Azim Premji University

Reviewing the republic

Reflections on the Constitution of India

by **Dr CK Mathew**

with a foreword
by **Anurag Behar**

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Dr CK Mathew
Former Chief Secretary, Rajasthan
Visiting Professor, Azim Premji University

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CEO, Azim Premji Foundation

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Dr CK Mathew IAS (retd)

Former Chief Secretary, Rajasthan

Visiting Professor, Azim Premji University

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Table of Contents

Foreword

Why another book on the Constitution? There are several reasons.

Our Constitution continues to be not understood or mis-understood, so one more good book about the Constitution is certainly helpful.

A book like this which comprehensively covers the Constitution – its matters, purposes, philosophy, and history – is even more useful. But the third reason is perhaps the most compelling one.

Why is the Mahabharata told and re-told, interpreted and re-interpreted, in part and in whole, and this just goes on? This treasure of human civilization is such rich material for everything that is human that almost every such telling is worthwhile. Each new teller presents it from their perspective, which discovers and communicates meanings which are new or particularly relevant. The Constitution on this count is like the Mahabharat. The telling and re-telling of it provides new meaning and relevance because of the perspective of the teller. And it is because of this reason that this book is really special.

As we know, the real task is to bring our Constitution to life. Because perhaps the most important parts of the Constitution are indeed promises and commitments that must be fulfilled. Once fulfilled we do not have the guarantee that they remain so, often requiring continuous effort and struggle.

Dr. C.K. Mathew has been a true implementor of the Constitution as a civil servant and hence, naturally an interpreter of the Constitution. Through his stellar career, he has tried to bring to life the promises and vision of our Constitution for the average Indian -- in the messy reality of our country.

It is this effort and struggle that runs through this book. Much like the insights in his book *"The historical evolution of the District Officer"*, which was an eye opener and brought out very clearly the importance of the role of the District Collector in India.

He writes like the scholar that he also is, while the imagination, emphasis, and issues, arise from his deep experience in dealing with the most complex of matters on the ground, which he did for 35 years from when he was a District Collector to being the Chief Secretary of Rajasthan.

I find his perspective invaluable. For each Indian, the meaning of the Constitution is in the way that it enables their life. Someone who has grappled with this for over three decades can communicate nuances, which most of us won't even notice. So, whether you have read scores of books on the Constitution or read none, I would strongly urge you to read this one.

Many of us have had the privilege of observing and working with Dr. Mathew and he has been an inspiration – with his work ethic, humility, and wisdom. I look forward to his next book!

Anurag Behar
CEO, Azim Premji Foundation
15 August 2023

Author's Note

The germ of the idea to write this book on the Constitution of India grew when, in interactions with students at the University, I got the impression that their understanding of this vital document, the foundation of our country's identity and polity, is not as sound or comprehensive as it should be. These students, while learning prodigious quantities of subjects and concepts from their classroom syllabi and the new curriculum framework, seem to place little significance on the century-long efforts the country undertook before the Constitution was adopted in 1950.

Thus, the chapters in this volume are intended for the average student or the interested reader, eager to know something more about the Constitution of India. Admittedly these chapters are more descriptive than analytical, more explanatory than interrogative. However, I believe that this volume may help the uninitiated to gain a more detailed appreciation of the Constitution of India, in its antecedents and its processes, than can normally be accessible in the many books available on the subject. Indeed, the story of the writing of the Constitution begins not with the formation of the Constituent Assembly in 1946, but a century earlier when the first attempts to formulate a document spelling out the aspirations of the people of the sub-continent were prepared. A spate of other documents followed in the years thereafter. An analysis of these various and diverse documents, numbering more than two dozen in number, is included in this compendium. Another chapter is on the complex processes of the actual writing of the Constitution through the efforts of a large number of committees and sub-committees.

A substantial part of the book pertains to issues that relate to Fundamental Rights, the Directive Principles of State Policy, the nature of the Legislature, the Executive, and the Judiciary as well as the special provisions in the Constitution that protect the disadvantaged sections of society as well as minority communities. Two chapters deal with specific amendments made to the Constitution; namely, the 42nd amendment that a beleaguered Smt Gandhi pushed through during the heydays of the Emergency, and the 73rd and 74th amendments that ushered in rural and urban local bodies

into the framework of the Constitution in the form of grass root level institutions promising to bring power to the people. A brief description of these chapters hereunder will help the reader understand the nature and character of this compendium and will assist her/him in choosing those that are of special interest to him for deeper reading.

This compendium begins with an introductory chapter (Chapter I) expounding on some of the main philosophical underpinnings of the Constitution. The international sources of inspiration for our Constitution have been mentioned as well as the main principles that differentiate it from the constitutions of other countries.

This is followed by the second of the chapters (Chapter II), mainly focusing on the Preamble. This chapter attempts to connect the ideas of three lofty concepts, a philosophical triad, that has enriched our understanding of the nature of the Indian Republic. At the apex stands the Preamble to the Constitution of India, encapsulating the aspirations of the people of our nation, further articulated in the contents of the 395 articles of the Constitution. At one end of this triangle are the deliberations of the Constituent Assembly, that august body, which debated from December 1946 to November 1949 and laid the foundations of the unique political and social identity that India has today. At the other end, are the pronouncements of the Supreme Court, which from time to time, have deliberated upon the intent of the Constitution and have often rendered nuanced and layered interpretations. These judgments have shown us the way ahead when the road was dark and uncertain. Undoubtedly, it has assisted in the ongoing creation of a just society based on human values and social justice. The interplay between these three grand concepts has helped create 'the idea of India', never inflexible, but constantly mutating in a fast-changing world, urging us to shed old prejudices and create new paradigms, while also enabling the creation of a just and righteous national order which will stand rock steady in a fast-growing modern world.

Chapter III looks at the federal nature of our polity, and the relations between the Centre and the States. Initial discussions had favoured a nominal Centre with most of the powers and responsibilities to be discharged by the States. Fast-moving political changes and the breaking away of Pakistan radically altered this view. Consensus soon veered down to the requirement of a strong Centre with States performing delineated duties and responsibilities as demarcated between the Union List, the

Concurrent List, and the State List. The dominant role of the Centre in critical times such as emergencies or the breakdown of the constitutional machinery, was unambiguously laid out in the relevant Articles of the Constitution. The recent catchword of 'cooperative federalism', especially in the light of the dispensation of the latest Finance Commission and other bodies, has been elaborated upon, including certain disparities seen between State and State in terms of development parameters.

Chapter IV takes a close look at Part III of the Constitution of India and examines the nature and character of the Fundamental Rights that have been assured to the people of India as envisaged by the founding fathers of our Republic. The historical developments leading to the Constitution in general and the Rights, in particular, can be traced here. It studies the intellectual and philosophical inputs that had gone into their making, elicited from other countries who went through the same questions and also traces some of the significant debates that transpired in the Constituent Assembly. The chapter then proceeds to analyze each of these Fundamental Rights in the context of some of the most important judgments pronounced by the Supreme Court, the guardian of these rights. The enlargement of these rights, as modern understanding improved on the universality of these attributes, has also been explored in the chapter. Some of the path-breaking judgments that expanded the right to privacy and protected personal behaviour and life choices have also been touched upon.

Chapter V examines the complementary subject of **t**he Directive Principles of State Policy, included in Part IV of the Constitution of India, which forms one of the key pillars of governance on which our Republic rests. These fifteen constitutional Articles list out the aspirational goals of our country, and though they are admittedly not enforceable in a court of law, yet they provide the vital and imperative structure of the socio-economic polity of our nation. This chapter discusses the origins and sources of these principles and their evolution into guiding doctrines of strength and compassion, that continue to inform our nation to this day. The conflict between the Directive Principles of Part IV and the Fundamental Rights of Part III is an interesting debate that has been examined in some detail, as we follow the transformation of these same principles into entitlements that can be demanded by the people, and which are sought to be delivered by the government. Each of the Directive Principles has also been examined in light of the myriad judgments delivered by the Supreme Court on them.

The Supreme Court has had a major role to play in the interpretation of the critical position of Directive Principles vis-à-vis the Fundamental Rights and has often constructively interpreted their provisions in a manner that has helped to bring about clarity in concept and implementation. The relevance of these Principles to the welfare and betterment of the people of India cannot be over-emphasized; they are of eternal value, especially to the poor and the disadvantaged. The article attempts to give both an overview of the evolution of the Principles as they were being debated in the Constituent Assembly, as well as their current significance in the ongoing task of nation-building.

Chapters VI, VII, and VIII that follow look at the three arms of the government: the Legislature, the Judiciary, and the Executive. These discussions have been central to the formulation of concepts of ideal forms of governance for any country. The nature of the distribution and separation of powers between these three arms and their inter se checks and balances are essential for an understanding of the fundamentals of any governance model. Much ink and breath have been expended on the subject. Yet, the nuances in the roles and functions of the three arms at National and State levels of governance, have often led to imbalances arising out of the basic misunderstanding of the respective roles and functions of each.

In the first of these three chapters, Chapter VI goes into a description of the constitutional provisions related to the Legislature, both at the Union level and the level of the States. Each of the Articles of the Constitution, dealing first with the Union Legislature, and thereafter with the Legislatures of the State, are examined here, both in the context of certain selected references to the discussions in the Constituent Assembly, as well as the aspirations of the people. At the same time, they are constantly elaborated upon by the nature of the Supreme Court's interpretative pronouncements on them. Special mention is also made to the matter of reservation of seats in the House of the People at the level of the Parliament and in the State legislative assemblies for the Scheduled Castes and Tribes. The role of the legislature in framing laws for the Nation and the States and the areas of their law-making powers are mentioned here. The process followed regarding financial bills and money bills are also mentioned, and the role of the President (at the Union level) and the Governor (at the level of the States) have been described in this chapter. Some of the issues faced by the President and the Governors of the States in the formation of popular governments after elections are also referred to here.

Chapter VII looks at the Judiciary. Intensive discussions had taken place in the Constituent Assembly while determining the structure and form of our judicial system. Eminent minds contributed to the churning process involved in finalizing these fundamental aspects of the Judiciary. It is a fact that we inherited from the British much of their colonial judicial structure, which we have continued to use, with some radical changes, in the Republic that we became in 1950. We examine the thoughts and ideas that had moved the members of the Constituent Assembly and how they sought to ensure the independence of the Judiciary from Executive or legislative overreach. We examine too the various Articles of the Constitution covering the Supreme Court, the High Court, and the Subordinate courts.

Similarly, in the next in the series, Chapter VIII looks at the Executive. The Constituent Assembly was justifiably apprehensive of the kind of administrative system that the British had employed in their reign over their subject country. There was much discussion as to the kind of system through which a free country would be administered. The choices they studied included the American model based on the presidential form of government and the British model with its hereditary monarchy, suitably modified to suit the Indian political ethos. That the country would be federal in nature was generally agreed upon, with a clear articulation about the set of duties and responsibilities assigned to the Union government and the parallel set that the States would have to fulfil. There was also a listing of subjects where both Union and States would have concurrent responsibility. This took the shape of the Union List, the State List, and the Concurrent List. The role of the President, as the chief executive of the Union, was deliberated upon in much detail, and ultimately it was decided that he would have to abide by the advice tendered to him by the Council of Ministers. Through discussion, and despite opposition, it was decided that the Union would have primacy over the States in certain situations such as emergencies or the failure of the constitutional machinery in the States. This chapter lists the key players who participated in these significant debates in the Constituent Assembly and how the resolution of these important issues was arrived at. The form and structure of the Executive as it stands in the Constitution today has so far stood the test of time over these past seven decades.

Chapter IX is on the sensitive issue of special provisions in the Constitution. While the Constitution is egalitarian and equally applicable to all the citizens of India, it also provides, given complex social reasons that necessitate a differential treatment, some special provisions relating to certain classes, castes, and tribes. Some of these special provisions are concerning social groups who for long had faced discrimination and exclusion. The special provisions in the Constitution provide for a series of affirmative action: they have been hotly debated and from time to time, condemned as well as praised, and have been created to enable model legislations for the better development and social integration of the underprivileged sections of society. These provisions include reservation of seats in the legislative houses at the Centre and State levels and employment in public service. Certain other special provisions in the Constitution deal with religious minorities and take care to ensure the protection of their religious and other rights. Yet again, some other articles relate to geographical or demographical, or political circumstances that may have isolated those areas from the rest of the country or created particular conditions of life over a long period of history, that necessitated a differential treatment. An examination of the articles of the Constitution dealing with these complex issues is essential for a fuller understanding of the thought processes that went into the formulation of these special provisions.

Taxation, trade, and commerce, as they figure in Part XII and XIII of the Constitution of India, constitute the subject of Chapter X. They have enabled the foundation of the trade and commercial activities that the country has engaged in during the past three-quarters of a century. It is essential to point out they lie under the protection of the fundamental right enshrined in Article 19 (1) (g) which guarantees to all the citizens of the country the right to practice any profession or to carry on any occupation, trade, or business. In more ways than obvious, these two parts of the Constitution have helped the country's economy grow exponentially in strength and size enabling it to occupy a significant place in the international market.

The next two chapters look at three specific Constitutional Amendment Acts. Chapter XI deals with the 42nd Amendment which had wreaked much damage to the fabric of the country's governance system. In the summer of 1975, Smt Indira Gandhi declared an Emergency in the country and proceeded to run a government, where basic Fundamental Rights were

suspended, and Parliamentary sovereignty was attempted to be enforced at the cost of the diminution of the Judiciary. In the 21 turbulent months that followed, the 42nd Amendment was brought to the Parliament in these turbulent days, made sweeping changes to 59 articles of the Constitution altering its very basic nature, reducing the authority of the Judiciary, and empowering the Union Government to take unilateral action, while keeping the States in subordination. This chapter examines the reasons behind the introduction of the Amendment Bill, the various provisions intended to strengthen central rule, the suspension of Fundamental Rights and civil liberties, and the deliberate attempt to incapacitate the Judiciary. When general elections were suddenly announced in early 1977, it surprised the opposition parties. When the results were known, it also surprised the government as Mrs Gandhi was roundly defeated and the new Janata Party was sworn into power. In the months that followed, attempts were made to rescind all the changes that had taken place in the Constitution. Some of these attempts succeeded, but others failed, mainly because the new Government was in a minority in the Rajya Sabha where the Congress still had dominance. Yet, many changes were brought in by successive Amendment Bills which removed some of the major distortions. Many clauses, however, remain.

Chapter XII discusses the 73rd & 74th Constitutional Amendment Acts which altered the existing governmental hierarchy, while including the Panchayat Raj and municipal-level institutions as constitutional bodies. The extent of the success of these new constitutional bodies has been examined critically, especially considering the criticism that they have not delivered the expected results.

Two additional chapters will form reference material for more exacting students of the Constitution. The first of them, Chapter XIII, describes the legislative activities that took place in the ninety years between the First War of Independence in 1857 and the final attainment of freedom from British colonial rule in 1947. The chapter deliberately avoids the narration of political struggles that were launched during this period, especially the period after the 1920s. More significantly, also mentioned and examined in this chapter are the almost two dozen aspirational and constitutional documents, each one of them being antecedents to our Constitution, articulating the desires and ambitions of Indians to see their country as a self-governing nation. It also focuses on the reciprocal legislative and statutory measures that were conceded by the British Government during

this period as the justification and requirement of the Empire faded away. The British Crown had no option but to slowly relax the iron grip it had initially exerted on the people of the country, first in retaliation for the Rebellion and later in the tenor and extent of its administration over a complex land. As the freedom movement gained strength, the need for keeping and nurturing the jewel in the crown during the two great World Wars became an indisputable necessity. Concessions had to be made to an adversarial people to ensure loyalty to the Allied forces. These measures had already begun with the Government of India Act of 1858, followed by the three Indian Council Acts, the Government of India Act of 1935 as well as the Indian Independence Act of 1947. These largely took the form of promulgation of consecutive Acts of Parliament. With each enactment, the Raj conceded more space to the Indian leadership, until by the close of the Second World War it became impossible to continue the myth of the Empire. This chapter traces the history of these legislative enactments and constitutional processes that finally ended with the grant of full freedom in 1947.

The last of the chapters in this volume, Chapter XIV, deals with the thought processes that went into the discussions of the Constituent Assembly, urged on by the Cabinet Mission, and the indirect elections that were held for the selection of the members that would constitute the Assembly. The need for a separate Constitution for the fledgling country had been expressed for many years. Starting from 1946 and stirred by the lofty aspirations of the Objectives Resolution of Jawaharlal Nehru, the members of the Assembly held long and often contentious debates to arrive at a near consensus on all issues. The towering personalities of other stalwarts such as Ambedkar, Sardar Patel, and Rajendra Prasad, along with legal luminaries and down-to-earth representatives of the legislative assemblies, shepherded the debates to the final draft that has held us in good stead all these decades. The manner in which the many committees and sub-committees were constituted, and the highlights of their debates have also been mentioned in this chapter. Some divisive issues also find mentioned here such as reservation for the backward communities, the protection to be given to the minorities, the official language debates, the nature of state and federal relations, the dominant powers of the Central government, etc.

In known and unknown ways, the Constitution of India has had a significant role to play in the lives of the people of the country. As concepts of individual freedom, privacy, rights and responsibilities, social justice, and economic development, grow and flourish from time to time, we are all affected, in some way or the other by the expansive articles of the Constitution. They have an ever-present significance in our lives. What this volume attempts to do is to describe and present to the general readership the many complex and significant aspects of the document that impinge on the lives of ordinary men and women of the country. It is hoped that this compendium will help the student of India to arrive at a better understanding of this great country as it moves forward to claim its destiny.

Dr CK Mathew

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About the Author

Dr CK Mathew is currently Visiting Professor at Azim Premji University, Bangalore. He is a retired IAS officer from the 1977 batch of Rajasthan cadre. He was Chief Secretary of the State in 2012 and 2013 before which he had worked in several assignments including that of Principal Secretary to the Chief Minister of Rajasthan and Addl. Chief Secretary in the Finance Department. Post-retirement, he worked as a Senior Fellow in the Public Affairs Centre, Bangalore where he developed an index for the measurement of the quality of governance in the states of India, known as the Public Affairs Index. He was also Special Rapporteur for the southern states under the National Human Rights Commission. He is currently also a member of the Working Committee of the Malankara Orthodox Syrian Church.

He holds a doctorate in English Literature and has written two novels as well as two non-fiction books, the latest of which was published by the Azim Premji University, 'The Historical Evolution of the District Officer'. It is accessible at https://cdn.azimpremjiuniversity.edu.in/apuc3/media/publications/downloads/evolution_DC_CK-Mathew.f1626688987.pdf

Dr. Mathew lives in Bangalore and can be reached at
mathew.ck@apu.edu.in

Chapter I:

An Introduction to the Constitution of India, 1950

Some thoughts on the Constitution: The Indian Constitution is one of the bulkiest in the world. We know that it has been amended over a hundred times in the last three-quarters of a century; this fact alone, as pointed out in many interpretations, makes it both admired and castigated. And to think that such a constitution owes its primary inspiration to the English Constitution, which in its unwritten form is but a concept and an idea is even more significant and noteworthy. Having been ruled as a colony by a British corporate entity and then by the British Raj, there can be no doubt that many of the modern structures and instruments of Indian governance owe much to the formats and templates of administration that the foreign conquerors left behind. Many of them find a place in our Constitution. We shall shortly see the sources from where some of the basic ideas underlying our Constitution have been taken.

The three hundred men and women who gathered in 1946 to form the Constituent Assembly were assigned the complex task of framing the Constitution of India. They were keenly aware and naturally apprehensive of the nature of the task at hand. The document they delivered is the world's longest constitution and remains a matter of much debate and discussion in this, world's largest democracy. It is a unique document that lays down the structure of our polity, while also establishing our institutions such as the Parliament and the Supreme Court, and fleshing out the role of its main players, from the President to the Prime Minister, the elected representatives of the people, the justices of the courts and the members of the executive spread in offices across the country. Stalwarts such as Nehru and Azad and Patel and Rajendra Prasad steered the deliberations through the rough waters of debate and discussion under the able penmanship of Ambedkar. The name of the constitutional advisor BN Rau cannot be ignored: his awareness of western constitutional antecedents

and skill in drafting find their place in every article of the document. The final text, as approved in the Constituent Assembly in November 1949, and then adopted in January 1950, had already gone through some 2500 amendments, and featured 395 articles and twelve schedules.

The preliminary question we have to ask is why we need a Constitution at all. One of the earliest definitions of a constitution was suggested by Aristotle who wrote that "the constitution (*politeia*) is a way of organizing the offices of the city-state, particularly the sovereign office.[i] In the context of our country, it has been argued that in the writing of the Constitution, "India was finding a way to resolve major substantive debates and disputes over norms and values."[ii] Its strength was that it gave a framework for common institutional life, despite disagreements on particular issues. At the same time, it would not be bound by any particular tradition; "it would reflect and be in the service of a global conversation on law and values."[iii] For this, the Indian nationalist struggle must get due credit. It was never a revolutionary movement, eschewing violence even in the most difficult of circumstances. Throughout our history, constitutionalism has been the mainstay of the freedom struggle. In another chapter in this volume, we can see that there were over two dozen earlier documents - legislative and constitutional antecedents - that step by step, took the country towards freedom and the creation of a Republic based on a written constitution. It is also remarkable, that the Dalits of our country, who have sufficient reason to resent the structural violence and discrimination of Indian history, have also embraced the constitutional structure of our polity.

Ambedkar's speech of 4 November 1948 in the Constituent Assembly raises the theory of 'constitutional morality', as expounded by George Grote (1794-1871), the English political radical and classical historian. Ambedkar quoted him in his address, while describing constitutional morality as "a paramount reverence for the forms of the constitution, enforcing obedience to authority and acting under and within these norms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts, combined too, with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest, that the forms of the constitution will not be less sacred in the eyes of his opponents than his own."[iv]

At the heart of this theory was the argument of self-restraint, to turn to constitutional methods for the resolution of claims, rather than resort

to revolution. In any given polity, the key challenge is the arbitration of differences, without resorting to disruptive political action. This in turn means the respect for plurality, a fundamental aspect of our Constitution that requires reiteration from time to time. A related aspect is an idea that no singular claim to represent the will of the people can be accepted without scepticism. This is closely related to the concept that the chief aim of constitutional morality was to prevent any branch of government from declaring that it could uniquely represent the people.[v]

This leads to the question of the need to restrict the exercise of power. Constitutions provide the basic rules and thus prevent states from turning towards tyranny. We also need constitutions to check the tyranny of a majoritarian democratic state and to give us laws to protect not only individuals but also minority groups. Further, the framework of law culled from years of collective experience and wisdom, prevents people from succumbing to fashionable whim, fancies, and popular passion. Finally, the Constitution provides us with a peaceful, democratic means with which to bring about profound social transformation. The demand for a Constituent Assembly was to engender the first real exercise for self-determination, without external interference. It was created by a body of people that reflected "a nation on the move, throwing away the shell of its past political and possibly social structure, and fashioning for itself a new garment of its own making".[vi]

That is why, as we take up this examination of the Indian constitution as a beacon that has lit up the political and social landscape of the country, we must necessarily go back to the early ingredients that have been borrowed from earlier avatars and models, of political ideas and ideals that have shaped how it was conceived and translated into a living document, reflecting the aspirations of a newly liberated population.

The antecedents of a Constitution: The name of Walter Bagehot comes readily to the mind as we explore the modern beginnings of intellectual thought that have inspired the heart of our constitution. His classic *The English Constitution*,[vii] originally written as a series of articles in the *Fortnightly Review* in 1867, (within a few years after the British Raj had taken over the reins of administration of the country), grew into a popular and definitive book that analyses the monarchy and the role of the prime minister and cabinet, even while making comparisons with the French government as well as the American presidential system. He is

best remembered for his contention that the British cabinet, accountable to parliament, presents the harmonious balance between the sovereign, the Lords, and the Commons and that it demonstrates the separation of powers between, Legislature, Judiciary, and Executive. He is also known for his articulation of the role of the monarch, not as the working head of the state, but as a dignified symbol of ceremonious authority, more likely to be revered and obeyed than the professional politicians who run the government. The cabinet was all-powerful, but also accountable to the crown; it was the 'hyphen' or 'buckle' combining the authority of the Crown (as the Ministers were appointed by the Crown) with the legislative functions of the parliament.

Bagehot welcomed the fact that the Ministers were Members of Parliament (MPs), who headed departments and worked along with faceless bureaucrats, as was the case in the American system. Their collective responsibility meant that they had to show a united face to the Parliament. With a foot in both camps – executive and legislative – the cabinet depended on the House of Commons for its continuance for its allotted term; yet it could also dissolve the Commons if it was willful or misused its responsibility. Cabinet government was also good government because it was deliberative and discursive; this was not possible within the Commons itself as it was more concerned with the demands of the constituencies.

Bagehot appreciated the role of the modern British monarch, which deflected ordinary people's attention from the workings of the government. The monarch was also a crucial figure in moments of crisis, as a permanent source of authority, even as the popular government was being made, unmade, and remade. So too the House of Lords had a significant role to play as a revising chamber, for the Commons was usually too busy and self-important to give legislation the attention it demanded. [viii]

Much of the description above is particularly pertinent in the context of the Indian Constitution. The monarch has been replaced by a president, selected through indirect elections by the House of the People and the Council of the States on the formula of the single transferable vote. In our Constitution, the attempt has been to present the President of the Republic of India as the 'dignified part', covered in ceremony and presenting its imposing self, working in tandem with the 'efficient part', the cabinet engaged with the actual task of governance which has to be down-to-earth and modern. In most other attributes too, there is much similarity. The

Lords and the Commons are replaced in the Indian House of the People and the Council of the States. It is the President who appoints the government, and the Prime Minister and the Ministers, who aid and assist him in the business of the government.

There have been arguments made that the volumes written on the Indian Constitution after its proclamation in 1950, do not address the moral and conceptual underpinnings of that magnificent document, while also not showing sufficient interest in the possible meanings, or detailed analysis, of terms such as 'rights', citizenship' 'democracy' etc. Perhaps no current work grasps fully the structure of ideals embedded in the Constitution. Further, the Constitution today is rarely read in light of the nuanced discussions that were held in the Constituent Assembly.[ix] During those hectic days leading up to Independence and even after when the Constitution was declared, there were broadly speaking, five competing visions: the social democratic vision of Nehru, the liberal democratic Ambedkar view, the non-modernist quasi-communitarian vision of Gandhi, the radical and egalitarian vision of the left as espoused by KT Shah; and the last, what we may now call as the Hindutva ideology.[x] Yet we may term the Indian Constitution as a statement of national identity: it is self-determined and belongs to the people. It also reflects a civilisation and a nation-state, embodying ancient cultural values as well as the progressive aspirations of modern people. The Constitution is committed to principles of Justice, Liberty, Equality, Fraternity, and the dignity of the individual. Secularism too is part of this identity. For a fuller understanding of what the Constitution means to the average Indian, we need to explore its multiple meanings and appreciate its intent.

The Supreme Court and the Constitutional Trinity: In the evolution of the Constitution, we cannot ignore the role played by the Supreme Court which articulated the transformative vision of the Indian Constitution. As Bhatia[xi] puts it, the constitutional trinity of Liberty, Equality, and Fraternity, resonating from the days of the French Revolution, distils the very heart and soul of our Constitution, the three mutually reinforcing pillars upon which the edifice of the Constitution is erected. Each can be understood only in the context of the other two. While Liberty is simple enough in its classical sense, its fruits can be guaranteed only if the state commits itself to equality of status. This is so especially in a context where the laws themselves supported discriminatory and unequal treatment. Thus, we have the 'Equality Code' contained within Articles 14 to 18 of the Constitution. Yet, they would not suffice in a country where community

sanctions, and social and economic boycotts, were widely used to discipline and punish. Thus, Ambedkar visualized fraternity as the bridge to make liberty and equality become the natural course of things. To him, it was the principle of fraternity that would reject forms of domination and break down hierarchical social relations. It would "liberate and equalize the individual, not from or concerning the state, but with respect to her community, her family, and her workplace, so that the guarantees of liberty and equality meant something more than a rope of sand."[xii]

There are three sets of cases that together try to make this vision a practical reality. The first set speaks of the Equality Code (Articles 14 to 16) in matters related to gender equality, the decriminalisation of sexual orientation, the justification of affirmative action, and reservation in employment and democratic representation. The merely formal notions of equality are made substantive through these sets of judgments. The second set deals with the question of fraternity and examines the question of economic exclusion, social boycotts, religious ex-communication, and workplace exploitation. They revolve around Articles 15 (2), 17, and 23. They recognize the role of private authorities that dominate individuals and block their access to sustain a dignified life. The last set of cases centre around the Liberty Code (Articles 19 to 22) and interrogate issues related to oppressive structures that threaten individual freedom, how core civil liberties can be suffocated by claims of public welfare such as the Emergency, and how the Constitution stands between the individual and the state in its most violent avatars.

It would be to delve into the thoughts that Bhatia has elaborated. Gautam Bhatia's *The Transformative Constitution: A Radical Biography in Nine Acts,*[xiii] regards the Constitution, as we have just seen, under the three heads of Equality, Fraternity, and Liberty, with each section highlighting three significant judicial pronouncements. The main burden of the book is to demonstrate how the far-reaching articles of the Constitution influenced judicial thinking, leading to several pathbreaking pronouncements that set the way for the future growth of the country. It is in this manner that the Constitution can be termed as truly transformative. For example, the part dealing with Equality closely examines the issues of sex discrimination in the light of the Anuj Garg judgment, which had turned down the ban imposed by the State on women's employment in the liquor industry because it was necessary to ensure the safety of women. "No law in its ultimate effect should end up perpetuating the oppression of women."[xiv]

Similarly, the judgment of the Apex Court in the Naz Foundation case[xv], which decriminalized homosexuality, by raising the question that "the roots of inequality and discrimination lie in the denial of full inclusiveness within the polity and in the undermining of human dignity." Unfortunately, the judgment was snuffed out by the Supreme Court in its reversal of the Delhi High Court decision. It took another ten years for it to be re-established in the Navtej Singh Johar case, [xvi] which finally struck down Section 377 of the Indian Penal Code stating that "Section 377 affects the private sphere of the lives of LGBT persons. It takes away the decisional autonomy of LGBT persons to make choices consistent with their sexual orientation, which would further a dignified existence and a meaningful life as a full person. Section 377 prohibits LGBT persons from expressing their sexual orientation and engaging in sexual conduct in private, a decision which inheres in the most intimate spaces of one's existence." The third judgment that elucidates the principle of equality referred to in the book is that of NM Thomas[xvii], referring to the contradiction between Article 16 (1) which guarantees equality of opportunity in matters relating to employment while Article 16 (4) empowers the state to make reservations for backward classes of citizens. It was the NM Thomas case that grasped the insight that the access to the chances offered by life corresponds in large measure to the membership of the individual in different communities. It was perhaps the first judgment to articulate the role of Part IV of the Constitution, i.e., the Directive Principles of State Policy, as a system of framework values that give life to the abstract concepts outlined in the Fundamental Rights chapter.

The second set of issues raised by Bhatia refers to Fraternity. The first of the three judgments he quotes is that of the Indian Medical Association (IMA). The question in the IMA case was whether a private, non-minority higher educational institution, that admitted students only based on their score in an entrance test, violated Article 15 (2) and in extension, the Consumer Protection Act, 1986. Article 15 (2) is the centre of the judgment which states that no citizen shall be subject to any restriction in access to shops, public restaurants, etc., only on grounds of religion, race, caste, sex, or place of birth. The court held that educational institutions were covered by the term 'shop'. The transformative nature of this judgment was that whereas traditionally civil liberties were exercisable vertically (individuals against the state), it clarified that even within the private sphere, there was a need to regulate the inequalities of power and reduce disparities.

Another case referred to is the Saifuddin judgment[xviii], in which the Court struck down the Bombay Prevention of Excommunication Act, 1949, which outlawed the practice of ex-communication within religious communities and protected the right of religious heads to act against errant followers. The judgment stipulates that the State and the Court must respect the integrity of religious groups, except where the practices in question lead to the exclusion of individuals from economic, social, or cultural life that impairs their dignity or hampers their access to basic goods. The third case is that of the People's Union for Democratic Rights[xix] in the matter of labour rights, where "the court articulated a vision of freedom that included not just protection from arbitrary interference from the state, or other human beings, but also the concentrated power wielded through human institutions and practices such as the market."[xx]

The third set of issues on the transformative power of the Constitution raised by Bhatia refers to Liberty. The first of the judgments is the Sareetha case[xxi] in which the Apex Court struck down Section 9 of the Hindu Marriage Act because any order granting restitution of conjugal rights would in effect transfer the choice to have or not to have marital intercourse from the concerned individual to the state. It upheld a vision of privacy focused on the body and individual control over the body. The second case in this section relating to Liberty is the Jyoti Chorge case[xxii] in which the Apex Court demonstrated its resolve of judicial resistance and repudiated earlier courts' willingness to uphold and endorse laws that severely curtail civil liberties by citing exceptional circumstances. The third of these cases is the Selvi case[xxiii]. It dealt a challenge to the interrogation methods used by investigation agencies such as the police etc. The Apex Court stated: "The compulsory administration of the impugned tests impedes the subject's right to choose between remaining silent and offering substantive information… subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy." In these circumstances, the due procedure becomes important. The radical insight is that it is weak among us who, far from being dispensable, stand most in need of constitutional sanctuary.

Evolving principles of the Constitution: The purpose of mentioning various judicial pronouncements is that the Constitution stands under constant examination in the light of new tensions and social conflicts that necessitate an interpretation of its provisions. This task has been efficiently carried out over the many preceding decades by the Apex Court

which has been providing essential interpretation and guidance, as well as instructions that have helped the transformation of the economic and social landscape of the country. The constant checks and balances the Court provides help regulate possible arbitrariness in state action and enable the charting of a new path based on social justice and compassion.

The cosmopolitan nature of the Indian Constitution also needs to be mentioned, not only because it adheres to the universal principles of Liberty, Equality, and Fraternity, ignited by the French Revolution as it were, but because it is enriched by the international currents of global constitutional law. It is a compound derived from many sources and traditions. The English Common Law, as institutionalized and practised in India is a major source. The particular sections and clauses of the Government of India Act of 1935 find many echoes in our Constitution. The Directive Principles of State Policy are almost entirely lifted from the Irish constitution. The American debates of due process have also fed into the text of our Constitution. All these influences, however, led to the charge that the Indian Constitution was not Indian in its true sense. This accusation misses the point. Our Constitution, in its inception, and its evolution through interpretation and amendments, has taken its best form through a universalism that transcends nationalism. It is not to be bound by a particular tradition or a particular political contract or a specific economic vision. "It was free to be free to take any tradition and history and make its one's own."[xxiv]

In the early days of the evolution of the new Indian Constitution, two views prevailed about the continuity of constitutionalism in the fledgling country. One is that the new Constitution completely extinguished all vestiges of the arbitrary and capricious system of law that the British colonial government had exercised on the people of the country. This was best expressed by Justice Vivian Bose in the Virendra Singh case of 1955 when he wrote: "In our opinion, the Constitution… blotted out in one magnificent sweep all vestiges of arbitrary and despotic power in the territories of India and over its citizens and lands and prohibited just such acts of arbitrary power as the state now seeks to uphold. The past was obliterated except where expressly preserved; at one moment, the new order was born with its new allegiance springing from the same source for all, grounded on the same basis; the sovereign will of the peoples of India, with no class, no caste, no race, no creed, no distinction, no reservation."[xxv] There was another view too expressed by Justice JC Shah in the Vora Fiddali case a decade later,

when in a concurring opinion pronounced in a slender majority of 4-3, he wrote: "There is no warrant for holding at the stroke of midnight of 25 January 1950 all our pre-existing political institutions ceased to exist, and in the next moment arose a new set of institutions completely unrelated to the past. The Constituent Assembly, which gave form to the new Constitution, functioned for several years under the old regime, and set up the constitutional machinery on the foundations of the earlier political set up…the process was not one of destruction but of evolution." He went on to say that the promulgation of the Constitution was merely a change in the form of the government, a final step in the process of evolution towards self-government, all of which was signified by the continuance of the governmental machinery and the laws of the Dominion.[xxvi] These contradictory statements, of Justice Bose and Justice Shah, represented two divergent views about history and the very meaning of the Constitution of India. The overwhelming view that time and the evolution of constitutional law in independent India has taught us, however, is overwhelmingly in favour of Justice Shah's views of conservatism and continuity.

There is reason to support this stand in the way history has been interpreted. BN Rau, the Constitutional Advisor termed the moment of independence as 'the transference of power'[xxvii] We know that the Constituent Assembly itself owed its existence to the recommendations of the Cabinet Mission Plan of 1946; its members were elected under indirect electoral provisions of the existing colonial legal framework. The new political system itself was based on the Westminster model. The Constitution borrowed considerably from the Government of India Act of 1935, a colonial law of imperial power. It had many provisions that had been once condemned by the freedom movement, such as preventive detention, the power of the political executive to pass ordinances while bypassing the legislative processes, and even the power to suspend the law by the declaration of an Emergency. It is in these conditions that some scholars have commented that freedom was only of secondary importance to the members of the Constituent Assembly; what was of greatest concern to them were the goals of national integration and security, the removal of economic and social barriers, and India's international standing.

This worldview is indeed present in the manner in which the ideals of the Constitution are articulated. Thus, the concepts of Liberty, Equality, and Fraternity, though denied by the British Raj, were indeed based on European and Western ideas of freedom and enlightenment. That they

entered the grammar of our Constitution and gave it its transformative character is of particular importance to enable us to understand the mood of the Constituent Assembly. It entails a broader canvas that includes "the social history of the period preceding the Constitution…the struggles of the people who fought for freedom, the repressive legal structures on whose altars people were sacrificed and their dreams shattered…[and] the aspirations of the people to build a better society for themselves."[xxviii]

The argument that the new Constitution owes much to its colonial past does not hold water as it is not difficult to understand how much of a radical departure it entailed. It is moot to quote Uday Mehta at length in this regard: "Here was a document which granted a universal adult franchise in a country that was overwhelmingly illiterate; where, moreover, the conditionality of acquiring citizenship did not refer to race, caste, religion, or creed…which committed the state to being secular in a land that was by any reckoning deeply religious; which evacuated as a matter of law every form of prescribed social hierarchy under extant conditions marked by a dense plethora of entrenched hierarchies; that granted a raft of fundamental individual rights in the face of a virtually total absence of such rights… [and] most importantly, the Constitution created a federal democracy with all the juridical and political instruments of individual, federal, local and provisional self-governance, where the nearest experience had been of imperial and princely authority."[xxix]

The Transformative Constitution: That is why, as Bhatia has stated, the Constitution is defined as transformative, seeking to repudiate and transform two legacies of injustice: One, the legal relationship between the individual and the state, transforming the subjects of a colonial regime into citizens of a republic. It also replaced the colonial logic of administering a population with the democratic logic of popular sovereignty, public participation, and self-government. Apart from the instruments of universal adult franchise and structures of parliamentary democracy referred to above, the transformation was expressed through the Fundamental Rights that embodied citizenship and made democracy possible: the freedom of speech, expression, association, and conscience; the right to life and personal liberty; and the right to equality before the law. These rights were alien to the Government of India Act of 1935[xxx]. It represented "a tectonic shift in constitutional philosophy".[xxxi]

Two, the Constitution has been transformative in another sense also, seeking a thorough and ongoing reconstruction of the state and society through continuous examination and introspection. The Constitution understood that the State could never be the sole locus of concentrated power. Indian society has always been hierarchical with layers and nuances rarely understood by a foreign mind. Societies were structured by various paradigms of caste and class and often the state was limited in its ability to intervene and correct historical aberrations. These sources of traditional and social practices, including domestic and religious rituals and patterns of behaviour, tended to suppress and distort freedom and equality. The British forms of government had been rather centralised and unitary in practice and could not make much headway in the reform of these nebulous behaviours of society. Thus, the freedom struggle can be interpreted not merely as a revolt against foreign rule, but equally as "a struggle for self-determination against multi-layered oppressive structures"[xxxii].

And this finds expression in the Constitution through its provisions that seek to rectify the societal fractures by protecting the rights of the backward classes and castes, the minorities, and other cultural and social groups. These clear articulations spring from the thoughts of the leaders of the freedom struggle, including Bankim Chandra Chattopadhyay's treatise *Samya* on equality, the voices of women in the controversies regarding child marriage and the suffrage movement, the writings of Ambedkar in his *Annihilation of Caste* and Gandhiji's uncompromising defence of free speech, even revolutionary speech. Even beyond the nationalist movement, there was inspiration gained from the Bhakti movement, from Jyotirao Phule's critique of caste and the advocacy of women's rights, from Tarabhai Shinde's critique of gender relations, etc. "For more than a hundred years, in their struggle against alien colonial rule, and against indigenous social and economic domination, Indians imagined, conceptualized, and articulated a vocabulary of rights, of equality and freedom, and dignity, a vocabulary rooted in the lifeworld of India. We do that struggle a disservice if we erase it from our consideration when interpreting the charter of Fundamental Rights that finally constituted an independent India."[xxxiii] All three were based on the individual who stands at the heart of the Fundamental Rights chapter. The constitution has "adopted the individual as its unit,"[xxxiv] placing him at the front and centre of the elaborate structure.

It is in this context that we must appreciate that the Constitution sees the state not as a threat, but as a necessary enabler for social transformation, especially through the Directive Principles of State Policy. These are exhortations to the legislature for the creation of a social-democratic welfare state with equal distribution of resources and with a special solicitude towards vulnerable sections of society and other economic rights. They stand in consonance with the articles on Fundamental Rights as well as other articles of the Constitution. In all its various provisions and interpretations, it is committed to creating the framework for a rich and substantive vision of democracy, that makes democratic politics possible. Every act of public power must necessarily be justified by the touchstone of the Constitution.[xxxv]

And that is why, in the course of its many amendments, it has been able to move forwards in the transition from a State-directed re-distributive model of economic development to a more liberalized and globalized economy. It has debated and pronounced its verdict on the limitations of popular public power. It has deliberated over the recognition and preservation of human rights. It has also recognised the authority of the Supreme Court to adjudicate complex issues and decide principles in the light of conflicting claims and demands. It has enabled the expansion of these rights and transformed them into social and economic rights that are justiciable. All these discourses entail a continuing tension between the original constitutional texts and intentions and the ongoing discourses on the social contract and the meaning of social justice. And that is why there has been a profusion of interpretations and pronouncements on the widest range of political, economic, and administrative matters that transform themselves into constitutional questions, regularly brought to the courts. Thus, the Apex Court has had its duties marked out not only in determining rights and limiting executive power but also in constitutionalizing so much of our life, such as protecting the environment, allocating natural resources, defining both the rights and the inviolable privacy of a citizen, redressing grievances as also laying the norms of civil and social behaviour. The low capacity of the State has often led to the court's intervention to craft solutions, where the administration has fallen short. In many ways, it has also presided over compromise and settlements. The disputation through the courts about the power of the state, the limits of that power over a private citizen, as well as the innumerable questions attached to the governance of a people indicates the all-pervasive spirit of constitutionalism in our country.

Aristotle defined a constitution as "an organisation of the offices of a state, by which the method of their distribution is fixed, the sovereign authority is determined, and the nature of the end to be pursued by the association and all its members is prescribed."[xxxvi] All modern constitutions derive their strength and authority from the consent of the people. Alexander Hamilton wrote: "The streams of national power ought to flow immediately from that pure original fountain of all legitimate authority."[xxxvii] It may also be referred to as 'the rules of the game', defining "the parliament, the executive, the judicial framework, the superior law that constrains ordinary law, the mode and extent of judicial review, how power is apportioned in different branches of the government, the stipulations of the franchise, the rights that citizens have and to whom they may be exercised, along with a variety of other norms that make up the political template of the state."[xxxviii] And, we must also not miss out on the requirement of popular consensus regarding the role of the State and its relationship with the individual.

Fault lines and apprehensions: Yet there are inherent fault lines that get exposed when a new constitution has to articulate this national emotion, while at the same time recognizing that there are sectarian civil wars already in play threatening the new paradigm striving to get recognized. Many of these fears were indeed expressed in the early debates of the Constituent Assembly. Rajendra Prasad, in one of his addresses, bemoaned this fact: "There is a fissiparous tendency arising out of various elements in our life. We have communal differences, caste differences, language differences, provincial differences, and so forth."[xxxix] The impending partition of the country also leaves its imprint on the members of the Assembly. Nehru's thoughtful words exemplify the situation: "I tremble a little and feel overwhelmed by this mighty task…I feel there is some strange magic in this moment of transition from the old to the new, something of that magic one sees when day turns into night."[xl] That then is the mood of the day: while the past and its weight have many oppressive features, the task of creating something new that will be profoundly different, sustains the hopeful anticipation for the future, while at the same time striving to protect the dignity of the individual. In the new state, unity and self-sustaining development will be the keywords. It is only the future that could stand as the foundation for the Constitution, "where justice, morality, order, and a regime of giving and accepting reasons become real and serve as norms."[xli]

This is not to say that the past did not impinge upon the new India in its founding years. Poverty, caste, and other social and economic complexities beset the new country and continue to do so even now. But they cannot and do not limit the potential power of political agency. These are challenges that must be faced by exercising the right of choice of political and social action and choosing the ones that will attempt to rectify and settle issues. It is in this context that the Constituent Assembly was focused on two important essentialities which demanded resolution. One, the issues of mass poverty, illiteracy, health crises, poor education, and other pressing demands essential for nation-building. The State has vast powers to ameliorate these problems and must find the resources to do so. The citizen cannot consider himself independent of these problems and must necessarily subject himself even to reductions in Fundamental Rights to achieve the broader national and political vision. Two, the diversity of India in its religions, languages, castes, social mores, etc., tended to be seen as reasons for her political backwardness and lack of national coherence. This was a profound challenge that the members of the Constituent Assembly keenly felt. It could be met only by regarding the federation as a Union of States, indestructible and "one integral whole, its people a single people, living under a single imperium, derived from a single source."[xlii] Nowhere in the Constitution, do we see words such as federal or federation.[xliii]

Be that as it may, it has been argued that the crises mentioned above were generated by the founding fathers, themselves guided in their deliberations by intellectual giants, a collective self-understanding where national unity was deeply braided with the sanction and amplification of political power. The State is "the ultimate backstop against anarchy, strife, crisis, and acute destitution that makes it a guarantor of national purposefulness and supplies the ground for it having a priority in our collective self-understanding…the Constitution was a way of conceptualizing the problems of a new nation in the present and for the future, as a political project of profound and permanent urgency."[xliv]

These and other ideas emerged right at the very beginning of the work of the Constituent Assembly with the tabling of the Objectives Resolution by Jawaharlal Nehru on 13 December 1946. In his address, he spoke of the need "to rise above party and to think of the nation, think sometimes of even the world at large of which our nation is a great part."[xlv] The resolution declared "the firm and solemn resolve of the Constituent Assembly to proclaim India as an independent sovereign republic and to draw up for her future

governance a Constitution."[xlvi] It stated the willingness of the territories of British India, as well as the Indian native states, to be constituted into India, which shall be a Union of them all. These territories shall possess and retain the status of autonomous units together with residuary powers and exercise all powers and functions vested in or assigned to the Union. It unequivocally stated that all power and authority of India are derived from the people, and to them shall be granted and secured justice, social, economic, and political; equality of status and opportunity and before the law; freedom of thought, expression, belief, faith, worship vocation, association, and action, subject to the law and public morality with adequate safeguards for minorities, backward and tribal areas, and depressed and other backward classes. On a larger landscape, it also pledged to maintain the integrity of the territory of the Republic and its sovereign rights according to justice and the laws of civilized nations. It was assured of its rightful and honoured place in the world and to make its full and willing contribution to the promotion of world peace and the welfare of mankind. Many of these noble ideas later found expression in the preamble of the Constitution as well as in the chapter dealing with Fundamental Rights.

The Basic Doctrine theory: We cannot avoid reference to the great pronouncements made about the Constitution of India in the Keshavananda Bharathi case of 1973 [xlvii] where, by a wafer-thin majority of 7:6, the general principle was laid that there are certain fundamental aspects of the basic structure of the Constitution that are inviolable and cannot be changed by the Parliament at will. Indeed, there had been a certain sense of haziness about what the elements of this basic structure were, until the 2007 case of IR Coelho vs State of Tamil Nadu[xlviii]. The matter sprang from the interpretation of Article 31B of the Constitution which stated that Acts and Regulations included in the Ninth Schedule, shall not be deemed to be void under any circumstances. The Coelho judgment looked at the entire issue de novo. The limitless amending powers of the Parliament are restrained by the strategy of checks and balances between the arms of the government. Further, the power of amending is not a constituent power, but one arising out of the law-making power vested with the Parliament and is hence limited by the same constitutional restraints as spelt out for law-making powers. Further, the Coelho judgment made it clear that "since the power to amend the constitution is not limited, if changes brought about by the amendments destroy the identity of the constitution,

such amendments should be void."[xlix] In addition, the principle of judicial review is integral or inseparable from the basic structure theory; without it, the basic structure would be violated. Thus, the Coelho judgment established that the issue of determining whether the Ninth Schedule laws are immune to Fundamental Rights in the exercise of power under Article 368 (Power of the Parliament to amend the Constitution) in pursuance of Article 31B cannot be left to the discretion of Parliament. It may be said that the basic structure doctrine is the single most important fact that has made the survival of our Constitution possible in its pristine form.[l] In a way, this judgment propounded the basic doctrine theory and shielded the immutable heart of the Constitution, which remains inviolable and permanent.

We may also glance over some of the significant statements made by students of the Constitution in various articles, essays, and other publications. Bhiku Pareek has opined that the Constitution provides a statement of Indian identity, and its various symbols give it depth and continuity[li]. The motto, *Satyameva Jayate,* drawn from the Mahabharata, reiterates the ancient idea of *satya* (truth) and resonates with Gandhi's emphasis on truth, truthfulness, and satyagraha. The national emblem, Ashoka refers to the confluence of Hindu and Buddhist influences. The tricolour symbolizes religious pluralism. The national anthem celebrates our splendiferous identities. Nehru's articulation of the Constitution symbolised a national philosophy. Although the Constitution did not accept the Gandhian view of the polity, an effort was made to add his thoughts on village panchayats into Article 40 under the Directive Principles of State Policy.

The various conceptions of the meaning of the state were defined in the Constituent Assembly. In their discourses, the speakers tended to move between the concepts of democracy and welfare. *Swaraj* (self-government) was a precondition to *Surajya* (good governance). In contrast, Ambedkar insisted that the state should function as an instrument of change and justice.[lii] In this sense, the Indian Constitution is an interventionist document, and this view gains strength in the articulation of the Directive Principles of State Policy. This is also the reason that in the debates, it was strongly felt that the obligations of the State be placed into the section on Fundamental Rights.[liii] Another view is that the state should be neutral as an instrument of governance, thus elevating itself above the distortions of civil society: however, this view did not gain much traction. In a sense, posited between neutrality and instrumentality, the Indian Constitution

provides a great opportunity for the judiciary to interpret and take forward the agenda of the growth of the nation. The provision of amendments to the Constitution as expressed in Article 368 enables this forward movement. No generation can bind down the next to adhering to what it had created.[liv]

In this sense, the great social transformation that the Constitution intended to achieve, by empowering the backward classes through its definitive emphasis on affirmative action in favour of the Scheduled Castes and the Scheduled Tribes, is a clear example of how an interventionist Constitution can attempt to wrest the concept of equality in an otherwise unequal society. The opposite view has been taken by Jaffrelot when he argues the Constitution did not achieve this aim.[lv] However, Acharya has made a comparative study of affirmative action programmes for disadvantaged groups in both India and the US and has concluded that in India there is a temptation to apply flexibility to the definition of disadvantaged groups which tends to weaken the idea of equal opportunity. In the US, however, it was felt that the equal opportunity argument, tied down to the non-discrimination theme, is being used to undermine whatever remains of affirmative action.[lvi]

What have we attained: Can we list out the achievements of the Indian Constitution? One of the greatest achievements is our commitment to the universal adult franchise: men and women over the age of 21 initially, and later reduced to 18, can participate in the process of elections to determine the government that shall rule over them. Over the last seventy-five years, that attribute has become a permanent part of our national political identity. We take pride in it. In many countries, it was only recently that the principle of universal adult suffrage was extended to women. Citizenship to cast a vote is given to all adults: to be an adult member of society is a sufficient qualification for full citizenship and consequently, the right to vote. More than a century ago, the idea was already taking root. In 1919 a group of some members of the Imperial Legislative Council wrote to the Viceroy proposing a scheme of self-government, because, without it, the Indians felt that they hold a very inferior position in the British Empire. To remedy this, they needed "not merely good government but one that was acceptable to the people because it was responsible to them."[lvii]

A nation may be defined as a collection of people, who see themselves as individuals, and relate to each other as equals, and who have a collective aspiration for a better tomorrow. In this light, no one can be left out of the

social fabric of the people. The change in the definitional perspective of the people over the last few centuries reflects a change in the way societies are imagined: from hierarchical communities to networks consisting of free and equal individuals.[lviii] The first serious attempt to draft a constitution for India, though there were some endeavours made even earlier, was the Constitution of India Bill of 1895, where the author, while not challenging the authority of the Viceroy of India, did espouse the hope that Indian citizens would "in future enjoy and use the rights proposed to the greatest advantage of their country and the British Government." [lix] More than three decades later came the Motilal Nehru report of 1928. It was unequivocal in asserting that the powers of the government are derived from the people and that anyone who has attained the age of 21 has the right to vote for the Parliament. The Government of India Act of 1935 was an attempt of the British Government to assuage the feelings of a rising popular nationalist movement, though it got but a lukewarm reception. In his presidential address to the National Convention of Congress legislators in 1937, Nehru raised his voice against the Government of India Act of 1935 saying that a genuine democratic state of India can be created only by transferring power to the people.

The second significant achievement of the Indian Constitution is to reinforce and reinvent forms of liberal individualism implicit in a commitment to civil liberties. Part III and the articulation of the Bill of Rights is a profound achievement for the new country. This commitment presupposes acceptable forms of dissent and the presence of political liberty within a liberal state. Freedom of expression is one of its most important attributes: the demand for a free press and opposition to its gagging, had always remained a key feature of the freedom movement as was the opposition to arbitrary detention.

The third important achievement was the commitment to group rights, or the right to the expression of cultural particularity, indicating the willingness of the framers of the Constitution to accept what has now come to be known as multiculturalism. In this, the Constitution deviated from the background of communalism and the obvious incompatibility with individual rights. Rather, this entailed a marked drive towards universalism and communitarian egalitarianism, an acceptance of cultural and social differences that are recognised and affirmed, and not rejected. For example, this aspect can be seen in the protection granted to religious minorities.

The fourth major achievement of the Constitution may be defined as a commitment to caste-based affirmative action. To tackle the basic inequalities existing in the Indian social structure, the introduction of constitutionally protected preferential treatment to such groups was thought to be essential. Articles 334 and 335 provide respectively for reservation of seats for the Scheduled Castes and the Scheduled Tribes in the Legislature and appointments to public service. This is radically different from the situation obtaining in the United States, where affirmative action is a result of executive orders and remains outside the Constitution. There, it was almost two centuries after the creation of the United States that the Civil Rights Movement gained some success.

Fifthly, Article 370 (now abrogated) and 371, reflected a differential treatment of Kashmir and the Northeast, underlining the concept of differential federalism. The acknowledgement and validation of different forms of societal living, exclusive to different geographies and demographics, are embraced, and not rejected, in the Indian Constitution. The rescinding of Article 370 puts Jammu and Kashmir (now a Union Territory) at par with the other Union Territories in the country.

The Constitution reflects a strong faith in political deliberation and discourse, embodying inclusive principles and the willingness of people to modify existing preferences and accommodate differences. It also reflects a spirit of compromise and adjustment. This leads to the idea that decisions on the most important issues must be arrived at by consensus, rather than by a majority vote.

Some criticisms: We may also note here that our Constitution is said to be unwieldy, based on the argument that it is not a single document. The wisdom of our Constitution lies not merely in its bounded volume, but in its many amendments and some key judgments of the Supreme Court. Another criticism is that it is unrepresentative. Indeed, the members of the Constituent Assembly were not elected by popular vote but through representational voting. Yet, the panorama of views that were expressed during the discussions has been nothing short of astonishing. Yet another criticism is that the Constitution is morally unstable and does not provide unambiguous criteria in conflicting situations. But the fact is that the Constitution attempts to include many values, nurturing national unity but also preserving regional autonomy. It grants individual liberty, while

also limiting these liberties to realise the common good. It is a conjunctive mode of thought where it is possible to have both this and that. In fact, "the refusal of the framers to give us a well-delineated criterion to settle all moral conflict is the strength, not the weakness, of the Constitution… The Constitution reflects compromise, accommodation, and in some measure, Hegelian reconciliation, all of which exemplify the conjunctive mode of thought."[lx]

One of its strongest criticisms is that the Indian Constitution is an entirely alien document drawing its strength from the western ethos and liberal political thought. The fact is that most Indians are tired of the traditional Indian understanding based on scriptures and cultural behaviour that may have emerged over years of use, abuse, and misuse in the country. The so-called disadvantaged groups or communities have shown their impatience to accept traditional Indian modes of behaviour that reflect fissures in society. In fact, with the passage of time and the exposure to new ideas and thoughts emanating from the west, there is a greater sense of confidence and assertiveness that augurs well for the future.

Another piece of criticism is that the concept of the country is based on a centralized idea of national unity. Further, there is no provision for safeguards to ensure a minimal representation of minorities in the legislature. Questions have also been posed as to why certain socio-economic rights have been relegated to the section on Directive Principles and not included with Fundamental Rights. Yet another critique is that it places less attention on rural India. These and other shortcomings have been referred to by Bhargava in his essay while introducing the Constitution.[lxi]

On a different plane, the role of the Supreme Court has been defined as a conversation between law and democracy. The effort at public reason involves judges thinking of the legitimacy of their own decisions, especially about what reasonable people would accept and agree upon and making their pronouncements through a genuine inquiry into what reason demands against extraordinary background social pressures. "It is an effort to bridge the gap between representation and legitimacy. The compromise that occurs is a compromise aimed at deepening the constitutional project."[lxii] And thus the project turns transformative in the evolution of the country's identity.

An evolving document: So, what defines the structure of this transformative constitution? The prevalent view is that it best resembles 'a living tree', an evolving document with the courts bearing the responsibility of updating it from time to time. This has been profoundly articulated in various judgments of the Apex Court including the concurring opinion of Justice SK Kaul in the famous 'right to privacy' judgment (Justice KS Puttuswamy vs Union of India) in a separate section entitled The Constitution of India- A Living Document[lxiii]. The opposite view, not in popular acclaim, is the concept of constitutional originalism as symbolised by the AK Gopalan case,[lxiv] which is now derided even by the Justices of the Supreme Court. When the Supreme Court examines constitutional issues, it goes into the text, its structure, the debates in the Constituent Assembly, the discussions in the Drafting Committee, and all other relevant material. "Transformative constitutionalism rules out interpretations that simply cannot be reconciled with a historically informed reading of the constitutional text."[lxv] The court does not bind itself to a mythical 'original intent'. It recognizes that the framers of the Constitution chose their words consciously to express principles that would endure. Kannabiran's interpretation of transformative constitutionalism hits the nail on its head: "A constitution framed after a liberation struggle for independence is like poetry, emotion recollected in tranquillity…there cannot be two social histories, one for political theorizing and another for legal theorizing..." [lxvi] Judgments of High Courts are not ignored, even though they may have been overturned later. It does not hesitate to upturn pronouncements made earlier by its very own judges. The Court does not take upon itself the responsibility to pronounce a superior interpretation. Its judgments are placed within the historical context and in the light of what is required for the country to move forward. We must recognize too that there were some significant absences from the Constituent Assembly debates such as the Muslim League, the Socialist Party, and Gandhiji himself. Perhaps some of these absent voices also find a place in the pronouncements of the Apex Court.

An overview: Just a few months after the Constitution was adopted, Varadachariar[lxvii], had deliberated about the essential requirements of constitutional democracy. He noted that early English utilitarians including Bentham had deemed it to provide the greatest happiness to the greatest number and that this would be achieved by allowing the fullest measure of individual freedom to every citizen. They did not consider

the deleterious effect of competition resulting in the exploitation of the weakest. Adam Smith had hoped that in the long run, competition would result in the general good. The extreme reaction to this form of unbridled competition resulted in the evolution of the other extreme of Marxism. The only balance possible between these bitter opposites is to introduce the element of fraternity, which encourages the welfare of all citizens with a sense of equality and brotherhood among the people. It is in this context that the aims of our Constitution ring true: Justice (social, economic, and political) Liberty (of thought, expression, belief, faith, and worship) Equality (of status and opportunity), and Fraternity (assuring the dignity of the individual and the unity and integrity of the nation).[lxviii] The Directive Principles of State Policy attempt to give articulation to these principles of social justice and fraternity and the brotherhood of all men. So too would the Fundamental Rights in a more obvious and justiciable manner.

"The democratic socialism spelt out in the Preamble, and the Directive Principles of our Constitution is meant to provide the context in which the fulfilment of the Fundamental Rights is to be achieved. It is this harmonious development which will give life to every part of the Constitution for the benefit of the people. It is this prospect which underlies the promise of the future development of the Constitution for all of us and this sums up the practical value of our Constitution and the laws made under it." [lxix]

As an independent observer of the Indian Constitution on the fiftieth anniversary of its adoption, Austen commented in his classic interpretative style: "India's founding fathers and mothers established in the Constitution both the nation's ideals and the institutions and processes for achieving them…The new society was to be achieved through a social-economic evolution pursued with a democratic spirit, using constitutional, democratic institutions. The ideals were national unity and integrity and a democratic and equitable society… I am struck by the extent to which the framers were successful in articulating the nation's goals and in designing the necessary governing structures. The Constitution has served the nation remarkably well. Every contingency the framers did not foresee – nor realistically, could they have been expected to. A combination of idealism and the multitude of issues confronting the country during the framing period obscured their appraisal of several future contingencies… [but] leaders in the future should find, within the Constitution's principles, their way out of difficulties that might confront them…The essential element of the framers' foresight was their concept of the seamless web,

the interdependence of the nation's three grand goals, and their building into the Constitution the institutions and the processes for their pursuit."[lxx]

National unity and integrity were served by the Constitution's highly centralized federalism, its prerogative in distributing revenues, the idea of national development and planning, the continuation of the Central and All-India Services, the placement of state governors who are presidential appointees, the provisions of Emergency and a plethora of central government schemes. On the other hand, the democratic features were as risk-taking as the unity features were cautious. This was characterized by the concept of a representative government established through universal adult suffrage, a bill of rights providing for equality, and an independent judiciary. Other measures included the protection of minorities and assisting underprivileged sections of society to end their oppression. The Directives Principles of State Policy were revolutionary and were intended to guide the new nation in its task of attaining a just and equitable society.

It is necessary to mention in this overall assessment of the Constitution that in the political identity of this union of states, the nature of the federal scheme was espoused in the very detailed listing of state and Centre duties and responsibilities. "The Indian federal model emerged out of and has been sustained by an understanding that only a strong Union can keep the country together and is necessary for the conditions in which the Constitution is operating. At the same time, the Indian scheme affords certain flexibility and can thereby avoid the rigidness to which federal models are often vulnerable. These issues were further examined after the end of the one-party rule in the late sixties, with regional parties demanding greater autonomy and a higher share of the revenues. The Sarkaria Commission that was appointed to review the existing arrangements only recommended administrative and functional adjustments between the Union and the states to ensure effectiveness at the two levels of the government. The Punchhi Commission appointed later in 2007 also did not make any radical changes, thus indicating broad acceptance of the terms of the federal scheme and the centralised vision it embodies.[lxxi] Even in terms of fiscal federalism too, the Constitution has provided a durable and flexible, if imperfect, framework for India's fiscal federal arrangements.[lxxii] It is only in 1992, with the 73rd and 74th Constitutional Amendments, that the democratic process was deepened to integrate the urban and rural local bodies into the governance structure, by assigning several functions to these elected bodies. This third tier, though not fully operational in

many of the states, provides a rich potential for the future and encourages the greater involvement of people at the grassroots level.

In pluralist societies, it would not have been acceptable to create a uniform format for all to adhere to. The Constituent Assembly knew this well and adopted a conscious strategy not to impose one specific set of values or traditions, especially on minority cultural communities. As BN Rau, the Constitutional Advisor put it, "We have to bear in mind that conditions in India are rapidly changing; the country is in a state of flux politically and economically; and the Constitution should not be too rigid in its initial years."[lxxiii] We may, therefore, define our Constitution as incremental in its aspirations, signifying the need for a consensus-based approach to questions of national identity and the State's underlying commitments. In fact, "this innovative model developed by the framers of the Indian Constitution should be considered a potential solution for contemporary and future constitutional debates in societies deeply divided over their national, religious, or cultural vision."[lxxiv]

We may also touch upon the concept of sovereignty as presented in the Indian Constitution. It is the single most important question that suffuses the document. The question is not merely who holds absolute power in the state and the power to coerce, but also how power in the modern world is closely linked to discourse and consensus building. "Rather than looking at sovereignty … simply in terms of the institution or the person that possesses final authority in a state, the better approach may be to see it as a complex discursive formation involving ever-shifting alignments of conceptual networks and institutional practices that evolve historically and as such vary, often in subtle ways, from one polity to another."[lxxv] It may be reasonably argued that the concept of universal adult franchise grants that sovereignty to the people of India. As a result, thereof, and since the people of India are diverse and heterogeneous, there has to be debate and discussion within the demographic space of India, for that sovereignty to be established in a strong and unassailable position.

But as situations developed, there were unforeseen complications resulting in the early amendments to the Constitution. This included the conflict between the Fundamental Rights and the provisions for special treatment for backward groups of citizens, the often abused provisions of the President's Rule in the States, the drastic changes brought in by the 42nd Amendment to the Constitution, the alarming rise of corruption in public life, the decline

of healthy debate and discussion in the representative legislatures at the Centre and state levels, and a strong trend of centralisation perceived in recent days. Yet, there were also constant exhortations by senior members such as HV Kamath, to remind the members of the Constituent Assembly of the nature of the great task they had undertaken. He said: "I hope that we in India will go forward and try to make the state exist for the individual rather than the individual for the state… at least let us try to bring about this empire of the spirit in our political institutions. If we do not do this, our attempt today in this Assembly would not truly reflect the political genius of the Indian people…"[lxxvi] He then quoted Sri Aurobindo Ghosh: "India of the ages is not dead, nor has she spoken her last creative word; she lives and has still something to do for herself and the human family."[lxxvii]

That these apprehensions were foreseen by the chief framer of the Constitution is significant. Ambedkar was a critic of his product. On 4 November 1948, while presenting the draft constitution to the Constituent Assembly Ambedkar had bemoaned: "Democracy in India is only a top-dressing on Indian soil, which is essentially democratic." His words still resonate today. Thus, his closing statement in the Constituent Assembly is strangely prophetic: "On the 26th of January 1950, we are going to enter a life of contradictions. In politics, we will have equality, and in social and economic life we will have inequality. In politics, we will be recognizing the principle of one man one vote. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions?" On other later occasions he has stated: "We have a social structure which is incompatible with the parliamentary system.[lxxviii]

Yet, there was much optimism when the nation adopted the Constitution of India on 26 January 1950. Rajendra Prasad realized well that its functioning is dependent on the character of the men who exercise the powers of the Constitution. "The Constitution "acquires life because of men who control it and operate it, and today India needs nothing more than a set of honest men who will have the interest of the country before them…would to God that we shall have the wisdom and the strength to rise above them and to serve the country which we have succeeded in liberating."[lxxix]

The words of Austen ring true: "Democracy is vibrant, although subject to excesses and shared unequally among citizens. The social-economic evolution has changed the face of the country, even if it too, has far to go.

