislative Assembly, and to the Chairman and the Deputy Chairman of the Legislative Council, such salaries and allowances as may be respectively fixed by the Legislature of the State by law and, until provision in that behalf is so made, such salaries and allowances as are specified in the Second Schedule.

187. *Secretariat of State Legislature:*

(1) *The House or each House of the Legislature of a State shall have a separate secretarial staff:*
Provided that nothing in this clause shall, in the case of the Legislature of a State having a Legislative Council, be construed as preventing the creation of posts common to both Houses of such Legislature.

(2) The Legislature of a State may by law regulate the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the House or Houses of the Legislature of the State.

(3) Until provision is made by the Legislature of the State under clause (2), the Governor may, after consultation with the Speaker of the Legislative Assembly or the Chairman of the Legislative Council, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the Assembly or the Council, and any rules so made shall have effect subject to the provisions of any law made under the said clause.

CONDUCT OF BUSINESS

188. *Oath or affirmation by members:* Every member of the Legislative Assembly or the Legislative Council of a State shall, before taking his seat, make and subscribe before the Governor, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

189. *Voting in Houses, power of Houses to act notwithstanding vacancies and quorum:*

(1) Save as otherwise provided in this Constitution, all questions at any sitting of a House of the Legislature of a State shall be determined by a majority of votes of the members present and voting, other than the Speaker or Chairman, or person acting as such.
The Speaker or Chairman, or person acting as such, shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes.

(2) A House of the Legislature of a State shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in the Legislature of a State shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings.
(3) Until the Legislature of the State by law otherwise provides, the quorum to constitute a meeting of a House of the Legislature of a State shall be ten members or one-tenth of the total number of members of the House, whichever is greater.
(4) If at any time during a meeting of the Legislative Assembly or the Legislative Council of a State there is no quorum, it shall be the duty of the Speaker or Chairman, or person acting as such, either to adjourn the House or to suspend the meeting until there is a quorum.

DISQUALIFICATIONS OF MEMBERS

190. *Vacation of seats:*
(1) No person shall be a member of both Houses of the Legislature of a State and provision shall be made by the Legislature of the State by law for the vacation by a person who is chosen a member of both Houses of his seat in one house or the other.
(2) No person shall be a member of the Legislatures of two or more States specified in the First Schedule and if a person is chosen a member of the Legislatures of two or more such States, then, at the expiration of such period as may be specified in rules made by the President, that person's seat in the Legislatures of all such States shall become vacant, unless he has previously resigned his seat in the Legislatures of all but one of the States.
(3) If a member of a House of the Legislature of a State-
  (a) Becomes subject to any of the disqualifications mentioned in clause (1) or clause (2) of article 191; or
  (b) Resigns his seat by writing under his hand addressed to the speaker or the Chairman, as the case may be, and his resignation is accepted by the Speaker or the Chairman, as the case may be, his seat shall thereupon become vacant:
  Provided that in the case of any resignation referred to in sub-clause (b), if from information received or otherwise and after making such inquiry as he thinks fit, the Speaker or the Chairman, as the case may be, is satisfied that such resignation is not voluntary or genuine, he shall not accept such resignation.
(4) If for a period of sixty days a member of a House of the Legislature of a State is without permission of the House absent from all meetings thereof, the House may declare his seat vacant:

Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days.

191. *Disqualifications for membership:*

(1) *A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State:*

(a) If he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;

(b) If he is of unsound mind and stands so declared by a competent court;

(c) If he is an undischarged insolvent;

(d) If he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) If he is so disqualified by or under any law made by Parliament.

Explanation: For the purposes of this clause, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

(2) A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule.

192. *Decision on questions as to disqualifications of members:*

(1) 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 in clause (1) of article 191, the question shall be referred for the decision of the Governor and his decision shall be final.

(2) Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion.

193. *Penalty for sitting and voting before making oath or affirmation under article 188 or when not qualified or when disqualified:*

If a person sits or votes as a member of the Legislative Assembly or the Legislative Council of a State before he has complied with the requirements of article 188, or when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament or the Legislature of the State, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the State.

POWERS, PRIVILEGES AND IMMUNITIES OF STATE LEGISLATURES AND THEIR MEMBERS

194. *Powers, privileges, etc., of the Houses of Legislatures and of the members and committees thereof:*

(1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State.

(2) No member of the Legislature of a State shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of section 26 of the Constitution (Forty-fourth Amendment) Act, 1978.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of the Legislature of a State or any committee thereof as they apply in relation to members of that Legislature.

195. *Salaries and allowances of members:* Members of the Legislative Assembly and the Legislative Council of a State shall be entitled to receive such salaries and allowances as may from time to time be determined, by the Legislature of the State by law and, until provision in that respect is so made, salaries and allowances at such rates and upon such conditions as were immediately before the commencement of this Constitution applicable in the case of members of the Legislative Assembly of the corresponding Province.

LEGISLATIVE PROCEDURE

196. *Provisions as to introduction and passing of Bills:*

(1) Subject to the provisions of articles 198 and 207 with respect to Money Bills and other financial Bills, a Bill may originate in either House of the Legislature of a State which has a Legislative Council.

(2) Subject to the provisions of articles 197 and 198, a Bill shall not be deemed to have been passed by the Houses of the Legislature of a State having a Legislative Council unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.

(3) A Bill pending in the Legislature of a State shall not lapse by reason of the prorogation of the House or Houses thereof.

(4) A Bill pending in the Legislative Council of a State which has not been passed by the Legislative Assembly shall not lapse on a dissolution of the Assembly.

(5) A Bill which is pending in the Legislative Assembly of a State, or which having been passed by the Legislative Assembly is pending in the Legislative Council, shall lapse on a dissolution of the Assembly.

197. *Restriction on powers of Legislative Council as to Bills other than Money Bills:*

(1) *If after a Bill has been passed by the Legislative Assembly of a State having a Legislative Council and transmitted to the Legislative Council:*

(a) The Bill is rejected by the Council; or

(b) More than three months elapse from the date on which the Bill is laid before the Council without the Bill being passed by it; or

(c) The Bill is passed by the Council with amendments to which the Legislative Assembly does not agree; the Legislative Assembly may, subject to the rules regulating its procedure, pass the Bill again in the same or in any subsequent session with or without such amendments, if any, as have been made, suggested or agreed to by the Legislative Council and then transmit the Bill as so passed to the Legislative Council.

(2) *If after a Bill has been so passed for the second time by the Legislative Assembly and transmitted to the Legislative Council:*

(a) The Bill is rejected by the Council; or

(b) More than one month elapses from the date on which the Bill is laid before the Council without the Bill being passed by it; or

(c) The Bill is passed by the Council with amendments to which the Legislative Assembly does not agree; the Bill shall be deemed to have been passed by the Houses of the Legislature of the State in the form in which it was passed by the Legislative Assembly for the second time with such amendments, if any, as have been made or suggested by the Legislative Council and agreed to by the Legislative Assembly.

(3) Nothing in this article shall apply to a Money Bill.

198. *Special procedure in respect of Money Bills:*

(1) A Money Bill shall not be introduced in a Legislative Council.

(2) After a Money Bill has been passed by the Legislative Assembly of a State having a Legislative Council, it shall be transmitted to the Legislative Council for its recommendations, and the Legislative Council shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the Legislative Assembly with its recommendations, and the Legislative Assembly may thereupon either accept or reject all or any of the recommendations of the Legislative Council.

(3) If the Legislative Assembly accepts any of the recommendations of the Legislative Council, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Legislative Council and accepted by the Legislative Assembly.

(4) If the Legislative Assembly does not accept any of the recommendations of the Legislative Council, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the Legislative Assembly without any of the amendments recommended by the Legislative Council.

(5) If a Money Bill passed by the Legislative Assembly and transmitted to the Legislative Council for its recommendations is not returned to the Legislative Assembly within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the Legislative Assembly.

199. *Definition of "Money Bills":*

(1) *For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely:*

(a) The imposition, abolition, remission, alteration or regulation of any tax;

(b) The regulation of the borrowing of money or the giving of any guarantee by the State, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the State;

(c) The custody of the Consolidated Fund or the Contingency Fund of the State, 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 the State;

(e) The declaring of any expenditure to be expenditure charged on the Consolidated Fund of the State, or the increasing of the amount of any such expenditure;

(f) The receipt of money on account of the Consolidated Fund of the State or the public account of the State or the custody or issue of such money; or

(g) Any matter incidental to any of the matters specified in sub-clauses (a) to (f).

(2) 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.

(3) If any question arises whether a Bill introduced in the Legislature of a State which has a Legislative Council is a Money Bill or not, the decision of the Speaker of the Legislative Assembly of such State thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Legislative Council under article 198, and when it is presented to the Governor for assent under article 200, the certificate of the Speaker of the Legislative Assembly signed by him that it is a Money Bill.

200. Assent to Bills. When a Bill has been passed by the Legislative Assembly of a State or, in the case of a State having a Legislative Council, has been passed by both Houses of the Legislature of the State, it shall be presented to the Governor and the Governor shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President:

Provided that the Governor may, as soon as possible after the presentation to him of the Bill for assent, return the Bill if it is not a Money Bill together with a message requesting that the House or Houses will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, when a Bill is so returned, the House or Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the House or Houses with or without amendment and presented to the Governor for assent, the Governor shall not withhold assent therefrom: Provided further that the Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill.

201. Bills reserved for consideration. When a Bill is reserved by a Governor for the consideration of the President, the President shall declare either that he assents to the Bill or that he withholds assent therefrom: Provided that, where the Bill is not a Money Bill, the President may direct the Governor to return the Bill to the House or, as the case may be, the Houses of the Legislature of the State together with such a message as is mentioned in the first proviso to article 200 and, when a Bill is so returned, the House or Houses shall reconsider it accordingly within a period of six months from the date of receipt of such message and, if it is again passed by the House or Houses with or without amendment, it shall be presented again to the President for his consideration.

PROCEDURE IN FINANCIAL MATTERS

202. *Annual financial statement:*

(1) The Governor shall in respect of every financial year cause to be laid before the House or Houses of the Legislature of the State a statement of the estimated receipts and expenditure of the State for that year, in this Part referred to as the "annual financial statement".

(2) *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 the State; and
   (b) The sums required to meet other expenditure proposed to be made from the Consolidated Fund of the State; and shall distinguish expenditure on revenue account from other expenditure.

(3) *The following expenditure shall be expenditure charged on the Consolidated Fund of each State:*
   (a) The emoluments and allowances of the Governor and other expenditure relating to his office;
   (b) The salaries and allowances of the Speaker and the Deputy Speaker of the Legislative Assembly and, in the case of a State having a Legislative Council, also of the Chairman and the Deputy Chairman of the Legislative Council;
   (c) Debt charges for which the State is liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt;
   (d) Expenditure in respect of the salaries and allowances of Judges of any High Court;
   (e) Any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal;
   (f) Any other expenditure declared by this Constitution, or by the Legislature of the State by law, to be so charged.

203. *Procedure in Legislature with respect to estimates:*

(1) So much of the estimates as relates to expenditure charged upon the Consolidated Fund of a State shall not be submitted to the vote of the Legislative Assembly, but nothing in this clause shall be construed as preventing the discussion in the Legislature of any of those estimates.

(2) So much of the said estimates as relates to other expenditure shall be submitted in the form of demands for grants to the Legislative Assembly, and the Legislative Assembly 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.

(3) No demand for a grant shall be made except on the recommendation of the Governor.

204. *Appropriation Bills:*

(1) As soon as may be after the grants under article 203 have been made by the Assembly, there shall be introduced a Bill to provide for the appropriation out of the Consolidated Fund of the State of all moneys required to meet-
   (a) The grants so made by the Assembly; and
   (b) The expenditure charged on the Consolidated Fund of the State but not exceeding in any case the amount shown in the statement previously laid before the House or Houses.

(2) No amendment shall be proposed to any such Bill in the House or either House of the Legislature of the State 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 of the State, and the decision of the person presiding as to whether an amendment is inadmissible under this clause shall be final.

(3) Subject to the provisions of articles 205 and 206, no money shall be withdrawn from the Consolidated Fund of the State except under appropriation made by law passed in accordance with the provisions of this article.

205. *Supplementary, additional or excess grants:*

(1) *The Governor shall:*

(a) If the amount authorised by any law made in accordance with the provisions of article 204 to be expended for a particular service for the current financial year is found to be insufficient for the purposes of that year or when a need has arisen during the current financial year for supplementary or additional expenditure upon some new service not contemplated in the annual financial statement for that year, or

(b) If any money has been spent on any service during a financial year in excess of the amount granted for that service and for that year, cause to be laid before the House or the Houses of the Legislature of the State another statement showing the estimated amount of that expenditure or cause to be presented to the Legislative Assembly of the State a demand for such excess, as the case may be.

(2) The provisions of articles 202, 203 and 204 shall have effect in relation to any such statement and expenditure or demand and also to any law to be made authorising the appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure or the grant in respect of such demand as they have effect in relation to the annual financial statement and the expenditure mentioned therein or to a demand for a grant and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure or grant.

206. *Votes on account, votes of credit and exceptional grants:*

(1) Notwithstanding anything in the foregoing provisions of this Chapter, the Legislative Assembly of a State shall have power-

(a) To make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the completion of the procedure prescribed in article 203 for the voting of such grant and the passing of the law in accordance with the provisions of article 204 in relation to that expenditure;

(b) To make a grant for meeting an unexpected demand upon the resources of the State when on account of the magnitude or the indefinite character of the service the demand cannot be stated with the details ordinarily given in an annual financial statement;

(c) To make an exceptional grant which forms no part of the current service of any financial year; and the Legislature of the State shall have power to authorise by law the withdrawal of moneys from the Consolidated Fund of the State for the purposes for which the said grants are made.

(2) The provisions of articles 203 and 204 shall have effect in relation to the making of any grant under clause (1) and to any law to be made under that clause as they have effect in relation to the making of a grant with regard to any expenditure mentioned in the annual financial statement and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure.

207. *Special provisions as to financial Bills:*

(1) A Bill or amendment making provision for any of the matters specified in sub-clauses (a) to (f) of clause (1) of article 199 shall not be introduced or moved except on the recommendation of the Governor, and a Bill making such provision shall not be introduced in a Legislative Council: Provided that no recommendation shall be required under this clause for the moving of an amendment making provision for the reduction or abolition of any tax.

(2) A Bill or amendment shall not be deemed to make provision for any of the matters aforesaid 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.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of a State shall not be passed by a House of the Legislature of the State unless the Governor has recommended to that House the consideration of the Bill.

PROCEDURE GENERALLY

208. *Rules of procedure:*

(1) A House of the Legislature of a State may make rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business.

(2) Until rules are made under clause (1), the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature for the corresponding Province shall have effect in relation to the Legislature of the State

subject to such modifications and adaptations as may be made therein by the Speaker of the Legislative Assembly, or the Chairman of the Legislative Council, as the case may be.

(3) In a State having a Legislative Council the Governor, after consultation with the Speaker of the Legislative Assembly and the Chairman of the Legislative Council, may make rules as to the procedure with respect to communications between the two Houses.

209. *Regulation by law of procedure in the Legislature of the State in relation to financial business:*

The Legislature of a State may, for the purpose of the timely completion of financial business, regulate by law the procedure of, and the conduct of business in, the House or Houses of the Legislature of the State in relation to any financial matter or to any Bill for the appropriation of moneys out of the Consolidated Fund of the State, and, if and so far as any provision of any law so made is inconsistent with any rule made by the House or either House of the Legislature of the State under clause (1) of article 208 or with any rule or standing order having effect in relation to the Legislature of the State under clause (2) of that article, such provision shall prevail.

210. *Language to be used in the Legislature:*

(1) Notwithstanding anything in Part XVII, but subject to the provisions of article 348, business in the Legislature of a State shall be transacted in the official language or languages of the State or in Hindi or in English: Provided that the Speaker of the Legislative Assembly or Chairman of the Legislative Council, or person acting as such, as the case may be, may permit any member who cannot adequately express himself in any of the languages aforesaid to address the House in his mother-tongue.

(2) Unless the Legislature of the State by law otherwise provides, this article shall, after the expiration of a period of fifteen years from the commencement of this Constitution, have effect as if the words "or in English" were omitted therefrom:

Provided that in relation to the Legislatures of the States of Himachal Pradesh, Manipur, Meghalaya and Tripura this clause shall have effect as if for the words "fifteen" years occurring therein, the words "twenty-five years" were substituted:

Provided further that in relation to the Legislatures of the States of Arunachal Pradesh, Goa and Mizoram, this clause shall have effect as if for the words "fifteen years" occurring therein, the words "forty years" were substituted.

211. *Restriction on discussion in the Legislature:*

No discussion shall take place in the Legislature of a State with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties.

212. *Courts not to inquire into proceedings of the Legislature:*

(1) The validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure.

(2) No officer or member of the Legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

5

Administrative Relations and Law

GENERAL

256. *Obligation of States and the Union:* The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

257. *Control of the Union over States in certain cases:*

(1) The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

(2) The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance:
Provided that nothing in this clause shall be taken as restricting the power of Parliament to declare highways or waterways to be national highways or national waterways or the power of the Union with respect to the highways or waterways so declared or the power of the Union to construct and maintain means of communication as part of its functions with respect to naval, military and air force works.

(3) The executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection of the railways within the State.

(4) Where in carrying out any direction given to a State under clause (2) as to the construction or maintenance of any means of communication or under clause (3) as to the measures to be taken for the protection of any railway, costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State if such direction had not been given, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of the extra costs so incurred by the State.

257A. [Assistance to States by deployment of armed forces or other forces of the Union.] Rep. by the Constitution (Forty-fourth Amendment) Act, 1978, s. 33 (w.e.f. 20-6-1979).

258. *Power of the Union to confer powers, etc., on States in certain cases:*

(1) Notwithstanding anything in this Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.

(2) A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer powers and impose duties, or authorise the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof.

(3) Where by virtue of this article powers and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties.

258A. *Power of the States to entrust functions to the Union:* Notwithstanding anything in this Constitution, the Governor of a State may, with the consent of the Government of India, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the State extends.

259. [Armed Forces in States in Part B of the First Schedule.] Rep. by the Constitution (Seventh Amendment) Act, 1956, s. 29 and Sch.

260. *Jurisdiction of the Union in relation to territories outside India*: The Government of India may by agreement with the Government of any territory not being part of the territory of India undertake any executive, legislative or judicial functions vested in the Government of such territory, but every such agreement shall be subject to, and governed by, any law relating to the exercise of foreign jurisdiction for the time being in force.

261. *Public acts, records and judicial proceedings:*

(1) Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State.

(2) The manner in which and the conditions under which the acts, records and proceedings referred to in clause (1) shall be proved and the effect thereof determined shall be as provided by law made by Parliament.

(3) Final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law.

DISPUTES RELATING TO WATERS

262. *Adjudication of disputes relating to waters of inter-State rivers or river valleys:*

(1) 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.

(2) Notwithstanding anything in this Constitution, Parliament may be law provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1).

COORDINATION BETWEEN STATES

263. *Provisions with respect to an inter-State Council.- If at any time it appears to the President that the public interests would be served by the establishment of a Council charged with the duty of:*

(a) Inquiring into and advising upon disputes which may have arisen between States;

(b) 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; or

(c) Making recommendations upon any such subject and, in particular, recommendations for the better coordination of policy and action with respect to that subject, it shall be lawful for the President by order to establish such a Council, and to define the nature of the duties to be performed by it and its organisation and procedure.

GENERAL ADMINISTRATIVE LAW

The general administration law is basically ruled in the Administrative Procedures Law. Other legal sources are the Rules of the Administrative Courts, the social security code and the general fiscal law.

SPECIAL ADMINISTRATIVE LAW

The special administrative law consists of various laws. Each special sector has its own law. The most important ones are the

- Town and Country Planning Code
- Federal Control of Pollution Act

- Industrial Code
- Police Law
- Statute Governing Restaurants.

THE NETHERLANDS

In The Netherlands, administrative law provisions are usually contained in separate laws. There is however a single General Administrative Law Act ("Algemene wet bestuursrecht" or Awb) that applies both to the making of administrative decisions and the judicial review of these decisions in courts. On the basis of the Awb, citizens can oppose a decision ('besluit') made by a public body ('bestuursorgaan') within the administration and apply for judicial review in courts if unsuccessful.

Unlike France or Germany, there are no special administrative courts of first instance in the Netherlands, but regular courts have an administrative "chamber" which specializes in administrative appeals. The courts of appeal in administrative cases however are specialized depending on the case, but most administrative appeals end up in the judicial section of the Council of State (Raad van State).

Before going to court, citizens must usually first object to the decision with the administrative body who made it. This is called "bezwaar".

This procedure allows for the administrative body to correct possible mistakes themselves and is used to filter cases before going to court. Sometimes, instead of bezwaar, a different system is used called "administratief beroep" (administrative appeal).

The difference with bezwaar is that administratief beroep is filed with a different administrative body, usually a higher ranking one, than the administrative body that made the primary decision. Administratief beroep is available only if the law on which the primary decision is based specifically provides for it. An example involves objecting to a traffic ticket with the district attorney ("officier van justitie"), after which the decision can be appealed in court.

SWEDEN

In Sweden, there is a system of administrative courts that considers only administrative law cases, and is completely separate from the system of general courts. This system has three tiers, with 12 county administrative courts (*förvaltningsrätt*) as the first tier, four administrative courts of appeal (*kammarrätt*) as the second tier, and the Supreme Administrative Court of Swedenas the third tier.

Migration cases are handled in a two-tier system, effectively within the system general administrative courts. Three of the administrative courts serve as migration courts (*migrationsdomstol*) with the Administrative Court of Appeal in Stockholm serving as the Migration Court of Appeal (*Migrationsöverdomstolen*).

BRAZIL

In Brazil, unlike most Civil-law jurisdictions, there is no specialized court or section to deal with administrative cases. In 1998, a constitutional reform, led by the government of the President Fernando Henrique Cardoso, introduced regulatory agencies as a part of the executive branch.

Since 1988, Brazilian administrative law has been strongly influenced by the judicial interpretations of the constitutional principles of public administration (art. 37 of Federal Constitution): legality, impersonality, publicity of administrative acts, morality and efficiency.

CHILE

The President of the Republic exercises the administrative function, in collaboration with several Ministries or other authorities with*ministerial rank*.

Each Ministry has one or more under-secretary that performs through public services the actual satisfaction of public needs. There is not a single specialized court to deal with actions against the Administrative entities, but instead there are several specialized courts and procedures of review.

PEOPLE'S REPUBLIC OF CHINA

Administrative law in the People's Republic of China was virtually non-existent before the economic reform era initiated by Deng Xiaoping. Since the 1980s, the People's Republic of China has constructed a new legal framework for administrative law, establishing control mechanisms for overseeing the bureaucracy and disciplinary committees for the Communist Party of China. However, many have argued that the usefulness of these laws is vastly inadequate in terms of controlling government actions, largely because of institutional and systemic obstacles like a weak judiciary, poorly trained judges and lawyers, and corruption.

In 1990, the Administrative Supervision Regulations and the Administrative Reconsideration Regulations were passed. Both regulations have since been amended and upgraded into laws. The 1993 State Civil Servant Provisional Regulations changed the way government officials were selected and promoted, requiring that they pass exams and yearly appraisals, and introduced a rotation system. In 1994, the State Compensation Law was passed, followed by the Administrative Penalties Law in 1996.

6

Delegated Legislation in India

In the realm of legal theory, delegated legislation is one of the most debatable issues because of its various implications. Indian democracy is said to rest on the acclaimed four pillars and these are the legislature, the executive, the judiciary, and the press. These pillars are empowered by the constitution not to interfere in the matters of others. As per the Constitution, the legislative has legislative powers and the Executive has the power to execute the laws. Similarly, the Judiciary has the power to resolve dispute and to met out justice. But we have to keep in mind that there are multifarious functions that have to be performed by the Legislature in welfare states and it is not an easy task for the legislature to look after every matter. In contrast to this increasing legislative activity, the legislatures are not able to find adequate time to legislate on every minute detail. They have limited themselves to policy matters and have left a large volume of area to the Executive to make rules to carry out the purposes of the Legislature. In such types of situation, the system of delegated legislation comes to our mind. Therefore, the need for delegation is necessary and is sought to be justified on the ground of flexibility, adaptability and speed. This delegation is also known as 'secondary legislation' or 'subordinate legislation'. The Act that gives the executive the power to legislate is called the 'Enabling Statute' or 'Parent Act'. The standard of rule of the majority has made authoritative controls inadequate. The term delegated legislation is hard to characterize.

MEANING OF DELEGATED LEGISLATION

'Delegation' has been defined by *Black's Law Dictionary* as an act of entrusting a person with the power or empowering him to act on behalf of that

person who has given him that power or to act as his agent or representative. 'Delegated legislation' means exercising of legislative power by an agent who is lower in rank to the Legislature, or who is subordinate to the Legislature. Delegated legislation, additionally alluded to as an auxiliary legislation, is an enactment made by an individual or body other than Parliament. Parliament, through an Act of Parliament, can allow someone else or some body to make enactment. An Act of Parliament makes the system of a specific or particular law and tends to contain an outline of the purpose for the Act. By delegating the legislation by Parliament to the Executive or any subordinate, it empowers different people or bodies to integrate more details to an Act of Parliament. Parliament along these lines, through essential enactment (for example an Act of Parliament), licenses others to make laws and guidelines through delegated legislation. The enactment made by authorize person must be made as per the reason set down in the Act of Parliament.

According to Sir John Salmond, "*Subordinate legislation is that which proceeds from any authority other than the sovereign power.*"

Justice *P.B Mukherjee* also observed about delegated legislation that it was an expression which covered a multitude of confusion. He viewed it as an excuse for the Legislature, a shield for Executors and a provocation to the Constitutional Jurist.

According to M.P Jain, this term can be used in two senses:

- *Exercise by subordinate agency or agency that is lower in rank to legislature delegated to it by the Legislature.*
- The Subsidiary rules made by the Subordinate Authority in the execution of the power bestowed on it by the Legislature.

Delegated legislation is, referred to as Subordinate, Ancillary, Administrative legislation, and Quasi-Legislation.

HISTORY OF DELEGATED LEGISLATION IN INDIA

The historical backdrop of the delegation of power can be followed from the Charter Act of 1833 when the East India Company was recapturing political impact in India. The Charter Act of 1833 vested the administrative powers only in the hands of the Governor-General-in Council, which was an official body. He was enabled to make laws and guidelines for revoking, correcting or modifying any laws or guidelines, which were for all people regardless of their nationality. In 1935 the Government of India Ac, 1935 was passed which contained a serious plan of delegation. The report of the Committee of Ministers' Powers was submitted and affirmed which completely settled the case for assignment of forces and appointment of enactment that was viewed as inescapable in India.

However, our Constitution depended on the separation of power; a total partition of forces was unrealistic henceforth it kept up the holiness of the tenet in the cutting edge sense. The Indian Constitution does not deny the assignment of forces. Then again there are a few arrangements where the official had been

conceded with the administrative forces. For instance, the administrative forces of the President under the Indian Constitution are prominent. The problem of the delegation of legislation in India originated under the British rule when the controversy on the problem in the West was in full swing. In independent India, the conflict of settling the problem of the delegation of legislative power was *prima facie* to a conflict between the English and American type of solution.

The Constitution of India comprises of more than four hundred Articles and it had not been surprised if the Constitution makers include some solution for it. But why these provisions were incorporated in the Constitution? This is because the politicians in the Constituent Assembly tended to multiply legal formulations. These issues were of minor importance on which legal formulation was made in comparison to other greater constitutional issues that were by-passed by the Assembly that were left to future accord or judicial interpretation. In the case of *Queen v. Burah*, nature and extent of Legislature power and the feasibility of its delegation was considered by the Privy Council. The Privy Council, in this case, held that Councils of Governor-General was supreme Legislature and has ample number of powers and who are entitled to transfer certain powers to provincial executors. At the time of passing of New Delhi Act of 1912, the Privy Council accepted the transfer of Legislature power to the Executive.

DELEGATED LEGISLATION UNDER THE CONSTITUTION OF INDIA

Although the concept of delegated legislation was not mentioned specifically in the Indian Constitution it can be understood by interpreting Article 312 of the given Constitution. This Article gives right to the Rajya Sabha to open a new branch of All India Service with a majority of two-thirds majority vote. This means that some powers of legislation will be delegated to the new recruiter of All India Service. There are many cases through which delegated legislation under the constitution of India can be understood. These are:

D.S. Grewal v.The State of Punjab

Facts: This case questions the constitutionality of All India Service Act, 1951. The appellant was appointed to All India Service and posted to the State of Punjab. He held the charge of Superintendent of Police in various districts but was reverted or return to the post of Assistant Superintendent of Police in August 1957 and was posted to Dharamsala in March in the year 1958. In the same month, he was informed that an action has been taken against him under Rule 5 of the All India Services (Discipline and Appeal) Rules, 1955. An enquiry committee was set up against him under the leadership of Shri K. L. Bhudiraja. He then immediately made an application under Article 226 of the Indian Constitution before the Punjab High Court challenging the constitutionality of the Act and legality of the enquiry against him. Six contentions were made by the appellant lawyer.

Judgment: K.N. Wanchu, Justice of the Supreme Court at that time, dealing with the power of delegated legislation under Article 312 of the Indian Constitution. As the case has been very serious the appellant can be removed or compulsorily dismissed from the post by the Central Government and therefore Central Government has instituted enquiry against him. There is nothing mentioned in Article 312 of the Indian Constitution that takes away the power of delegation.

- The delegation power of India and America is that the Congress doesn't have much power of delegation but it is different from the English in which the parliament is supreme has an excess of delegating power.

Panama Refining Co. v. Rayan

Facts: Section 9(c) of the National Industrial Recovery Act, 1933 authorizes the President of the United States with some powers under which he can make any order and violation of that order may lead to panel provision. The President issued the prohibition made by the above act through the executive and authorized the Security of Interior to exercise all the powers vested in the President under section 9(c) of the Act. The Security of Interior issued a regulation to accomplish the President's order(s). The Section mentioned above was challenged on the ground that it was an unconstitutional delegation of legislative power by the Congress.

Judgment: It was held by the Supreme Court of the United States that delegation of legislative power given by President is void. The court held that Congress can delegate power to the Executive only on two conditions. Firstly, the Statute laid down these policies. Secondly, one has to establish the standards and give the administration the power of making the subordinate rule within the given limit.

Sikkim v. Surendra Sharma

Facts: After Sikkim became the State of the Union Of India, the Directorate of Survey and Settlement of Government of Sikkim created and advertised for certain temporary posts. Like other people, the respondent has also applied for the post. They got selected and were appointed in different capacities. After the survey work got completed some of the employees got terminated from the job. In 1982, some of the employees, who were 'not locals', filed a writ petition in the High Court of Sikkim challenging the decision of the Government asking why it has fired the employees from the service on the ground that they were not locals.

Judgment: The judge held that the termination of the employees solely on the ground that he is not local is impermissible under Article 14 and 16 of the Indian Constitution. It was held that all rules and legislations created under the power which is granted under sub-clause (k) of the Article 371F constituted subordinate legislation. This article was added to the Constitution through the 36th Constitutional Amendment.

DRAWBACKS OF DELEGATED LEGISLATION

Delegated legislation, apart from having numerous plus points, is censured on numerous grounds:

1. It is contended that delegated legislation empowers specialists other than legislators to make and change laws along these lines bringing about the overlapping of functions.
2. It is against the spirit of majority rule government as an excess of designated enactment is made by unelected individuals.
3. Delegated legislation is subject to less Parliamentary examination than primary enactment. Parliament, hence, has an absence of authority over delegated enactment, and this can prompt irregularities in law. Delegated legislation, along these lines, can possibly be utilized in manners which Parliament had not foreseen when it gave the force through the Act of Parliament.
4. Delegated legislation, for the most part, experiences an absence of publicity. Since the law is made by a legal authority not told to people in general. On the other hand, the laws of the Parliament are broadly publicised. The purpose of the absence of publicity is the huge extent of legislation that is being delegated. There has likewise been concern communicated that an excess of law is made through delegated legislation.

RULES FOR INTERPRETING THE DELEGATED LEGISLATION

For simplicity of reference, the accompanying steps are drawn from the Queensland legislation. The Commonwealth approach is to a great extent, however not exactly, the equivalent:

1. One of the initial steps will be to learn whether the document being referred to is without a doubt a piece of delegated legislation. Both Commonwealth and Queensland enactment addresses that question.
2. Another significant thought when interpreting delegated legislation is whether it is as a matter of fact substantial or valid, including whether it is inside the extent of the power under which it was made and whether it is steady with the empowering Act.
3. The core value is that delegated legislation is to be interpreted as working "to the full extent of, however not to surpass, the power presented by the law under which it is made". That is if any piece of the assigned enactment surpasses the power allowed by the empowering Act, at that point, it is to be perused down so as not to surpass that power.
4. The next proposition is that many, yet not all, of the provisions of the Interpretation Act, 1954 (Qld) will likewise apply to delegated legislation as though that designated enactment were an Act of Parliament. For instance:

(a) Headings, examples, notes (however not footnotes), calendars, informative supplements and punctuation are completely considered to be a piece of the delegated legislation.
(b) Any examples utilized in the delegated enactment are "not thorough" and, while they can't constrain the significance of a provision they "may broaden" the importance (in spite of the fact that, in the instance of irregularity, the provision beats the example).
(c) When deciphering a provision of delegated legislation, the interpretation that will best accomplish the reason for the enactment is to be preferred to some other interpretation.
(d) When interpreting a provision of delegated legislation, thought might be given to "outward material" in order to decipher a "questionable or obscure" provision; to give an interpretation that keeps away from a "plainly ludicrous" or unreasonable outcome acquired from the "common meaning" of the provision, or to affirm the understanding passed on by the common meaning.
(e) If the designated enactment requires an individual to make a decision to "give composed reasons for the decision (regardless of whether the articulation 'reasons', 'grounds' or another articulation is utilized)", at that point the individual "should likewise set out the discoveries on material inquiries of fact; and refer to the proof or other material on which those discoveries were based".
(f) Part 8 of the Interpretation Act, 1954 (old), which manages different terms and references, additionally oversees the interpretation of designated enactment. This incorporates the rules that "words in the solitary incorporate the plural" (and vice versa), reference to an individual, for the most part, incorporates a reference to a corporation, references to an office or jurisdiction is impliedly a reference to that office or purview in Queensland, and (in connection to powers) "may" signifies prudence and "must" signifies the "power is required to be exercised. The Interpretation Act, 1954 (old) concepts of separation, time and age are applicable to delegated legislation.
(h) If a form is prescribed or affirmed under delegated enactment, severe consistency with the form isn't vital and substantial compliance is adequate.

CONSTITUTIONALITY OF DELEGATED INDIAN LEGISLATION

The issue of delegated legislation has been one of the most debated issues in the domain of legal theory because of its various implications. Scholars and Researchers have consistently presented differing and even contradicting views about delegation of power to legislate and have thus taken different stands on

the issue. A welfare state welcomes a wide growth in a government's authority which stands as the essence of any welfare state. Therefore for such an expansion in the authority of the government present, there is a requirement of delegation of powers, function and authority in order to ensure effectiveness in the administration procedure. The task of augmenting the competency of the government to validate it to handle the social and economic issues and reconstruct the same has been accomplished through the methodology of delegation of legislative power to it. The very same delegation of power stands interrogative when it comes to its constitutionality. This question is indeed natural and original in form.