If the dream of the Constitution has not yet been fully realized, India has become a great nation under it."[lxxx]

When India gained Independence at the stroke of midnight between the 14th and 15th of August 1947, The Hindu wrote as follows: "…our agelong tradition, to which totalitarian tyranny is profoundly repugnant, has always favoured the allowing of the maximum liberty to people to live their own lives without denying others their due. If we are to be true to our own best impulses, we should depend on education rather than legislation, on the catalytic action of creative thought, and not on mass agitation and crude propaganda to bring about those changes which may be necessary to eliminate poverty, wretchedness, and strife and to enable every citizen of free India to attain to the fullness of life and that inner freedom which the Vedic seers termed *swaraajya*."[lxxxi]

Notes

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iii Ibid.

iv BR Ambedkar, *Constituent Assembly Debates*, Vol 7 (Lok Sabha Secretariat, 1986) 38, 4 November 1948.

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vi Jawaharlal Nehru, in his foreword to a book by YG Krishnamurthy, *Constituent Assembly and Indian Federation.'* New Book Company, 1940 (original from the University of Michigan).

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x Ibid: 7.

xi Gautam Bhatia, *The Transformative Constitution*: *A Radical Biography in Nine Acts* (HarperCollins Publishers, 2019).

xii Ibid, Prologue: xxviii.

xiii Ibid.

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xvi Navtej Singh Johar vs Union of India case of 6 September 2019, accessible at https://indiankanoon.org/doc/168671544/

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xxiii Selvi vs State of Karnataka of 5 May 2010, accessible at https://indiankanoon.org/doc/338008/

xxiv S Chaudhary, Supra:5.

xxv Virendra Singh vs State of UP (1955) 1 SCR 415, accessible at https://indiankanoon.org/doc/635617/

xxvi State of Gujarat vs Vora Fiddali Badruddin Mithibarvala (1964) 6 SCR 461, accessible at https://indiankanoon.org/doc/19878/

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xxix Uday Mehta, "Constitutionalism," *The Oxford Companion to Politics in India*, ed Jayal and Mehta (New Delhi: Oxford University Press, 2010), 20.

xxx Gautam Bhatia, Supra: xxv.

xxxi Ananth Padmanabhan, "Rights," ed. Sujit Chaudhary, *The Oxford Handbook of the Indian Constitution*, Oxford University Press, (2016): 581-82.

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xxxiii Gautam Bhatia, Supra: xxvi-xxvii.

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xxxviii Uday S Mehta, "*Indian Constitutionalism: Crisis, Unity and History,*" Oxford Handbook of The Indian Constitution, eds. Sujit Chaudhary, (Oxford University Press, 2016).

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xl Constituent Assembly Debates Vol 1, Lok Sabha Secretariat, 1955) 64, 13 December 1946, accessible at https://www.constitutionofindia.net/debates/13-dec-1946/ para 1.5.14 of the text of the speech of Nehru.

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xlii Constituent Assembly Debates, Vol 7, (Lok Sabha Secretariat, 1955), 984-985, 26 November 1949.

xliii Uday Mehta, Supra:53.

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xlv From the speech of Pandit Jawaharlal Nehru while tabling the Objectives Resolution in the Constituent Assembly on 13 December 1946, taken from the records of the Assembly proceedings, accessible at https://www.constitutionofindia.net/debates/13-dec-1946/para 1.5.12 of the text of the speech of Nehru.

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lxxii Nirvikar Singh, in the essay "Fiscal Federalism," *The Oxford Handbook of the Indian Constitution,* eds. Sujit Chaudhary (Oxford University Press, 2016), 539.

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Chapter II:
The Preamble to the Constitution Of India

Introduction: Just eighty-five words; yet, the Preamble to the Constitution of India, rings with a mighty resonance, articulating the lofty aspirations of "we, the people of India".

In this chapter, an attempt is made to connect the three ends of a philosophical triangle that symbolises the highest aspirations of the people of India. They are, one, the Preamble to the Constitution of India; two, the deliberations of the Constituent Assembly on the Preamble leading to the creation of the Republic of India; and three, the pronouncements made by the Supreme Court, the highest court of the land, on the Preamble that has helped clarify and strengthen the fundamental building blocks that make our nation. We shall try to decipher the thoughts and aspirations of the people of India speaking through the enlightened members of the Constituent Assembly. We shall also see how some of the landmark judgments of the Supreme Court delivered on the Preamble, have given a layered and nuanced interpretation to our Constitution.

The Formation of the Constituent Assembly: First, a definition of the Constituent Assembly. A brief historical overview of this unique collection of intellectuals, patriots, and political personages is necessary, as we delve into a study of their crowning achievement, the Constitution of India. At the end of the Second World War, with the Labour Party forming the government in Britain, it became clear that the call for independence for India could not be put off any longer. At the initiative of Clement Atlee, the new British Prime Minister, who replaced the war-time icon Winston Churchill, a Cabinet Mission headed by Sir Stafford Cripps was constituted to consider the question of transfer of power from the British government to the Indian people. Its primary goal was to preserve India's unity and integrity and grant independence. The Constituent Assembly of

India was created as a result of the deliberations of the members of the Cabinet Mission and the leaders of the Independence movement. It may be borne in mind that the demand for a Constituent Assembly had been first raised in 1934 by the Indian National Congress and had found the approval of Gandhi himself in 1939, when he wrote in the Hind Swaraj: "Pandit Jawaharlal Nehru has compelled me to study, among other things, the implications of a Constituent Assembly. When he first introduced it in the Congress resolutions, I reconciled myself to it because of my belief in his superior knowledge of the technicalities of democracy. But I was not free from scepticism. Hard facts have, however, made me a convert and, for that reason perhaps, more enthusiastic than Jawaharlal himself."[i]

The Cabinet Commission faced impossible challenges. The ambitions of Mohammed Ali Jinnah ran counter to the idea of a unified India when he demanded a separate theocratic nation for the Muslims. Moreover, the plan for Independence, put forward by the Cripps Mission, envisaged an administrative arrangement where the Centre would be left with only foreign affairs, defence, currency, and communications; all the rest of the subjects and attendant powers were to be granted to the provinces. The plan also proposed that the princely states would continue their administrative autonomy and function as before. Significantly and controversially, the plan also proposed that the states would be grouped into three geographical federations; two with higher Muslim populations in the west and the east and the third, with a larger Hindu population, in between.

Though Jinnah was in favour of the scheme which gave the Muslim identity a certain geographic legitimacy, such a plan was not acceptable to the Indian leadership. The Congress party's leadership, speaking through Nehru, increasingly believed that the scheme would leave the centre without the required strength and clout to achieve the party's ambitions for the new nation. The socialist section of the Congress Party, led by Nehru who by now was slated to be Gandhi's successor and the leader of the free nation, desired a government that would be enabled and empowered to industrialize the country and to eliminate poverty[ii]. They were also deeply averse to the idea of a fractured sub-continent. The Cabinet Commission's proposal effectively put an end to the idea of a unified India, where all citizens were equal and free from biases of race, religion, geography etc. Faced with this resolute stand of Nehru, the Stafford Cripps plan broke down. A new world order was emerging, the power of the British was diminishing, and this was not the time or place for a British empire to hold sway in such matters.

In such circumstances, Viceroy Lord Wavell pushed ahead, ignored Jinnah, and constituted a provisional government. On 2 September 1946, a new Cabinet with Pandit Jawaharlal Nehru as the head was installed. The Muslim League completely boycotted these efforts and turned critical of all efforts made in the direction of a unified India. Communal violence broke out in many parts of India.

It was in such circumstances that the Constituent Assembly began its profound deliberations. The members of the Constituent Assembly were elected by the provincial assemblies through the single transferable vote system of proportional representation. The total membership of the Constituent Assembly was 389 of which 292 were representatives of the provinces, 93 represented the princely states, and four were from the Chief Commissioner provinces of Delhi, Ajmer-Merwara, Coorg, and British Baluchistan. The elections for the 296 seats assigned to the British Indian provinces were completed by August 1946. Congress won 208 seats, and the Muslim League only 73[iii]. After these election results, on the heels of the failure of the Cripps Plan, the political situation deteriorated with the Muslim League refusing to participate. The Muslim League demanded a separate constituent assembly for Muslims. On 3 June 1947, the dashing new Viceroy, Lord Mountbatten, the last British head of state in India, announced his intention to scrap the Cabinet Mission Plan. This directly culminated in the Indian Independence Act of 1947, leading to the two separate nations of India and Pakistan. On the same day, a separate Constituent Assembly was announced for Pakistan.

Although it had been earlier declared that India would become independent in June 1948, the Indian Independence Act of 18 July 1947 made it clear that Britain was now anxious to get out of the sub-continent. This led very shortly to Independence for both countries: 14 August 1947 for Pakistan and the next day, 15 August for India. Of course, by then the Indian Constituent Assembly had already started its work. It met for the first time on 9 December 1946 and completed its work on 29 November 1949. In the interregnum, in the midnight hour between August 14th and 15th freedom dawned on a country that was, contradictorily, both young and ancient. It was India's tryst with destiny. On that day, the Constituent Assembly was re-assembled as a sovereign body and the successor to British Parliament's authority in India. In fact, until the first general elections in 1952, the Constituent Assembly continued functioning as India's Parliament.

The drafting of the Constitution: BR Ambedkar as Chairman of the Drafting Committee of the Assembly was in overall charge of the writing of the Constitution of India, based on the profound deliberations and debates in the Constituent Assembly. Jurist BN Rau was appointed constitutional adviser to the Assembly. It was Rau who prepared the original draft of the Constitution. The Assembly's work had several stages. Various committees prepared their reports for submission which were all incorporated into an initial draft prepared by Rau, which itself was based on these reports as well as his research into the constitutions of other nations. Thereafter, the drafting committee, chaired by Ambedkar presented a detailed draft constitution which was published for public discussion. The draft constitution was discussed, and amendments were proposed and enacted. The Assembly, as we have seen, approved the Constitution on 26 November 1949, celebrated as Constitution Day. It took effect on 26 January 1950, a day now commemorated as Republic Day in India. Once the Constitution took effect, the Constituent Assembly became the Provisional Parliament of India.

As we touch upon the extraordinary efforts of the Constituent Assembly to create a constitutional foundation on which the country could grow with strong roots, we cast a glance at the extraordinary men and women who led the debates and formulated the document that to this day inspires the country. Apart from Ambedkar and Rau, the chief lights of the Assembly were Jawaharlal Nehru, Vallabhbhai Patel, JB Kripalani, Abul Kalam Azad, Rajendra Prasad, C Rajagopalachari, Sarat Chandra Bose, Rafi Ahmed Kidwai, Shyama Prasad Mookerjee, Rajkumari Amrit Kaur, Hansa Mehta, TT Krishnamachari, Kailashnath Katju, KM Munshi, Mohammed Ismael, Frank Anthony, John Matthai, Pratap Singh Kairon, K Kamaraj, C Subramaniam, and so many others. This galaxy of profound thinkers, practical politicians and experienced administrators formed the core of the Assembly and helped formulate the great principles enshrined in our Constitution. While the majority of the members were male Hindus, it is a commentary on the wisdom of the leadership of the times, that it also included fifteen women as members. The Muslim League, shorn of the members who left for Pakistan, represented the minority view along with Sikhs and Christians.

We may dwell for a moment on the actual authorship of the Preamble. In fact, this is a matter that is still shrouded in mystery. The popular view is that Jawaharlal Nehru is primarily responsible for it, as there are many references to his Objectives Resolution, which formally initiated the

deliberations of the Constituent Assembly. In another version, BN Rau is credited with its authorship. The third account attributes it collectively to the Drafting Committee. The most recent view is that it was Ambedkar himself who took up the task on his shoulders.[iv]

The Origins of the Preamble: In all writings about the Preamble, its origin is normally traced to the text of the Objectives Resolution that had been moved by Pandit Jawaharlal Nehru in the very first regular meeting of the Constituent Assembly on 13 December 1946, some eight months before the country gained Independence. Yet, some other antecedents are required to be mentioned. The Congress Party had constituted a committee of experts which had formulated a 'Declaration' on 22 July 1946, which emphasised the concepts of justice, equality, and freedom with safeguards for the Minorities and Backward Classes. Ambedkar too had proposed a Preamble focussing on States and Minorities on 15 March 1947. BN Rau's Preamble of 30 May 1947 also deserves mention. This had been partially modified by Ambedkar on 6 February 1948, where he had insisted on adding some new concepts such as fraternity, dignity, caste, etc. Other amended preambles prepared by Ambedkar came out on 9 February 1948 as well as 10 February 1948. The final draft was dated 21 February 1948. And, of course, the formal Preamble prefixing the Constitution was dated 26 November 1949, when "We, the people of India" did hereby "adopt, enact, and give to ourselves this Constitution."

Yet, we take up again for discussion the Objectives Resolution of Nehru of December 1946. It was his earnest prayer in the House that day, that the Constituent Assembly must "rise above our ordinary selves and party disputes and think of the great problems before us in the widest and most tolerant and most effective manner so that, whatever we may produce, should be worthy of India as a whole and should be such that the world should recognise that we have functioned, as we should have functioned, in this high adventure."[v]

The Objectives Resolution, with other insights that came in as mentioned above, morphed into the Preamble to the Constitution. It was moved by him "in the nature of a pledge", "an undertaking with us, and with the millions of our brothers and sisters who live in this great country". His resolution urged the Constituent Assembly to declare "its firm and solemn resolve to proclaim India as an independent sovereign republic and to draw up for her future governance a constitution…. wherein shall be guaranteed and

secured to all the people of India justice, social, economic, and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association, and action, subject to the law and public morality."[vi]

His words were poignant and expressed a certain soaring aspiration that still rings true. He continued: "The first task of this Assembly is to free India through a new constitution, to feed the starving people, and to clothe the naked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity. This is certainly a great task. Look at India today. We are sitting here and there in despair in many places, and unrest in many cities. The atmosphere is surcharged with these quarrels and feuds which are called communal disturbances, and unfortunately, we sometimes cannot avoid them. But at present the greatest and most important question in India is how to solve the problem of the poor and the starving. Wherever we turn, we are confronted with this problem. If we cannot solve this problem soon, all our paper constitutions will become useless and purposeless.[vii]

This historic Objectives Resolution[viii], moved by Jawahar Lal Nehru was adopted on 22 January 1947. The particular attention of the reader is drawn to Articles 4, 5 and 6 as reproduced below, which presage the formulation of the Preamble. How closely its aspirations resemble the Preamble as it appears today in our Constitution!

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

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

3. WHEREIN the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the Constitution, shall possess and retain the status of autonomous Units, together with residuary powers and exercise all powers and functions of government

and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom; and

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

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

6. WHEREIN adequate safeguards shall be provided for Minorities, backward and tribal areas, and depressed and other Backward Classes; and

7. WHEREBY shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to justice and the law of civilized nations; and

8. This ancient land attains its rightful and honoured place in the world and makes its full and willing contribution to the promotion of world peace and the welfare of mankind.

From this mother document, the Objectives Resolution arose most of the deliberations on the Preamble in the Constituent Assembly. The text of the Constitution derives its strength and inspiration from these pithy eternal words. The exact formulation of the Preamble was debated in one of the last meetings of the Constituent Assembly on 17 October 1949. It was as if the collected assemblage was looking back on the momentous work they had first begun in December 1946, proudly surveying the grandeur of the new country they were imagining into existence. The Preamble had to reflect the nature of the fledgling country and its aspirations and should stand as a marker and guide for the generations to come. Just thirty-nine days thereafter, the Assembly adopted the Constitution on 26 November 1949. And two months later, to the very day, on 26 January 1950, 'we, the people of India' transformed ourselves into the Republic of India.

Deliberations on the Preamble in the Constituent Assembly: In the style and articulation of the day, Shri Seth Govind Das, Constituent Assembly Member from Central Province & Berar had this to say: "Now, if we look at our Constitution our attention is attracted towards the *Adi Vakya*, called Preamble in English…Pandit Jawaharlal Nehru's motion is the foundation stone of the Constitution. Similarly, the Preamble, the *Adi Vakya* contains the whole gist of the Constitution. In this Preamble, we have made it clear that we will have a democratic government in our country. There were only two ways open to us. Either we could frame a democratic constitution or advance towards despotism and frame a type of constitution which would have in essence meant the establishment of despotism in this country. We have made it clear in this Preamble, in this *Adi Vakya*, that our Government would be a democratic one. Further, I would also invite your attention to the four points in this Preamble, which are justice, liberty, equality, and fraternity. Justice has been quite rightly given the first place. In our country justice has always been given the first place. If we look at our history and the traditions of that history we would come to know that justice has always got the first place in this country. It has been said *Swasti Prajabhyah Paripalayantam Nyayana Margana Mahim Mahishah*. That is, 'the ruler should protect, nourish and cherish his subjects in accordance with justice.' So, it is quite proper that justice has been given the first place in the Preamble after the declaration of democracy. After that the next place has been given to liberty. All is of no worth without liberty. If our liberty is gone, everything is gone. We have gained everything by attaining liberty."[ix]

He went on to add: "Goswami Tulsidas has said in Ramayan: *Pradhin Sapanaihu Sukh Nah* (one who is dependent on others cannot be happy even in dreams.) This sentence of the Goswami will always retain its importance even though it has become so common. Thus, the second place given to liberty in this Preamble is quite proper. After this, the third place has been given to equality. No country can be happy wherein on the one hand, one per cent, of the people live in big palaces eat a variety of dishes, put on covers like *Pashmina* in winter and the finest raiment in summer, while on the other 99 per cent of the people do not even get tents to live in, do not get even dry bread to eat, do not get clothes, so much so that their womenfolk do not get clothes to cover their body, that country must inevitably face a revolution. Hence 'equality' must rightly get a place in this Preamble. The fourth place has been given to fraternity. No social structure

can beget happiness without mutual love. So, I hope that our country would be ruled according to the Preamble of this Constitution."[x]

Such were the expectations that the Preamble engendered. The debates on the Preamble in the Assembly that day in October 1949 were wide-ranging. Some interesting highlights need to be mentioned. One such revolved around discussions on the proposal for the inclusion of the words 'God' and 'Gandhi' within the contents of the Preamble. HV Kamath insisted that the Preamble may begin with an invocation to the Almighty by including the words *'In the name of God*'. Pandit Govind Malaviya wanted a reference to Lord Parameshwar in the Preamble. Prof Shibban Lal Saksena moved that the name of Gandhi as the Father of the Nation should be included in the Preamble. These motions were not agreed to after voting in the Constituent Assembly. The patriotic fervour of those heady days did not lean towards hagiography.

Indeed, there are some lessons to learn from the proposed amendments that failed. The country had just been freed from the yoke of a colonial power and in the euphoria that swept across the country it was only natural that joyous emotions would find place in the utterances of the members of the Constituent Assembly. But even at that stage, their collective wisdom rejected the motion to include any reference to God, or the Father of the Nation, in the text of the Constitution. Neither god nor a single human could ultimately find a place in the expression of the soaring aspirations of the collective will and consciousness of the people of 'India, that is Bharat'. In no uncertain terms did the Assembly turn down any reference to God in a constitution that was agnostic in nature, though completely dedicated to the betterment of the human population of the country. Nor could it give consent to include the name of the extraordinary man who had led the country to freedom from British rule. The Constitution was for Everyman, for all citizens of the country, and even the Mahatma, in this particular context, was but one of them.

Deliberations on Sovereignty: It is moot to point out here that this very same issue of whether the Preamble was a part of the Constitution or not, had been raised by Shri Mahavir Tyagi, a member of the Constituent Assembly on 15 September 1949. His words proved germane to the discussions in the *Keshavananda* judgment. Shri Tyagi said: "I would like to know from the expert draftsmen whether the Preamble forms part of the body of the Constitution. Since the Preamble is not an Article of

the Constitution, may I know if it comes in the body of the Constitution proper? What I want is that sovereignty should be defined in one of the Articles of the Constitution. The Preamble mentions only casually that we are constituting India into a sovereign union. From this, my friends of the Drafting Committee draw the conclusion that sovereignty resides in the 'people'. That does not satisfy me. We cannot depend on the implication drawn. I insist that sovereignty should be defined in the body of the Constitution itself. I want that sovereignty should reside in the whole people of the country, and not in State or Union. A state may only mean to be a sort of Governmental structure in the Centre, or it may include the people as well, or it may be only the union or one or more states. The Provinces will also be known as States hereafter. Let us, therefore, define in unambiguous terms the actual residence of sovereignty for the future. I may submit that in the Constitution of China, it is stated that sovereignty rests in the whole people. We may lay down the same thing in our Constitution also. I, therefore, beg to move this amendment."[xi]

Prof Shibban Lal Saksena also moved an amendment, which inter alia, insisted that "all powers of government, legislative, executive, and judicial, shall be derived from the people, and shall be exercisable only by or on the authority of the organs of the government established by this Constitution…. if we do not say here that the source and the fountain of all authority is the people, the theory that kings have got divine rights will continue. Therefore, it is important that it should be stated in the Constitution that it is the people who have sovereignty."[xii]

Shri Lok Nath Mishra supported the argument in his way: "…I remember to have heard Dr. Ambedkar, while he was speaking somewhere, that this sovereignty rests with the Government of India and I want to make a difference between the Government of India and the people of India; they may be identical, they may be different. It might be that the Government of India will be supposed to be one thing and the people of India might be supposed to be another thing. They were so one day. Therefore, we must make it clear where, after our freedom, sovereignty vests. In the people of India? In the Cabinet? In the Government? In the President, or somewhere else? I, therefore, think that to avoid this snag once and for all, we ought to declare that the sovereignty vests in each one of the citizens of India and for that purpose at least this amendment is very appropriate. I do not want to insist that this amendment should be passed and put in here, but it must be clear that there need be no reservation in our minds of us that sovereignty

does not lie in each one of the citizens of India. I, therefore, support the spirit of this amendment and reiterate that really India's sovereignty vests in each one of her citizens, however high or low, pandit or no pandit, fool or wise; it belongs to the people, each one of them, once and for all.[xiii]

Thoughts on 'secular' and 'socialist': As a significant thought that moved the members of the Assembly, Sir Brijeshwar Prasad had, with much prescience, suggested that there must be a reference to the 'socialist' and 'secular' nature of the new country. Similarly, Prof KT Shah of Bihar, economist, academic and socialist, further emphasised- and it would be appropriate to quote from his speech at some length- as follows: "We have been told time and time again from every platform that ours is a secular state. If that is true, if that holds good, I do not see why the term could not be added or inserted in the constitution itself, once again, to guard against any possibility of misunderstanding or misapprehension. The term `secular', I agree, does not find a place necessarily in constitutions on which ours seems to have been modelled. But every constitution is framed in the background of the people concerned. The mere fact, therefore, that such description is not formally or specifically adopted to distinguish one state from another, or to emphasise the character of our state is no reason, in my opinion, why we should not insert now at this hour when we are making our constitution, this very clear and emphatic description of that State. The secularity of the state must be stressed in view not only of the unhappy experiences we had last year and in the years before and the excesses to which, in the name of religion, communalism or sectarianism can go. But I intend also to emphasise by this description the character and nature of the state which we are constituting today, which would ensure to all its peoples, all its citizens, that in all matters relating to the governance of the country and dealings between man and man and dealings between citizen and Government, the consideration that will actuate will be the objective realities of the situation, the material factors that condition our being, our living, and our acting. For that purpose and in that connection, no extraneous considerations or authority will be allowed to interfere, so that the relations between man and man, the relations of the citizen to the state, and the relations of the states inter-se, may not be influenced by those other considerations which will result in injustice or inequality as between the several citizens that constitute the people of India." [xiv]

Prof Shah also insisted upon the insertion of the word 'socialist' into the Preamble to describe the nature of the new republic. He took pains to explain the meaning of the term as he saw it. For him, it is "a state in which equal justice and equal opportunity for everybody are assured, in which everyone is expected to contribute by his labour, by his intelligence, and by his work all that he can to the maximum capacity, and everyone would be assured of getting all that he needs and all that he wants for maintaining a decent civilised standard of existence…It is the only order in which justice between man and man can be assured, it is the only order in which privileges of class exclusiveness and property for exploiting elements can be dispensed with must support me in this amendment. It is the only order in which man would be restored to his natural right and enjoy equal opportunities and his life no longer be regulated by artificial barriers, customs, conventions, laws, and decrees that man has imposed on himself and his fellows in defence of vested interests."[xv]

These motions were denied. We now know that it was Ambedkar who finally argued (on 15 November 1948), against the inclusion of the word 'socialist' in the Constitution, saying that "what should be the policy of the state, how the society should be organised in its social and economic side are matters which must be decided by the people themselves according to time and circumstances. It cannot be laid down in the constitution itself because that is destroying democracy altogether. If you state in the Constitution that the social organisation of the State shall take a particular form, you are, in my judgment, taking away the liberty of the people to decide what should be the social organisation in which they wish to live. It is perfectly possible today, for the majority of people to hold that the socialist organisation of society is better than the capitalist organisation of society. But it would be perfectly possible for thinking people to devise some other form of social organisation which might be better than the socialist organisation of today or tomorrow. I do not see, therefore, why the Constitution should tie down the people to live in a particular form and not leave it to the people themselves to decide it for themselves. This is one reason why the amendment should be opposed."[xvi] The thoughts behind those words are a little perplexing: while in theory, it may sound edifying, the question unanswered is whether the people (speaking through elected representatives with a political ideology) have the power to determine the nature of government, even to the extent of whether it should be capitalistic, oligarchic, monarchical, or dictatorial.

But, twenty-seven years later, in 1976, these self-same two words, 'socialist' and 'secular' would be added to the Preamble at the insistence of Smt. Gandhi. Many would argue that these new insertions of 1976, driven home through the 42nd Amendment to the Constitution on the strength of her brute majority in the Parliament, were political assertions that Smt. Gandhi imposed on the people of India just because she could do it. She took recourse to the drastic powers that the Emergency gave her. But there are also some wise approbations. Perhaps the need for these two words to strengthen the Preamble to the Constitution is much more evident today than it was then.

While this paper shall take a close look at some of the pronouncements made by the Supreme Court on the Preamble to the Constitution, we should not forget the fact that the Supreme Court itself came into existence as a result of the Constitution, replacing the Federal Court that existed earlier. Thus, it would not be incorrect to say that there were exceptionally high expectations from the Supreme Court of India, in its role as guardian of the Constitution. The challenges that it had to face in the years ahead, and how the judgments delivered affected the basic spirit behind the Constitution, tell the tale of an activist interventionist court that took pains to ensure that the dreams and aspirations of the people of India were kept sacred and eternal. In all its judgments, the Apex Court has always held the view that both the formal (or 'thin') and the substantive ('thick') definitions of law, have to co-exist in all the functions of governance. This means not merely the letter of the law, but also its spirit which may include reference to larger judicial principles such as Fundamental Rights and human rights, democracy and the criteria of justice and the overall principles of good governance.

Pronouncements on the Preamble by the Supreme Court: While this chapter takes a close look at some of the pronouncements of the Supreme Court on the Preamble to the Constitution, we should not forget that the Supreme Court itself came into existence as a result of the Constitution, taking the place of the Federal Court that had existed earlier. It also replaced the Privy Council which was located in London and was the ultimate court of appeal for all matters of the British Empire.

Chanting the Preamble to ourselves may be the best way to give it fresh life. The Supreme Court has passed significant judgments on the Preamble from time to time that have strengthened and enlivened the Constitution. It may be time to refresh our minds once again with the soaring words of the Preamble:

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 opportunity;

And to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the nation;

In our Constituent Assembly this twenty-sixth day of November 1949, do hereby adopt, enact, and give to ourselves this Constitution.

With independence in 1947 and the declaration of the Republic in 1950, it was only natural, given the nature of the people of a growing country, to demand immediate reflection on the purpose and intent of the Preamble. And, like the scheme of judicial intervention, it was up to the Supreme Court of India to examine all matters dealing with the Constitution.

The Supreme Court has been inclined to give substantial significance to the Preamble as setting forth the goals of our political society. With time, and as the government of the day grappled with the problems that rose from day to day, the Supreme Court too became punctilious in its interpretation of the Preamble. It has stated in various judgments, that the Preamble may be invoked to determine the ambit of the 'Fundamental Rights' and the 'Directive Principles.' Similar observations have been made regarding the ideals of socialism, secularism and democracy referred to in the Preamble which are elaborated in the enacting provisions of the Constitution. In short, there has been consistency in the judgments of the Supreme Court, that in the matter of interpretation of the provisions of the Constitution,

or where the constitutionality of a statute which has been challenged, one should rely on the objects enshrined in the Preamble.

For the moment we may examine the principal characteristics of the Preamble and reflect on the Supreme Court's various and varying interpretations of them. In one of the early judgments after the Constitution was promulgated[xvii], after Shri AK Gopalan, the Indian communist leader was arrested under the Preventive Detention Act of 1950, his lawyers contended that the Preamble which seeks to give India a 'democratic' Constitution should be the guiding star in its interpretation, and hence any law passed under Article 21, relating to the protection of life and liberty, should be held as void if it militated against Fundamental Rights and natural justice. Yet, the majority view of the Supreme Court, in its judgment of May 1950, hardly four months after the new nation had become a republic, rejected this contention, holding that the language of Article 21, which refers to state-made laws, should not be confused with principles of natural justice. Nevertheless, the Court also stated that the rule of law called for the use of fair treatment and liberties on a global platform. In other words, the Preamble shows the general purpose behind the several provisions of the Constitution, and it cannot be regarded as a source of any substantive power or limitation.[xviii]

Yet, this view changed soon: in *Kesavananda* judgment[xix], by a thin majority of 7:6 of the Full Bench, it was held that the Preamble to our Constitution should be interpreted as a part of the Constitution. In the *Berubari Union* judgment[xx], these pronouncements were further fine-tuned. The matter pertained to the question of India ceding some of its areas to Pakistan in exchange for similar ceding of another area from that country. It was contended that the legislature did not have this authority that would go against the Constitution. The Court took the stand that the Preamble should not be construed as limiting the power of the legislature. Its purpose is to show the reasons for which the provisions of the Constitution were made, and should, therefore, not be construed as an independent source of any substantive power or prohibition. Reference was also made to the Preamble of the American Constitution, which has never been regarded as a source of independent power. The Court also asserted that in the interpretation of its various provisions, some assistance may be sought in the objectives enshrined in the Preamble.[xxi] The *Golaknath* judgment[xxii] too repeated the axiom that the Preamble does not prohibit or limit the powers of the Legislature to amend the Constitution. It is necessary to

mention here that the *Keshavananda* judgment overruled *Golaknath* to the extent that it did not concur with the finding that the Preamble was not part of the Constitution, though the opinion as to the use of the Preamble was not overruled. Summarising the above, Durga Das's view is that the Constitution provides all the powers to the Legislature: while the Preamble articulates the constitutional philosophy, it cannot be regarded as imposing any prohibition or limitation on legislative powers.[xxiii]

We shall now attempt to touch upon the major principles espoused by the Preamble and discuss the manner in which the Supreme Court interpreted the same across several judgments delivered over the years. The key phrases of the Preamble are discussed below:

We, the people of India: There are untold treasures of significance and aspirations in the lofty phrase 'we, the people of India', with which the Constitution begins. Because of the identical opening words, we are immediately taken back to 17 September 1787, when the American Constitution was signed into being. Less than a year later, on 21 June 1788, it was ratified. The drafting committee of our Constitution must have been moved and inspired by the revolutionary spirit of the thirteen colonies of America when they ousted a foreign power from their land, the very same

Preamble to the American Constitution

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

power that had enslaved our sub-continent for about two centuries. These five words permeate the entire text of our Constitution, the main aim of which is to empower the people. The people of India are supreme, through the Constitution of India, and not their elected representatives.

There are echoes too of the Charter of the United Nations of 1945, written in a spirit of reconciliation immediately after the end of World War II. It begins: 'We, the people of the United Nations determined to save succeeding

generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom."

Sovereign: The word sovereignty means the independent authority of the state; both in the sense that it is not subject to control by any external authority and also in the sense that it is empowered to legislate on any subject for the good of the country and its people. Of course, these powers are subject to the Fundamental Rights, for no legislation which infringes on these rights can be countenanced. Both the Union and the States have no extra-legislative powers beyond that which are mentioned in the specific provisions of the Constitution, especially those finding a place in the Seventh Schedule in Lists I, II and III. Thus, where sovereignty is exercised, there are also countervailing powers that limit sovereignty, which powers themselves are both explicit and implicit in the various provisions of the Constitution.

Socialist: When the word was introduced into the Preamble through the 42nd Amendment by Smt. Gandhi's government at the height of the Emergency, the purpose was to underline a concept that had always been one of the guiding beacons of the Constitution. We have already seen how that word was sought to be introduced during the discussions of the Constituent Assembly. Yet, then, because the principles of socialism had already found a place in various provisions of the Constitution, especially in the Directive Principles, the Constituent Assembly had not deemed it necessary to include the word in the Preamble. In 1976, things were different; Smt. Gandhi was beleaguered on all sides, with a resurgent combined opposition fighting her on every front. The 42nd Amendment was pushed through, perhaps to demonstrate that Smt. Gandhi's 'Garibi Hatao' would be strengthened, if the word found a place in the text of the Preamble. Its inclusion has often led to acrimonious arguments within and without the Parliament when actions of the government are seen as contradictory to the spirit of the 'socialist' order.

In a judgment of 1983[xxiv], where service personnel were being differentiated on the basis of the date of retirement and being denied pension, the Supreme Court touched upon this aspect of the Constitution stating it is "intended to bring about a socio-economic revolution and to create a new socio-economic order where there will be social and economic justice for all and everyone, not only a fortunate few but the teeming millions of India, would be able to participate in the fruits of freedom and development and exercise the Fundamental Rights." The differential treatment of pensioners based on the date of retirement was deemed to violate Article 14 and the Preamble's insistence on 'equality and status of opportunity': it was, therefore, declared unconstitutional. In fact, in other judgments too, the Supreme Court had held that the insertion of the word 'socialist' in the Preamble has only made explicit what was already latent in the constitutional scheme. It has been more or less the consistent view of the Supreme Court whenever enacting provisions contested, to interpret matters in the light of the Preamble. Socialist concepts of the Society, as laid down in Part III (Fundamental Rights) and IV (Directive Principles of State Policy) of the Constitution ought to be implemented in the true spirit of the Constitution. "In deciding a case which may not be covered by authority, courts have before them the beacon light of the trinity of the Constitution viz., the Preamble, Part III and Part IV and the play of legal light and shade must lead on the path of justice social, economic and political." [xxv] The same view was expressed in the Supreme Court judgment of August 2000, when it stated that "Justice social and economic, as noticed above ought to be made available with utmost expedition so that the socialistic pattern of the society as dreamt of by the founding fathers can thrive and have its foundation so that the future generation do not live in the dark and cry for social and economic justice."[xxvi]

For the record, we may state that on the very word 'socialist', there has been a spate of rulings delivered by the Supreme Court while passing judgment on various matters, such as nationalisation of private property[xxvii], equal pay for equal work[xxviii], striking down of a statute which failed to achieve the socialist goal to the fullest extent[xxix], regularisation of casual workers[xxx], as well as matters related to inequality in income and status and providing equality of opportunity[xxxi].

Secular: The Statement of Objects and Reasons of Smt. Gandhi's 42nd Amendment Act of 1976 explained the need to insert this particular word.[xxxii] "The democratic institutions provided in the Constitution are

sound and the path for progress does not lie in denigrating any of these institutions. However, there could be no denying that these institutions have been subjected to considerable stresses and strains and vested interests have been trying to promote their selfish ends to the great detriment of the public good. It is, therefore, proposed to amend the Constitution to spell out expressly the high ideals of socialism, secularism, and the integrity of the nation, to make the directive principles more comprehensive and give them precedence over those Fundamental Rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing the directive principles." That these words were written at a time when the Emergency was in force gives them a particular significance, that was subject to much criticism then and later.

Much debate has indeed been engendered by the inclusion of the word 'secular' in the Preamble. The secular nature of the Constitution has already found specific expression in Articles 25 to 30 relating to the Right to Freedom of Religion. So also do Article 15 (prohibiting discrimination on grounds of religion, race, caste, sex, or place of birth) as well as Article 16 (equality of opportunity in matters of public employment. The definition of the word secular has also been a matter of contention, some arguing that it is used only for an appeasement of the religious minority, while others have argued that in a deeply divisive and fractured society, it is necessary to spell out our commitment to a state independent of any religion. A newer concept of 'principled distance', denoting the separation of government institutions and persons mandated to represent the state, from religious and religious dignitaries, is also very relevant in this context.[xxxiii]

When the matter was earlier discussed in the Constituent Assembly in October 1949, twenty-seven years before the 42nd Amendment, most members had shared an understanding that the "movement for the separation of religion and state was irrevocably part of the project for the democratisation of the latter". The connection between secularism and the effective functioning of democracy had been well established in Europe, and since India was to follow the ideals of democracy, secularism was deemed essential.[xxxiv] Yet, there was some apprehension about whether secularism in the truest sense could be applied in the diverse and deeply entrenched construct of the country. After the debate, it had been agreed then that the word secular is already implicit in various provisions of the Constitution and did not need to be specifically mentioned in the Preamble.

Ultimately though, as we have seen, it was Smt. Gandhi who prevailed in 1976: the Preamble was amended to indicate in specific terms the secular nature of the national polity. In recent times there has been much debate, especially in the context of the current muscular and aggressive rightist groundswell permeating the Indian political sphere. The jury is still out. It may suffice to also add here that the definition of the word varies from country to country. To some it may mean a negative attitude to all religions, to others, it may mean that there is a wall of separation between state and religion. In India, the simple interpretation is that the State has no religion. In the ultimate analysis, the Indian Constitution does not, unlike the United States, subscribe to the idea of non-interference of the State in religious organisations but it remains secular in that it strives to respect all religions equally, the equality being understood in its substantive sense as is discussed in the subsequent paragraphs[xxxv].

It is mentioned in passing here, that the Preamble was modified through the 42nd Amendment by the inclusion of three new words. The first two we have discussed: are 'socialist' and 'secular'. It may also be of interest to learn that the words 'unity of the nation', as it was originally framed in the Preamble, was amended to 'unity and integrity of the nation'. This third of the amendments in the text of the Preamble has not generated as much debate as the first two.

Democratic: A democratic society derives its strength from the will of all the citizens of the country, who are, by definition, free and equal. In a 2001 judgment, the Supreme Court listed the attributes of parliamentary democracy in the light of Articles 164 (1) and 164 (4). "The essence of this is to draw a direct line of authority from the people through the Legislature to the Executive." [xxxvi] It held the view that a Parliamentary democracy derives its identity from certain attributes universally acknowledged: free and fair elections, representation of the people, a responsible government dedicated to the well-being of its people, accountability of the executive to the legislature, a free press, etc.

Justice, social, economic, and political: The concepts involved in this significant phrase of the Preamble point to distributive justice, which in turn connotes the removal of economic inequalities and rectifying the injustice resulting from the dealings or transactions between unequal in society. "The concept of distributive justice in the sphere of law-making connotes, inter alia, the removal of economic inequalities and rectifying

the injustice resulting from dealings or transactions between unequal in society. It comprehends more than the lessening of inequalities…; it may also take the form of forced distribution of wealth as a means of achieving a fair division of material resources among the members of society." [xxxvii] The law should be used as an instrument of distributive justice to achieve a fair division of wealth among the members of society based upon the principle: 'From each according to his capacity, to each according to his needs' ". Incidentally, this neat turn of words has been variously attributed to Karl Max, the Bible, and the French theorist Henri de Saint-Simon!

In another judgment involving Dalmia Cement, the Supreme Court stated: "The idea of economic justice is to make equality of status meaningful and life worth living at its best removing inequality of opportunity and of status – social, economic and political.[xxxviii] Yet another significant pronouncement of the Supreme Court written by Justice PN Bhagawati was to affirm as follows: '…A little tinkering here and there in the procedural laws will not help. What is needed is a drastic change, a new outlook, and a fresh approach which takes into account the socio-economic realities and seeks to provide a cheap expeditious and effective instrument for the realisation of justice by all Sections of the people, irrespective of their social or economic position or their financial resources."[xxxix]

It should suffice to say that in judgment after judgment, especially the Indra Sawney judgment of 1993[xl], the Court has emphasised that social justice assured by Articles 238, 39, 39A, 41 and 46 of Part IV of the Constitution, must be understood in the light of the doctrine of equality as embodied in Articles 14 to 18 and as articulated in the Preamble.

Liberty, Equality and Fraternity: A direct legacy of the French Revolution, these words had shaken Europe in the last quarter of the 18th century. They had first appeared during the French Revolution though it was only after many decades of discussion, they were finally included in the 1958 Constitution of France. It may be deducted that Nehru, who was deeply influenced by European ideals, had had a role in the inclusion of these phrases into the Preamble. But there is also a reference to Ambedkar's powerful 1936 text, *Annihilation of Caste*, where he wrote: "What is your ideal society if you do not want caste, is a question that is bound to be asked of you. If you ask me, my ideal would be a society based on liberty, equality, and fraternity. And why not?"[xli]

The reference to the word 'fraternity' has special significance in the Indian context "because of the social backwardness of certain sections of the community who had in the past been looked down upon and deprived of any participation in the administration." In this judgment (*Indira Sawney* judgment: endnote xxxviii) with far-reaching consequences, the court had given the final seal of approval for the Backward Classes to be brought up to the level of the rest of the community by giving them a share of the administrative apparatus through the mechanism of Article 16 (4) of the Constitution: "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the state." Elsewhere in the same judgment, the Supreme Court states that "this is possible only when the people of India as a whole were bound together by a spirit of brotherhood". The Preamble has therefore had a great impact on mechanisms of affirmative action that have uplifted people belonging to the scheduled castes and tribes and other Backward Classes.

The same theme can be seen repeated in another judgment of the same year when the Supreme Court observed: "In a country like ours, with so many disruptive forces of regionalism, communalism and linguism…the unity and integrity of India can be preserved only by a spirit of brotherhood. India has one common citizenship as every citizen should feel that he is Indian first, irrespective of other basis. [xlii]" Yet again, the theme of inclusiveness, in the context of the Backward Classes and the Scheduled Castes and Tribes, was expressed by the Supreme Court when it observed in another judgment: The goals of fraternity, unity and integrity of the nation cannot be achieved unless the Backward Classes of citizens and the Scheduled Castes and the Scheduled Tribes, who for historical factors, have not advanced are integrated into the mainstream of the nation.[xliii]

In concluding this aspect of the Supreme Court's various pronouncements with reference to the Preamble to the Constitution, we may touch briefly on the issue of the basic structure. In the *Keshavananda* judgment (endnote xviii), seven judges out of the thirteen had held that the objectives specified in the Preamble contain the basic structure of our Constitution, which cannot be amended under Article 368 of the Constitution. In Para 316, the Supreme Court noted as follows emphasising that these features can be seen in the Preamble as well as the whole scheme of the Constitution. "The true position is that every provision of the Constitution can be

amended provided in the result the basic foundation and structure of the Constitution remains the same. The basic structure may be said to consist of the following features:

1. Supremacy of the Constitution;
2. Republican and Democratic forms of Government.
3. Secular character of the Constitution;
4. Separation of powers between the Legislature, the Executive and the Judiciary;
5. Federal character of the Constitution.

The above structure is built on the basic foundation, i.e., the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed. The above foundation and the above basic features are easily discernible not only from the Preamble but the whole scheme of the Constitution, which I have already discussed."

The many judges in the *Keshavananda* judgment provided some variations on the same theme. Justice Shelat and Justice Grover added two more features to this list, namely the mandate to build a welfare state contained in the Directive Principles of State Policy, and the unity and integrity of the nation. Justice Hegde and Justice Mukherjee identified a separate and shorter list of basic features: the sovereignty of India, democratic character of the polity, unity of the country, essential features of the individual freedoms secured to the citizens and mandate to build a welfare state. Justice Jagmohan Reddy clearly stated that the elements of the basic structure were to be found in the Preamble and the provisions into which they translated were sovereign democratic republic, parliamentary democracy and the three organs of the state, the legislative, the judiciary and the executive. He emphasised that the Constitution would not be itself without the fundamental freedoms and the directive principles. Surprisingly, only six of the thirteen judges in the Bench (and hence a minority view), agreed that the Fundamental Rights of the citizen belonged to the basic structure and Parliament could not amend it. [xliv]

It is important to realise that most of the principles espoused above find a place in the eighty-five words of the Preamble. That is why it is important to distinguish the Preamble from the rest of the text of the Constitution which it encapsulates and symbolises in many ways. Though the Constitution has been amended over a hundred times in the seventy-three years since it was adopted, it continues to reshape itself in ways that suit the genius of the country. It is not a staid and common document representing what the law was at the time of its commencement. Rather, it sets out a vision, constantly changing, adapting, transforming, and setting out our objectives and principles for an ever-expanding future. In this form and character, it ensures that it never gets fossilised, but remains malleable enough to meet and surpass, new challenges. And that is why a generous and constructive interpretation of the Constitution is an entitlement for the vast and diverse population of the country.

Strangely, this may sound to be at odds with the statement that the basic structure of the Constitution is not alterable, and that no legislative or executive power should be in a position to mutate it. But, a deeper understanding removes this oddity. Indeed, the Constitution is a permanent instrument to guide the destiny of the nation for all times to come. It has to be accepted by the system that governs people and is not subject to depredations by governments in power. The interpretation of the Constitution arises in circumstances that demand a more nuanced look at the various articles in question because the situation demands a new meaning. The supreme legislature has been empowered to make these changes as and when required, after following due process. Yet, any such mutation must pass the test of critical examination by the Apex Court of the land. While doing so, there is a moral dimension that cannot be overlooked: the mere formulation of the text of the Constitution would not limit its usage.

The basic structure of the Constitution, so tellingly summarised in the Preamble, ensures the highest principles of governance, and guarantees certain fundamental human rights that cannot be modified, for these are fundamental, universal, and eternal principles. Even so, the Constitution and its conscience keepers, the Supreme Court of India, have found ways and devised means to interpret the articles to ensure the expansion of the rights of humankind, without deleting its unalterable core. The interpretation of words and expressions in the articles of the Constitution, in no way, can contradict the higher purpose of keeping the basic structure intact. In a

December 2004 judgment of the Supreme Court, the five-member bench took the stand that unlike the interpretation of the words and expressions in a statute "[The] Constitution is a permanent document framed by the people and has been accepted by the people to govern them for all times to come and that the words and expressions used in the Constitution, in that sense, have no fixed meaning and must receive interpretation based on the experience of the people in the course of working of the Constitution.[xlv]

It was Justice SH Kapadia in a 2007 judgment[xlvi] who summarised this profound aspect of constitutionalism as seen through the prism of the Supreme Court. "Constitutional adjudication is like no other decision-making. There is a moral dimension to every major constitutional case; the language of the text is not necessarily a controlling factor. Our constitution works because of its generalities, and because of the good sense of the Judges when interpreting it. It is that informed freedom of action of the Judges that helps to preserve and protect our basic document of governance.

The Preamble today: From time to time, successive governments have in their way drawn attention to the great moral principles of the Preamble. Each year, the 26th of November is celebrated by the Government of India as Constitution Day or *Samvidhan Divas*; this was duly formalised by an announcement made by the Ministry of Social Justice and Empowerment in November 2015 and all citizens were urged to read out the Preamble in social and community gatherings[xlvii]. More significantly, protesting social groups have been resorting to reading out the Preamble as a form of legitimate protest to pre-empt the charge that such demonstrations are anti-national. This was followed with considerable impact in the Shaheen Bagh protests where citizenship rights were thought to be in danger after the Citizen Amendment Act was passed. Similar efforts were seen in the farm laws agitation on the borders of Delhi now ongoing for over a year. These are but a few examples where a conscious chanting of the Preamble is resorted to, to exemplify that protests are indeed within the legal framework of the Constitution and its Preamble.

Some other judgments, old and new: It may also be asserted here the most significant cases decided by the Supreme Court, have in some way or the other referred to the Preamble, in the sense that is the kernel of irreducible truth of the Constitution. Here are a few examples. We have already seen the pronouncements in the judgments now referred to by

the names of the key figures, namely AK Gopalan, Keshavananda Bharathi, Indira Sawney etc. We know too of the judgment of Maneka Gandhi, where the decision to impound her passport was upheld, but the right to personal liberty was cited as an important precedent for Fundamental Rights cases. The Preamble was quoted in the judgment.

In the *Shayara Bano* judgment in 2017, the Court declared triple *talaq* unconstitutional and announced a legal ban on the archaic system of divorce in a particular community. It stated the following judgment: "…secularism and socialism were brought in the Preamble to the Constitution to realise that in a democracy unless all sections of society are provided facilities and opportunities to participate in political democracy irrespective of caste, religion and sex, political democracy would not last long. Again, in para 15, it stated: "It is seen that if after the Constitution came into force, the right to equality and dignity of the person enshrined in the Preamble to the Constitution, Fundamental Rights and Directive Principles which are a trinity intended to remove discrimination or disability on grounds only of social status or gender, removed the pre-existing impediments that stood in the way of female or weaker segments of the society".[xlviii]

In another significant decision in the *Navtej Singh Johar* judgment in September 2018, Section 377 of the IPC was struck down, thus allowing consensual relationships among individuals of the LGBT community. The court quoted the Preamble saying: 'We may conclude by stating that persons who are homosexual have a fundamental right to live with dignity, which, in the larger framework of the Preamble of India, will assure the cardinal constitutional value of fraternity that has been discussed in some of our judgments."[xlix] The significant Supreme Court judgment of August 2017 delivered by a nine-judge bench[l] which included the right to privacy as part of the Fundamental Rights also mentioned the Preamble. It "noted the link between the Fundamental Rights and the constitutional vision contained in the Preamble and the position of the Fundamental Rights as a means to facilitate its fulfilment." It also referred to another landmark judgment (*Kharak Singh*) while quoting as follows: It might not be inappropriate to refer here to the words of the Preamble to the Constitution that it is designed to "assure the dignity of the individual" and therefore of those cherished human values as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the constitution which would point to such vital words as "personal liberty"

had to be construed reasonably and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any pre-conceived notions or doctrinaire constitutional theories."[li]

The *Ram Mandir* judgment of September 2019 also referred to the Preamble in these words: "Over four decades ago, the Constitution was amended and a specific reference to its secular fabric was incorporated in the Preamble. At its heart, this reiterated what the Constitution always respected and accepted: the equality of all faiths."[lii]

There have been some moments of confusion, especially during the interregnum of the Emergency, when the common man's faith in the wisdom of the Supreme Court may have been shaken. Yet, in broad terms, the Apex Court has stood the test of time and has delivered innumerable judgments that have uplifted the spirit of the nation. It has referred time and again to the basic features of the Constitution while drawing special attention to the Preamble. There are testing days ahead when some significant issues will come up before the Supreme Court for decision. Over 140 petitions challenging the Citizenship (Amendment) Act, 2019 are pending there. The 23 petitions writs challenging the abrogation of Article 370 are to be taken up for hearing. The review petition on the judgment passed by the Supreme Court[liii] on the matter of entry of women into the premises of Sabarimala is also to be decided. The dissenting opinion of a lady justice of the Supreme Court, supporting the exclusion of women from the temple premises, has been a matter of concern where women may feel they have been discriminated against. A nine-judge Constitution bench has permitted reference to a larger bench in a review petition. The strong message that the current Chief Justice sent to the government when he made his remarks in open court that the law of sedition of Section 124A of the Indian Penal Code may have passed its time, is an indication of his thoughts on its misuse to muzzle free speech.[liv] A judgment is surely expected on that very critical issue of liberty of thought and expression, which stands at the heart of the Preamble.

The authorship of the Preamble is still debated: some say that it is based on the Objectives Resolution of Nehru; others give BN Rau the credit. A third view is that it springs from the combined wisdom of the Drafting Committee. And the fourth view grants Ambedkar the authorship of the Preamble. "Given the ubiquity of Dr. Ambedkar's designation as the chief

architect of the Constitution, it seems to follow that he must be the chief architect of its Preamble."[lv] The interplay between the aspirations of the Constituent Assembly, as articulated in the Preamble, and the continuing interpretations delivered by the Supreme Court, demonstrates how the 'idea of India' is a work in progress and shall remain ever so as we move towards a perfect society, the Ram Rajya dreamed of in our collective consciousness. As long as the wisdom and perspicacity of the Supreme Court continue to be profound, vigilant and encompassing, we can always aspire for Tagore's dream to be fulfilled. "Into that heaven of freedom, My Father, let my country awake."

Notes

The main source of the judgments of the Supreme Court is the Durga Das (2021) Shorter Constitution of India (16th Edition). The main source to elicit quotations from Supreme Court judgments is indiankanoon.org. The verbatim discussions of the Constituent Assembly are available from multiple sources but in this paper, they include the Constitution of India website, accessible at https://www.constitutionofindia.net/constitution_assembly_debates, the Lok Sabha website accessible at http://164.100.47.194/Loksabhahindi/cadebatefiles/cadebates.html and the Rajya Sabha website accessible at

https://rajyasabha.nic.in/rsnew/constituent_assembly/constituent_assembly.asp

i Quoted in the address of Dr. Shankar Dayal Sharma, President of India, on the occasion of the fiftieth anniversary of the first sitting of the Constituent Assembly, at Parliament House 9 December 1996, accessible at https://rajyasabha.nic.in/rsnew/constituent_assembly/constituent_assembly_mem.asp

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iii Compiled from Rajya Sabha website: https://rajyasabha.nic.in/rsnew/constituent_assembly/constituent_assembly_mem.asp

iv Aakash Singh Rathore, *Ambedkar's Preamble: A Secret History of the Constitution of India*, (Penguin Random House, 2020), xv.

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Chapter III:

The Union and the States: A Study of Federalism in the Constitution of India

India, that is Bharat…: Article 1 of the Constitution defines India thus: "India, that is Bharat, shall be a union of States..." A few things of note stand out here. This is the only occasion where 'Bharat' has been mentioned in the entire text of the Constitution. Perhaps it was a nod to those members of the Constituent Assembly who were still clinging to a traditional concept of an ancient country deriving its identity from its religious texts, legends, and myths. The Constitution had already rejected the Gandhian concept of the village as the centre of the economy. It had also taken pains to deliberately avoid references to any particular religion. Thus, perhaps there was a need only for this single reference to the ancient name of the sub-continent, the land of the legendary son of Raja Dushyant and Shakuntala. The use of the future tense in the definition also stands out. Was it but a pious hope then, that India 'shall' be a union of States? Perhaps, with the five-hundred-odd Native States yet to make their position clear regarding accession to the Union, there may have been apprehensions about the future of the fledgling country. The deliberate avoidance of the word 'nation' is also significant. 'Nation' itself did not appear in the Constitution from its adoption up in 1950 to January 1977, about 27 years, when Smt. Indira Gandhi, with her back to the wall just a few months before the lifting of the Emergency, introduced the concept of 'unity and integrity of the nation' into the Preamble through the contentious 42nd Amendment.

Cooperative federalism: Similarly, the word 'federation,' never appears in the text of the Constitution and the reason for the same requires the erudite explanation of the architect of the Constitution himself. Ambedkar was clear that though India was federal in nature, it was not just a federation, but a

Union, in all senses of the word. On 4 November 1948, while introducing the Draft Constitution in the Constituent Assembly, he clarified: "The Drafting Committee wanted to make it clear that though India was to be a federation, the federation was not the result of an agreement by the States to join in a federation, and that the federation not being the result of an agreement, no State has the right to secede from it. The Federation is a Union because it is indestructible. Though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people a single people living under a single imperium derived from a single source."[i]

Today, after about three-quarters of a century, there are more interpretations and catchwords available. The current popular usage is 'cooperative federalism' which has now regained its prominent place in the lexicon of governance. The NITI Aayog has been assigned the task of actualising the important goal of cooperative federalism and enabling good governance in India. 'On the premise that strong States make a strong nation, NITI Aayog acts as the quintessential platform for the Government of India by bringing States together as 'Team India' to work towards the national development agenda.'[ii] The Aayog is designed to foster "cooperative federalism, promotion of citizen engagement, egalitarian access to opportunity, participative and adaptive governance and increasing use of technology"…. Its purpose is to evolve a shared vision of national development priorities with the active involvement of States. "NITI Aayog (will) seek(s) to provide a critical directional and strategic input into the development process."[iii]

The 15th Finance Commission also emphasised this from the standpoint of fiscal federalism as it highlighted certain aspects of cooperative federal fiscal management through the four principles of expenditure responsibilities, revenue assignments, intergovernmental transfers, and sub-national debt and borrowing. In this regard, the national rollout of the GST framework is inarguably the most important element of fiscal federalism.

A quick look backwards: A brief overview of the historical circumstances then obtaining in India will help us understand the way the Constituent Assembly members were persuaded to adopt the kind of system we now have. Both Mughal and British administrative systems had recognised the size and diversity of India and had realised how difficult it would be to impose a highly unified administrative system on the sub-continent. At the same time, they appreciated the necessity of putting in place a strong

central authority to prevent disintegration. Further, during the British Raj, improved communication made it possible to exert direct central control and rule. With time, the balance tipped in favour of a strong central government. Thus, despite the Government of India Act of 1919 stemming from the Montague-Chelmsford Reforms which promised devolution of powers to the Provinces, or the federal provisions of the Government of India Act of 1935, power remained almost exclusively in British hands. As a result, we had never experienced the working of a federal system as in the United States or Australia.

Undoubtedly, federalism was very much on the minds of the Constituent Assembly members even though they refused to attach themselves to any particular theory or precept. Federalism as a means of reconciling conflicting elements in the Indian polity was the favoured general policy right from the 1930s and the discussions in the Round Table Conferences emphasised the viewpoint clearly. This was embodied in the Government of India Act of 1935. By the time the nation had its own Constitution, "federalism had become an article of faith and the members of the Constituent Assembly turned somewhat mechanically to the Government of India Act of 1935, which they accepted as the model. "[iv] NV Gadgil expressed the views of almost all the members when he said, "I doubt whether there is a single individual either here or outside, or a party here or outside, which has stood or even stands for a complete unitary State."[v] Also, as a result, national leaders were convinced that while the new nation would have a federal structure, it should necessarily have strong unitary control.

Cooperative federalism has indeed been around for a long, as exemplified in the arrangements in the United States, for example. However, the Assembly adopted the principle of 'cooperative federalism', as defined by AH Birch, for example, when referring to the increasing interdependence of federal and regional governments. According to him, it is "the practice of administrative cooperation between general and regional governments, the partial dependence of the regional governments upon payments from the general governments, and the fact that the general governments, by use of conditional grants, frequently promote development in matters which are constitutionally assigned to the regions" [vi]

A Union of States: The inescapable fact is that India would not have been able to function as a working democracy if it had not adopted a federal model of governance. Covering over 3.2 million sq kilometres of land area, India today, with a population of over 1.4 billion spread over 28 States and 8 Union Territories, is astonishing in its demographic and linguistic diversity. All major world religions find their presence here, with the Hindus constituting about 80 percent of the population and Muslims and Christians with 14 and 2.3 percent respectively. In addition, there are Sikhs, Buddhists, and Jains too. While the Constitution lists 22 scheduled languages there are about 325 languages and dialects spoken in the sub-continent. Diversity is the only word to describe the nature of our country. In terms of culture, food habits, dress, and other rituals and practices, we present an unparalleled model of unity in diversity.

In a lighter vein, it has been remarked that the only things that bring India together are Bollywood and cricket. War too has had this effect. Again, there are certain instruments of governance, such as the Tiranga or Aadhaar or the PAN card, or the driving license, that uniquely unites Indians. As the attributes of a unified governance system for the country grows, such symbols of a centrifugal governance mechanism are only likely to expand. The older constitutional federations, such as the US, Australia, and Canada went through a process of competition between the Centre and the States in the initial years of their formation. But they soon understood the dynamic process of cooperation and shared action between the two levels of Government. India learned from their experience, realizing that "governments in a federation were arranged not hierarchically or vertically, but horizontally, that no line of command runs from the Centre to the States and that common policies among the various governments can be promoted not by dictation, but by a process of discussion, agreement, and compromise."[vii]

The members of the Assembly were of the view that India faced unique problems that no other federations had ever confronted. They thus studied the experiences of other great federal countries such as the United States, Canada, and Australia, to follow "the policy of pick and choose to see what would suit… the genius of our country best."[viii] "This process produced new modifications of established ideas about the construction of federal governments and their relations with the governments of their constituent units. The Assembly produced a new kind of federalism to meet India's peculiar needs."[ix] As an example, while Assembly members had stridently

demanded enhanced revenue streams for the provincial governments, they also permitted the Union Government to collect the money and distribute it amongst the States. Certainly, by any argument, this could not be called a form of traditional support for local autonomy.

In the Indian context, while the federal structure of the Constitution is largely centralised, the overriding powers of the Union Governments rarely encroach into the jurisdiction of the State Governments. Indeed, we are aware of the powers of the Union to impose emergency provisions in State or to supersede the State Assembly using the President's rule, and even the powers of legislation for a State with the approval of the Council of States. However, in everyday governance, as Ambedkar defined it, our Constitution "is a federal constitution since it establishes what may be called a dual polity (which) …will consist of the Union at the Centre and the States at the periphery, each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution." Yet, as he clarified, it could be "both unitary as well as federal according to the requirements of time and circumstances."[x]

It is also necessary to point out here that the initial discussions had preferred a Union government that would have only certain selected subjects such as defence, communications, etc, relegating the rest of all governance activities to the States. The breaking away of Pakistan and other communal developments forced the political leaders of the time to realise the need for a strong central government to prevent fissiparous tendencies. These fears were well expressed in the 1928 Nehru Report and the 1945 Sapru Report and found expression when the Union Powers Committee of the Constituent Assembly finally recommended in July 1947: "It would be injurious to the interests of the country to provide for a weak central authority which would be incapable of ensuring peace, of coordinating vital matters of common concern, and of speaking effectively for the whole country in the international sphere. The soundest framework for our constitution is a federation with a strong Centre."[xi] Balkrishna Sharma, a member of the Assembly defined the "attributes of a strong Centre" as one that should be in a position to think and plan for the well-being of the country as a whole, which means having the authority to coordinate and the power of initiative to be in a position to supply the wherewithal to the Provinces for their better administration whenever the need arises. He

expressed the view that the Centre should have the right in times of stress and strain to issue directives to the Provinces regulating their economic and industrial life in the interest of the nation.[xii]

That this decision was right can be judged by the way the Central government in its early days dealt with the matters related to the transfer of power, the frenzy of partition, the settlement of refugees, and the food security problem. Again, only a strong Central government could have dealt with the Princely States and ensured their integration with the Indian Union. As a free nation, the priority given to improving the standard of living and enhancing industrial and agricultural productivity also required a steady hand at the national level. Of course, it should be kept in mind that the Provinces were already members of a federal union when the Constitution was being framed, and in terms of political requirements, this union was indissoluble.

The structure of the Union: The presence of a powerful political party with clout across the sub-continent, as well as the lack of strong regional or provincial level parties, made this task easier. The irreversible fact of Partition, declared by Mountbatten on 3 June 1947, put an end to the Cabinet Mission Plan and served to unite Indians. On 6th June, the Union Constitution Committee chaired by Nehru took some major decisions, recorded in the minutes as follows[xiii]:

- That the Constitution would be federal with a strong Centre;
- That there would be three exhaustive legislative lists; and that residuary powers should vest in the Union Government;
- That the Princely States should be on par with the Provinces regarding the federal list, subject to special matters; and
- That, the executive authority of the Union should be co-extensive with its legislative authority

In the following weeks, the two committees of the Constituent Assembly, the Union Constitution Committee, and the Union Powers Committee, started preparing reports to give shape to the above recommendations, covering critical aspects of the federal structure such as the distribution of powers, the extent of Union executive authority, the distribution of revenue and how amendments to the Constitution are to be carried out.

A student of the federal system in India would do well to examine the above aspects to understand the unique way the Assembly crafted these federal provisions. Part XI of the Constitution deals with the nature of the distribution of powers between the Union and the States and is entitled Relations between the Union and the States. It is divided into two chapters, Legislative Relations, where the three lists – Union, State, and Concurrent - were drawn up, and Administrative Relations. However, as Austen explains, there are also other provisions strewn throughout the Constitution which affect the relationship. These include the Emergency powers of the Union, as also the temporary and transitional provisions to control trade in certain commodities. We may also add within this list, the limitation of powers of the Upper House, the unified judicial system, the single Election Commission with nationwide authority, and the provision of amendment of the Constitution- "all of which weigh the scales of power in favour of the Union."[xiv]

The early concept of distribution of legislative powers between the Centre and States can be seen in the Devolution Rules made under the Government of India Act of 1919. This gained acceptance when included as recommendations of the three Round Table Conferences and in reports of the Joint Parliamentary Committee. The subjects reserved for the central legislature also finds parallel in the Canadian and Australian Constitutions. The Round Table Conferences also recommended the concept of a concurrent list, where both the federal and provincial governments had the authority to pass legislation. The Government of India Act of 1935 embodied the list system in its relevant Schedule in clear and unambiguous terms. The Union Constitution and the Union Powers Committee of the Constituent Assembly, after a joint meeting of these two committees, incorporated these lists into the draft of our Constitution without many changes. The Union Constitution Committee recommended that our Constitution should have a strong Centre,[xv] with exhaustive legislative lists, and that the Princely States should be at par with the States as regards the Union list. The members of both Committees also realized that the list and the nature of subjects for Union legislation should have the consent of the States. It was not possible to demand obedience in such matters. As Pandit Govind Ballabh Pant put it: "If it is hoped that the Provinces can be made to cooperate against their will utilizing central legislation, that hope is not likely to materialize."[xvi]

Against these apprehensions was the prevailing thought expressed by BN Rau, that the Union should not be precluded from legislating on matters of national importance, even though the subject may fall within the jurisdiction of the States. He was influenced by the emerging mood in the United States in matters of Civil Rights, comparable to the position of the Scheduled Castes and Tribes in India. "The essence of the matter is that where legislation is called for on a national basis, the Central Legislature should have the power to enact it without amending the Constitution. Such legislation may be needed not only in such spheres such as education, cooperative farming, or public health but also in a matter which is coming to be regarded as one of national and indeed almost international importance, namely the safeguarding of the civil rights of all citizens, e.g., removing the social disabilities of Harijans."[xvii] He proposed that the Union Legislature should have powers to legislate on a state subject, provided that two-thirds of the members of the Council of States recommended the same. This view carried the day, and the provision was included as Article 249, as it stands today.

When NG Ayyangar presented the Union Powers Committee report to the Assembly, he stated: "The Committee concluded that we should make the Centre in this country as strong as possible, consistent with leaving a fairly wide range of subjects to the Provinces in which they would have the utmost freedom to order things as they liked."[xviii] During debates, there was some concern regarding whether the States were being enfeebled to the advantage of the Centre, and this fear was voiced by some Muslim members as well as representatives of the Princely States. The three lists were not discussed in detail especially since the majority of the members believed in the need to keep the Union power unaffected. Factors that strengthened this viewpoint included the crisis that the fledgling country was going through in matters related to agricultural production, price control in food items, the establishment of central educational institutions, etc., all of which required the Union government to have constitutional powers to fulfil its responsibilities. The legislative lists were almost finalised by July 1949 after extensive discussions held by BN Rau with the respective Ministries. After agreement by the heads of the Union and the provincial governments on the contents of the three lists, the subsequent discussions in the Constituent Assembly were not of much consequence. In September 1949, the lists were adopted.

Legislative Relations: We may now look at the specific Articles related to the Union-State relationship, as they appear today in the Constitution. Chapter I of Part XI contains eleven articles from Article 245 to Article 255 about the legislative relations between the Union and the States. **Article 245** specifies the extent of laws made by Parliament and the legislatures of the States, enumerated in Schedule VII referred to in **Article 246**. The Union List has 98 items, the State List has 59 items and Concurrent List has 52 items, all of them covering the entire gamut of administration of the nation. As we have seen elsewhere in this volume, **Article 246A** is the special provision related to the Goods and Services Act, inserted into the Constitution on 16 September 2016, by the Constitution (Hundred and First Amendment) Act, 2016. **Article 247** empowers the Parliament to provide for the establishment of additional courts for the better administration of laws about laws made by the Parliament. Residual power rests with the Union as provided for in **Article 248**. Further, according to **Article 249**, if authorised by two-thirds of the members of the Council of States, the Union Parliament is empowered to make laws overriding the normally exclusive legislative powers of the State. To enhance the emergency powers of the Union, the Parliament is also authorised under **Article 250** to legislate on any matter in the State list, while a proclamation of emergency is in operation. **Article 251** states in no uncertain words that in case there is an inconsistency between the State legislation and the Union legislation in the laws made under Articles 249 and 250, it is the latter that shall prevail. **Article 252** also enables the Parliament to make laws for two or more States with the consent and adoption of the States concerned. **Article 253** enables Parliament to make laws to give effect to any international agreements and treaties entered into. **Article 254** is analogous to the provisions stipulated under Article 251, but concerning the matters listed in the Concurrent List, giving pre-eminence to the laws of the Parliament in case of any inconsistencies. **Article 255** only stipulates that the absence of previous sanction to a Bill as required in the proviso Article 304, (about restrictions on trade, commerce, and intercourse among States) does not invalidate an Act, if the Bill, as passed has received the assent of the President.

Administrative Relations: Chapter II of Part XI deals with the administrative relations between the Union and the States. While the legislative lists included in Chapter I were clear enough, three articles in Chapter II modified this distribution of powers. They were adopted in toto

from the Government of India Act of 1935 and pertained to the superior powers of the Union Government over the States in certain matters. They were: Those instructions can be given to the States by the Union Government to ensure that the State executive complies with the laws of the Union and the Union Executive (Article 256); that the States do not impede or act in prejudice of the executive power of the Union (Article 257); and that the Union Government can devolve upon the State, with its consent, any of the functions of the Union Government (Article 258). However, just a few days before the completion of the Constitution, a new provision, Article 365, was introduced by Ambedkar which finally put teeth into the Union's Executive authority over the States. When the President concluded that a State was not acting in compliance with the directions of the Union executive, he could declare that the Government of that State was not being carried on according to the Constitution. Thereafter, under the Emergency provisions, the President could assume any of the functions of the State government.

There was much angry debate on this late addition and the members denounced this drastic power it gave the Union Government. They argued that this was identical to arbitrary powers as laid down in the hated Government of India Act of 1935 which gave the Governor-General, or a Governor of a Province, the authority or discretion to assume any of the functions of a Province. Ambedkar responded that it merely followed from the other articles that gave the Union executive the power to issue directions to the States: "The authority to give directions was useless without the power to enforce them."[xix] Despite stiff opposition, the Assembly passed the Article. We may now glance at the provisions regarding the administrative relations between Union and the States as they exist in the Constitution today.

The administrative relations between the Union and the States, covered in eight Articles from Article 256 to 263 can be seen in Chapter II of Part XI. **Article 256** enjoins that the executive powers of a State shall be so exercised as to ensure compliance with the laws made by the Parliament and the Union can issue directions to ensure compliance in this regard. **Article 257** stipulates that in certain cases, such as the construction and maintenance of means of communication of national and military importance or highways and waterways required for construction and maintenance of communication with respect for naval, military, and air force, or for the protection of railways, the powers of the State shall be

subordinate to the exercise of the executive power of the Union. **Article 258** empowers the President to entrust any of the functions of the Union executive to a State government. **Article 259** which referred to the role of armed forces in Part B States was repealed when it became irrelevant in 1956. **Article 260** authorises the Government of India to undertake any executive, legislative or judicial function in any territory outside the territory of India provided agreement for the same has been granted by the government of that territory. **Article 261** states that full faith and credit shall be given throughout the country to public acts, records, and judicial proceedings, including final judgments or orders passed by civil courts of the Union and the States. The purpose of this Article is to ensure that the acts and records of one State are given full faith and credit throughout the territory of India so that public acts, records, and judicial proceedings are not confined to the territory of one State alone. **Article 262** provides for the Parliament to adjudicate in any dispute in matters related to inter-state rivers or river valleys, as major rivers pass through many States and no single State can have exclusive right to the water resources. **Article 263** relates to the setting up of an Inter-State Council by the President for advising on disputes between two or more States having a common interest and to make any recommendations in that regard. The council's function is advisory, not statutory, and has no binding effect on the states.

One more matter deserves some attention: this can be seen in Articles 200 and 210 as they appear in the Constitution now. **Article 200** pertains to the assent of bills passed by the State legislature, the withholding of the assent, by the Governor of a State, or reserving the same for the consideration of the President. **Article 201** pertains to situations where the Governor reserves assent for the President's consideration: in such cases, the President may declare that he withholds assent or assents to it. Of course, both of these articles do not affect Money Bills passed by the legislature, where the final word lies with the legislature.

Emergency Provisions: The most extreme example of Union dominance over the States is apparent in the Emergency Provisions of the Constitution lying in Part XVIII. According to **Article 352**, the President can proclaim a state of emergency if he is satisfied that national security is threatened by external aggression or internal disturbance. This can be done only after the decision of the Union Cabinet is conveyed to him in writing about the issuance of such a proclamation. Such a proclamation must be immediately placed before both Houses of Parliament and automatically lapses after

one month. An analogous provision concerning the financial credit or stability of India, or any part of India exists in **Article 360.** In such cases, the Union Executive can issue directions to the States to observe canons of financial propriety. **Article 353** enables the Union government to issue directions to such States under emergency provisions and empowers the Parliament to pass laws for them. **Article 354** also enables the President to modify the provisions of Articles 268 to 279, about the distribution of revenues, while a Proclamation of Emergency is in operation. **Article 355** stipulates that the Union must protect the States against external aggression and internal disturbance.

There was a prolonged debate on the Emergency provisions in the Union Powers Committee under Nehru's chairmanship, right from February 1947. The Committee believed that powers analogous to the relevant sections of the Government of India Act of 1935, where the Governor General could declare an Emergency at his discretion, or where the Union government could legislate on subjects mentioned in the State and Concurrent lists, should be included in the Constitution. The Assembly considered it fit to postpone discussions to a later time. BN Rau did try to consider this in some detail, given his belief that both the President and the Governor had to fulfil their responsibility to prevent grave dangers to the Union. A joint session of the Union and Provincial Constitution committees revealed sharp differences. One view was that the Governor could proclaim an Emergency only on the advice of the ministers. The other view was that he could so at his discretion but must report the same to the President. When the matter came up for discussion in the Assembly in August 1939, opposition to the Governor's discretion to proclaim an Emergency, led by Pant and Kunzru, steadily grew. Ultimately, the accepted version was that in a situation where the Government of a State could not be carried on by the Constitution, the President, on the receipt of a report from the Governor, 'or otherwise', could assume the functions of a State's executive, and the Parliament those of the legislature. In the kind of situations envisaged above, both the President and the Governor have the powers to issue ordinances that have the same authority as legislative statutes passed by the elected houses. However, all such action is subject to legislative ratification within a period of six months. These provisions were adopted in May and June 1949.

President's Rule: One of the most contentious articles of the Constitution is **Article 356**. It has always been a matter of tension between the Union and the States and the focal point of a wider debate on the federal structure of

government in Indian polity. It empowers the President, to his satisfaction, with or without a report from the Governor of a State, to assume for himself all or any of the functions of the Government of a State and to declare that all the legislative functions of the State shall be exercised by the Parliament. Such a proclamation must be laid before both Houses of Parliament. Unless approved by them, it shall lapse after two months. Even after such approval, the declaration shall lapse after six months unless further extended by the Parliament by resolution. Such periodic extensions are not to exceed three years.

The Sarkaria Commission Report on Centre-State Relations 1983 has recommended that Article 356 must be used "very sparingly, in extreme cases, as a measure of last resort, when all the other alternatives fail to prevent or rectify a breakdown of Constitutional machinery in the State"[xx]. Dr. Ambedkar also said that it would be like a "dead letter"[xxi]. Yet, it cannot be denied that Article 356 gives wide powers to the Union Government to establish control over a state. Commonly known as President's rule, the Union government has used this power several times to dissolve elected State Governments ruled by political opponents. Thus, it is seen by many as a threat to the federal system. The article was used for the first time in Punjab in June 1951. It was also used in the State of Patiala and East Punjab States Union (PEPSU) and Kerala in July 1959. Between 1966 and 1977, President's rule was imposed 39 times in different States. Similarly, the Janata Party which came to power after the Emergency in 1977, issued President's rule in 9 States which were then ruled by the Congress.

The practice was limited only after the Supreme Court established strict guidelines for imposing the President's rule in its judgment on SR Bommai vs Union case in 1994.[xxii] This landmark judgment has helped curtail the widespread abuse of Article 356. The judgment laid down some guidelines for imposing President's rule. Subsequent pronouncements by the Supreme Court in Jharkhand and other States have further limited the scope for misuse of Article 356. Only since the early 2000s have the number of cases of imposition of President's rule been drastically reduced.

Financial relations: The other area for examination of the federal nature of our country lies in the matter of the distribution of revenue. In classical theory, both the central and the regional governments "must each have under its own independent control financial resources sufficient to perform its exclusive functions."[xxiii] Yet, the members of the Constituent

Assembly did not find it odd to request the Union Government to assist them in the task of financial management of the State government insofar as many of the tax heads were considered. Alladi Krishnaswamy Ayyar, while conceding that it is proper for the federal government to have independent sources of revenue, spoke in the Assembly, stating that "the central government should act as the taxing agency while taking care at the same time that the units [states] shared in the proceeds of the taxes received and other subsidies."[xxiv] That the resources gathered at the State level were inadequate even for the normal administrative duties of the States was established later in the report of the First Finance Commission of 1952. Many memoranda were received both from the Provinces and departments at the Centre in the matter of sharing of the revenue proceeds. The Government of India Act of 1935 placed greater emphasis on the financial strength of the Centre. There was almost universal demand from the Provinces that they should have an increased share in the revenues from income tax, excise duties, and corporation tax. They conceded that it should be the Union Government that should levy, collect, and distribute the proceeds from these revenues, thus refraining from insisting that these levies should fall within the jurisdiction of the States. The Expert Committee on Financial Provisions of the Constitution did not recommend expansion in the areas in which the States could levy taxes. However, the actual procedure for the sharing was left to the Finance Commission.

The specific articles of the Constitution dealing with the subject can be seen in the first two chapters of Part XII of the Constitution. These articles, from 264 to 291, deal with the question of sharing the proceeds from taxes and other revenue through the mechanism of the Finance Commission. **Articles 292** and **293** deal with the matter of borrowings to be availed by the Union and the States. Taxes that have an inter-state basis fall under the jurisdiction of the Union, while those with a local base have been assigned to the legislative authority of the States.[xxv] Broadly they deal with issues related to the allocation of taxation powers and the distribution of the proceeds of these taxes; the power of the Union in such matters, especially that of making grants-in-aid; the provisions regulating borrowings; and the matters related to the Finance Commission. They are not being detailed out here as they, and other related provisions of the Constitution, have been examined in some detail in another chapter in this volume dealing with taxation, trade, and commerce in the country.

We may, however, briefly state that four categories of Union taxes are:

- Taxes levied, collected, and retained by the Union (corporation taxes, custom duties, surcharges levied on Union taxes, etc)
- Taxes levied and collected by the Union, but the revenues of which are shared with the States (income tax, excise duties, etc)
- Taxes levied and collected by the Union but the proceeds of which are assigned wholly to the States (succession ad estate duties, terminal taxes on goods and passengers)
- Taxes levied by the Union but collected by the States (stamp duty and excise on medicinal products)

As for the State Governments, land revenue, taxes on professions and callings, taxes on vehicles, luxury, and entertainment tax, etc., fall within their competence.

As for making grants, both the Union and the States have the authority to do so: These grants may be for large projects, to defray budgetary deficits, or for improvements in tribal areas, etc. Both the Union and the States have the right to borrow on their revenues, under restrictions imposed by the Constitution. The Fiscal Responsibility and Budget Management Act of 2003 further places stringent conditions in matters of both revenue and fiscal deficit as well as the total borrowings of the Union and the States.

Students of the financial history of India may be interested to understand the reason why the Constituent Assembly agreed, in a federal structure such as ours, to such a constitutional centralised financial arrangement that lays great emphasis on the Union. Much of the outline of this arrangement comes from the Government of India Act of 1935 which was clearly within the framework of a tight federal constitutional government. The main reason for the acceptance of these ideas was that many of the senior members of the Assembly such as Shyama Prasad Mukherjee, C Rajagopalachari, Pandit Govind Ballabh Pant, KM Munshi, and others had practical experience of the working of the Act of 1935 and were involved in its report.

Even as the Constitution was being drafted, India was under a strong federal structure. British Raj had ensured a centrifugal system of power and the rules of governance were based around the power of the Viceroy, acting as Governor-General on behalf of the Crown, and under the direct supervision of the Parliament. The States could not bargain under these circumstances. There were, however, two pressure points that the members of the Constituent Assembly raised in their discussions. One, the precarious financial situation prevailing in those days; two, the need of the Provinces to determine the manner of distribution of the revenues especially in the context of "the constantly growing social services and nation-building activities" in the states.[xxvi] The demand was made that "it was the duty of the Centre to give greater assistance to the poorer Provinces" and to raise them to the level of the richer.[xxvii]

Mention is to be made of the Expert Committee on Financial Provisions of the Constitution. A request had been made by some senior members of the Assembly that there should be an expert committee to advise on matters about the financial provisions of the Constitution. This 3-member committee comprised two civil servants, VS Sundaram and MV Rangachari, and a businessman, NR Sarkar. The Expert Committee supported this view and stated that the States must have adequate resources "if the services on which the improvement of human well-being and the increase of the country's productive capacity so much depend, are to be properly planned and executed."[xxviii] All this necessarily endorsed the need for a strong central arrangement to dispense the bounty of the revenues equitably." This necessarily meant that the richest Provinces, such as Bombay, West Bengal, and Madras, would have to accept the formula of sharing as would be decided by the constitutional financial provisions. The inevitable third party between the wealthy and the poorer Provinces was the Union Government – whose pact as the dispenser of the bounty would be watched over by the Finance Commission."[xxix]

On the other hand, the Union Finance Ministry was apprehending a shortfall in the revenues of the new country because there would be a decrease in various heads of Union revenue and a simultaneous increase in the expenditure in the future because of possible large-scale import of food grains, cost of defence, refugee settlement, etc, all of which would be exclusively the responsibility of the Union Government. It was left to the President of the Constituent Assembly, Rajendra Prasad to allay the fears of the Provinces: There was a "considerable feeling in the Provinces that

their sources of revenue have been curtailed… [and] that the distribution of the income tax is no such as to give them satisfaction. I desire to ask the Finance Minister to bear this in mind … so that it may not be said that the policy of the Government of India is such as to give more to those who have much and to take away the little from those who have little."[xxx]

The relationship between the Union and the States has always been a subject of controversy. The Constitution gives the States greater autonomy than had been provided for in the Government of India Act of 1935. The coordinated and interdependent nature of the relationship of the States with the Union makes it a delicate and complex issue. The States need Union funds, and the Union without the cooperation of the States could not exist for long. The nature of this bond has been described thus: "No other large and important government, I believe, is so dependent as India on theoretically subordinate, but rather distinct units, responsible to a different political control, for so much of the administration of what is recognised as national programmes of great importance to the nation."[xxxi]

A mention is to be made about Finance Commission, a quasi-judicial body set up under Article 280, that is charged with the responsibility of recommending the principles governing the distribution of tax revenues between the Union and the States, as well as grants-in-aid, and other matters referred to them by the President. Their recommendations are accepted without question and thus their power is indeed great, thus affecting the financial balance of the federal system.

National Planning: Pre-Independence had seen the creation of a National Planning Committee under the Congress with Nehru as its Chairman in 1937. The Viceroy's Executive Council had a member entrusted with the subject of Planning and Development. It is interesting to note that in 1945, a group of bankers and industrialists brought out a paper entitled 'A Plan of Economic Development for India', popularly called the 'Bombay Plan'. It was a forward-looking blueprint envisaging comprehensive plans to be created by a national planning committee working under a supreme economic council under the authority of the Central Government. That this plan received widespread support is confirmed by the report of the Fiscal Commission in 1949 which reported on "the preponderance of opinion …in favour of an organisation for the overall planning of the economic activities of the country"[xxxii].

In discussions with the Cabinet Mission, the Congress leadership had insisted on the Central Government being responsible for national planning; this was stoutly refused by the Mission, probably because it may have hinted at a dangerous Marxist model of development, that in the context of the post-World War II scenario was anathema to the Raj. The first Union Powers Committee had only expressed the pious hope that planning would be by agreement between the Union and the States. The second Union Powers Committee had taken the step of including 'Economic and Social Planning' in the concurrent list. The Constituent Assembly adopted this formula. The formation of the Planning Commission in 1950 underlined the importance of planning on a nationwide scale for the fledgling country.

For over 50 years, the Planning Commission occupied a central position in the task of planning for the economic and social development of the country. It was central also to the idea of a federal nation and functioned through the formulation of five years plans. The Commission's original mandate was to raise the standard of living of ordinary Indians by efficiently exploiting the country's material and human resources, boosting production, and creating employment opportunities for all. The Commission was chaired by the Prime Minister and included a deputy chairman and several full-time members. Each of the numerous divisions of the commission, corresponding to sectors of the national economy and society, was headed by a senior officer. The divisions included education, health, infrastructure, science, financial resources, industry, social welfare, rural development, and water resources.[xxxiii] The various Five-Year Plans prepared and implemented in the country for over half a century tell volumes regarding the sagacity and leadership that the Planning Commission provided.

The abolition of the Planning Commission in 2014 and its replacement by the NITI Aayog was a radical step that has been both lauded and castigated at the national level. It has been argued that the Planning Commission was a national forum that strengthened the concept of India as a federal nation and contributed to the evolution of high principles of federalism over the five decades of its existence. It provided a platform for the States to discuss common issues and policies as well as strategies for overall development. Its critics have argued that the body was unnecessary and only imposed impractical and unnecessary conditions and often ignored the aspirations of the States. The responsibility for the low growth rates of the economy in the four initial decades of centralised planning was also laid at the doorstep of the Planning Commission.

NITI Aayog has replaced the Planning Commission, though its objectives are not entirely identical to those of the Planning Commission. The NITI Aayog's avowed object is "to evolve a shared vision of national development priorities, sectors, and strategies with the active involvement of States. It aims to foster cooperative federalism through structured support initiatives and mechanisms continuously, recognizing that strong States make a strong nation."[xxxiv] It attempts to form credible plans at the village level while also aggregating them at higher levels. It also aims to design strategic and long-term policy and programme frameworks and initiatives, to monitor their progress and efficacy. It also functions as a resource Centre on good governance and best practices to assist in sustainable and equitable development.

There are other bodies too which promote the idea of India as a federal nation. We have already referred to the Inter-State Council created according to Article 263 of the Constitution. There are also five zonal councils – Northern, Eastern, Western, Central, and Southern – created as instruments of intergovernmental consultation and cooperation in socio-economic fields. We have already seen how the Finance Commissions attempt to redress financial inequalities between developed and not-so-developed States based on certain formulae that seek to level the playing field while determining the devolution of financial resources from the Union to the States.

The National Development Council is another such body that can strengthen federalism. It is the apex body for decision creating and deliberations on development matters and is presided over by the Prime Minister. It was set up in August 1952 to strengthen and support the efforts of the Five-Year Plans of the Planning Commission. The Council comprises the Prime Minister, all the Union Cabinet Ministers, the Chief Ministers of the States, and now the members of NITI Aayog. However, as it stands today, it has been proposed to be abolished. Since the inception of NITI Aayog's Governing Council (which has almost the same composition and roles as NDC), the assigned work to NDC has been limited. It is important to realise that several bodies now exist which seek to re-examine the power equation between the Union and the States. Another such body, again recommendatory in nature, is the Administrative Reforms Commission which attempts to re-examine the political and administrative relationship in the federation of states. The Commission periodically issues recommendations to cover all aspects of administrative efficiency and the fruitful utilisation of resources. The 1988

Sarkaria Commission had made an exhaustive and detailed examination of the state of the nation and had investigated the entire arena of federal power sharing and distribution of resources. "It strove to situate the union framework of the Indian polity within the grand design of federalism as a "living theory." In other words, it tried to strike a fair balance between autonomy and integration on a case-to-case basis. It attempted to resolve the conflicted domain of the federal government's prerogatives and states' rights within the overall framework of the Indian Constitution. Another interesting aspect of the report was that it made the exercise of authority under various federal provisions of the Constitution as transparent and objective as possible. Instead of effecting too many amendments to the Constitution, it favoured the growth of norms and conventions, a kind of federal political culture.[xxxv]

The GST Council is yet another body that is federal in nature, though it is restricted to matters related to the Goods and Services Tax. Created under Article 279A of the Constitution, it deliberates upon issues related to the administration of the tax and attempts to bring uniformity in taxation matters across the country. It also decides on matters of compensation for States for the loss of Sales Tax they may have suffered because of the change over to the GST regime.

Other bodies of a national nature nurture the idea of a federal nation, imposing a common framework across all the states of the country in the sphere that they work in, like the Central Council of Health or the Central Council of Local Self-Government. These are similar national bodies that give strength to the concept of a federation. The list also includes the Central Information Commission (for matters under the Right to Information Act), the Union Public Services Commission (for recruitment to national level civil services) the Central Administrative Tribunal (for disputes regarding establishment matters of the various civil services), the National Investigation Agency (for matters of crime and threats to the integrity of the nation), the National Human Rights Commission for violations of basic human rights) etc.

Asymmetry in development: There is an asymmetry in the growth profile of individual States, with some showing high human development indices and per capita incomes while others are markedly behind the curve. The political disparities were beaten into a single political entity, decidedly democratic and secular in nature, with integrated judicial and

administrative systems, as well as a uniform financial system to take the country forward. However, the social and developmental differences remain, dividing all the states into more, or less, developed states. Notwithstanding these disparities, it stands to the credit of the Constituent Assembly that it could envision a Union based on single citizenship with a uniform constitutional framework that enabled the country to emerge as a major international power in the recent past.

The spirit of cooperative federalism has indeed been revived recently, as is evident from the report of the 15th Finance Commission. Yet, one of the terms of reference of the Commission raised a controversy that is still unresolved. The new reference point has generated a spirit of unhealthy 'competitive federalism' that threatens to distort development strategies amongst the states. Para 5 of the terms for the quinquennial 2020-2025 stated: 'The Commission shall use the population data of 2011 while making its recommendations.' This is in sharp contrast to the similar terms issued to previous commissions where the population statistics of 1971 were taken into consideration. This has raised a flurry of issues largely from the more progressive Southern States, alleging bias and discrimination. It has been alleged that the federal nature of the country has been distorted by this change. To understand this issue, we must examine the skewed trajectory of the development of States across the past few decades in the country.

A few common variables normally used for comparing the quality and manner of governance and development in the States may be taken into consideration. HDI, the Human Development Index is one of them, based on certain aspects of education, per capita income, and health parameters. Gross Domestic Product along with Per Capita Income can be another. The quantum of devolution from the Centre is yet another factor to consider in this regard. Of course, the population growth rate is the more important of these indicators. We may examine a few of the important states to understand the grievances of some of the states.

State	SDP per capita: INR at current prices: (2019-20)xxxvi	HDI (2021)xxxvii	Devolution % (2023-24) xxxviii	Decadal Population growth rate (2001-2011)xxxix
Uttar Pradesh	65,704	0.592	17.939	20.23
Bihar	46,664	0.571	10.058	25.40
Tamil Nadu	2,18,599	0.709	4.079	15.61
Karnataka	2,23,433	0.667	3.647	15.60
Kerala	2,04,105*	0.751	1.925	4.91
Maharashtra	2,16,375*	0.688	6.317	15.99
Gujarat	1,95,845*	0.638	3.478	19.28

*Kerala, Maharashtra, and Gujarat figures are for 2018-19

The grouse of the developed Southern States is that despite lower decadal population growth rates and better revenue collection, their share of devolution from the successive Finance Commissions has been coming down over the years. This grievance has been further aggravated by the 15th Finance Commission which has taken the 2011 population data as the reference point for devolution. The progress achieved by these developed States in population control and in enhancing per capita income has been negated by the 15% weightage allocated to population and 45% for income distance, i.e., the gap in the per capita income between developed and undeveloped States. In this way, the States which have not put in any effort to control population growth rates or to increase per capita income have been rewarded for their inefficiencies. The better-performing States (regarding population growth rate control and income generation as also human resources development indices) have been penalised. In the federal nature of our country, the access of the States to equitable financial resources of the nation is an important aspect of cooperative federalism. The apprehension of some States that these fundamental principles are being given the go-by may have adverse implications for the harmonious relationship between the Union and the States. The differences amongst the States of the Union, situated above and below the Vindhyas, in terms

of the stark differences in their achievements in a host of development factors and parameters, are already a matter of much acrimonious debate. With regional parties in power in many of the States, these acrimonious feelings may exacerbate.

The Language Issue: Admittedly, language was the most complex and contentious of all issues that the Constituent Assembly faced. That it had serious implications for the federal nature of the new country cannot be ignored. The only solution the Constitution provided was for an enabling provision mentioned in Article 3 that allowed the Parliament to form a new state on the recommendation of the President after he had ascertained the views of the Legislature of the State(s) concerned. This required no mechanism of constitutional amendment. The Constituent Assembly decided that Bills affecting the boundaries of a State can only be introduced by the Government, on the approval of the representatives of the area or the sanction of a resolution from the State legislature. The attempt was to solve the ever-increasing demand for linguistic Provinces while keeping them within the framework of a federal nation. Some members were still dissatisfied: Ayyar believed that giving the Parliament the drastic power of Article 3 was not consistent with the federal principle of the Constitution itself. He, however, conceded to the demand for linguistic Provinces.[xl] Nehru's Objectives Resolution also referred to the possibility of a new India being made up of Provinces, "whether with their present boundaries or such others as may be determined by the Constituent Assembly".

The beginnings of the language conundrum can be traced to the policy followed by the Congress over the earlier few decades as it had organised its administrative structure on a linguistic basis after its Nagpur Congress of 1920. The 1928 Nehru report also recommended provincial distribution according to "the wishes of the people and the linguistic unity of the area concerned."[xli] Each linguistic group had focussed its hopes on the Constituent Assembly, though it was opposed at many levels by other forces. After Independence Day, the agitation increased, and a move to establish a Linguistic Provinces Commission was initiated by BN Rau. Set up in June 1948, the three-member commission, known popularly as the Dar Commission after its chairman, concluded after much enquiry, that the formation of states on linguistic consideration is not in the larger interests of the Indian nation.[xlii]

The possible impact of Article 3 on the federal nature of the Constitution was discussed by Deshmukh and Azad. The former went so far as to say that given the bitter discussions on the subject of the linguistic Provinces, it may be better to draw up the Constitution based on India as a unitary government.[xliii] The latter was disturbed by the rising demand for linguistic Provinces and recommended giving a "commanding position to the Centre in the new constitutional set-up".[xliv] Those who were demanding separate linguistic Provinces, including members such as Diwakar, Pataskar, Nijilingappa, Munawalli, etc did not consider themselves as separatists or promoting such tendencies, and expressed the determination that they only wished for the good of all of India. That these two viewpoints may have an impact on the federal nature of India was a fear that some expressed. President Prasad tried to intervene stating that the model constitutions that the Union and the Provincial Constitution Committees were formulating need to necessarily require linguistic Provinces. He meant that the relations of the Provinces to the Union were to be the same no matter on what basis the Provinces were constituted. In fact, the linguistic rearrangement of the Provinces, both then and later, has not led to any weakening of the Centre in its relations to the States. All States are claimants for the patronage and bounty of the Centre.[xlv]

Dissatisfied with this negation of popular demands, immediately thereafter, the Jaipur Congress session approved a resolution to take a second look at the question. The JVP report (named after the first names of Nehru, Patel, and Sitaramayya) of April 1949 expressed the fear that this may not be an opportune moment for new Provinces. However, the door was not closed completely: it said "If public sentiment is insistent and overwhelming, we, as democrats, have to submit to it, but subject to certain limits regarding the good of India as a whole…"[xlvi] Yet, with the completion of the work of drafting the Constitution of India in January 1950, the Assembly ended its task, having refused to accede to the demand for linguistic Provinces.

Success only came after the formation of Andhra in 1953 and the States Reorganisation Act in 1956. To enable the implementation of the Act, a States Reorganisation Commission was constituted, headed by the retired Chief Justice of the Supreme Court, Justice Fazal Ali with HN Kunzru and KM Panikkar as members. Its work was under the oversight of Govind Ballabh Pant, who was Home Minister then. The States Reorganisation Commission submitted a report in September 1955, with clear recommendations for the reorganisation of India's states. The report was then debated in the

Parliament and subsequently, bills were passed to make changes to the Constitution and to administer the reorganisation of the states. The States Reorganisation Act was enacted in August 1956. Before it came into effect on 1 November, another important amendment was made to the Constitution of India. Under the Seventh Amendment, the existing terminology of Part A, Part B, Part C, and Part D states was altered. The distinction between Part A and Part B states was removed, becoming known simply as "states". A new type of entity, the Union Territory, replaced the classification as a Part C or Part D state. Of course, more states were created from time to time thereafter too. Some more details of the issues involved in this bitter dispute may be seen in another chapter in this volume entitled 'The Writing of the Constitution of India'.

The Evolving Union: In the period after 1950, there have been over a hundred amendments to the Constitution serving a wide variety of purposes such as enlarging the power of the Union by bringing subjects from the State list to the concurrent list. Through small and big steps, the character of the country is being moulded into a unified federation, which respects the autonomy of the individual state, while at the same time, binding it irrevocably into the embrace of the Union. Amendments have also led to the scope of affirmative action to support disadvantaged sections of society being enlarged. Significantly, some amendments also led to introducing the third tier of government both in rural and urban local bodies by constitutionalising them, etc. As we have seen, Gandhiji's dream of the village republic was relegated to a single provision in the Article 40 of the Directive Principles of State policy that demanded the organisation of village panchayats and to endow them with such power and authority as to enable them to function as units of self-government. It may be argued that the 73rd and 74th Amendments were another step in strengthening the ideals of a federation, moving beyond the format of Union and States into a deeper engagement with the people at the grassroots level.

The nature of our Constitution is such that critical comments about its federal nature are unavoidable. Some hesitate to define it as truly federal, preferring to use such terms as quasi-federal, or unitary with federal features, or federal with unitary features. Wheare has referred to it as quasi-federal and not strictly federal.[xlvii] Ivor Jennings characterized it as a "federation with strong centralising tendency."[xlviii] It is interesting to note that in legal disputes in the Supreme Court between the Centre and the state, the Apex Court has generally preferred a strong Centre and has,

played down the federal character of the Constitution.[xlix] That is not to say that the authority of the State has been denied. In the famous *Bommai* case already referred to above, Justice Jeevan Reddy wrote: "Within the sphere allotted to them, the States are supreme. The Centre cannot tamper with its powers. More particularly, the courts should not adopt an approach, an interpretation, which has the effect of, or tends to have the effect of whittling down the power reserved to the states".[l]

There is also the presence of an asymmetrical form of federalism that belies the traditional concept of a Union of States, each uniformly equal to the others in all aspects. Until recently, the state of Jammu and Kashmir had a special status under Article 370. Similarly, the Sixth Schedule granted the Northeastern States the format of autonomous districts and regions with a unique administrative structure in their District and Regional Councils, with law-making powers. The purpose of this form of asymmetrical federalism "is often praised for respecting ethnic diversity and providing for a design mechanism for holding different cultural groups together…the fear is that a symmetric federal structure in which special treatment is not accorded to certain groups will result in their exploitation."[li]

The emergence of pushback from the States may also be mentioned here. The recent Supreme Court judgment in the *Union of India vs Mohit Minerals Pvt Ltd*[lii] is an important development in the model of Indian federalism. In the matter dealing with two notifications issued based on the recommendations of the GST Council, the Supreme Court struck them down because the will of a State government with an opinion different from that of the GST Council, cannot be usurped by the GST Council, merely on account of its sole existence. The Apex Court used the scholarship of American law professors Jessica Bulman-Pozen and Heather K Gerken seen in their seminal piece Uncooperative Federalism[liii], which presented an alternative to the conventional Centre-State relationship. "In light of the equal powers granted to Parliament and State legislatures, and the non-mandatory nature of its recommendations, the GST Council serves not only as an instrument for exercising "cooperative federalism" but also for expressing differing political viewpoints on policy matters. Hence, federalism need not necessarily be 'cooperative' or 'collaborative' but can also be 'uncooperative'."[liv]

We may quickly glance through some Supreme Court judgments that have made some observations about our federal nature. In State of *West Bengal vs Union of India*[lv], Justice B. P. Sinha CJ, structure observed: "The exercise of powers legislative and executive fields is hedged in by numerous restrictions so that the powers of the States are not coordinate with the Union respects independent ... [t]he political sovereignty is distributed between… the Union of India and the States with greater weightage in favour of the Union." Similarly, in the *Kuldip Nayar vs Union of India* case[lvi], the Apex Court pronounced: "[It is] evident …that India is not a true agreement between various States, and territorially it is open to the Central Government under Article 3 of the Constitution not only to change the boundaries but even to extinguish a State." This leads to the question of judicial interpretation of the powers of the State as has been explained in the court's judgment in *ITC Ltd vs Agriculture Produce Committee* thus: "The Constitution of India deserves to be interpreted, language permitting, in a manner that it does not whittle down the powers of the State Legislature and preserves the federalism while also upholding the Central supremacy as contemplated by some of its articles." [lvii]

Some thoughts gleaned from the speeches of Ivor Jennings can be useful for setting out the premise of federalism in our Constitution.[lviii] "…The general principle adopted by the Constituent Assembly [was] that despite federalism, the national interest should be paramount,"[lix] Jennings states that India, like Canada, enacted the State Constitution into the Federal Constitution, by incorporating three Parts, including Part XI (relations between Union and States), Part XII (finance) and Part XIII (trade and commerce), comprising over eighty articles into a comprehensive and integrated package delineating the basic principles of federalism. All this has been expressed in the Indian Constitution with considerable detail and rigidity. Many of these provisions figure in the Government of India Act of 1935, which was intended to cover the transition to independence and finally hand over power to the Indians. The three Lists of the Seventh Schedule are in such detail and most of the cases will be covered by the express words. Further, it has been made clear that the residuary powers lie with the Union; in case of any repugnancy between the Centre and State laws, the former shall prevail. Jennings has opined that instead of this model, it would have been easier to assign sovereign powers to the Union and defined powers to the States, subject to their not infringing the Bill of Rights or other constitutional powers.

Jennings goes on to say that the distribution of legislative power has two interesting features. One is the comparative weakness of the States when compared with the powers of the Centre. The second is the question of the validity of State legislation. Any law the State wishes to pass, which is repugnant of central legislation, immediately fails. In addition, any proposed legislation conflicting with Fundamental Rights will also not survive. "Legislation whose validity can be challenged is legislation which people will hesitate to obey. Since the practice of obedience to law is not well established in India, the result may be that much of State legislation will be nullified by non-observance."[lx]

Similarly, Jennings draws attention to Part XI of the Constitution governing administrative relations of the States with the Union. Under Articles 256 and 257, the Union Government can issue directions to the States. "It is not difficult to imagine a conflict between a Congress Government of the Union and a non-Congress Government of a state… if a federal system is selected, one must put up with the inevitable consequences of federalism, one of which is the possibility of a conflict between the State and Federal governments."[lxi] A similar conflict can be envisaged concerning All India Service Officers who are appointed by the Union but work with the States. "How far State officers can serve two masters, especially when the two masters conflict, is an interesting question to which time will no doubt supply a negative answer."[lxii]

"The complete disregard of minority claims is one of the most remarkable features of Indian federalism."[lxiii] Writing in the early 1950s, Jennings refers to the fact that no reservation has been provided for minority religious communities in the political membership of elected bodies or appointments in public services. "What effect this will have on the Constitution cannot be estimated, because it depends essentially on how majorities exercise their power. Countries with divided loyalties are always on the horns of a dilemma. Compromise with communal claims may be the height of statesmanship because it enables the majority to secure the support of minorities. To recognise communal claims, on the other hand, is to strengthen communalism. The Constituent Assembly has decided to ignore communalism. If this bold step succeeds, history will record it as a decision of the highest statesmanship; if it fails, history will call it another case of political blindness."[lxiv]

A definitive conclusion of judgment on the success or otherwise of our federal system is difficult even after so many years of independence. We may quote verbatim from Justice BN Srikrishna: "The candid admission of the Prime Minister at the International Conference on Federalism that there has been a distortion of the national vision and collective purpose by narrow political considerations based on regional or sectional loyalties and ideologies, must be an eye-opener to all of us who pride ourselves on the country's pragmatic approach to federalism. It has been pointed out that examples of chauvinism, domestic insurgencies, social tensions, and federal disputes undermine the claims of the success of India's federal democracy in adopting an inclusive polity. It has been suggested that India's political system remains vulnerable, and caution must be exercised against complacency in dealing with the diverse aspirations of the people."[lxv] Sunil Khilnani was even more critical: "The Republic of India is 'an ungainly, unlikely, inelegant concatenation of differences' that, decades after its foundation, still exists as a political entity."[lxvi]

As far as India is concerned, we may go by the traditional definition of federalism, where "the legislative and executive authority is partitioned between the Centre and the States, not using an ordinary law passed by the Centre, but by something more enduring, viz., the Constitution.[lxvii] The Indian Constitution provides for an arrangement where in normal times, the States do not depend on the Centre and the Centre cannot intrude into their domain. A larger role for the Centre does not detract from the federal nature of our Constitution.[lxviii] Indeed, we cannot say that the concept of federalism is static and fixed: all over the world where federations exist, there is a dynamic fluidity and a strengthening of the principle of 'cooperative federalism.' From a one-party rule at the time of Independence, extant at the Centre and State level, we have moved to the era of regional parties and coalitions. This has given greater strength to the federal nature of our Constitution where both the Centre and States have their roles to play. It has been argued that the recent phenomenon of the re-assertion of a strong Central Government may have slowed the process for a time, but the aspirations and the sense of autonomy of the States may not be denied for long. Constant discussions and negotiations between the Centre and the States in various fora can help in ironing out differences to make our brand of federalism more robust.

Yet, despite contradictory voices, there are genuine aspirations that we can work towards the true spirit of federalism. "Even when the constituents of the federation continue to protect their interests, there must be a will to subordinate one's short-term interest to the long-term interest of the country. An irrepressible sense of national unity must dominate if federalism is to work. Unless we can … voluntarily subordinate all local dissensions, disputes, and differences to the country's interests, we shall have proved right the critics of our experiment in federalism. We need to look and think beyond federalism toward the larger interests of the country. That, more than the machinery provided in the Constitution, will enable us to revive and abidingly re-establish the true spirit of federalism."[lxix]

Notes

i BR Ambedkar. from the Constituent Assembly Debates. Here this has been extracted from BR Ambedkar Selected Speeches, brought out by Prasar Bharati, and accessible at https://prasarbharati.gov.in/whatsnew/whatsnew_653363.pdf

ii https://www.niti.gov.in/cooperative-federalism

iii From the 15th Finance commission report quoting from the Cabinet Secretariate Resolution No 511/2/1/2021 dated 1 January 2015, accessible at page 9 of the resolution https://www.niti.gov.in/sites/default/files/2021-09/Cabinet_Secretariat_Resolution_dated_01-01-2015.pdf

iv SP Aiyer, "India's Emerging Cooperative Federalism," *The Indian Journal of Political Science,* Vol 21, no. 4 (Oct-Dec, 1960): 307-314.

v NV Gadgil, *Constituent Assembly Debates*, Vol XI, 637.

vi AH Birch, *Federation, Finance and Social Legislation in Canada, Australia and the United States*, (Oxford Clarendon Press, 1955), 305-306.

vii MP Jain, "Cooperative Federalism," in *Indian Constitutional Law*, (LexisNexis Butterworths, 5th Edition Wadhwa, Nagpur), 707.

viii Laxmi Kant Maitra, *Constituent Assembly Debates*, Vol XI, no. 5, 654.

ix Granville Austen, *The Indian Constitution: Cornerstone of a Nation,* (Oxford India paperbacks, Oxford University Press, 1966), 231.

x BR Ambedkar, *Constituent Assembly Debates* Vol VII, no. 1, 33-34.

xi The 2nd Report, Union Powers Committee, 5 July 1947, (*Reports, First Series*), 70-71.

xii Balkrishna Sharma, *Constituent Assembly Debates*, Vol V, no. 4, 77.

xiii Minutes of the Union Constitution Committee, 6th June 1947 accessible from Shiva Rao's 'The Framing of India's Constitution Indian Institute of Public Administration, 1968. Also available online at https://archive.org/details/in.ernet.dli.2015.275967/page/n11/mode/2up

xiv Granville Austen, Supra: 241.

xv Nehru's letter to President Rajendra Prasad, in which he wrote that "the soundest framework for our constitution is a federation with a strong centre": Second Union Powers Committee report; *Reports, First Series*, pp 70-80. As quoted from page 244, Granville Austen, supra.

xvi Proceedings of the meeting of the Drafting Committee dated 21 July 1947 from the Law Ministry Archives as quoted by Austen, Supra: 249.

xvii BN Rau, *India's Constitution*, page 313, forwarding his report to the President Rajendra Prasad and the Constituent Assembly.

xviii Constituent Assembly Debates Vol V, 3, 39, 245.

xix Granville Austen, Supra: 254.

xx Extract from para 6.8.01 of the Sarkaria Commission report as quoted in the SR Bommai judgment ([1994] 2 SCR 644: AIR 1994 SC 1918: (1994)3 SCC1), accessible at https://indiankanoon.org/doc/139734870/

xxi BR Ambedkar, *Constituent Assembly Debates*, Vol IX, 177.

xxii SR Bommai vs Union of India, 11 March 1994, Citation: [1994] 2 SCR 644: AIR 1994 SC 1918: (1994)3 SCC1: accessible at https://indiankanoon.org/doc/60799/

xxiii Dr KC Wheare, *Federal Government*, (London, Oxford University Press), 97.

xxiv Constituent Assembly debates, Vol VII, 4, 336.

xxv RN Bhargava, *The Theory and Working of Union Finance in India*, (Chaitanya Publishing House, 1965), 79.

xxvi From the memorandum of the prime minister of West Bengal to the Constituent Assembly, dated 30 September 1947. Now available in the volume known as the *Munshi papers,* available online at https://archive.org/details/in.ernet.dli.2015.136830/page/n33/mode/2up , (Bhartiya Vidya Bhawan, February 1967).

xxvii From a memorandum submitted by Krishna Sinha, prime minister of Bihar to the Assembly dated 31 October 1947 available in the Munshi Papers, Supra.

xxviii Report of the Expert Committee on the Financial Provisions of the Constitution, para 23: from *Reports, Third Series*, 218.

xxix Granville Austen, Supra: 277.

xxx Rajendra Prasad, *Constituent Assembly Debates,* Vol X, no. 9, 340.

xxxi Paul Appleby, *Public Administration in India, Report of a Survey*, (Cabinet Secretariat, New Delhi, Government of India, Manager of Publications, 1953), 22.

xxxii Government of India, Report of the Fiscal Commission, 1949-50, accessible at https://archive.org/details/dli.ministry.20645: 254.

xxxiii Note on the Planning Commission, accessible at https://www.britannica.com/topic/Planning-Commission

xxxiv NITI Aayog, accessible at https://www.niti.gov.in/objectives-and-features

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Chapter IV:

Fundamental Rights

Historical background: The role of the French and American Revolutions in the evolution of Fundamental Rights in India needs no special mention. In both countries, the revolutions were against inequalities and privileges. In France, it was against the privileged classes of nobles and clergy, and in America against the privileged Englishman. Rousseau's cry of pain in the opening words of The Social Contract, "Man is born free, but he is everywhere in chains", is the clarion call from where the revolutionary spirit arose. In the same way, the Declaration of American Independence begins with these resounding words, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

Inspired as the Indian freedom fighters were by these proclamations, the political leaders of the times had consistently asked for the incorporation of the right to equality as a fundamental right in the Indian Constitution. Alexander[i] points out that the demand had always been consistently pushed forward at various fora, including the Round Table Conferences and several parliamentary committees. The first explicit demand for Fundamental Rights appeared in the Constitution of India Bill 1895, in which Article 16 laid down a variety of demands such as free speech, imprisonment only by a competent authority, free education, etc. The Congress resolutions between 1917 and 1919 stridently repeated these demands, including a system of trial by jury. In the Commonwealth of India Bill of 1925, Mrs. Annie Besant called for individual liberty, freedom of conscience, free expression of opinion, free assembly, etc.

Yet, all these efforts received no satisfactory response. The Simon Commission commented, "Experience has not shown such a declaration to be of any great practical value. Abstract declarations were useless unless there existed the will and the means to make them effective".[ii]

It went on to say that "having regard, especially to the ingenuity and persistence with which litigation is carried on in India, we should anticipate that an enactment of the kind would result in the transfer to the law courts of disputes which cannot be conveniently disposed of by such means."

The Congress Resolution on Fundamental Rights of Karachi in 1931, significantly passed just a week after the execution of Bhagat Singh, Rajguru, and Sukhdev, guaranteed unqualified equality for all: "No disability attaches to any citizen because of his or her religion, caste, creed or sex regarding public employment, office of power or honour and in the exercise of any trade or calling."[iii] It is also moot to point out here that the Government of India Act of 1935 contained one provision in Section 298 which at least remotely recognised the right to equality: "No subject of His Majesty domiciled in India shall, on grounds only of religion, place of birth, descent, colour or any of them, be ineligible for office under the Crown in India or be prohibited on any such grounds from acquiring, holding or disposing of property, or any occupation, trade business or profession in British India."[iv] These provisions were, however, limited and recognised only equality of rights for public service, property, and of the profession.

Alexander[v] goes on to examine the scope of the application of this right in practice. In a comparison with the 14th Amendment which led to the Civil Rights Act of the United States, he points out that the makers of the American Constitution did not find it necessary to include the Fundamental Rights in the American Constitution, as it is "founded upon the power of the people and executed by their immediate representatives and servants."[vi] The Federalist Paper No 81, from where the above quote is taken, goes on to state rather sardonically: "Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government."

Fundamental Rights, concerning equality, do not merely mean the absence of special privileges. It means that adequate opportunities are laid open to all. For this, all citizens have to grow in an atmosphere congenial to equitable growth. Above all citizens must be fully conscious of their right to equality. Political equality is never real unless it is accompanied by virtual economic equality.[vii] It was that clear voice of individual liberty, John Stuart Mill, who said it so well: "…equality is one of the ends of good social arrangements; and that a system of institutions which does not make the scale turn in

favour of equality … is essentially a bad government – a government for the few, to the injury of the many."[viii]

An Introduction to Fundamental Rights in Part III of the Constitution: Fundamental Rights have long been the heart and soul of the Constitution and have always held a special and privileged place in the hearts and minds of the people of the nation. These are the rights of citizens who do not permit encroachment on their hallowed grounds. It is a fallacy to regard Fundamental Rights as a gift from the State to its citizens: all individuals possess basic human rights independent of any Constitution, by being members of the human race. "Hence Part III of the Constitution does not confer Fundamental Rights but confirms their existence and gives them protection."[ix] Its purpose is to withdraw certain subjects from political controversy and place them beyond the ambit of administrative overreach and apply them as legal principles to be applied by the courts. A fundamental right is in a way a limitation on the power of the State, and over the years have proved to be the most significant constitutional control on the Government and particularly legislative power. Their objective is to foster a social revolution by creating an egalitarian society where all citizens shall be equally free from coercion or restriction by the State. They are deeply interconnected and not to be read in isolation: rather, they must be read along with the Directive Principles of State Policy and the Fundamental Duties of Article 51A.

Yet, unlike the Constitution of some countries, in India no fundamental right is absolute. It has been universally accepted that reasonable restrictions can be placed on them. These rights have a large social and political context because the objectives of the Constitution cannot be otherwise realised. They have to give way to the rights of the public at large. Not only this, but as the Constitution is a living document, its interpretation may change, as time and circumstances change, to keep pace with it. Thus, over the years the Apex Court has expanded the reach and ambit of Fundamental Rights by the process of judicial interpretation, making it abundantly clear that they are not limited, narrow rights but provide a broad check against violations and excesses by the State. The Supreme Court has never considered only the letter of the law and in numerous cases deduced fundamental features because certain unarticulated rights are implicit in the enumerated guarantees.[x] Two examples may suffice. Article 21 of the Constitution (protection of life and personal liberty) has been interpreted to include the right to environmental protection.[xi] Similarly,

till the Right to Information, Act 2005 came into existence, there was no legislation securing the freedom of information. Yet, the Supreme Court by a liberal interpretation deduced the right to know and access information, because the same is implicit in the right to free speech and expression. The Court stated: "…this Court by a liberal interpretation deduced the right to know and right to access information on the reasoning that the concept of an open government is the direct result from the right to know which is implicit in the right of free speech and expression guaranteed under Article 19 (1) (a)." [xii]

That the British were reluctant to concede the inclusion of Fundamental Rights in the governance structure of the country was clear from the start. They held the opinion enunciated by Dicey that the proclamation of rights in the Constitution "gives of itself but slight security that the right has more than a nominal existence."[xiii] On these grounds, it had refused the demand of the Congress party to include rights in the Government of India Act of 1935. Yet, successive documents including the Nehru Report, the proceedings of the Round Table Conferences, and the Sapru Report of 1945, all recommended the same. Only in 1946, after proactive action on the international front in terms of the United Nations Charter, the UN Human Rights Commission, etc., was the British Government ready to concede this demand. The Cabinet Mission Plan then suggested the formation of an Advisory Committee in the Constituent Assembly to make recommendations on Fundamental Rights and Minority Rights. Thus, a day before the Constituent Assembly convened, on 8 December 1946, the Working Committee of the Congress drew up a resolution to establish the Advisory Committee which converted itself into the Fundamental Rights sub-committee and began work on 27 February 1947.

Constituent Assembly Committee on Fundamental Rights: The Constituent Assembly was set up to craft a Constitution for India and created a total of 22 committees to deal with various constitutional issues. In its resolution dated 24 January 1947, the Constituent Assembly had decided to constitute an Advisory Committee on the subject of Fundamental Rights under the chairmanship of Sardar Patel. The Committee was formally decided to be named as Fundamental Rights, Minorities and Tribal and Excluded Areas Committee and was chaired by Sardar Vallabhbhai Patel. This committee had separate sub-committees on each of the subjects within its mandate, with JB Kripalani heading the sub-committee on Fundamental Rights.

According to the schedule approved, the interim report by the Advisory Committee was to be submitted in six weeks, an interim report from the Minorities Committee within ten weeks, and the final report three months from the date of appointment of the Committee. This implicitly implied that the concerns of the Minorities Committee would be addressed in the final report. The interim report of this committee was submitted on 29 April 1947 and the House decided to extend the time of the committee to submit a final report.

Interim report of the Sub-Committee on Fundamental Rights: In the interim report presented to the Assembly by Sardar Patel,[xiv] he stated that the rights recommended are justiciable and that the Committee had yet not considered those aspects of the rights that are non-justiciable. The report explained this in some detail:

"The Fundamental Rights Sub-Committee recommended that the list of Fundamental Rights should be prepared in two parts, the first part consisting of rights enforceable by an appropriate legal process and the second consisting of Directive Principles of social policy which, though not enforceable in Courts, are nevertheless to be regarded as fundamental in the governance of the country. On these latter, we propose to submit a subsequent report; at present, we have confined ourselves to an examination only of the justiciable Fundamental Rights. We attach great importance to the constitution making these rights justiciable. The right of the citizen to be protected in certain matters is a special feature of the American constitution and the more recent democratic constitutions. In the portion of the Constitution Act, dealing with the powers and jurisdiction of the Supreme Court, suitable and adequate provision will have to be made to define the scope of the remedies for the enforcement of these Fundamental Rights."[xv] The Committee recommended that these shall be binding upon all authorities, whether of the Union or the Units (States).

Clause 10 of the interim report dealt with the freedom of trade, commerce, and intercourse between the citizens. However, since many States depend upon internal customs for a considerable part of their revenue, it was thought abolishing such duties immediately on the coming into force of the Constitution Act would lead to financial loss for the States. The members thought it would be reasonable for the Union to enter into agreements

with such States in the light of their existing rights, to give them time, up to a maximum period to be prescribed by the constitution, by which internal customs could be eliminated and complete free trade established within the Union.

The Sub-Committee also made a special provision regarding "full faith and credit being given to the public Acts, records and judicial proceedings of the Union in every Unit and for the judgments and orders of one Unit being enforced in another Unit. We regard this provision as very important and appropriately falling within the scope of Fundamental Rights."[xvi]

Special importance was given to Clause 2 which laid down that "all existing laws, regulations, notifications, custom or usage in force within the territories of the Union inconsistent with the Fundamental Rights shall stand abrogated to the extent of such inconsistency. While in the course of our discussions and proceedings, we have kept in view the provisions of existing Statute law, we have not had sufficient time to examine in detail the effect of this clause on the mass of existing legislation. We recommend that such an examination be undertaken before this clause is finally inserted in the Constitution."[xvii]

The inclusive and self-abnegating provision about the redressal of grievances against the State requires special mention here. The Fundamental Rights Sub-Committee thought that the right of the citizen to have redress against the State in a court of law shall not be fettered by undue restrictions. However, due to a shortage of time, they could not formulate a suitable formula for this purpose.

The basic principles of universal franchise were mooted in this document. The Fundamental Rights Sub-Committee and the Minorities Sub-Committee jointly agreed that the following should be included in the list of Fundamental Rights. The report stated: "Every citizen not below 21 years of age shall have the right to vote at any election to the legislature of the Union and of any Unit thereof, or, where the legislature is bicameral, to the lower chamber of the legislature, subject to such disqualifications on the ground of mental incapacity, corrupt practice or crime as may be imposed, and subject to such qualifications relating to residence within the appropriate constituency, as may be required, by or under the law."

It went on to say: "The law shall provide for free and secret voting and periodical elections to the legislature." It was also recommended that for the superintendence of elections, there should be an Election Commission.

The report made specific recommendations regarding citizenship, rights of equality, and the abolition of discrimination based on religion, race, caste, or sex while also emphasising the equality of opportunity for carrying on any trade or occupation. The rights of freedom that were recommended included freedom of speech and expression, the right to assemble peacefully, the right to form associations, the right to move freely within the country, equal treatment under the law, the adherence to due process of law before being deprived of life and liberty, abolition of the trade in human beings or forced labour or child labour. Significantly rights to religion were specifically added: "All persons are equally entitled to freedom of conscience, and the right freely to profess, practise and propagate religion subject to public order, morality or health…" The right of minority institutions to manage their affairs in matters of religion was also recommended to be granted.

Extracts from Constituent Assembly Debates: As could be expected there was much debate on these provisions. Pandit Hirday Nath Kunzru cautioned: "You may confer general rights on the citizens of India, but if they are to be surrounded with the restrictions mentioned here, and I submit that they will have to be surrounded with some such restrictions--then the right will, in practice, cease to be justiciable."[xviii] Mr. Promotha Ranjan Thakur added: I do not understand why economic Fundamental Rights should not be included in these justiciable rights. Economic rights are essential while framing a country's constitution and they must also be made justiciable."[xix]

With what seemed to be prescient foresight, Somnath Lahiri asked: Almost every article is followed by a proviso which takes away the right almost completely because everywhere it is stated that in case of a grave emergency, these rights will be taken away. Now Sir, what constitutes a 'grave emergency' God alone knows. It will depend on the executive obtaining at a particular period of government. So, naturally, anything that the party in power or the executive may not like would be considered a grave emergency, and the very meagre Fundamental Rights which are conceded in this resolution will be whittled down. Therefore, we must see the whole thing together and see what people are going to get.[xx]

There is a sense of apprehension about the possible misuse of Mr Lahiri's words when he goes on to say: "According to Patel a seditious speech is a punishable crime. If I say at any time in the future, or if the Socialist Party says, that the Government in power is despicable, Sardar Patel if he is in power at that time, will be able to put the Socialist Party people and myself in jail, though, as far as I know, even in England a speech, however seditious it may be, is never considered a crime unless an overt act is done. These are the fundamental bases of the Fundamental Rights of a free country. But here a seditious speech also is going to be an offence, and Sri Rajagopalachariar wants to go further. Sardar Patel would punish us if we make a speech, but Rajaji would punish us even before we made the speech. He wants to prevent the making of the speech itself if, in his great wisdom, he thinks that the fellow is going to make a seditious speech."[xxi]

Prof Ranga too expressed fears for the future and the threat of totalitarianism. He mentioned what happened in the states of Europe between the two wars: "They took advantage of the Fundamental Rights there to the extent that they came to power and paved the way for Nazism on the one hand and for communism on the other. We want to safeguard ourselves against such a menace. We have had this experience before us, and any responsible body like this has to make provision for such provisos as will enable a democratic parliament in this country to prevent any mischief-monger--organized or unorganized--from demoralizing our democratic State to such an extent as to pave the way and effectively achieve a totalitarian State in this country."[xxii]

That there were intensive debates in the Constituent Assembly as a whole and in the Fundamental Rights Sub-Committee, is now well documented. The question of the requirement for 'due process' in all questions dealing with the protection of Fundamental Rights was of paramount importance. It had a close connection with life, liberty, and property. Austin tackles this question in his masterful book on the Constitution.[xxiii] Pandit Govind Vallabh Pant argued for a strong legislature that should not be "subject to varying court judgments, to the whims and vagaries of judgments." Ambedkar gave a strong response: there is no need to give *carte blanche* to the government to detain with a 'facile provision'. KM Munshi added that due process prevented legislative extravagance and there should be no fears that judges would replace legislatures. Both Ambedkar and Munshi had, in their respective lists of draft rights, included due process as a protection for life, liberty, and property.[xxiv] In the committee's Interim

Report to the Constituent Assembly, it was stated that no person would be deprived of life and liberty without due process of law.

It was Sardar Patel who strove to find a balance between the conflicting views and his statement that day reveals his determination to find the golden mean: "These two schools viewed the matter from two different angles. One school considered it advisable to include as many rights as possible in this Report--rights that could straightaway be enforceable in a court of law, rights regarding which a citizen may, without difficulty, go straightaway to a court of law and get his rights enforced. The other school of thought considered it advisable to restrict Fundamental Rights to a few very essential things that may be considered fundamental. Between the two schools, there was a considerable amount of discussion, and finally, a mean was drawn which was considered to be a very good mean. It must not be understood, because this Report is called an Interim Report, that the second Report will be much bigger, or that many more important things will come under the subsequent report. It cannot, in the nature of things, be that the principal report which comes before the House would be containing less important things."[xxv]

Report of the Sub-Committee on Fundamental Rights for Minorities: It would be moot to refer to the report of the Minorities Sub-Committee on Fundamental Rights, mentioned above in the address of Sardar Patel. This can be seen in the minutes of the meetings held on 27th and 28th February 1947. The Chairman of the Sub-committee on Minority Matters, Dr. SP Mookerjee felt that it would be better for interested members to write to the main committee on Fundamental Rights regarding Minority Rights which they wanted inserted into the Constitution. KM Munshi suggested that a small committee be constituted to examine "what is the precise scope of the expression 'clauses for the protection of minorities', what are the provisions in the Constitution Act for the protection of minorities and the clauses in the constitutions of other countries for the protection of minorities?" [xxvi]

KP Salve was of the view that Minority Rights must gradually disappear and that they should not be an inflexible feature of the Constitution. SH Prater suggested that the discussions. should cover Fundamental Rights peculiar to a community (such as the wearing of kirpans by the Sikhs), Minority Rights about the Centre and the Provinces, and questions of franchise and representation should be discussed. Dr. Mookherjee added

that rights regarding places of worship, cemeteries, and education may also be included. Finally, the suggestion of M Munshi and Sir Homi Mody was accepted, and the following questionnaire was decided upon:

1. What should be the nature and scope of the safeguards for the minority in the new Constitution?
2. What should be the political safeguards of a minority (a) in the Centre and (b) in the Provinces?
3. What should be the economic safeguards of a minority (a) in the Centre and (b) in the Provinces?
4. What should be the religious, educational, and cultural safeguards for a minority?
5. What machinery should be set up to ensure that the safeguards are effective?
6. How is it proposed that the safeguards should be eliminated, at what time, and under what circumstances?

It was in the meeting of the Sub-committee on 27 July 1947, that the matter came up for discussion again with specific reference to the administrative machinery to ensure the protection of Minority Rights. It was Dr. Ambedkar who suggested that there should be an independent officer appointed by the President at the Centre and the Governors in the Provinces to report to the Union and Provincial Legislatures about the working of the safeguards provided for the minorities. 16 of the 18 members present accepted this proposal.

The report of the Advisory Committee about Minority Rights of 8 August 1947 is also of relevance and was presented by Sardar Patel to the President of the Constituent Assembly. While the report largely dealt with the reservation of seats for minorities in public services and Cabinets, the recommendation made by Dr. Ambedkar was included in the final report on the matter of safeguards for minorities. This is quoted from the said report as follows:

Working of Safeguards: Officer to be appointed: An officer shall be appointed by the President at the Centre and by the Governors in the Provinces to report to the Union and Provincial Legislatures respectively about the working of the safeguards provided for minorities[xxvii]

When Sardar Patel moved the report for the consideration of the Constituent Assembly on 27 August 1947, barely 12 days after the country attained independence, this is what he stated on the specific matter of protection of the Fundamental Rights of minorities: "…we have also provided some sort of administrative machinery to see that whatever safeguards are provided are given effect to, so that it may not be felt by the communities concerned that these are paper safeguards. There should be continuous vigilance and watch kept over the safeguards that have been provided in the working of the government machinery in different provinces, and it shall be the business of the officer or administrative machinery concerned to bring to the notice of the legislature or the Governments the defects or drawbacks in the protection of the rights of the minority communities."

A few important trends may be mentioned here as they surfaced in the deliberations of the committee. History had taught that there is a need for a clear enunciation of these principles, an imperative that would not be denied. As Austin stated: "what disagreement there was centred primarily around the classic predicament of the degree to which personal liberty should be infringed to secure governmental stability and the public peace, of how conditional the statement of a right should be."[xxviii] It was always clear that freedom of conscience and religion would always be a part of the Fundamental Rights. Yet, Rajkumari Amrit Kaur warned that the free practice of religion would include anti-social practices such as sati, devadasi, purdah, etc. AK Ayyar reminded her that social reform was a difficult area to legislate upon and how the British in the 1935 Act had refused to insert any provision that might interfere with social reform. The problem was addressed by laying down that the right to freely practice religions should not prevent the State from making laws providing for social welfare and reform. Similarly, it would have been assumed that equality before the law would have been accepted without debate, yet Ayyar felt that such an interpretation of equality might hamper the introduction of laws that differentiated between women and men for the protection of the former. The clause to address this issue stated that no person should be denied equality before the law.

In brief, we may say that the purpose of a written Bill of Rights is to create and preserve individual liberty and a democratic way of life based on equality among the members of society. In India it appears that the Fundamental Rights have done both: they created a new equality that had been absent in the traditional Indian (largely Hindu) society and also helped to preserve individual liberty. "The classic arguments against the inclusion of written rights in a constitution have not been borne out in India. In a politically underdeveloped country like India ...it may be that written rights come close to being a necessity…it is very doubtful if, in any other constitution, the expression of positive or negative rights has provided so much impetus towards changing and rebuilding society for the common good."[xxix]

Part III of the Fundamental Rights chapter, (the bare text of which is included as an annexure to this chapter given the paramount importance of the same to the very purpose of this volume) begins with **Article 12** where the elaboration of the words 'the State' as appearing in Part III, is clarified. It includes the Government and the Parliament of India and the Government and the Legislatures of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Successive Apex Court judgments have included within this definition all government departments, local bodies as well as other authorities, instrumentalities, or agencies or bodies or institutions which discharge public functions of the governmental character. The significance of this Article lies in the fact that in matters vis-à-vis the individual, it is the State that must ensure constitutional protection of the individual's rights, either under Article 32 (Remedies for enforcement of rights) or Article 226 (Power of High Courts to issue certain writs).

Article 13 (1) also goes so far as to declare all laws in force in the country immediately before the commencement of the constitution as void, in so far as they are inconsistent with the provisions of this part. Nor does the State, according to Article 13 (2), have any powers to make any laws that take away or abridges the rights conferred by this part. In other words, a pre-constitutional law, after the commencement of the Constitution, must conform to the provisions of Part III of the Constitution. In the same way, any law made by any Legislature after the commencement of the Constitution, which contravenes any of the Fundamental Rights included in Part III of the Constitution shall, to the extent of the contravention, be void. Further, it has been held in many judgments that it is the Courts that enjoy the power of judicial review to decide on these matters.

In a very significant decision in 1994,[xxx] the nine-judge Bench explained that the Constitution, which is the fundamental law of the land, is the will of the people, while a statute is only the creation of the elected representatives of the people. Thus, when the will of the legislature as declared in a statute, stands in opposition to that of the people as declared in the Constitution, the will of the people must prevail. It would be to quote extensively from this judgment as stated in para 428: "The Constitution of India which we have given to ourselves is the fundamental law of the land. The Judiciary, under the Constitution, is designed to be an intermediary body between the people on the one side and the Executive on the other. It belongs to the Judiciary to ascertain the meaning of the constitutional provisions and the laws enacted by the Legislature. To keep the Executive/Legislature within the limits assigned to their authority under the Constitution, the interpretation of laws is the proper and peculiar province of the Judiciary. Constitution is the "will" of the people whereas the statutory laws are the creation of the legislators who are the elected representatives of the people. Where the will of the legislature - declared in the statutes - stands in opposition to that of the people - declared in the Constitution - the will of the people must prevail. The Constitution of India provides for an elected President. House of People is elected. The State Legislators are elected. Supreme Court Judges are not elected, they are appointed under the Constitution. So are other High Court Judges. Yet the Constitution gives unelected Judges a power - called judicial review under which they nullify unconstitutional acts of the Executive and the elected representatives of the people assembled in the Parliament and the State Legislatures. This conclusion does not suppose that the Judiciary is superior to the Legislature. It only supposes that the power of the people - embodied in the Constitution - is superior to both."

In this same judgment, the Apex Court defines its responsibility of the court to protect the citizen and enforce his Fundamental Rights. "The right to move the Supreme Court for the enforcement of Fundamental Rights is guaranteed by the Constitution and the court cannot, accordingly, throw out a petition on grounds such as that the proper writ has not been prayed for, or there is another alternative remedy open to the petitioner."[xxxi] As the judgment states: "The role of the Judiciary under the Constitution is a pious trust reposed by the people. The Constitution and the democratic

polity thereunder shall not survive, the day Judiciary fails to justify the said trust. If the Judiciary fails, the Constitution fails, and the people might opt for some other alternative."[xxxii]

With this, we enter upon the substantive Articles of Part III.