Globally, delegated legislation is welcomed in several countries. In case the Constitution of a specific country is silent regarding the definite limit of the delegated legislation, the responsibility of the same lies on the courts to decide. There is a presence of clear silence on the part of the constitution of countries like the USA, Canada, India, Australia, and South Africa in this context. While in the UK large volumes of administrative rule-making is not subject to parliamentary scrutiny but there are statutes to check the permissible limits of the same.

In the case of India, the constitutionality of administrative rule-making should be subject to discussion under the umbrella of three different periods ranging from the Privy Council to that of the present apex court, the Supreme Court of India. The article further deals with the weapon of constitutionality with light to India in depth.

In the realm of legal theory, delegated legislation is one of the most debatable issues because of its various implications. Indian democracy is said to rest on the acclaimed four pillars and these are the legislature, the executive, the judiciary, and the press. These pillars are empowered by the constitution not to interfere in the matters of others. As per the Constitution, the legislative has legislative powers and the Executive has the power to execute the laws.

Similarly, the Judiciary has the power to resolve dispute and to met out justice. But we have to keep in mind that there are multifarious functions that have to be performed by the Legislature in welfare states and it is not an easy task for the legislature to look after every matter.

In contrast to this increasing legislative activity, the legislatures are not able to find adequate time to legislate on every minute detail. They have limited themselves to policy matters and have left a large volume of area to the Executive to make rules to carry out the purposes of the Legislature. In such types of situation, the system of delegated legislation comes to our mind.

Therefore, the need for delegation is necessary and is sought to be justified on the ground of flexibility, adaptability and speed. This delegation is also known as secondary legislation or subordinate legislation. The Act that gives the executive the power to legislate is called the Enabling Statute or Parent Act. The standard of rule of the majority has made authoritative controls inadequate. The term delegated legislation is hard to characterize.

Delegation has been defined by Black's Law Dictionary as an act of entrusting a person with the power or empowering him to act on behalf of that person who has given him that power or to act as his agent or representative. Delegated legislation means exercising of legislative power by an agent who is lower in rank to the Legislature, or who is subordinate to the Legislature.

Delegated legislation, additionally alluded to as an auxiliary legislation, and is an enactment made by an individual or body other than Parliament. Parliament, through an Act of Parliament, can allow someone else or somebody to make enactment. An Act of Parliament makes the system of a specific or particular law and tends to contain an outline of the purpose for the Act.

By delegating the legislation by Parliament to the Executive or any subordinate, it empowers different people or bodies to integrate more details to an Act of Parliament. Parliament along these lines, through essential enactment (for example an Act of Parliament), licenses others to make laws and guidelines through delegated legislation. The enactment made by authorize person must be made as per the reason set down in the Act of Parliament.

The Dictionary further defines Doctrine of Delegation as:

The Principle (based on the Separation of Powers Concept) limiting Legislature's ability to transfer its legislative power to another Governmental Branch, especially the Executive Branch.

Subordinate Legislation has been defined as:

Legislation that derives from any authority other than the Sovereign Power in a state and that depends for its continued existence and validity on some superior or supreme authority.

DELEGATED LEGISLATION: MEANING

Delegation of powers means the powers passed on by the higher authority to the lower authority to make laws. Delegated legislation means the powers given by the legislature to the executive or administration to enact certain laws. The simple meaning of the expression delegated expression may be:

When the function of the legislation is entrusted to organs other than the legislature by the legislature itself, the legislation made by such organs is known as delegated legislation.

According to M.P. Jain, the term delegated legislation is used in two senses:

a. Exercise by a subordinate agency of the legislative power delegated to it by the legislature
b. The subsidiary rules themselves which are made by the subordinate authority in pursuance of the power conferred on it by the legislature.

Delegated legislation is, referred to as Subordinate, Ancillary, Administrative legislation, and Quasi-Legislation. The concept can be further substantiated with the help of an example. The Parliament of UK itself made the Road Traffic Act, 1930, and so the legislation is original (rather than delegated). Section 30 of that Act provides that, the Minister [of Transport and Civil Aviation] may make regulations as to the use of motor vehicles, their construction and equipment.

Accordingly the Minister made the Motor Vehicles (Construction and Use) Regulations, 1955. The regulations were made by someone other than Parliament and are, therefore, delegated (rather than original) legislation.

Delegated legislation, also referred to as secondary legislation, is legislation made by a person or body other than Parliament. Parliament, through an Act of Parliament, can permit another person or body to make legislation. An Act of Parliament creates the framework of a particular law and tends only to contain an outline of the purpose of the Act.

By Parliament giving authority for legislation to be delegated it enables other persons or bodies to provide more detail to an Act of Parliament. Parliament thereby, through primary legislation (*i.e.*, an Act of Parliament), permit others to make law and rules through delegated legislation. The legislation created by delegated legislation must be made in accordance with the purpose laid down in the Act.

JUDICIAL CONTROL OVER DELEGATED LEGISLATION

The delegated legislation can be challenged in India in the courts of law as being unconstitutional, excessive and arbitrary. It can be controlled by the Judiciary on two grounds *i.e.*, firstly, it should be on the ground of substantial ultra vires and secondly, it should be on the ground of procedural ultra vires. The criteria on which the law made by the executive can be considered as void and null by the court is that it should not be considered inconsistent by the constitution or ultra vires the parent act from which it has got the power of making law. The power of examining the delegated legislation in India has been given to the Supreme Court and the High Court and they play an active role in controlling the delegated legislation.

Judicial control over delegated legislative is exercise at the following two levels:

1. Challenging the delegation as unconstitutional
2. Improperly exercise of Statutory power.

No delegated legislation can survive clashing with the provisions granting Fundamental Rights. If any Acts violate the fundamental rights then the rules, regulations, and by-laws framed under it cannot survive. In India as well as in America the judicial control over the delegated legislation is based on the doctrine of *ultra vires.* Also, there are various methods through which judiciary in America exercises control over delegated legislation.

The two main approaches taken by the judiciary in America for justifying the delegation of legislative power to the executive are:

1. Filling up the details approach.
2. Intelligible principle approach.

In the first approach, the Congress should lay down the standard policy for the guidance of executives and the executives have to fill the further details and carry out the policy of legislation according to the standard laid down by the Congress.

In the second approach, the court will review the delegated legislation if *ultra vires* the enabling statutes or it is not in accordance with the provisions mentioned in enabling statutes.

CASES THAT ILLUSTRATE THE JUDICIAL CONTROL OVER THE EXECUTIVES

- *Kruse v. Johnson: The court laid down in the case that by-laws would be unreasonable on the following ground.*
- It should not be partial or unequal
- It should not be manifestly unjust
- It should not disclose bad faith
- It should not involve oppressive interference with the right of the people that it could find no justification in the mind of the reasonable person.
- *Delhi Law Act Case: In this case the power is given to the Central Government through an act to repeal the pre-existing law held to be ultra vires.*
- *Chintaman Rao's Case:* Prohibition of making bidis in the agriculture season by the Deputy Commissioner is violative of Article 19(1)(g) of the Indian Constitution.
- *Chandran v. R:* It was held in this case that if the power of by-laws entrusted in the hands of the Legislature, then it must be within the limits of the Legislature and if it exceeds the limit then this by-laws can be struck down.

EFFECTIVENESS OF PARLIAMENTARY CONTROL OVER DELEGATED LEGISLATION

It is on the parliament to confer on anyone its power of legislation whom it likes, but at the same time, it has to see that if the power that has been conferred to the person is using that power for the public or not. If that person is misusing that power the Parliament can take that power back. It must ensure that there should be no misuse of that conferred power.

In *Avinder Singh v. State of Punjab*, Krishna Iyer J. appropriately expressed that parliamentary authority over designated enactment should be a living continuity as a protected need. The authoritative command over the organization in parliamentary nations like India is more hypothetical than practical. In truth, the control of the Parliament is not that much effective as it needs to be.

Jain and Jain stated about the control of the legislature over the delegated legislation that "*It is the function of the legislature to legislate in a parliamentary democracy. If it seeks to delegate its legislative powers to the government due to a few motives, it is not the right of the legislature, but additionally its duty, as predominant, to look how its agent i.e., the executive carries out or maintain the company entrusted to it."* Since it is the legislature which delegates legislative power to the executive, so it is its primary duty to check whether the entrusted

the power is working properly or not and also it has power to supervise and control the actual exercise of this power. In the U.S.A., the government is not responsible to the Legislature and Congressional control of delegated regulation is in most cases indirect. However, the Congress can also direct administrative groups to put up the periodical and unique reports or to give an account of their activities. In the USA, Congress has no effective control over delegated regulation due to the fact the President of the USA is not accountable to the Legislature.

However, in India, there is a Parliamentary form of Government and the Prime Minister is accountable to the Legislature. So in India Parliament can exercise direct control over the Government. In India committees regarding control of delegated rules are formulated through Parliament for both houses every year. The principal characteristic of each committee is to scrutinize the statutory regulations, to make legal guidelines for the public, *etc.*, made with the aid of any administrative frame and reports to the residence whether or not the delegated power has been exercised nicely within the limits provided underneath the Parent Act or the Constitution. However, in America no such type of powers are given to Legislature and also Legislature has no power to exercise direct control over delegated legislation made by the Executive. So it is essential to keep concord between Legislature and Executive in a democratic society and also there needs to be a powerful system of management of the Legislature over the Executive so that government cannot misuse their powers while making delegated rules.

CASE LAWS

Kruse v. Johnson

Facts: In this case, under the authority of the Local Government Act 1888, the Kent County Council made a by-laws. This law states that nobody could play music or sing a song within 50 yards of dwelling house in public place or highway after being requested to stop by a constable. The claimant was singing a hymn within 50 yards of the dwelling house and had refused to stop after the constable had told him to do so. He was given a penalty. He sought for judicial review to declare that the by-law was void.

Judgment: Lord Russell CJ, giving the courts leading judgment, held the by-law became valid on the ground that it becomes no longer unreasonable, due to the fact that it does not have a discriminatory impact on the population.

Chintaman Rao Case

Facts: Section 3 and 4 of the Central Province and Berar Regulation of Manufacture of Beedis Act, 1948 grants power to the Deputy Commissioner to fix the period of agriculture season with respect to a certain village where the Act applies. The Deputy Commissioner has the power to prohibit the manufacturing of bidis and no person is authorized to manufacture bidis.

On 13th June 1950, an order was issued via the Deputy Commissioner of Sagar prohibiting the people in certain villages to manufacture bidis. When the case is dealt by the Hon'ble Supreme Court, the period cited within the order expired and another order covering the agricultural period from 8th October 1950 to 18th November 1950 was issued and the same order was questioned in the present case. Does the question arise whether the impugned Act is falling within the saving clause or excess of its provisions?

Judgment: It has been held in this case that prohibition of making bidis in the agriculture season by the Deputy Commissioner is violative of Article 19 1(g) of the Indian Constitution.

CRITICISM ON DELEGATED LEGISLATION

Following are the criticism of delegated legislation:

1. Delegated legislation results in overlapping of functioning as the delegated authorities get work to amend the legislation that is the function of the legislators.
2. It has been a matter of question that if the Legislature control has come down after the arrival of the delegated legislation.
3. Unelected people cannot make much delegated legislation as it would be against the spirit of democracy.
4. After getting too much power from the Legislature, the Executive has encroached upon the domain of legislature by making rules and regulations.
5. The enactment subject that was appointed to less Parliamentary scrutiny than essential enactment. Parliament, along these lines, has an absence of authority over appointed enactment, and this can prompt irregularities in laws. Appointed enactment, in this way, can possibly be utilized in manners which Parliament had not foreseen when it was given the power through the Act of Parliament.
6. Delegated legislation makes laws without much discussion. So, it may or may not be better for the public.
7. Designated legislation by and large experiences an absence of exposure. Since the law made by a statutory authority not informed to general society. Then again, the laws of the Parliament are generally broadcasted. The purpose of the absence of exposure is the enormous degree of enactment that is being assigned. There has likewise been concern communicated that an excess of law is made through appointed enactment.
8. It can possibly be misused for political gain. The executive makes law according to what the political parties. Hence, it results in the misuse of the legislation made by the Executive by the ruling party.
9. Executives become too powerful as it already has the power of executing any laws and legislation and now the Legislature is delegating its legislative power to the Executive. So, both the power are in the hands of the executives now he can use this power in whatever way he wants to use it.

10. It is against the theory of the power of separation which has been given by the famous political thinker Montesquieu.

Delegated or subordinate legislation means rules of law made under the skilled person of the Act of Parliament. In spite of the fact that lawmaking is within the capacity of the lawmaking body, it might, by a resolution, delegate its capacity to different bodies or people. The resolution which delegates such power is known as the Enabling Act. By Enabling Act the council sets out the wide rules and nitty-gritty principles are instituted by the delegated authority.

If in India the control of Parliament over the delegated legislation has to be made a living continuity, then it is important that the job of the advisory groups of the Parliament must be fortified and a different law like the Statutory Instruments Act, accommodating uniform standards of laying and production, must be passed. The board of trustees might be enhanced by a specific authority body to make the watchfulness of assigned enactment progressively successful. Other than the different measures mentioned above, it should be taken to reinforce the control of Parliament over designated enactment. The tenets and standards created by the Legal Executive should be connected by the necessities of the advanced age. In spite of the fact that there are no express arrangements in the Constitution of India to allow the appointment of authoritative power, the legal pattern saw in regard of assigned enactment is as per the aim of establishing fathers our Constitution whose principal concern was the flexibility of the Constitution with changing needs of the time. If you want to make certain that the power of delegated law in the arms of the government is not misuse, it is vital to adopt powerful modes of control as applicable in the USA which India has now not integrated yet.

7

Judicial Review and Constitutional Remedies

JUDICIAL REVIEW

Judicial Review is the power of judiciary to review any act or orders of the Legislative and Executive wings and to pronounce upon the constitutional validity when challenged by the affected person. While reviewing such enactment, the Supreme Court will examine whether jurisdictional limits have been transgressed. This power is based upon a simple rationale that the constitution is the supreme law of land and any authority, if it ventures to go beyond the limitation laid down by the constitution, will be curbed.

The doctrine of judicial review is a contribution of American constitutional system. This was acquired by the American Supreme Court in Marbury v. Madison case of 1803 when Chief Justice Marshall announcing the verdict remarked that any law violating the constitutional provision is null and void. Since then it got strongly embedded in the constitution and judicial supremacy got established. In India, the Government of India Act, 1935, gave the power of judicial review to the federal Court, but its scope was limited to the extent that it could review only the provisions of the act which provided for distribution of powers between the Union and Provinces. The Constitution provides for distribution of power among states and the centre, separation of powers among governmental organs and Fundamental Rights, which has widened the scope of judicial review.

The constitution does not refer to the concept of judicial review because the framers realized that there were inherent drawbacks of this doctrine. In the first place, it may set at naught the will of the people expressed through the Parliament: Secondly, judicial review inevitably opens the floodgates litigation involving huge expenditure and loss of time and consequent delay in the implementation of government programmes, and, thirdly, the judiciary is responsible to none and is not answerable for consequences of its decisions.

Justice Patanjali Shastli states: "our constitution contains express provision for judicial review of legislation as to its conformity with the constitution, unlike in America, where the Supreme Court has assumed extensive powers of reviewing legislative acts under 'due process' clause in the Fifth and Fourteenth Amendments". This is especially true as regards the Fundamental Rights as to which this court has been assigned the role of sentinel; while the court naturally attaches great weight to the legislative judgement, it cannot desert its own duty to determine finally the constitutionality of an impugned statute.

There are specific provisions in the constitution which provide for judicial review, though the Supreme Court has enumerated certain rules for applying this doctrine.

According to H.M. Seervai, they are:

(1) There is a presemption in favour of constitutionality and a law will not be declared unconstitutional unless the case is free from all doubts and onus to prove that it is unconstitutional lies with the petitioner who has challenged it.
(2) When the validity of law is questioned, it should be upheld to protect parliament sovereignty.
(3) The court will not constitutional questions if a case is capable of being decided on other grounds.
(4) The court will not decide a larger constitutional question when is required by the case before it.
(5) The court will not hear an objection as to the constitutionality of a law by a person whose rights are not affected by it.
(6) A statute cannot be declared unconstitutional merely because it is not consistent with the split of the constitution.
(7) In assessing the constitutionality of a statute the court Is not concerned with the motives-bonafides or malafides-of the legislature but the law must be upheld whatever a court may think of it.
(8) Courts should not pronounce on the validity of an Act or part of an Act which has not been brought into force because till then the question of validity would be merely academic.

The independent India had to go through many controversies leading to institutional rivalry between the legislature and judiciary. Though the power of judicial review had its limitations, it was viewed as a challenge to the supremacy of legislature leading to may constitutional amendments. Dr. Ambedkar had earlier remarked, "The Constituent Assembly In making the constitution has no

partisan motive. Beyond securing a good and workable constitution, it has no axe to grind. In considering the articles of the constitution, it has an eye on getting through a particular measure. The future Parliament, if it met as a Constituent Assembly, its members will be acting as partisans seeking to carry amendments to the constitution to facilitate the passing of party measures which they have failed to get through in Parliament by reason of some article of the constitution which has acted as an obstacle in their way. Parliament will have an axe to grind while the Constituent Assembly has none".