Article 14 proclaims as follows:

Equality before the law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Rule of law is the basic rule of governance of any civilized polity; every person is under the supremacy of law. In the Indian system of governance, the Constitution, implicitly and explicitly, has assigned this task to the judiciary. It is only through the courts that the rule of law unfolds its contents and establishes its concept. The famous case of Arundhati Roy emphasises this aspect of the law. The Supreme Court apprehended that the famous writer was not adhering to the principles of supremacy and sentenced her to a day's imprisonment and a fine. "If the judiciary is to perform its duties and functions effectively and true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the courts have to be respected and protected at all costs. Otherwise, the very cornerstone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society." [xxxiii]

The 'State' refers to the government and all its instrumentalities and agencies as we have already seen. 'Any person', whether he is a citizen or an alien is entitled to the protection of this law. 'Equality before law' declares equality of all persons before the law, and the absence of any special privilege in favour of any individual. This doctrine of equality is a dynamic and evolving concept and is embodied in the many articles of Part III and the articles of Part IV dealing with the Directive Principles of State Policy. Yet, it must be kept in mind that equal protection does not prohibit reasonable classification founded on the principle of *intelligible differentia.* This is with special reference to equally placed persons within a reasonable classification, for example within the Scheduled Castes or the Scheduled Tribes, or a group of differently enabled persons. If there is equality and uniformity within each group, the law cannot be condemned as discriminatory. Even if special benefits or rights to a particular group of citizens are assigned for rational reasons, there is no abridgement of the content of Article 14: rather it is an exposition and practical application

of such content.[xxxiv] It would be appropriate to refer to the Nagaraj case in this context where Article 14 got expanded conceptually to comprehend the doctrine of promissory estoppel, non-arbitrariness, compliance with rules of natural justice, eschewing irrationality, etc.[xxxv] "Backwardness and inadequacy of representation, therefore, operate as justifications in the sense that the State gets the power to make reservations only if backwardness and inadequacy of representation exist. These factors are not obliterated by the impugned amendments."

The Apex Court from time to time has passed judgments clarifying various conceptual principles attached to equality. The need for reasonableness to inform all state actions has been emphasized from time to time. Arbitrariness has been denounced as an irrational act not based on sound reason, and contrary to the rule of law, equity, fair play, and justice. Improper or incorrect application of an otherwise unambiguous or well-recognized norm, concept, or criterion would not render it arbitrary. In the same way, the courts have held that the distribution of State largesse must be transparent, just, fair, and non-arbitrary. Where there has been arbitrariness or defect in the application of equality, there is a right to compensation accruing to the adversely affected person. State power also must be exercised with discretion and without any arbitrariness.

Article 15 prohibits discrimination on grounds of religion, race, caste, sex, or place of birth. Yet, the State is not prevented from making any special provision for the advancement of any socially and educationally backward classes of citizens or economically weaker sections of society as well as for women and children. The Article is levelled against any State action relating to the citizens' rights, whether political, civil, or otherwise. The fundamental right conferred by this clause is on a citizen as an individual and is a guarantee against being treated with discrimination in the matter of his rights, privileges, and immunities about him as a citizen generally. It is personal and is invoked when a single citizen is discriminated against on the grounds of caste or religion etc. The judgments of the Apex Court in the cases of Nain Sukh Das and Chitralekha are relevant in this regard.[xxxvi] There have also been judgments that define the nature of discrimination when it takes place based on sex, religion caste, or race, as well as place of birth.

The practical application of the article to provide benefits to women, children, etc is a special and welcome provision inbuilt into this article. Examples such as maternity benefits for women workers or free education for children fall under this provision. The protection of old and infirm parents is another aspect of this provision. The golden principle of gender equality is part of this philosophy, but it did not prevent the Court from upholding that the prohibition of employment of women in liquor shops does not conflict with gender inequality. The proactive measure taken by the Court in the National Legal Service Authority case of 2014 ensured that the third gender was given recognition and rights under the law. By recognising transgenders as the third gender, the Court held that it is not only upholding the rule of law but also advancing justice to the class, so far deprived of their legitimate natural and constitutional rights.[xxxvii] "The TGs are also citizens of this country. They also have equal rights to achieve their full potential as human beings. For this purpose, not only are they entitled to proper education, social assimilation, and access to public and other places but employment opportunities as well.

Yet another judgment in this direction was that of the LGBTQ community as pronounced in the Navtej Singh Johar case[xxxviii]. Justice Chandrachud held that a provision challenged as being ultra vires the prohibition of discrimination on the grounds only of sex under Article 15 (1) is to be assessed not by the objects of the State, but by the effect that the provision has on the affected individuals and their Fundamental Rights. "A discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about, a class constituted by the grounds prohibited in Article 15 (1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex." On similar lines, Justice Indu Malhotra also added "The LGBT community is a sexual minority which has suffered from unjustified and unwarranted hostile discrimination and is equally entitled to the protection afforded by Article 15."

Of the many judgments passed on sexual harassment, most significantly the Vishaka judgment[xxxix] has great relevance to the safety and dignity of working women. This judgment led to the laying down of guidelines for the protection of women's rights. "There is no gainsaying that each incident

of sexual harassment, at the place of work, results in violation of the fundamental right to Gender Equality and the Right to Life and Liberty, the two most precious Fundamental Rights guaranteed by the Constitution of India."[xl]

A judgment that raised much discussion was on the question of adultery as a penal offence that discriminates against women on grounds of sex as can be seen in 497 IPC and 198 Cr PC and is therefore violative of Article 15(1) of the Constitution. In the Joseph Shine case,[xli] the Apex Court held that adultery as defined in 497 IPC only finds the man guilty of adultery and the consenting woman is treated as a victim and hence is not seen as an abettor. Justice Chandrachud held that this section implies that the woman has no sexual agency and thus criminal exemption is granted to the woman to 'protect' her. He stated that Article 15 (3) cannot be used to protect a statutory provision that entrenches patriarchal notions in the garb of protecting women. Justice Indu Malhotra concurred, saying that Article 15 (3) cannot operate as a cover for exemption from an offence having penal consequences.

Of course, the special protection given to Scheduled Castes and Tribes as a protected class gets strength from Article 15 (4), and the State is entitled to do everything for the upliftment of members of these Castes and Tribes, including reservations for their admission to educational institutions, prescribing lower qualifying marks, etc. The Constitution Bench of the Apex Court has held as valid the insertion of Article 15 (5) which provides for the reservation of socially and educationally backward classes in State institutions subject to the exclusion of the 'creamy layer'. This led to the enactment by Parliament of the Central Educational Institutions (Reservation in Admission) Act 2006 in furtherance of this constitutional provision.

Article 16 deals with equality of opportunity in the matter of employment, without any ineligibility on grounds of religion, race, caste, sex, descent, place of birth, residence, etc. However, both Parliament and State Assemblies are empowered to make any law prescribing any requirement of residence to that State or making enabling provisions for Backward Classes of citizens as well as for Scheduled Castes and Tribes. Public employment in a democratic republic such as ours has to be according to the provisions of the Constitution, while at the same time ensuring equality of opportunity to all. The two principles in public employment are equality of opportunity

and affirmative action. Such affirmative action is to ensure that those who have been unequal and have suffered deprivation and discrimination through the centuries past are not compared with equals who have not had to face such disabilities. Their merits would be judged only from amongst those who have had to face the same disabilities as themselves. It would be imperative to mention here that the 81st Constitutional amendment of 2001 introduced sub-clause 4 B in Article 16 that enabled the filling up of unfilled reserved vacancies which for whatever reason could not be filled up in earlier years. Such vacancies were allowed to be filled up as a separate class of vacancies and were not considered together with the vacancies of any particular year. This allowed members of reserved communities in the Castes and the Tribes and the Backward Classes to bring up their numbers within a service or a cadre up to the permitted percentage of vacancies for that particular caste, tribe, or class.

The Nagaraj judgment, referred to earlier, had gone on to clarify that equality of opportunity has two different and distinct concepts: one, the non-discrimination principle, and the other, affirmative action, under which the State is obliged to provide a level playing field to the oppressed classes. Affirmative action moves beyond the concept of non-discrimination towards equalising results concerning various groups. Both concepts constitute 'equality of opportunity'. that is to say "…equality in employment" consists of equality of opportunity, anti-discrimination, special classification, and affirmative action which does not obliterate equality, but stands for classification within equality, and lastly, efficiency.[xlii] It may be recalled that this principle applies not only to initial appointment but also to promotion during one's career. To enable this concept, it may be recalled that in 1995, Clause 4 A in Article 16 was inserted by the 77th Constitutional amendment whereby such provision of reservation was enabled with consequential seniority to any class or classes of posts in the services under the State in favour of Scheduled Castes and Tribes. Significantly this was not extended to the Backward classes. It was the Nagaraj judgment that provided the remedy for past historical discrimination against a social class. It created a field that enables the State to provide for reservation in a class where it is satisfied based on quantifiable data, that there exists backwardness of a class and inadequacy in representation in employment.

The Nagaraj judgment was assailed because it had sought the collection of quantifiable data to demonstrate backwardness, whereas the nine-judge bench in the Indra Sawhney case had held that once the Scheduled Castes

and Tribes were included in the Presidential List under Articles 341 and 342 of the Constitution then there is no question of showing demonstrating backwardness all over again.[xliii] Yet, Article 16 (4) while conferring no constitutional right of reservation of appointments for persons from Backward Classes, nevertheless is an enabling provision and confers a discretionary power on the States to make a reservation of appointments in favour of the backward classes.

It was also the Indra Sawhney case that clarified that it is for the State to decide the extent of reservation, subject of course to judicial review, to ensure that the reservation is not so excessive that it renders meaningless the guarantee of equality under Article 16 (1) or Article 335 (claims of Scheduled Castes and Scheduled Tribes to services and posts.) Thus, the reservation of more than 50% of the vacancies in any one year will be outside the protection of Article 16 (4). The court also conceded that there may be extraordinary situations that call for an exception to this provision to accommodate additional reservations for people inhabiting remote areas and those outside the mainstream of national life. The Indra Sawhney judgment had held that if suitable candidates are not available in a particular year to fill the reserved seats, the reserved quota should not be carried forward to exceed the 50% limit for reservation. This, as we have seen, was legislatively overruled by the insertion of Clause 4 B, which provided for unfilled reserved quota posts to be considered as a separate class of vacancies that could be filled up in later years. The bar of 50% would not apply to filling up the backlog of reserved posts which could extend even up to 100%. This carry-forward rule is but an extension of the principle of providing facility and opportunity to secure adequacy of the representation of SCs and STs as mandated by Article 335.

Another significant judgment in this regard is the Virpal Singh Chauhan case where it was held that candidates of reserved category selected on their merit are not to be counted as reserved category candidates.[xliv] In another nuanced judgment[xlv], the Supreme Court held that the reservation policy was inapplicable for making appointments to entry-level faculty posts of Assistant Professor and Super Speciality posts in the All India Institute of Medical Sciences.

Article 17 proclaims the abolition of untouchability. By this proclamation, the Parliament enacted the Untouchability (Offences) Act of 1955. It is interesting to keep in mind that the word 'untouchability' has not been

defined by any law. The word appears in inverted commas in the text of the Constitution itself. It is only a single judge of the Karnataka High Court who has stated that 'untouchability' refers to social disabilities historically imposed on certain classes of people because of their birth in certain castes.[xlvi] The National Campaign on Dalit Human Rights fought the case in the Supreme Court where a three-judge bench directed the Central Government and the State Government to enforce the provisions of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act of 1989 and its relevant rules of 1995. The National Commissions for Scheduled Castes and Scheduled Tribes were also directed to discharge their duties to protect the Tribes and the Castes. The National Legal Services Authority was also directed to formulate appropriate schemes to spread awareness and to provide free legal aid to the members of the castes and tribes.[xlvii]

Article 18 abolished all titles and prohibited citizens from accepting any form of titles from any Foreign State. It intended to put an end to the practice of the British conferring such titles and to terminate the practice because it creates a distinct unequal class of citizens. But the national awards are not violative of the principles of equality, as they are to recognise merit or work of an extraordinary nature.

Article 19 is a collection of certain rights and guarantees the protection of certain rights regarding freedom of speech etc.

Article 19 (1) All citizens shall have the right

a) to freedom of speech and expression;

b) to assemble peaceably and without arms;

c) to form associations or unions or cooperative societies;

d) to move freely throughout the territory of India;

e) to reside and settle in any part of the territory of India; and

f) *omitted*

g) to practise any profession, or to carry on any occupation, trade, or business

Yet, the subsequent clauses of Article 19 from 19 (2) to 19 (6) impose certain restrictions on the exercise of these rights. For example, 19 (2), inserted into the Article by the 1st Constitutional Amendment Act of 1951 allows the State to make laws that place reasonable restrictions on the exercise of this right in the interest of the security of the State, friendly relations with the Foreign States, public order, decency, and morality, or in relation to contempt of court, defamation, or incitement to an offence. Later through the 16th Constitutional Amendment Act of 1963, the phrase 'sovereignty and integrity of the nation' was added to the list. Clauses (3), (4), (5), and (6) saved existing laws that place reasonable restrictions on the exercise of the rights pertaining to peaceful assembly, the formation of associations and unions, moving freely throughout India or to reside in any part of India, or to practice an occupation, trade or business. Thus, the declaration of Article 19 (1) gets diluted with the subsequent provisions that in a sense dilute the unfettered exercise of these rights. The background to the reasons behind the introduction of the First Amendment Act can be seen in the article by Mathew published in the Economic and Political Weekly, EPW.[xlviii]

The nature of the rights guaranteed by Article 19 is what is known as civil rights and not political rights (such as the right to vote or hold a political office). They are natural or common law rights as distinguished from rights created under a statute. They cannot be taken away by the legislature for it is a fundamental right and can be subjected to certain restrictions as are permitted under the Constitution itself. Article 19 (1) guarantees those great and basic rights which are recognised and guaranteed as natural rights inherent in the status of the citizen of a free country. At the same time, it is also recognised that there is no such thing as absolute or uncontrolled liberty wholly free from restraint that would lead to anarchy and disorder. What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between liberty and social control. The restrictions, if imposed, must be reasonable and is certainly reviewable by the courts. It is the courts that are invested with the ultimate responsibility of determining whether the restrictions are reasonable or not.

The test of reasonability is determined by several factors such as the implementation of the Directive Principles of State Policy, the non-arbitrary nature of the restrictions, the required balance between the restrictions imposed and the need for social control as also the direct and proximate nexus between the restrictions imposed and the object sought to be

achieved. In such cases, a strong presumption of the constitutionality of the Act will naturally arise. The court will have to determine the reasonableness of the restriction, and whether the restriction sought to be imposed on the fundamental right falls within Clause 19 with reference to the sub-clauses (a) to (g) of Clauses (2) to (6) of Article 19 (1). Admittedly, the requirement of reasonability "runs like a golden thread through the entire fabric of the Fundamental Rights. The lofty ideals of social and economic justice, the advancement of the nation as a whole, and the philosophy of distributive justice – economic, political, and social - cannot be given a go-by in the name of undue stress on Fundamental Rights and individual liberty. Reasonableness and rationality, legally and well as philosophically provide colour to the meaning of Fundamental Rights."[xlix]

It is relevant to point out here that sub-clause (f) under Article 19 (1), the right to property, was omitted through the Forty-Fourth Amendment Act which was one of the original rights. Courts had been protecting the right of properties of large landowners and zamindars when the government was attempting to acquire their properties for allotment of such surplus land to the landless. The only way that such proactive socialistic legislation could succeed was by removing this right from the list of rights listed in Article 19 (1). Therefore, in 1978, the Government abolished the right to property as a fundamental right and removed Article 19 (1) (f) from Part III of the Constitution. Though the right to property was now no more a fundamental right, it was made a legal right well within the constitution itself, by inserting Article 300A (persons not to be deprived of property save by authority of law) in Part XII. Now if this right is violated, the aggrieved person cannot approach the Supreme Court directly, but he can move to high courts. This right can now be regulated or abridged even by ordinary law.

The scheme of Article 19 shows that a group of rights listed as Clauses (a) to (g) are recognised as Fundamental Rights conferred on the citizens. The article was intended to protect these rights against State action other than in the legitimate exercise of its power to regulate private rights in the public interest.

It is also of interest to the student of the recent political history of India to know that Article 19 was suspended under Article 358 (Suspension of provisions of Article 19 during Emergencies) in view of the proclamation of Emergency in December 1971 because of Pakistani aggression in

Indian territory arising out of the Bangladesh crisis. The suspension of these Fundamental Rights continued right up to 25 June 1975 when the proclamation was reissued on grounds of internal disturbance. Of course, both Proclamations were revoked in March 1977, when general elections were announced leading to the defeat of Smt. Indira Gandhi and the installation of the Janta Party government.

In the Gopalan case,[l] it had been held that the rights enumerated in Article 19 are the rights of free men and a person whose personal liberty has been taken away under a valid law of punitive (Article 20) or preventive (Article 21) detention, cannot complain of the infringement of his Fundamental Rights guaranteed under Article 19. However, with time, this view has been overturned bit by bit by the Supreme Court itself under various judgments. More significantly, Article 19 shall be of no avail where Article 31A (acquisition of estates), 31B (validation of certain Acts and regulations placed in the Ninth Schedule), and Article 31C where directive principles are to be secured).

We are also to appreciate the tensions that exist between the Fundamental Rights on the one hand and the Directive Principles on the other. It has been held that even though the Directive Principles of State Policy are not justiciable, the Parliament is competent to amend the Constitution to override or abrogate any of the Fundamental Rights to enable the State to implement the Directives, so long as the 'basic features' of the Constitution are not affected. The decision in the 13-judge Keshavananda Bharati judgment states: "The successive amendments of the Constitution merely carried out the principle embodied in Article 31 Clauses (4) and (6) that legislation designed to secure the public good and to implement the Directives under Article 39 (b) and (c) should have priority over individual rights and that, therefore, Fundamental Rights were to be subordinate to the Directives of State Policy."[li]

In addition to the list of freedoms enumerated in Article 19 (1), there are also some unlisted Fundamental Rights which can be regarded as an integral part of the Fundamental Rights mentioned in Article 19 (1). These have been so decided by various judgments of the Supreme Court, particularly the Maneka Gandhi case,[lii] and include the right to travel, the right to human dignity, the right to a speedy trial, the right to know, the right to residence, etc.

Article 20 grants protection for all persons who can be convicted only for the violation of any law extant at the time, that he cannot be convicted twice for the same offence, and that he cannot be compelled to stand witness against himself. Judicial interpretation of this article has concluded that while every legislature has the power to enact prospective as well as retrospective criminal laws, this article sets limitations upon the law-making power of every legislative authority in India as regards retrospective criminal legislation. It prohibits a) the making of ex post facto criminal law; b) the infliction of a penalty greater than that which might have been inflicted under the law which was in force when the act was committed; and c) that he cannot be punished twice for the same crime and d) that he cannot be forced to bear witness against himself.

Article 21 is one of the key foundations of constitutional law: It states that no person shall be deprived of her/his life or personal liberty except according to the procedure established by law. It occupies a pride of place in the Constitution. It is of great importance to understand that Article 21 refers to various aspects of life and that several unenumerated rights fall within the scope of the Article since the expression is of the widest amplitude.[liii] In various judgments the Court has held that these rights include the right to go abroad, the right to privacy, the right against solitary confinement, the right against handcuffing, the right to legal aid, the right to a speedy trial, the right against delayed execution, right against public hanging, right to doctor's assistance, right for shelter, right not to be subjected to 'bonded labour', right to the rehabilitation after release from bonded labour, right to hawk, right of locomotion, right to socialise, right to education, right to food security, right to health and medical aid, right of women to be treated with decency and dignity, reproductive rights, right to marry a person of one's choice, etc.

Where there has been alleged deprivation of life and personal liberty, the court while exercising its right of judicial review has to decide whether there is a law authorising such deprivation and whether the procedure prescribed by law is reasonable, fair, and just and not arbitrary, whimsical, and fanciful. Along with this negative duty not to interfere in the life and personal liberty of the citizens, activist judges have now imposed a positive obligation upon the State to take steps for ensuring a better enjoyment of life and dignity for the individual.

The phrase 'procedure established by law' means the law prescribed by the legislature at any given point in time. Where it is found that such procedure has not been followed when a person has been deprived of personal liberty, the court is duty-bound to free the person. Such procedure must be 'just, fair, and reasonable as had been stated in the Maneka Gandhi case[liv]

The Right to Livelihood is one of the most significant of such rights: hence the right of agriculturists to cultivation is considered part of their fundamental right to livelihood. The minimum of 100 days of employment guaranteed under the Mahatma Gandhi National Rural Employment Guarantee Act is considered even higher than a mere legal right. It stands on a higher pedestal as it enables members of a family to take care of their bare minimum requirement for existence.[lv] Similarly, the right to live with dignity is considered included within the concept of the right to life and personal liberty. In the Puttuswamy case, [lvi] the court had quoted a judgment written by A Barak, former Chief Justice of the Supreme Court of Israel thus: "The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the Constitution; second, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in determining the proportionality of a statute limiting a constitutional right."

The right to die with dignity is another concept that the Apex Court has upheld in the *Gian Kaur vs State of Punjab* case[lvii] just as the right to die with dignity was also upheld in the Common Cause vs Union of India[lviii] case including the right to die by allowing passive euthanasia.

The right to privacy is yet another very significant concept developed through many judgments of the Supreme Court. The right was never explicitly stated to be a fundamental right, and this fact was taken note of in earlier cases such as in the *MP Sharma* case[lix] and the *Kharak Singh* case[lx]. In fact in the *Gobind* case of 1975, the three-judge Supreme Court upheld the right of the individual to be left alone but stopped short of holding the right to privacy to be a fundamental right.[lxi] The breakthrough was achieved only in 2012 in the Puttuswamy case where the nine-judge bench held as follows: Both earlier judgments i.e. *MP Sharma* case and the *Kharak*

Singh case were overruled and the right to privacy was declared protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.

In the eloquent words of Justice Chandrachud: "Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary State action. It prevents the State from discriminating between individuals. The destruction by the State of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary State action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation, and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised…The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not to express those choices to the world. These are some illustrations of the way privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha-suffixed right of privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty, and freedom which the Constitution has recognised."

Various other judgments may be referred to in this regard: The *RM Malkani*[lxii] case with regard to wiretapping, the District Registrar and Collector Hyderabad case on the matter of search and seizure etc. In the sexual orientation case, the Supreme Court corrected an error committed by it in its earlier judgment in the *Suresh Kumar Koushal vs Naz Foundation*

case[lxiii] where it had struck down a Delhi High Court decision that had held Section 377 of the IPC (unnatural offences) as unconstitutional. This was corrected in the *Puttuswamy* Right to Privacy case where five out of the nine judges struck down Section 377 of IPC. Again, it was Justice Chandrachud who stated: "Sexual orientation is an essential attribute of privacy. Discrimination of an individual based on sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lies at the core of the Fundamental Rights guaranteed by Articles 14, 15 and 21 of the Constitution."

Yet another significant area that was covered by the *Puttuswamy* judgment is the matter of data privacy. The judgment warns of the dangers to the right to privacy in this age of information from not only State but also non-State actors. It was acknowledged that the electronic tracks left by individuals regarding their activities on the internet without their knowledge are powerful means of information. "Individually these information silos may seem inconsequential. In aggregation, they disclose the nature of the personality: food habits, language, health, hobbies, sexual preference, friendships, ways of dress and political affiliation. In aggregation, information provides a picture of the being: of things which matter and those that don't, of things to be disclosed and those best hidden." Justice Kaul added: "…it is but essential that the individual knows as to what the data is being used for, with the ability to correct and amend it…The State must ensure that the information is not used without the consent of users and that it is used for the purpose and to the extent it was disclosed." Justice Nariman too held the view that informational privacy is a fact of the fundamental right to privacy "which deals with a person's mind, and therefore, recognises that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore, lead to infringement of this right."

Subsequently, the Aadhaar scheme got statutory recognition in 2016, consequent to the related Aadhaar Act. The Act was held to be constitutional to the extent that it allowed for Aadhaar number-based authentication for establishing the identity of an individual for receipt of a subsidy, benefit or service given by the Central or State governments. Similarly, the link between PAN numbers and Aadhaar was held to be valid, though linking Aadhaar with bank account numbers was held to be invalid.

In matters of medical testing there have been a few judgments of significance: *Selvi vs State of Karnataka*[lxiv] held that subjecting a person to narco-analysis violates privacy; *Sharda vs Dharampal*[lxv] held that the court has the power to order a person to undergo a medical test; in the *Bhabhani Prasad Jena case*[lxvi], held that the paternity of a child should not be routinely directed by a court, but should be exercised only after due examination of facts and keeping discretion in mind; in *Dipanwita vs Ronobroto Roy*[lxvii] the court stated that where the court had directed the wife to carry out a paternity test, the wife had the liberty to either comply or disregard the directions. But if she declined, the court would be free to draw an adverse inference against her.

The right to know has also been upheld by the Supreme Court in various judgments. In the context of community participation in the protection of the environment and human health is also a right that flows from Article 21 of the Constitution. In the *Essar Oli* case[lxviii], the court maintained that there is a strong link between Article 21 and the right to know, particularly where "secret government decisions may affect health, life and livelihood." These judgments led to the enactment of the Right to Information Act of 2005. Extending this to the area of elections, the Court in the *PUCL* case of 2003[lxix] held that information on a candidate's criminal records of the declaration of his assets is not an infringement of privacy as they are both available in the public record.

Several other rights have been established by court orders which cover areas such as the right to fair and open trial, rights for a prisoner on death row, the right to a speedy trial, the right to legal aid, the right to development, rehabilitation rights where people have been ousted from some public works programmes, right to a clean and healthy environment, right to sustainable development, right to freedom from pollution, right to public safety, etc. As regards public safety, the Court has directed that Article 21 be read into all public safety statutes since the prime object of public safety legislation is to protect the individual and to compensate him for the loss suffered. This was reiterated strongly in the *Association of Victims of Uphaar Tragedy* judgment[lxx].

Article 21A provides for free and compulsory education to all children aged six to fourteen years in such a manner as the State may, by law, determine. Originally a Directive Principle of State Policy, Article 45 stated: "The State shall endeavour to provide, within a period of ten years

from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years." This aspirational goal was not achieved over more than five decades. The 2009 Right to Education Act made this a reality and was inserted into Part III as a fundamental right. The validity of the Act was upheld in the *Society for Unaided Private Schools of Rajasthan vs Union of India* judgment[lxxi] which specified that the Act applied to schools established, owned, or controlled by the government or local body, including aided schools receiving grants from the government as well as unaided, non-minority schools would be covered by the Act. However, it was held that the Act infringed the fundamental freedom guaranteed to unaided minority schools under Article 30 (1) of the Constitution and that such schools would not be covered by the Act. Later even aided minority schools were shielded from the applicability of this Act as pronounced in the *Pramati Trust* judgment of 2014.[lxxii]

Article 22 granted protection from arbitrary arrest and detention, prohibiting persons from being arrested without being informed of the grounds for arrest, or denying them the right to consult and be defended. Every person arrested is to be produced before a magistrate within twenty-four hours and cannot be detained further without the authority of a magistrate. Certain other conditions regarding the detention of a person for more than three months were also provided for. These amendments made by the 44th Amendment Act regarding safeguards for preventive detention in 1978 have not been implemented and the pre-amended Article 22 is still in force. There are several judgments prohibiting the arbitrary arrest of persons and the minimum procedure that has to be followed in such matters.

Preventive detention is an important aspect of this article and the principles behind the rationale of this provision must be understood. Preventive arrests require action to be taken to prevent apprehended objectionable activities. But at the same time, personal liberty cannot be deprived unless there is meticulous compliance with procedural requirements. "No law is an end to itself and the curtailment of liberty for reasons of State's security and national economic discipline as a necessary evil must be administered under strict constitutional restrictions. No carte blanche is given to any organ of the State to be the sole arbiter in such matters.[lxxiii] These provisions are in the Constitution itself and they cannot be defeated on the ground of abridging the liberties of the people or the doctrine of due process.

A Constitutional Bench further upheld that Articles 21 and 22 are not watertight compartments and any action of this kind must also satisfy the requirements of Articles 14, 19 and 21. The *AK Roy* case[lxxiv] arose out of the perceived contradiction with the provisions of the National Security Act. "To allow the personal liberty of the people to be taken away by the application of that clause (Section 3 (2) of the NSA Act) would be a flagrant violation of the fairness and justness of procedure which is implicit in the provisions of Article 21.

Article 23 prohibits the traffic of human beings and forced labour, while at the same time does not prevent the State from imposing compulsory service for public purposes. Such traffic includes traffic in women and children for immoral or other persons. The term forced labour also includes the term *begar* which is labour or service exacted without giving remuneration for it.

Article 24 prohibits the employment of children in factories or mines or any hazardous employment. The term is wide enough to include the construction industry. The Supreme Court has directed that children should not be employed in hazardous jobs and that positive steps should be taken for the welfare of such children as well as for improving the quality of their lives. Further, employers of children below 14 years must comply with the provisions of the Child Labour (Prohibition and Regulation) Act providing for compensation, employment of their parents/guardians, and their education.[lxxv]

We now look at six articles of the Constitution in the realm of religion and Minority Rights, which are being grouped for convenience. **Article 25** grants freedom of conscience and the free profession, practice, and prorogation of religion, while stating that all persons are equally entitled to freedom of conscience and the right to practice the religion of their choice. Yet the article does not prevent the State from making any laws regulating or restricting any economic, financial, political, or other secular activity which may be associated with religious practice or for providing welfare and reform measures including the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. As the explanation states, the wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion. Further, in Explanation II, it has been clarified that about Hindu religious institutions, other religions such as Sikh, Jain, or Buddhist are included.

We shall also include **Article 26** in this same context as it grants freedom to every religious denomination to manage its affairs in matters of religious affairs, to establish and maintain institutions for charitable and religious purposes, to own and acquire moveable and immoveable property, and to administer such property by the law. Between the two articles, the first relates to all persons and the second to religious denominations. Indeed, they are both subject to 'public order, morality, and health.'

Similarly, **Article 27** grants freedom from payment of taxes for the promotion of any particular religion; no person can be compelled to pay such taxes for the promotion of any particular denomination or religion.

Article 28 is of particular relevance in these contentious times. No religious instruction, it states, shall be provided in any educational institution wholly maintained out of State funds. The article frees persons from being required to take part in any religious instruction or any religious worship that may be conducted in such institutions. The study of religions is not prohibited by the Constitution as the prospect of religious growth, perhaps the highest goal of human existence, would otherwise be hampered. Article 28 should not be so interpreted that it negates the fundamental right of a person to get an education about different religions of the country and conduct his life based on a philosophy of his liking.[lxxvi] "What is sought is to have value-based education and for 'religion' it is stated that students be given the awareness that the essence of every religion is common. Only practices differ. There is a specific caution that all steps should be taken in advance to ensure that no personal prejudices or narrow-minded perceptions are allowed to distort the real purpose. Dogmas and superstitions should not be propagated in the name of education about religions. What is sought to be imparted is incorporated in Article 51 (A) (e), which provides "to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women" And to see that universal values, such as truth, righteous conduct, peace, love, and non-violence be the foundation of education."

It has been held that matters related to secular activities of these religions cannot be brought within the guarantee of Articles 25 and 26, such as marriage, succession, etc which should normally find a place within the civil law.[lxxvii] The debate on a uniform civil code begins from this point of debate.

The rights of women to religious freedom vis-à-vis their male counterparts came into prominence in the *Sabrimala* case[lxxviii] where these rights were accepted while rejecting the claim that the Ayyappas constituted a separate organisation, the individuals of which have a common faith and can be identified by a distinct name. They cannot be judicially recognised as a distinct religious denomination. In such circumstances, the women cannot be proscribed from entering the temple premises.

Article 29 protects minorities: any section of the citizens residing in the territory of India or any part thereof having a distinct language, script, or culture of its own shall have the right to conserve the same. Further, such persons cannot be denied admission into any educational institution maintained by the State on grounds of religion, race, caste, or language. The phrase 'cultural minority' is a significant clause in this Article. The question of minority institutions giving preference to candidates belonging to their community was taken up in the *St Stephen's College* case where the court decreed that minority educational institutions are free to adopt their selection processes and permitted them to admit 50% of students from their community.[lxxix]

This leads us directly to **Article 30** which guarantees the right to establish and administer educational institutions of their choice. The State cannot make any discrimination while granting aid to educational institutions on the ground that it is under the management of a minority, whether based on religion or language. The purpose of this Article is to instil confidence in minorities against any legislative or administrative encroachment against their institutions. The scope of its provision is, to some, more than what is desirable. A Constitution Bench of the Supreme Court has held that the power under Article 21A of the Constitution vesting in the State the power to make a law determining the manner in which it will provide free and compulsory education to the children of the age group 6-14 years, cannot extend to making laws which will abrogate the right of the minorities to establish and administer schools of their choice under Article 30 (1) of the Constitution.[lxxx]

In various judgments, the Apex Court has held that though Article 30 does not lay down limitations on the right to administer educational rights, this right cannot be absolute, but must be subject to reasonable regulations for the benefit of the institution as a vehicle for education for the minority community, consistent with the national interest. Undoubtedly, laws of the

land relating to health, morality, and standards of education shall apply. The *TMA Pai Foundation* judgment is relevant here: "Regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as a minority institution effective as an educational institution. Such regulation must satisfy a dual test - the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it." [lxxxi]

The rest of the articles in Part III can be mentioned, but is not, in the context of this chapter, being examined in any detail, as they are not substantial in nature. They are rather, largely procedural, and transactional in intent. They are Article 31A (saving of laws providing for the acquisition of estates); Article 31B (validation of certain Acts and regulations specified in the Ninth Schedule); 31C (savings of laws giving effect to certain directive principles); 32 (remedies for enforcement of rights conferred by Part III); 33 (power of Parliament to modify the rights conferred by Part III in their application to the Armed forces); Article 34 (restriction on rights conferred by this part while martial law is in force any area); and Article 35 (legislation to give effect to the provisions of this Part).

As we complete this close examination of the various articles that encompass Fundamental Rights, we can move back and attempt a broader view of this grand and expansive subject that stands at the very heart of our conceptions of human rights and dignity. The Fundamental Rights are, in general, those rights of citizens, or those negative obligations of the State not to encroach on individual liberty, that has become well-known since the late eighteenth century and since the drafting of the Bill of Rights of the American Constitution. Although these Rights primarily protect individual and minority groups from arbitrary State action, they are also designed to protect the individual against the action of private citizens as well. For example, Article 17 abolishes untouchability, or Article 15 (2) which lays down that no citizen shall be discriminated against in matters of religion, race, caste, sex, or place of birth. The purpose of the Rights is to "foster the social revolution by creating a society egalitarian to the extent that all citizens were to be equally free from coercion or restriction by the State, or by society privately; liberty was no longer to be the privilege of the few."[lxxxii]

There is still debate ongoing about some of the negative factors in the Indian context which have beset the path of the Indian Supreme Court. The high degree of awareness of law found in other countries such as the United States or Europe is simply not seen here. Further, charismatic leaders such as Gandhi simply did not have the psychological makeup to yield an equal place to the judiciary or share political power with it. Further, it has also been conjectured that the perversion of the legal system by some political powers has also been one of the features of the Indian judicial system. "Nevertheless, the positive role of the Supreme Court cannot be denied, for absent the court, degeneration into tyranny and authoritarianism might have occurred years ago in the country. The court, the bar, and the elite who share a commitment to liberal, humanist values of Fundamental Rights, may well be the crucial factor why in India, the lamp of liberty still burns steadily though dimly, unlike in several other developing countries where authoritarianism has long ago replaced democracy."[lxxxiii]

Notes

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ii Simon Commission report, accessible at https://www.tandfonline.com/doi/pdf/10.1080/03071843009422678?needAccess=true

iii Karachi Resolution 2 (KR 2) listed out (i) freedom of association and combination, (ii) freedom of speech and press, (iii) freedom of conscience and the free profession and practice of religion, subject to public order and morality, (iv) No disability attaches to any citizen by reason of his or her religion, caste, creed or sex in regard to public employment, office of power or honour and in the exercise of any trade or calling, (v) Equal rights and obligations of all citizens, no civic bar on account of sex (vi) equal rights to all citizens of access to and use of public roads, public wells and all other places of the public resort (vii) right to keep and bear arms in accordance with regulations made in that behalf and such reservations as required for public safety. Accessible at https://www.constitutionofindia.net/historical_constitutions/karachi_resolution__1931__1st%20January%201931

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Chapter V:

Directive Principles of State Policy

Introduction: Part IV of the Constitution deals with the Directive Principles of State Policy (hereafter referred to as DPSPs unless the context requires otherwise), included as Articles 36 to 51 in the Constitution. An introductory perusal of the directives as they appear in Part IV of the Constitution may be necessary as we delve into the subject. DPSPs are classified under various categories, such as economic and social, political, and administrative, justice and legal, environmental, protection of monuments, and peace and security. They are guidelines or principles given to the great institutions engaged in the governance of our republic, to encourage them to move towards a more just and humane way of life. They are fundamental to the way we envision our country and the path we intend to follow. The DPSPs aim to create social and economic conditions under which the citizens can lead a self-fulfilled life. They also aim to establish social and economic democracy through a welfare state. Though the DPSPs are non-justiciable, they are still fundamental to the governance of the country. It shall be the duty of the State to apply these principles in the task of both administration and legislation. Besides, all the administrative and executive agencies of the Union and States should also be guided by these principles. Even the Judiciary has to keep them in mind while interpreting the law and deciding cases.

The Irish Connection: That the DPSPs owe much to the 1937 Irish Constitution was a fact known and discussed in the debates of the Constituent Assembly. Today though, it may not be as well known to the average thinking person. The Constitution of Ireland, known in Irish as *Bunreacht na hÉireann,* is the basic Irish document that asserts the national sovereignty of the people of Ireland. As in many other European countries, it proclaims the traditions of liberal democracy and is based on representative elections through universal adult franchises. As in India,

Ireland too guarantees certain fundamental rights, along with the office of a President, a bi-cameral Parliament, separation of powers marked out, and providing for a system of judicial review. The earlier 1922 Constitution of the Irish Free State was replaced in December 1937 after a nationwide plebiscite held earlier in July of the same year. This Constitution can be amended only if recommended by a national referendum.

Article 45 of the Irish Constitution outlines several broad principles of policy affecting the social and economic activities of the nation. It reads as follows and is being quoted at length to emphasise the close relationship that its contents and philosophy have with the same principles as espoused in the Indian Constitution. The article makes it clear that the provisions are intended solely for the guidance of the Oireachtas[i], the Parliament of the Republic of Ireland. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively and shall not be cognisable by any Court under any of the provisions of this Constitution."

The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may, a social order in which justice and charity shall inform all the institutions of the national life.

The State shall, in particular, direct its policy toward securing:

- That the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs.
- That the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good.
- That, especially, the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment.
- That in what pertains to the control of credit the constant and predominant aim shall be the welfare of the people.

- That there may be established on the land in economic security as many families as in the circumstances shall be practicable.
- The State shall favour and, where necessary, supplement private initiatives in industry and commerce.
- The State shall endeavour to secure that private enterprise shall be so conducted as to ensure reasonable efficiency in the production and distribution of goods and as to protect the public against unjust exploitation.
- The State pledges itself to safeguard with special care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged.
- The State shall endeavour to ensure that the strength and health of workers, men, and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age, or strength.

Directive Principles finds mention even in the Nehru Report of 1928 and the Sapru Report of 1945. In the 1928 report, there is a specific reference to the constitution of the Irish Free State, "which may properly be grouped under the general head 'fundamental rights'…". Ireland is the only country where the conditions obtained before the treaty were the closest to those we have in India. The first concern of the people of Ireland was, as indeed it is of the people of India today, to secure Fundamental Rights that have been denied to them."[ii] Many of the recommendations regarding Fundamental Rights were included in the Constitution as were some as Directive Principles. The 1945 Sapru report also had a section on Fundamental Rights and called for a future body to formulate these rights. Interestingly the report engaged with the issue of dividing rights into justiciable and non-justiciable, though no final recommendations were made in this context. "It, however, alerted the future drafters of the Constitution to this question. This was arguably the first time a constitutional document brought up the question of justiciable and non-justiciable rights in Indian Constitutional history."[iii] It may not be out of place to mention here in passing that the

earlier Constitution of Nepal which was in force from 1962 until 1990 and commonly called the *Panchayat Constitution* contained a verbatim translation of the "Directive Principles" of the Irish constitution[iv].

Debates in the Constituent Assembly: There was much debate in the Constituent Assembly on the meaning of the word 'directive' as used in Part IV of the Constitution. It was, as usual, left to Dr. Ambedkar to define its meaning in the context in which it was used. "With regard to the word "directive," I think it is necessary and important that the word should be retained because it is to be understood that in enacting this part of the constitution, the Constituent Assembly, as I said, is giving certain directions to the future Legislature and the future Executive, to show in what manner they are to exercise the legislative and the executive power which they will have. If the word "directive" is omitted I am afraid the intention of the Constituent Assembly in enacting this part will fail in its purpose. Surely, as some have said, it is not the intention to introduce in this part these principles as mere pious declarations. This Assembly intends that in the future both the Legislature and the Executive should not merely pay lip service to these principles enacted in this part, but that they should be made the basis of all executive and legislative action that may be taken hereafter in the matter of the governance of the country."[v]

There were wide-ranging discussions on the DPSP, and the thoughts and questions of the members of the Constituent Assembly on the subject find a place in Part IV as it currently stands. As we understand it today, they are the norms or principles given to the legislative bodies governing India and are intended to be kept in mind while framing laws and policies. They comprise an extensive social, financial, and political curriculum for a modern, progressive, and welfare state. They impose a moral obligation on the state for their implementation as they are fundamental for the achievement of economic and social democracy in the country. It is an irony of Indian history that we have almost forgotten the name of Sir Benegal Narsing Rau, who was appointed as the Constitutional Adviser to the Constituent Assembly in 1946. It was he who was responsible for the general structure of the framework of the Constitution and prepared its initial draft in February 1948. It was he who had advised the division of the Fundamental Rights into two categories; the enforceable part included in Part III as Fundamental Rights, and the non-enforceable part in Part IV indicated as DPSP, without any guarantee or assurance to be enforced by any court of law. In this regard, BN Rau had observed: "There are certain rights

which require positive action by the State, and which can be guaranteed only as far as such action is practicable, while others merely require the state shall abstain from prejudicial action…It is obvious that rights of the first type are not normally either capable of or suitable for, enforcement by legal action, while those of the second type may be so enforced."[vi]

Dr Ambedkar in his speech introducing the Draft Constitution in the Constituent Assembly on 4 November 1948, referred to the DPSP in the following manner. It is appropriate to quote fully from his speech in this regard:

"In the draft Constitution, the Fundamental Rights are followed by what is called 'Directive Principles'. It is a novel feature in a Constitution framed for Parliamentary Democracy. The only other Constitution framed for a Parliamentary Democracy which embodies such principles is that of the Irish Free State. These Directive Principles have also come up for criticism. It is said that they are only pious declarations. They have no binding force. This criticism is, of course, superfluous. The Constitution itself says so in many words. If it is said that the Directive Principles have no force behind them, I am prepared to admit it. But I am not prepared to admit that they have no binding force at all. Nor am I prepared to concede that they are useless because they have no binding force in law.

The Directive Principles are like the Instrument of Instructions which are issued to the Governor-General and the Governors of the Colonies and those of India by the British Government under the 1935 Act. Under the draft Constitution, it is proposed to issue such instruments to the President and the Governors. The text of these instruments of instruction will be found in Schedule IV of the Constitution. The only difference is that they are instructions to the Legislature and the Executive. Such a thing is to my mind to be welcomed. Wherever there is a grant of power in general terms for peace, order, and good government, it must be accompanied by instructions regulating its exercise.

The inclusion of such instructions in a Constitution such as is proposed in the Draft becomes justifiable for another reason. The Draft Constitution as framed only provides a machinery for the government of the country. It is not a contrivance to install any particular party in power as has been done in some countries. Who should be in power is left to be determined by the people, as it must be, if the system is to satisfy the

tests of democracy. But whoever captures power will not be free to do what he likes with it. In the exercise of it, he will have to respect these instruments of instruction, which are called Directive Principles. He cannot ignore them. He may not have an answer for their breach in a court of law. But he will certainly have to answer for them before the electorate at election time. What great value these Directive Principles possess will be realized better when the forces of right contrive to capture power."[vii]

A close reading of the debates in the Constituent Assembly about the DPSP reveals a lot about the nature of the thinking of the diverse group of representatives which made up the Assembly. The quotations from the speeches of these worthy and learned members of the Constituent Assembly can be perused in their entirety in the resources available in the Parliamentary Library, digitised and maintained by the National Informatics Centre.[viii] In the subsequent paragraphs while referring to the statements made by the members, the number in brackets refers to the document of the Constituent Assembly proceedings mentioned above.

Syed Kazi Karimuddin, a member from the Central Provinces & Berar demanded the deletion of the word 'Directive' as they are "only platitudes and pious wishes". These principles "should be made mandatory so that a scheme embodying these principles could be brought into operation within ten years." (Page 473) – why are we mentioning a page number here?

Shri HV Kamath, another member from the Central Provinces & Berar, referred to the report of the Advisory Committee chaired by Sardar Patel presented to the Assembly on 30 August 1947. "We have concluded that in addition to these Fundamental rights, the Constitution should include certain directives of state policy which though not recognizable in any court of law, should be regarded as fundamental in the governance of the country." (page 474)

Shri Ananthaswamy Iyengar, a member from Madras, gave clarity to the entire issue of the justiciability of the directives. "Sir, the object of differentiating certain rights as justiciable and non-justiciable rights is well-known. Those here are non-justiciable rights as has been laid down in paragraph 29. They shall not be enforceable in a court of law…consider one or two suggestions. In Article 26 it is said that the State should within

a period of ten years introduce free compulsory education. Take this as an instance. Let us assume that the State does not do so, then can any court of law enforce it? Against whom? In case a decree is granted by a court of law, who will carry it out? If the Government does not carry it out, can the High Court or the Supreme Court enforce it? Is it open to the Supreme Court to change such a government? With its authority, can it by an officer of the Court, an Amin, or a Sheriff, imprison all the Ministers, and bring into existence a new set of ministers? Like things, these are only directives and cannot be justiciable rights at all. So, there is no purpose in removing the word directive. These are principles that the Government must keep in mind, whatever government may be in power, and they must be carried out. We have incorporated them in the Constitution itself because we attach importance to them. But to classify them as Fundamental Rights as in Part III would be to take away the difference between the one set and the other, and make all the rights justiciable, which, like things, is impossible. There is no use being carried away by sentiments. We must be practical. We cannot go on introducing various provisions here, which any Government if it is indifferent to public opinion, can ignore. It is not a court that can enforce these provisions or rights. It is public opinion and the strength of public opinion that is behind a demand that can enforce these provisions. Once in four years elections will take place, and then it is open to the electorate not to send the very same persons who are indifferent to public opinion. That is the real sanction and not the sanction of any court of law." (page 475)

Prof KT Shah, Member from Bihar, also spoke emotionally about the need to make the DPSP mandatory. "… in the absence of any such mandatory direction to those who may have the governance of the country hereafter, it is quite possible that all these things for which we have been hoping and striving all these years may never come to pass, at any rate within our lifetime." (page 479)

Shri Naziruddin Ahmad, a member from Bengal raised some doubts regarding the word 'State' and its different connotations as they appear in different articles of the Constitution (page 477). Dr. Ambedkar again set at rest these queries by referring to the distributive sense of the word, stating that the 'State' includes the Government and the Parliament of India and the Legislatures of each of the states and all local or other authorities within the territory of India. (pages 477-478).

Finally, it was Ambedkar himself who settled the issue: The directive "is giving certain directions to the future legislature and the future executive to show in what manner they are to exercise the legislative and executive power which they will have. If the word 'directive' is omitted I am afraid the intention of the Constituent Assembly in enacting this part will fail in its purpose. Surely as some have said, it is not the intention to introduce in this part these principles as mere pious declarations. This Assembly intends that in the future both the Legislature and the Executive should not merely pay lip service to these principles enacted in this part, but that they should be made the basis of all executive and legislative action that may be taken hereafter in the matter of the governance of the country. I, therefore, submit that both the words 'fundamental' and 'directive' are necessary and should be retained. (page 476)

Prof. Shibban Lal Saksena from United Provinces too supported Ambedkar's view: "…those friends who term this Article merely as a chapter of pious wishes are not correct. This is a very important chapter that lays down the principles which will govern the policy of the state and which, therefore, will ensure to the people of the country the realisation of the great ideals laid down in the preamble. (page 482)

An explanatory statement made by Dr. Ambedkar as to the purpose of the DPSP is also relevant here. "While we have established political democracy, it is also desirable that we lay down as our ideal economic democracy. The Constitution wishes to lay down an ideal before those who would be forming the government…There are various ways in which people believe that economic democracy can be brought about; there are those who believe in individualism as the best form of economic democracy, there are those who believe in having a socialistic state as the best form of economic democracy; there are those who believe in the communistic idea as the most perfect form of economic democracy…[thus] we have left enough room for people of different ways of thinking, about the reaching of the ideal of economic democracy, to strive in their way, to persuade the electorate that it is the best way of reaching economic democracy, the fullest opportunity to act in the way in which they want to act…so that is the reason why the language of the Articles in Part IV is left in the manner in which this Drafting Committee thought it best to leave it. It is no use giving it a fixed, rigid form to something which is not rigid, which is fundamentally changing and must, having regard to the circumstances and the times, keep changing. It is, therefore, no use saying that the Directive

Principles have no value. In my judgment, the directive principles have great value, for it lays down that our ideal is economic democracy. Because we did not want merely a parliamentary form of government to be instituted through the various mechanisms provided in the Constitution, without any direction as to what our economic ideal, our social ideal ought to be, we deliberately included the Directive Principles in our Constitution. I think if my friends who are agitated over this question bear in mind what I have said just now, that our object in framing this constitution is two-fold: (i) to lay down the form of political democracy, and (ii) to lay down that our ideal is economic democracy and also to prescribe that every Government whatever, it is in power, shall strive to bring about economic democracy, much of the misunderstanding under which most members are labouring will disappear.[ix] (pages 494-495)

Shri Karimuddin pleaded for the inclusion of prohibition within the context of the DPSP. "We know that thousands of families have been ruined and are miserable on account of this evil. In the Directive Principles of the State, which according to Dr. Ambedkar have no sanction, they ought to have been embodied because the State would have tried its utmost to secure the prohibition of liquors. The rejection of this additional clause will be the rejection of the wishes of Mahatma Gandhi." Prof Saksena concurred and said, "When all the religions are unanimous about prohibition, this amendment of Kazi Karimuddin should be mentioned…because this is something in which the entire House is unanimous." Mohammed Ismail Sahib, a member from Madras, and Seth Govind Das, a member from Central Provinces and Berar supported this proposal. Shri Mahavir Tyagi, a member of the United Provinces also spoke eloquently for the inclusion of prohibition in the Constitution. However, Shri Biswananth Das, a member from Orissa had different views. He questioned the reason why only the ban on liquor was proposed to be included in the Directive Principles, and not other intoxicants such as opium. "I consider the Directive Principles …as the Sermon on the Mount… we must look to the practical aspect of the question, and nothing will be served by putting this in the Directive Principles (pages 497-498).

There were some debates about certain other aspects of the DPSP too: On the question of "the ownership and control of the material resources of the community are so distributed as best to subserve the common good", finding a place as Article 39 (b), Prof Shibban Lal Saksena, a member from United Provinces said, "I feel personally that we should today at least lay down

that the key industries of the country shall be owned by the State. This has been an important programme of the Congress since 1921. The Congress has accepted the principle that the key industries shall be controlled by the State. Even recently in the committee appointed by the Congress, the report mentioned that the key industries shall be owned by the State; for the present, we have postponed the nationalisation of key industries for ten years. But I do feel that in our Constitution we must lay down that this is our fundamental policy. Unless we lay down in the Constitution itself that the key industries shall be nationalised and shall be primarily used to serve the needs of the nation, we shall be guilty of a great betrayal. Even if the principle is not to be enforced today, we must lay down in this clause (ii) about Directive Principles that the key industries shall be owned by the State. That is, according to Congress, the best method of distributing the material resources of the country.[x]

Shri Seth Govind Das, a member from Central Province and Berar, spoke movingly about the role of villages in India and the need to recognize this in the Constitution. "Just as Mahatma Gandhi brought about a revolution in every other aspect of this country's life, so also he brought about a revolution in village life. He started living in a village. He caused even the annual Congress Sessions to be held in villages. Now that we are about to accept this motion I would like to recall to the memory of the members of this House a speech that he had delivered here in Delhi, to the Asiatic conference. He had then advised the delegates of the various nations to go to Indian villages if they wanted to have a glimpse of the real India. He had told them that they would not get a picture of real India from the towns. Even today 80 per cent of our population lives in villages and it would be a great pity if we make no mention of our villages in the Constitution."[xi] The present Article 40 as a Directive Principle of State Policy gives substance to his thoughts on the matter of organisation of village panchayats and endowing them with powers and authority to enable them to function as units of self-government.

The Supreme Court and the Directive Principles: There have been many Supreme Court pronouncements on matters related to the DPSP. These Articles, namely 36 to 51, articulate certain directives that the nation will have to follow, both as regards its administration and also in the matter of making laws. It may be said that these principles embody the aspirations of the people of India under a republican constitution and is a measure of our common objectives of socio-economic justice. In the *Hindustan*

Development Corporation Case decided by the Supreme Court in 1994, it was stated in the judgment as follows: "What according to the founding fathers constitutes the plainest requirement of public interest is set out in the Directive Principles and they embody par excellence the constitutional concept of public interest."[xii]

According to Durga Das[xiii], the Directives differ from the Fundamental Rights contained in Part III of the Constitution, or the many ordinary laws of the land, in several aspects. First and foremost, they are not enforceable in the courts and do not create any justiciable rights in favour of individuals. This has been reiterated time after time in various judgments of the Apex Court, especially as Article 37 specifically states so. Yet, "the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."[xiv] Again the Supreme Court has said: "The Directive Principles of State Policy though not strictly enforceable in courts of law, are yet fundamental in the governance in the country."[xv] Further, whenever the Directives are required to be implemented and given effect, it has to be by way of legislation. On the other hand, no state or individual can violate any existing law or legal right under the pretext of following a directive as an example of this, we may quote the case of the *Municipality of Budge Budge* in West Bengal, an order of the Municipal Commissioner for closure of slaughterhouses on the plea that its purpose was to achieve the DPSP of Article 48, was declared as illegal by the Supreme Court as there is no law for forbidding the sale of beef.[xvi] The Supreme Court has also made it clear in the *Deep Chand* case[xvii] that the presence of the DPSP does not take away the legislative rights of a state which, through its legislature, is fully empowered to make laws as prescribed in the State list as mentioned in the Seventh Schedule.

Given the non-enforceability of the DPSP, the Apex Court has clarified that the courts cannot declare any law void because it contravenes the provisions of the DPSP.[xviii] On the same principle, neither can courts force any state to make laws to enforce the DPSP.[xix] The Court clearly said, "The mandate of Article of the Constitution is that while the Directive Principles of State Policy shall not be enforceable by any Court, the principles are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws". As far as Courts are concerned, what the injunction means is that while Courts are

not free to direct the making of legislation, Courts are bound to evolve, affirm and adopt principles of interpretation that will further, and not hinder, the goal set out in the Directive Principles of State Policy."

Early decisions of the Supreme Court paid little attention to the DPSP, especially as they were not legally enforceable, unlike the Fundamental Rights. But the *Keshavananda* case (please see endnote xiv) laid down certain broad propositions which had a profound effect on many future cases. Some of these broad propositions are: There is no disharmony between the Directives and the Rights, as they supplement each other in aspiring for a social revolution and the establishment of a welfare state. "The Directive Principles enjoin the State to reorganise the economic system by law or administrative means and the Fundamental Rights are means to that end to make right to life meaningful, equality of opportunity and status and dignity of person a reality. The Fundamental Rights and the Directive Principles are the two wheels of "the chariot as an aid to make social and economic democracy a truism."[xx] Together they form the core of the Constitution: "The Constitution aims at bringing about a synthesis between 'Fundamental Rights' and 'Directive Principles of State Policy' by giving to the former a place of pride and to the latter a place of permanence.[xxi] A reading of some lines from the *Keshavananda* case is relevant here and quoting from the judgment makes this abundantly clear: "If the normal rule is that all rules of civilized government are subject to the public interest and the common wealth, those rules will have to undergo new adjustments in the implementation of the Directive Principles. A blind adherence to the concept of freedom to own disproportionate wealth will not take us to the important goals of the Preamble, while a just and sympathetic implementation of the Directive Principles has at least the potentiality to take us to those goals, although, on the way, a few may suffer some diminution of the unequal freedom they now enjoy. That being the philosophy underlying the Preamble the Fundamental Rights and the Directive Principles taken together, it will be incorrect to elevate the Fundamental Rights as essentially an elaboration of the objectives of the Preamble."[xxii]

Most significantly, one which had far-reaching implications for the future, especially in the tenure of Smt. Gandhi during the Emergency and the infamous 42nd Amendment, the *Keshavananda* decision, while conceding the competence of the Parliament to amend the Constitution, and even

to override or abrogate the Fundamental Rights to enable the state to implement the Directives, laid down the cardinal rule that the basic features of the Constitution cannot be altered.[xxiii]

Another interesting aspect of the judgments of the Supreme Court is its articulation of what the role of the courts should be in the matter of DPSP. The courts also form part of the definition of 'state'. This has been made clear in Article 36 read with Article 12, a constructive reading of which makes it obvious that the judicial process also constitutes 'state action'. Hence the courts have a responsibility in interpreting the Constitution in such a manner as to ensure the implementation of the Directive Principles and their harmonisation with individual rights. This has been explained in depth in the *Keshavananada* case. Thus, apart from the primary role of the Legislature in making laws for the implementation of the DPSP, the courts of justice too are bound by this mandate. In the *Lingappa* case,[xxiv] the judgment states: "The concept of distributive justice in the sphere of law-making connotes, inter alia, the removal of economic inequalities and rectifying the injustice resulting from dealings or transactions between unequal in society. The law should be used as an instrument of distributive justice to achieve a fair division of wealth among the members of society based upon the principle: 'From each according to his capacity, to each according to his needs'. This philosophy has been repeated in the *Manchegowda* case too[xxv].

A proactive role of the Judiciary concerning the implementation of the DPSP is also perceptible in some other pronouncements of the Apex Court. From time to time, the Supreme Court has been issuing directions to the Government to take action to remove grievances caused by the non-implementation of the DPSP. A few examples will suffice. In the *Mukesh Advani* judgment,[xxvi] directions were given by the court to the Madhya Pradesh government to issue a notification under the Minimum Wages Act for the benefit of bonded and other exploited labourers. In the same case, directions were also issued to the Union of India and the State Government to set up joint committees to ensure that poor employees are not exploited by unscrupulous contractors in imposing terms violative of the DPSP as embodied in Articles 38, 41, 42 and 43 or other labour laws. As regards Article 39A dealing with 'equal justice and free legal aid', the court directed

that steps should be taken for extending this facility to all under-trial prisoners.[xxvii] Procedural safeguards were directed to be laid down in the matter of the adoption of Indian children by foreigners given Article in the *Mirzapur Moti Kureshi Jamat* case.[xxviii]

That there has been a conflict between Fundamental Rights as elaborated in Part III of the Constitution and the DPSP as listed in Part IV is well known, and came to the foresight when, during the tenure of Smt. Gandhi, certain amendments were brought into effect at the height of the Emergency by the 42nd Constitutional Amendment to this effect. The contradictions between Articles 19 (1) and 19 (2) have been the matter of much debate over the years: the first lays down the list of freedoms guaranteed to all citizens, while the second states the restrictions on the exercise of these rights. When agitated before the Apex Court, the prevalent touchstone was the matter of the reasonability of the restrictions that would be imposed on the Fundamental Rights because of the need to implement the requirements of the DPSP. Changing factual conditions have to be considered and given weightage by the courts while deciding the constitutional validity of legislative enactments. A restriction placed on any Fundamental Right aimed at securing DPSP will be held as reasonable and hence *intra vires* subject to two limitations: first that it has not run in clear conflict with the Fundamental Rights, and second, that it has been enacted within the legislative competence of the enacting legislature under part XI Chapter I of the Constitution. Implementation of the Directive Principle is within the expression "restriction in the interests of the general public" in Article 19 (6)[xxix]. In brief, what this means is that the "Directive Principles of State Policy provide for guidance in the interpretation of Fundamental Rights of a citizen as also statutory rights".[xxx]

What this essentially means is that the court can apply the doctrine of harmonious construction to interpret the various justiciable provisions in the light of the DPSP. Though the Directives cannot override the Fundamental Rights, the DPSP too cannot be overlooked: the effort should be to adopt the principle of harmonious construction to give effect to both as much as possible. Some examples of how the Apex Court attempted to resolve this apparent conflict are useful for understanding this sensitive matter. Article 14 enjoins the state not to deny equality before the law. Hence Article 39 (d) ("equal pay for equal work for both men and women" as a fundamental right) read with the word 'socialist' in the Preamble, makes it clear that any administrative order which violates this right is

irrational.[xxxi] Restrictions imposed on Fundamental Rights to secure the objectives of any of the Directives would be regarded as reasonable, within the requirements of Article 19 (Clauses 2-6) as the DPSP embodies the ideal of socio-economic justice as assured in the Preamble. The Apex Court went so far as to say that in the implementation of a DPSP even if hardship is caused to a few people, it should be upheld in the larger interest of the society. The matter related to the state acquisition of land from large landholders and redistributing the same to landless tenants, in what is known as the *Sonia Bhatia* case.[xxxii] The words of the judgment are striking: "Individual interests must yield to the larger interests of the community or the country as indeed every noble cause claims its martyr."

Another principle that the Supreme Court espoused is about Article 26 (freedom to manage religious affairs) and Article 37 (on the application of the principles contained in Part IV), holding that the latter imposes an obligation on the State to regulate the affairs to secure social welfare, including the secular activities of religious institutions, without interfering in the core of religious beliefs. Thus, in the case of *Narendra Prasad ji Anand Prasad ji vs the State of Gujarat* where the matter was the acquisition of land belonging to a religious institution, the Supreme Court upheld such acquisition undertaken by the state, since the larger goal was agrarian reform and redistribution of assets for the greater good.[xxxiii] Article 47 which advocates the prohibition of drugs and drinks was relied on by the Court to conclude that the state has the power to enforce an absolute prohibition on the manufacture and sale of liquor as well as the exclusive right to carry on such business.[xxxiv] In short, and to reiterate, the overall message that comes through from the above slew of judgments is that the Court should make every attempt to reconcile the Fundamental Rights with the DPSP, remembering that the reason why the DPSP was left by the fathers of the Constitution as non-enforceable in the courts, was to give the Government sufficient latitude to implement these principles from time to time according to capacity and circumstances that might arise.[xxxv]

It has also been a Supreme Court practice to use the provisions of Part IV of the Constitution as a guide in the matter of statutory construction. That is to say, where there are two alternative constructions of statute available, the Court should prefer the construction which conforms with the DPSP. "Public interest is promoted by a spacious construction of locus standi

in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with individualisation of the right to invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker."[xxxvi]

The Articles of the Directive Principles of State Policy: We shall now look at the contents of the specific articles dealing with the Directive Principles of State Policy and glance at certain selected pronouncements of the Supreme Court with regard to some of the specific directives as listed in Articles 38 through 51 of the Constitution. Articles 36 and 37 are introductory articles leading up to the principles themselves. **Article 36** merely mentions that the meaning of 'state' shall be the same as mentioned in Part III dealing with Fundamental Rights. **Article 37** defines both the strength and the weaknesses of the Directive Principles, namely, that the provisions of these principles "shall not be enforceable by any court" and that "the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State, to apply these principles in making laws".

Article 38 reads as follows:

1. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic, and political, shall inform all the institutions of the national life.

2. The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities, and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.[xxxvii]

The reference to social justice was amplified by the observations of the Apex Court in the matter of the definition of social justice as "the comprehensive form to remove social imbalance by law harmonizing the rival claims or the interest of different groups and/or section in the social structure or individuals using which alone it would be possible to build up a welfare state."[xxxviii] The Court had also observed in the *Captain Sube Singh* case that the provisions of statute which is a social welfare measure

should be interpreted in the light of the public law principles and the State cannot pass on the burden of its social obligation on the private parties. The matter referred to concessional passes for buses run by the Delhi Transport Corporation, whose services were later handed over to private parties, who did not honour those passes. "We see no discharge of 'social obligations', nor even the shadow of Article 38 of the Constitution, in this arrangement which is sought to be brought into force …"[xxxix] A reference may also be made to the *M Nagaraj* case which elaborated that it is not merely Article 38 that refers to justice, social, economic, and political. There can be no justice without equality, which has been provided in Articles 14, 17, 25, etc., and therefore, the provisions of Part III dealing with Fundamental Rights also provide for justice.[xl]

The Court has a profound role in interpreting and referring to the DPSP. Dispensation of social justice and achieving the goals outlined in the Constitution are not possible without the active, concerted, and dynamic efforts made by the person concerned with the justice dispensation system. "The prevailing ailing socio-economic-political system in the country needs treatment which can immediately be provided by judicial incision. Such surgery is impossible to be performed unless the Bench and the Bar make a concerted effort."[xli]

Article 39 reads as follows**:**

The State shall, in particular, direct its policy towards securing—

a) that the citizens, men, and women equally, have the right to an adequate means of livelihood;

b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

d) that there is equal pay for equal work for both men and women;

> e) that the health and strength of workers, men, and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
>
> f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and moral and material abandonment.[xlii]

These clauses, along with other provisions of the Constitution have one main aim: the building of a welfare State and an egalitarian social order. The Court has also made it clear in the *Keshavananda* case that that there is a possibility of individual liberty of a few being affected in the implementation of DPSP, but they widen the horizon for many. The amendment of the Constitution to give legal cover to this precept was made by adding Article 31C which saves laws giving effect to the DPSP on the grounds that it is inconsistent with, or takes away, or abridges, any of the Fundamental Rights conferred by Article 14 or 19.

Article 39 (b) and (c) have a special reference here. These clauses pertain to ownership and control of the material resources of the community and their distribution to subserve the common good; also, these clauses aim to ensure that the operation of the economic system does not result in the concentration of wealth. Nationalisation of coal resources, services, or electrical energy, for example, can be considered in light of these clauses of Article 39. The expressions used are wide enough to include all manner of resources or property. The word 'distributed' includes division, apportionment, allocation, dispersal of goods and services, etc., throughout the community.[xliii] The phrase 'Common good' has also been examined by the Supreme Court in the *Mahinder Kumar Gupta* case where it was held that "The distribution of the largesse of the State is for the common good and to subserve the common good of as many persons as possible."[xliv] The vesting of surplus land with the state also falls within the intent of Article 39 (b) and (c) as had been pronounced in the *Ramakrishna Reddy* case in Andhra Pradesh.[xlv]

Another important aspect in Article 39 clause (d) is that of 'equal pay for equal work'. There have been many cases in the Apex Court, the majority of them filed by employees in private institutions desiring parity of pay with similarly placed employees in the government. The relevant judgment of the Supreme Court is the *Randhir Singh* case where the court stated: "Construing Articles 14 and 16 in the light of the Preamble and Article 39 (d), we are of the view that the principle 'Equal pay for Equal work' is deducible from those articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though these drawing the different scales of pay do identical work under the same employer."[xlvi] Yet, the Court has pronounced that the principle of equal pay for equal work is not always easy to apply due to inherent difficulties in comparing and evaluating the work done by different persons in different organisations, or even in the same organisation, the difference in educational or technical qualifications or other considerations like experience and seniority. The court should not interfere unless there are *mala fides*.[xlvii]

An important case was the *Krishnamacharyalu* litigation[xlviii] where it was decided that there is an interest created by the Government in an institution to impart education, which is a fundamental right of the citizens, the teachers who impart education get an element of public interest in the performance of their duties, which requires regulation of conditions of services of those employees at par with the government employees. Such employees are entitled to a parity of pay scales as per executive instructions of the Government in this case.

Some judgments about Article 39 (d), about the welfare of children, are also significant. There are judgments that children should not be employed in hazardous occupations,[xlix] and that in cases where children are sought to be adopted by foreign nations, particular care should be taken to ensure the proper credentials of such persons.[l]

A unique case where Constitutional provisions enshrined in 39 (e), 47, and 48A were interlinked is the *MC Mehta case.li* These three provisions of the Constitution cast a collective duty on the state to secure the health of the people, improve public health and protect and improve the environment. The matter related to the supply of CNG by the government to private industry at subsidized costs. This was not considered a sign of good governance since enabling the private industries to cut their losses

or make more profit at the cost of public health, was not a sign of good governance; rather, it was contrary to the constitutional mandate of the constitutional provisions 39 (e), 47, and 48A.

Article 39A was added to the Constitution of India on the directions of Smt. Gandhi, at the height of the Emergency, through the Constitution (Forty-second Amendment (Act), 1976 with effect from 3/1/1977. It reads as follows:

> The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

In purpose, these provisions intend to allow indigent persons to obtain free legal aid so that they contest their matters in courts of law. Several judgments have been issued by the Supreme Court about this provision. One of the more significant judgments in this regard is *National Campaign on Dalit Human Rights* case The Apex Court was quite firm in its pronouncements: "The travails of the members of the Scheduled Castes and the Scheduled Tribes continue unabated. We are satisfied that the Central Government and State Governments should be directed to strictly enforce the provisions of the Act and we do so. The National Commissions are also directed to discharge their duties to protect the Scheduled Castes and Scheduled Tribes. The National Legal Services Authority is requested to formulate appropriate schemes to spread awareness and provide free legal aid to members of the Scheduled Castes and Scheduled Tribes.[lii]

Other judgments in this regard may also be referred to. *Hussainara Khatoon* is a relevant case to quote here, where the court observed that when the accused is unable to engage a lawyer owing to poverty or similar circumstances, the trial would be vitiated unless the state offers free legal aid for his defence.[liii] *The Khatri vs State of Bihar* is another such case stating this right arises from the moment that an accused is produced before a Magistrate.[liv] Jail Authorities have to be supplied a free copy of the judgment to a prisoner so that he may exercise his right to appeal.[lv]

Article 40 enters into another area of DPSP strengthening the principle of local government through village panchayats, an old institution that has been part of Indian history and societal arrangements for centuries. It reads:

> The organisation of village panchayats: The State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

While the Supreme Court had its views about the meaning and concept of a village, it understood that the DPSP cannot be enforced by law. The Court conceded that it cannot impose its concept of what a village is, upon the government. Yet it expressed certain ideas about the village in the case of the *Pradhan Sangh Kshettra Samiti*. " 'Village' connotes ordinarily an area occupied by a body of men mainly dependent upon agriculture or occupations subservient thereto. Article 40 not only does not define 'village' but also does not require that the village panchayats should be organised based on any particular concept of the village. The concept of a village cannot be confined by defining it as a habitat according to anthropological concepts, nor can a village be determined according to the aspiration, chauvinism, and wishes of the villagers as that would be against unity and integrity and social and economic progress of the country as well as to the ideals of the Preamble."[lvi]

Article 41 reads as follows:

> Right to work, to education, and to public assistance in certain cases the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education, and to public assistance in cases of unemployment, old age, sickness, and disablement, and in other cases of undeserved want.

Though this is not a justiciable right, there have been pronouncements from the Apex Court as well as positive legislative action by the Government to move towards a universal employment-oriented rights-based system in the country. The National Rural Employment Guarantee Act (NREGA) of

2005 provides legislative sanction for a right to work with assured wages for the rural population. Later renamed as the 'Mahatma Gandhi National Rural Employment Guarantee Act', MGNREGA), it is an Indian Labour law and social security measure that aims to guarantee the right to work. This Act was passed on 23 August 2005 under the UPA government. It provides at least 100 days of wage employment in a financial year to at least one member of every household whose adult members volunteer to do unskilled manual work. Women were guaranteed one-third of the jobs made available under the MGNREGA. The statute is, in fact, the largest and most ambitious social security and public works programme in the world, and the World Bank in its World Development Report 2014, termed it a "stellar example of rural development".[lvii]

Through various judgments, the Supreme Court too has made meaningful deductions in the light of the Preamble to the Constitution and other Directives embodied in Part IV. In fact, in the *Jacob Puthuparambil* case, the Court expressed the view that as Article 41 is a mandate both to the Legislature and the Courts, it should positively interpret the statute. "… the rule must be so interpreted if the language of the rule permits, as will advance this philosophy of the Constitution."[lviii] The Court also went so far as to direct that Constitutional functionaries should so evolve schemes and policies to provide continuous means of employment in rural areas.[lix]

Similarly, in the matter of the right to education listed as a DPSP in Article 41, the Supreme Court had, even as early as 1990 stated that it was the duty of the state not only to establish educational institutions but also to effectively secure the right to education by admitting students to the seats available at such an institution by admitting a candidate found eligible according to some rational principle.[lx] As we know, the Government has already converted this into a fundamental right through the legislation of the Right to Education Act, 2009, which provides for free and compulsory education for children in schools aged 6 to 14. Article 21A guaranteeing education as a fundamental right was inserted by the Constitution (Eighty-sixth Amendment) Act 2002 with effect from 1 April 2010.

Article 41 also mentions the provision of making assistance available to cases of unemployment, old age, sickness, disablement, and other cases of undeserved want. In this direction, withholding pensions of a retired employee or in cases where the findings do not prove misconduct or negligence, was frowned upon.[lxi] In a matter where the State Transport

Corporation was delaying payment of compensation for its employee who had suffered disablement, the Court took a strongly critical view.[lxii] However, we are aware of various schemes started by the central government and the state governments where pension amounts are distributed to widows, disabled persons, senior citizens, etc.

Article 42 reads as follows:

> The State shall make provision for securing just and humane conditions of work and for maternity relief.

In a significant judgment, the Supreme Court had held that the provisions of the Maternity Benefit Act 1961 entitling maternity leave to women engaged on a casual basis or muster roll on daily wages, and not only to those in regular employment, are wholly in consonance with the intention of Article 42.[lxiii]

Article 43

> The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial, or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

The issue of 'fair wages', or 'living wages', or 'minimum wages' has been drawing the attention of the courts for many years now. In the *Reserve Bank Employees* case, the Supreme Court made a critical reference to this in light of Article 43. "…in actual practice living wage has been an ideal which has eluded our efforts like an ever-receding horizon and will so remain for some time to come. Our general wage structure has at best reached the lower levels of fair wage though some employers are paying much higher wages than the general average."[lxiv] The Unorganised Workers' Social Security Act 2008 is a step taken by the government in the direction of moving towards the intent of Article 43. Various schemes are already in place for unorganised workers or for workers formally appointed on the rolls.

These include, for the former category, the Indira Gandhi National Old Age Pension Scheme, National Family Benefit Scheme, Janani Suraksha Yojana, Handloom Weavers' Comprehensive Welfare Scheme, Handicraft Artisans' Comprehensive Welfare Scheme, Pension to Master craft persons, National Scheme for Welfare of Fishermen and Training and Extension, Janshree Bima Yojana, Aam Admi Bima Yojana, Rashtriya Swasthya Bima Yojana, etc. As for the regular workers, the statutes and other provisions include, The Workmen's Compensation Act, 1923 (8 of 1923), The Industrial Disputes Act, 1947 (14 of 1947), The Employees' State Insurance Act, 1948 (34 of 1948), The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), The Maternity Benefit Act, 1961 (53 of 1961), The Payment of Gratuity Act, 1972 (39 of 1972), etc.

The Supreme Court has relied on this article to uphold the reasonableness of restrictions imposed by the Minimum Wages Act, 1948 upon the fundamental right of business guaranteed by Article 19 (1) (g) to condemn unfair labour practices.[lxv] In the *DS Nakara* case[lxvi], the Court took an integrated view of Article 43, along with Article 41, (with particular reference to the right to work) and Article 39 (c) (that the operation of the economic system does not result in the concentration of wealth and the means of production to the common detriment) and stated that these provisions aim at establishing a 'socialist' State as envisaged by the Preamble, which would endeavour to secure a decent standard of life and economic security to the workers.

Article 43A was introduced into DPSP by the Constitution (Forty-Second Amendment) Act with effect from 3 January 1977, and reads as follows:

> The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry.

As an incentive for the workers who may have been dissatisfied with the actions of the government during the Emergency period, the concept of workers' participation was introduced in the economic and industrial scenario in the country. The Supreme Court noted that this opened a new perspective in industrial relations, particularly relating to discharge, reinstatement, and right-to-back wages on reinstatement.[lxvii]

Article 43B was introduced by the Constitution (Ninety-seventh Amendment) Act 2011, with effect from 15 February 2012. It reads as follows:

> The State shall endeavour to promote voluntary formation, autonomous functioning, democratic control, and professional management of co-operative societies.

It would be noted that the Government of India has also created a new Ministry in July 2021 for providing a separate administrative, legal, and policy framework for strengthening the cooperative movement in the country.

Article 44

> The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

The article is based on the concept that there is no necessary connection between religion and personal law in a civilized society.[lxviii] And indeed the Court commented acidly: "…the rulers of the day are not in a mood to retrieve Article 44 from the cold storage where it is lying since 1949. The Governments - which have come and gone - have so far failed to make any effort towards "unified personal law for all Indians."[lxix] The Court has observed that the Parliament is still to step in for framing a common civil code in the country which will help the cause of national integration by removing the contradictions based on ideologies.[lxx]

Yet, the subject has created much debate and acrimony whenever it is aired in the public domain. It is too large a subject to be treated in this article.

(The author's separate essay on the subject can be referred to in this context.lxxi)

Article 45 reads as follows**:**

> The State shall endeavour to provide, early childhood care and education for all children until they complete the age of six years.

This directive principle overlaps a part of Article 41 which also mentions the right to education**.** Specifically, though, this pertains to what is considered pre-school education. There are a few important aspects of the insertion of this principle through the Constitution (Eighty-sixth Amendment) Act 2002 which came into effect on 1 April 2020. The article replaces another article that has now been deleted from the list of DPSP because it has now become a reality. When the Constitution was framed in 1950, compulsory and free education for children was but a dream and an aspiration. Thus, it was included as a DPSP with the following words: "The State shall endeavour to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children until they complete the age of fourteen years." The Right to Education Act of 2009 converted the aspiration into a reality. Thus, it had no longer any relevance in the list of DPSP. Simultaneously, a new Article, 21A, has been included in Part III within the list of Fundamental Rights, making it obligatory for the State to provide free and compulsory education to all children from the age of six to fourteen years. The old Article 45 was, therefore, substituted with the new Article 45, which speaks of early childhood and care for children up to the age of six. The New Education Policy, 2020 has included what used to be preschool education, for children up to the age of six, within the formal structure of school education.

Article 46 reads as follows:

> The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

A reference to Article 15 is in order here: this article prohibits discrimination on grounds of religion, race, caste, sex, or place of birth. Article 15 was amended by the Constitution (First Amendment) Act, 1951 by adding clause 4 which saved any law made by the State for the advancement of any socially and educationally backward classes of citizens or the Scheduled Castes and Scheduled Tribes.

This article embodies the concept of 'distributive justice; which connotes the removal of economic inequalities and rectifying the injustice resulting from dealings or transactions between unequals in society. As Durga Das

states[lxxii], "This may be achieved by the State by lessening of inequalities by differential taxation, giving debt relief, distribution of property owned by one to many who have none by imposing a ceiling on holdings, or by direct regulation of contractual transactions by forbidding certain transactions. Hence, a law invalidating transfers of land belonging to a member of a Scheduled Tribe to a non-tribal and for restoration of such land to a transferor would be an implementation of this Article and is constitutionally valid.[lxxiii] Similarly, after the allotment of surplus land to people belonging to the Tribes and Castes for economic justice was put into effect, simultaneously, the alienation of such land from them to others became illegal and such sales were made void.[lxxiv] As a general policy, the State is under obligation to provide the SCs/STs facilities and opportunities for their economic empowerment as it is their fundamental right. The court observed: "Economic empowerment is a fundamental right of the weaker sections of the people, in particular the Scheduled Castes and Scheduled Tribes, ensured under Article 46 as a part of social and economic justice envisaged in the Preamble of the Constitution; the State is enjoined to promote their welfare effectuated under Article 38. Distribution of material resources to elongate that purpose envisaged in Article 39 (b) is the means for the development of the weaker sections."[lxxv]

The reference to 'weaker sections' mentioned in Article 46 also needs clarification. Though not properly defined, the Supreme Court observed that apart from the Scheduled Tribes and Castes millions of other citizens also belong to the weaker sections. In the *Indra Sawhney* case, the Court observed that the term is wider than the expression 'backward class' which is only a part of the weaker sections. Backward classes comprise only those who are socially and educationally backward. 'Weaker sections' connotes all sections of society which are rendered weaker due to various causes such as poverty, natural calamity, or physical handicap.[lxxvi]

Article 47

The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

The improvement of public health is a primary duty of the State. Hence, the court has to enforce this duty against a defaulting local authority on the pain of penalty prescribed by law, regardless of the financial resources of such authority. If needed, the local authority should approach the State Government for loan or aid and such finances must be provided by the State given the primary duty of the State as mentioned in Article 47.[lxxvii] In another case, the Court noted that it is the paramount duty of the State to achieve an appropriate level of protection of human life and health. Enjoyment of life and its attainment, including the right to life and human dignity, encompasses within its ambit the availability of articles of food.[lxxviii]

Another significant case filed by PUCL[lxxix] resulted in a judgment where the court issued directions for the operationalisation of 12 lakh Anganwadi centres and for the supply of nutritious food/supplements to children, adolescent girls, and pregnant and lactating women for 300 days in a year.

In the *Moolchand Khairati Ram Trust* case, the Supreme Court upheld the decision of the government that all hospitals, which have taken land from the government on concessional rates, are obliged to provide services free of cost for 10% of indoor patients and 25% of outdoor patients coming from economically weaker sections of society. The court held that "it would be inhuman to deny a person who is not having sufficient means or no means, the life-saving treatment, simply on the ground that he is not having enough money. Due to financial reasons, if treatment is refused, it would be against the very basic tenets of the medical profession, and the concept of charity in whatever form we envisage the same, besides being unconstitutional would be violative of basic human rights.[lxxx]

Article 48 reads as follows:

> The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

This article mainly deals with the subject of animal husbandry and improving the breeds, prohibiting the slaughter of cows and calves, etc. The prohibition of cow slaughter has been enjoined here, and such prohibition cannot be held to be an unreasonable restriction upon the right conferred

by Article 19 (1) (g) which is the right to "practice any profession, to carry on any occupation, trade or business."[lxxxi] The contentious question of statutes prohibiting cow slaughter which has been enacted in many states is not being addressed in this book.

Article 48A, inserted by the Constitution (Forty-second Amendment) Act with effect from 3 January 1977 reads as follows:

> The State shall endeavour to protect and improve the environment and safeguard the forests and wildlife of the country.

Introduced into the DPSP by the 'infamous' 42nd Amendment, it nevertheless brought more focused attention to the subjects of environment, forests, and wildlife, further strengthened by the removal of these subjects from the State List to the Concurrent List of the Seventh Schedule. This led to a series of enactments by the Union Government in the field of these three subjects. The Court has held that these three subjects are interrelated and interdependent and protect each other.[lxxxii]

Reference to Article 51A (g) in Part IV A dealing with Fundamental Duties may also be mentioned here in the context of Article 48A because the citizen's duty to protect these resources has been included as a duty: "to protect and preserve the natural environment including forests, lakes, rivers, and wildlife, and to have compassion for living creatures." This has been clearly articulated in the *Intellectuals Forum* Case of 2006.[lxxxiii]

The Supreme Court has expanded the scope of this Article by construing it to be part of the principle of Article 21 dealing with the protection of life and liberty. A statute may not be ultra vires Article 48A itself if it is not otherwise offensive to Articles 14 and 21 of the Constitution.[lxxxiv] Thus reading, Article 51A (g) along with Articles 14 and 21, the court has drawn the following conclusions: that it is the constitutional duty not only of the State but of every citizen to protect and improve the environment and natural resources of the country. Though Article 48A and 51A are not judicially enforceable, it becomes enforceable because of the expanding interpretation of Article 21. Where there is a failure of these duties, the courts can entertain a petition under Article 32 (remedies for enforcement of rights) or Article 226 (power of High Courts to issue writs) as a public interest litigation. Further, in the *MC Mehta* case[lxxxv] in

this regard, the Supreme Court directed the Central Government to list out all the steps taken since the insertion of this article, for the protection and improvement of the environment along with details of the national policy to restore the quality of the environment. The Court critically commented that there has been accelerated degradation of the environment primarily on account of the lack of effective enforcement of environmental laws and non-compliance with the statutory norms.

The Court has come down heavily on mining activities given their potential to damage the ecology and hamper people's rights to natural resources. The regulating authorities have to act with utmost care and when they connive or act negligently they have to be informed about their responsibilities. To monitor the overall eco-restoration efforts in the Aravalli Hills, the Supreme Court constituted a Monitoring Committee in the area and filed a report. All individuals and departments were directed to give full cooperation.[lxxxvi] It is relevant to mention here that the Supreme Court understood forest land in the dictionary sense and also that any area regarded as a forest in government records, irrespective of ownership, would be a forest.

Article 49:

> It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal, or export, as the case may be.

An example of the intervention of the Supreme Court in matters related to Article 49 can be obtained from the Taj Mahal case. When the expert committee appointed by the Court opined that the use of coke/coal by industries situated within the Taj Trapezium Zone (TTZ) was emitting pollution and causing damage to the Taj, the Supreme Court directed the industries to stop pollution by using natural gas in place of coke /coal or relocate themselves.[lxxxvii]

Article 50 reads as follows:

> The State shall take steps to separate the judiciary from the executive in the public services of the State.

The expression "State' in Article 50 has to be construed in the distributive sense as including the Government and Parliament of India and the Government and Legislature of each State and all local or other authorities within the territory of India or under the control of the Government of India.[lxxxviii] The most well-known case to establish this precept of the independence of the Judiciary is the *SP Gupta* case (also known as the First Judges case) where the Court had held that the independence of the Judiciary is one amongst many other principles that run through the entire fabric of the Constitution and is part of the law under the Constitution. The Judiciary is entrusted with the task of keeping the other two organs within the limits of the law and making the law meaningful and effective. Then independence of the Judiciary is not limited to judicial appointments to the courts but has a wider concept. "It has many dimensions, namely fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong." Quoting Scriptures, the judgment ended with these stirring words. "Let men trained in ethics or morality, insult or praise; let Lakshmi (wealth) accumulate or vanish as she likes; let death come today itself or at the end of a yuga (millennium), men with discretion will not deflect from the path of rectitude".[lxxxix]

In other judgments, the Supreme Court has maintained that Judicial independence and accountability are mutually reinforcing concepts,[xc] that superior courts should refrain from passing strictures and derogatory remarks of judicial officers of the subordinate Judiciary,[xci] that the Judiciary should give due regard to the fundamental nature and importance of the legislative process,[xcii] that equity or equitable considerations play no role in interpreting constitutional provisions dealing with the distribution of powers among the three wings of the government, etc. [xciii]

The Supreme Court has also touched upon the sensitive areas of the relationship between the Executive and the Judiciary. To permit the executive to review and/or revise the judicial decision would amount to interference with the exercise of judicial functions by a quasi-judicial body. It would amount to subjecting the decision of the judicial body to the scrutiny of the executive. Under the Constitution, the position is reversed. The Executive has to obey the judicial orders. The reverse would be a travesty of law which is the basic structure of the Constitution.[xciv] Article 50 has been referred to as the 'conscience of the Constitution', which "embodies the social philosophy of the Constitution and its basic

underpinnings and values reveals, without any scope for doubt or debate, the intent of the Constitution-makers to immunise the Judiciary from any form of executive control or interference."[xcv]

Article 51, the last of the DPSP reads as follows:

> The State shall endeavour to— (*a*) promote international peace and security; (*b*) maintain just and honourable relations between nations; (*c*) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and (*d*) encourage settlement of international disputes by arbitration.

This Article embodies the objectives of India in the international sphere, though it does not lay down that international treaties entered into by India shall have the force of law without appropriate legislation, which is exclusive to the State legislatures or the Parliament. For an international treaty to be binding, it has to be legislated upon, especially if the treaty involves the payment of money to a foreign power, or affects the justiciable rights of a citizen, the acquisition of private property, the imposition of a tax, or modification of the laws of a State, or the cession of Indian territory to a foreign power.[xcvi] In the absence of contrary legislation, the courts in India would respect the rules of International law; but if there is any express legislation contrary to international laws, then the Indian courts are bound to give effect to Indian laws.

Indeed, the DPSP have encouraged the nation to frame laws that seek to achieve some of its goals. We have already noted the Right to Education Act 2009 and the MNREGA schemes. Various schemes for the welfare of the Scheduled Castes and the Tribes have been put into implementation, including the Prevention of Atrocities Act, 1989 thereby fulfilling to a considerable extent the purpose of Article 46. In this connection, the special reservation of financial resources under the Special Component Plan for welfare programmes of the Scheduled Castes also requires special mention. One may even say that the slew of land reform legislations across the country has furthered the intent of the DPSP in a very significant way. Various other legislation to protect the environment, forests, and wildlife also require to be mentioned here. The elevation of Panchayat Raj and other local government institutions to constitutional entities by way of the 73rd and 74th Constitutional Amendment Acts requires to be highlighted

here. Legal Aid for the poor has become an essential part of the justice system for the benefit of poor people, in keeping with the intent of Article 39A.

DPSP vs Fundamental Rights: The DPSP have been the matter of much debate in political circles as well as amongst writers and thinkers of government and public policy. However, one of the significant issues that emerge is the relationship between Part III (Fundamental Rights) and Part IV (Directive Principles) of the Constitution. David Ambrose has made a study of this aspect which is particularly important to understand.[xcvii] This relationship has changed over time, and it is possible to identify four phases in the evolution of thought in this direction. In the first period, primacy was given to Part III over Part IV because of the non-enforceability of the DPSP. This is known as the subsidiary period. Thus, in *State of Punjab vs Champakam Dorairajan*, the Supreme Court held that "the Directive Principles of State Policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights," because the latter are enforceable while the former is not.[xcviii] The second period may be termed the harmonious construction period where an attempt was made by the Judiciary to harmonise Part III and Part IV. This was signalled by the observation that both these parts "are complementary and supplementary to each other" in the case known as *CB Boarding and Lodging*.[xcix] This has been upheld in the *Minerva Mills* case as well, where the court held that "harmony and balance between the Fundamental Rights and Directive Principles is an essential feature of the basic structure of the Constitution."[c] This judicial approach indeed led to the third stage namely the enforcement stage, where the DPSP otherwise unenforceable (non-justiciable), was enforced, though not directly, but indirectly. "Initially provisions of Part IV were used to justify restrictions imposed on the Fundamental Rights and in this fashion, they were indirectly accorded judicial recognition. In determining the reasonableness of a restriction under Article 19, the court had regard to the directives, and gave such interpretation to the other articles of the Constitution which aimed at promoting the goal contained in the Preamble and the Directive Principles of State Policy, envisaging a socialistic policy."[ci]

The realisation that the two kinds of human rights, namely civil and political rights, and economic and social rights, are complementary to one another, led the Judiciary to interpret Part III by reading Part IV into it. For example, in the *Banduan Mukti Morcha* case[cii], the Supreme Court found that the right to live with human dignity, as enshrined in Article 21,

derives its life breath from the DPSP and therefore it must include facilities for children to be healthily and conditions of freedom and dignity with educational facilities and just and humane conditions of work. Similarly, even before the right to education was included in Article 21A, it was found to be a right after interpreting Article 21 in the light of Articles 42, 45, and 46 and thus it becomes obligatory for the state to provide for the education of the children. The judgment of *Mohini Jain* is relevant in this matter.[ciii]

These developments gradually led to the fourth stage of the evolution of judicial thought in matters related to the DPSP known as the primacy stage, where supremacy has been given to Part IV, and some Fundamental Rights made subservient to Part IV. The introduction of 31C through the 25th Amendment in 1971 was intended to give effect to laws to implement DPSP, contained in Article 39 (b) and (c), even if they may be purportedly violative of Fundamental Rights such as Article 14 or 19. In 1976, Article 31C was further amended by the 42nd Amendment to cover all DPSP and not merely 39 (b) and (c). The Supreme Court struck down this expanded Article 31C holding that the unamended 31C is valid as it does not destroy the basic features of the Constitution. By the time the *Waman Rao* case[civ] came around, the Supreme Court went so far as to say, "Article 31 is now out of harm's way. Far from damaging the basic structure of the Constitution, laws passed true and bona fide for giving effect to the Directive Principles contained in clauses (b) and (c) of Article 31, will fortify that structure." In the *Sanjeev Coke Manufacturing* case[cv], the court held that the extension of constitutional immunity to other DPSPs does not destroy the basic structure of the Constitution.

Some constitutional commentators such as Upendra Baxi and Sundara Rami Reddy have held the view that DPSPs are not subordinate to the Fundamental Rights and have the same stature. As regards enforceability, Baxi stresses "institutionalised coercion' as a necessary and sufficient condition of law. Prof Al Goodhart has observed: "If a principle is recognised as binding on the Legislature, then it can be correctly described as a legal rule, even if there is no court that can enforce it." He states that the Indian Constitution is emphatic and declares in no uncertain terms that the directives are nevertheless fundamental in the governance of the country, and it shall be the duty of the State to apply these principles in making laws.[cvi]

David Ambrose sums up[cvii]: The DPSP are fundamental in governance and aim at achieving economic democracy. These Principles contain many of the economic and social rights and thus impose an obligation or duty on the State. They are not made enforceable in their implementation as they may depend on the financial capabilities of the state. Part IV is viewed as the 'Book of Interpretation' to interpret constitutional provisions, especially Part III. Based on the judicial judgments that the State can implement Part IV, the directives in Part IV are enforced as Fundamental Rights. At times, to realise socio-economic justice, primacy is given to Part IV over Part III.

In Conclusion: Article 37 which explains the applicability of the DPSP is clear: while conceding that the provisions are not enforceable, it says that "the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." The reason for the non-enforceability clause may be the lack of financial capability of the State, for the reason "that an infant state shall not be made accountable immediately for not fulfilling these obligations. Merely because the Directive Principles are non-justiciable by the judicial process, does not mean that they are of subordinate importance."[cviii] Another reason advanced for the principle of non-enforceability is as follows: "If the court can compel the Parliament to make laws, then parliamentary democracy would be soon reduced to an oligarchy of judges. It is for this reason that the Constitution says that the Directive Principles shall not be enforceable by courts. However, it does not mean that the Directive Principles are less important than Fundamental Rights for the simple reason that they are not judicially enforceable."[cix]

One of the early papers in this regard by Narayana Rao[cx] quotes Harold Laski from 'Grammar of Politics', who was discussing the question of rights in the context of the American Constitution: "Musty parchments will doubtless give them greater sanctity; they will not ensure their realisation." Rao goes on to say that non-justiciability may be a handicap to the individual when a reactionary government ignores these principles or escapes them by putting a different interpretation on them. However, it may be hoped that the government and the Judiciary, and the justiciable and non-justiciable rights will work in a scheme of checks and balances, so that the shortcomings of one part may be balanced by the other." There are also the famous words of Sir Ivor Jennings. "The philosophy behind most

of the provisions of the Directive Principles of State Policy is that of Fabian Socialism without the socialism, for only the nationalisation of the means of production, distribution, and exchange is missing."[cxi]

There have been learned expositions about the various articles included in Part IV of the Constitution. Opinions on them varied, from describing them as "a variable dustbin of sentiments"[cxii] to the 'Instrument of Instructions.'[cxiii] It is not the intention to refer to them extensively: but a glance at some of these references will help in deepening our understanding. David Ambrose examined Article 39 (b) pertaining to ownership and control of the material resources of the community and their distribution to best subserve the common good[cxiv]. He concluded that the public trust mandate governs the aspect of the distribution of natural resources with a high degree of judicial scrutiny. State action in this regard has to satisfy the test of equality as well. "Putting it in a nutshell, the policy of distribution may be outside judicial review, however, the method of distribution is subject to judicial review. By emphasising the public trust doctrine in the distribution of natural resources, the court has once again emphasised and reasserted its power of judicial review, thus clearing the cloud of confusion created by Article 31 (c) and some judicial pronouncements." The specific reference to the court case pertains to the *Centre for Public Interest Litigation vs Union of India*, known as the 2G case. The court pronounced: "The State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good."[cxv]

But the fact remains that other countries have deeply considered the requirement of introducing the concept of socio-economic rights within the framework of their respective constitutions. We have already seen the impact of Irish political thought on the Constitution of India. O'Normain has written about the impact of Irish political thought on the Indian Constitution. "It is somewhat difficult to find comparable foreign case law to assist in the interpretation of socio-economic rights. This is because South Africa is the only jurisdiction to incorporate an extensive list of directly enforceable socio-economic rights in their constitution (for example, Brazil, India, Portugal, and Ireland do so in the form of directly enforceable Principles of State Policy). These principles are not directly enforceable but may influence the interpretation of those rights by being 'read into' those rights or are relevant in the interpretation of legislation."[cxvi] DPSP are

an increasingly common way of constitutionally entrenching social values and providing an alternative to conventional rights provisions that have yet to be adequately understood. DPSP place binding. but typically, non-justiciable. obligations on the state to promote social values, and they are designed to be given effect by means other than direct judicial enforcement -predominantly by legislation.[cxvii]

In many countries, such as in India, political rights are enforceable while economic rights remain unenforceable. Yet, an articulation of these rights in the Constitution ensures a better chance of enforcing such economic rights. The African continent with differing systems is going through the throes of transformation. Constitutions in those countries see these rights not only as a means for constituting and constraining political power but also as a mechanism for enabling societal transformation. It plays a potentially important role in responding to some of the challenges of constitutionalism related to the multiparty political system, the Judiciary, and substantive justice. DPSP advance transformative constitutionalism because their substantive content and procedures of implementation are animated by forward-looking transformative ethos. They have the potential to address these challenges as they first, create minimum standards in the substantive formulation of political-party programmes and implementation strategies. Secondly, they empower and legitimise the Judiciary in the functioning of constitutional democracy. Thirdly, they provide substantive justice to the majority through the implementation of socio-economic rights, both in the democratic and judicial processes.[cxviii]

In conclusion, we may say that in India, the gradual transition of the DPSP from aspirational goals set by a fledgling country to an elaborate set of do-able prescriptions, enabled by a pro-active Legislature and supported by pronouncements of an active Judiciary, makes the way ahead look bright and hopeful. Ambedkar dwelt at length on the reason for the word 'strive' as it appears in Article 38: "The State shall strive to promote the welfare of the people…" The construction of the sentence makes it appear as if it is not mandatory, but only aspirational. The doubt remains, though Ambedkar took time to explain its significance: " ... The word 'strive' which occurs in the Draft Constitution, in judgment, is very important. We have used it because our intention is even when there are circumstances which prevent the Government, or which stand in the way of the Government giving effect to these Directive Principles, they shall, even under hard and unpropitious circumstances, always strive in the fulfilment of these Directives. That is

why we have used the word 'strive'. Otherwise, it would be open for any Government to say that the circumstances are so bad, that the finances are so inadequate that we cannot even make an effort in the direction in which the Constitution asks us to go."[cxix]

It is a fact that as a republic, while we have made impressive strides in economic development and the building up of our gross national product, yet our attainments in the social sector are far from ideal. The position of women and children, the fractured and hierarchical caste structure within society, the disturbing elements of social injustice, etc., are all evils that still plague the socio-political scenario of the country. We still have a long way to go to reach that 'heaven of freedom' dreamt of by Tagore. Yet, we may be sanguine that even in the difficult days ahead, the DPSP will provide a framework that will guide us on our journey to that goal.

Notes

This chapter makes extensive references to the deliberations of the Constituent Assembly which have been preserved by the Parliament office in digital form. Similarly, there are myriad references to judgments of the Supreme Court which are downloadable from the indiakanoon.org website.

i The word *oireachtas* comes from the Irish word *airecht/oireacht* ("deliberative assembly of freemen; assembled freemen; assembly, gathering; patrimony, territory"), ultimately from the word airig (freeman). Its first recorded use as the name of a legislative body was within the Irish Free State.

ii Report of the Committee appointed by the All-Parties' Conference, 1928, known as 'The Nehru Report 1928: An Anti-Separatist Manifesto'. Published under the auspices of The Indian Institute of Applied Political Research, printed by Michiko & Panjathan, New Delhi, and downloadable at https://www.constitutionofindia.net/historical-constitution/nehru-report-motilal-nehru1928/

iii Sapru Committee report (Sir Tej Bahadur Sapru), accessible at https://www.constitutionofindia.net/historical_constitutions/sapru_committee_report__sir_tej_bahadur_sapru__1945__1st%20December%201945

iv Hrishikesh Shah, *prarabdha ra purushartha: aatmakatha*; at note no. 22 at pages 144–5 (2014); Hrishikesh Shah was the Chairman of the Constitution Drafting Committee of the Constitution of Nepal, 1962. A more detailed analysis is available in the work of Madhav Kumar Basnet known as 'Adoption of foreign values in Nepal: A Study.'

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vii E-Library of the Parliament: minutes of the discussions of Constituent Assembly on 9 November 1948, accessible at https://eparlib.nic.in/bitstream/123456789/763029/1/cad_19-11-1948.pdf

viii BR *Ambedkar's Selected Speeches*, concluding remarks in the Constituent Assembly on 4 November 1948, accessible at https://prasarbharati.gov.in/whatsnew/whatsnew_653363.pdf

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xiii Durga Das Basu, *Shorter Constitution of India*, (Lexis Nexis, 16th Edition, 2021).

xiv Keshavananda Bharati vs State of Kerala, (AIR 1973 SC 1461: (1973) 4 SCC 225, accessible at https://indiankanoon.org/doc/257876/

xv PM Ashwathanarayana Setty vs State of Karnataka AIR 1989 SC 100: 1989 Supp (1) 696, accessible at https://indiankanoon.org/doc/278573/

xvi Mangru Meya vs Commissioners of Budge Budge Municipality, accessible at https://indiankanoon.org/doc/1690155/

xvii Deep Chand vs State of UP (1959 AIR 648, 1959 SCR Supl (2) 8, accessible at https://indiankanoon.org/doc/570453/

xviii Ibid.

xix Deep Chand vs State of UP (1959 AIR 648, 1959 SCR Supl (2) 8, accessible at https://indiankanoon.org/doc/570453/

xx Jilubhai Nanbhai Khachar vs State of Gujarat, 1995 SC 142, accessible at https://indiankanoon.org/doc/1515136/

xxi V Markhandeya vs State of Andhra Pradesh AIR 1989 SC 1308(para(9), accessible https://indiankanoon.org/doc/978175/

xxii Supra: Keshavananda judgment (end note 3), para 1355.

xxiii Supra: Keshavananda judgment (endnote 3) para 134, 139, 1714.

xxiv Lingappa Pochanna vs State of Maharashtra (AIR 1985, SC 3890 para 16, 20), accessible at https://indiankanoon.org/doc/1145196/

xxv Manchegowda vs State of Karnataka AIR 1984 SC 1151, accessible at https://indiankanoon.org/doc/1545120/

xxvi Mukesh Advani vs State of Madhya Pradesh AIR 1985 SC 1363, accessible at https://indiankanoon.org/doc/1685522/

xxvii Sheela Borse vs State of Maharashtra AIR 1983 SC 378 (para 3.4).

xxviii State of Gujarat vs Mirzapur Moti Kureshi Kassab Jamat, (2005), 8 SC 534, 564 1-42) para 41- 42, accessible at https://indiankanoon.org/doc/101278772/

xxix Durga Das Basu, Supra: 786.

xxx Ms Ashoka Smokeless Coal India vs Union of India of 1 December 2006 para 12, accessible at https://indiankanoon.org/doc/1067949/

xxxi Randhir Singh vs Union of India AIR 1982SC 879 (paras 8-9), accessible at https://indiankanoon.org/doc/1230349/

xxxii Sonia Bhatia vs State of Uttar Pradesh AIR 1981 SC 1274 para 29, accessible at https://indiankanoon.org/doc/1631108/

xxxiii Narendra Prasad ji Anand Prasad ji vs State of Gujarat, 1974 AIR 2098, 1975 SCR (2) 317, accessible at https://indiankanoon.org/doc/527065/

xxxiv Nashirwar vs State of Madhya Pradesh AIR 1975 SC, accessible at https://indiankanoon.org/doc/1203112/

xxxv State of Tamil Nadu vs Abu Kavur, accessible at https://indiankanoon.org/doc/847888/

xxxvi Quoted from the judgment dated 10 March 1976 Mumbai Kamgar Sabha vs Abulbhai Faizaullabhai AIR 1976 SC 1455 (Para 29), accessible at https://indiankanoon.org/doc/191016/

xxxvii Article 38 (2) was inserted by the Constitution (Forty-fourth Amendment Act 1978 (with effect from 20.6.1979) in the series of 'corrective' legislative actions taken by the Janata Government after the defeat of the Indira Gandhi government in the 1977 general elections.

xxxviii As explained in the article entitled *Social and Economic Justice under Constitution of India: A Critical Analysis* by GS Mahantesh Principal ABBS School of Law Bangalore, accessible at https://www.ijlmh.com/wp-content/uploads/2019/04/Social-and-Economic-Justice-under-Constitution-of-India-A-Critical-Analysis.pdf. The article makes specific reference to the Dalmia Cement (Bharat) Limited vs Union of India case 1996 10 SCC 104 (para 21).

xxxix Captain Sube Singh vs Lt Governor of Delhi, AIR 2004 SC 3821: (2004) 6 SCC 440, 452 (paras 31 and 52), accessible at https://indiankanoon.org/doc/1926027/

xl M Nagaraj vs Union of India (2006)8 SCC 212, 247-48 (para 42): (2006) 9 JT 191, accessible at https://indiankanoon.org/doc/102852/

xli Ramon Services Pvt Ltd vs Subash Kapoor delivered on 14 November 2000, in Appeal (Civil) 6385/2000, accessible at https://indiankanoon.org/doc/342787/

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xliii Sanjeev Coke Manufacturing vs Bharat Coking Coal Ltd of 10 December 1982, 1983, AIR 239, 1983 SCR (1) 100, accessible at https://indiankanoon.org/doc/1195357/

xliv Mahinder Kumar Gupta vs Union of India decided on 22 September 1994, 1995, SCC (1) JT 1995 (1) 11, accessible at https://indiankanoon.org/doc/1515205/

xlv D Ramakrishna Reddy vs Additional Revenue Decisional Officers AIR 2000 SC 2723, accessible at https://indiankanoon.org/doc/1515205/

xlvi Randhir Singh vs Union of India 1882 AIR 879, 1982 SCR (3) 298, accessible at https://indiankanoon.org/doc/1230349/

xlvii All India Customs and Central Excise vs Union of India b 1988 AIR 1291, 1988 SCR (3) 998, accessible at https://indiankanoon.org/doc/1135560/

xlviii K Krishnamacharyulu vs Shri Venkateshwara Hindu College of Engineering, 1997 3 SCC 571 (para 4)

xlix MC Mehta vs State of Tamil Nādu AIR 1997 SC 17, accessible at https://indiankanoon.org/doc/212829/ß

l St Theresa's Tender Loving Care Home vs State of Andhra Pradesh AIR 2005 SC 4375: (2005) 8 SCC 525, accessible at https://indiankanoon.org/doc/257199/

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lii National Campaign on Dalit Human Rights vs Union of India (2017) 2 SCC 432 (-para 18), accessible at https://indiankanoon.org/doc/182520259/

liii Hussainara Khatoon vs State of Bihar AIR 1979 SC 1369 (paras 6-7), accessible at https://indiankanoon.org/doc/1373215/

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lix Ahmedabad Municipal Corporation vs Nawab Khan Gulab Khan decided on 11 October 1996, accessible at https://indiankanoon.org/doc/1352960/

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lxii Rajasthan State Road Transport Corporation vs Narain Shanker AIR 1980 SC 695, accessible at https://indiankanoon.org/doc/1558901/

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lxvii Gujarat Steel Tubes Limited vs Mazdoor Sabha AIR 1980 SC 1896 (paras 143-44), accessible at https://indiankanoon.org/doc/609478/

lxviii Sarla Mudgal vs Union of India, AIR 1995 SC 1531, accessible at https://indiankanoon.org/doc/733037/

lxix Ibid.

lxx John Vallamatton vs Union of India AIR 2003 SC 2902: (2003) 6 SCC 611, 627 (para 44), accessible at https://indiankanoon.org/doc/533870/

lxxi CK Mathew, "Uniform Civil Code: The Importance of an Inclusive and Voluntary Approach," *The Hindu Centre for Politics and Public Policy,* (2019), accessible at https://www.thehinducentre.com/publications/issue-brief/article29784007.ece

lxxii Durga Das Basu, Supra: 806.

lxxiii Lingappa Pochanna Appealwar vs State of Maharashtra AIR 1985 SC 389 (para 14): (1985) 1 SCC 479, accessible at https://indiankanoon.org/doc/1145196/

lxxiv Ibid.

lxxv Panchayat Vargha Sharmajivi Samudaik Sahakari Kheduit Co-op Society vs Haribhai Mevabhai AIR 1996 SC 2578: (1996) 10 SCC 320, accessible at https://indiankanoon.org/doc/1063586/ and Tarachand Vyas vs Chairman & Disciplinary Authority (1997) 4 SCC 565, accessible at https://indiankanoon.org/doc/391063/

lxxvi Indra Sawhney vs Union of India (1992) Supp (3) SCC 217: 1993 SC 477, accessible at https://indiankanoon.org/doc/1363234/

lxxvii Ratlam Municipal Council vs Vardhichand AIR 1980 SC 1622 (para 24): (1980) 4 SCC 162, accessible at https://indiankanoon.org/doc/440471/

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lxxxiii Intellectuals Forum, Tirupathi vs State of Andhra Pradesh (2006) SCC 549, 576 (para 82), accessible at https://indiankanoon.org/doc/1867873/

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lxxxv MC Mehta vs Union of India (1998) 9 SCC 589 (paras 4 and 5) and MC Mehta vs Union of India (2004) 12 SCC 118, 166 (para 45).

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xc Central Public Information Officer, Supreme Court of India vs Subhash Chandra Agarwal (2020) 5 SCC 481 (p 585), accessible at https://indiankanoon.org/doc/101637927/

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xcv Union of India vs Sankalchand Himatlal Sheth AIR 1997 SC 2328 (para 52): (1997) 4 SCC 193, accessible at https://indiankanoon.org/doc/1302865/

xcvi There are many citations of the Supreme Court in these matters. Some examples would suffice: Verghese Jolly George vs Bank of Cochin AIR 1980 SC 470, Ali Akbar Hasami Mirza vs United Arab Republic AIR 1966 SC 230, Moti Lal vs Uttar Pradesh AIR 1951 ALL 257 FB, Magan Bhai vs Union of India AIR 1969 SC 783 (789-807): (1970) 3 SCC 400, State of West Bengal vs Jugal Kishore More AIR 1969 SC 1171 (para 6), etc.

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xcviii State of Madras vs Champakam Dorairajan, AIR 1970 SC 2042, accessible at https://indiankanoon.org/doc/149321/

xcix CB Boarding and Lodging vs State of Mysore AIR 1970n SC 2042, accessible at https://indiankanoon.org/doc/1801637/

c Minerva Mills vs Union of India AIR 1980 SC 1789, accessible at https://indiankanoon.org/doc/1939993/

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cii Banduan Muktim Morcha vs Union of India, AIR 1984 SC 802 at para 811-12, accessible at https://indiankanoon.org/doc/595099/

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cix VN Shukla, *Constitution of India*, (Eastern Book Company, 11th Edition, 2008), 345-346.

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cxii TT Krishnamachari VII C.A.D (1948-49) quoted in the book of KC Markandan titled *Directive Principles of Indian Constitution*, (Allied Publishers, 1966).

cxiii BR Ambedkar used this phrase in his address on 4 November 1948, introducing the Constitution to the Constituent Assembly.

cxiv David Ambrose, Supra.

cxv 2G Spectrum case, judgment dated 4/2/12 of the Special Judge CBI (04), New Delhi in CC No: Centre for Public Interest Litigation vs Union of India (2012) 3 SCC 1; MSANU/SC/0089/2012.

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Chapter VI:

The Constitution and the Legislature

Introduction: Our Constitution has adopted a Parliamentary system where there is a harmonious blending of all three arms of governance. The Executive power is wielded by a group of members of the Legislature who command a majority in the popular chamber of the legislature and remain in power so long as they retain that majority.[i] The Legislature expresses the will of the people who, through the system of universal adult suffrage or franchise, have placed in power a certain party, or coalition of parties, that are expected to deliver good governance and fulfil the aspirations of the people. The Judiciary keeps a close eye on these activities, intervening where a challenge to sacred constitutional principles is apprehended. In this chapter, we first explore the various aspects of the Union Legislature as it finds expression in the relevant articles of the Constitution of India. Thereafter, we shall examine the provisions relating to the Legislature of the States and consider the impact of these provisions on the polity that is India.

As Austin has noted, the predominant aim of the Constituent Assembly was to create a basis for the social and political unity of the country. And this they chose to do "by uniting Indians into one mass electorate having universal adult suffrage, and by providing for the direct representation of the voters in genuinely popular assemblies."[ii] In this task, unlike for the executive and judicial functions of the State, a major refashioning of the legislative provisions of the Government of India Act of 1935 had to be made. Under the 1935 Act, the electorate was small and fragmented. It was restricted by property, educational and other qualifications limited to approximately only 15% of the country's population. This was itself split into no less than thirteen communal and functional compartments for whom seats were

reserved in the various parliamentary bodies. The federal lower house was filled in from lower houses of the various provincial assemblies by indirect election entirely based on communal or functional electorates.

Refashioning the Legislative Structure: The Constituent Assembly had to refashion this structure and provide for a system that could pursue the goals of national unity and stability. The drastic cure it provided was a universal adult franchise, joint electorates in which all groups could contest for the seats, thus decisively rejecting separate communal electorates. There was to be neither weightage of representation for Minorities, nor reservation of seats (except for Scheduled Castes and Tribes). Such reservation was originally provided for a period of only ten years in the Lok Sabha and the State assemblies, though this was extended initially for a further ten years by the Eighth Amendment of 1959, and later for further periods of ten years each through the 23rd, 45th, 62nd and 79thAmendments in 1980, 1990, 2000 and 2010 respectively. By the 95th amendment of 2009, such reservation was further extended up to 2020. The final extension for SCs and STs in their representation to the Lok Sabha and the State Assemblies for yet another period of ten years upto 2030 was carried out by the 126th Constitutional Amendment of December 2019.

In the Upper House, otherwise known as the Council of States or Rajya Sabha, the members were to be selected through a single non-transferable vote cast by the members of the State Assemblies. As for the members of Upper Houses of the States where the Legislative Councils exist, one-third were elected by the members of the Legislative Assemblies and the rest were to be directly elected from territorial constituencies by special electorates consisting of municipal, district, and other forms of government, university graduates and teachers at higher schools.

The new India's fight against schism that they had suffered under British rule, had to be put away once and for all. The leaders of the freedom movement fought hard to unify the electorate. Even as the movement gained strength, the Nehru report and Sapru report demanded electorates that were mixed and joint, and not separate and communal. They rejected the idea of separate electorates for the Upper House at the federal and state levels. As the Nehru Report phrased it more bluntly, there was no justification for a chamber comprised of obscurantists and people belonging to special classes "whose chief aim was to protect their interests and obstruct liberal measures."[iii] The Sapru report, a little more cautious,

while agreeing that the voter's judgment may be faulty, stated that "he is yet no better or worse than the average voter in many parts of Europe where the adult franchise has been in force for some time."[iv] Yet, it went a few steps backwards in comparison to the stand taken in the earlier Nehru report, in asking for ten per cent of the seats to be filled up from special constituencies and Minorities.

Work on the main provisions of the Constitution, for so long beset with issues of Hindu-Muslim antagonism, could take place more vigorously once the British left in 1947. Sixty per cent of Indian Muslims had by then left for Pakistan. In such circumstances, the Constituent Assembly recommended elections to the federal lower house to be entirely based on adult suffrage. Further, the Upper House was not to be on the lines of functional representation. In the States too, the Lower House would be elected in the same way through universal suffrage. Separately, the Minority Rights Sub-committee of the Constituent Assembly considered the question of protected minority representation in the legislatures. Ultimately, HC Mukherjee, the subcommittee's chairman, under pressure from Sardar Patel and KM Munshi, decided to disavow reservation for Minorities in the legislatures. The Anglo-Indian, then a significant political force, led by Frank Anthony, demanded reservation for themselves but gave this up on the assurance that the President would nominate such members if there were inadequate representation for them in areas with their substantial population.

It was on 3 January 1949 that the Constituent Assembly discussed the provisions relating to the composition of the Parliament. By this time the demand for reservation of seats for the Minorities was waning. Patel, too much of a strategist, was wary of denying this demand, stating that it is the Muslims themselves who have to take a view in this direction. A group of Muslims made the demand that both in the Council of States and in the House of the People, there should be proportional representation: this was made in lieu of the demand for reservation of seats for Minorities, hoping thereby to allow for the presence of at least some minority members without the obvious stratagem of outright reservation. But in the Assembly, there was no support for this move. Dr. Ambedkar pointed out that proportional representation produced an effect of fragmentation and that the successful working of the Cabinet demanded a majority political party. The final decision regarding reservation of seats for communal Minorities was taken in May 1949 and the Minorities Committee ultimately

voted against it. The dissenters were Scheduled Caste members who took Gandhiji's name stating that he had personally 'set his seal' on it when the matter had been discussed in August 1947. This view could not be swept aside. The final resolution adopted was: "That the system of reservation for Minorities other than Scheduled castes be abolished."[v] The Constituent Assembly expressed complete support for the Committee's stand.

The retention of the provision for special electorates in the Legislative Councils of the States remained, though there was a view that it made no sense after it was not considered for the Union House of the People. In the end, Ambedkar's formula prevailed and was retained: one-third of the representatives were to be elected according to proportional representation, and the rest were from special electorates representing the municipal, district, and other local bodies, university graduates, and high school teachers. A small component was to be nominated by the Governor. The Parliament could alter this arrangement if it so desired, but that has not yet come about.

An explanation for the raison d'être of the second chamber, the Council of the States, or the Rajya Sabha also needs to be articulated. In his deeply perceptive *Constitutional Precedents*,[vi] BN Rau had listed out the four commonly used arguments in favour of the second chamber: first, tradition; second, the desire of propertied and other interests to protect themselves from the majority; third, the desire to have a body to impost checks on hasty legislation; and last, the desire to provide representation for interests difficult to include in Lower Houses. There was a difference of opinion as to the role of the second chamber in a federal democracy, other than "to delay legislation which might be the outcome of passions of the moment."[vii] In general, the interest in the second chamber was fading with time. Its powers were curtailed: it could hold on to a legislation approved by the House of People only for fourteen days, after which it would be deemed to have been passed as a Bill of the House of the People. It had no substantial powers with regard to Money Bills. In the States, if the Legislative Assembly passed a resolution for the abolition of the Legislative Council with a two-thirds majority, the council could be abolished. In effect, it was made clear that the House of the People would be more powerful, and this was equally true for the Legislative Councils in the Provinces.[viii]

In the 1935 Act, the power of the legislatures had been severely circumscribed, with the Governors of the Provinces, or the Governor-General, having powers to block popular legislation or enact unilateral legislation without a popular vote. Significantly, under the new Constitution and as the final bestowal of powers on the concept of popular government, the Union Parliament and the State Legislatures had full powers commonly possessed by parliamentary bodies in representative federal democracies.

In brief, the efforts of the Constituent Assembly in providing for a powerful House of the People at the level of the Union or the Legislative Assembly at the State level may be summarised as follows: "The goals of the Constituent Assembly when drafting the legislative provisions of the Constitution, were to bring popular opinion into the halls of government and, by the method of bringing it there, to show Indians that although they were many peoples, they were but one nation."[ix]

The functions of the Legislature can be enumerated as follows:

Legislation: The authority to frame laws lies with the Legislature since this is a necessary part of the government to carry out development and other measures necessary to establish a welfare system.

Providing the Cabinet: It follows from the above that the first function of the Parliament is to provide members to the Cabinet and, in all their functions of governance and administration, hold them responsible to the Parliament. It is important to note that the members of the Cabinet, while belonging to the popular chamber can also be inducted from the Upper House.

Control of the Cabinet: The theory of ministerial responsibility also implies that the popular chamber will ensure that the cabinet remains in power so long as it retains the confidence of the majority of the House.

Indeed, there has been criticism of the Cabinet and individual ministers. In modern times, the boundaries between the legislative and the executive have blurred, as both actions are initiated by the Cabinet. Consequently, the importance of the legislative functions has diminished. Yet, the critical function of the parliament has increased; this is necessary to prevent the Government from being an autocratic one. Thus, both the majority party as well as the Opposition have an important role to play in holding the government responsible for its actions and alerting it to the needs of the

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

The Parliament functions as an organ of information. In this aspect, the Parliament is more powerful than any Press or private agency as it can obtain information authoritatively, from those in the know of things. Such information is collected and disseminated not only through discussions but also through the device-starred and unstarred questions raised by the members of the Parliament to the ministers.

The Parliament also exercises financial control over the government**.** It is only the parliament that has the power to authorise expenditure for public purposes and to specify the purposes for which the money is to be appropriated. It also provides the ways and means to raise the revenues required by authorising various taxes and other duties and cesses and to ensure that the money thus raised is used for the specific purposes for which it was authorised.

We shall now examine the specific articles of the Constitution of India concerning the Union Legislature and the Legislature of the States.

The Parliament: The specific provisions in the Constitution concerning the Union Legislature can be seen in Chapter II titled The Parliament and are as follows:

Article 79 of the Constitution makes the statement that there shall be a Parliament for the Union which shall consist of the President and the two Houses to be known as the Council of States and the House of the People. And while this statement lays down the foundations of one of the greatest institutions of modern India, it is important to realise the preliminary concept that in India, unlike in England, it is not the Parliament that is supreme. Of course, there is no written constitution in England; it is convention and tradition and the body of common law that takes the place of a written Constitution in that country. In India, it is the Indian Constitution that is supreme and sovereign, and the Parliament has to act within the limitations imposed by the Constitution. This is of great significance in our country as none of the three arms of the Government,

the Legislative, the Executive, and the Judiciary, can claim superiority over the other. Yet, over time, and through a myriad of cases where the matter has been contested, it has come to be accepted that it is the Judiciary that shall interpret the provisions of the Constitution and take steps for safeguarding the Constitution.

This principle was espoused by the Supreme Court in many judgments, and the Raja Ram Pal case is a good example[xi]. It is the Judiciary that is entrusted with the task of construing the provisions of the Constitution and safeguarding Fundamental Rights. Quoting Justice Bhagwati in the State of Rajasthan vs Union of India case[xii], the judgment stated: "This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law."

Article 80 defines the composition of the Council of States, otherwise known as the Upper House, or in common parlance, the Rajya Sabha. It shall consist of two categories of members: first, as Clause (3) states, of twelve members nominated by the President from amongst persons having special knowledge or practical experience in respect of such matters as literature, science, and social service. Second, of not more than two hundred and thirty-eight representatives of the States in accordance with the provisions contained in the Fourth Schedule. The Fourth Schedule prescribes the number of members that each State and Union Territory are allocated: the present total number is 245, with various amendment acts modifying, from time to time, the numbers allocated to the States. It may be noted that the original allocation of seats to the States was modified by consequential changes based on the original formula of "one seat per million for the first five million and one seat for every additional two million or part thereof exceeding one million."[xiii] The representation from the Union Territories to the Council of States is to be decided by the Parliament. Accordingly, Sections 27 A and 27 H of the Representation of Peoples Act, 1950, have prescribed that the members of the Council of States shall be indirectly elected by the electoral college from that territory with the system of proportional representation, through the means of the single transferable vote.

This system ensures that the Upper House reflects the federal character of the country and the political aspirations of each State and Union Territory, though the numbers vary from as small as 1 for Nagaland to as high as 31 for Uttar Pradesh.

Clause (4) states that the representatives of each State in the Council of States shall be elected by the elected members of the Legislative Assembly of the State by the system of proportional representation using the single transferable vote. In the original Constitution, representation in the Council of States was restricted to States mentioned in Parts A, B, and C only, whereas by the Constitution (Seventh Amendment) Act, 1956 promulgated with effect from 1 November 1956, all States were included. The Legislative Assembly of each State becomes a separate electoral college for returning a member to fill the seat allocated to that State. As regards representatives of the Union Territories in the Council of States, they shall be chosen in such manner as the Parliament by law shall prescribe.

The Rajya Sabha or the Council of States is the Upper Chamber of the Parliament, a forum where experienced public personalities get access to the highest political body of the country without going through a general election. The existence of two debating chambers means that all proposals and programmes are discussed twice: as a revising chamber, the Rajya Sabha can help improve the Bills passed by the Lower House, the Lok Sabha.[xiv] The members of the Rajya Sabha vote according to their own views and party affiliations. Although they are voted by the elected representatives of a State, they need not show residence in any State. There is no requirement for residential qualification for election to the Rajya Sabha. This was made clear in the Kuldip Nayar case of 2006. The judgment stated: "It cannot be said that residential requirement for membership to the Upper House is an essential basic feature of all Federal Constitutions. Hence, if the Indian Parliament, in its wisdom has chosen not to require residential qualification, it would not violate the basic feature of Federalism. Our Constitution does not cease to be federal simply because a Rajya Sabha Member does not "ordinarily reside" in the State from which he is elected."[xv] In all matters of powers and privileges the elected and the nominated members are equal, except that the latter cannot participate in the election to the office of the President of India.

The system of proportional representation by single transferable vote characterises electoral systems in which divisions in an electorate are reflected proportionately in the elected body. If a certain percentage of the electorate supports a particular political party as their favourite, then roughly the same percentage of seats will be won by the party concerned when the elections are held for the Upper House in that State. In the single transferable vote, the voter, that is the member of the Legislative Assembly of the State, casts just one vote although multiple seats are to be filled. They can offer alternative preferences to be used if needed by ranking the candidates in order of preference. Their votes are transferred to their second or third preference, if possible when otherwise it would have been wasted. Each elector marks their ballot for the most preferred candidate and also marks secondary preferences. A vote goes to the voter's first preference, if possible, but if the first preference is eliminated, instead of being thrown away, the vote is transferred to an alternate preference, with the vote being assigned to the voter's second, third, or lower choice if possible (or, under some systems, being apportioned fractionally to different candidates). As long as there are more candidates than seats, the least popular candidate is eliminated, and their votes are transferred based on voters' marked subsequent preferences. A quota (the minimum number of votes that guarantees election) is calculated and candidates who accumulate that number of votes are declared elected.[xvi]

Article 81 describes the composition of the House of the People, popularly known as the Lok Sabha. It prescribes the total number of members who shall represent the States of India (not more than 530) and the Union Territories (not more than 20). Clause (2) states that the ratio between the number of seats allotted to a State and the population of the State is to be maintained as far as possible. In the same manner, the State shall be divided into territorial constituencies, and the population of each constituency and the number of seats allotted to the State should as far as practicable be the same throughout the State.

There are prescriptions in the Constitution regarding the base population figures, and that the current figures shall not be modified until the figures of the first census after the year 2026 are taken published. The census of 1971 is the basis for the computation of seats for the House of the People, and the census of 2001 to determine the seats of the constituencies of each State. The application of the above to the State of Jammu & Kashmir requires mention here. By the Constitution (Application to Jammu &

Kashmir) Order, 1954, the State was allotted six seats in the House of the People. Presently, the J&K Assembly has 83 seats (reduced from 87) after the separation of Ladakh (with four seats) as a Union Territory.

Article 82 provides for the readjustment of seats after each census by such authority and in such a manner as may be determined by the Parliament, with the provision that such changes shall not be implemented until the term of the existing House is over. It is the President who shall prescribe the date from which such readjustments shall take place. The further proviso virtually nullifies the effect of the article by stating that such readjustment shall not be affected until after the first census taken after the year 2026 for the House of the People. For the State constituencies, the relevant census shall be in 2001. The freezing of the readjustment of seats put in place initially by the 42nd Amendment Bill of 1976 was for a specific purpose and was replete with hidden significance. The internal notes on this clause state that this is being introduced "in the context of the intensification of the family planning programmes of the government."[xvii] We may also mention here that Article 327 is also relevant here which refers to the power of the Parliament to make provision with respect to elections to Legislatures. Parliament is empowered to make provisions concerning all matters relating to, or in connection with, elections to either the House of Parliament or House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies, and all other matters necessary for securing the due constitution of such House or Houses.

Article 83 refers to the duration of the Houses of Parliament. The Council of States is a permanent body and not subject to dissolution, with one-third of the members retiring every second year under the provisions made on that behalf by the Parliament. The House of the People has a term of five years unless sooner dissolved. A vestige from the days of the Emergency remains through the proviso enabling the extension of the term of the House of the People by one year at a time in case the proclamation of an emergency is in operation.

Article 84 prescribes the qualification for membership of Parliament. A member has to be a citizen of India, not less than 25 years of age (and not less than 30 for the Council of the States), and should take an oath before a person duly authorised by the Election Commission or an affirmation according to the form set out in the Third Schedule. The form states that

he or she "will solemnly affirm that I shall bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India and that I will faithfully discharge the duty upon which I am about to enter."[xviii] An interesting footnote to this Article on qualifications of members is on the question of whether the candidate chosen to represent a State in the Council of States has to be a voter in that State. This requirement did exist in the Constitution as it originally stood. However, after five decades of following this requirement, the Parliament in its wisdom, decided through an amendment in the Representation of People Act of 1951, to do away with this provision, requiring only that he or she be an elector in any parliamentary constituency in India.

Article 85 imposes the responsibility on the President to summon each house of the Parliament to meet at such time and place as he thinks fit, with the proviso that there shall not be a gap of more than six months between one session and the next. He can also prorogue the Houses or either of House or dissolve the House of the People. Of course, it is now abundantly clear that through Article 74 (1) that the power of summoning, prorogation, or dissolution has to be exercised only according to the advice of the Council of Ministers.

Article 86 refers to the right of the President to address and send messages to the Houses. These messages may be concerning any Bill pending in the Parliament or otherwise, and it is incumbent on the Houses where such messages are sent to consider any matter required by the message to be taken into consideration. **Article 87** also empowers the President to deliver a special address at the commencement of the first session after each general election to the House of the People and also at the commencement of the first session of each year. The President is required to address both Houses of Parliament only at the commencement of the first session of each year under this Article and to inform the Parliament of the cause of it being summoned.[xix]

Article 88 confers the right on the Ministers and the Attorney General to speak in, and take part in the proceedings of either House, though under this article, he shall not be entitled to vote.

Articles 89 to 98 deal with the Officers of the Parliament and pertain to the administrative arrangements for the successful conduct of the Houses. **Article 89** states that it is the Vice President of India who shall be the ex-

officio Chairman of the Council of States and that the Council shall choose a member to be the Deputy Chairman. **Article 90** describes how the member holding the post of Deputy Chairman can vacate his office (on ceasing to be a member of the Council), resign, or be removed (by a resolution of the Council passed by a majority of the members of the Council). **Article 91** states that the Deputy Chairman or any other person can perform the duties of, or act as, the Chairman. **Article 92** states that the Chairman or Deputy Chairman will not preside over the sitting of the Council of States when a resolution for his removal is under consideration. **Article 93** states that the House of the People shall select two persons to be Speaker and Deputy Speaker respectively, and when these posts become vacant, two other persons can be chosen to perform these duties.

Article 94 deals with the question of vacation and resignation of, or removal from, the offices of the Speaker and Deputy Speaker. Of course, the removal from office of Speaker and Deputy Speaker is only through a resolution of the House of the People passed by a majority of all the then members of the House. Prior notice of fourteen days has to be given recording the intention to move the resolution. **Article 95** reiterates, as in Article 91 about the Council of States, the power of the Deputy Speaker or other person to perform the duties of the Speaker. Again, as in Article 92 for the Council of States, **Article 96** states the Speaker or the Deputy Speaker cannot preside while a resolution for his removal is under consideration. **Article 97** provides for the salaries and allowances of the Chairman and Deputy Chairman and the Speaker and Deputy Speaker to be fixed by Parliament by law. **Article 98** provides for a separate secretarial staff for each House of the Parliament, and it is the Parliament that shall regulate the recruitment and conditions of service of persons thus appointed. Article 99 states that each member of either House of Parliament must make and subscribe to an oath or affirmation according to the form set out in the Third Schedule.

Article 100 pertains to the matter of voting in Houses, and the power of Houses to act, notwithstanding vacancies and quorum. All questions are to be determined, unless otherwise provided for in the Constitution, by a majority of votes of the members present and voting (other than the Speaker or the person acting as Speaker). It is only in the case of equality of votes that the Speaker shall have the power of the casting vote. Either House shall act even if there are some vacancies, or some members are not present. Clause (3) of this Article prescribes the quorum as ten per

cent of the total number of members of the House: in case the quorum is not present, the Speaker shall have to suspend the meeting or adjourn the house, until there is a quorum present.

Article 101 refers to the disqualifications of members. It is clarified that no person can be a member of both Houses of Parliament: if a member is so elected, he shall have to vacate his membership of one House. Similarly, no person can be a member of both the Parliament and the Legislature of the States at the same time. There are other provisions regarding disqualification mentioned in **Article 102** as well. He cannot hold an office of profit, other than an office declared by Parliament by law not to disqualify its holder. This provision has been of some significance in matters related to the membership of the Houses. The purpose is to eliminate or reduce the risk of conflict between the duty and interest amongst members of the Legislature by ensuring that the Legislature does not have persons who receive benefits from the Executive and may thus be amenable to its influence.[xx] Further, he should not have been declared to be of unsound mind as declared by a competent court. He should not be an undischarged insolvent, has acquired the citizenship of a foreign state, or has been disqualified under any law made by the Parliament. It is also made clear in this Article that he will be disqualified from being a member of either House if he attracts the adverse consequences of the Tenth Schedule. The Tenth Schedule pertains to disqualification on grounds of defection and was added to the Constitution by the Constitution (Fifty-Second Amendment) Act, 1985. This lists out various circumstances where the member loses membership in the House he belongs to. This includes the joining of another political party, voting in the House against the directives of his party, etc.