But Pandit Nehru, a staunch supporter of parliamentary sovereignty has remarked with a different tone, "No Supreme Court and no judiciary can stand in judgement over the sovereign will of Parliament, representing the will of the entire community…Ultimately, the whole constitution is a creation of Parliament.

By interpretation and amendment, the constitution underwent many vital changes. The process got started with the First Amendment Act, 1951, which abolished the zamindari system. This act was challenged in the Shankari Prasad case on the ground that this has infringed Fundamental Rights. The Court rejected the petition and stated that Parliament is authorized to amend any part of the constitution including the chapter on Fundamental Rights. This was upheld by a majority judgement in the Sqjjan Singh case where the 17th Amendment Act 1964 was challenged on the ground that it violated Fundamental Rights under article 31A. The landmark judgement professing judicial activism came in 1967, when the 1st, 4th and 17th amendments were challenged in the Golaknath case. The court by majority of 6-5 held that Parliament does not possess the authority, to amend the chapter on Fundamental Rights with respect to Article 13(2) embedding the doctrine of judicial review and giving way to due process of law.

In fear of non-implementation of its social legislations, the Parliament through an ordinance in 1969 nationalized 14 banks under Banking Companies (Acquisition and Transfer of Undertakings) Ordinance. This Act was challenged by R. C. Cooper on the ground that it violated Article 14 and 31(2). Once again in 1970, the President by an executive order abolished-the institution of ruler's privy purses. This was challenged by Madhav Rao Scindia. Both these ordinances were declared unconstitutional by the court.

In response to these setbacks the Parliament framed the Constitution (Twenty Fourth) Amendment Act, 1971, and due amendments were made in articles 13 and 368 to provide the authority to Parliament to amend any part of the constitution. By the (Twenty-Fifth) Amendment Act, 1971, Article 31 was amended to remove obstacles laid down by the court in the Bank Nationalization case. Further, the Tewenty-Sixth Amendment Act, 1971, was made to abolish the institution of rulers privy purses. The government defended its action by stating that these were necessary amendments which would transform socioeconomic structures of the society.

In the Keshvanand Bharati case, the constitutional validity of the twenty-fourth, twenty-fifth and twenty-ninth amendments-came up for judicial review.

The court by limiting the power of amendment, held that Parliament does not possess the authority to amend the basic structure of the constitution though the concept of basic structure was not explained. The Supreme Court was moved to review its decision but the bench was abruptly dissolved by the chief justice. In 1975, the Thirty-Ninth Amendment Act, relating to electoral matter, was challenged in the historic election case. The court dismissed the petition and it was held that they had adhered to the theory of basic structure.

The 42nd amendment of the constitution placed limitations upon the exercise of the power of judicial review. They were:

(1) The power of centre was increased by transferring certain provisions from State List to the Concurrent List.
(2) The power of the Supreme Court and High Courts were curtailed. With respect to Article 14, 19 and 31, Parliament can make any law to implement Directive Principles of State Policy.
(3) The powers of the Supreme Court was further curtailed by stating that no amendment of this constitution made or purporting to have been made under this article shall be called in question in any court on any ground.
(4) The validity of central law was to be decided by the Supreme Court (Art. 141A) and not by High Courts (Art. 228A) and subsequently the validity of the state law could be decided only by High Courts.
(5) The power of issuing writs for implementation of Fundamental Rights were curtailed to the effect that these writs will not be issued unless substantial injury has taken place and also if alternative remedy is provided under any law;
(6) Minimum seven judges of the Supreme Court should sit for the purposes of determining constitutional validity of central law and it cannot be declared unconstitutional unless two-thirds majority of judges decide and for the High Court there had to be five judges to determine the constitutional validity of a law.
(7) Further, the appointment procedure of High Court were dealt extensively.
(8) It was also stated that the decisions of any administrative tribunals can be questioned or challenged only in the Supreme Court under Article 323B.

The subsequent amendments, the 43rd and 44th amendments, did restore the lost glory of judiciary and the threat of judicial supremacy got lessened, the judiciary was forced to look into the democratic values of the constitution and interpret them more generously.

The 44th amendment:

(1) Deleted Right to Property from the chapter as Fundamental Rights and placed it under article 300A.
(2) Fundamental Rights were to be duly protected.
(3) The powers of judiciary were partially restored by repealing article 131A and 226A and restored the power of judicial review to the courts.

In the Minerva Mills case the court struck a balance between Fundamental Rights and Directive Principles of State Policy by placing Article 39B and C above the chapter on Fundamental Rights. It was further held by Justice Bhagwati that, "It is for the judiciary to uphold the constitutional values and, to enforce constitutional limitations". The court has also been called upon to exercise its power of judicial review in cases relating to presidential rejection of clemency for sentence of death. The court has upheld the decisions of the President. Justice Krishna Iyer, spoke of judicial review in the following words, "No power in the republic is irresponsible or irresponsive, the people in the last resort being the repositories and beneficiaries of public power. But two constitutional limitations exist in our constitutional system. The court cannot intervene everywhere as an omniscient, omnipotent or omnipresent being. And when the constitution has empowered the nation's executive, excluding by implication judicial review it is presumptuous this court to be a super power unlimited. The second limitation conditions all public power, whether a court oversees it or not. That trust consists in the plurality of public authorities. All power, howsoever, majestic and dignified weilding it, shall be exercised in good faith with intelligent and informed care and honestly for public well being".

Further he held that the magnificent concept of judicial review is at its best when kept within the framework of broad principles of public policy and tested by the intentionability of the statute. The working of the Supreme Court during the first three decades can be described as an arena of struggle between the legislature and the judiciary in relation to Fundamental Rights and power of amendment. The Maneka Gandhi case gave new impetus to the concept of liberty. During this period the court adopted a strategy of coordination enhancing the glory of the institution and practised self-restraint. Many political observers and jurists have held that judiciary will always avoid a confrontation between popular sovereignty and independent judiciary.

The institutional rivalry dominated the Indian political process and judiciary till 1980s and the advocates of parliamentary sovereignty blamed the judiciary for non--implementation of their programmes aimed at weaker sections of the society-the poor and distressed. This led to the outflow of new ideas and dimensions in the minds of the socially progressive judges like Justice Krishna Iyer and Justice P.N. Bhagwati. They led the movement to protect the socially oppressed with programmes like legal aid as provided in article 39A of the constitution inserted by the 42nd amendment and institutions like Lok Adalat and public interest litigation. This added a new dimension in an already existing jurisdiction and power of the judiciary.

LOK ADALAT

Lok Adalat is a voluntary agency. It settles disputes' between the parties outside the courts with the hip of public spirited lawyers and like-minded citizens. It was established by Legal Services and Authorities Act, 1987. It has been given the widest possible jurisdiction and it and take up and any matter, pending

in any court including the apex court. The Lok Adalat is guided by legal principles including principles of justice, equality and fair play. The judicial officers of the area and other such members possessing such qualifications conduct the affairs of Lok Adalat. It is being urged by many that Lok Adalat has therapeutic role to fulfil in aid of justice. So the legal system must encourage the government and voluntary agencies should reach out to aid them and the parties must trust them so that it can share the burden of accumulated litigation of the courts.

PUBLIC INTEREST LITIGATION

PIL, or Social Action Interest Litigation as termed by Upendra Baxi, is an offshoot of liberalized rule of locus standi. The traditional rule of locus standi was based on the fact that judicial remedy can be sought only by those who have suffered an injury on account of violation of a legal right by some public authority. The PIL chose to liberalize this rule by making it clear that any person who suffers an injury but is unable to reach the court is helped by public-minded citizens to reach the court to seek justice. The institution of PIL originated in the U.S., in mid-1960s and legal aid to these litigations were provided by private foundations. The PIL cases centered around issues relating to civil rights, liberties and problems of the distressed and this provided representation to those previously unrepresented groups.

The PIL is considered to be an off shoot of social forces where freedom suffered in the cruel hands and public participation was required to check the system. It was an opportunity for like-minded citizens to participate and reaffirm their faith in the legal process. The petition can be filed by any voluntary agency or a member of the public. However, the court must satisfy itself while accepting the petition and see that the person is acting bona fide and not for personal gain or profit. The PIL involves issues connected with environmental protection, and a set of evolved fundamental rights like right to free legal aid, right against torture, right to humane treatment in prison, *etc.*, reflecting the human dimension of the PIL. Further, it extended its domain in a delicate task of mediating between social actualities and social change. Issues like degraded bonded labour, humiliated inmates of protective homes, women prisoners, custodial violence, and other victimised groups are attracting remedial attention of the courts. For this, article 32 emerged as a forum of PIL in recent years and it has become a byword for judicial involvement in social, political and economic affairs of the society.

The movement of liberalization of locus standi started with the Bar Council of Maharashtra v. M. V. Dabholkar where the Bar Council was stated to be an aggrieved party. Further, the judiciary directed the government agencies to be responsive to public grievances. In the Fertilizer Corporation Case it was held that, 'in a society where freedom suffers from atrophy activism is essential for participative public justice. Some risks have to be taken and more opportunities opened for the public-minded citizen to rely on the legal process and not be repelled from it by narrow pendantry now surrounding locus standi.

As litigations became very expensive the affected persons joined together to fight for a common cause. Justice Krishna Iyer has observed in Akhil Bhartiya Shoshit Karmachari Sangh (Railway) case that our current processual jurisprudence is not of individualistic Anglo-Indian mould. It is people-oriented and envisions access to justice through class actions, PIL and representative proceedings. Indeed, little Indians in large numbers seeking remedies in courts through collective proceedings instead of being driven to an expensive plurality of litigations is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept of cause of action and person aggrieved and individual litigation is becoming obsolescent in some jurisdiction.

The PIL got the required recognition in S.P. Gupta case who was not an aggrieved person. The court observed that the basis of judicial redressal was personal injury but today where there is public wrong or injury caused by an act or omission of the state or a public authority which is contrary to the constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such public wrong or public injury.

The Asiad workers case further strengthened the rule of locus standi in the PIL. The PUDR was an organization for the protection of human rights which sought to enforce labour laws for the unorganised construction workers of projects concerning Asiad Games. Justice Bhagwati held that strategy has to be evolved for relaxing the traditional rule of locus standi so that justice becomes, easily available to the lowly and the lost. Judicial activism has become the root of PIL and this was reflected in various other cases.

The Supreme Court with its wide jurisdiction and powers reflects the concern with providing social equality and rule of law. In India, the apex court has acted judiciously in changing socioeconomic structure and the progress of a nation has been dependent on its decisions. The existence of this court gives a feeling of security among the citizens. It acts as an independent authority which puts check on extreme actions and upholds the constitutional values. It has adhered to values enshrined in the minds of the framers of the constitution.

Unfortunately, the apex court has not escaped controversy because of various reasons. Lately, the contempt of court cases have shown the sensitivity or the highhandedness of the Judges. The court has at last woken up to the repeated charges of human rights violations by law-enforcing agencies. Further, loads of cases and delays in judgement have reflected the loopholes of the judicial system. As a democratic institution, the judiciary is answerable to the people. As Justice Krishna Iyer observed that all public power is people's trust and so even judicial power has a fiduciary component... Executive power is accountable to the Parliament and Parliament to the people, judicial power is not accountable to the executive nor to the Parliament in any direct sense.

The judiciary by deriving its power from the constitution, its accountability to people cannot be negated. Unfortunately, these ethnics have not been adhered to by judiciary and therefore whenever natural calamities struck the different

parts of the nation it remained a spectator and could not reach the people at the grassroots level, be it Bhopal tragedy or Narmada andolan. Many areas of the court need to be reformed like the code of conduct of judges, transfer of judges, and rigidity of the system to ensure and preserve its position as the guardian of the constitution and the protector of the basic rights of the individual and society at large.

There is a great need to revamp the judicial system so that people can get access to justice and speedy justice. The experiment of Lok Adalat has met only with a limited success. Most cases referred to Lok Adalat are those where the state has to pay and it agrees to pay for an early settlement. The Supreme Court of India should inspire alternate dispute settlement machinery where public can redress its grievances and not burden it with special leave petitions. The Judges should write brief judgements and give early decisions. In a few cases judgments are pronounced only when a judge is to, retire, otherwise they remain reserved for unlimited period. Quality of judges and ability to handle cases with speed and honesty should be the criterion in selection. Unfortunately, politics has entered even in appointments. One finds that judges like ministers also come from different High Courts representing different castes, class, or religious backgrounds. It would be worthwhile to restrict the time for arguments. It need not be stressed that a lot of time is wasted by a few senior lawyers who keep arguing for days and many other cases suffer. There is need to reform even the legal profession, which has made access to Supreme Court virtually impossible for millions in this country. Long and tardy procedure with further uncertainty whether the matter would be taken up or not on a particular day keeps the poor away from approching the Supreme Court.

Time has come when either we reduce the cases that can come up before the Supreme Court or have its benches in different regions. The sitting judges should not be appointed for commissions of inquiry. There is need to have a fresh took at Advisory jurisdiction also. The recent reference on Ram Janam Bhumi-Babri Masjid dispute will not end the controversy even after the decision.

TYPES OF JUDICIAL REVIEW

The judicial review in India can be classified under the following categories:

Primary and secondary review: The doctrine of primary review is applicable in relation to the statutes, statutory rules, or any order, which has force of statute. The secondary review is applicable inter alia in relation to the action in a case where the executive is guilty of acting arbitrarily. In such a case Article 14 of the Constitution of India would be attracted. In relation to other administrative actions, as for example punishment in a departmental proceeding, the doctrine of proportionality is equated with Wednesbury's unreasonable.

Direct and indirect review: This w is most important and frequently used by the courts in India while judging the constitutionality of various statutes. In the "direct review" the court overrides or annuls an "enactment" or act of "executive" on the ground that it is inconsistent with the Constitution. In the "indirect review",

while considering constitutionality of a statute, the court interprets the statutory language in such a manner that the element of unconstitutionality attached with it is eliminated and the statute survive the attack of unconstitutionality.

This may be done in the following two manners:

(a) *Reading down:* An effective tool in the hands of judiciary, to test the validity of legislation, is to invoke the principle of "reading down". The rule of reading down a provision of the law is now well established and recognised. It is a rule of harmonious construction in a different name. It is resorted to smoothen the crudities or ironing the creases found in a statute to make it workable. In the garb of reading down, however, it is not open to read words or expressions not found in it and thus venture into a kind of judicial legislation. The rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute. It is to be used keeping in view the scheme of the statute and to fulfill its purposes. In B.R.Enterprises v State of U.P the Supreme Court observed: "First attempt should be made by the courts to uphold the charged provisions and not to invalidate it merely because one of the possible interpretation leads to such a result, howsoever attractive it may be. Thus, where there are two possible interpretations, one invalidating the law and the other upholding, the latter should be adopted. For this, the courts have been endeavouring, sometimes to give restrictive or expansive meaning keeping in view the nature of the legislation. Cumulatively, it is to sub serve the object of the legislation. Old golden rule is of respecting the wisdom of the legislature, that they are aware of the law and would never have intended for an invalid legislation. This also keeps the courts within their track and checks. Yet inspite of this, if the impugned legislation cannot be saved, the courts shall not hesitate to strike it down. Here the courts have to play a cautious role of weeding out the wild from the crop, of course, without infringing the Constitution. The principle of reading down, however, will not be available where the plain and literal meaning from a bare reading of any impugned of any impugned provision clearly shows that it confers arbitrary or unbridled power"

(b) *Severability:* The doctrine of severability separates the unconstitutional part and keeps the statute alive. If, however, the offensive portion cannot be separated then the entire statute has to be struck down as unconstitutional. It is further trite that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation. These changed circumstances may also create a vacuum in the legal system, which has to be suitably filled up by the legislature. If the legislature fails to meet the need of the hour, the courts may interfere and fill-in the vacuum by giving proper directions. These directions would be binding

and enforceable in law until suitable legislation is enacted to occupy the field. These directions may also include a direction to severe the offending portion of the statute which was originally constitutional to keep it alive.

The Constitution of India envisages separation of power between the three organs of the Constitution so that the working of the constitution may not be hampered or jeopardised. This thin and fine line of distinction should never be ignored and transgressed upon by any of the organ of the Constitution, including the judiciary. This rigid perception and practice can be given a go by in cases of "abdication of duties" by one of the organ of the Constitution. Thus, the judiciary can interfere if there is an abdication of duties by the legislature or the executive. For instance, if the legislature delegates its essential and constitutional functions to the executives, it would amount to "excessive delegation" and hence abdication of the legislative functions by the legislature. In such cases, the theory of separation of powers would not come in the way of judiciary while exercising the power of judicial review. Thus, the judicial review powers of the Constitutional Courts in India are very wide and flexible in nature.

JUDICIARY AND JUDICIAL REVIEW OF INDIA

The Judiciary of India is an independent body and is separate from the Executive and Legislative bodies of the Indian Government.

The judicial system of India is stratified into various levels. At the apex is the Supreme Court, which is followed by High Courts at the state level, District Courts at the district level and Lok Adalats at the Village and Panchayat Level.

The judiciary of India takes care of maintenance of law and order in the country along with solving problems related to civil and criminal offences. The judiciary system that is followed in India is based on the British Legal System that was prevalent in the country during pre-independence era. Very few amendments have been made in the judicial system of the country.

SUPREME COURT IN INDIA

The Supreme Court is the highest judicial body in India. The Supreme Court came into power on 28th January 1950; just two days after the Constitution of India came to effect. In the initial stages, it had its office in a part of the Parliament House. The Supreme Court is endowed with many duties and responsibilities. The biggest responsibility is that it is the highest court of appeal and is also the protector of the Constitution in the country.

The Chief Justice of India and 25 other judges make up the Supreme Court of India. The appointments are done directly by the President of India.

There are certain criteria that have to be fulfilled by the advocates to become a judge of the Supreme Court. Being a citizen of India is one of the most important criteria. Apart from this, the person has to have an experience of minimum five years as a judge in the High Court or any other two courts one after another. He should also be a prominent jurist as per the President of the country, so that he can take up responsibilities well. The Chief Justice is also consulted at the time

of appointment of the judges in the Supreme Court. The Judges of the Supreme Court are free to exercise their power as and when required. The process of removal of the Supreme Court judges is quite an interesting but lengthy process. An order from the President is mandatory in case of removal of the judges. A two-thirds majority has to be obtained from both the houses for the removal of the judges. The jurisdiction of the Supreme Court is divided into original jurisdiction, advisory jurisdiction and appellate jurisdiction. Original jurisdiction is required when there is a dispute between the Government and the states of India or any one state of India. The Supreme Court can also enforce fundamental Rights according to the Article 32 of the Constitution of India. The appellate jurisdiction is mentioned in Articles 132(1), 133(1) or 134 of the Constitution. The decision of the High Court can be questioned in the Supreme Court of the country. One can appeal to the Supreme Court, if he or she is not satisfied with the decision of the High Court. The Supreme Court has the provision of accepting or rejecting the case at its own discretion. There are also provisions of pardoning criminals and canceling their lifetime imprisonment or death sentence by the Supreme Court.

Apart from the original and appellate jurisdiction of the Supreme Court, there is an advisory jurisdiction that needs special mention. There are many cases that are directly referred by the President of India and the Supreme Court has to look into those matters. This provision is mentioned in Article 143 of the Indian Constitution. The Supreme Court in India acts as an independent body and is free from any outer control. The contempt of law court in India is a punishable offence and the Supreme Court takes care of this immaculately.

JUDICIARY-EXECUTIVE CONFRONTATIONS

LAND REFORM (EARLY CONFRONTATION)

After some of the courts overturned state laws redistributing land from *zamindar* (landlord) estates on the grounds that the laws violated the zamindars' fundamental rights, the Parliament of India passed the First Amendment to the Constitution in 1951 followed by the Fourth Amendment in 1955 to protect its authority to implement land redistribution. The Supreme Court countered these amendments in 1967 when it ruled in *Golaknath v. State of Punjab* that Parliament did not have the power to abrogate fundamental rights, including the provisions on private property.

OTHER LAWS DEEMED UNCONSTITUTIONAL

- On February 1, 1970, the Supreme Court invalidated the government-sponsored Bank Nationalization Bill that had been passed by Parliament in August 1969.
- The Supreme Court also rejected as unconstitutional a presidential order of September 7, 1970, that abolished the titles, privileges, and privy purses of the former rulers of India's old princely states.

RESPONSE FROM PARLIAMENT

- In reaction to the decisions of the Supreme Court, in 1971 the Parliament of India passed an amendment empowering itself to amend any provision of the constitution, including the fundamental rights.
- The Parliament of India passed the 25th Amendment, making legislative decisions concerning proper land compensation non-justiciable.
- The Parliament of India passed an amendment to the Constitution of India, which added a constitutional article abolishing princely privileges and privy purses.

COUNTER-RESPONSE FROM THE SUPREME COURT

The Court ruled that the basic structure of the constitution cannot be altered for convenience. On April 24, 1973, the Supreme Court responded to the parliamentary offensive by ruling in *Kesavananda Bharati v. The State of Kerala* that although these amendments were constitutional, the court still reserved for itself the discretion to reject any constitutional amendments passed by Parliament by declaring that the amendments cannot change the constitution's "basic structure", a decision piloted through by Chief Justice Sikri.

EMERGENCY AND GOVERNMENT OF INDIA

The independence of judiciary was severely curtailed on account of powerful central government ruled by Indian National Congress. This was during the Indian Emergency (1975-1977) of Indira Gandhi. The constitutional rights of imprisoned persons were restricted under Preventive detention laws passed by the parliament. In the case of Shiva Kant Shukla *Additional District Magistrate of Jabalpur v. Shiv Kant Shukla*, popularly known as the *Habeas Corpus case*, a bench of five seniormost judges of Supreme court ruled in favour of state's right for unrestricted powers of detention during emergency. Justices A.N. Ray, P. N. Bhagwati, Y. V. Chandrachud, and M.H. Beg, stated in the majority decision:

(under the declaration of emergency) no person has any locus to move any writ petition under Art. 226 before a High Court for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention.

The only dissenting opinion was from Justice H. R. Khanna, who stated:

detention without trial is an anathema to all those who love personal liberty... A dissent is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possible correct the error into which the dissenting Judge believes the court to have been betrayed.

It is believed that before delivering his dissenting opinion, Justice Khanna had mentioned to his sister: *I have prepared my judgment, which is going to cost me the Chief Justice-ship of India."* When the central Government is to recommend one of Supreme court Judges for the post of Chief Justice in January 1977,Justice Khanna was superseded despite being the most senior judge at the time and thereby Government broke the convention of appointing only the senior

most judge to the position of Chief Justice of India. In fact, it was felt that the other judges may have gone along for this very reason. Justice Khanna remains a legendary figure among the legal fraternity in India for this decision.

The New York Times, wrote of this opinion: "The submission of an independent judiciary to absolutist government is virtually the last step in the destruction of a democratic society; and the Indian Supreme Court's decision appears close to utter surrender."

During the emergency period, the government also passed the 39th amendment, which sought to limit judicial review for the election of the Prime Minister; only a body constituted by Parliament could review this election. The court tamely agreed with this curtailment (1975), despite the earlier Keshavanand decision. Subsequently, the parliament, with most opposition members in jail during the emergency, passed the 42nd Amendment which prevented any court from reviewing any amendment to the constitution with the exception of procedural issues concerning ratification. A few years after the emergency, however, the Supreme court rejected the absoluteness of the 42nd amendment and reaffirmed its power of judicial review in the *Minerva Mills* case (1980).

As a final act during the emergency, in what Justice V. R. Krishna Iyer has called "a stab on the independence of the High Court", judges were moved helter-skelter across the country, in concurrence with Chief Justice Beg.

POST-1980: AN ASSERTIVE SUPREME COURT

Fortunately for Indian jurisprudence, the "brooding spirit of the law" referred to by Justice Khanna was to correct the excesses of the emergency soon enough.

After Indira Gandhi lost elections in 1977, the new government of Morarji Desai, and especially law minister Shanti Bhushan (who had earlier argued for the detenues in the Habeas Corpus case), introduced a number of amendments making it more difficult to declare and sustain an emergency, and reinstated much of the power to the Supreme Court. It is said that the Basic Structure doctrine, created in *Kesavananda*, was strengthened in *Indira Gandhi's* case and set in stone in *Minerva Mills*. The Supreme Court's creative and expansive interpretations of Article 21 (Life and Personal Liberty), primarily after the Emergency period, have given rise to a new jurisprudence of public interest litigation that has vigorously promoted many important economic and social rights (constitutionally protected but not enforceable) including, but not restricted to, the rights to free education, livelihood, a clean environment, food and many others.

Civil and political rights (traditionally protected in the Fundamental Rights chapter of the Indian Constitution) have also been expanded and more fiercely protected. These new interpretations have opened the avenue for litigation on a number of important issues. It is interesting to note that the pioneer of the expanded interpretation of Article 21, Chief Justice P N Bhagwati, was also one of the judges who heard the ADM Jabalpur case, and held that the Right to Life could not be claimed in Emergency

RECENT IMPORTANT CASES

Among the important pronouncements of the Supreme Court post 2000 is the Coelho case (I.R. Coelho v. State of Tamil Nadu (Judgment of 11the January, 2007). A unanimous Bench of 9 judges reaffirmed the basic structure doctrine. An authority on the Indian Constitution, former Attorney-General Soli Sorabjee commented on the judgment, "The judgment in I.R. Coelho vigorously reaffirms the doctrine of basic structure.

Indeed it has gone further and held that a constitutional amendment which entails violation of any fundamental rights which the Court regards as forming part of the basic structure of the Constitution then the same can be struck down depending upon its impact and consequences.

The judgment clearly imposes further limitations on the constituent power of Parliament with respect to the principles underlying certain fundamental rights. The judgment in Coelho has in effect restored the decision in Golak Nath regarding non-amendability of the Constitution on account of infraction of fundamental rights, contrary to the judgment in Kesavananda Bharati's case. With the utmost respect the judgment is not conducive to clarity. It has introduced nebulous concepts like 'the essence of the rights' test. Besides apart from the express terms of Articles 21, 14 and 19, what are the 'the principles underlying thereunder'? One does not have to be a prophet to visualize further litigation to explain the Coelho judgment which is sure to add to the prevailing confusion." This comment was made in a lecture in Oslo, as reported on the reputed Indian blog 'Law and Other Things'.

Another important decision was of the five-judge Bench in Ashoka Kumara Thakur v. Union of India; where the constitutional validity of Central Educational Institutions (Reservations in Admissions) Act, 2006 was upheld, subject to the "creamy layer" criteria. Importantly, the Court refused to follow the 'strict scrutiny' standards of review followed by the United States Supreme Court. At the same time, the Court has applied the strict scrutiny standards in Anuj Garg v. Hotel Association of India (2007) ([1])

In Aravalli Golf Course and other cases, the Supreme Court (particularly Justice Markandey Katju) has expressed reservations about taking on an increasingly activst role.

CORRUPTION AND MISCONDUCT OF JUDGES

The year 2008 has seen the Supreme Court in one controversy after another, from serious allegations of corruption at the highest level of the judiciary, expensive private holidays at the tax payers expense, refusal to divulge details of judges' assets to the public, secrecy in the appointments of judges', to even refusal to make information public under the Right to Information Act. The Chief Justice of India K.G.Balakrishnan invited a lot of criticism for his comments on his post not being that of a public servant, but that of a constitutional authority. He later went back on this stand. The judiciary has come in for serious

criticisms from both the current President of India Pratibha Patil and the former President APJ Abdul Kalam for failure in handling its duties. The Prime Minister, Dr.Manmohan Singh, has stated that corruption is one of the major challenges facing the judiciary, and suggested that there is an urgent need to eradicate this menace.

The Union Cabinet of the Indian Government has recently introduced the Judges Inquiry (Amendment) Bill 2008 in Parliament for setting up of a panel called the National Judicial Council, headed by the Chief Justice of India, that will probe into allegations of corruption and misconduct by High Court and Supreme Court judges. However, even this bill is allegedly a farce, just meant to silence and suppress the public. As per this Bill, a panel of judges themselves will be judging the judges, no inquiry can be initiated against the Chief Justice of India or against retired judges, which is against the principles of natural justice, and a citizen can be punished and fined for any complaint that the judges find "frivolous" or "vexatious", which would discourage genuine complaints against judges.

SENIOR JUDGES

- Supreme Court Bench, Justice B N Agrawal, Justice V S Sirpurkar and Justice G S Singhvi: "We are not giving the certificate that no judge is corrupt. Black sheep are everywhere. It's only a question of degree."
- Supreme Court Judge, Justice Agarwal: "What about the character of politicians, lawyers and the society? We come from the same corrupt society and do not descend from heaven. But it seems you have descended from heaven and are, therefore, accusing us."
- Supreme Court Bench, Justice Arijit Pasayat, Justice V S Sirpurkar and Justice G S Singhvi: "The time has come because people have started categorising some judges as very honest despite it being the foremost qualification of any judge. It is the system. We have to find the mechanism to stem the rot" "Has the existing mechanism become outdated? Should with some minor modification, the mechanism could still be effective?"
- Supreme Court Bench, Justice Justice G S Singhvi: "The rot has set in." The judges appeared to be in agreement with senior advocate Anil Devan and Solicitor General G. E. Vahanvati who, citing the falling standards, questioned the desirability of keeping the immunity judges have from prosecution.

SENIOR GOVERNMENT OFFICIALS

- Former President of India, APJ Abdul Kalam: "If longevity of cases continued, people would resort to extra-judicial measures."
- President of India, Pratibha Patil: *At a seminar on judicial reforms* "Judiciary cannot escape blame for delayed justice that is fraught with

the risk of promoting the lynch mob phenomenon." "Time has come when we need to seriously introspect whether our judicial machinery has lived up to its expectations of walking the enlightened way by securing complete justice to all and standing out as (a) beacon of truth, faith and hope." "Admittedly, the realm of judicial administration is not without its own share of inadequacies and blemishes."

- Former Chief Justice of India, Y. K. Sabharwal: "The justice delivery system has reached its nadir"
- Speaker of Lok Sabha, Somnath Chatterjee: "As a citizen of this country and as a lawyer who had practiced for many decades, it is a matter of agony if there is even a whisper of an allegation against a judicial officer … But the fact is that allegations against judicial officers are becoming a reality. One Chief Justice has said that only 20 per cent of the judges are corrupt. Another judge has lamented that there are no internal procedures to look into the allegations. Therefore, the necessity of a mechanism is being emphasized by the judges themselves. Then the question arises as to how this mechanism would be brought about and as to who would bring it. The fact of the matter is that the judiciary is the only unique institution that has no accountability to the people in a democracy. In this overall context, it is absolutely essential to involve outside elements in the process of judicial accountability."
- Additional Solicitor General, G. E. Vahanvati: *At a Delhi High Court hearing* "Declaration of assets by judges to the CJI are personal information which cannot be revealed under the present RTI and the same should be amended accordingly." "It is submitted that the information which is sought (pertaining to judges assets) is purely and simply personal information, the disclosure of which has no relationship to any public activity"

Pranab Mukherjee: "Constructive criticism should be encouraged." He joined the chorus on judicial delays that has resulted in people taking law into their own hands. He underlined the need for strengthening judicial infrastructure.

THE UNION JUDICIARY IN INDIA

124. *Establishment and constitution of Supreme Court:*

(1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years: Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted: Provided further that-

(a) A Judge may, by writing under his hand addressed to the President, resign his office;
(b) A Judge may be removed from his office in the manner provided in clause (4).
(2A) The age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide.

(3) *A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and:*
(a) Has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or
(b) Has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or
(c) Is, in the opinion of the President, a distinguished jurist.
Explanation I: In this clause "High Court" means a High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India.
Explanation II: In computing for the purpose of this clause the period during which a person has been an advocate, any period during which a person has held judicial office not inferior to that of a district judge after he became an advocate shall be included.

(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority 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 has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4).

(6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(7) No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India.

125. *Salaries, etc., of Judges:*

(1) There shall be paid to the Judges of the Supreme Court such salaries as may be determined by Parliament by law and, until provision in that behalf is so made, such salaries as are specified in the Second Schedule.

(2) Every Judge shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such privileges, allowances and rights as are specified in the Second Schedule: Provided that neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

126. *Appointment of acting Chief Justice:* When the office of Chief Justice of India is vacant or when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the Court as the President may appoint for the purpose.

127. *Appointment of ad hoc Judges:*

(1) If at any time there should not be a quorum of the Judges of the Supreme Court available to hold or continue any session of the Court, the Chief Justice of India may, with the previous consent of the President and after consultation with the Chief Justice of the High Court concerned, request in writing the attendance at the sittings of the Court, as an ad hoc Judge, for such period as may be necessary, of a Judge of a High Court duly qualified for appointment as a Judge of the Supreme Court to be designated by the Chief Justice of India.

(2) It shall be the duty of the Judge who has been so designated, in priority to other duties of his office, to attend the sittings of the Supreme Court at the time and for the period for which his attendance is required, and while so attending he shall have all the jurisdiction, powers and privileges, and shall discharge the duties, of a Judge of the Supreme Court.

128. *Attendance of retired Judges at sittings of the Supreme Court:* Notwithstanding anything in this Chapter, the Chief Justice of India may at any time, with the previous consent of the President, request any person who has held the office of a Judge of the Supreme Court or of the Federal Court or who has held the office of a Judge of a High Court and is duly qualified for appointment as a Judge of the Supreme Court to sit and act as a Judge of the Supreme Court, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that Court: Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that Court unless he consents so to do.

129. *Supreme Court to be a court of record:* The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

130. *Seat of Supreme Court:* The Supreme Court shall sit in Delhi or in such other place or places, as the Chief Justice of India may, with the approval of the President, from time to time, appoint.

131. *Original jurisdiction of the Supreme Court:* Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute-

(a) Between the Government of India and one or more States; or

(b) Between the Government of India and any State or States on one side and one or more other States on the other; or

(c) Between two or more States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends: Provided that the said jurisdiction shall not extend to 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 Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.

131A. [Exclusive jurisdiction of the Supreme Court in regard to questions as to constitutional validity of Central laws.] Rep. by the Constitution (Forty-third Amendment) Act, 1977, s. 4 (w.e.f. 13-4-1978).

132. *Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases:*

(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies under article 134A that the case involves a substantial question of law as to the interpretation of this Constitution.

(2) Where such a certificate is given, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided.

Explanation: For the purposes of this article, the expression "final order" includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case.

133. *Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters:*

(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies under article 134A-

(a) That the case involves a substantial question of law of general importance; and

(b) That in the opinion of the High Court the said question needs to be decided by the Supreme Court.

(2) Notwithstanding anything in article 132, any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.

(3) Notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.

134. *Appellate jurisdiction of Supreme Court in regard to criminal matters:*

(1) *An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court:*

(a) Has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or

(b) Has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or

(c) Certifies under article 134A that the case is a fit one for appeal to the Supreme Court: Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1)of article 145 and to such conditions as the High Court may establish or require.

(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law.