The matter regarding the disqualification of members for criminal charges has been under discussion for some time now. It has been held by the Supreme Court that only the Parliament can make laws in this regard and that the judiciary cannot presume to take on these powers. The Parliament has been somewhat indeterminate in making these laws. The Supreme Court commented: "The nation eagerly awaits such legislation, for the society has a legitimate expectation to be governed by proper constitutional governance...substantial efforts have to be undertaken to cleanse the polluted stream of politics by prohibiting people with criminal antecedents so that they do not even conceive of the idea of entering politics. They should be kept at bay."[xxi] The court did not hesitate to give directions to

the effect that the candidate had to inform the Election Commission about criminal cases pending against him, and the concerned political party will have to put up such information on its website. When a contempt case was filed against the Election Commission for not following these directions, the Supreme Court further issued the following directions: details of such criminal cases have to be placed on the websites of political parties, along with reasons for their selection; such reasons cannot be mere 'winnability'; the information should also be published in a newspaper and social media; political parties also to file a report before the Election Commission in this regard.[xxii]

Article 103 states that if a question regarding the disqualification of a member of either House arises, it is the President who shall give the final decision in the matter.

Article 104 states that a member who sits and votes before making the oath or affirmation prescribed under Article 99 or when not qualified or disqualified, shall be punished with a penalty of five hundred rupees per day to be recovered as a debt due to the Union.

Article 105 is significant and grants the Member certain powers, privileges, and immunities. Clause (1) grants him freedom of speech, that is absolute and independent of Article 19. He will not be liable to any proceedings in any court in respect of anything said, or any vote given by him in Parliament. All other powers, privileges, and immunities are to be decided by the Parliament itself. The matter of immunity received the most attention in a case some members alleged that they were offered a bribe not to vote in the no-confidence motion against the then Prime Minister Shri Narasimha Rao. The court rules that the alleged MP bribe-takers who had cast their votes were entitled to immunity as the acceptance of the bribe had nexus with the vote against the motion of non-confidence. On the other hand, the MP who had accepted the bribe and had not voted would be liable to prosecution and the charge of criminal conspiracy. The bribe-giver and the bribe-taker could both be proceeded against by the Parliament for the breach of privileges and contempt.[xxiii]

Article 106 states that the salaries and allowances of the members of the Houses shall be such as are determined by the Parliament.

Article 107 deals with legislative procedure and spells out the provisions pertaining to the introduction and passing of bills. It states that subject

to the provisions of Article 107 (Money Bills) and Article 117 (Financial Bills), a Bill may originate in either House of Parliament. It shall be deemed to have been passed only after it receives the assent of both Houses of Parliament. Clauses (3), (4) and (5) states respectively that a Bill pending in the Parliament shall not lapse because of the prorogation of the Houses, that a Bill pending in the Council of States, not passed by the House of the People shall not lapse on the dissolution of the House of the People, and that a Bill pending, or passed, in the House of the People which is pending in the Council of States shall lapse on the dissolution of the House of the People.

Article 108 refers to the joint sitting of both Houses in certain cases. This provision is used to break the deadlock which may arise when there is no unanimity in views. Such circumstances may pertain to the rejection of a Bill by one House, there is disagreement in the Houses about amendments to be made in the Bill, or where more than six months elapse from the date of reception in the House. In the case of the last of these circumstances, the President can notify the Houses of his intention to summon them to a joint sitting to deliberate and vote on the Bill. A proviso mentions that this shall not apply to a Money Bill. If at such a joint sitting, the Bill is passed with amendments if any, by a majority of the total number of members of both Houses present and voting, it will be deemed to have been passed by both Houses. At the joint sittings, the decision of the person presiding as to the amendments which are admissible under this clause shall be final. It is a unique feature of this Article that a joint sitting may be held, and a Bill may be passed even if a dissolution of the House of the People has intervened since the President notified his intention to summon the Houses.

Article 109 makes special provisions regarding Money Bills. After the House of the People passes a Money Bill, it shall be transmitted to the Council of the States, which within fourteen days shall send its recommendations. The House of People shall accept or reject any or all of its recommendations. Recommendations of the Council of States accepted by the House of the People shall be deemed to have been passed by both Houses. However, if the recommendations of the House of the People do not accept the recommendations made by the Council of the States, or if the Bill is not returned to the House of the People, the Bill shall be deemed to have been passed by both the Houses of the Parliament. This gives the upper hand to the House of the People insofar as Money Bills are concerned.

Article 110 defines what a Money Bill is. It is defined as a bill that contains provisions relating to the imposition, remission, alteration, or regulation of any tax; regulations related to the borrowing of any money or the giving of any guarantee given by the Government of India; the custody or management of the Consolidated or Contingency Funds of India; the appropriation of sums of money out of the Consolidated Fund; the declaring or increasing the expenditure charged on the Consolidated Fund; the receipt of money in the Consolidated Fund of India or public account or the custody of issue of such money or the audit of the accounts of the Union or the States; or matters incidental to the above. A bill does not become a Money Bill only because it provides for any fines or penalties (or the demand for fees for licenses or fees for services rendered), or for the reason that it may provide for imposition, abolition remission, or alteration or regulation of any tax. Any question on whether the Bill is a Money Bill or not will be finally decided by the Speaker. The Speaker, while presenting these Bills to the President shall indicate that such a bill is a Money Bill.

The well-known Supreme Court case where the Aadhaar legislation was introduced as a Money Bill is relevant here.[xxiv] The Supreme Court had noted that Section 7 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits, and Services) Act, 2016 clearly states that the purpose of the Act was to ensure that subsidies, benefits, and services reach the categories of people for whom it is meant. In this regard, the Act was pronounced by the Apex Court to be a Money Bill. Yet, Justice Chandrachud gave a dissenting judgment, stating that in cases where the ruling party does not have a majority in the Council of States, presenting such a Bill as a Money Bill "would constitute subterfuge, something which a constitutional court cannot countenance. Differences in a democratic polity have to be resolved by dialogue and accommodation. Differences with another constitutional institution cannot be resolved by the simple expedient of ignoring it."[xxv] However, it must be stated that the constitutional implications of the word 'only' in Article 110 (1) were not examined in detail. To quote this would make it clear: "For this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the matters, namely." Thus, the word 'only' has to be interpreted in the right manner or else it would be a nullity. Thus, in another case, the Supreme Court has directed that the matter be referred to a larger bench.[xxvi]

Article 111 enables the President, while at the same time also circumscribing his powers, in the matter of giving his assent to the Bills passed by both Houses of Parliament. He has the constitutional authority to withhold assent in the matter of non-Money Bills, by returning it with a message to reconsider the Bill, or any specified provisions of it, and in particular suggest the desirability of introducing any amendments that he may recommend. In such circumstances, the Houses shall reconsider the Bill accordingly and if it is passed again by the Houses, with or without amendments, the President shall not withhold his assent.

Article 112 is a significant article that deals with the annual budget exercises. It stipulates that the President shall every financial year cause to be placed before the Houses of the Parliament an annual financial statement of the estimated receipts and expenditures of the Government of India. It further states in Clause (2) that these estimates shall separately show the charged expenditure as well as other expenditures proposed to be made from the Consolidated Fund of the state and shall distinguish the expenditure on revenue account from other expenditures. Clause (3) goes on to list the various kinds of expenditure charged on the Consolidated Fund of India, such as emoluments and salaries of the President of India, the Chairman, and Deputy Chairman of the Council of the States, and the Speaker and Deputy Speaker of the House of the People, debt charges related to the raising of loans and the redemption of debt, the salaries, allowances, and pensions, etc., of Supreme Court Judges, pensions in respect of High Court Judges, salaries of the Comptroller and Auditor General of India, decretal amounts, and finally, expenditure to be declared by the Parliament as a charged expenditure.

Article 113 refers to the procedure in Parliament concerning the annual estimates. It states that charged expenditure shall not be subject to the vote of the Parliament, though discussion on the same is not prohibited. It empowers the House of the People to assent, refuses to assent, or assent with the reduction of any demands of the various activities of the government. Such demand for grants can only be made with the recommendation of the President.

Article 114 titled Appropriation Bills states that soon after the grants under Article 113 have been made by the House of the People, a Bill shall be introduced to provide for the appropriation out of the Consolidated Fund of India, all the sums of money required to meet the grants so made by the

House of the People as well as the expenditure charged on the Consolidated Fund. It further stipulates that no amendment shall be proposed to any such Bill in either House of the Parliament for varying the amount. No money can be withdrawn from the Consolidated Fund of India except as provided in this Article or Articles 115 and 116. **Article 115** provides for an appropriation for supplementary funds under the grants approved, for additional funds for new services not contemplated when the annual financial statement was presented, or for excess grants when the amount spent is more than envisaged in the annual financial statement.

Article 116 relates to vote on account, votes of credit, and exceptional grants: vote on account refers to making a grant in advance in respect of estimated expenditure before all the procedures can be completed as prescribed in Article 113; vote of credit is a grant for meeting an unexpected demand upon the resources of India, where the nature of the demand is of an unexpected magnitude or an indefinite character where details cannot be present at the time; exceptional grants is to provide for grants which form no part of the current service of any financial years.

Article 117 states that all such financial bills can be introduced or moved only on the recommendation of the President. A Bill which involves expenditure from the Consolidated Fund cannot be passed by either House of the Parliament unless the President has recommended to that House the consideration of the Bill. No such bill for these provisions can be introduced in the Council of States.

Articles 118 to 122 refer to the general procedures to be followed by each House of Parliament. **Article 118** states that each House of Parliament may make its own rules for regulating its procedure. It is the President who can make rules for the joint sittings of both Houses of Parliament after consulting the Chairman of the Council of the States and the Speaker of the House of the People. In case of joint sittings, it is the Speaker of the House of the People who shall preside. For timely completion of financial business in either of the Houses, according to **Article 119**, the Parliament can regulate by law the procedures for the conduct of such business. **Article 120** states that the language of the Parliament shall be Hindi or English, although the Speaker can permit any member who cannot express himself in these languages to speak in his mother tongue. **Article 121** prohibits discussion in the House of the conduct of any Judge of the Supreme Court or High Court, except when there is a motion in the House for the removal of the

Judge. Similarly, **Article 122** prohibits the Courts from inquiring into the validity of any proceedings of Parliament on the grounds of irregularity of procedure. No officer or Member of Parliament, in the discharge of his conduct or for regulating procedure can be subject to the jurisdiction of any court.

Legislative Powers of the President: The Parliament is defined as a triad, comprising the House of the People, the Council of the States, and the President. As the Supreme Head of the Republic and as an integral part of the Parliament, the President is provided by the Constitution with certain legislative powers. **Article 123** authorises him to issue Ordinances during the recess of the Parliament when circumstances are such that it is necessary to promulgate such ordinances and when the President is satisfied that it is necessary to do so. Such an ordinance will have the same force and effect as any Act of Parliament: however, every such ordinance will cease to operate at the expiration of six weeks from the reassembly of the Parliament, or if resolutions are passed, before that period, by both the Houses. The President also can withdraw his ordinances at any time. It is interesting to point out that Clause (4) to Article 123, which had been inserted by the Constitution (Thirty-eighth Amendment) Act, 1975 was later deleted by the Constitution (Forty-fourth Amendment) Act, 1978. This deleted clause stated that the decision of the President shall not be questioned in any court on any ground; this meant the satisfaction of the President that "circumstances exist which render it necessary for him to take necessary action" cannot be questioned. With the deletion of Clause (4), it becomes subjective and can be questioned on the ground of mala fides. Thus, these ordinances are now not immune from judicial review and the court can take a view that the President's decision to issue the ordinance is based on some relevant material.

In the examination of the competence of the President to issue such an ordinance, what is to be taken into consideration is whether the Parliament had the competence to make a law on the subject or whether the Ordinance is open to challenge because it is colourable legislation[xxvii], or whether it contravenes any Fundamentals Rights[xxviii] or it violates substantive provisions such as Article 301[xxix] (pertaining to freedom of trade, commerce, and intercourse), or its retroactivity is unconstitutional.[xxx]

In this chapter, we are not examining the complex issues related to the formation of the government after the general elections for the country have been completed. Yet a mention of the same is necessary. The composition of the elected members of Parliament and their party affiliations are critical to the question of the formation of governance. The leader of the party which wins a clear and unquestioned majority on the House of the People, or the Lok Sabha, is invited by the President to form the government and prove the majority within a specified period. The scale of the majority often reveals the popularity of the leader of the party. This was the case with the Rajiv Gandhi government in December 1984 or that of Narendra Modi in 2019. Sometimes, it is a coalition of parties, that has grouped together before the elections, that gain a viable majority enough to form the government. An example of this is the Deve Gowda government which was formed in June 1996 with the help of a coalition of several national and regional parties. Rarely, a single party or a coalition of parties can't form the government and a minority party forms the government with the tacit approval of the other parties. This was exemplified by the Narasimha Rao government of 1991. The role of the President may be complicated when margins of victory are slim and there is the possibility of horse-trading, though this situation appears to be more prevalent in elections to the State Legislatures. He has to tread carefully to ensure the formation of a stable government that can manage the affairs of the government for the next five years.

It is to prevent the possibility of elected representatives from defecting from their party and joining other parties for political or monetary gain that the anti-defection law was created. Before this law, there were many instances of political instability arising out of legislators changing their political allegiance. By one estimate, almost 50 per cent of the 4,000 legislators elected to central and federal parliaments in the 1967 and 1971 general elections subsequently defected, leading to political turmoil in the country.[xxxi] In the 1967 elections, approximately 3,500 members were elected to Legislative Assemblies of various States and Union Territories; out of those elected representatives, around 550 subsequently defected from their parent parties, and some politicians crossed the floor more than once.[xxxii] These problems were particularly accentuated by the presence of coalition and regional parties in the formation of the government. With rising public opinion for an anti-defection law, immediately after securing a clear majority in 1984, Rajiv Gandhi proposed a new anti-defection bill in

Parliament. After marathon debates, both the Lok Sabha and Rajya Sabha unanimously approved the bill on the 30th and 31st of January 1985, respectively. The bill received the President's approval on 15 February 1985 and the act came into effect on 18 March 1985. The law laid out the process for disqualifying an elected member for the remaining term, who defected either by resigning or by defying the party leadership and being absent on a crucial vote. However, the law allowed mergers and splits of political parties, allowing splits in the party by one-third of its members and merger (joining another party) by two-thirds of other party members.[xxxiii]

The State Legislature: We shall now examine the articles of the Constitution on the Legislative Assemblies and the Legislative Councils. Chapter III of Part VI of the Constitution pertains to the State Legislature and is encompassed in Articles 168 to 212. In many ways, these articles regarding the State Legislature mirror the articles that pertain to the Parliament in Chapter II of Part V. **Article 168** specifies that the State Legislatures shall consist of the Governor and, in eight states there shall be two Houses, while in the rest there will be only one House. The states with two houses are Andhra Pradesh, Bihar, Madhya Pradesh, Maharashtra, Karnataka, Tamil Nadu, Telangana, and Uttar Pradesh. In these states, one house shall be called the Legislative Council and the other, the Legislative Assembly. **Article 169** provides for the abolition of an existing Legislative Council or the creation of a new one in any state provided that the Legislative Assembly passes the resolution to this effect. The necessary constitutional amendments to this effect are enabled in this article itself.

Article 170 specifies the composition of the Legislative Assemblies of the States. It states that the Assembly of each state shall consist of not more than five hundred, and not less than sixty members chosen by direct election from the territorial constituencies. Clause (2) stipulates that the ratio between the population of each constituency and the number of seats allotted to it, shall as far as practicable, be the same throughout the state. The population base for this estimation is the 2001 census and the same shall be in operation until the first census after the year 2026. Certain provisos as regards the census details have also been provided for in the same Article which enable the readjustment of the seats for taking into consideration various aspects of the population demographics as required under Article 332 for reserving seats for the Scheduled Castes and the Scheduled Tribes.

Similarly, **Article 171** pertains to the Composition of the Legislative Councils. It restricts the number of members of the Legislative Council of a State to one-third the number of the members in the Legislative Assembly, though it shall not be less than forty. The composition of the State Legislative Council has been detailed as follows: one-third from electorates consisting of members of municipalities, district boards, and other local authorities as the state may prescribe; one-twelfth from electorates consisting of persons residing in the State who have been graduates for at least three years in a University in India; one-twelfth from persons who have been teaching in educational institutions within the State, not lower than secondary level; one third to be elected by the members of the Legislative Assembly from amongst those who are not members of the Assembly; and the remaining to be nominated by the Governor from among those with special knowledge or practical experience in matters of literature, science, art, co-operative movement or social service. The elections of the members, except the nominated members, shall be based on proportional representation utilizing the single transferable vote.

Article 172 prescribes the duration of the State Legislature. The Legislative Assembly is constituted for five years, whereas the Legislative Council is not subject to dissolution. One-third of the members shall retire on the expiration of every second year.

Article 173 stipulates the qualifications for membership of the State Legislature. He or she has to be a citizen of India and must make or subscribe to an oath or affirmation according to the prescribed form. The oath or affirmation is a requirement not only after the election to the Assembly, but even earlier, that is after he files the nomination papers for contesting the elections. If he fails to do so, his nomination may be rejected. A member of the Legislative Assembly must not be less than twenty-five and a member of the Legislative Council is not less than thirty years of age.

Article 174 relates to the sessions of the State Legislature, its prorogation, and dissolution. It is the Governor who summons the Assembly or the Council to meet at such time and place as he thinks fit. There cannot be a gap of more than six months between one sitting and the next. The Governor may from time to time prorogue the Legislative Assembly or the Council or dissolve the Legislative Assembly. The Supreme Court has held that the members of the Legislature have no constitutional right to remain undissolved till the expiry of the term, and the exercise of the power to

dissolve by the Governor belongs to the arena of political expediency and the Courts cannot interfere where such power has been exercised by him on the advice of the Council of Ministers, or even at the direction of the President in a case falling under Article 356 (1) which deals with the failure of the constitutional machinery of the state leading to President's rule.[xxxiv] Undoubtedly, this is an area fraught with difficult constitutional questions. In a case pertaining to Rajasthan, the majority of the judges, in this case, has held that even when the Governor dissolves a State Assembly despite the Government having a majority in the House, the Governor's action cannot be held as mala fides because in the case at hand, the state electors have returned to power another party at the national elections. Such action would be proper as stated by Justice Bhagawati in this judgment: "… the ground that on account of the total and massive defeat of the ruling party in the Lok Sabha elections, the Legislative Assembly of the State has ceased to reflect the will of the people and there is complete alienation between the Legislative Assembly and the people is … clearly a relevant ground having reasonable nexus with the matter regarding which the President is required to be satisfied before taking action under Article 356 (1).[xxxv] The definitive ruling in this regard is, of course, the Bommai judgment[xxxvi] which lists out the procedure to be followed in matters about the authority of the Governor to dismiss the State Governments while dissolving the Assembly.

Article 175 refers to the right of the Governor to address and send messages to the House (or Houses, (where the Legislative Council exists) and can, for that purpose, require the attendance of the members. He can also send messages to the House to consider any Bill pending in the Legislature. **Article 176** lays the duty on the Governor to address the House (or both Houses where the Council also exists) at the commencement of the first session of each year and to inform the Legislature of the causes of its summons. In normal years, it is during the budget session of the Assembly that the Governor addresses the House. **Article 177** empowers every Minister and the Advocate-General with the right to speak in the Legislative Assembly (or in the Legislative Council where it exists) and take part in its proceedings, or in the proceedings of any committee of the Legislature in which he is a member, though he is not entitled to vote.

Articles 178 to 187 deal with the Officers of the State Legislature. In many ways, this mirrors the provisions of the Constitution about Parliament. **Article 178** states that the Legislative Assembly shall choose two members to be the Speaker and the Deputy Speaker. **Article 179** states that a Speaker

or Deputy Speaker will have to vacate his office when he is no longer a member of the Assembly. He can, of course, resign from his office. He can also be removed if a majority of the members present, and voting pass a resolution to this effect after giving a fourteen-day notice. It also clarifies that when the Assembly is dissolved, the Speaker shall not vacate his office, until the new Assembly is constituted. **Article 180** empowers the Deputy Speaker to perform the duties of the office of the Speaker. **Article 181** states that when the resolution for the removal of the Speaker or Deputy Speaker is under consideration, they cannot preside over the Legislative Assembly, though they can be present in the House.

Articles 182 to 185 repeat the provisions mentioned above, but concerning the Chairman and Deputy Chairman of the Legislative Council, in matters related to their appointment, their resignation or removal, the powers of the Deputy Chairman to perform the duties of the office of the Chairman, and their not being able to preside in the Legislative Council when the matter of their removal is under consideration. Article **186** mentions the salary and allowances of the Speaker and Deputy Speaker as well as the Chairman and the Deputy Chairman which shall be as respectively fixed by the Legislature of the State by law. **Article 187** declares that the House (or Houses) shall have their separate secretariats and that they can by law determine the recruitment and conditions of service of persons appointed to the secretarial staff.

This is followed by articles on the conduct of business in the House or Houses, the disqualification of members, and the members' powers, privileges, and immunities. **Article 188** specifies the oath or affirmation by members according to the form prescribed in the Third Schedule. **Article 189** clarifies that all matters of any sitting of the House shall be determined by a majority of the votes of the members present and voting, with the Speaker having the casting vote. The quorum is ten members, or one-tenth of the total members of the House, whichever is greater. **Article 190** states that no Member can be a member in both the Houses simultaneously, and in the legislatures of two or more states: he will have to vacate one of them. A member ceases to be a member if he attracts the disqualifications mentioned in Article 191, or if he resigns. Article 191 lists the reasons for such disqualification, such as holding an office of profit, being of unsound mind, is insolvent, is not a citizen of India, or if he is disqualified under any law of parliament.

There are many judgments of the Supreme Court in the matter of the definition of 'an office of profit'. To constitute an office of profit, there must be a permanent, substantive position that exists independently of the holder of the office.[xxxvii] Further, that office must be capable of yielding a profit or pecuniary gain.[xxxviii] The true test for determining whether a person holds an office of profit depends on the degree of control the Government has over it. The moot question is to determine whether the person who holds an office of profit is the government's power to appoint and remove him from office.[xxxix] The object of providing for the disqualification under Article 191 of the Constitution is that the person elected to the Legislative Assembly or Council should be free to carry out his duty fearlessly without being subjected to any kind of governmental pressure. It is to be ascertained if there is a conflict bound to arise between the Member's duties as a member of the Legislature and his employment.[xl]

Under the original text of sub-clause (1) of Article 191 (1), the general rule was that any person holding an office of profit or service under the Government was not eligible to be a member of the Legislature, unless the Parliament or the State Legislature, as the case may be, exempts that particular office from disqualification. The 42nd Amendment of 1976 reversed that position by stating that all public servants would be eligible for membership of the Parliament unless there is a law positively imposing a disqualification in any particular case. In practical terms, it would have been impossible for the Parliament to exhaust all the innumerable posts under various categories of public service. This anomalous situation was once again reversed by the Constitution (Forty-Fourth Amendment) Act, 1978 which restored the original text thus reviving the case law anterior to 1976.

Article 192 directs that in case of a question regarding the matter of disqualification of a member, the matter will be referred to the Governor whose decision shall be final though he will have to take the opinion of the Election Commission and shall act according to such opinion.

Article 193 states the penalty for sitting and voting when a person does not take the oath or affirmation, or when he is not qualified or when disqualified: such a person shall be liable to pay rupees five hundred in respect of each day when the violation has taken place.

Article 194 refers to the powers, privileges, and immunities of the State Legislatures and their members as well as their committees. Its clause (1) proudly proclaims that there shall be freedom of speech in the Legislature of every state, subject only to the provisions of the Constitution. This is similar to the freedom of speech granted to the members of the Parliament according to Article 105 (2). Clause (2) of Article 194 goes on to state that no member will be liable to any proceedings in any court for anything that the member may have said or any vote that he may have given in the Legislature or any of its committees. All other powers, privileges, and immunities can be defined by the Legislature by law. Yet, by judicial judgment, it has been pronounced that in the exercise of freedom of speech, a member cannot raise a discussion as to the conduct of a judge of the Supreme or High Court.[xli] The Constitution makers wanted to make it clear that they thought it necessary to confer on the legislator's freedom of speech separately and independent of Article 19 (1) (a) which is available to all citizens though, of course, subject to the restrictions specified in Article 19 (2). Article 194 (1) implies that even these restrictions of Clause (2) of Article 19 do not apply to a legislator while he is speaking within the legislative chamber. It is within the Speaker's hands to remedy any such utterances when made which are violative of the constitutional provisions.

Article 195 states that the members of the Legislative Assembly and the Council shall be entitled to receive such salaries and allowances as shall be determined by the Legislatures of the State by law. **Articles 196 to 212** go on to describe the legislative procedures, starting with provisions as to the introduction and passing of Bills. **Article 196** states that a Bill can originate in either of the Houses in States where there is a legislative council. In such cases, these Bills have to be passed by both Houses to be deemed as law. A Bill pending in the Assembly, or the Council of a State shall not be deemed to have lapsed if either the Assembly or the Council is prorogued. **Article 197** refers to the restriction of powers of the Legislative Council as to Bills (other than Money Bills). The Legislative Council has the power to reject a Bill passed by the Legislative Assembly or move amendments to it. The Assembly may pass it with the amendments made by the Council. If not, the Assembly may pass it again and the Bill shall be deemed to have been passed by both the Houses of the Legislature in the form in which the Assembly has passed it. **Article 198** specifies that no Money Bill shall be introduced in the Legislative Council: thus, can only be done in the Legislative Assembly. Such a Money Bill passed by

the Assembly shall be transmitted to the Legislative Council which within fourteen days shall pass it, or suggest an amendment, which the Assembly may or may not accept. If the Legislative Assembly accepts any of the recommendations of the Council, the Money Bill shall be deemed to have been passed by both Houses. As to what constitutes a Money Bill, **Article 199** defines it, analogous to Article 110 with reference to the Parliament, namely: imposition, remission abolition, alteration or regulation of any tax; regulation regarding the borrowing of any money or giving guarantees for the same; the custody of the Consolidated Funds or Contingency Fund, appropriation of money out of the Consolidated Fund; the declaring of any expenditure charged in the Consolidated Fund, the receipt of money in the Consolidated funds or the public account; or any matter incidental to the above matters. If a question arises as to whether a Bill is a Money Bill or not, the decision of the Speaker shall be final. The certificate of the Speaker about the Bill being a Money Bill shall be endorsed on the bill when it is sent to the Governor.

Article 200 speaks about the Governor's assent to the Bill, or that he withholds assent therefrom, or that he reserves the Bill for the consideration of the President. In cases where the Governor returns the Bill for reconsideration, the House shall consider the desirability of the amendments and if the House passes the Bill again with or without the amendments, the Governor shall not withhold assent therefrom. The Governor's powers to withhold the Bill for the consideration of the Governor refers to any Bill which in his opinion would, if it became law, derogate the powers of the High Court, and endangers the Court's role regarding the Constitution. **Article 201** elaborates on the matters reserved by the Governor for consideration of the President. In such cases, the President can return the Bill with the message for reconsideration and the House (or Houses where a Council exists), which shall reconsider the same within a period of six months. 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.

Articles 202 to 207 refer to the procedure to be followed in case of financial matters. **Article 202** states that the Governor shall cause to be laid before the House or Houses a statement of the estimated receipts and expenditures of the State, referred to as the annual financial statement. This statement shall show separately the sums required to meet the expenditure charged upon the Consolidated Fund of the State as well

as other expenditures, while at the same time distinguishing between revenue account and other expenditure. The charged expenditure refers to emoluments and allowances for the Governor and his office, the Speaker and Deputy Speaker (and Chairman and Deputy Chairman where a Legislative Council exists), Judges of the High Court, debt charges where the State has to bear including interest, sinking fund, redemption charges, etc relating to loans and servicing of the loans, decretal amounts to satisfy judgments or decrees and any other expenditure declared to be charged expenditure by the Constitution. **Article 203** makes it clear that charged expenditure is to be presented to the House and can be discussed but shall not be subject to a vote by the Assembly. For all other expenditures, presented to the House as demands, the House has the power to assent, or refuse to assent or assent with reductions. Immediately thereafter, **Article 204** comes into play whereby an Appropriation Bill is introduced, to provide for the demands of the Consolidated Fund of the State.

Article 205 mentions the grants for supplementary, additional, or excess grants. Where the amount provided is found to be insufficient for the requisite purposes in the year, more funds can be provided, for which another statement showing the required amount has to be laid before the House or Houses for approval. **Article 206** describes the procedure for votes on account, votes of credit, and exceptional grants: namely, the Legislative Assembly can make any grant in advance, pending the procedure prescribed in Articles 203 and 204. So too, it can make a grant for meeting any unexpected demand on the resources of the State, where because of its magnitude or its indefinite nature, details ordinarily given in the annual financial statement cannot be given. **Article 207** specifically states that no such Bill can be moved without the recommendation of the Governor.

Article 208 deals with the general rules of procedure of a House of Legislature, stating that the House may make its own rules for regulating its procedure. It is the Governor who can make rules for the communication between the two Houses, in consultation with the Speaker of the Legislative Assembly and the Chairman of the Council. **Article 209** empowers the Legislature of the State to regulate by law the procedure of, and conduct of business in, the House or Houses, about the timely completion of financial business. **Article 210** states that the business in the Legislature of State shall be conducted in the official language or languages of the State or Hindi or English, although the Speaker can permit any member without

adequate knowledge of these languages to speak in his mother tongue. **Article 211** restricts discussion in the Legislature which refers to the conduct of any judge of the High Court or the Supreme Court. **Article 212** is a corollary to Article 211: the Courts too cannot inquire into the validity of any proceedings of the Legislature on the grounds of alleged irregularity. Further, no officer of members of the Legislature shall be subject to the jurisdiction of any court.

Article 213 in Chapter IV of Part VI of the Constitution describes the Legislative Power of the Governor and is a provision parallel to Article 123 in Chapter III of Part V with regard to the same powers of the President for the Union. When the Legislative Assembly of the State (or the Council, in states where there are two Houses) is not in session, and when the Governor is satisfied that it is necessary to do so, he may promulgate such ordinances as the circumstances appear to him to require. An ordinance thus issued shall have the same effect and force as an Act of the Legislature, though such ordinances shall be laid before the House or Houses and cease to operate within six weeks after the reassembly of the House or Houses for its approval or disapproval unless disapproved earlier. The ordinance can also be withdrawn by the Governor at any time.

It is also relevant here to mention the Articles in Part XVI of the Constitution which refer to special provisions relating to certain classes in the Parliament and the State Legislative Assemblies. These sections merit much deeper examination, though here they are only being mentioned in passing. **Article 330** provides for the reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People. Clause (1) states that seats shall be reserved in the House of the People for (a) the Scheduled Castes; (b) the Scheduled Tribes, except the Scheduled Tribes in the autonomous districts of Assam; and (c) the Scheduled Tribes in the autonomous districts of Assam. Clause (2) stipulates that the number of seats reserved in any state or union territory for the Castes, or the Tribes shall bear the same proportion to the total number of seats allotted to that State or Union Territory in the House of the People as the population of the castes or the tribes in respect of which seats are so reserved, bears to the total population of the State or Union Territory. Clause (3) says the same principle with respect to the Tribes of the autonomous districts of Assam. An explanation as to the basis of the population count is also given which refers to the 2001 census, until such time as the first decennial census that would be carried out after the year 2026.

The effect of reservation of seats for the Scheduled Castes or Tribes is to guarantee a minimum number of seats to the members of the Scheduled Castes or Tribes, while at the same time, it is clear that members of the SC or ST can equally contest for any general seat as well.[xlii]

Article 331 provides for representation of the Anglo-Indian community in the House of the People, which is done by nomination by the President if he thinks that the Anglo-Indian community is not adequately represented in the House of the People.

Article 332 provides for the reservation of seats for Scheduled Castes (SC) and Scheduled Tribes (ST) in the Legislative Assemblies of the States and is parallel to Article 330 which makes the same provisions with reference to the House of the People. The purpose of reservation of constituencies is to ensure representation in the legislature to such tribes and castes which are deemed to require special efforts for their upliftment. In the *Sobha Hymavathi* case, the Supreme Court rules that to permit non-tribal under the cover of marriage to contest such a seat would tend to defeat the very object of such reservation.[xliii]

Article 333 mirrors the provisions of Article 331 providing for nomination by the Governor for representation of Anglo-Indians in the Legislative Assemblies in the State.

It is interesting to consider that the Constituent Assembly had made provision for such reservation for SCs and STs in the House of the People and the Legislative Assemblies of the States only for a period of ten years. **Article 334** states clearly that the reservation is only for a certain period and shall cease thereafter. Yet, as we have seen above, extensions have been given for one decade after another for the continuation of such reservations in both the Parliament and the Legislative Assemblies. Undoubtedly these are contentious issues and have generated much discussion across the country.

The proclamation by the President for the dissolution of the Legislative Assemblies according to Article 356 is a confrontational issue. The withdrawal of support to the government by some members of the Legislative Assemblies can render the government into a minority situation. In such circumstances, the Governor is likely to recommend the dissolution of the Assembly to the President. The due process to be followed by the Governor has been laid down in the *SR Bommai vs Union*

of India case which stipulates certain guidelines to prevent the misuse of Article 356.[xliv] These include the following: The majority enjoyed by the Council of Ministers shall be tested on the floor of the House. The Centre should give a warning to the state and a period of one week to reply. The court cannot question the advice tendered to the President, but it can question the material behind the satisfaction of the President. Hence, Judicial Review will involve three questions only:

a) Is there any material behind the proclamation?

b) Is the material relevant?

c) Was there any mala fide use of power?

If there is improper use of Article 356 then the court will provide a remedy. Under Article 356 (3), we can surmise that the court has placed certain limitations on the powers of the President. Hence, the president shall not take any irreversible action until the proclamation is approved by the Parliament i.e., he shall not dissolve the assembly. Article 356 is justified only when there is a breakdown of constitutional machinery and not administrative machinery. The controversies about Article 356 have been more or less settled by this judgment.

A Matter of Privileges: There has been much debate about the privileges of the Legislatures. When the Constitution was drafted by the Constituent Assembly, it had been provided that the privileges, powers, and immunities of the members of the Parliament and the members of the Legislatures of the States shall be made by the Parliament and the State Legislatures by law. And that until such time, the uncodified privileges of the British House of Commons were sanctified by the Indian Constitution as a temporary measure. Although more than seventy years have passed since then, there has been no complete and exhaustive listing of the privileges of the members of the Parliament or the State Legislatures. Yet, it would not be wrong to say that many of the principles of such powers and immunities have been settled by judicial decisions for the highest court and the consensus of precedents laid down by the Presiding Officers of the Houses of the Union and State Legislatures. It would not be conducive to the working of the Parliamentary system of government that we have adopted, to have a war between the courts and the legislatures though this

has happened a few times in the past. One solution proposed is to have a 'High Court of Parliament' exercising powers and privileges, such as the British House of Commons. However, this may be a fallacious argument, since in our written constitution there are limits to the powers of all the organs of the state, including the Legislature and the latter cannot claim any overriding power in the name of privileges and interfere in the working of the judiciary. Article 32 guarantees the right to move the Supreme Court for the enforcement of the rights conferred by Part III pertaining to Fundamental Rights. The Supreme Court has the power to issue directions or writs for the enforcement of these rights. In the same way, Article 226 empowers the High Court to issue certain directions, orders, or writs for the enforcement of the rights of Part III.

We have seen the contest between the Parliament and the Judiciary evolving into an ugly war during the days of the Emergency and just earlier. We have seen some examples of the submission of the court to the political executive, although corrective action was taken by the new dispensation after the defeat of the Indira Gandhi Government after the Emergency was lifted and elections were held. In recent times too, there were attempts to bring about some transparency in the appointment of judges to the Apex Court and the High Courts through the Judicial Appointments Commission; however, the Judiciary did not approve this measure considering it to be an interference in its working and independence.

The Legislature in the Constituent Assembly debates: We may in passing refer to the aspirations of the members of the Constituent Assembly as they debated matters related to the place of the Legislature in the Constitutional framework. The words of some of the more articulate of its members still ring true and still raise questions that are required to be pondered on. For example, on 5 November 1948, Damodar Swarup Seth raised questions about the representative nature of the Constituent Assembly: "I can emphatically say that this House cannot claim to represent the whole country. At the most it can claim to represent fifteen per cent of the population of India who had elected members to the Provincial Legislature…in these circumstances, when eighty-five per cent of the people of this country are not represented in this House and when they have no voice here, it will be in my opinion a very great mistake to say that this House is competent to frame a constitution for the whole country."

Lakshmi Kanta Maitra had this to say about the Bi-cameral nature of the Legislature: "I want to insist that we should have in every province a Bi-cameral Legislature. You are giving adult suffrage and you do not know how big your Legislature would be and you do not know what kind of people you will have. We want to revise the chamber as a check or brake on hasty legislation."

Shri Ram Narayan Singh argued against the parliamentary system and spoke in favour of a presidential arrangement: "In the Presidential system of Government it is easy to find one honest President, but it is not easy to find an army of honest ministers and deputy ministers and parliamentary secretaries…I think both in the centre and the provinces we must have all-powerful presidents who will be responsible for the work done and who will choose their ministers or secretaries… I want the power to go direct to the villages. It is not enough that they should vote; they must be made to take an interest in day-to-day administration in the country. Everybody knows that in a good state, the three functions of judicial, legislative, and executive are independent. But these days, under the parliamentary system of Government, people from parties can manipulate votes and get a majority in the legislatures and form the government. This is dangerous."[xlv]

VI Munniswamy Pillai spoke in favour of reservation for Scheduled Castes in the Upper House when he said: "I fail to see any mention of representation for Scheduled Castes in the amendment so ably moved by the Honourable Dr. Ambedkar. It is true that members of the Scheduled Castes that are sent to the Lower Chamber, in the popular House, will have a chance of voting for representatives to come to the Upper Chamber. But, unless seats are reserved in the Upper House, I fail to see how it will be possible for the members of the Scheduled Castes in the Lower House to get several seats or adequate representation in the Upper House."[xlvi]

HV Kamath spoke eloquently about the need for having men from religion and philosophy be included in the list of nominations to be made by the Governor in the Upper Houses in the Provinces. "The conception of a secular State is in my humble judgment not a State which has discarded religion or philosophy in the highest sense but a State which is in the highest degree spiritual, and in the light of that highest spirituality or highest religion, regards all religions as one and makes no distinction between one religion and another. Is it necessary, I ask, to plead with my honourable colleagues here that the presence of men and women who have devoted or dedicated

their lives to the cause of the highest religion and the highest philosophy-spirituality will lend colour and dignity to the house? … I would welcome the divines of every religion in the Upper Chamber so that it will conduce not merely to the dignity of the Chamber and the raising of its level, but also conduce to harmony in the House.[xlvii]

KT Shah did not approve of the second chamber at all, though he was not opposed to the idea of the second house at the Union level: "Sir, I do not believe in a bicameral Legislature at least for the States. I think a Second Chamber is not only not representative of the people as such; but even if and where it is representative of the people, even if and where it has been made in such a way as to represent some aspect of the country other than the pure popular vote, even then it is there more as a dilatory engine rather than a help in reflecting popular opinion on crucial questions of legislation."[xlviii] Kuladhar Chalia supported Shah in this argument: "A second chamber is nothing but a clog in the way of progressive legislation… the second chamber in the past has clogged some very good pieces of legislation in Europe and other countries. I think as modern people we should get rid of these ideas, and we should march forward. Therefore, we should not have second chambers in our country."[xlix]

Perhaps what is more important is that as an arm of the government, the Legislature, at the level of the Union and the States, has held its ground. Successive elections at the national level, seventeen of them, have testified to the sound and strong nature of the parliamentary form of government that we have adopted. The 17th Lok Sabha is now in position. Invariably, after a general election, the transfer of power from a defeated government to the incoming one has been smooth and without controversy. The strength of the Indian political and constitutional system has been proven time and again. With but few exceptions, the Legislatures at Union and State levels have performed their duties to the best of their capabilities, fulfilling the expectations of the people. Where such expectations have not been fulfilled, the people spoke through the ballot and removed the political parties in power when the next polls came around. Ultimately, the foundation of true power resting with 'we, the people' has been proven and established without doubt and in no uncertain terms. In the international comity of nations, there is respect for the strength of India's parliamentary democratic system which has held its ground even after three-quarters of a century.

Notes

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iv Sapru Report, 170, accessible at https://www.constitutionofindia.net/historical_constitutions/sapru_committee_report__sir_tej_bahadur_sapru__1945__1st%20December%201945

v Granville Austin, Supra: 192-93.

vi Constitutional Precedents, (Government of India Press, January 1946).

vii Granville Austin, Supra:198.

viii WH Morris Jones, *Parliament in India,* (Longman Greens and Co Ltd, 1956), 90

ix Granville Austin, Supra: 203.

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xi Raja Ram Pal vs Hon'ble Speaker (2007) SCC 184: (2007) 1 SCR 317, accessible at https://indiankanoon.org/doc/1757390/

xii State of Rajasthan vs Union of India of 6 May 1977, (AIR 1977 SC 1361), accessible at https://indiankanoon.org/doc/174974/

xiii Statement of Objects and Reasons of the Constitution (Ninth Amendment Bill) 1956.

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xv Kuldip Nayar vs Union of India AIR 2006 SC 3127, accessible at https://indiankanoon.org/doc/1903935/

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xvii Notes on clauses of the 42nd Amendment Bill, 1976.

xviii Form III B in the Third Schedule to the Constitution

xix Ramdas Athavale vs Union of India AIR 2010 SC 1310, para 17-18, accessible at https://indiankanoon.org/doc/1249806/

xx Shibu Soren vs Dayanand Sahay, AIR 2001SC 2583, accessible at https://indiankanoon.org/doc/592428/

xxi Public Interest Foundation vs Union of India (2019) 3 SCC 244, p 280, 281 (paras 116.1-116.5, 118), accessible at https://indiankanoon.org/doc/146283621/

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xxviii Ibid

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xxx Sat Pal and Co vs Lt Governor of Delhi, Supra.

xxxi Venkatesh Kumar, "Anti-defection Law: Welcome Reforms," *Economic and Political Weekly.* 38, (19) (May 2003): 1837–1838.

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xliii Sobha Hymavathi vs Setti Gangadhara Swamy AIR 2005 SC 800, accessible at https://indiankanoon.org/doc/1380261/

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xlix Ibid.

Chapter VII:

The Constitution and the Judiciary

Introduction- The British judicial system: Under British administration, our country's highest court was the Federal Court, which entertained appeals from all subordinate courts in the country. The Federal Court was created by the Government of India Act of 1935. However, there was a Privy Council above the Federal Court, the last court of appeal for all countries under the entire British Empire. Appeals of the decisions of the Federal Court of India were referred to the Privy Council in London. For the members of the Constituent Assembly, it was inconceivable that judicial decisions of a free India could be referred to anywhere outside the country. These and other matters related to the independence of the Judiciary occupied the minds of the members of the Constituent Assembly as they deliberated upon the subject during their debates. It is moot to point out here, Dr Ambedkar moved a bill on 17 September 1949 in the Constituent Assembly for the abolition of the jurisdiction of the Privy Council. The bill envisaged that when such jurisdiction was terminated, the powers of the Privy Council would stand transferred to the Federal Court, the country's highest court. The Federal Court, barely 12 years after its creation, was duly rechristened as the Supreme Court of India on 26 January 1950.

A brief background is necessary here: The Supreme Court had first found mention in the Commonwealth of India Bill of 1925 framed by Annie Besant: Section 47 mentions the Supreme Court and the subsequent sections up to 55 present more details.[i] The Nehru Report, 1928 envisaged that the judicial system set up by the British may continue, but at the apex, there should be a Supreme Court with original jurisdiction in all 'federal' matters as also matters regarding the interpretation of the Constitution, to say, the power of judicial review. Clauses 46-52 of the Nehru Report are relevant in this connection.[ii] The White Paper of 1933 proposed a Supreme Court in addition to the Federal Court for hearing appeals over the decisions of

the High Courts. The Joint Parliamentary Committee of 1934 promptly rejected the idea. However, support for the Federal Court grew and was mooted in the Government of India Act of 1935. As envisaged in the 1935 Act, the function of the Federal Court was only to pronounce a declaratory judgment and did not have any authority to seek compliance with its orders. The Sapru Committee report of 1945 made mention of a Supreme Court for the Union. Para 235 of the report clearly stated that "as matters stand at present, the Federal Court at New Delhi does not and cannot function as a Supreme Court of appeal in civil cases from High Courts in British India. There is no doubt that when India has a self-contained Constitution of self-government, she cannot avoid having her final court of appeal deal with all civil appeals finally. The Committee is, however, divided in its views about the propriety of an immediate expansion of the Federal Court into a Supreme Court of appeal for the whole country, and the opinion is strongly held by some members that such expansion should come only as a part of any free Constitution which India may obtain in the future and that the question cannot be settled independently of the constitutional status of India under the new Constitution."[iii]

Thus, it would not be incorrect to say that there were exceptionally high expectations from the Supreme Court of India in its role as guardian of the Constitution. The challenges that it had to face in the years ahead, and the manner in which the judgments delivered affecting the profound spirit of the Constitution, tell the tale of an activist interventionist court that took pains to ensure that the dreams and aspirations of the people of India were kept sacred and eternal.

The Judiciary in the Constituent Assembly Debates: When the members of the Constituent Assembly discussed provisions relating to the Judiciary, they displayed a high level of idealism, equal to their contemplation of Fundamental Rights. "The Judiciary was seen as an extension of the Rights, for it was the Courts that would give the Rights its force. The Judiciary was to be the arm of social revolution, upholding the equality that Indians longed for during colonial days, but had not gained - not simply because the regime was colonial, and perforce repressive, but largely because the British had feared that social change would endanger their rule."[iv] While framing the Articles that constitute the provisions relating to the Union Judiciary, the High Courts, and the subordinate courts, what loomed large

in the minds of the Assembly members was the matter of the independence of the courts along with two related matters, the powers of the Supreme Court and the interpretative powers of judicial review.

Thus, it is that Article 124 of the Constitution proudly proclaims: "There shall be a Supreme Court of India". The words have a certitude and a grandeur that is edifying. It was Shri KM Munshi, a member of the Constituent Assembly, who gave expression to the need for continuity that he expected from the Apex Court. He stated: "Sir, on the 26th of January our Supreme Court will come into existence, and it will join the family of Supreme Courts of the democratic world of which the Privy Council is the oldest and perhaps the greatest. I can only hope and trust that though we part with the Privy Council, our Supreme Court will carry forward the traditions of the Privy Council, traditions which involve that judicial detachment, that unflinching integrity, that subordination of everything to the rule of law, and that conscientious regard for the rights and justice not only between subjects but also between the State and the subjects. And no higher tribute can be paid to the Privy Council than my hope that our Supreme Court may be given the strength to maintain the traditions of fearless justice which have prevailed in this country as a result of the supremacy of the Privy Council.[v]

Similar thoughts were expressed in the Assembly by the legal luminary and former Advocate General of Madras State Shri Alladi Krishnaswami Ayyar. He said, "When the Constitution comes into force, the Supreme Court [will be]… invested with the sole and exclusive jurisdiction in constitutional and other matters and is constituted as the final court of appeal of not merely what are now provinces under the present regime, but also of Indian States… the Supreme Court will be the final court of appeal not only from the High Courts in what is known as the provinces but also from High Courts in the Indian States…It is hoped that … the Supreme Court will evolve a jurisprudence suited to the genius of the people and the conditions of our country, [and that] the new dispensation will occupy a position of unique importance and the verdict of history would largely depend upon the independence, the ability and the learning which they would bring to bear upon their task."[vi]

Srimathi Durgabai Deshmukh, another prominent member, said that the Constitution "will usher in the era of judicial autonomy in India. The important changes made therein are all corollary to the political and constitutional independence of this country. When the Constitution is passed our Federal Court will be designated as the Supreme Court. It will be the highest court of appeal for all high courts and also the judicial authority for the interpretation of the Constitution. We wish and hope that the Supreme Court which is going to be the guardian of the Constitution and the Fundamental Rights guaranteed therein, will do its function very well and every citizen in India will have the occasion to say that it has protected his rights as a true guardian of this Constitution. With these few words, I commend this Bill and say that it will be a very interesting period in our history to watch the progress and functions of the Supreme Court".[vii] The words are unmistakable: they concede the pride of place in the constitutional scheme of things to the Judiciary which, though contested at times, has often held the legislative and political arms of the government in check.

Granville Austin's opus on the Indian Constitution[viii] is a relevant and pertinent work to study in this regard. It must be pointed out that the Constituent Assembly spent much more time discussing the Supreme Court than the High Courts and subordinate courts. Even before a committee was established within the Constituent Assembly to look into the role of the Supreme Court, Assembly members were anxious to ensure that the Apex Court would be the watchdog to safeguard civil and minority rights. The Assembly attached great importance to making the Rights justiciable and was determined to make suitable provisions to define the scope of the remedies for the enforcement of these Fundamental Rights. But it was obvious that there were conflicting concepts of individual rights and society's needs. The Advisory Committee of the Constituent Assembly qualified the exercise of basic freedoms with provisos and the protection of due process was removed from one of these rights, the right to property. An ad hoc committee of five members undertook the work of framing draft provisions for the setting up of a Supreme Court: its members were BN Rau, Munshi, Ayyar, Mitter, and Varadachariar, all men of distinction in legal matters. The Committee wrote: "A Supreme Court with jurisdiction to decide upon the constitutional validity of acts and laws can be regarded as a necessary implication of any federal scheme."[ix] It went on to recommend

that the Court should have exclusive jurisdiction in disputes between the Union and a Unit (State) and between Units (States). The jurisdiction of the Court would be legislated upon by the central legislature. However, on the matter of Rights, other judicial courts would also have the authority to decide.

Ayyar and Munshi argued that the power of judicial review was especially necessary for the safeguarding of Fundamental Rights and ensuring the observance of due process. Munshi had included in his Draft Constitution the power of the Supreme Court to examine the constitutionality of legislation. Ayyar wrote that judicial review is a requirement in a written constitution or even a federal constitution. Yet, in the Draft Constitution, the Judiciary's review power was circumscribed only to rights to property and personal liberty, both in the name of social revolution. As Ayyar wrote: "The doctrine of independence is not to be raised to the level of a dogma to enable the Judiciary to function as a kind of super-Legislature or super-Executive."[x] The members of the Constituent Assembly believed that in some areas of social revolution, the Legislative Branch of the government should be supreme; in these areas, they could not bring themselves to trust the judges, whose function was to be limited to interpreting the law as written. But for these exceptions, it was the duty of the Judiciary itself to 'keep the charter of government current with the times and not allow itself to become archaic or out of tune with the needs of the day."[xi]

A peep into the nature of the debates of the Constituent Assembly held on 29th May 1949, on the subject of the highest elements of the Judiciary will be revealing about the then prevalent mood of those extraordinary men and women who created the constitutional fabric of our republic. Some examples would suffice. The quotations below are all extracted from the Constituent Assembly debates of that date.

Shibban Lal Saksena, a member from the United Provinces, while moving his amendment motion, said: "The Chief Justice of the Supreme Court should be completely independent of the Executive, and it is this principle which I want to introduce in this section. At present, he shall be a creature merely of the executive and the President shall appoint him on the advice of the Prime Minister. This will take away some independence of the Supreme Court. We are here providing for the highest tribunal of justice in our country. This tribunal should be above suspicion and no executive should be able to have any influence upon him. If the Chief Justice is appointed by the

President or the Prime Minister, then his independence is compromised. I therefore want, Sir, that the Chief Justice shall be appointed by the President of course, but at least two-thirds of members of the Parliament shall approve his name."

Prof KT Shah, from Bihar, stated: "…this Constitution concentrates so much power and influence in the hands of the Prime Minister in regard to the appointment of judges, ambassadors, or Governors to such an extent, that there is every danger to apprehend that the Prime Minister may become a Dictator if he chooses to do so. I think there are cases that ought to be removed from the political influence, of party manoeuvres. And here is one case, viz. Judges of the Supreme Court, who I think should be completely outside that influence. I am, therefore, suggesting that the appointment of the Judges should be made by the President, after consultation not only with the Judicial services proper, but also with the Council of States so that the party element may be eliminated or minimised, and any political influence also may be avoided."

He went on to add: "…judges, particularly of the Supreme Court, should be appointed for life. They should not, in any way be exposed to any apprehension of being thrown out of their work by official or executive displeasure. They should not be exposed to the risk of having to secure their livelihood by either resuming their ordinary practice at the bar or taking up some other occupation that may not be compatible with a judicial mentality, or which may not be in tune with their perfect independence and integrity."

PK Sen from Bihar stated: "I desire that the Judge who has retired will not be able to engage himself in any office of emolument under the Government in any other field of activity, and that is exceedingly necessary because otherwise there is always the phenomenon of the Judge while in office aligning himself with a political party or with commercial caucuses, which is a very undesirable thing."

HV Kamath from Central Provinces and Berar argued in widening the choice available for appointments as Judge of the Supreme Court: " …the article as it stands restricts the selection of judges to only two categories. One category consists of those who have been judges of a high court or of two or more such in succession and the second category consists of those who have been advocates of a high court or of two or more high courts

in succession. I am sure that the House will realize that it is desirable, maybe it is essential, to have men -or for the matter of that, women- who are possessed of outstanding legal and juristic learning. In my humble judgment, such are not necessarily confined to Judges or Advocates."

Tajamul Hussain from Bihar, spoke of the need to maintain objectivity in enquiring into complaints against Judges: "In my opinion, Sir, to remove a judge on the recommendation of the Parliament would be wrong in principle. If the majority party in the parliament is not in favour of a particular judge, then removal will become very easy, and the judge should always be above party politics. He should be impartial, and he should never look up to the Government of the day and he must carry on his work. It does not matter who is in power. If there is an allegation against a judge, I submit, Sir, that the allegation must be enquired into first. Therefore, I suggest that all the judges of the Supreme Court form themselves into a committee, and this committee should investigate the charge against the particular judge, then submit its report to the President and then the President is to remove him in consultation with the parliament, provided the charges are proved against him."

Jawaharlal Nehru (A member of the United Provinces) too spoke; his point was about fixing age limits for the Judges. "I rather doubt whether honourable Members of this Assembly will think of fixing an upper age limit for membership of this Assembly, or for any Cabinet ministership or anything of that kind. We do not do it. But the fact is, when you reach certain top grades where you require absolutely first-class personnel, then it is a dangerous thing to fix a limit which might exclude these first-rate men."

The members of the Assembly were keen to render the Supreme Court impregnable to the outside, and especially political interests. The final provisions as they appear in the Constitution are close to the suggestions in the Sapru Committee report. The Union Constitution Committee recommended that the Supreme Court Justices be appointed by the President in consultation with the Chief Justice of the Supreme Court. Justices of the High Court were to be appointed by the President in consultation with the Chief Justices of the Supreme Court and High Court and the Governor of the State concerned. Their salaries were protected by the President himself and were part of the 'charged' budget and not the 'voted' budget and thus immune from legislative intervention.

The observations of Arghya Sengupta during the debates in the Constituent Assembly have a historical significance, with an important bearing on the function and nature of our Judiciary. He observed: "There was a keen perception of the ends which had to be achieved – the independence of the Judiciary and safeguarding the dignity of the institution, the interests to be accommodated – a balance between governmental oversight and judicial autonomy in administration, a sharp awareness of the constitutional position in other jurisdictions and equally a realisation of the need to institute a system that would be effective in India's political culture."[xii] The Sapru Committee of 1945 heavily criticised the colonial system of appointment of judges which had allowed for excessive executive discretion. The members of the Assembly were clear that appointments to the Courts would have to be free from influence and discretion. "Thus, for the first time, a consultative method of appointment was proposed with judges of the Supreme Court appointed by the President in consultation with the Chief Justice of India, and judges of the High Courts also appointed by the President, in consultation with the Chief Justice of the High Court, the Premier (Governor) of the province concerned and the Chief Justice of India." The rationale was that the inclusion of the apolitical office of the Chief Justice of India in the system would ensure an appropriate counterbalance to political factors that may influence the executive. "A multiplicity of high constitutional authorities, some of whom were apolitical, would ensure that judges of the highest quality would be appointed."[xiii] The Drafting Committee went a step further and insisted on a proviso to make the consultation with the Chief Justice of India mandatory.

The discussions went on to a more nuanced and richer interpretation of the role of the Judiciary. The view that prevailed, as we have seen, was that there should be adequate checks and balances on the Judiciary too as shorn of any restraints, it could assume the role of a 'super-legislature or super executive'. TT Krishnamachari denounced the creation of an *Imperium in Imperio*[xiv] in the name of creating an independent Judiciary. The prevailing view of the members of the Assembly was that independence of the Judiciary did not mean its insulation. The original proposition that the concurrence of the Chief Justice would be necessary, was rejected by Ambedkar as such power would have defeated the careful inter-institutional equilibrium that had been envisaged. By refusing to accord the determinative role to the Chief Justice, Ambedkar underlined the fact that the power to appoint the judges was fundamentally of an executive nature. "Without questioning

the integrity of the Chief Justice of India, Ambedkar shows cognisance of the possibility of operation of inherent biases, if the Chief Justice were to be accorded an unchecked power. The emphasis is hence not only on the need for a multiplicity of authorities but equally on preserving an inter-institutional balance in appointments, with the Judiciary and Executive mutually informing and checking each other. This is an aspect of judicial appointments which has been lost sight of in contemporary debates with judicial conflict with the Executive being perceived as the sole way to demonstrate independence."[xv]

Another underlying thought of the Constituent Assembly also needs mention here. Munshi had all along stressed the unifying effect of a uniform interpretation of the laws by a Supreme Court. He feared that with the units (States) desiring considerable autonomy and demonstrating a growing enthusiasm for linguistic provinces, there would be a natural tendency towards "petty nation-states." However, "the unconscious process of consolidation which uniformity of laws and interpretation involves, makes the unifying unconscious and, therefore, more stable."[xvi]

The Judicial Hierarchy: An examination of the structure of the Judiciary as provided for in the Constitution of India is essential before delving into its various Articles. Despite the federal structure of our nation, the Constitution provides for a single integrated Judiciary system for the Union and the States, the head of which is the Supreme Court of India. Below are the high courts in the different States and under each one of which is a hierarchy of courts referred to as the subordinate courts. As of today, there are 24 High Courts, with some States sharing their high courts with others in their proximity.[xvii] The organisation of the subordinate courts varies from State to State, and the need for some uniformity in the general structure of the legal system has been felt for some time now. The Supreme Court has issued directions[xviii] to the Union and the States to constitute an All-India Judicial Service and to bring about uniformity in the designation of officers both on the civil and criminal sides.

There are Panchayat Courts set up by state legislation with bifurcation between the civil and the criminal sides, known by different names such as *Panchayat Adalat* or *Gram Kutchery Nyaya Panchayat*. At the next higher level are the Munsiff Courts with jurisdiction as determined by their respective High Courts. Above them are the Subordinate judges with unlimited pecuniary jurisdiction over civil suits and the power to hear

appeals over decisions of the Munsiff judges. At the apex of the District Judiciary sits the District Judge who hears first appeals over decisions of the subordinate judges as also from the Munsiffs. He is the highest judicial authority over criminal and civil cases and tries the more serious criminal matters known as session cases. Since the enactment of the Criminal Procedure Code 1973, the trial of all criminal cases is done exclusively by the 'Judicial Magistrates'. The Chief Judicial Magistrates are the heads of the criminal courts in 'metropolitan areas' such as Kolkata. They have to be distinguished from Executive Magistrates who discharge executive functions of maintaining law and order and who are under the State Government.

At the State level, the High Court is the supreme judicial body with both original and appellate jurisdiction. It exercises appellate jurisdiction over the District and Sessions Judge and the Presidency Magistrates. There is a High Court for each of the States, except Nagaland, Mizoram, and Arunachal Pradesh, which have the three respective benches of the High Court of Guwahati as their common high court, and Haryana, which has a common High Court (at Chandigarh) with Punjab. The High Court of Judicature at Hyderabad functioned as the common High Court for the States of Telangana and Andhra Pradesh with effect from 02 June 2014 by virtue of the Andhra Pradesh Reorganisation Act, 2014. In December 2018, the common High Court of Judicature at Hyderabad has been bifurcated and new high courts namely, the High Court for the State of Telangana and High Court of Andhra Pradesh have been established. The seat of the High Court of Andhra Pradesh has been established at Amravati while the seat of the High Court of Telangana is Hyderabad. The Bombay High Court is common for the States of Maharashtra and Goa, (and also for the Union Territories of Dadra and Nagar Haveli, and Daman and Diu). The Jammu and Kashmir Reorganisation Act, 2019 provides that the High Court of Jammu and Kashmir shall be the common High Court for the Union territory of Jammu and Kashmir and the Union territory of Ladakh.

The Supreme Court has appellate jurisdiction over the High Courts and is the highest judicial body of the land. The Supreme Court also possesses original, appellate, and advisory powers. Our federal structure implies the requirement of a federal court, but in India, the Supreme Court is more than that. It has its roots in the Federal Court of India established under

the Government of India Act of 1935. At that time, the Federal Court was not the ultimate judicial authority as appeals could go to the Judicial Committee of the Privy Council in England. Today, our Supreme Court is the highest court of appeal and stands at the apex of the judicial system in India. It is an admixture of the Federal Court and the Privy Council. As Prof Kagzi says: The Supreme Court "has three roles to play; firstly, it is a federal machinery of impartial arbitrament in cases of disputes between the Union of India and the States of the Indian Union; secondly, it is the agency which interprets the Constitution; and thirdly, it is the highest court of appeal – the ultimate tribunal for deciding the disputes and rights of the private citizens and other persons. In the first two aspects, it takes the place of the Federal Court and in the third aspect it plays the part of the Judicial Committee of the Privy Council."[xix] To this, we may add its advisory role to render advice to the President of India under Article 143 (1) of the Constitution, where the Supreme Court's opinion is sought by him.

The Supreme Court: Specific constitutional articles pertaining to the role and functions of the Apex Court are listed out below. **Article 124** (1) majestically pronounces that "there shall be a Supreme Court of India. It consists of the Chief Justice of India, and "until Parliament by law prescribes a large number, of not more than seven other judges." This number has been enhanced from time to time and is now thirty-three[xx]. Clause (2) of the same Article states that the judges of the Supreme Court shall be appointed by the President under his hand and seal on the recommendation of the National Judicial Appointments Commission and shall hold office until he is sixty-five. The introduction of the idea of a National Judicial Appointments Commission was introduced into Article (2) by way of the Constitution (Ninety-ninth Amendment) Act, 2014 substituting the earlier provision of the President consulting the Judges of the Supreme and High Courts as he may deem fit. The article goes on to state that the age of the judge can be determined by the Parliament, and specifies the required qualifications for appointment as judge of the Supreme Court. It also states that such a judge cannot be removed except by a majority of the total membership of each of the Houses of Parliament and by a two-thirds majority of those present and voting.

Article 124 (A) defines the National Judicial Appointments Commission as consisting of the following:

a) The Chief Justice of India, Chairman ex officio

b) Two other judges of the Supreme Court of India next to the Chief Justice - Members ex officio

c) Union Minister in charge of Law and Justice - Member

d) Two eminent persons to be nominated by a committee consisting of the Prime minister, The Chief Justice of India, and the Leader of the Opposition (one of whom should be from the SC or ST or OBC or Minorities or Women - Members

Its functions stated in Article 124 (B) are to recommend persons for appointment as Chief Justice of India or Chief Justice of the High Courts, as also Judges of the Supreme Courts or the High Courts. Transfers of Chief Justices and other judges from one High Court to another were also to be recommended by this Commission. Both 124 (A) and (B) derived their authority from Article 124 (C) which empowered the Parliament to make laws to regulate the appointment to these posts.

The controversy embedded in this Clause (2) of Article 124 continues to this day as the Supreme Court held this Amendment of 2014 to be void through its decision in the Supreme Court Advocates-on-Record Association vs Union of India AIR 2015 SC (suppl) 2463. The judgment held that the National Judicial Appointments Commission was violative of the principle of judicial independence. The judgment stated: "…the centralized accumulation of power in any man or single group of men meant tyranny; the division and separation of powers, both vertically (along the axis of federal, state, and local authority) and horizontally (along the axis of legislative, executive, and judicial authority) meant Liberty. It was thus essential that no department, branch, or level of government be empowered to achieve dominance on its own… So too with each other centre of governmental power; exercising the mix of functions delegated to it by the people in the social compact that was the Constitution, each power centre would remain dependent upon the others for the final efficacy of the social designs."[xxi]

As a result, the National Judicial Appointments Commission remains a dead letter on the law books and a source of permanent conflict between the Judiciary and the Executive. We are not examining the question of the independence of the Judiciary here, but it is a fact that on numerous occasions the gulf between the two has widened. Even as this volume goes to print, the matter remains contentious and a source of friction.

"The primary function of the Judiciary is to interpret the law. It may lay down principles, and guidelines, and exhibit creativity in the field left open and unoccupied by legislation. Courts can declare the law, they can interpret the law, can remove obvious lacunae, and fill the gaps, but they cannot encroach upon the field of legislation properly meant for the Legislature. Binding directions can be issued for enforcing the law, to redeem the injustice done, and for taking care of rights violated, in a given case or set of cases, depending on facts brought to the notice of the court…but it may not, like the legislature, enact a provision. Legislation is that source that consists of a declaration of legal rules by a competent authority. When Judges by judicial decisions lay down a new principle of general application of the nature specifically reserved for the legislature, they may be said to have legislated and not merely declared the law. It is not difficult to perceive the dividing line between permissible legislation by judicial directives and enacting law – the field exclusively reserved for the Legislature."[xxii] Yet, the Supreme Court has time and time again emphasised that in a democracy the role of the court cannot be subservient to the administrative fiat. The Executive and the Legislature have to work within the constitutional framework and the Judiciary has been given the role of a watchdog to keep the Legislature and the Executive within check. [xxiii] The picturesque words quoted from Lord Wright, Justice of the British High Court, portray this characteristic of the Judiciary as follows: The judges proceed "from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point and avoiding the dangers of the open sea of system and science'. The golden age judges were not rationalisers and, except in the devising of procedures, they were not innovators. They did not design a new machine capable of speeding ahead; they struggled with the aid of fiction and bits of procedural string to keep the machine on the road."[xxiv]

On the question as to whether consultation with the Chief Justice of India in the matter of appointment of the judges implies concurrence, there has been much debate. The majority of the judges in the SC Advocates-

on-Record Association vs Union of India[xxv] concluded that 'consultation' would almost mean 'concurrence'. The Chief Justice's opinion must have primacy is what they have concluded. This was reiterated in the case known as Special Reference No 1 of 1998[xxvi]. This was one of the important considerations of the Supreme Court when it held that the National Judicial Appointments Commission as stipulated in Article 124 A of the Constitution was violative of the principles of judicial independence. The presence of three non-judicial members in the Commission as well as the presence of the Union Minister for Law will bring in political influence which will also violate this principle. Thus, the Supreme Court decided that the Ninety-Ninth Amendment Act, 2014 was unconstitutional and void, as was the National Judicial Appointments Commission Act 2014. The system of appointment of judges, as was existing before the above, was held to be operative. The Government of India is yet to finalise the revised Memorandum of Procedure by modifying it after consultation with the Chief Justice.

And herein lies a matter of utmost controversy that is still to be finally resolved. The simmering discontent on the part of the political executive acting through the Legislature continues and all appointments of Judges thereafter have only followed the pattern and procedure that existed earlier. The Judges have zealously guarded the turf of judicial independence even as the Legislature attempts to play a more direct role in enforcing some measure of executive involvement in the matter of the appointment of judges.

Article 125 specifies the salaries as may be determined by the Parliament by law and mentioned in the Second Schedule to the Constitution. Currently, the Chief Justice earns a salary of two lakhs and eighty thousand rupees as approved by the High Court and Supreme Court Judges (Salaries and Conditions of Service) Amendment Act 2018 (10 of 2018) section 6, with effect from 22 September 2017. The judges of the Supreme Court earn Rs two lakh and fifty thousand.

Article 126 relates to the appointment of an Acting Chief Justice, in cases where the post of the regular Chief Justice is vacant, or he is unable to perform his duties. In such cases, the President appoints one of the Judges as Acting Chief Justice.

Article 127 pertains to the appointment of ad hoc judges. A judge of the High Court who is duly qualified for appointment as a Judge of the Supreme Court can be asked to function as an ad hoc Judge on being so designated by the Chief Justice.

Similarly, **Article 128** permits the attendance of retired Judges of the Supreme Court to attend the sittings of the Supreme Court with all the normal jurisdiction, powers, and privileges.

Article 129 states that 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. The term 'court of record' may be understood here: Article 129 (and Article 215 concerning the High Courts) terms these courts as a court of record. This does not confer any new jurisdiction or status on the Supreme Court or the High Courts but merely recognises that they have the inherent jurisdiction to punish for contempt of themselves. Contempt of court proceedings is a special jurisdiction and is used to uphold the dignity of courts and the majesty of the law. The availability of jurisdiction to punish for contempt provides efficacy to the functioning of the judicial forum and enables the enforcement of the orders on account of its deterrent effect on avoidance.[xxvii]

As to what constitutes contempt of court, some of the actions that fall in this definition may be scandalising the judge himself by imputing corruption or dishonesty or obstruction of or interference with the due course of justice. The power of the court here is a summary power: the court can proceed suo moto or on the petition of an advocate of the court. However, if the contemnor extends an unconditional apology, the court may, at its discretion, drop the contempt proceedings against him.

Article 130 states that the seat of the Supreme Court shall be at Delhi or in such other place or places as the Chief Justice may, with the approval of the President, appoint.

Article 131 defines the jurisdiction of the Supreme Court as 'original jurisdiction in any dispute' (a) between the Government of India and one or more States; (b) between the Government of India and any State or States on one side and one or more States on the other; and (c) between two or more States. These include questions of the validity of the law, disputes on the question of competence to legislate over a subject, the right of the Union to dissolve an Assembly, whether the Union can order

inquiries into the allegation of corruption, etc, questions of interpretation of the Constitution, and must appertain to the Government in office at the Union and in the State. We know of many issues relating to water disputes between States that are pending in the Supreme Court under this provision of the Constitution. However, a dispute arising out of any treaty, agreement, covenant, engagement or *sanad,* or similar instrument which may have been entered into before the commencement of the Constitution and continues in operation shall not be considered a dispute under Article 131.

Article 132 maintains that an appeal shall lie to the Supreme Court from any judgment, decree, or final order of a High Court whether in civil, criminal, or other proceedings, provided that the High Court certifies under Article 134A that the case involves a substantial question of law as to the interpretation of the Constitution. We shall touch on this a little later while discussing Article 134A. As Durga Das Basu states the appellate jurisdiction of the Supreme Court may be classified under the following heads: appeals on constitutional questions, as per Article 132 (1); appeals involving no constitutional questions regarding Article 133 for civil cases and Article 134 for criminal cases, and appeal by special leave of the Supreme Court in any case other than the above whole referring to Article 136.[xxviii]

Article 133 and **Article 134** further clarify what has been mentioned above with reference to civil and criminal matters. As far as Article 133 is concerned, the High Court has to certify under Article 134A that the case involves a substantial question of law of general importance and that in the opinion of the High Court, the said question needs to be decided by the Supreme Court. As regards Article 134 concerning criminal cases, an appeal to the Supreme Court will lie only where on appeal, the High Court has reversed an order of acquittal of an accused person and sentenced him to death. Alternatively, the appeal will also lie where the High Court has withdrawn a case from any court subordinate to itself and has convicted the accused person in the trial before it and sentenced him to death. Of course, if the High Court certifies that the case is fit for decision in the Supreme Court, such an appeal will also be maintainable.

Article 135 states that the cases lying in the Federal Court that used to exist in the days of the British Raj before the independence of the would-be exercisable by the Supreme Court until Parliament by law otherwise provides.

Article 136 goes a step further and grants the Supreme Court the Special Leave to accept appeals at its discretion from any judgment, decree, determination, sentence, or order in any matter passed or made by any court or tribunal in the territory of India. However, under clause (2) of this Article, it has been specified that this power does not lie to any judgment passed by any court or tribunal constituted by or under any law relating to the Armed Forces. "The jurisdiction under Article 136 is extraordinary and discretionary: in such matters, the Supreme Court may not either accept or dismiss the appeal but may make any order which according to the court would do justice to both parties or would otherwise be conducive to meet the ends of justice."[xxix] Though this power is discretionary and not subject to any limits, the Supreme Court has imposed certain limitations on itself. It takes up only such cases where the view of law has been erroneously viewed, where the lower court's orders are not based in facts or law, where there is a grave miscarriage of justice, where the lower court has exceeded its jurisdiction and there is a violation of the principles of natural justice. Indeed, there are a host of such cases where the Supreme Court has intervened under Article 136 where the above circumstances have made such intervention necessary.

Article 137 empowers the Supreme Court to review its judgments, subject to any law made by the Parliament or any rules made under Article 145 (Rule of Court, etc., for regulating the practice and procedure in the court). This article authorises the Court to take a fresh look at the order that it has passed to correct it or improve it in the light of new material which may have escaped its consideration. The discovery of facts not previously known is a cause for such review. The basic premise is the possibility of human fallibility that may lead to errors.

Article 138 (1) enlarges the jurisdiction of the Supreme Court in respect of any of the matters in the Union List as may be conferred on it by the Parliament. Clause (2) also grants extra jurisdiction and powers with respect to any matter that the Union Government or any State Government may confer if Parliament by law provides for the exercise of such powers by the Supreme Court. The Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 has been passed under the provision of Clause (2).

Article 139 confers the Supreme Court with powers to issue certain writs, in matters other than prescribed in Clause (2) of Article 32. It may be recalled that Article 32 provides for remedies for enforcement of any of the rights mentioned in Part III dealing with Fundamental Rights. It would be appropriate here to refer to the various writs that the Supreme Court has the power to issue, as this is fundamental to the nature of the working of the Apex Court. High Courts have also similar rights under Article 226. Writs are commands of the Court to an authority or person by which such authority or person has to act or abstain from acting in a certain way. They are invoked by the Supreme Court when any fundamental right of a citizen is violated, and the citizen approaches the court for enforcing his right.

These writs are of the following nature[xxx]:

a) **Habeas corpus:** The writ of Habeas Corpus is issued by the Courts in those cases where a person is illegally detained. Habeas Corpus means 'to have the body' and it is one of the most effective remedies available to a person detained. By this writ, the Court commands the person or authority who has detained or restrained another person to present such a person before the Court. The Court requires the detaining person to provide the grounds on which the person has been detained and if he fails to provide a valid ground, the person who has been detained will be released by the Court immediately.

b) **Mandamus**: This is another important writ provided for by the Indian Constitution. Here, superior courts can order the subordinate Courts to do an act or to abstain from doing an act. This order can also be given to a tribunal, board, corporation, or any other type of administrative authority. In India, the Supreme Court is the apex court; therefore, it has the power to issue the writ of Mandamus even against the High Court even though the High Courts have also been provided with the power to issue such writs under Article 226. So, a High Court can issue this writ under Article 226 only to the Inferior Courts such as the trial court of a district. This writ is useful for enforcing the duty which is required to be done by law or by the office which a person holds. E.g., the Judge of the Court must follow the principles of natural justice and if the Judge fails to do so, a writ can be issued by the Superior Court to observe the fulfilment of this duty. One of the most important points about the writ of Mandamus is that it cannot be issued against a private person and, therefore, only the State or the

people who hold any office which falls in the category of a public office can be compelled to do or to abstain from doing an act.

c) **Certiorari:** This is a different type of writ when compared with others. It is corrective in nature which means the purpose of this writ is to correct an error that is apparent on the records. Certiorari is a writ that is issued by a superior court to an inferior court when it wants to decide a matter in the case itself or if there is an excess of jurisdiction by the inferior court. This writ can also be issued when there is a fundamental error in the procedure followed by the inferior court or if there is a violation of the principles of natural justice. If the superior court finds out that there has been a violation of natural justice or a fundamental error in the procedure adopted, it can quash the order of that inferior court.

d) **Quo Warranto**: The writ of Quo Warranto is issued by the courts against a private person when he assumes an office on which he has no right. Quo Warranto means 'by what authority' and it is an effective measure to prevent people from taking over public offices.

e) **Prohibituiob:** The last writ which can be issued under the Constitution is the Writ of Prohibition. This Writ is not issued often and is an extraordinary remedy that a Superior Court issues to an inferior court or tribunal for stopping them from deciding a case because these courts do not have the jurisdiction. If the court or tribunal does not have jurisdiction and it still decides the case, it will be an invalid judgment because for an act to be legal it should have the sanction of law. For e.g., if a District Court is hearing an appeal against the judgment of the High Court, such an act is bound to be prohibited because the District Court does not have the power to hear such an appeal. So, a writ of Prohibition can be issued against such an act of the District Court.

Article 139A deals with the transfer of certain cases. This article empowers the Supreme Court when it is satisfied with its motion, or on the application made to it by the Attorney General, that a case pending before it deals substantially with the same questions of law as are pending before a High Court or two or more High Courts, to withdraw all such cases and decide them by itself. Further, the Supreme Court, after deciding these questions of law, can send back the cases thus withdrawn from the

High Court or Courts, directing that it may be disposed of in conformity with such judgment. Under Clause (2), the Supreme Court, if it deems it expedient can also transfer one case from a High Court to another High Court.

Article 140 is an enabling provision that authorises the Parliament to confer any supplemental powers not inconsistent with the Constitution for enabling the Court to more effectively exercise the jurisdiction conferred on it by the Constitution.

Article 141 is a declaratory provision that unambiguously states that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The Supreme Court is not only the constitutional court, but it is also the highest court of the land. As such its pronouncements are the law of the land. We have given unto ourselves a system of governance by law. "The Supreme Court is expected to decide questions of law for the country and not to decide individual cases without reference to such principles of law. Consistency is a virtue. Passing orders not consistent with its own decisions on law is bound to send out confusing signals and usher in judicial chaos. Its role, therefore, is really to interpret the law and decide cases coming before it, according to law."[xxxi] And such interpretation pronounced by it is to be accepted by all courts across the land. What is involved is also the doctrine of *stare decisis,* meaning to stand by decided cases, the matter of binding precedent.

Article 142 (1) provides for the Supreme Court to issue any order or decree for ensuring complete justice in any case pending before it and these orders shall be enforceable across the territory of India. Clause (2) gives the Supreme Court all powers to secure the attendance of any person or the production of any document or the investigation or punishment of any contempt of itself. In a sense, this is the repository of discretionary powers that can be wielded to deliver complete justice, even when laws are found to be inadequate to grant relief.

In the Kalyan Chandra Sarkar case, it has been stated that the advantage of these constitutional powers couched in such a wide compass prevents the "clogging or obstruction of stream of justice."[xxxii] "Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been

expressly provided for in a statute dealing expressly with the subject."[xxxiii] The use of Article 142 has been clarified in the same judgment as follows: "The proper way of expressing the idea is that in exercising powers under Article 142 and in assessing the needs of "complete justice" of a cause or matter, the apex Court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly."[xxxiv]

Article 143 is an important constitutional provision enabling the President to consult the Supreme Court in matters where it appears to the President that a question of fact or law has arisen which is of such a nature and public importance that it is expedient to obtain the opinion of the Supreme Court upon it. The Court may, after such hearing as it thinks fit, report to the President its opinion thereon. This is an advisory function of the Supreme Court. Till now, the questions referred to the Supreme Court by the President include matters such as the constitutionality of an existing law, a law presented to the President for his assent, or a draft bill to be moved in the Parliament, the implementation of an international agreement, the respective jurisdiction of the Legislature and the superior courts in relation to the power of the former to punish for contempt, the interpretation of constitutional provisions relating to the election of the President, the powers of an Inter-State water disputes tribunal, method of allocation of natural resources, etc.[xxxv] It is to be mentioned here that it is neither obligatory for the Supreme Court to give its opinion, nor for the President to act upon the opinion. The Supreme Court may decline on grounds that the question referred to it is of a political nature, or that it is hypothetical or speculative, etc.

Article 144 binds all authorities, civil and judicial, in the territory of India to act with the aid of the Supreme Court. Whatever the merits of the case, any order of the Supreme Court has to be complied with immediately. For the survival of the rule of law, the orders of the court have to be obeyed and continued to be obeyed unless overturned, modified, or stayed by the appellate or revisional courts. The court does not have any agency of its own to enforce its orders, and hence the executive authority of the State has to comply with the orders issued. The execution of the orders of the Court

cannot be resisted on the grounds that it will have a political fallout or any kind of adverse reaction. This would be a subversion of the Constitution. Article 141, which states that the law declared by the Supreme Court is binding on all the courts is complementary to Article 144.

Article 145 authorises the Supreme Court to make rules for regulating the practice and procedure of the court, subject of course to any law of the Parliament. These rules may be for persons practising before the Court, rules about the procedure for appeals and other matters, rules as to the costs of any proceedings, rules for granting bail or summary disposal of vexatious appeals, etc. These rules may also specify the minimum number of judges who are to sit for any purpose, as also for any substantial questions of law such as the interpretation of the Constitution.

A sensitive issue regarding the powers of the Chief Justice of India as Master of Roster is of special relevance here. The powers of the Chief Justice of India (CJI) to determine the names of the Judges who would be included in a particular bench have become a matter of some controversy. In various cases such as *State of Rajasthan vs Prakash Chand* and *Campaign for Judicial Accountability and Reforms vs Union of India*, the Court reiterated that the Chief Justice is the Master of the Roster, and he alone has the prerogative to constitute benches of the Court and allocate cases to the benches thus constituted. There are two dimensions to the role of the Chief Justice: one as the 'first among equals' and this is generally applicable to his judicial function. It implies that the voices of the member of a particular Bench which includes the Chief Justice, are equally as important as the opinion of the Chief Justice's voice. The other dimension is his being the senior most judge who is empowered to exercise 'leadership' in the Court. In this role, he is the spokesperson and the representative of the Judiciary in its dealings with the Executive and the Government. Thus, in administrative functions, the Chief Justice's decision is final.[xxxvi] In the Ashok Pande vs Supreme Court of India, the Court stated: "The Chief Justice is guided by the need to ensure the orderly functioning of the court and the expeditious disposal of cases. The publication of the roster on the websites of the High Courts provides notice to litigants and lawyers about the distribution of judicial work under the authority of the Chief Justice. This Court was constituted in 1950. In the preparation of the roster and the distribution of judicial work, some of the conventions which are adopted in the High Courts are also relevant, subject to modifications having regard to institutional requirements."

Article 146 pertains to the officers and servants and expenses of the Supreme Court of India. Appointments to the various administrative posts in the Court are to be made by the Chief Justice (or any other Judge authorised by him) and it is he who shall determine the conditions of service of these personnel. Matters relating to salary, pensions, etc., will require the approval of the President of India. It is relevant to state here that the administrative expenses of the Court will be charged (and not voted) by the Parliament on the Consolidated Fund of India. Other fees and receipts taken by the Court shall form part of the Fund. It is also significant to note that though it is the President who approves the rules framed by CJI, the President has to act on the advice of the Council of Ministers. The difference in concept between charged and voted expenditure may be also kept in mind: charged expenditure is different from voted expenditure which requires the Parliament to approve it. Charge expenditure means expenditure charged in the Consolidated Fund of India and does not require any vote of approval from the Parliament. The salaries and allowances and pension payable to, or in respect of the judges of the Supreme Court, fall in the list of charged expenditures, along with other offices such as that of the President, the Chairman, and Dy Speaker of the Houses of Parliament, the expenses of the Comptroller and Auditor-General, etc.

Article 147 is the last article in Chapter IV of the Constitution dealing with the Union Judiciary. It is a residuary and clarificatory article stipulating that 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 regards the interpretation of the Government of India Act of 1935 (including any enactment amending or supplementing that Act) or of any Order in Council or order made thereunder, of the Indian Independence Act of 1947. The limited purpose that Article 147 serves is to clarify the meaning of references regarding any substantial question of law. It covers the interpretation of the Constitution along with that of the Government of India Act of 1935. The marginal heading of Article 147 is somewhat considered misleading. Also, the article does not lay down any rules, principles, or guidelines regarding the interpretation of the Constitution by the Supreme Court. However, Article 395 has repealed the Indian Independence Act, of 1947 and the Government of India Act of 1935. This was introduced into the Constitution based on the intervention of Dr. Tek Chand and Shri Krishnamachari, members of the Constituent Assembly during discussions in June and October 1949.

The High Courts: Chapter V of the Constitution deals with the High Courts in the States. It begins with **Article 214** which simply states that there shall be a High Court for each State. All High courts have the same status under the Constitution. A High Court means the entire body of judges appointed to the Court. A High Court judge is a constitutional authority and not a government servant. It also includes the establishment of a Bench outside the principal seat of the High Court. There can also be a common High Court for two States or more as has been provided for in Article 231.

Article 215 states that High Courts are Courts of record and shall exercise all powers of a court including the power to punish for contempt of itself. In this sense, they have inherent and plenary powers as well as the power to determine questions about their jurisdiction. Unless expressly or impliedly barred, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their powers. This has been mentioned in the MV Elisabeth case of 1993.[xxxvii] The matter pertained to certain financial issues arising out of maritime trade by a company in Andhra Pradesh. The Supreme Court expressed this view. "The High Court in India being courts of unlimited jurisdiction, the repository of all judicial power under the Constitution except what is excluded is competent to issue directions for the arrest of a foreign ship in the exercise of statutory jurisdiction or even otherwise to effectuate the exercise of jurisdiction. Since the jurisdiction to entertain a suit on tort or contract concerning cargo going out of the country in a ship is found to exist under the 1890 Act (English Colonial Courts Admiralty Act 1890) the High Court of Andhra Pradesh was competent to direct arrest of the foreign ship when it appeared in India waters."

As a Court of Record, powers to punish for contempt of itself inherently exist in the High Court. However, due process as laid down in the Contempt of Courts Act must be followed as has been prescribed in PN Duda's case[xxxviii] or the Anil Kumar Gupta vs K Suba Rao case of the Delhi High Court[xxxix].

Article 216 states that every High Court shall consist of a Chief Justice and such other Judges as the President may from time deem it necessary to appoint. The decision of the number of Judges in a High Court should have been a matter of executive function which is to be exercised by the Council of Ministers at its discretion.

Article 217 pertains to the appointment of the office of a Judge of a High Court which is done by the President of India under his hand and seal on the recommendation of the National Judicial Appointments Commission referred to in Article 124A. However, as we have seen in the earlier discussion with reference to Article 124, the Supreme Court declared on October 2015 in the *Advocates-on-Record Association vs Union of India* [2015 (11) Scale1:2015 (5) GLT (SC) 12] that the Constitution (Ninety-Ninth Amendment) Act 2014, and the National Appointments Commission Act, 2014, as void and restored the earlier collegium system of the appointment of judges to the higher Judiciary. The proviso to this article lists out circumstances where a Judge may resign, or may be removed by the President, or where the post become vacant. Only such persons as have held a judicial office for ten years or been an advocate of a High Court for the same period can be appointed as Judge of the High Court. The explanation at the end of the Article explains how the computation of the period of experience is to be done to qualify for such an appointment.

Here we may mention the decision taken by a five-judge bench in the *Supreme Court Advocates on Record Association vs Union of India*, known as the 'second judges' case[xl]. The combined opinion of the judges was recorded by Justice J Verma and can be summarised as follows: The process of appointment of judges to the Supreme Court and the High Courts is an integrated participatory consultative process and all the constitutional functionaries must perform their duties collectively. The Chief Justice of the Supreme Court and the Chief Justice for the High Courts must initiate the process. In the event of differing opinions, the opinion of the Judiciary, "symbolised by the view of the Chief Justice of India" will have primacy. In exceptional cases where for cogent reasons disclosed to the Chief Justice of India, the recommendee is not suitable, such an appointment need not be made. Appointment to the post of Chief Justice of India should be of the seniormost judge of the Supreme Court. The opinion of the Chief Justice of India has not mere primacy but has determinative in nature.[xli] Similar observations have also been made regarding the transfer of judges from one High Court to another.

It may be mentioned here that in matters of transfer, the opinion of the Chief Justice of India is not his personal opinion: it comprises the collective views of the two seniormost judges of the Supreme Court as well as the

senior Supreme Court judge who comes from the State concerned. This concept of plurality of judges in the formation of the CJI's opinion ensures there is no arbitrariness or bias.

Article 218 merely mentions that the provisions of clause Article 124 shall apply in relation to a High Court as they apply in relation to the Supreme Court with the substitution of references to the High Court for the Supreme Court.

Article 219 prescribes the oath or affirmation by Judges of the High Court to be made before the Governor of the State according to the form set out in part VIII of the Third Schedule, swearing in the name of God, or affirming that he or she would uphold the sovereignty and integrity of India and that he or she would perform the duties of the office without fear or favour, affection, or ill will.

Article 220 stipulates that no Judge of the High Court shall plead or act in any court or before any judge or authority except for the Supreme Court or the High Courts (other than where he has worked).

Article 221 pertains to the salaries of the High Court judges which are to be determined by the President of India. Clause (2) makes provision for allowances and other matters such as leave pension etc.

Article 222 deals with the transfer of Judges from one High Court to another, with the provision in Clause (2) for additional compensatory allowance as may be determined by the Parliament. While the article mentions the recommendation of the National Judicial Appointments Commission in such matters, as we have seen, the Commission Act was found to be void and the old system of recommendations of the collegium continues to be in existence. Such transfer can be more than once in a Judge's career and his consent need not be taken as the CJI's proposal alone is enough. This is not to be considered as punishment and the only consideration for such transfer should be the better administration of Justice and the proper functioning of the courts.

Article 223 deals with the provision of appointment of an Acting Justice of the High Court to be done by the President of India. Likewise, **Article 224** deals with the subject of the appointment of Additional and Acting Judges of the High Court. The circumstances in which this may be required are when the workload has temporarily increased or if a judge is unable

to perform his duties. The first provision is for additional judges and the second is for acting judges. In the same manner, Article 224A provides for the appointment of retired Judges, on their consent, at sittings of the High Court.

Article 225 states that the jurisdiction of, and the law administered, in the area of the Court, shall be the same as was there before the commencement of the Constitution. Further, the proviso to this article states if there were any restrictions imposed earlier in this jurisdiction, such restrictions shall not apply. The proviso after its deletion through the Constitution (42nd Amendment) Act, 1975 (w.e.f 1 February 1977), was thereafter restored through the Constitution (44th Amendment) Act, 1977 (w.e.f 20 June 1977). It is interesting to note that the Government of India Act of 1935 barred the jurisdiction of the High Court in matters related to 'revenue'. The 42nd Amendment Act, passed at the time of the Emergency by the Smt. Indira Gandhi's government reintroduced this restriction in the jurisdiction given the provision for the establishment of separate Tribunals concerning revenue matters. Such separate Tribunals were enabled through the insertion of Article 323B by the same Amendment Act. More of this matter a little later. When the government changed post-Emergency, the Janata government, reintroduced the proviso to Article 225.

Article 226 refers to the powers of the High Court to issue certain writs for various purposes. This entire article was substituted for the earlier Article 226 by the Constitution (Forty-Second Amendment) Act, with effect from 1 February 1977. These drastic changes were significantly rolled back by the 43rd and 44th Amendment Acts and previous provisions were substantially restored. Clauses (2) and (3) of the Article details some procedural matters related to the exercise of these powers by the High Courts. We have already discussed the various forms of writs available to judicial forums for differing purposes about the Supreme Court. These self-same powers lie with the High Courts as well, though it cannot be in derogation of the powers exercised by the Apex Court. The kinds of writs under Article 226 are being reiterated here: habeas corpus, mandamus, certiorari, quo warranto, and prohibition.

Durga Das deals with this Article in the following terms stating that it confers extraordinary jurisdiction on the High Courts to issue prerogative rights for the enforcement of Fundamental Rights and other purposes[xlii]. Yet, these powers are to be used sparingly and should not be used in a

discretionary manner contrary to law. These powers must be understood in the context of the philosophical concept of judicial review, which is the heart and soul of our Constitution. The Judiciary is the ultimate interpreter of the Constitution and is assigned the task of determining the context and scope of the powers conferred on each branch of the Government, ensuring that each does not transgress its limits. Article 226 is couched in the widest terms possible and can be resorted to about any law where violations of constitutional provisions are apprehended. There are no unreviewable discretions under this constitutional dispensation.[xliii] The High Court while exercising powers of judicial review is concerned with the illegality, irrationality, and procedural impropriety of any order passed by the State. The court sits in judgment only on the correctness of the decision-making process and not on the correctness of the decision itself. If the High Court is of the view that vital evidence has been ignored or the provisions of any Act have been misconstrued or its scope misunderstood, the constitutional power of the High Court can be invoked to set right the errors and to prevent injustice to the party complaining. "… the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by the judicial experience and practical wisdom of the Judge." [xliv]

The proceedings under Article 226 can be either civil or criminal. Further, it can be invoked in the original, appellate, or revisional jurisdiction of the High Court. As stated earlier, the administrative action is subject to judicial review and we can find three grounds for such review in the myriad of cases, which act as precedents: these are 'illegality', 'irrationality' and 'procedural impropriety." Ordinarily, one organ of the State should not interfere in the working of another. As long as an infringement of Fundamental Rights is not shown, there is no cause for the High Court to intervene in the actions of another organ of the State. It is important to realise that courts in India do not possess exclusive jurisdiction in equity as in England: our courts exercise jurisdiction in both equity as well as law, though exercise in equity is always subject to the provisions of law. Under these provisions, the Court has to power to grant interim relief, quash criminal proceedings, mould the nature of the relief requested, examine disputed questions of fact, etc. Of late, the Courts have been admitting a class of cases under the classification 'public interest litigation'. Where the public interest is undermined by arbitrary and perverse executive action, it would be the duty of the High Court to issue a writ. "…the Court cannot

close its eyes and persuade itself to uphold publicly mischievous executive actions which have been so exposed. When arbitrariness and perversion are writ large and brought out clearly, the court cannot shirk its duty and refuse its writ." [xlv]

Article 227 states that the High Court shall have superintendence over all courts in its jurisdiction**.** Clause (2) makes it clear that this includes the power to call for returns from the subordinate courts, to make general rules, and prescribe forms for regulating the practice and procedure in the courts. According to Clause (3), the High Court also has the power to settle the tables of fees to be allowed to the staff and officers of such courts and attorneys, leaders, etc. As for the Supreme Court, the High Court will also not have any powers of superintendence over any court or tribunal relating to the Armed Forces. The scope of the power of the High Court over the subordinate courts is wide to ensure that the Lower Courts and Tribunals discharge their duties and obligations. Not only does this mean administrative superintendence but also the powers of judicial revision. Yet, it is clear that this power of superintendence is not to be misused to influence the working of the Lower Courts.

The Subordinate Courts: Articles 233 to 237 deal with matters related to the subordinate courts. **Article 233** relates to the appointment, posting, and promotion of District Judges which is to be made by the Governor of the State in consultation with the High Court concerned. Clause (2) also states that a person not in service of the Union or the State can be appointed as District Judge only if he has put in at least seven years as an advocate or pleader and is recommended by the High Court for appointment. Consultation here does not mean an empty formality, but an effective and meaningful consultation where the views of the High Court have to be obtained before such an appointment.

Article 233A deals with the validation of appointments of, and judgments, etc., delivered by, certain District Judges and was inserted by the Constitution (Twentieth Amendment) Act, 1966. In intent, it was to validate with retrospective effect certain appointments made prior to 1966, otherwise than as per the provisions of Article 233 or Article 235.

Article 234 deals with the subject of recruitment to the Judicial Service and states that such appointments shall be made by the Governor of the State in consultation with the State Public Service Commission and the High Court. Even the removal of judicial service officers is to be effected by the Governor.

Article 235 states that the High Court shall exercise control over the subordinate courts, including such matters as posting and promotion, transfer, grant of leave, and disciplinary control. suspension, removal from service, etc. The High Court also exercises some control over the Consumer Forums and the Family Courts.

Article 236 is titled 'Interpretation' and clarifies the exact meaning of 'District Judge' and 'judicial service'. The term 'District Judge' includes a Judge of a civil court, additional district and joint District Judges, chief presidency judge, etc. The expression 'judicial service' means a service consisting exclusively of persons intended to fill the post of District Judge and other civil posts inferior to the post of District Judge.

Article 237 states that the provisions of this Chapter VI also apply to certain classes of magistrates such as may be publicly notified by the Governor of the State. The purpose of this Article was to cover certain magistrates who were administering criminal justice, who were separate from the Civil Judiciary and not under the control of the High Court but under the control of the respective government. With this Article, they too became a wing of the judicial service of the State.

This covers the specific provisions related to the Judiciary in the Constitution. However, we may mention in passing the institution of the Tribunals that was set up by the Constitution (Forty-Second Amendment) Act, 1976. The Swaran Singh Committee in 1976 noted that the High Courts were burdened with service cases by public servants. It recommended setting up three sorts of Tribunals: (i) administrative tribunals (both at the National level and State level) to adjudicate on matters related to service conditions, (ii) an all-India Appellate Tribunal for matters from labour courts and industrial tribunals, and (iii) tribunals for deciding matters related to various sectors (such as revenue, land reforms, and essential commodities). It further recommended that the decisions of the Tribunals should be subject to scrutiny by the Supreme Court. The Amendment empowered Parliament to constitute all three forms of

Tribunals. Articles 323A and 323B were inserted in the Constitution of India through this Amendment. Article 323A empowered Parliament to constitute Administrative Tribunals (both at the Central and State level) for adjudication of matters related to recruitment and conditions of service of public servants. Article 323B specified certain subjects (such as taxation and land reforms) for which Parliament or State Legislatures may constitute Tribunals by enacting a law. In 2010, the Supreme Court clarified that the subject matters under Article 323B are not exclusive, and legislatures are empowered to create Tribunals on any subject matter under their purview as specified in the Seventh Schedule of the Constitution.[xlvi]

In broad terms, we may say that the Supreme Court has been largely insulated from external influences. With time it has expanded its constitutional powers, often filled the governance vacuum, championed human rights, and attempted to reduce bureaucratic and political corruption. It has often issued guidelines that have tended to replace the legislative void, notably in matters of sexual harassment[xlvii], police reform[xlviii], the procedure for arrest,[xlix] etc. It has encouraged public interest litigations that have benefitted economically disadvantaged groups. More significantly, such litigation has successfully challenged Section 377 of the Indian Penal Code which had termed same-sex relationships illegal, giving relief to the LGBTQ community.

Yet, the Supreme Court has also been castigated, especially for its conduct during the Emergency under Smt. India Gandhi, where for a brief spell it was apprehended that the Judiciary has lost its independence and had become an instrument for executive hubris. A recent case of a Chief Justice of India having been accused of sexual misconduct, sitting in judgment in his own case, has been severely criticised everywhere. Preferential treatment of influential litigants has been observed in several cases. The Supreme Court, in many senses, can be called the most powerful court in the world. However, the mounting number of cases and a large backlog has been hampering the delivery of justice for many years now. As per the latest statistics at the end of 2021, more than 77,000 cases were pending in the Supreme Court, and about 44 million in the Courts of India, up 19% since the previous year. More than a lakh of cases has been pending in the judicial system of the country for more than 30 years, simply destroying the principle of delivery of justice. There are allegations that the courts are packed with kith and kin of the Judges themselves. There are no reservations for SCs, STs, or Other Backward Classes in the High Courts and

the Supreme Court, forcing the then President of India KR Narayanan to comment (in 1988): "It would be consonant with constitutional principles and the nation's social objectives if persons belonging to weaker sections of society like SCs and STs…are given due consideration. Eligible persons from these categories are available and their under-representation or non-representation would not be justifiable."[l]

The relationship between the Judiciary and the Legislature has been commented upon very often and particular reference has been drawn to the period in the early 1970s when it appeared that the Judiciary was asserting itself to protect certain basic features of the Constitution to the detriment of the Legislature. The Kerala case (Writ Petition (Civil) 135 of 1970), also known as the Kesavananda Bharati judgment[li], is a landmark decision of the Supreme Court of India that outlined the basic structure doctrine of the Indian Constitution. The case is also known as the Fundamental Rights Case. The Court asserted itself against what it considered to be legislative excess by insisting that certain features are fundamental to the Constitution and the Republic of India that are fundamental in nature and cannot be altered by legislative intent. Various legislative enactments were sought to 'correct' these judicial pronouncements and the infamous 42nd Amendment of Smt. Gandhi in 1976 is the prime example of this trend. An attempt was made to limit the powers of the Judiciary, and especially of the High Courts. The Legislature's desire to effect curtailment of Fundamental Rights to achieve the purpose of the Directive Principles of State Policy became a matter that was contested, but later grudgingly accepted by the Supreme Court over the course of many judgments.

In overall though, the role of the Judiciary has been of paramount significance and importance for the growth of our nation toward maturity and compassionate governance. Fundamental Rights have been the particular preserve of the Supreme Court and over the years many pronouncements have been made that have protected and also expanded their content and intent. Legislation about better environmental laws, the right to education and information, nutrition for children, better health coverage, the need for transparency in executive decisions, etc have flown from various judgments of the Supreme Court.

We cannot but appreciate the vision of Ambedkar who was perhaps the greatest apostle in the Constituent Assembly of a unified Judiciary. "A dual Judiciary, a duality of legal codes, and a duality of civil services, as I said, are

the logical consequences of a dual polity which is inherent in a federation. The Indian federation, though a dual polity, has no dual Judiciary at all. The High Courts and the Supreme Court form one single integrated Judiciary, having jurisdiction and providing remedies in all cases arising under the constitutional law, the civil law, or the criminal law." For him, such a judicial system along with uniformity of law was "essential to maintaining the uniformity of the country."[lii]

As Chandrachud[liii] put it, the Indian Judiciary is insulated from vibrant checks and balances. Its 'democratic' insulation arises from its use of contempt of law to restrict criticism, its permissive view of libellous speech directed against 'other' officials, and controversially, the use of English as the official language of the court. Its political insulation arises from its ability to determine its composition, and the inability of the political establishment to effectively remove allegedly tainted members of the Judiciary. Both these forms of insulation embolden the Judiciary on the one hand, while directly and indirectly restricting participation on the other, and further threaten to exacerbate the severe problems of judicial administration, delay, and corruption.

Our approbation of the Constitution of India received certain trenchant remarks made by Sir Ivor Jennings, the constitutional expert, who had helped create the constitutions of other countries such as Nepal. As he began his lectures at Madras University in 1951, he summed up his cynicism with these words: "Too long, too rigid, too prolix." Over the series of his lectures, his views focused on the following: the Constitution's rigidity and superfluous provisions, Fundamental Rights and Directive Principles of State Policy, and some aspects of India's federalism.

History proved him wrong. The average life spans of constitutions according to a study by the University of Illinois, is but about eighteen years.[liv] Yet, the Indian Constitution is an example of the theory that fractionalized environments produce constitutional stability since no one group can dominate. It is also a testimony to the fact that an active Judiciary has taken the pains to interpret the Constitution in a manner that is flexible and suited to the changing aspirations of the people. The fact that there have been more than a hundred constitutional amendments in the years after 1950 reveals the ability of the body politic to accommodate changes and make alterations that transform the socio-political milieu of the country for the better. The Judiciary has been proactive and has nudged the country into

taking decisions and passing laws that have in the long run proved useful to the needs of the times. Judicial positivism and public ratification have helped create the more enduring Constitution that we have.

We can conclude with the words of the first Prime Minister of the country who always held a clear view about the independence of the Judiciary and its role in the growth of a nation. Many may not know the role he played in ensuring that the Supreme Court should be housed in a magnificent structure, and personally chose the present site of the Court and got it constructed. A beautiful building modelled on the European architectural style tempered with ideas of the Indian conception of Justice. He said, "…we must respect the Judiciary, the Supreme Court, and the other High Courts in the land. As wise people, their duty is to see that in a moment of passion, in a moment of excitement, even the representatives of the people do not go wrong; they might. In the detached atmosphere of the courts, they should see to it that nothing is done that may be against the Constitution, that may be against the good of the country, that may be against the community in the larger sense of the term."[lv]

Notes

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ii Clauses 46-52 of the Nehru Report 1928, accessible at https://www.constitutionofindia.net/historical_constitutions/nehru_report__motilal_nehru_1928__1st%20January%201928

iii Constitutional Proposals of the Sapru Committee, Padma Publications, (Chapter V, para 235, Page 190), accessible at http://14.139.60.153/handle/123456789/855

iv Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, (Oxford University Press, 1966), 204.

v KM Munshi, *Constituent Assembly Debates*, 17 September 1949, accessible at https://indiankanoon.org/doc/719983/?type=print

vi Alladi Krishnaswamy Ayyar, *Constituent Assembly Debates*,17 September 1949, accessible at https://indiankanoon.org/doc/719983/?type=print

vii G Durgabai, *Constituent Assembly Debates*, 7 September 1949 (Part II), accessible at https://indiankanoon.org/doc/1171678/

viii Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, (Oxford University Press, 1966).

ix Report of the Ad hoc Committee of the Supreme Court, para 3, dated 21 May 1947; Reports, First Series, page 63, attached as an appendix to the UCC report of 4 July 1947.

x Granville Austin, Supra: 216-17.

xi William O Douglas, *From Marshall to Mukherjea, Studies in American and Indian Constitutional Law*, 332.

xii Arghya Sengupta, *Independence and Accountability of the Indian Higher Judiciary*, Cambridge University Press, 2019. Quoted in the Scroll of 8 May, 2019 and accessible at https://scroll.in/article/922597/when-india-decided-how-to-appoint-judges-independence-did-not-imply-insulation-from-oversight

xiii Ibid.

xiv Merriam-Webster dictionary: a government, power, or sovereignty within a government, power, or sovereignty.

xv Arghya Sengupta, Supra.

xvi Munshi's note to the Ad hoc Committee on the Union Judiciary quoted in Hans Raj Khanna's *Making of India's Constitution,* (Eastern Book Company 1981), 115.

xvii Durga Das Basu, *Shorter Constitution of India*, (Lexis Nexis, 16th Edition, 2021), 479.

xviii All India Judges Association vs the Union of India, AIR 1992 SC 165. The judgment issued directions for the setting up of an All India Judicial Service and for bringing uniform conditions of service for members of the subordinate judiciary.

xix Mangal Chandra Jain Kagzi, *The Indian Administrative Law. Second Edition, Delhi Metropolitan Book Co. 1969.*

xx The Supreme Court (Number of Judges) Amendment Act 2019 (37 of 2019) raised the number of judges to 33.

xxi Supreme Court Advocates-on-record Association vs Union of India AIR 2015 SC (suppl) 2463 accessible at https://indiankanoon.org/doc/66970168/. The judgment3 was quoting Laurence H. Tribe (American Constitutional Law) Second Edition, Page 2 of Chapter 1 "Approaches to Constitutional Analysis"

xxii Durga Das Basu, Supra: 931-32. https://indiankanoon.org/doc/516669/

xxiii Sunup ET vs CANNS Employees Association, (2004) 8 SCC 683,688 (para 16), accessible at https://indiankanoon.org/doc/813658/

xxiv Ibid.

xxv SC Advocates-on-Record Association vs Union of India, AIR 1994 SC 268: nine-judge decision, decided by the majority (7:2), accessible at https://indiankanoon.org/doc/753224/

xxvi Special Reference No 1 of 1998, AIR 1999 SC 1: (1998) 7 SCC 739: (1998) 5 Scale 36, accessible at https://indiankanoon.org/doc/543658/

xxvii T Sudhakar Rao vs Government of Andhra Pradesh (2001) 1 SC 516, 533 (para 22), accessible at https://indiankanoon.org/doc/727569/

xxviii Durga Das Basu, Supra: 968.

xxix Durga Das Basu, Supra: 1025.

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xxxii Kalyan Chandra Sarkar v Rajesh Ranjani AIR 2005 SC 972, accessible at https://indiankanoon.org/doc/932761/

xxxiii From the judgment in the case of Supreme Court Bar Association vs Union of India, 1998 4 SCC 409 quoted in the Kalyan Chandra Sarkar case mentioned above.

xxxiv Ibid.

xxxv Durga Das Basu, Supra: 1138.

xxxvi State of Rajasthan vs Prakash Chand AIR 1998 SC 1344, accessible at https://indiankanoon.org/doc/865812/Campaign for Judicial Accountability vs Union of India (2018) SC 13, accessible at https://indiankanoon.org/doc/168661293/and Ashok Pande vs Supreme Court of India AIR online 2018 SC 1344, accessible at https://indiankanoon.org/doc/98391116/

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xxxviii PN Duda vs P Shiv Shanker (1988) 3 SCC 167, accessible at https://indiankanoon.org/doc/681713/

xxxix Anil Kumar Gupta vs K Suba Rao (1974) ILR 1 Del 1.

xl SC Advocates-on-Record Association vs Union of India, AIR 1994 SC 268. Supra, accessible at https://indiankanoon.org/doc/753224/

xli Durga Das Basu, Supra: 1273.

xlii Ibid: 1302-03.

xliii Election Commission of India vs Union of India (1995) Supp 3 SCC 643 para (8), accessible at https://indiankanoon.org/doc/1350339/

xliv State of Andhra Pradesh vs PV Hanumantha Rao AIR 2004 SC 627, accessible at https://indiankanoon.org/doc/538739/

xlv Chaitanya Kumar vs State of Karnataka AIR 1996 SC 825 (Para 10), accessible at https://indiankanoon.org/doc/114379/

xlvi From *The Tribunal System in India,* accessible at https://prsindia.org/billtrack/prs-products/the-tribunal-system-in-india-3750

xlvii Vishaka vs State of Rajasthan AIR 1997 SC 3011, accessible at https://indiankanoon.org/doc/1031794/

xlviii Prakash Singh vs Union of India (2006) 8 SCC 1, accessible at https://indiankanoon.org/doc/1090328/

xlix DK Basu vs State of West Bengal (1997) 1 SCC 416, accessible at https://indiankanoon.org/doc/501198/

l Extract from the article "*44 million pending court cases: How did we get here?*" by Sandipan Deb in Money Control dated 5 December 2021, accessible at https://www.moneycontrol.com/news/trends/features/44-million-pending-court-cases-how-did-we-get-here-7792511.html

li Keshavananda Bharati vs State of Kerala, accessible at https://indiankanoon.org/doc/257876/

lii Constituent Assembly Debates VII, 1, 37.

liii Abhinav Chandrachud, "The Insulation of India's Constitutional Judiciary," *Economic and Political Weekly,* Vol XLV, no. 13, (March 27, 2010).

liv Thomas Ginsburg, Zachary Elkins, and James Melton, *The Lifespan of Written Constitutions*, (University of Illinois, College of Law, 2007).

lv Alice Jacob, "Nehru and the Judiciary," *Journal of the Indian Law Institute,* Vol 19, no. 2 (April-June 1977), 169-181.

Chapter VIII:

The Constitution and the Executive

Introduction: The Constituent Assembly was keenly aware of the choices that it faced in creating the ideal executive structure to administer the newly freed country. Granville Austen correctly described the dilemma by identifying the choices that lay before it. It was clear that the administrative structure had to be based on direct and responsible government, thereby rejecting the indirect village-based system that Gandhiji had advocated. The Euro-American constitutional template provided three alternatives: the American Presidential system, The Swiss elected executive, and the British Cabinet government. The answer lay in the context of the past - of a cabinet government that had been imbibed into the political consciousness of the country- and the future, in terms of the need for "strength and quick effectiveness, for huge strides in industrial, agricultural, and social development…in the rapidly moving world of the mid-twentieth century, a new Indian had to be built almost overnight. How was the leadership for this task to be provided? What type of Executive would be stable, strong, effective, and quick, yet withal, democratic."[i]

After much discussion, the Assembly chose a slightly mutated version of the British system, with a President indirectly elected for five years, functioning as the constitutional head of state, comparable to the British monarch. The Vice President, similarly, elected, would be the chairman of the Upper House. A Council of Ministers headed by the Prime Minister and collectively responsible to the Parliament would aid and advise the head of state. The President would be the nominal head, and the Prime Minister the real head.

The provincial governments were also provided for in the Constitution with a second set of executive provisions. The Governors of the Provinces would be appointed by the President and their executive powers would

mirror the New Delhi system in many ways. At one point of time during the discussions of the Assembly, it was considered whether the Governors could be directly elected, not mere figure heads, but with powers to be exercised at their discretion. In the end, "a combination of tighter federal structure and a belief in the desirability of uniform executive procedures, had worked to make the authority of the Governors and the President nearly identical.[ii] Nehru explained he favoured nominated Governors because it would keep the centre in touch with the units and would remove a source of possible "separatist tendencies".[iii]

Many details had to be sorted out. India would be a republic, not a monarchy, such as the one it had been ruled by all these years. In England, the relationship between the Executive and the Parliament was determined by unwritten conventions as it had no written constitution. In Ireland, however, these same conventions were transcribed into the written Constitution that it possessed. The problem was all the more real as, even before the Assembly started discussions, its early deliberations had been around the subject of Fundamental Rights, free elections based on universal suffrage, and the manner in which the legislatures would be constituted. As a consequence, the nature of the Executive had not been much debated. The two major reports recommending the form of the government, of Nehru[iv] and Sapru[v], had made some suggestions in this regard. The former recommended a Governor-General as head of state with an executive Council of Ministers having collective responsibility, chosen, and operating as a responsible government. The latter report was somewhat in two minds, proposing two alternatives. One, of a Parliamentary type but including special provisions for minority representation. This reflected the nation's preoccupation with communal issues that it was facing in those days. The second was for a Council of Ministers chosen by proportional representation.

The thoughts of the Constituent Assembly: As Austen explains, during the early days of the working of the Constituent Assembly, many members drafted the executive provisions, some at their own initiative, some in response to a questionnaire drafted by Shri BN Rau. This questionnaire was exhaustive and explored issues regarding the type of Executive desired, its formation, etc. In March 1947, his questionnaire was sent to the Central Assembly and the Legislatures of the Provinces; but it could elicit only a couple of responses. The efforts of KM Munshi were by far the most detailed, preferring the British system over the American presidential government, mainly because of the mutual relationship between the

members of the Government and Legislature. "The Parliamentary system produces a stronger government, for (a) Members of the Executive and Legislature are overlapping, and (b) The heads of government control the Legislature."[vi]

When the same questionnaire was submitted to the 15-member committee of the Union Constitution Committee, it received five responses. They came from KT Shah, SP Mookerjee, KM Panikkar, AK Ayyar, and NG Ayyangar. All of them supported a cabinet system of government with a constitutional head of state.[vii] All these replies were to be the basis of a white paper prepared by BN Rau titled 'Memorandum on the Union Constitution', which provided for a President as the constitutional head, to exercise executive authority with the aid and advice of ministers. Simultaneously, the parallel Provincial Constitution Committee, chaired by Sardar Patel, also decided to have 'the parliamentary system of the constitution, the British type of constitution, with which we are familiar."[viii]

It is Austen again who enlightens us on the subsequent developments. The Union Constitution Committee designated the President of the Republic as the Commander-in-Chief of the armed forces. It empowered him with the authority to refer back bills to the Parliament as well as to dissolve the lower house on the advice of his ministers. It was unambiguous in denying him discretionary powers. As regards the Prime Minister, while at one time the Committee had considered that he should be the person most likely to command the majority in the lower house, it finally recommended simply that there should be a council of ministers headed by a Prime Minister to aid and advice the President.[ix]

These ministers would be directly elected by the voting population, based on universal franchise and not proportional representation. Nehru opposed the very idea of election of ministers by proportional representation as he could think of "nothing more conducive to creating a feeble ministry and a feeble government than this business of electing them by proportional representation."[x] Finally, on 28 July 1947, just eighteen days before India became independent, the Constituent Assembly adopted the last of the principles regarding the Union Executive drafted by the Union Constitution Committee. Yet for some time the debates continued. Those who advocated the American presidential form of government were reminded by AK Ayyar

that "an infant democracy cannot afford to take the risk of a perpetual cleavage, feud or conflict, or threatened conflict between the Legislature and the Executive."[xi]

All these suggestions were gathered together by BN Rau in a second memorandum dated 21 June 1947 which was presented to the Assembly by Nehru himself. He explained that though the President had no 'real power', he was in a position 'of great authority and dignity'. He confessed that though he had "a sneaking sympathy with the proposition that a President should be a non-Party man", he realized that that would be impracticable and "that the best that could be hoped for was the President's impartial behaviour in office."[xii] It was not proposed that he be elected by direct elections as he would not have any real powers. It was necessary to emphasize the ministerial character of the Government, that power resided in the Ministry and the Legislature and not in the President as such. He would be elected by an electoral college consisting of members of the lower house of the federal parliament and the lower houses of the provinces, where the vote was calculated according to a formula devised by NG Ayyangar to give proper weight to the provincial population.

Most members of the Assembly, and particularly Nehru, were at pains to emphasize a direct, parliamentary constitution and not an indirect Gandhian one. A new unity could be created only by breaking down the old loyalties that had fragmented and compartmentalized Indian life. They understood that having a fixed executive of ministers elected by proportional representation would be a step backwards from the goal of national consciousness.[xiii]

Another concern agitated the members of the Assembly. If the idea of proportional representation is to be rejected, then who could care for the interest of the minority communities? Ayyangar and Ayyar suggested that the President, in appointing ministers should have due regard to minority interests and geographical considerations. Jagjivan Ram, leader of the Congress Untouchables recommended that seats in cabinets be reserved for minorities. This was, however, rejected by the sub-committee by a narrow margin. Six weeks before the completion of the Constitution, minority representation in the Executive was left to convention. This arrangement has worked reasonably well.

The sub-committee felt that national interest would be better served by including an Instrument of Instructions as a schedule to the Constitution, similar to that in the Government of India Act 1935 which would encourage the Governor and the President to appoint members of important minority communities to the ministries, as far as was practicable. The draft constitution, however, provided this only for the Governor and not for the President. To correct this, an Amendment was proposed later providing for similar directions for the President as well. Finally, even this was omitted. With the Instrument of Instructions removed, the protection of parliamentary government was left to convention, the vigilance of the Parliament, and ultimately to the will of that power which is the true political sovereign of the state - the people.

The Constituent Assembly had placed its faith in the model of parliamentary executive, though, with some justification, they had some suspicions about executive powers. They had been subject to arbitrary executive actions for so long under foreign colonial rule. Thus, the Constitution was designed to have many provisions to keep the executive powers in check. The Council of Ministers was collectively responsible to the Legislature. The exercise of emergency powers was subject to review by the Union Parliament. The curtailment of central authority and the vesting of the state legislatures with a wide swathe of powers was also designed in this direction. But most significant was the idea, moved by BN Rau, for the creation of a body, separate from, and in addition to the cabinet, in the form of a council of states, to act as "a sort of Privy Council, whose advice shall be available to the President whenever he chooses to obtain it in all matters of national importance in which he is required to act in his discretion. The idea came from the Irish Constitution and has been described in his *Precedents*.[xiv] Rau had attempted to restrict the powers of the President through the Council of States acting as a brake on the authority of the President in his use of discretionary powers. The Union Constitution Committee rejected the idea of the President exercising arbitrary powers: memories of the colonial government's imperial exercise of powers were too fresh in the collective memory to permit this. The conduct and supervision of elections were left to an independent commission, a non-party, quasi-judicial body. Even the powers of the President in times of emergency were curtailed. The Executive could declare an emergency, but it has to present its justification to the Parliament for approval.

Another issue that absorbed the attention of the Constituent Assembly, was whether the traditional conventions of the cabinet government as practised in England, should be included as clear and unambiguous written provisions in the Constitution. In the end, the Union Constitution Committee omitted all reference to the authority of the President, to his relations with the Council of Ministers (except that its function was to aid and advise the President), and with the Cabinet to the Parliament. In September 1947, Rau made some significant contributions, adding that the Cabinet was collectively responsible to the House of the People, a major feature of a constitutional republic. Rau also gave the President the power to return a legislation for re-consideration, though he omitted to mention the procedure by which the Parliament could re-pass the legislation. This lapse was removed only in May 1949, when provision was made for the re-passage of legislation over a presidential veto. The drafting committee clarified the relationship between the Council of Ministers and the President: The Prime Minister was obliged to inform the President about ministerial decisions and proposed legislations and to provide any information the President desired. It was Ambedkar who suggested that, in the fashion of the Parliament in the United Kingdom, the President should address each new session of the Parliament. It was proposed that the President could not serve more than two terms as head of state, a provision taken from the Irish Parliament. Yet, the final version did not place any such restrictions, simply stating he would be eligible for re-election.

In the years after the promulgation of the Constitution of India, with parliamentary executives at both the Centre and the States, the Executive has functioned very much as envisaged by the Constituent Assembly. With the one exception of the overreach of the Parliament in the period of the Emergency under the stewardship of Smt. Gandhi, the role of the Executive has been within the bounds defined for it within the Constitution.

A perusal of the specific provisions of the Constitution may be in order at this stage. Chapter I of Part V of the Constitution deals with the subject of the Executive under the Union. Starting with Article 52 this goes on until Article 78. **Article 52** simply, and grandly, states that there shall be a President of India. (Needless to say, where in the paragraphs below, where the pronoun used is he, it also includes the feminine.) **Article 53** goes on to explain that the Executive power of the Union shall be vested in him and shall be exercised by him directly or through the officers subordinate

to him by the Constitution. Clause (2) of Article 53 makes it abundantly clear that the Supreme Command of the Defence Forces of the Union shall be vested in the President. Clause (3) further clarifies that this does not mean that the functions conferred on the State Governments, or any other authority shall be deemed to be transferred to the President or cannot be transferred by Parliament to authorities other than the President.

Article 54 describes the election of the President who is elected by an electoral college comprising of the members of both Houses of Parliament and the elected members of the Legislative Assemblies of the States. The manner of the election of the President is described in **Article 55,** which exhorts that as far as practicable there shall be uniformity in the scale of representation of the different states in this election. Clause (2) describes how such uniformity can be achieved to ensure that there is *inter se* parity between the states and the Union. Thus, each elected Member of Parliament and the member of the Legislative Assemblies are assigned a certain number of votes. The Member of the Legislative Assembly shall have as many votes as there are multiples of one thousand in the quotient obtained by dividing the population of the state by the total number of elected members of the Assembly. If, after this calculation, the remainder is more than five hundred, the vote of the member is increased by one. Further, each elected Member to the Houses of Parliament shall have such number of votes assigned to the members of the Legislative Assemblies of the states by dividing the total number of votes assigned to the members of the Legislative Assemblies of the states by the total number of elected members of both Houses of Parliament, fractions exceeding one-half being counted as one and other fractions disregarded.

Article 56 defines the term of office of the President as five years from the date he enters his office, though he shall continue in office until his successor enters his office. Of course, he can resign by sending his letter to the Vice President which is immediately to be forwarded to the Speaker of the House of the People. He can also be removed from office by following the procedure stated in Article 61. **Article 57** permits his re-election to office. The qualifications for election as President have been listed in **Article 58**: he or she has to be a citizen of India, having completed the age of thirty-five years, and is qualified to be elected to the House of the People. He should not be holding an office of profit under the government of India or the State Governments or any other authority. On becoming President, **Article 59** states that he will not be a member of either House

of the Parliament or a House of Legislature in the states, it being deemed that he has vacated his seat on entering that office. Of course, he cannot hold any other office of profit. He is entitled to the use of his official residences, the Rashtrapati Bhawan, without rent and shall also be entitled to such emoluments, allowances, and privileges as may be determined by Parliament by law, which cannot be diminished during his term of office. **Article 60** specifies the form of the oath or affirmation to be made by the President in the presence of the Chief Justice of India: It states that he or she will faithfully execute the office of the President of India "and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and wellbeing of the people of India." It is interesting to note that the Presidential oath as prescribed in Article 60 is different from that prescribed for others. Parliamentarians, legislators, ministers, judges, etc. swear to 'uphold the sovereignty and integrity of India' while the President pledges to 'preserve, protect and defend the Constitution' to the best of their abilities.

As mentioned above, **Article 61** describes the procedure to be adopted for impeachment of a President. Either House of Parliament can move the charge, though at least one-fourth of the total members of the House shall have to send a notice in writing with at least fourteen days' notice period regarding their intention to move the resolution. This resolution has to be passed by a majority of not less than two-thirds of the total members of the House. When a charge has been so preferred by a House, the other House shall investigate the charge while giving the President the right to be represented in the investigation. If, as a result of such an investigation, a resolution is passed by the majority of not less than two-thirds of the total membership of the House that investigated the charges, such resolution shall have the effect of removing the President from his office from the date on which such resolution is passed.

Article 62 stipulates that the process of holding elections to fill the vacancy of the President's office should be completed before the expiration of the term of the office of the President. In case the vacancy occurs because of the death or resignation or removal from office, the election to fill the vacancy shall be held not later than six months from the date when the vacancy occurred. A person thus elected shall continue in office for the full term of five years.

Articles 63 to 69 are about the office of the Vice President. **Article 63** declares that there shall be a Vice President of India. **Article 64** designates him to be the ex-officio Chairman of the Council of States, though when he is holding the office of the President in his absence, illness, resignation, or removal, he will not perform the duties of the Chairman of the Council of States. **Article 65** authorises the Vice President to hold the office of the President in case of death, resignation, or removal from office until the date when the vacancy is filled in. In case the President is unable to discharge his functions owing to illness or absence, the Vice President shall discharge his duties with all the powers and immunities as the President enjoys and shall be entitled to such emoluments, allowances, and privileges that he enjoys. **Article 66** deals with the election of the Vice President. A candidate for such elections has to be a citizen of India having completed thirty-five years and is qualified to be a member of the Council of States. He shall be elected by a college of members of both Houses of Parliament in accordance with the system of proportional representation using the single transferable vote through a secret ballot. **Article 67** states that the term of his office shall be for five years, though he will continue to be in office until his successor enters his office. Like the President, he too can resign from his office, or be removed by a resolution of the Council of States, after a fourteen-day notice period has been given to move the resolution. This resolution has to be passed by a majority of all the then members of the Council and agreed to by the House of the People.

Article 68 states that the election to fill the office of the Vice President when his term expires must be completed before the expiration of such term. However, if the vacancy occurs due to resignation or removal, then the process must be completed as soon as possible after the occurrence of the vacancy. The person elected to fill the vacancy shall be entitled to hold the office for the full term of five years. The form of the oath or affirmation is specified in **Article 69.**

Article 70 empowers the Parliament to make such provisions as it thinks fit for the discharge of the functions of the President in any contingency not provided in the Chapter. **Article 71** states that all doubts and disputes pertaining to matters related to the election of a President or a Vice President shall be enquired into and decided by the Supreme Court, whose decision shall be final. If upon such enquiry, the election of a President or Vice President is declared void by the Supreme Court, the acts done by a President or Vice President before the date of the decision of the Supreme

Court shall not be invalidated because of that declaration. Of course, the Parliament can regulate by law any matter reacted to the election of the President or the Vice President.

Article 72 empowers the President to grant pardons, etc., and to suspend, remit, or commute sentences of any persons convicted of any offence in certain cases such as a punishment by a martial court, or where the punishment or offence against any law relating to a matter to, cases which the Executive power of the Union extends, and in all cases where the sentence is one of death.

Presidents have near-complete immunity while in office. They are not answerable to any court for the exercise and performance of the powers and duties of their office or for any act done or purporting to be done by them in the exercise and performance of their powers and duties. They also enjoy complete immunity in their capacity, even in criminal matters.[xv]

Article 73 defines the extent of the Executive power of the Union. Clause (1) states that it extends to all matters concerning which the Parliament has the power to make laws; the exercise of such rights, authority, and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. There is a proviso under this clause. This states that the Executive power referred to above shall not extend to matters with respect to which the Legislature of the state also has the power to make laws.

Article 74 states that there shall be a Council of Ministers, with the Prime Minister at its head, to aid and advise the President, in the exercise of his functions, in accordance with such advice. A significant proviso states that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and that the President shall act by the advice tendered after such advice.

Article 75 deals with other provisions related to Ministers. Sub Clause (1) states that the Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister. A limitation on the number of Ministers has been placed by sub-clause 1A which is that it should not exceed fifteen per cent of the total number of members of the House of the People. Clause (2) states that the Ministers shall hold office at the pleasure of the President. Clause (3) states that the Ministers shall hold office at the pleasure of the President. Clause

(4) states that the Council of Ministers shall be collectively responsible to the House of the People. It is the President who administers the oath of office and secrecy before the Minister enters his office. While a person who is not a member of either of the Houses of Parliament can be appointed as Minister, he cannot continue to hold his office beyond a period of six months, whereupon he shall cease to be a Minister.

Article 76 authorises the President to appoint a person, qualified to be appointed as a Judge of the Supreme Court, as the Attorney General of India. He must render advice to the Government of India on such legal matters and perform such other duties of a legal character as may be referred or assigned to him by the President and discharge the functions conferred on him by or under the Constitution or any other law in force.

Article 77 is of great importance to the day-to-day administration of the country. It is titled the conduct of the business of the Government of India. All executive action of the Government shall be expressed to be taken in the name of the President. Clause (2) states that such orders executed in the name of the President shall be authenticated in the manner specified in the rules to be made by the President. Clause (3) allows the President to make rules for the more convenient transaction of business of the Government of India and the allocation of this business amongst the Ministers. The principles of governance, as enunciated in the Constitution, are given practical articulation in the Rules of Business. They guide the Executive at the Union level as to how the business of the government is to be conducted and provides a guide for the administrators and the personnel working at the Government of India. The Rules of Business are instruments that allocate and define the zone of authority for ministers and their subordinates, have statutory force, and are binding.

To exemplify this provision, we take a look at an example of the actual Rules of Business made by the President on 14th January 1961 in accordance with Clause (3) of Article 77. This order describes the procedure to be followed with respect to the allocation of business in the Government of India and the distribution of subjects to the various Ministries.

RASHTRAPATI BHAVAN
NEW DELHI
14th January 1961/Pausa 24, 1882(S)

THE GOVERNMENT OF INDIA (ALLOCATION OF BUSINESS) RULES

In exercise of the powers conferred by Clause (3) of Article 77 of the Constitution and in super session of all previous rules and orders on the subject, the President hereby makes the following rules for the allocation of the business of the Government of India.

1. Short Title - These rules may be called the Government of India (Allocation of Business) Rules, 1961.

2. Allocation of Business - The business of the Government of India shall be transacted in the Ministries, Departments, Secretariats, and Offices specified in the First Schedule to these rules (all of which are hereinafter referred to as "departments").

3. Distribution of Subjects -

    a. The distribution of subjects among the departments shall be as specified in the Second Schedule to these Rules and shall include all attached and subordinate offices or other organisations including Public Sector Undertakings concerned with their subjects and Sub-rules (2), (3) and (4) of this Rule.

    b. The compiling of the accounts of each Department shall stand allocated to that Department with effect from the date from which the President relieves, by order made under the first proviso to sub-section (1) of Section 10 of the Comptroller and Auditor General's (Duties, Powers, and Conditions of Service) Act, 1971; the Comptroller and Auditor General from the responsibility for compiling the accounts of that Department.

    c. Where sanction for the prosecution of any person for any offence is required to be accorded-

        i. If he is a government servant, by the Department which is the Cadre Controlling authority for the service of which he is a member, and in any other case, by the Department in which he was working at the time of the commission of the alleged offence;

        ii. If he is a public servant other than a government servant, appointed by the Central Government, by the Department administratively concerned with the organisation in which he was working at the time of the commission of the alleged offence; and

iii. In any other case, by the Department which administers the Act under which the alleged offence is committed; Provided that where, for offences alleged to have been committed, a sanction is required under more than one Act, it shall be competent for the Department which administers any of such Acts to accord sanction under all such Acts.

d. Notwithstanding anything contained in sub-rule (3), the President may, by general or special order, direct that in any case or class of cases, the sanction shall be by the Department of Personnel and Training.

4. Allocation of Departments among Ministers:

a. The business of the Government of India allocated to the Cabinet Secretariat is and, shall always be deemed to have been, allotted to the Prime Minister.

b. Subject to the provisions of sub-rule (1), the President may, on the advice of the Prime Minister, allocate the business of the Government of India among Ministers by assigning one or more departments to the charge of a Minister.

c. Notwithstanding anything contained in sub-rule (1) or sub-rule (2), the President may, on the advice of the Prime Minister -

i. associate in relation to the business allotted to a Minister under either of the said sub-rules, another Minister or Deputy Minister to perform such functions as may be assigned to him; or

ii. entrust the responsibility for specified items of business affecting any one or more than one Department to a Minister who is in charge of any other Department or to a Minister without Portfolio who is not in charge of any Department.

RAJENDRA PRASAD
PRESIDENT

At the next lower level of directions, beneath the Rules of Business, are the standing orders issued by each ministry, under the signature of the Minister, clearly listing the various kinds of matters that are to be disposed of in that Ministry and the levels of delegation of work to the officials working therein. Usually, but for important policy matters, the work is disposed of at the level of the Minister himself or is delegated to the hierarchy of

officers and officials ranging from the Secretary to the Government of India, and then lower down to Joint Secretaries, Deputy Secretaries, Under Secretaries, etc.

Article 78 lays responsibility on the Prime Minister in the matter of furnishing information to the President: he has to communicate all the decisions of the Council of Ministers relating to the administration of the affairs of the Union including proposals for legislation; he has to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for; and if the President so require, 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.

We shall now consider **Articles 153 to 167** which deal with the executive of the states falling under Chapter II of Part VI of the Constitution. **Article 153** proclaims that there shall be a Governor in every State, with the provision that the same person can be Governor of more than one state. **Article 154** states that the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. These two articles pertaining to the Governor of the State mirror Articles 52 and 53 with reference to the President of India. Clause (2) of Article 154 states that nothing in this article shall be deemed to transfer to the Governor any functions conferred on other authorities; nor shall the Parliament or the Legislatures of the State be prevented from conferring functions on other authorities subordinate to the Governor. **Article 155** states that the Governor shall be appointed by the President by warrant under his hand and seal. **Article 156** goes on to prescribe the term of the office of the Governor: that he shall hold the office during the pleasure of the President, and that his term shall be for five years from the date he enters upon his office, though he can resign from the office at any time.

Article 157 stipulates that the qualification for being appointed as Governor is that he or she has to be an Indian and should have completed thirty-five years. **Article 158** stipulates the conditions of the Governor's office: he cannot be a member of either House of the Parliament or the Houses of Legislatures of the state and if such a person is appointed as Governor, he will be deemed to have vacated the seat in that House from the date he enters upon the office of the Governor. He cannot hold any

office of profit and he will be entitled to use his official residence without payment of any rent, while at the same time enjoying all such emoluments, allowances, and privileges that are specified. Before entering the office of the Governor, according to **Article 159**, he or she shall make and subscribe in the presence of the Chief Justice of the High Court, an oath of affirmation stating that he or she will faithfully execute the office of Governor of the State and to the best of his/ her ability preserve, protect and defend the Constitution and the law and that "I will devote myself to the service and wellbeing of the people" of the State concerned.

Concerning any contingency not provided in the Constitution, **Article 160** states that the President of India may make any provisions as he thinks fit for the discharge of the functions of the Governor of a State. **Article 161** empowers the Governor to grant pardons and to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. **Article 162** maintains that the extent of executive power of the state shall extend to matters with respect to which the legislature of the state has the power to make laws. Further, the executive power of the state shall be subject to, and limited by, the executive power conferred by the Constitution or by any law of the Parliament, upon the Union or its authorities.