134A. *Certificate for appeal to the Supreme Court:* Every High Court, passing or making a judgment, decree, final order, or sentence, referred to in clause (1) of article 132 or clause (1) of article 133, or clause (1) of article 134,-

(a) May, if it deems fit so to do, on its own motion; and

(b) Shall, if an oral application is made, by or on behalf of the party aggrieved, immediately after the passing or making of such judgment, decree, final order or sentence, determine, as soon as may be after such passing or making, the question whether a certificate of the nature referred to in clause (1) of article 132, or clause (1) of article 133 or, as the case may be, sub-clause

(c) Of clause (1) of article 134, may be given in respect of that case.

135. *Jurisdiction and powers of the Federal Court under existing law to be exercisable by the Supreme Court:* Until Parliament by law otherwise provides, the Supreme Court shall also have jurisdiction and powers with respect to any matter to which the provisions of article 133 or article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law.

136. *Special leave to appeal by the Supreme Court:*

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

137. *Review of judgments or orders by the Supreme Court:* Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

138. *Enlargement of the jurisdiction of the Supreme Court:*

(1) The Supreme Court shall have such further jurisdiction and powers with respect to any of the matters in the Union List as Parliament may by law confer.

(2) The Supreme Court shall have such further jurisdiction and powers with respect to any matter as the Government of India and the Government of any State may by special agreement confer, if Parliament by law provides for the exercise of such jurisdiction and powers by the Supreme Court.

139. *Conferment on the Supreme Court of powers to issue certain writs:* Parliament may by law confer on the Supreme Court power to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for any purposes other than those mentioned in clause (2) of article 32.

139A. *Transfer of certain cases:*

(1) Where cases involving the same or substantially the same questions of law are pending before the Supreme Court and one or more High Courts or before two or more High Courts and the Supreme Court is satisfied on its own motion or on an application made by the Attorney-General of India or by a party to any such case that such questions are substantial questions of general importance, the Supreme Court may withdraw the case or cases pending before the High Court or the High Courts and dispose of all the cases itself:

Provided that the Supreme Court may after determining the said questions of law return any case so withdrawn together with a copy of its judgment on such questions to the High Court from which the case has been withdrawn, and the High Court shall on receipt thereof, proceed to dispose of the case in conformity with such judgment.

(2) The Supreme Court may, if it deems it expedient so to do for the ends of justice, transfer any case, appeal or other proceedings pending before any High Court to any other High Court.

140. *Ancillary powers of Supreme Court:* Parliament may by law make provision for conferring upon the Supreme Court such supplemental powers not inconsistent with any of the provisions of this Constitution as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under this Constitution.

141. *Law declared by Supreme Court to be binding on all courts:* The law declared by the Supreme Court shall be binding on all courts within the territory of India.

142. *Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.-*

(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

143. *Power of President to consult Supreme Court:*

(1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

(2) The President may, notwithstanding anything in the proviso to article 131, refer a dispute of the kind mentioned in the said proviso to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon.

144. *Civil and judicial authorities to act in aid of the Supreme Court:* All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.

144A. [Special provisions as to disposal of questions relating to constitutional validity of laws.] Rep. by the Constitution (Forty-third Amendment) Act, 1977, s. 5 (w.e.f. 13-4-1978).

145. *Rules of Court, etc.:*

(1) Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including-

(a) Rules as to the persons practising before the Court;

(b) Rules as to the procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Court are to be entered;

(c) Rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III; (cc) Rules as to the proceedings in the Court under article 139A;

(d) Rules as to the entertainment of appeals under sub-clause (c) of clause (1) of article 134;

(e) Rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court for such review are to be entered;
(f) Rules as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged in respect of proceedings therein;
(g) Rules as to the granting of bail;
(h) Rules as to stay of proceedings;
(i) Rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay;
(j) Rules as to the procedure for inquiries referred to in clause (1) of article 317.

(2) Subject to the provisions of clause (3), rules made under this article may fix the minimum number of Judges who are to sit for any purpose, and may provide for the powers of single Judges and Division Courts.

(3) The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under article 143 shall be five: Provided that, where the Court hearing an appeal under any of the provisions of this Chapter other than article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion.

(4) No judgment shall be delivered by the Supreme Court save in open Court, and no report shall be made under article 143 save in accordance with an opinion also delivered in open Court.

(5) No judgment and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion.

146. *Officers and servants and the expenses of the Supreme Court:*

(1) Appointments of officers and servants of the Supreme Court shall be made by the Chief Justice of India or such other Judge or officer of the Court as he may direct: Provided that the President may by rule require that in such cases as may be specified in the rule, no person not already attached to the Court shall be appointed to any office connected with the Court, save after consultation with the Union Public Service Commission.

(2) Subject to the provisions of any law made by Parliament, the conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of India or by some other Judge or officer of the Court authorised by the Chief Justice of India to make rules for the purpose: Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the President.

(3) The administrative expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of India, and any fees or other moneys taken by the Court shall form part of that Fund.

147. *Interpretation:* In this Chapter and in Chapter V of Part VI, references to any substantial question of law as to the interpretation of this Constitution shall be construed as including references to any substantial question of law as to the interpretation of the Government of India Act, 1935 (including any enactment amending or supplementing that Act), or of any Order in Council or order made thereunder, or of the Indian Independence Act, 1947, or of any order made thereunder.

8

Administrative Law: Evolution, Nature and Scope

Development of Administrative law is the most significant and outstanding development of the 20th century. It however, does not mean that there was no Administrative Law before this century. It was in existence even during the time of King Shivaji's period and Mughal period.

In the 20th century the role and the function of the state has undergone a radical change. The Government functions have been increased tremendously. Today, the State is not merely a Police State, to exercise sovereign functions only. The traditional functions of the State is to protect the life and the property of the citizens from external aggression, war and internal disturbance but in a progressive democratic State it has to ensure social security and social welfare for a common man.

The State has become the welfare State. Today, the state has entered into each and every aspect of our life. State improves slums, looks after health and morals of the people, it improves education to children. It exercises control over production, manufacture and distribution of essential commodities, regulate the industrial relations, tries to achieve equality for all and ensures equal pay for equal work. All these developments in a State have widen the scope and the ambit of Administrative Law. Administrative Law is basically a law relating to administrative operation of Government. It deals with the powers and duties of Administrative Authorities, the procedure followed by them in exercising the power and discharging the duties and the remedies available to an aggrieved person when his rights are affected by any administrative action.

DEFINITIONS

1. *According to Sir Ivor Jennings a famous jurist defined Administrative Law as:* "The law relating to administration. It determines the organisation, powers and duties of administrative authorities."
2. *According to M. P. Jain Administrative Law is:* "Administrative law deals with the structure, powers and functions of the organs of administration; the limits of their powers; the methods and procedures followed by them in exercising their powers and functions; the methods by which their powers are controlled including the legal remedies available to a person against them when his rights are infringed in their operation."

NATURE AND SCOPE OF ADMINISTRATIVE LAW

Administrative Law deals with the powers of administrative authorities, the manner in which the powers are exercised and the remedies which are available to the aggrieved persons, when those powers are abused by these authorities.

As discussed above the administrative process has come to stay and it has to be accepted as a necessary evil in all progressive societies, particularly in a welfare state, where many schemes for the progress of society are prepared and administered by the government. The execution and implementation of this programme may adversely affect the rights of citizens. The actual problem is to reconcile social welfare with the rights of individual subjects.

The main object of the study of administrative law is to unravel the way in which these administrative authorities could be kept within their limits so that the discretionary powers may not be turned into arbitrary powers.

Administrative Law deals with following matters:

1. Who are administrative authorities?
2. What powers are exercised by those authorities?
3. What limits should be exercised while using powers?
4. Procedure to be followed while using the powers?
5. What are remedies available if the rights are affected?

SCOPE OF ADMINISTRATIVE LAW IS AS UNDER

According to Friedman scope of Administrative Law is:

1. It deals with law making powers of administrative authorities under common law and various statutes;
2. Judicial and quasi-judicial powers of administrative authorities *i.e.*, court and tribunal to deal with problems and remedies;
3. Executive powers of administration *i.e.*, concentration of powers;
4. Powers of the courts to supervise the administrative authorities;
5. Legal liability of public servant.

Administrative Law is a branch of public law which deals with the relationship of the individual with the administrative authorities. Administrative Law deals

with the organization and powers of administrative and quasi-administrative agencies, procedure for exercise of those power and control over those powers. It deals with the study of existing principles and also the development of certain new principles which the administrative and quasi-administrative agencies must follow while exercising the powers in relation to individuals that is principle of natural justice, and fairness. The study of administrative law is not an end in itself but it means to an end. The main object of study of administrative law is the reconciliation of power with liberty of the individual. Administrative law is not a branch of philosophy of law but of sociology of law.

IN CIVIL LAW COUNTRIES

Unlike most common law jurisdictions, most civil law jurisdictions have specialized courts or sections to deal with administrative cases that as a rule apply procedural rules that are specifically designed for such cases and distinct from those applied in private law proceedings, such as contract or tort claims.

BRAZIL

In Brazil, administrative cases are typically heard either by the Federal Courts (in matters concerning the Federal Union) or by the Public Treasury divisions of State Courts (in matters concerning the States). In 1998, a constitutional reform, led by the government of President Fernando Henrique Cardoso, introduced regulatory agencies as a part of the executive branch. Since 1988, Brazilian administrative law has been strongly influenced by the judicial interpretations of the constitutional principles of public administration (art. 37 of Federal Constitution): legality, impersonality, publicity of administrative acts, morality and efficiency.

FRANCE

In France, most claims against the national or local governments as well as claims against private bodies providing public services are handled by administrative courts, which use the *Conseil d'État* (Council of State) as a court of last resort for both ordinary and special courts. The main administrative courts are the *tribunaux administratifs* and appeal courts are the *cours administratives d'appel*. Special administrative courts include the National Court of Asylum Right as well as military, medical and judicial disciplinary bodies. The French body of administrative law is called "*droit administratif*".

Over the course of their history, France's administrative courts have developed an extensive and coherent case law (*jurisprudence constante*) and legal doctrine (*principes généraux du droit* and *principes fondamentaux reconnus par les lois de la République*), often before similar concepts were enshrined in constitutional and legal texts. These principes include:

- Right to fair trial (*droit à la défense*), including for internal disciplinary bodies
- Right to challenge any administrative decision before an administrative court (*droit au recours*)

- Equal treatment of public service users (*égalité devant le service public*)
- Equal access to government employment (*égalité d'accès à la fonction publique*) without regard for political opinions
- Freedom of association (*liberté d'association*)
- Right to Entrepreneurship (*Liberté du Commerce et de l'industrie*, lit. freedom of commerce and industry)
- Right to Legal certainty (*Droit à la sécurité juridique*)

French administrative law, which is the founder of Continental administrative law, has a strong influence on administrative laws in several other countries such as Belgium, Greece, Turkey and Tunisia.

GENERAL ADMINISTRATIVE LAW

The general administration law is basically ruled in the administrative procedures law (*Verwaltungsverfahrensgesetz* [VwVfG]). Other legal sources are the Rules of the Administrative Courts (Verwaltungsgerichtsordnung), the social security code (Sozialgesetzbuch [SGB]) and the general fiscal law (Abgabenordnung [AO]).

ADMINISTRATIVE PROCEDURES LAW

The *Verwaltungsverfahrensgesetz* (VwVfG), which was enacted in 1977, regulates the main administrative procedures of the federal government. It serves the purpose to ensure a treatment in accordance with the rule of law by the public authority. Furthermore, it contains the regulations for mass processes and expands the legal protection against the authorities. The VwVfG basically applies for the entire public administrative activities of federal agencies as well as federal state authorities, in case of making federal law. One of the central clause is § 35 VwVfG. It defines the administrative act, the most common form of action in which the public administration occurs against a citizen. The definition in § 35 says, that an administration act is characterized by the following features:

It is an official act of an authority in the field of public law to resolve an individual case with effect to the outside.

§§ 36 – 39, §§ 58 – 59 and § 80 VwV—fG rule the structure and the necessary elements of the administrative act. § 48 and § 49 VwVfG have a high relevance in practice, as well. In these paragraphs, the prerequisites for redemption of an unlawful administration act (§ 48 VwVfG) and withdrawal of a lawful administration act (§ 49 VwVfG), are listed.

OTHER LEGAL SOURCES

Administration procedural law (Verwaltungsgerichtsordnung [VwGO]), which was enacted in 1960, rules the court procedures at the administrative court. The VwGO is divided into five parts, which are the constitution of the courts, action, remedies and retrial, costs and enforcement15 and final clauses and temporary arrangements.

In absence of a rule, the VwGO is supplemented by the code of civil procedure (Zivilprozessordnung [ZPO]) and the judicature act (Gerichtsverfassungsgesetz [GVG]). In addition to the regulation of the administrative procedure, the VwVfG also constitutes the legal protection in administrative law beyond the court procedure. § 68 VwVGO rules the preliminary proceeding, called "Vorverfahren" or "Widerspruchsverfahren", which is a stringent prerequisite for the administrative procedure, if an action for rescission or a writ of mandamus against an authority is aimed. The preliminary proceeding gives each citizen, feeling unlawfully mistreated by an authority, the possibility to object and to force a review of an administrative act without going to court. The prerequisites to open the public law remedy are listed in § 40 I VwGO. Therefore, it is necessary to have the existence of a conflict in public law without any constitutional aspects and no assignment to another jurisdiction.

The social security code (Sozialgesetzbuch [SGB]) and the general fiscal law are less important for the administrative law. They supplement the VwVfG and the VwGO in the fields of taxation and social legislation, such as social welfare or financial support for students (BaFÖG), *etc.*

TAIWAN (ROC)

In Taiwan the recently enacted *Constitutional Procedure Act* in 2019 (former *Constitutional Interpretation Procedure Act, 1993*), the **Justices of the Constitutional Court** of Judicial Yuan of Taiwan is in charge of judicial interpretation. This council has made 757 interpretations to date.

TURKEY

In Turkey, the lawsuits against the acts and actions of the national or local governments and public bodies are handled by administrative courts which are the main administrative courts. The decisions of the administrative courts are checked by the Regional Administrative Courts and Council of State. Council of State as a court of last resort is exactly similar to Conseil d'État in France.

UKRAINE

Administrative law in the Ukraine is a homogeneous legal substance isolated in a system of jurisprudence characterized as: (1) a branch of law; (2) a science; (3) a discipline.

DISTINCTIONS BETWEEN PUBLIC ADMINISTRATION AND PRIVATE ACTION

Activities such as traffic control, fire-protection services, policing, smoke abatement, the construction or repair of highways, the provision of currency, town and country planning, and the collection of customs and excise duties are usually carried out by governments, whose executive organs are assumed to represent the collective will of the community and to be acting for the common

good. It is for this reason that they are given powers not normally conferred on private persons. They may be authorized to infringe citizens' property rights and restrict their freedom of action in many different ways, ranging from the quarantining of infectious persons to the instituting of criminal proceedings for nonpayment of taxes. To take another example, the postal laws of many countries favour the post office at the expense of the customer in a way unknown where common carriers are concerned. Again, a public authority involved in slum clearance or housing construction tends to be in a much stronger legal position than a private developer.

The result of the distinction between public administration and private action is that administrative law is quite different from private law regulating the actions, interests, and obligations of private persons. Civil servants do not generally serve under a contract of employment but have a special status. Taxes are not debts, nor are they governed by the law relating to the recovery of debts by private persons. In addition, relations between one executive organ and another, and between an executive organ and the public, are usually regulated by compulsory or permissive powers conferred upon the executive organs by the legislature.

The law regulating the internal aspects of administration (*e.g.*, relations between the government and its officials, a local authority and its committees, or a central department and a local authority) differs from that covering external relations (those between the administration and private persons or interests). In practice, internal and external aspects are often linked, and legal provisions of both kinds exist side by side in the same statute. Thus, a law dealing with education may modify the administrative organization of the education service and also regulate the relations between parents and the school authorities.

Another distinction exists between a command addressed by legislation to the citizen, requiring him to act or to refrain from acting in a certain way, and a direction addressed to the administrative authorities. When an administrative act takes the form of an unconditional command addressed to the citizen, a fine or penalty is usually attached for failure to comply. In some countries the enforcement is entrusted to the criminal courts, which can review the administrative act; in others the administrative act itself must be challenged in an administrative court.

THE NEED FOR LEGAL SAFEGUARDS OVER PUBLIC ADMINISTRATION

Statutory directions addressed to the executive authorities may impose absolute duties, or they may confer discretionary powers authorizing a specified action in certain circumstances. Such legislation may give general directions for such activities as factory inspection, slum clearance, or town planning. The statute lays down the conditions under which it is lawful for the administration to act and confers on the authorities the appropriate powers, many of which involve a large element of discretion. Here the executive is not confined merely

to carrying out the directions of the legislature; often it also shares in the lawmaking process by being empowered to issue regulations or ordinances dealing with matters not regulated by the statute. This may be regarded either as part of the ordinary process by which the legislature delegates its powers or as an inevitable feature of modern government, given that many matters are too technical, detailed, or subject to frequent change to be included in the main body of legislation—legislation being less easy to change than regulations.

Whatever the source of the executive's rule-making power, safeguards against misuse are necessary. For instance, the regulation must not exceed the delegated powers; its provisions must conform with the aims of the parent statute; prior consultation with interests likely to be affected should take place whenever practicable; and the regulations must not contravene relevant constitutional rules and legal standards. In some countries regulations are scrutinized by a type of watchdog known as the council of state before they come into force; in others, by the parliamentary assembly; and in yet others, by the ordinary courts.

In most countries the executive arm of government possesses certain powers not derived from legislation, customary law, or a written constitution. In the United Kingdom there are prerogative powers of the crown, nearly all of which are now exercised by ministers and which concern such matters as making treaties, declaring war and peace, pardoning criminals, issuing passports, and conferring honours. In Italy, France, Belgium, and other continental European countries, certain acts concerning the higher interests of the state are recognized as *actes de gouvernement* and are thereby immune from control by any court or administrative tribunal. In the German Empire (1871–1918) the principle that an administrative act carried its own legal validity was accepted at the end of the 19th century by leading jurists. This led to the doctrine that administration was only loosely bound to the law. The doctrine was rejected in the Federal Republic of Germany (1949–90), however, and efforts were made to reduce the area in which the executive was free to act outside administrative law.

BUREAUCRACY AND THE ROLE OF ADMINISTRATIVE LAW

An inevitable consequence of the expansion of governmental functions has been the rise of bureaucracy. The number of officials of all kinds has greatly increased, and so too have the material resources allocated to their activities, while their powers have been enlarged in scope and depth. The rise of bureaucracy has occurred in countries ruled by all types of government, including communist countries, dictatorships and fascist regimes, and political democracies. It is as conspicuous in the former colonial states of Africa and Asia as among the highly developed countries of western Europe or North America. A large, strong, and well-trained civil service is essential in a modern state, irrespective of the political character of its regime or the nature of its economy.

Fear of the maladies that tend to afflict bureaucracy has produced a considerable volume of protest in some countries; and, even in those where

opposition to the government or the party in power is not permitted, criticism and exposure of bureaucratic maladministration are generally encouraged.

Bureaucratic maladies are of different kinds. They include an overdevotion of officials to precedent, remoteness from the rest of the community, inaccessibility, arrogance in dealing with the general public, ineffective organization, waste of labour, procrastination, an excessive sense of self-importance, indifference to the feelings or convenience of citizens, an obsession with the binding authority of departmental decisions, inflexibility, abuse of power, and reluctance to admit error. Many of these defects can be prevented or cured by the application of good management techniques and by the careful training of personnel. A whole range of techniques is available for this purpose, including effective public relations, work-study programmes, organization and management, operational research, and social surveys.

Administrative law is valuable in controlling the bureaucracy. Under liberal-democratic systems of government, political and judicial control of administration are regarded as complementary, but distinct. The former is concerned with questions of policy and the responsibility of the executive for administration and expenditure. The latter is concerned with inquiring into particular cases of complaint. Administrative law does not include the control of policy by ministers or the head of state.

IN COMMON LAW COUNTRIES

Generally speaking, most countries that follow the principles of common law have developed procedures for judicial review that limit the reviewability of decisions made by administrative law bodies. Often these procedures are coupled with legislation or other common law doctrines that establish standards for proper rulemaking. Administrative law may also apply to review of decisions of so-called semi-public bodies, such as non-profit corporations, disciplinary boards, and other decision-making bodies that affect the legal rights of members of a particular group or entity.

While administrative decision-making bodies are often controlled by larger governmental units, their decisions could be reviewed by a court of general jurisdiction under some principle of judicial review based upon due process (United States) or fundamental justice (Canada). Judicial review of administrative decisions is different from an administrative appeal. When sitting in review of a decision, the Court will only look at the method in which the decision was arrived at, whereas in an administrative appeal the correctness of the decision itself will be examined, usually by a higher body in the agency. This difference is vital in appreciating administrative law in common law countries.

The scope of judicial review may be limited to certain questions of fairness, or whether the administrative action is *ultra vires*. In terms of ultra vires actions in the broad sense, a reviewing court may set aside an administrative decision if it is unreasonable (under Canadian law, following the rejection of the "Patently

Unreasonable" standard by the Supreme Court in Dunsmuir v New Brunswick), *Wednesbury* unreasonable (under British law), or arbitrary and capricious (under U.S., Administrative Procedure Act and New York State law). Administrative law, as laid down by the Supreme Court of India, has also recognized two more grounds of judicial review which were recognized but not applied by English Courts, namely legitimate expectation and proportionality.

The powers to review administrative decisions are usually established by statute, but were originally developed from the royal prerogative writs of English law, such as the writ of mandamus and the writ of certiorari. In certain common law jurisdictions, such as India or Pakistan, the power to pass such writs is a Constitutionally guaranteed power. This power is seen as fundamental to the power of judicial review and an aspect of the independent judiciary.

UNITED STATES

In the United States, many government agencies are organized under the executive branch of government, although a few are part of the judicial or legislative branches.

In the federal government, the executive branch, led by the president, controls the federal executive departments, which are led by secretaries who are members of the United States Cabinet. The many independent agencies of the United States government created by statutes enacted by Congress exist outside of the federal executive departments but are still part of the executive branch.

Congress has also created some special judicial bodies known as Article I tribunals to handle some areas of administrative law.

The actions of executive agencies and independent agencies are the main focus of American administrative law. In response to the rapid creation of new independent agencies in the early twentieth century, Congress enacted the Administrative Procedure Act (**APA**) in 1946. Many of the independent agencies operate as miniature versions of the tripartite federal government, with the authority to "legislate", "adjudicate" (through administrative hearings), and to "execute" administrative goals (through agency enforcement personnel). Because the United States Constitution sets no limits on this tripartite authority of administrative agencies, Congress enacted the APA to establish fair administrative law procedures to comply with the constitutional requirements of due process. Agency procedures are drawn from four sources of authority: the APA, organic statutes, agency rules, and informal agency practice. It is important to note, though, that agencies can only act within their congressionally delegated authority, and must comply with the requirements of the APA.

At state level the first version of the Model State Administrative Procedure Act was promulgated and published in 1946 by the Uniform Law Commission (ULC), in which year the Federal Administrative Procedure Act was drafted. It is incorporated basic principles with only enough elaboration of detail to support essential features, therefore it is a "model", and not a "uniform", act. A model act is needed because state administrative law in the states is not uniform, and

there are a variety of approaches used in the various states. Later it was modified in 1961 and 1981. The present version is the 2010 Model State Administrative Procedure Act (**MSAPA**) which maintains the continuity with earlier ones. The reason of the revision is that, in the past two decades state legislatures, dissatisfied with agency rule-making and adjudication, have enacted statutes that modify administrative adjudication and rule-making procedure.

The American Bar Association's official journal concerning administrative law is the *Administrative Law Review*, a quarterly publication that is managed and edited by students at the Washington College of Law.

HISTORICAL DEVELOPMENT

Stephen Breyer, a U.S., Supreme Court Justice since 1994, divides the history of administrative law in the United States into six discrete periods, in his book, Administrative Law & Regulatory Policy (3d Ed., 1992):

- English antecedents & the American experience to 1875
- *1875 – 1930:* The rise of regulation & the traditional model of administrative law
- *1930 - 1945:* The New Deal
- *1945 – 1965:* The Administrative Procedure Act & the maturation of the traditional model of administrative law
- *1965 – 1985:* Critique and transformation of the administrative process
- *1985 – ?:* Retreat or consolidation

AGRICULTURE

The agricultural sector is one of the most heavily regulated sectors in the U.S., economy, as it is regulated in various ways at the international, federal, state, and local levels. Consequently, administrative law is a significant component of the discipline of agricultural law. The United States Department of Agriculture and its myriad agencies such as the Agricultural Marketing Service are the primary sources of regulatory activity, although other administrative bodies such as the Environmental Protection Agency play a significant regulatory role as well.

DEFINITION, NATURE AND SCOPE OF ADMINISTRATIVE LAW

For the smooth functioning of a democratic country, there should be a society based on fairness, reasonableness and justness. Administrative law strives to develop a rule of law. It regulates the relationships between citizens and government & protects the common man from arbitrary decisions of officials. It consists of all executive actions, its programmes & policies; all administrative aspects of parliament & judiciary; all actions of state like actors (agency & instrumentality of the state); all actions of non-state actors (private entities) exercising public functions. It is the branch of public law which ensures the

working of government at both central and state levels and also deals with the organizations and powers of administrative and quasi- administrative bodies. It is judge-made law in general which ensures public welfare by providing guidelines.

Administrative law is basically a law which regulates the actions of administrative authorities or agencies. Administrative law tries to develop a relation between the public and government by regulating itself as the time required. Administrative law as per the Indian perspective it is almost judge-made law it is because of its changes by the court case by case in the form of guidelines.

It contains all aspects of administrative actions as it can work as legislative as it has delegated powers given through legislature but in limits, it can also work as executive as it enforces the law or implements the law, it comes in the role of the judiciary when there is need to make quick decisions but there can be judicial review of that actions if there is contrary in that decision. Administrative law regulates all these actions and ensures remedies against the arbitrary actions of administrative agencies.

Administrative law may be identified on the four basics stone:

1. Checking constructive or abusive of the powers of the administrative authorities
2. Ensuring citizens a just and fair solution or determination of disputes
3. Protect from unauthorized curtailing of rights of the citizens
4. Accountability of the powers.

Ensuring the protection of citizens over the arbitrary actions of the administration and also focuses on the judicial review of the actions or decisions taken by the administration to fulfill that protection against the actions of the administration are main objects of the administrative law.

DEFINITIONS OF ADMINISTRATIVE LAW

Administrative law is a law related to administration and can be defined as the law which governs the activities of the administrative agencies of the government including actions like rulemaking, adjudication, or the enforcement of a particular agenda.

Many scholars state different definitions of Administrative law in their views:

According to K.C. Devis, Administrative law is a law which is related to powers and procedures of administrative agencies, including specially the law related to judicial review of administrative actions.

According to Ivor Jennings, Administrative law is relating to the administration which helps in the determination of the organization, powers and duties of the administrative authorities.

According to F.J. Port, Administrative law consists of all legal rules which have ultimate objects to fulfill the public law, it touches legislature and judiciary too and also there are rules which govern judicial actions such as issuing writs brought by or against the administrative person, rules that permit the administrative body to exercise judicial powers and practical application of the law.

According to Austin, Administrative law is to determine the ends to and the modes in which the sovereign powers shall be exercised. It shall be directly or by the subordinates.

According to Prof. H.W.R. Wade, Administrative law is the law which controls the powers of the government.

According to Dicey, Administrative law denotes that part of the nation's legal system which determines the legal status and liabilities of all states offices which defines the rights and liabilities of private individuals in their dealing with their public officials and which specifies the procedure by which these rights and liabilities are enforced.

According to Indian Law Institute, Administrative law is a law relating to the power of administration. It also includes the procedure of how to exercise the powers, limits of those powers, the way in which the powers are kept in those limits followed by the officials and the remedies available to the public when their rights have encroached.

According to C.K.Takwani, Administrative law is the branch of constitutional law which deals with the powers and procedures of the administrative authorities.

Now we can define administrative law as the law which is a part of the public law of a nation which deals with the administration, it also includes the procedure which is going to be followed by the authorities under administrative law which deals with the procedure which discuss how to exercise the powers, limitation on the powers, how powers are enforced on the public and also the remedies for the public when their rights encroached. Administrative law defines the relationship between the public and the government and protects from arbitrary actions which are unfair without any reasonable reason to the public.

NATURE OF ADMINISTRATIVE LAW

Administrative law is the branch of public law which defines the relation between individuals and state. But it is not a law in a true sense like other laws such as property law or labour law. It is also not like private law which deals with relations of individual inter se. it is a law to administer the administrative authorities and check them from making any arbitrary decisions. Administrative law deals with the organization, powers and duties of the administrative authorities and also the procedure followed by the officials while exercising the powers. Administrative law is limited to the law which limits the power of administrative authorities while exercising the powers. It also provides remedies in the favour of the public when the rights of the public encroached.

In India, administrative law is almost judge made law. Thus it suffers from more facilities and benefits because of judicial lawmaking. Judiciary interprets law according to the need of time and issues guidelines for such. It affects administrative law and makes it more strong and beneficial. It is a branch of the constitution that regulates all three branches *i.e.*, legislative, executive and judiciary in the same way administrative regulates all administrative authorities and protects them from corrupt practices. Its main purpose is to focus on the

judicial review of administrative actions. In this way, there is protection from the arbitrary actions of the administrative actions. Administrative actions can be legislative, executive or judiciary. Administrative can do all of three actions when which is required to do so. By delegation legislation administrative has the power to make law when it comes to implementation of administrative acts as an executive and when it comes to making quick decisions then the administrative can act as the judiciary. The nature of administrative law changes according to the need.

SCOPE OF ADMINISTRATIVE LAW

Scope means an area of study or the variety of subjects that are being discussed or considered. As administrative law is almost judge-made law so it changes according to societal needs but in the guidance of the basic principles so the scope of this law is wider in comparison to other laws. Administrative law determines the powers and duties of the organization and the administrative authorities. The scope of administrative law is wide enough because, with the requirement of time, Administrative Law incorporates and culls out new rules and regulations.

The concept of administrative law is founded on the following:

1. Principles of natural justice and for rulemaking
2. Notion of the Rule of law
3. Law conferred power to administration as per Article 13 of the Indian Constitution
4. Accountability of powers, no power is absolute or uncontrolled
5. There should be a reasonable restriction on the regulations of such powers
6. The power of the court to issues writs
7. Opinions of public and mass media.

As administrative law incorporates new rules and regulations as per the requirement of time, so its scope is wide enough to incorporate all such rules and regulations. In general, it is a judge made law so it varies according to societal needs. The scope of the administrative law is wide as it can act as all three branches of the government. It can make law, implement the law and can also take decisions whenever required. But the review of the decision can be taken and on the basis of that review, the court can issue guidelines if there is any contradiction in that decision.

Administrative law is to administer & protect the public from the arbitrary actions of the administrative authorities. For a democratic country, there should be a strong and honest administration system. Administrative law provides that strength by making laws for administrative authorities. Administrative law makes the working of the administration system more clear and more smooth. How to exercise powers, limits of those powers, how to keep those powers in limits while exercising such powers, procedures followed by the officials all these things are in administrative law. There are also remedies for the public when

their rights are seized. It does not like substantive law which is beyond the understanding of lawyers it is a law which is dictated by the judges and especially focusing on the judicial review of the administrative actions. It is limited to the law concerning powers and procedures of administrative and quasi-administrative agencies.

9

Administrative Law in Civil Law Countries

Unlike most Common-law jurisdictions, the majority of civil law jurisdictions have specialized courts or sections to deal with administrative cases which, as a rule, will apply procedural rules specifically designed for such cases and different from that applied in private-law proceedings, such as contract or tort claims.

FRANCE

In France, most claims against the national or local governments are handled by administrative courts, which use the *Conseil d'État*(Council of State) as a court of last resort. The main administrative courts are the *tribunaux administratifs* and appeal courts are the*cours administratives d'appel.* The French body of administrative law is called "*droit administratif*".

GERMANY

Administrative law in Germany, called Deutschland, generally rules the relationship between authorities and the citizens and therefore, it establishes citizens' rights and obligations against the authorities. It is a part of the public law, which deals with the organization, the tasks and the acting of the public administration. It also contains rules, regulations, orders and decisions created by and related to administrative agencies, such as federal agencies, federal state authorities, urban administrations, but also admission offices and fiscal authorities, *etc.* Administrative law in Germany follows three basic principles.

- Principle of the legality of the authority, which means that there is no acting against the law and no acting without a law.
- Principle of legal security, which includes a principle of legal certainty and the principle of nonretroactivity
- Principle of proportionality, which says that an act of an authority has to be suitable, necessary and appropriate

Administrative law in Germany can be divided into general administrative law and special administrative law.

CHALLENGING ADMINISTRATIVE DECISIONS

There are four main types of "review" of administrative decisions:

1. A reconsideration by the original decision-maker;
2. A specific statutory right to review of the decision "on the merits" (internally or by a *tribunal* such as the Victorian Civil and Administrative Tribunal);
3. Judicial review by a court; or
4. Complaint to the relevant Ombudsman.

There are also *appeal* mechanisms in administrative law. For example, an appeal from a tribunal decision on a question of law may be made to a court if the legislation allows for it, or a tribunal may conduct a form of appeal. Always check the legislation for the specific type of review or appeal that may be available.

This chapter provides a brief overview of reconsideration, merits review, *judicial review*, and Ombudsman review, and describes the steps you should take if you are considering challenging an administrative decision.

RECONSIDERATION

As long as the original decision-maker has not "exhausted" their power, they may be able to reconsider their decision. Always consider this option first. If you are not sure, you may ask the decision-maker whether they are prepared to reconsider the matter. Generally speaking, if more than one person's "rights" are at stake, reconsideration may not be possible (for example, if a licence has been granted to someone else instead of you, reconsideration of your matter might impact on their right to that licence).

REVIEW ON THE MERITS

A review "on the merits" generally means that a person will look again at a decision that has been made and make what they think is the "correct and preferable" decision instead. (Check the relevant legislation for the limits of the merits review.) The person conducting the review will usually be able to consider any additional *material* you wish to provide to them and come to their own decision about the facts of the case. They will then be able to substitute their own decision for the decision originally made.

You will only have a *right* to a review of an administrative decision "on the merits" if an Act or Regulation gives you that right. A right of review "on the merits" can be a very valuable right. If you are unhappy with an administrative decision or action you should carefully read the Act or Regulation under which the decision was made to see if it gives you an express right of review. (Also check the *Administrative Appeals Tribunal Act 1975* (Cth) ("AAT Act") if the decision is a Commonwealth decision; and the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ("VCAT Act") if the decision is a Victorian government decision.) Some laws give wide rights of merits review, while others give none. The right of review may be to a higher official, a Minister, a specialist *tribunal* (within or outside the departmental framework), or to an independent general tribunal, such as the Commonwealth Administrative Appeals Tribunal (AAT) or the Victorian Civil and Administrative Tribunal (VCAT).

One of the most common rights of review is a right of review to a general tribunal such as the AAT or VCAT. Appeals of this nature are dealt with in greater depth in Chapter 21*3 Administrative Appeals Tribunals.

JUDICIAL REVIEW

Judicial review is brought before a court, and the court determines whether the decision complained about is unlawful and of no effect. The court then exercises its *discretion* regarding whether or not to grant relief. The court usually has no power to review the decision "on its merits" and determine whether or not it was the decision the court would have made. The court only has the power to review the decision to see whether the decision-maker made the decision *lawfully*.

However, some of the "grounds of review" do require some consideration of the merits of the case (for example, if the decision-maker took into account an irrelevant consideration, or if the decision is manifestly unreasonable). And occasionally, when jurisdictional error is *alleged*, the court may need to make findings of fact.

JUDICIAL REVIEW VS MERITS REVIEW EXPLAINED

One of the most difficult things to understand in administrative law is the difference between *judicial review* and merits review. It is important to understand this difference when analysing the decision you wish to challenge, and the potential basis for such a challenge. In *Administrative Power and the Law*, the difference has been explained by way of analogy as follows:

The decision maker stands poised to make an administrative decision. Before making the decision, they must embark on a journey down a path which leads to an orchard. Trees from within the orchard's boundaries contain a variety of fruits. Any fruit may be picked – any decision may be made – as long as it is from a tree planted within the boundaries of the orchard. (This represents "discretion".)

There is only one lawful path to the orchard. If the decision maker digresses, strays off the path, and picks some fruit from a tree outside the path, it will not be fruit from a tree in the orchard… If the decision maker strays off the path, they will not be making a lawful decision…

What if a fruit from a tree outside the orchard is picked? If challenged, the reviewer (whether a court or tribunal) may throw away the fruit (set aside or quash the decision). The court can only throw it away if it is unlawful (outside the orchard). The merits review decision maker can throw it away for any reason (i.e fruits from inside and outside the orchard may be discarded). The merits review decision maker… may select a new fruit for consumption, after walking down the path to the orchard in order to find it. If the reviewer is a judicial review decision maker, that is, a court, they may order another decision maker to start the process again and choose a new fruit. The court on judicial review will generally not stand in the shoes of the decision maker and walk down the path in order to choose a new fruit…

ADMINISTRATIVE LAW IN COMMON LAW COUNTRIES

Generally speaking, most countries that follow the principles of common law have developed procedures for judicial review that limit the reviewability of decisions made by administrative law bodies. Often these procedures are coupled with legislation or other common lawdoctrines that establish standards for proper rulemaking. Administrative law may also apply to review of decisions of so-called semi-public bodies, such as non-profit corporations, disciplinary boards, and other decision-making bodies that affect the legal rights of members of a particular group or entity.

While administrative decision-making bodies are often controlled by larger governmental units, their decisions could be reviewed by acourt of general jurisdiction under some principle of judicial review based upon due process (United States) or fundamental justice (Canada). Judicial review of administrative decisions is different from an administrative appeal. When sitting in review of a decision, the Court will only look at the method in which the decision was arrived at, whereas in an administrative appeal the correctness of the decision itself will be examined, usually by a higher body in the agency. This difference is vital in appreciating administrative law in common law countries.

The scope of judicial review may be limited to certain questions of fairness, or whether the administrative action is *ultra vires*. In terms of ultra vires actions in the broad sense, a reviewing court may set aside an administrative decision if it is unreasonable (under Canadian law, following the rejection of the "Patently Unreasonable" standard by the Supreme Court in Dunsmuir v. New Brunswick), *Wednesbury* unreasonable (under British law), or arbitrary and capricious (under U.S.) Administrative Procedure Act and New York State law). Administrative law, as laid down by the Supreme Court of India, has also recognized two more

grounds of judicial review which were recognized but not applied by English Courts viz. legitimate expectation and proportionality. The powers to review administrative decisions are usually established by statute, but were originally developed from the royalprerogative writs of English law, such as the writ of mandamus and the writ of certiorari. In certain Common Law jurisdictions, such as India or Pakistan, the power to pass such writs is a Constitutionally guaranteed power. This power is seen as fundamental to the power of judicial review and an aspect of the independent judiciary.

THE ADMINISTRATION OF A TRUST

In connection with the Administration of a Trust, the Trustee has certain:

(i) Duties—Sections 12—20.
(ii) Liabilities—-Sections 23—30.
(iii) Rights—Sections 31—36.
(iv) Powers—Sections 37—45.
(v) Disabilities—Sections 46—54.

Similarly the beneficiary has certain:

(i) Rights—Sections 55—*67.*
(ii) Liabilities—Section 68.

1. Duties of a Trustee Sections 12—20

V (2) Duty to obey directions contained in the Trust.
IV (3) Duty to act impartially between the beneficiaries.
IV (4) Duty to sell Wasting and Reversionary property.
IV (5) Duty in relation to payment of outgoing of Crops and income.
IV (6) Duty to exercise reasonable care.
IV (7) Duty in relation to the Investment of Trust Funds.
IV (8) Duty to pay Trust moneys to the Right Persons.
IV (9) Duty in relation to delegation of Duties and Powers.
IV (10) Duty to act jointly when there are more than one Trustees.
IV (11) Duty not to set up *Jus Tertii*
IV (12) Duty to act gratuitously.
IV (13) Duty not to traffic in Trust Property.
IV (14) Duty to be ready with Accounts.

V. Powers of a Trustee Sections 37—45.

V. The powers of a Trustee

V (1) General Powers of a Trustee.
V (2) Power of Trustees to sell or mortgage the Trust Property.
V (3) Power in relation to conduct of sales.
V (4) Power to give receipts.
V (5) Power to compound and settle disputes.
V (6) Power to allow Maintenance to Infants.
V (7) Power of Trustees to pay Cost of Beneficiary.
V (8) Suspension of the Trustee's Powers by Administrative Action.

VI. Powers of the Beneficiaries

VI (1) Power of a sole beneficiary.
VI (2) Power of one of several beneficiaries.
25. Is a trustee liable for breach of trust by his predecessor? He is not.
26. Is a trustee liable for the breach of trust committed by a Co-trustee?
He is not except in the following cases:
(i) Where he has delivered trust-property to his Co-trustee without seeing to its proper application.
(ii) Where he allows his Co-trustee to receive trust property and fails to *make* due inquiry as to the Co-trustee's dealings therewith or allows him to retain it longer than the circumstances of the case reasonably require.
(iii) Where he becomes aware of a breach by a Co-trustee and conceals it or does not take proper steps to protect the property.
27. Breach of Trust jointly committed by Co-trustees.
What is the liability for each? Is it for the whole? Each is liable for the whole to the beneficiary. There will be a right of contribution from the rest.
28. Liability for Payment by a Trustee to a person who is not the person in whom the beneficiary's interest is not vested.
Trustee is not liable, provided:
(i) He had no notice that the interest had vested in another person.
(ii) That the person to whom payment is made was a person who was entitled to payment.
XIII. Protection to Trustees
(1) General Protection.
XIII (2) Statute of Limitation. Each page contains only the heading and not the details—ed.
XIII (3) Concurrence of or waiver or Release by the Beneficiary.
XIII (4) Protection against acts of Co-Trustees.
XIII (5) Right of contribution and indemnity as between Co-trustees.
XIV. Liability of Third Parties and Beneficiaries.
XIV (1) Liability of Third Parties and Beneficiaries who are parties to a Breach of Trust.
XIV (2) Following Trust Property into the hands of Third Parties.

CONSTRUCTIVE TRUSTS

1. There ar*e fourteen* cases of constructive trusts which are enumerated in the Trust Act.
2. *They fall under five heads:*
   (1) Constructive trusts arising out of transfers—Sections 81, 82,84,85.
   (2) Constructive trusts arising out of unfair advantage gained by one person as against another person—Secs. 85, 88, 89, 90, 93.
   (3) Constructive trusts arising out of contracts made-Secs. 86, 91,92.
   (4) Constructive trusts arising out of a merger of two personalities in one individual—Section 87.
   (5) Constructive trusts arising out of a past trust—Section 83.

(1) Transfer or Bequest of Property

(i) Section 81.

1. In certain cases the transfer or bequest of property imposes an obligation upon the transferee or legatee in the nature of a trust in favour of the owner or his legal representative. Ordinarily the transferee or legatee would take the property absolutely without any such obligation.
2. When can it be held that the transferee or legatee takes it subject to an obligation? He takes it subject to an obligation when there is no intention on the part of the owner to dispose of the beneficial interest in the property to the transferee or legatee.
3. How is intention to be determined?—In the light of the circumstances of the case. It is the circumstances which must be referred to in order to find out the intention of the owner.

(ii) Section 82.

1. The second case where the transfer of property imposes an obligation upon the transferee in the nature of a trust is the case where the transferee is made to one and the consideration is paid by another—in such a case the transferee holds it on trust for the person who paid the consideration. Ordinarily the transferee would be the owner in the eye of the law, the property being conveyed to him by the transferror.
2. This rule that a transferee who has not paid consideration holds it on trust for a person who has paid consideration applies generally except in one case—
3. *Exception:* This rule does not apply where there is an intention on the part of the person who paid the consideration to benefit the transferee.
4. Proof of intention.

(iii) transfer for an illegal purpose. Section 84.

1. Ordinarily when a transfer is for an unlawful purpose the Court will neither enforce the transaction in favour of the transferee nor will it assist the transferror to recover the estate if he has parted with it.
2. But the rule does not apply under *all* circumstances. The rule does apply under certain circumstances.
3. What are the circumstances in which the rule does not apply?
   The circumstances in which the rule does not apply are:
   (i) If the propose is not carried into execution.
   (ii) If the transferror is not as guilty as the transferee.
   (iii) If the effect of permitting the transferee to retain the property might be to defeat the provisions of any law.
4. In these cases the Court will help the transferror and impose upon the transferee an obligation to hold the property for the benefit of the transferror.

Bequest upon trust for an illegal purpose. Section 85.

1. The position in law with regard to transfers for an illegal purpose is on a par with trust for an illegal purpose.

2. That is, a Court will neither enforce the trust in favour of the parties intended to be benefited nor will it assist the settlor to recover the estate if he has parted with it.
3. Section 85 recognises a trust although the purpose is unlawful. This is in contrast with the general principle enunciated in section 4 of the Trust Act and therefore requires some explanation.
4. The general principles governing the rights of the parties to an unlawful trust and the exceptions to those principles may formulate as follows:—
   I. Where a trust is created for an unlawful and fraudulent purpose, the Court will neither enforce the trust in favour of the parties intended to be benefited nor will it assist the settlor to recover the estate (except in one case).
      Q.—Why is a beneficiary not allowed to enforce it?
      A.—Because it would be giving effect to an unlawful purpose.
      Q.—Why is the author not allowed to recover the estate if he has parted with it?
      A.—Because it would be helping him to take advantage of his own fraud.
   II. The one case in which the settlor allowed to recover the property although the trust is for an illegal purpose is the case where the illegal purpose has failed to take effect.
      Q.—Why is this exception made?
      A.—There are two reasons:—
      (i) The purpose being unlawful no trust arose—it being void *ab initio.*
      (ii) The trustee having paid no consideration has no right to retain the beneficial interest in the property which must, therefore, return to the settlor.
   III. The disabilities attaching to the author of an unlawful trust do not apply to his legal representatives—
      Q.—why?
      A.—Because they are not parties to the transactions.
5. The reason why section 85 recognises a trust in favour of legal representatives is because they are innocent parties having nothing to do with the creation of an unlawful trust.

Constructive Trusts arising out of unfair advantage—

1. Section 85.

1. The first case under this head arises where property is bequeathed under a will and the testator during his lifetime wanted to revoke the bequest and he is prevented from revoking it by coercion.
2. Under such circumstances the legatee takes the property not as a beneficial owner thereof but holds it as a trustee for the legal representatives of the testator.
3. The reason is that the legatee has taken unfair advantage by using unfair means. He cannot, therefore, be allowed to retain such an advantage.

II. Section 88

1. The second case arises when any person who is bound to protect the interest of another person by reason of his fiduciary relationship with the latter.
2. *Persons who fall in this category are:*
   (i) Agent and Principal.
   (ii) Partners in a firm.
   (iii) Guardian and ward.
   (iv) Trustee and beneficiary.
   (v) Executor and Legatee.
3. *The section says:*
   (i) That any such person who gains any pecuniary advantage by availing himself of his fiduciary.
   (ii) Enters into any dealings under circumstances in which his own interests are adverse to those of the person whom he is bound to protect and thereby gains for himself a pecuniary advantage
   Then,
   He must hold the advantage so gained for the benefit of the person whose interest he was bound to protect.
4. *Illus.*
   (i) A partner buys land in his own name with funds belonging to his firm. He must hold it for the benefit of the partners.
   (ii) A trustee, retires from his trust in consideration of a bribe paid to him by his Co-trustee. The trustee must hold the sum for the benefit of the trustee.
   (iii) An agent is employed by A to secure a lease from B of a certain property. The agent obtained a lease for himself. The agent must hold it for the benefit of B.
   (iv) A guardian buys up the Encumbrances on his ward's property at an undervalue. He can charge the ward only for the value he has actually paid for the Encumbrances.

III. Section 89

1. The third case arises where advantage is gained at the cost of another person by the exercise of undue influence.
2. This is dealt with in section 89. Section 89 says that such a person must hold the advantage for the benefit of the person who is the victim of such undue influence.
3. *This is subject to two limitations:*
   (i) The advantage must have been gained without consideration or
   (ii) The person must have had notice of the advantage having been gained by undue influence.

IV. Section 90

1. The fourth case arises where advantage is gained by a qualified owner availing himself of his position as such in derogation of the rights of other persons interested in the property.

2. This is dealt with in section 90. Section 90 says that such an advantage shall be held for the benefit of all and not merely for the benefit of the one who secured it.
3. Subject to two conditions— (i) The others must repay their due share of expenses properly incurred for securing such advantage. (ii) The others must bear proportionate part of their liabilities properly contracted for gaining such an advantage.
4. Cases covered are those of cotenants, members of joint family, mortgagee, *etc.*

V. Section 93

1. The fifth case arises where the advantage is gained by a creditor secretly.
2. Such a case generally arises when the creditors accept a composition from a debtor who is unable to pay his debts in full.
3. If it is found that one of the creditors who is a party to the composition has by arrangement with the debtor unknown to the other creditors gains better terms for himself he shall not be entitled to retain the advantage gained by him by reason of such better terms which have caused prejudice to other creditors.
4. The law will regard him as a trustee for the other creditors in so far as the advantage gained by him is concerned.

Constructive Trusts Arising out of Contracts

I. Section 86

1. The first case dealt with by the Trust Act under this head relates to a contract for the transfer of property.
2. It falls under section 86. Section 86 refers to a contract in pursuance of which property is transferred and where the contract is of such a character that— (i) It is liable to recession or (ii) It is induced by fraud or mistake.
3. The transferee of the property under such a contract shall hold the property for the benefit of the transferror.
4. This obligation arises only under certain circumstances and is not absolute:
   (i) The obligation arises only on receiving notice from the transferror that the contract is liable to recession or that it has been induced by fraud or mistake.
   (ii) The obligation will be enforced only on repayment by the transferror of the consideration actually paid by the transferee.

II. Section 91

1. Acquiring property with notice that is subject to a contract with another person.
2. In such a case the person who acquires the property must hold it for the person who had contractual rights in it.
3. This obligation is limited in its extent. It is enforced only to the extent necessary to give effect to the contract.

4. This obligation does not arise in the case of every acquisition of property which is subject to a contract. It applies only in the case of a contract which could be specifically enforced.
    1. Property bought for being held on trust for certain persons.
    2. A contracts to buy property from B and represents to B that the purpose of buying it is to hold the property on trust for C. B believing in the representation of A sells the property to A.
    3. A must hold the property for the benefit of C.
    4. This obligation is also limited in its extent—It is enforced only to the extent necessary to give effect to the contract.
    5. The contract may be to hold part of the property in trust for C. In that case the obligation will be enforced only to the extent of the property.

Constructive Trust Arising out of Merger of Two Personalities in one Individual.

1. Section 87

1. This provides for the case of double personality —one man but two persons.
2. Every contract, debt, obligation or assignment requires two persons.
3. But these two persons may be the same human being.
4. In all such cases, were it not for the recognition of double personality, the obligation or Encumbrance would be destroyed by merger.
5. Because no man can in his own right be under any obligation to himself; or own any Encumbrance over his property.
6. But with the recognition of the double personality this is possible.
7. In fact this is necessary.
8. *Illustration*— Debtor becoming executor. Executor is the owner in the eye of the law. Merger. Extinction of debt.
9. Section says no.

CONSTITUTIONAL AND ADMINISTRATIVE LAW

Constitutional and administrative law comprises the fundamental legal principles and frameworks that govern the structure, powers, and functions of government institutions, as well as the rights and obligations of individuals within the state. Constitutional law pertains to the interpretation and application of a nation's constitution, which serves as the supreme legal authority and establishes the framework for the exercise of governmental powers. It delineates the separation of powers between different branches of government, such as the legislature, executive, and judiciary, and enshrines fundamental rights and freedoms of citizens. Administrative law, on the other hand, focuses on the rules and regulations governing the activities of administrative agencies and bodies tasked with implementing and enforcing laws. It ensures that governmental actions are lawful, fair, and accountable by providing mechanisms for judicial review and oversight of administrative decisions. Administrative law also encompasses principles of procedural fairness, such as the right to a fair hearing and access to judicial remedies. Through the interplay of constitutional and administrative law, legal systems seek to achieve a delicate balance between the need for effective governance and the protection of individual liberties. This balance is essential for upholding the rule of law, promoting democratic principles, and safeguarding the rights and freedoms of citizens within society. Constitutional and administrative law thus play a critical role in shaping the relationship between government and governed, ensuring that governmental powers are exercised responsibly and in accordance with legal and constitutional principles. In this book, we delve into the dynamic relationship between constitutional frameworks and administrative regulations, offering insights into the foundations and functioning of modern legal systems.

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