Article 163 states that there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except when "he is by or under this Constitution, required to exercise his functions or any of them in his discretion." Clause (2) makes it clear that the decision of the Governor with regard to his discretion shall be final and the validity of anything he has done in this regard shall not be called into question. Clause (3) also states that the question of whether any and if so, what advice was tendered by the Ministers to the Governor shall not be inquired into in any court.

Article 164 relates to other provisions regarding ministers. Clause (1) states that the Chief Minister shall be appointed by the Governor and that the other ministers shall be appointed by him on the advice of the Chief Minister and that they shall hold office at the pleasure of the Governor. There is a special provision about the states of Chhattisgarh, Jharkhand, Madhya Pradesh, and Odisha stipulating that there shall be a minister in charge of tribal affairs who may in addition be in charge of the welfare of the Scheduled Castes and Backward Classes or any other work. Clause (1A)

limits the total number of ministers to fifteen per cent of the total number of members of the Legislative Assembly of the state, though it is also stated that this number should not be less than twelve. Clauses (2) to (5) go on to say that the Council of Ministers shall be responsible to the Legislative Assembly of the State; that before assuming the office of Minister, he shall have to subscribe to the oaths of office and secrecy; that if a Minister is not a member of the Legislature for a period of six consecutive months shall cease to be a Minister; and that his allowances, etc., shall be determined by the Legislative Assembly of the State.

Article 165 deals with the office of the Advocate General for the State who shall be appointed by the Governor and the eligibility of such a person is that he should be qualified to be appointed as a Judge of a High Court. He will hold office at the pleasure of the Governor. The Advocate-General has to give advice to the Government of the State upon such legal matters and to perform all other legal duties referred to or assigned to him by the Governor. Then validity of an order or instrument which is so executed shall not be called into question on the ground that it is not an order or instrument made or executed by the Governor.

Article 166 deals with the conduct of the business of the Government of a State, which shall be expressed to be taken in the name of the Governor. Orders and instruments made and executed in the name of the Governor are to be authenticated according to rules made by the Governor and their validity shall not be called into question on the grounds that it is not an order or instrument made or executed by the Governor. Clause (3) of this article states that the Governor shall make rules for the more convenient transaction of the business of the Government of the State. In order the illustrate this, we may refer, as an example, to the rules of business issued on 14 December 1956 by the Governor of a state, in this case, Orissa (now Odisha). This describes the working of the Council of Ministers in the State and how the business of the government is assigned to the Ministers and the various Departments. The role of the Finance Department of the state has also been emphasised in this order. Some paraphrasing has been done for ease of reading.

THE ORISSA GOVERNMENT RULES OF BUSINESS MADE UNDER ARTICLE 166 OF THE CONSTITUTION OF INDIA

Bhubaneswar, the 14th December 1956 No.4192-Gen –

In exercise of the powers conferred by Clause (3) of Article 166 of the Constitution of India and in supersession of all previous rules made on this behalf, the Governor of Orissa is pleased to make the following rules, namely:

1. These rules may be called the Orissa Government Rules of Business.

2. In these rules, unless the context otherwise requires - a. "Article" means an Article of the Constitution of India. b. "Council" means the Council of Ministers constituted under Article 163. c. "Cabinet" means the Committee of the Council of Ministers specified in Rule 4-A. "Secretary" means a Secretary to the Government of Orissa and includes a Principal Secretary, a Special Secretary, an Additional Secretary, a Joint Secretary, a Deputy Secretary, and an Under Secretary.

3. The General Clauses Act, 1897 applies to the interpretation of these rules as it applies to the interpretation of a Central Act.

4. The business of the Government shall be transacted in the departments specified in the First Schedule and shall be classified and distributed between those departments and their branches as laid down therein.

   4-A. There shall be a Committee of the Council of Ministers to be called the Cabinet which shall consist of the Ministers. Except when the Council of Ministers meets on any occasion, all matters referred to the Second Schedule shall ordinarily be considered at a meeting of the Cabinet: Provided that a Minister of State or a Deputy Minister may attend the meeting of the Cabinet when requested to do so, either when a subject with which he is concerned is under discussion or otherwise: Provided further that a Minister of State-in-charge of a department where there is no Minister-in-charge of that department, shall attend the meeting of a Cabinet where at a subject with which he is concerned is fixed or taken up for consideration.

5. The Governor shall, on the advice of the Chief Minister allot the business of the Government by assigning one or more departments to the charge of a Minister or of a Minister of State: Provided that different branches of a department or different subjects under a branch may be assigned to the charge of different Ministers of State:

Provided further that Minister of a State or a Deputy Minister may be in subordinate charge of a department or of specified branches of a department or specified subjects under a branch, under the Minister-in-charge or Minister of State-in-charge, as the case may be, or may assist the * Inserted vide Notification No. 28981, dated the 28th December 1993. Orissa Government Rules of Business 2 Minister-in-charge or the Minister of State in charge, as the case may be, in such manner as may be indicated by such Minister-in-charge or Minister of State-in-charge.

6. Each department of the Secretariat shall consist of a Secretary to Government who shall be the official head of that department and of such other officers and staff subordinate to him as the State Government may determine: Provided that more than one department may be placed in charge of the same Secretary: Provided further that different branches of a department may be placed in charge of different Secretaries.

7. The Council shall be collectively responsible for all executive orders issued in the name of the Governor in accordance with these rules whether such orders are authorised by an individual Minister or Minister of State on a matter appertaining his portfolio or as a result of discussion at a meeting of the Council or the Cabinet or howsoever otherwise.

8. (1) All cases referred to in the Second Schedule shall be brought before the Cabinet by the direction of i) the Chief Minister or ii) the Minister-in-charge or the Minister of State-in-charge of the case with the consent of the Chief Minister. (2) Cases shall also be brought before the Cabinet by the Chief Minister by the direction of the Governor under Clause (c) of Article 167: Provided that no case in regard to which the Finance Department is required to be consulted under rule 10 shall, save in exceptional circumstances under the direction of the Chief Minister, be discussed by the Cabinet unless the Finance Minister has had an opportunity for its consideration. Provided further that the Chief Minister may anticipate approval of the Cabinet in cases of emergency if the meeting of the Cabinet is likely to be delayed. Such cases shall have to be placed before the next meeting of the Cabinet as and when held.

9. (1) Without prejudice to the provision of Rule 7 the Minister-in-charge or the Minister of State-in-charge of a Department or a branch or branches thereof shall be primarily responsible for the disposal of business appertaining that department or branch. (2) Every Minister, every Minister of State, every Deputy Minister, and every Secretary shall transmit to the Chief Minister all such information with respect to

the business of the Government as the Chief Minister may from time to time require to be
transmitted to him.

10. (1) No department shall without previous consultation with the Finance Department authorise any orders (other than orders under any general delegations made by the Finance Department) which either immediately or by their repercussions will affect the finances of the State or which in particular, either - relate to the number or grading or cadres of posts or the emoluments or other conditions of service or post; or involve any grant of land or assignment of revenue or concession, grant lease or licence of mineral or forest rights or a right to water-power or any easement or privilege in respect of such concession; or in any way involve any relinquishment of revenue (2) No proposal which requires previous consultation with the Finance Department under sub-rule (1) of this rule but in which the Finance Department has not concurred, may be proceeded with unless a decision to that effect has been taken by the Cabinet. (3) No re-appropriation shall be made by any department other than the Finance Department except in accordance with such general delegations as the Finance Department may have made. (4) Except to the extent that power may have been delegated to the Departments under rules approved by the Finance Department, every order of an Administrative Department conveying a sanction to be enforced in audit, should be communicated in the manner as prescribed by the Finance Department from time to time. (5) Nothing in this rule shall be construed as authorising any department including the Finance Department to make re-appropriations from one grant specified in the Appropriation Act to another such grant.

11. All orders or instruments made or executed by order or on behalf of the Government of Orissa shall be expressed to be made by or by order of or executed in the name of the Governor of Orissa.

12. Every order or instrument of the Government of the State shall be signed either by a Principal Secretary, a Secretary, a Special Secretary, a Joint Secretary, a Deputy Secretary or an Under-Secretary or such other officer as may be specially empowered in that behalf and such signature shall be deemed to be the proper authentication of such order or instrument. Explanations- In this rule, the references to a Principal Secretary, a Secretary, a Special Secretary, a Joint Secretary, a Deputy Secretary, and an Under Secretary shall include references, respectively to an Additional Principal Secretary, an Additional Secretary, an Additional Joint Secretary, an Additional Deputy Secretary, and an Additional Under-Secretary.

13. The Secretary of the department or branch concerned is in each case responsible for the proper transaction of business and the careful observance of these rules, and when he considers that there has been any material departure from them, he shall personally bring the matter to the notice of the Minister-in-charge or the Minister of State-in-charge as the case may be and the Chief Secretary. **The Secretary in each department or branch shall also be responsible for the due execution of sanctioned policy and the discipline and efficiency of the administrative department or branch in his charge.

14. These rules may to such extent as necessary be supplemented by instructions to be issued by the Governor on the advice of the Chief Minister.

As we have seen in the case of Rules of Business issued by the President for the transaction of the business of the Government of India, in the above case too, the order describes the general procedure to be followed in the transaction of the business of the state. The various Departments in the State Government, similar to the Ministries at the Government of India level, also issue their own Standing Orders, under the signature of the minister concerned in that Department of the State Government, where the delegation of powers is spelt out regarding disposal of matters at various levels in the hierarchy of that Department. These orders will also specify the nature of those matters, normally of a policy level, that is to be brought to the attention of the Chief Minister. Important issues will require to be brought to the Cabinet for approval. Such matters will require the approval of the Finance Department of the State in case there are financial liabilities involved; or to the Law Department, in case the matter at hand has legal implications.

Article 167 prescribes the duties of the Chief Minister with regard to furnishing information to the Governor. He has to communicate to the Governor all decisions of the Council of Ministers relating to the administration of the affairs of the State and proposals for legislation. He also has to provide all information that the Governor may call for. Further, if the Governor so desires, he has to submit for the consideration of the Council of Ministers any matter in which a decision has been taken by a Minister, but which has not been considered by the Council.

We may also mention here the specific constitutional provisions relating to the administration of Union territories which may be perused in **Article 239**. It states that every Union territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify. **Article 239A** relates the creation of local legislatures or Council of Ministers, or both for Union territories. **Article 239AA** makes special provisions with respect to Delhi. We shall refer here only to the matters of administration of the Union territory of Delhi, which from the commencement of the Constitution (Sixty-ninth Amendment) Act, 1991 was called the National Capital Territory (NCT) of Delhi. We are ignoring here the provisions related to the legislative work of NCT but shall look at the constitutional provisions related to the executive. There have been many discussions on the provisions regarding the administration of Delhi, which has been a bone of contention between the NCT and the Union Government, especially in times when a political party different from the party in power at the Union Government level is in place. The Chief Minister of NCT is appointed by the President and the ministers shall be appointed by the President on the advice of the Chief Minister. In Clause (4) there is a provision for the Council of Ministers consisting of not more than ten per cent of the total number of members in the Legislative Assembly, with the Chief Minister at the head to aid and advise the Lieutenant Governor in the exercise of his functions in relation to matters with respect to which the Legislative Assembly has power to make laws, except where he is required to act in his discretion. In matters where there is a difference of opinion between the Lieutenant Governor and the Ministers, such matters are referred to the President and he shall act according to the decision of the President.

Article 240 enables the President to make regulations regarding certain Union territories, such as the Andaman and Nicobar Islands, Lakshadweep, Dadra and Nagar Haveli and Daman and Diu as well as Puducherry.

It is necessary here to refer to Part XIV of the Constitution to study the matter of services under the Union and the States. The executive functions of the Union and the States are performed by personnel recruited for their administration. **Article 309** refers to the recruitment and conditions of service of persons serving the Union and the State.

While all these constitutional provisions provide the framework for the administration of the country, it is in Part XIV that specific mention is made of the service of persons serving the Union or the States. **Article 309** deals with the recruitment and conditions of service of persons serving the Union Government or the State Governments. This is an enabling provision that stipulates that the appropriate legislatures may pass acts to regulate the recruitment and conditions of service appointed to public services and posts in connection with the affairs of the Union or of any state. It further mentions that the President (concerning the affairs of the Union) and the Governor (concerning the affairs of the State) are competent to make rules regarding the recruitment and conditions of service until the Act can be passed by the competent legislature. **Article 310** makes it clear that every person who is a member of the defence services or a civil service of the Union or an all-India service holds that post at the pleasure of the President; just as any person who holds a post of the State does so at the pleasure of its Governor.

Article 311 relates to the provisions of dismissal, removal, or reduction in the rank of persons employed in civil capacities under the Union or the State. The omnibus provision states that such a person cannot be dismissed or removed by an authority subordinate to that by which he was appointed. Clause (2) also makes it clear that before such dismissal, removal, or reduction in rank, the person must be informed of his charges and be given a reasonable opportunity of being heard in respect of those charges. When the punishment is imposed based on evidence adduced during such enquiry, it is not necessary to give such a person any opportunity of making representation on the nature of the penalty proposed. There is also a further proviso to the above which states that where the person is dismissed or removed from service or reduced in rank based on a conviction for a criminal charge, the granting of opportunity of hearing shall not apply. The opportunity of hearing shall not be given where the authority empowered to dismiss or remove a person or reduce him in rank is convinced that it is not reasonably practical to hold such enquiry. The decision of the said authority is final insofar as the practicality of holding such enquiry is concerned. Yet again, the opportunity of hearing is not granted where the President or Governor is satisfied that in the best interest of the security of the state, it is not expedient to hold such enquiry.

Article 312 pertains to All-India Services. This is a significant article of the Constitution providing for certain services that have an All-India character. It states that where 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 so to do", the Parliament may by law provide for the creation of one or more All-India Services (including an all-India judicial service) common for the Union and the States and make provisions for their recruitment and conditions of service. At the time the Constitution commenced, it was the Indian Administrative Service and the Indian Police Service which were deemed to be All-India services. In 1966, the Indian Forest Service was also added to the list of All-India Services. As yet there is not an All-India Judicial Service, though the provision exists for the same. The reference to the All-India Services in the Constitution of India is only because of the commanding authority of Sardar Patel, who in the face of opposition from worried members of the Assembly, wanted a break from the British style of administration. When some members urged him to drop the idea, he said: "The Union will go-you will not have a united India if you have not. a good All-India service that has the independence to speak out its mind, which has a sense of security that you will stand by your word and, that after all there is the Parliament, of which we can be proud, where their rights and privileges are secure…Many impediments in this Constitution will hamper us, but despite that, we have in our collective wisdom come to a decision that we shall have this model wherein the ring of Service will be such that it will keep the country under control." When separately speaking to the officers on 21 April 1949 (now celebrated as Civil Services Day), he cautioned them thus: "Your predecessors were brought up in the traditions in which they…kept themselves aloof from the common run of the people. It will be your bounden duty to treat the common men in India as your own." The debate on the role and responsibilities continues.

Article 312A empowers the Parliament to vary or revoke conditions of service of officers of certain services. This was a specific transitional provision to enable persons who were appointed before the commencement of the Constitution to civil services by the Secretary of State or Secretary of State in Council under the Crown in India to continue in service under the Government of India or the Government of a State. Further, neither

the Supreme Court nor any other court shall have the jurisdiction in any dispute about any agreement, instrument, covenant, etc., by which a person was appointed to any civil service under the Crown.

Article 313 is again a transitional provision: it states that all the laws that existed before the commencement of the Constitution apply to any public service or any post which continues to exist thereafter as a service or post under the Union or State Government shall continue in force so far as they are consistent with the provisions of the Constitution.

A study on the constitutional nature of the executive cannot be complete without an understanding of the complex Centre-State relationships that the Constitution presents. As a Union of States, the Indian polity has to balance the centripetal and centrifugal relationships that are ever present in a federation such as ours. The needs and demands of the states would have to be balanced against the imperatives of the Union. Some simple definitions of this relationship have been made: 'quasi-federal' or 'statutory decentralisation' are some of them. In the discussions in the Constituent Assembly members spoke of the need for a stable meaning to this relationship and to pick and choose from international experience as to what would suit the genius of our nation best. These discussions, between the 'centralists' and the 'provincialists' led to a new model of federalism that would be best for our particular needs. In fact, in the framing of these principles, there was less acrimony and heated debates than one would have assumed. For example, when the states were demanding more revenues for the states, they did not object to the Union Government collecting these taxes and distributing them between the States.

It is in this spirit that the Constituent Assembly embraced the concept of 'cooperative federalism', very different from other classical federalist theories that tended to regard the central and the regional governments as independent of each other. "Cooperative federalism produces a strong central, or general, government, yet it does not necessarily result in weak provincial governments that are largely administrative agencies for central policies. Indian federalism has demonstrated this."[xvi] This form of evolved polity has been described by Birch as "the practice of administrative cooperation between general and regional governments upon payments from the general governments, and the fact that the general governments, by the use of conditional grants, frequently promote developments in matters which are constitutionally assigned to the regions."[xvii] Dr. Ambedkar

while introducing the draft constitution in the Constituent Assembly said it "is a federal constitution since it establishes what may be called a dual polity (which will consist of the Union at the Centre and the States at the periphery), each endowed with sovereign powers to be exercised in the field assigned to them respectively to them by the Constitution". Yet, our Constitution avoids the 'tight mould of federalism' and could be both unitary as well as federal according to the requirements of time and circumstances.[xviii]

During British times, the central government grew in power and diminished the independence of local governing bodies. Despite the devolution of authority to the provinces in the Government of India Act of 1919 as well as the federalising provisions of the 1935 Act, power largely remained in British hands. While the 1935 Act relinquished central authority in many matters in the provincial sphere, the Governor-General still retained the authority to ensure compliance with directions he may have to issues in certain circumstances. For Indians, more distracted by communal issues and the demand for independence, there was not much thought about the relationship between the centre and the provinces. Intellectual reports produced at the time of the freedom struggle, such as the Nehru Report of 1928,[xix] recommended a centralized federal structure. Even the Sapru Report of 1945,[xx] struggled with this dilemma, stating that a strong centre was necessary for India.

Similarly, it was felt that only a strong central government could deal with the princely states, many of which had no semblance of a modern government or effective governance mechanisms. There were doubts too whether the provincial governments could deal with the strains of new responsibilities such as public security and the food crisis. The immediate demands of improving the standard of living and increasing agricultural and industrial productivity were another reason for recommending a strong central authority. In the debates in the Constituent Assembly, member after member spoke on these lines. The most vocal of them included DP Khaitan and Balakrishna Sharma. "The Centre should be in a position to think and plan for the well-being of the country as a whole" with "the authority to coordinate and supply the wherewithal to the provinces" and "the right to issue directives to the provinces."[xxi]

Ultimately though, the members of the Committee agreed to the formation of a loose federal system in which residuary powers would be vested in the provinces. The committee of the Constituent Assembly on Union Powers, chaired by Jawaharlal Nehru himself, had in its first report suggested a weak centre since it was limited by the terms of the Cabinet Mission Plan. However, in its second report of July 1947, unanimously recommended that "it would be injurious to the interest of the country to provide for a weak central authority which would be incapable of ensuring peace, of coordinating vital matters of common concern, and of speaking effectively for the whole country in the international sphere…the soundest framework for our constitution is a federation with a strong centre."[xxii] But this Committee on Union Powers became redundant after the Partition and its reports were consigned to the library shelves. Things moved rapidly after the announcement of partition on 3 June 1947. Within two days, on 5th June, the Union and Provincial Constitution committees met in a joint session and boldly announced that the Cabinet Mission Plan was no longer applicable. On 6th June, the Union Constitution Committee met separately and took momentous decisions: that the Constitution would be federal with a strong centre, that there would be three exhaustive legislative lists with residuary powers vesting in the Union Government, that the princely states would be at par with the provinces, and that the executive authority of the Union should be co-extensive with its legislative authority.

On 7th June, the very next day, the two committees met again in a joint session. The choice was clear: Should India be a unitary state with provinces functioning as agents of the central authority or whether India should be a federation of autonomous units ceding certain specified powers to the centre? The assembled members voted to accept the recommendations of the Union Constitution Committee. In the following five weeks, various reports were prepared which included detailed legislative lists as well as other recommendations. These included matters related to the distribution of powers, the extent of the union executive, the distribution of revenue, etc. Indeed, the powerful position of the Congress party across the country, and the absence of provincial political bodies in the provinces made this task easier. Finally, the Partition too had its effect: it established the dangers of separatism and removed all barriers to the creation of a cooperative federation. The slow building of central power was begun by the Committees entrusted with this momentous task.

Before we enter upon the subject of the Union List, the State List, and the Concurrent List, it must be stated that in the matter of distribution of powers between the Union and the state units, the balance of power lies clearly in favour of the Union. The Emergency powers enable the Union Government and the Parliament to suspend Fundamental Rights and take over the reins of administration of the country. Article 256 and 257 emphasizes that the states must comply with the Union laws and not impede or prejudice the exercise of Union authority. The Union executive normally extends only to subjects in the Union list, yet Article 73 Parliament can extend its authority to the Concurrent List as well. Further, Article 249 provides for the Council of States to empower the parliament to legislate on any matter included in the State list. Ambedkar said: "In normal times, it is framed to work as a federal system. But in times of war, it is so designed as to make it work as though it was a unitary system. Once the President issues a Proclamation which he is authorised to do under the provisions of Article 275, the whole scene can become transformed, and the State becomes a unitary state. The Union under the Proclamation can claim if it wants (1) the power to legislate upon any subject even though it may be in the State list, (2) the power to give directions to the States as to how they should exercise their executive authority in matters which are within their charge, (3) the power to vest authority for any purpose in any officer, and (4) the power to suspend the financial provisions of the Constitution. Such a power of converting itself into a unitary State no federation possesses. This is one point of difference between the Federation proposed in the Draft Constitution and all other Federations we know of."[xxiii]

It is part of our legislative history that in the Government of India Act of 1919, there was a provision for Devolution Rules that would grant the powers to legislate on various matters to the provinces. Its corollary was the list of subjects reserved for the federal legislature, which found precedents in the constitutions of other countries such as Canada and Australia. The idea of a third list, or the concurrent list, was developed in the Round Table conferences of those momentous times. If there were differences of opinion about the nature of subjects in the residuary list, it was the Governor-General, under the Government of India Act of 1935, who had the final say. Hence, when the Constituent Assembly discussed these issues, through the deliberations of Committees of the Union Constitution and Union Powers Committees, it was not difficult to accept the items as

they existed in the Seventh Schedule of the 1935 Act. It is important to note that the provinces too accepted the list as finalized in these Committees. It was also agreed that residuary powers should be vested in the Union.

NG Ayyangar, when presenting the Union Powers Committee report stated that "we should make the Centre in this country as strong as possible consistent with leaving a fairly wide range of subjects to the provinces, one which they would have the utmost freedom to order things as they liked."[xxiv] In the debates that followed, there was suspicion that provincial rights may be encroached upon. The majority believed in the need to maintain Union powers unimpaired. Ambedkar argued in favour of this arrangement, stating that based on the experience in other countries such as Australia, "the Draft Constitution has secured the greatest possible elasticity in its federalism, which is supposed to be rigid in nature".

We may glance through the Articles dealing with the division of legislative powers between the Union and the States, which are in Articles 245 to 255 in Chapter I of Part XI. **Article 245** empowers the Parliament, subject to the provisions of the Constitution, to make laws for the whole or any part of the territory of India, and the Legislature of the State may make laws for the whole or any part of the state. The phrase 'subject to the provisions of the Constitution' means that the Union and State legislatures are limited by basic constitutional principles such as Fundamental Rights, distribution of powers, etc. Clause (1) of **Article 246** is the relevant constitutional provision that states that the Parliament has the exclusive power to make laws with respect to the items enumerated in List I, the Union List, of the Seventh Schedule of the Constitution. Similarly, Clause (3) defines the exclusive power of the State Legislature to make laws for the state or any part of the state and has been enumerated in List II, the State List, of the Seventh Schedule. Thus Clause (2) defines the items listed in List III, the Concurrent List, where both the Parliament and the State legislatures have concurrent powers to legislate.

Article 247 provides for the power of the Parliament to establish additional courts. **Article 248** grants the Parliament exclusive power to make laws with respect to any matter not enumerated in the Concurrent or State List. States may have some reservations about the residuary power extended to the Parliament here, though the Supreme Court has stated that this residuary power should be resorted to only as a last refuge when all the entries in the three lists have been exhausted.[xxv] The primacy of the Union

Parliament over the States has been fully established in **Article 249** which grants it the power to legislate with respect to a matter in the State List in the national interest. The article mentions that if the Council of States approves this through a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws, then it shall be lawful for the Parliament to make laws for the country or any part of it. Our legislative history shows that on two occasions in the past, such resolutions have been passed by the Council of States leading to the Supply and Prices of Goods Act, of 1950, and the Evacuee Interest (Separation) Act, of 1951. **Article 250** further empowers the Parliament to legislate on any subject when the proclamation of emergency is in operation. This Article also states that when the proclamation of emergency is over, the law shall cease to operate after a period of six months. **Article 251** cautions that when the legislature of a state passes any law which is repugnant of any law made by the Parliament, the law made by the state shall be inoperative. **Article 252** empowers the Parliament to make laws for two or more States, with the consent of the States concerned. It also states that such a law can be adopted by any other State. **Article 253** provides for legislation by the Parliament to give effect to any international agreements. **Article 254** deals with the possibility of inconsistency between the laws made by the Parliament and those made by the Legislatures of the State on a subject included in the Concurrent List. In such cases, the law of the Parliament shall prevail and the law of the State, to the extent of the repugnancy, shall become void. Finally, **Article 255** states that Acts of the Parliament and the State Legislatures shall not become invalid, simply because previous sanction as required by the Constitution was not given.

Chapter II of Part XI of the Constitution deals with administrative relations between the States and the Union. **Article 256** titled 'Obligation of States and Union' is that the executive power of every state shall be so exercised as to ensure compliance with the laws made by the Parliament including laws which apply to that state. The executive power of the Union shall extend to giving directions to any state as may appear to the Government of India to be necessary for that purpose. **Article 257** clarifies that in certain cases the executive power of the Union shall extend to giving direction to a State. Specific instances have been mentioned: construction and maintenance of means of communication that are of national or military importance; national highways or waterways, construction of communication

concerning naval, military, and air force works, protection of railways, etc. **Article 258** authorises the Union Government through the President and with the consent of the States, to entrust any matter to which the executive power of the Union extends. Clause (2) states that where the law of the Parliament extends to a State, powers can be conferred for the imposition of duties and powers upon the state or its officers and authorities. If the State has to bear any extra costs, these shall be paid by the Government of India. **Article 259**, dealing with armed forces in the States, was repealed. **Article 260** authorises the Government of India to undertake any executive, legislative or judicial function in any territory that is not a part of the territory of India. **Article 261** maintains that full faith and credit shall be given to public acts, records, and judicial proceedings of the Union and every State, for which the Parliament can make laws. **Article 262** empowers the Parliament to provide by law for the adjudication of any dispute or complaint in matters related to the use, distribution, or control of the waters of, or in, any Inter-State River or River valley. It also states that the Parliament can provide that no courts may exercise jurisdiction in this matter, of course, notwithstanding anything in the Constitution. Finally, in **Article 263**, where the President feels that public interest is served by establishing an Inter-State Council, he can charge such a council to inquire into matters of disputes between the states, investigate matters in which the states have some common interests or make recommendations to achieve better coordination of policy and aspect.

The narration of the relations between the Union and the States on administrative relations as stated above, bestows the Union Government with the power to give directions to a State to ensure that the Executive of that State did not obstruct or impede the laws of the Union Government in the exercise of its authority. The protection of railways, for example, included in Article 257, was inserted at the behest of the Railways Ministry, because of the perceived failure of provincial governments to protect railways and trains from looting, arson, and murder. But it also empowers the President to devolve upon the state, with its consent, of course, any function normally performed by the Union Executive.

It is most significant to note that just a few days before the formal adoption of the Constitution, on 15 November 1949, a new provision was inserted at the behest of Ambedkar himself, now numbered **Article 365,** and introduced into the Constituent Assembly. In a way, this Article asserted the superiority of the Union over the state executive in no uncertain terms.

By this, if a state refused to comply with the directions of the Union, the President could declare that the State Government was not being governed by the provisions of the Constitution. He could then, under the emergency provisions take over any of its functions. There was an immediate uproar in the Assembly. Loud protests by Thakur Das Bhargava and Pandit Kunzru pointed to the drastic power being sought to be given to the union executive at a time when the drafting of the Constitution had been almost completed. They compared it with the hated provisions of Section 93 of the Government of India Act of 1935, "in all its nakedness and power"[xxvi]. It had given the Governor of a province the authority to assume any functions of the government, just as it also empowered the Governor-General to take over the government of a province. But Ambedkar prevailed: he argued that it followed from the Articles giving the executive the power to issue a direction, thus merely completing the President's powers. The authority to issue directions would have been useless without the power to ensure that they were enforced. Finally, despite the vehemence of the opposition, the Assembly passed the article.

It would be necessary to dwell on the Emergency provisions which lengthen the Union's arms even further. Part XVIII deals with these provisions, from Article 352 to Article 360. According to **Article 352**, the President, in the event of his satisfaction that national security is threatened by external aggression or internal disturbance, may proclaim a state of emergency. The declaration has to be laid before both Houses of Parliament and lapses automatically after two months unless the Parliament extends it further. **Article 353** states that the executive power of the Union extends to giving directions to any state as to how the executive power is to be exercised. **Article 354**, refers to the application of the provisions relating to the distribution of revenue, embodied in Articles 268 to 279 when a proclamation of emergency is in operation. **Article 355** enjoins the responsibility of the Union to protect the States against external aggression and internal disturbance.

Article 356 is the most contentious of all articles in the Constitution: it relates to the provisions to be enforced in case of failure of the constitutional machinery in the States. The condition precedent for invoking this Article, as stated in Clause (1), is that the Governor of the State must submit a report to enable the President to be satisfied that the conditions of the State are such that it cannot be carried on by the provisions of the Constitution. However, the parenthesis in the clause also gives the

President the authority to decide this matter even without such a report: "on receipt of a report, or otherwise is the relevant clause." The article states that in these circumstances, he may, by proclamation, assume to himself all or any of the functions and powers of the State Government and the Governor (other than the Legislature of the State). He may also declare that the functions of the Legislature shall be exercisable by the Parliament. As a consequence, thereof, he may make any consequential provisions that are necessary to give effect to the objects of the proclamation, which may include even the suspension of the operations of any of the provisions of the Constitution. The only restriction is that the President cannot assume the powers of the High Court. Such a proclamation has to be laid before both Houses of Parliament. It will automatically cease after a period of two months unless both Houses of Parliament approve the same by resolution. Such an approved proclamation shall cease to operate after six months from the date of its issue, again subject to the provision that it may be extended for another six months with the assent of both Houses of Parliament. Subsequent clauses of the Article give details of other circumstances necessitating the expiration or continuance of the proclamation.

Article 357 states that where the powers of the legislature are exercisable by the President under Article 356, the Parliament can confer on the President the power of the legislature to make laws or delegate the power to any other authority that he may specify. As a consequence, thereof, under Clause (2) he can confer powers to make laws or impose duties upon Union officers and other authorities. Such laws may continue, even after the proclamation has ceased to operate until it is altered or amended by the competent legislature.

Article 358 also, most controversially, states that nothing in Article 19 (about the protection of certain rights such as freedom of speech, freedom to assemble peacefully, to move freely, form associations, etc., all precious attributes of a democratic nation) shall restrict the power of the State to make any laws or take any executive actions. This in effect means the suspension of all rights enshrined in Article 19. **Article 359** takes this even further: The President may order the suspension of the right to move any court for enforcement of all the rights prescribed under Part III; all proceedings pending in any court shall also remain suspended during the period of the proclamation. The exception is that Article 20 (protection with respect to conviction for offences and Article 21 (protection of life

and liberty) shall continue to be operational during the period of the proclamation and cannot be suspended by the President.

Article 360 refers to the provision for the proclamation of emergency in times of financial crisis. When the President is satisfied that a situation has arisen whereby the financial stability or credit of India (or any of its part) is threatened, a similar proclamation of emergency can be made by him. As in Article 356, the proclamation automatically ceases after two months unless both Houses pass a resolution of approval. During the period of such proclamation, the Union Government can issue any directions to the states to observe the canons of financial propriety, including the reduction of salaries and allowances and the reservation of Money Bills or other Bills for the consideration of the President after they have been passed by the State Legislature.

As can be imagined, there has been a spate of cases regarding these emergency provisions in the Supreme Court. It confers an extraordinary power on the President to preserve, protect and defend the Constitution. It is a conditional power, the condition being the satisfaction of the President as contemplated in Clause (1) of Article 356. Yet, it must be remembered that the satisfaction of the President is the satisfaction of the Council of Ministers.[xxvii] Action can be taken by the President even without the report, as mentioned above. The President can conclude in case he has other relevant material for reaching the satisfaction as required under Article 356 (1). The expression "or otherwise" is of wide amplitude.[xxviii] During the Constituent Assembly debates, HK Kamath had warned: "Otherwise is a diabolical word, in this context, and I pray to God that it will be deleted from this Article."[xxix] Kunzru went further: "The Central Government will have the power to intervene to protect the electors against themselves." He deplored this because it would rob the people of their initiative. The power to redress bad government, he believed should rest with the electors and they should be made to feel their responsibilities.[xxx]

The satisfaction of the President has to be in the matter of the situation that 'has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution." Ultimately, it is the Council of Ministers that scrutinizes all the material available from the Governor's office, and a final decision is taken by the President based on the recommendation of the Council of Ministers. There is a wide range of opinions as regards this very matter. Dr Ambedkar while introducing

this provision in the Constituent Assembly had stated that this was an exceptional provision which should be applied only as a resort and that he expected that "such articles will never be called into operation and that they would remain a dead letter."[xxxi] The federal system and the autonomy of the State within the sphere allotted to them by the Constitution were the foundations of the Constitution and Articles 355-366 were introduced as exceptions to that normal system only when there is a likelihood of the failure of a State to maintain that system itself, in which case the Union would enforce its obligation to maintain that system. Ambedkar said: "…in view of the fact that we are endowing the provinces with plenary powers and making them sovereign within their field, it is necessary to provide that if any invasion of the provincial field is done by the Centre it is in virtue of this obligation."[xxxii] The report of the Sarkaria Committee on Inter-State Relations too has endorsed this stand.

Yet, this contentious provision has been used more than a hundred times in the last 75 years. Commonly referred to as 'President's Rule', the Article was exercised for the first time in the country in Punjab in June 1951. Very significantly, it was used to oust the democratically elected Communist State Government of Kerala in July 1959. In the 1970s and 1980s, it was widely used by the Union Government to dismiss State Governments led by opposition parties. The Indira Gandhi government between 1966-77 and the post-Emergency Janata Party government were noted for this practice. Indira Gandhi's government between 1966 and 1977 is known to have imposed President's rule 39 times in different states. Similarly, the Janata Party which came to power after the emergency issued President's rule in 9 states which were ruled by Congress. This was done in 12 states altogether at the same time. Even later it has been resorted to very often.

The practice was limited only after the Supreme Court established strict guidelines for imposing the President's rule in its ruling on the *SR Bommai vs Union of India* case in 1994. This landmark judgment has helped curtail the widespread abuse of Article 356.[xxxiii] The judgment established strict guidelines for imposing President's rule. Subsequent pronouncements by the Supreme Court in Jharkhand and other states have further limited the scope for misuse of Article 356. Only since the early 2000s has the number of cases of imposition of President's rule been drastically reduced.

The form and structure of the Government of India and the State Governments have more or less remained the same in the last three-quarters of a century. Beneath the Cabinet are Ministers holding charge of their respective departments, with the civil service (All-India Service Officers, Central Service Officers, and other departmental officials at the Union level. At the state level, they are again All-India Officers and State service officers along with an army of other services, subordinate service officers, etc.). There are officers at the headquarters (both at Delhi and state capitals) associated with policy planning, monitoring, and evaluation, along with field-level officers who implement the programs of the Government and ensure the achievement of the objectives of the state). There will also be parastatals, either corporate bodies created under corporate laws, or registered societies, which may be either profit or non-profit organisations. The management of this large army of civil servants is a complex task, for which the personnel departments of the Centre and the State take full responsibility. They are responsible for recruitment, appointment, training, promotions, evaluation of performance, etc. The financial resources required for the achievement of the various objectives of the government are garnered from tax and non-tax sources covering a wide array of subjects, for which constitutional provisions exist. This large monolithic structure of the government has been criticized and condemned, yet, it has held together this vast and diverse nation under the umbrella of the constitution that has survived many tests and trials in its long journey.

What does executive power entail? The Supreme Court has repeatedly said that it defies definitional precision. On the other hand, it "connotes the residue of government functions that remain after legislative and judicial functions are taken away." Determining policies and executing them, initiating legislation, maintaining law and order, promoting social and economic welfare, and directing foreign policy among other things involves the exercise of executive power.[xxxiv] Secondly, there are certain bounds within which the Executive must function. These have been enunciated in the *Madhav Rao Jivaji Rao Scindia* case[xxxv]. Executive action cannot contravene the Constitution; The Executive must uphold it even when it is inconvenient to do so. Secondly, executive action cannot infringe upon Fundamental Rights. Thirdly, executive action cannot contravene a

statute or exceed powers conferred through it: it is bound by statutory provisions and rules. Fourthly, the Executive can neither impose taxes nor spend money without legislative sanction.[xxxvi]

The power to make appointments of the Executive is worth noting. The Constitution has created a large number of institutions - such as the Attorney General, the Comptroller and Auditor General, members of the Union Public Service Commission, and the Election Commission - and vests in the Executive the authority to appoint its functionaries. The Constitution replicates some of these institutions at the state level and vests the power of appointments to them with the state executive. The other specific executive power is the power to grant pardons, reprieves, remissions, etc., although the extent and the grounds of judicial review in this matter are still insufficiently clear. We have already seen the rule-making powers of the President in Article 77 (3) and of the Governor in Article 166 (3). Other powers include the powers to make rules for the joint sittings of the two Houses of Parliament, rules regarding conditions of service of government employees, etc.

More strikingly, the Constitution also authorises the President to exercise original legislative power for the promulgation of ordinances – the equivalent of parliamentary legislation - under Article 123, provided there are existing conditions that 'render it necessary for him to take immediate action'. Of course, ordinances are temporary and must be approved by the Parliament when it next convenes within six months, failing which they lapse.

From the above, we may say, that the nation's constitutional system does not have a watertight arrangement of separated functions, with the Executive performing certain limited legislative actions.[xxxvii] Written to serve generations, the provisions of the Constitution on the executive "steadied the principal branch of government at the moment of founding, underwent amendments, witnessed controversies, and generated debates. That it has served well is a testament to the genius of those who penned it. The challenge, however, is to make the template – and its meaning – relevant to both stable and unstable times, politically. Whether those that work the Constitution and interpret it are up to this challenge remains to be seen."

The test of a strong and effective administration, is ultimately, not in the words and spirit of the Constitution, but in the calibre and mettle of the people who administer it. The manner in which the executive at both the Union level and the State level discharge solemn and sacred duties will determine the future of the country. In his address on 26 November 1949, just before the approval of the new Constitution, the President of the Constituent Assembly, Dr. Rajendra Prasad made this eloquent appeal. This was recently recalled in a speech made by the Vice President in March 2023: "Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. It is a trite saying that a country can have only the Government it deserves. Our Constitution has a provision in it that appear to some to be objectionable from one point or another. We must admit that the defects are inherent in the situation in the country and the people at large. If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and today India needs nothing more than a set of honest men who will have the interest of the country before them."[xxxviii]

Notes

i Granville Austen, *The Indian Constitution: The Cornerstone of a Nation, (*Oxford University Press, 1972), 145.

ii Ibid: 146.

iii Constituent Assembly Discussions VIII, 12, 454-6. https://www.constitutionofindia.net/constitution_assembly_debates

iv Nehru Report (1928). https://www.constitutionofindia.net/historical_constitutions/nehru_report__motilal_nehru_1928__1st%20January%201928

v The Sapru Report (1945). https://www.constitutionofindia.net/historical_constitutions/sapru_committee_report__sir_tej_bahadur_sapru__1945__1st%20December%201945

vi KM Munshi, *Notes on a Constitution,* (1972), 9-10. Munshi Papers, quoted in Granville Austen, Supra: 145.

vii *Law Ministry Archives*: File CA/63//Cons/47-III: *Prasad Papers* File 3-C/47

viii Constituent Assembly Discussions IV, 2, page 578.

ix Granville Austen, Supra: 150-51.

x Jawaharlal Nehru, *Constituent Assembly Debates* IV, 11, 915.

xi KA Ayyar, *Constituent Assembly Debates* VII, 24, 985-6.

xii Constituent Assembly Discussions IV, 6, 734, Supra.

xiii Granville Austen, Supra: 155.

xiv BN Rau,. Constituent Assembly of India, Constitutional Precedents (First), Government of India Press, (1946), 51.

xv Shubhankar Dam, "The Executive", *The Oxford Handbook of the Indian Constitution,* Oxford University Press, 2016): 310.

xvi Granville Austen, Supra: 232.

xvii AH Birch, *Federalism, Finance and Social Legislation in Canada, Australia and the United States*, (Oxford University Press, 1955): 305.

xviii Constituent Assembly Debates VII, 1, 33-34.

xix Nehru Report, 1928, Supra: 24.

xx Sapru Report,1945, Supra: 177.

xxi Constituent Assembly Debates V, pages 4, 77 and VII, 1, 43.

xxii *The Union Powers Committee, Second Report* (1947). *Reports, First Series*, 70-71.

xxiii BR Ambedkar (1947): BR Ambedkar: Selected Speeches, page 11, accessible at https://prasarbharati.gov.in/whatsnew/whatsnew_653363.pdf

xxiv NG Ayyangar, *Constituent Assembly Debates*, V, 3, 439.

xxv Second Gift Tax Officer vs DH Nazareth, AIR 1970 SC 999, https://indiankanoon.org/doc/1512163/

xxvi Constituent Assembly Debates, XI, 2, 516. Austen Granville, Supra: 254

xxvii Rameshwar Prasad vs Union of India, AIR 2006 SC 980, accessible at https://indiankanoon.org/doc/79280249/

xxviii Ibid.

xxix Constituent Assembly Debates, IX, 4, 140.

xxx Ibid: 156.

xxxi Constituent Assembly Debates, Vol 9, 177.

xxxii Durga Das Basu, *Shorter Constitution of India*, (Lexis Nexis, 16th Edition, 2021), 2281-2.

xxxiii SR Bommai vs Union of India AIR 1994 SC 1918, accessible at https://indiankanoon.org/doc/60799/

xxxiv Ram Jawaya Kapur vs State of Punjab (1955), Air 1955, SC 549, accessible at https://indiankanoon.org/doc/1318432/

xxxv Madhav Rao Jivaji Rao Scindia 1971 1 SC 85, accessible at https://indiankanoon.org/doc/660275/

xxxvi Subhankar Dam, Supra: 322.

xxxvii Ibid: 329.

xxxviii Rajendra Prasad, The Constituent Assembly (1949). From the Text of the speech of Vice-President Shri Jagdeep Dhankhar Speech at the 2nd Dr Rajendra Prasad Memorial Lecture at Indian Institute of Public Administration delivered on 29 March 2023, accessible at https://pib.gov.in/PressReleasePage.aspx?PRID=1911965v

Chapter IX:
Affirmative Action and Other Special Provisions

Introduction- The Evolution of Socio-Economic Rights: We begin this chapter by looking at the special provisions included in the Constitution for the betterment of socially deprived sections of society. A historical appreciation of the legal and statutory background to the special measures provided in the Constitution for the upliftment of socially deprived sections of society is essential to understand the context in which there were complex and prolonged discussions in the Constituent Assembly. In doing so, we shall also examine other special provisions pertaining to the religious minorities as well as those unique demographic identities that live in certain parts of the country, in the main about Jammu and Kashmir and the Northeast.

The issue of identifying such disadvantaged groups of the population finds its first expression in Tamil Nadu, then called Madras State. The term Backward Classes was first used by the Madras administration in the 1870s in framing an affirmative action policy for them.[i] By the 1920s, the list had grown from the original 39 communities to 131. By 1925, the backward were divided into two groups, namely the so-called untouchables or 'Depressed Classes', (in today's terms referred to as Dalits), and 'Castes other than Depressed Classes.'[ii] By 1919, the Central Government under the British Raj had started reserving seats for them in local and national assemblies, under the nomenclature of Depressed Classes. With the 1935 Government of India Act, the untouchables were designated as 'Scheduled Castes' and came to be known so across India. At that time, they were

allotted only 7 seats out of 156 in the Council of States, 19 out of 250 in the Central Assembly, and 151 out of 1585 seats in the various Provincial Legislative Assemblies.

Reference to the Poona Pact of 1932 is unavoidable here. Differences between Gandhiji, who rejected the idea of separate electorates for the Depressed Classes, and Ambedkar, who favoured it, were eventually settled by agreeing to establish a Scheduled Castes electoral college, consisting exclusively of the members of the Depressed Classes. The Depressed Classes exerted an exclusive influence during the primary elections. For the provincial councils, this college would elect a panel of four candidates belonging to the Depressed Classes, for each of the reserved seats by the method of the single vote. The four persons getting the highest number of votes in this primary round of elections shall be the candidates for election by the general electorate. Thus, though the depressed classes may not have been in a majority in any constituency, as the candidate elected in the first round and nominated as the Congress Party's official candidate, they were inevitably elected by the other castes. According to the Pact, agreed upon by Ramsay Macdonald, the then Prime Minister, the seats allotted in the provincial councils were 148, divided between the provinces of Madras, Bombay with Singh, Punjab, Bihar and Orissa, Central Provinces, Assam, Bengal, and the United Provinces. The same principle was followed in the Central Legislature with 18% of the seats reserved for the Depressed Classes.

Nehru used the term 'backward classes' while introducing the Objectives Resolution in the Constituent Assembly on 13 December 1946, but it was the committees of the Assembly that clarified this later. The 'Advisory Committee on Rights of Citizens, Minorities, and Tribals and Excluded Areas,' set up on 24 January 1947, deliberated on these matters through a sub-committee in charge of Fundamental Rights. Ambedkar, a member of this sub-committee suggested a formula for the number of job quotas in public service for the backward groups, then referred to as 'minority groups.' (Later this term came to be used only for religious minorities.) This ultimately became Article 16 (4) of the Indian Constitution. It has been suggested that Ambedkar's insistence for reservation in the State apparatus was not primarily as an employment scheme, but to be recognised as a means to achieving power. "You should realise what our object is" he said while mobilising the Dalits in his tour to Madras in 1944.

"It is not fighting for a few jobs or few conveniences. It is the biggest cause we have ever cherished in our hearts. That is to see that we are recognised as the governing community."[iii]

Discussions in the Constituent Assembly: After 1947, the Constituent Assembly recognised them as such, using the same terminology, while those who were not included in this definition were left behind and were reclassified as 'other backward classes.' Both groups were to benefit from the reservation policy; however, the Constitution gave the benefit only to Scheduled Castes, (apart from the Tribes, a completely distinct group), leaving the 'other backward classes' to their fate, until the Mandal commission revived the entire issue leading to reservation for them too. The Constituent Assembly too decided to reject the idea of separate electorates for these backward communities, accommodating Gandhiji's views on the matter, as we have seen in the Poona Pact mentioned above. Stalwarts such as Rajendra Prasad, KM Munshi, Seth Govind Das, and Vallabhai Patel, all of whom maybe described as belonging to the old Hindu traditionalism, also opposed Ambedkar's demand for separate electorates, and took the stand that the Scheduled Castes were 'part and parcel of the Hindu Community.'[iv]

Patel's words in the Constituent Assembly are important here: "…I feel that the vast majority of the Hindu population wish you well. Without them where will you be? Therefore, secure their confidence and forget that you are a Scheduled Caste …those representatives of the Scheduled Castes must know that the Scheduled Castes must be effaced from our society, and if it is to be effected, those who have ceased to be untouchables and sit amongst us have to forget that they are untouchables, or else if they carry this inferiority complex, they will not be able to serve their community."[v]

It would also be revelatory to overhear some of the debates that took place in the Constituent Assembly when the matter of reservation for the backward categories was discussed. Some examples would suffice. Mahboob Ali Baig Bahadur demanded on 17 July 1947 that reservation of these backward categories should find a place not only in the Legislatures but also in the Cabinet. "If you are accepting that method of representation of people to the Legislature, with reservations of seats by whatever method… then it necessarily follows that in the Cabinet also the minorities or different sections should find a place." As a digression we may also mention the stand taken by Mrs. Renuka Ray when she opposed reservation for women: "I should like to support this clause which has done away once and for

all with reservation of seats for women, which we consider impeding our growth and an insult to our very intelligence and capacity." There were some tentative discussions as to whether there should be any reservation for the post of the President. The general view was that this should not be accepted. RK Sidhwa expressed the view of the house when he said: "I therefore strongly oppose this. There is no amendment to that effect, but implicitly or explicitly no reservation or no convention should be made even by our topmost, leaders that, we shall elect the President province-wise or from the north, south, west, or east of India, or we shall elect a Parsi, a Christian or a Muslim. The best man should be elected. I, therefore, Sir, strongly oppose the convention of election province-wise to the office of President."

We may hear too the words of Sardar Patel as he spoke on the sensitive issue. It would be profitable for a student of the Constitution to read at length from his words on the issue. While referring to the report on Minority Rights (to repeat, here the word is used in the context of those people who require certain safeguards and not only to religious minorities), he said: "We have tried to solve this difficult problem without any bitterness and without any controversy which would create any ill-feeling or hitch, and I hope that this House also will be able to dispose of this question in a friendly spirit and an atmosphere of goodwill. Let us hope that we will leave the legacy of bitterness behind and forget the past and begin with a clean slate. There is much that is happening around us which requires us to dispose of our business as quickly as possible, and we should do nothing in this House which will add to our difficulties or to the difficulties of our neighbours who are at present involved in bitter strife and when our hearts are bleeding with the wounds that are being inflicted on one of our best provinces in India… We have now also decided that in the public services, a certain amount of reservation for certain communities is necessary - particularly the Anglo-Indian community, and the Scheduled Castes in certain respects deserve special consideration. We have made recommendations in this respect, and I am glad to say that in this matter also there is unanimity between us and the communities whose interests are affected… Then we have also provided for some sort of administrative machinery to see that whatever safeguards are provided are given effect, so that it may not be felt by the communities concerned that these are paper safeguards. There should be continuous vigilance and watch kept over the safeguards that have been provided in the working

of the Government machinery in different provinces, and it shall be the business of the officer or administrative machinery concerned to bring to the notice of the legislatures or the Government."

VI Muniswamy said: "The document that has been produced by the Advisory Committee, I consider to be the Magna Charta for the welfare of the Harijans of this land…I do admit that, but, Sir, it was given to Mahatma Gandhi as a great Avathar to find the disabilities of a section of the Hindus, namely, depressed classes known by various names, to come to their rescue and to take that great epoch-making fast which evoked all the Caste Hindus in the whole realm of India to think what is 'Untouchables', what is 'Depressed Classes', what is, 'Scheduled Castes' and what should be done for them. It was that Poona Pact to which you yourself have been a signatory along with me and Dr. Ambedkar, that produced a great awakening in this country." He continued: "It is up to the majority community to see that justice is done so that these minorities may rise in the educational and social sphere so that they may take an equal share in the administration of this great land. Sir, there is a fear in the minds of some of my friends, especially the Scheduled Castes. that the Hindus are getting into power and that Hindu Raj is coming into force, and that I may introduce the Varnashrama that was obtained years back, again to harass the Harijans. I may tell such friends, as we see things, the Varnashrama Dharma maybe applied in a different sense--not in a sense that was obtained years before--and I am sure this report will be accepted unanimously in this House and any amendments that maybe brought may not disfigure the very good report that…has been produced by my Honourable friend Sardar Vallabhbhai Patel ji."

Jaipal Singh spoke out: Our standpoint is that there is a tremendous disparity in our social, economic, and educational standards, and it is only by some statutory compulsion that we can come up to the general population level: I do not consider that the Adibasis are a minority. I have always held that a group of people who are the original owners of this country, even if they are only a few, can never be considered a majority. They have prescriptive rights that no one can deny. We are not, however, asking for those prescriptive rights. We want to be treated like anybody else. In the past, thanks to the major political parties, thanks to the British Government, and thanks to every enlightened Indian citizen, we have been isolated and kept, as it were, in a zoo. That has been the attitude, of all people in the past. Our point now is that you have got to mix with us.

We are willing to mix with you, and it is for that reason because we shall compel you to come near us because we must get near you, that we have insisted on a reservation of seats as far as the Legislatures are concerned."

There were some discordant voices too: Debi Prasad Khaitan was opposed to the idea that representatives of the reserved communities could also contest on seats that were not reserved for them: "It will be very unjust and unfair if the communities for whom reservations have been made are allowed to contest still more seats out of the unreserved ones." Smt. Dakshayani Velayudan too added: "As long as the Scheduled Castes, or the Harijans, or by whatever name they maybe called, are economic slaves of other people, there is no meaning demanding either separate electorates or joint electorates or any other kind of electorates with this kind of percentage. Personally speaking, I am not in favour of any kind of reservation in any place whatsoever. Unfortunately, we had to accept all these things because British Imperialism has left some marks on us, and we are always feeling afraid of one another. So, we cannot do away with separate electorates. This joint electorate and reservation of seats also is a kind of separate electorate, but we have to put up with that evil because we think that it is a necessary evil. I wanted to oppose this amendment because it will be standing in our way and because when the system is put into actual working it will be standing in the way of Harijans, getting a correct ideology." Kazi Syed Karimuddin wished for similar reservation for minorities too: "The problem of the Schedule Castes is over and above this joint electorate for centuries. There are many other considerations which have contributed to the present position. I make an earnest appeal that as you have made a generous gesture of giving reservation of seats, you should also concede that for a particular period, the Muslim minority should be allowed to have a minimum number of voters from the community which will satisfy their political aspirations.

Of course, Sardar Patel replied to this very strongly: "So far as the amendment moved by the representative of the Muslim League is concerned, I find that I was mistaken in my impression and if I had believed this, I would certainly not have agreed to any reservation at all. When I agreed to the reservation on a population basis, I thought that our friends of the Muslim League will see the reasonableness of our attitude and allow themselves to accommodate themselves to the changed conditions after the separation of the country. But I now find them adopting the same methods which were adopted when the separate electorates were first introduced in this

country, and in spite of ample sweetness in the language used, there is a full dose of poison in the method adopted. Therefore, I regret to say that if I lose the affection of the younger brother, I am prepared to lose it because the method he wants to adopt would bring about his death. I would rather lose his affection and keep him alive. If this amendment is lost, we will lose the affection of the younger brother, but I prefer the younger brother to live so that he may see the wisdom of the attitude of the elder brother and he may still learn to have affection for the elder brother." He continued with vigour: "Those who want that kind of thing have a place in Pakistan, not here. Here, we are building a nation and we are laying the foundations of One Nation, and those who choose to divide again and sow the seeds of disruption will have no place, no quarter, here, and I must say that plainly enough… In the majority Hindu Provinces you, the minorities, led the agitation. You got the partition and now again you tell me and ask me to say for the purpose of securing the affection of the younger brother that I must agree to the same thing again, to divide the country again in the divided part. For God's sake, understand that we have also got some sense. Let us understand the thing clearly. Therefore, when I say we must forget the past, I say it sincerely. There will be no injustice done to you. There will be generosity towards you, but there must be reciprocity. If it is absent, then you take it from me that no soft words can conceal what is behind your words."

On 25 May 1949, Sardar Patel finally rose to speak in the Constituent Assembly, while placing on the table of the House, The India (Central Government and Legislature) Amendment Bill. He began by first referring to the opposition to the principle of reservation from certain members, including Dr. Mookerjee, Vice Chairman of the House, and Rajkumari Amrit Kaur. He spoke of the report of the Advisory Committee and the subsequent report of the Minority Committee for adopting certain safeguards for minorities by reservation of seats in the Legislatures based on population. (It maybe noted that the word 'minorities' as referred to here is for all backward communities and not for the religious minorities for whom the reservation was not agreed to). Conflicting views from the Muslims, as well as some who recommended dropping the idea of reservation, altogether were also mentioned, which led to the constitution of a smaller committee led by Dr. Rajendra Prasad and including Jawaharlal Nehru, Sardar Patel himself, Munshi, and Ambedkar. This smaller committee's report led to further deliberations and the postponement of a final decision.

The Sikhs too were demanding reservations in jobs for themselves. Patel spoke with some regret that whereas the Sikh religion does not recognise discrimination in the form of caste, it was the feeling of the Sikhs themselves that those who converted from Scheduled Castes into the Sikh religion do suffer from discrimination; and if they are not given the benefit of reservation in jobs, there is the possibility that they may revert to the Hindu Scheduled castes. "Therefore, the utmost that we can do is to advise those people in their community who were wanting these safeguards to go into the classification of Scheduled Castes. These people have now agreed to be lumped into the Scheduled Castes; not a very good thing for the Sikh community, but yet they want it, and we feel, for the time being, we would make that allowance for them. Theoretically, the position is logically correct. They will be all Scheduled Castes, the Ramdasis, and three or four others whatever they are, they will all be called one Scheduled Caste."

There were several last-ditch efforts by Muslim members of the Assembly to revive the question of reservation for Muslims. Some members such as Naziruddin Ahmed were quite clear that the Muslims do not require reservation: "I think that reservations of any kind are against healthy political growth. They imply a kind of inferiority. They arise out of a kind of fear complex, and its effect would be really to reduce the Muslims into a statutory minority. Then, again, Muslim reservation is psychologically linked up with separate electorates, which led to so many disasters. Therefore, I should submit that to carry on reservation would only serve to perpetuate the unpleasant memory of those separate electorates and all the embitterment, that accompanied them." He ended his words by saying "The Muslims should be realists as they are expected to be, and they must not have their eyes on the past. They should try as quickly as possible to adjust themselves to their new environments. If they show faith in the great Hindu community, I am sure they will treat them with fairness and justice." Begum Aizaz Rasul too did not support reservations for Muslims. Tajamul Hussain too did not support reservations for Muslims: "We are not a minority. The term 'minority' is a British creation. The British created minorities. The British have gone, and minorities have gone with them. Remove the term 'minority' from your dictionary. (Hear, Hear). There is no minority in India. Only so long as there were separate electorates and reservation of seats there was a majority community and a minority community."

Rev Jerome D'Souza, speaking on behalf of the Christians also rejected the idea of reservation for Christians: "I think I can say with certainty that as far as the Christian community is concerned, in the light of letters received and the public expression of opinion which we have heard, India as a whole is behind Dr. Mookherjee in his decision that there should be no reservation of seats."

However, others such as Mohammed Ismail Khan, ZH Lari, and Syed Muhammed Saadulla spoke strongly in favour of reservations for Muslims. The former spoke feelingly as follows: "This Committee has done the right thing in recommending the retention of the reservation of seats for the Scheduled Castes. But when they according to the majority community form part of that latter community, they follow the same culture and same religion and when they are of the same race according to them, yet it was thought fit, Sir, that they should be given separate safeguard of the reservation of seats. When it is justified for them, Sir, is it not all the more justified in the case of other communities which are admittedly different from the majority community? Sir, this action may look like something like vindictiveness, but any arrangement based upon ill will or vindictiveness cannot be a lasting one. I want the House to consider this aspect. The Muslims as well as the other communities want to contribute effectively and efficiently towards the harmony, prosperity, and happiness of the country, which is their motherland, and for that purpose, they want to have equal opportunities with other people. They want to be an honourable section of the people of the land, as honourable as any other section; in the days of freedom, they also want to have the freedom of expressing their views. Sir, it maybe said that they may express their views through the representatives elected by all the people put together. Supposing there is a difference of opinion between the minority community and the majority community, then will the representative of the majority community represent the different views of the minority, Sir?" He continued: "My community wants peace, and prosperity in the country; it wants harmony in the land. It is with that view, Sir, that I am speaking, and I ask on behalf of my community that they maybe given this fundamental right of representing their views before the Legislatures and the Government so that they maybe in a position to contribute their utmost and their best for the happiness, strength, and honour of the country which is their motherland as much as it is of anybody else."

Lari spoke too but recommended multi-member constituencies; where the minorities were in substantial numbers, the constituency would return one member from the minority, and one from the major, community. He even made mention of the system in Ireland and Switzerland where both Catholics and Protestants once had their representatives from the same constituency. He referred to documents issued by parties other than the Congress who had supported the idea. "Why should you create the impression in the Muslim mind that while you are solicitous of the interests of the Scheduled Classes and are conceding representation to them, you do not care and you are not mindful of the interests of the Muslims and, although you say that the majority community will be generous and will consider it its duty to return Muslim representatives in enough numbers, you have not at all shown the same care and the same solicitude for the Muslims?" He stated three reasons for his logic for advocating the proportional multi-member constituencies: One; that the Parliament must be the mirror of the national mind, where there should be no disenfranchisement of any section of the people; two, that the minority would have no grievances; and three, that with proportional representation, there will be a responsible opposition in the House. To him, this was a viable alternative to the reservation of seats for religious minorities as well as separate electorates for them. "Therefore, my submission is that you should coolly consider the question whether apart from the reservation of seats, apart from separate electorates, is there any democratic method which can ensure due rights to minorities--be it political, social or religious."

Syed Muhammed Saadulla was of the view that the general Muslim populace must be consulted before the idea of reservation for Muslims is discarded. He said: "You admit reservation for the Scheduled Castes whose number is twice that of the Muslim minority community of India. You admit at least in two provinces the right of the Indian Christians for Political safeguards or reservation. You admit it for the Anglo-Indian community. The only part where the recent report and the present resolution differ from the previous decision of the House is as regards the Muslims. I appeal to the House that they should not deny this safeguard when it is wanted by the minority concerned."

In the end, the demands of the Muslim religious minority for separate electorates, reserved seats, or proportional representation were not acceded to. It was clear that the majority community was greatly peeved with the division of the country and the creation of a separate Islamic State

and was not willing to make any concessions for the Muslims in the matter of reservation. All other members, predominantly Hindu in character and a considerably large majority supported Sardar Patel's resolution for reservation for Scheduled Castes and Tribes. The main speakers were Shibban Lal Saxena, Hukkum Singh, LS Bhatkar, Sochet Singh, Mahavir Tyagi, BH Zaidi, Rohini Kumar Chaudhary, etc. The token reservation made for Anglo-Indians was appreciated by Frank Anthony: "I believe that in making this gesture to this small community, the Advisory Committee has been uniquely generous."

Jawaharlal Nehru summed up the mood of the Assembly in his eloquent words: "We call ourselves nationalists-and rightly so-and yet few of us are free from those separatist tendencies-whether they are communal, whether they are provincial or other: yet, because we have those tendencies, it does not necessarily follow that we should surrender to them all the time. It does follow that we should not take the cloak of nationalism to cover those bad tendencies… I try to look upon the problem not in the sense of religious minorities, but rather in the sense of helping backward groups in the country. I do not look at it from the religious point of view or the caste point of view, but from the point of view that a backward group ought to be helped and I am glad that this reservation also will be limited to ten years… I would remind the House that this is an act of faith, an act of faith for all of us, and an act of faith above all for the majority community because they will have to show after this that they can behave to others in a generous, fair, and just way. Let us live up to that faith."

The resolution moved by Sardar Patel was approved by an overwhelming majority in the House. The amendment moved by Pandit Thakur Das Bhargava of limiting the reservation to ten years from the commencement of the Constitution was adopted. Sardar Patel summed up by saying: "The future generation will record in golden letters the performance that you are doing today I hope and trust that the step that we are taking today is the step which will change the face, the history, and the character of our country. "

Eventually, the Constitution established a reservation system with quotas based on population. The SCs and the STs were 'counted' in the census and hence easily identified. Where SCs and STs were in the majority, the seat would automatically go to them. But in constituencies where SCs or STs were in large numbers, for a short time from 1950 to 1961, there was

a system prevalent where two MPs or MLAs were elected from each such constituency, one from SC or ST as the case maybe, and the other from non-SC or non-ST candidates. From 1961 onwards, there were only single-member constituencies. Today, as there were no constituencies where the Scheduled Castes or the Scheduled Tribes were in a majority, the reservation of seats for them is based on the constituencies where they have the largest numbers. This stands at 24.13% or 131 of the 543 Lok Sabha seats.

But the 'other backwards' who were left out were not enumerated in the census. It was Sardar Patel who suggested the criteria for identifying them in his report of 8 August 1947. "Provision shall be made for the setting up of a statutory Commission to investigate into the conditions of socially and educationally backward classes, to study the difficulties under which they labour and to recommend to the Union or the Units, as the case maybe, the steps that should be taken to eliminate the difficulties and the financial grants that should be given and the conditions that should be prescribed for such grants."[vi] Yet, the members of the Assembly were uneasy about the vagueness of the definition for 'other backward classes'. They did not have a spokesman of the stature of Ambedkar for them. The composition of the caste and community of the 285 Constituent Assembly Members reveals that 45% came from the Upper Castes. Only 3.5% came from other Backward Classes. Their only spokesman was Punjabrao Deshmukh, who himself was not of this category. He regretted that "there are millions of others (other than SC and STs), who are more backward and there is no rule nor room so far as these classes are concerned."[vii] His demand to mention these 'other backward classes' along with the SCs and STs in Article 335 was rejected. Deshmukh replied that the Assembly "was going to exclude the backward classes because they have not formed themselves into one group or agitated."[viii]

Ambedkar had the final say in the rejection of the demand for the inclusion of other backward classes within the definition of Article 335. "Everybody in the province knows who the backward classes are, and I think it is, therefore, better to leave the matter as has been done in this Constitution, to the Commission, which is to be appointed which will investigate into the conditions of the state of society, and to ascertain which are to be regarded as the Backward Classes in this country."

Other Backward Classes: The debate took on a sharper turn when an amendment was inserted as Article 15 (4) in the Constitution, after a Supreme Court judge struck down State reservations in educational institutions in Madras State, as it was then called, on the grounds that it violated the non-discrimination principle in Article 15 (1) and Article 29 (2). This amendment enabled the State to make special provisions for the advancement of any socially and educationally Backward Classes of citizens. In the Parliamentary debate, Ambedkar referred to the Backward Classes, as "nothing else but a collection of certain castes". Nehru was not willing to define backwardness only in terms of caste. "We have to deal with the situation where for a variety of causes for which the present generation is not to blame, the past has the responsibility, there are groups, classes, individuals, communities…who are backward. They are backward in many ways – economically, socially, and educationally – sometimes they are not backward in any one of these respects and yet backward in another. The fact is therefore that if we wish to encourage them in regard to these matters, we had to do something special for them… we want to put an end to all these infinite divisions that have grown up in our social life…we may call them by any name you may like, the caste system or caste, religious, divisions, etc.."[ix] Nehru, it maybe said, while recognising the pernicious influence of caste, did it rather reluctantly. Yet, one may venture to say that Nehru did not wish to fight caste as a priority objective; for him, economic modernisation would eradicate all the legacies termed backwardness. The vague and non-operational definition of other Backward Classes resulted in them being virtually absent from the political discourse of the country for almost fifty years after Independence.

Not only this, but the other Backward Classes have also lost many advantages after Independence. In Madras and Mysore administrations, they had enjoyed reservations in government posts to the order of 25% and 50% respectively. When these States tried to pursue these policies after independence, they were challenged by Upper Caste litigants who won the day in the famous Balaji vs Mysore State case[x], as a consequence of which they lost the positive discrimination that they had been hitherto enjoying. The Court's view in this landmark case was that the powers conferred on the State to provide reservation under Articles 15 (4) as well as 16 (4) of the Indian Constitution are to promote the educational and economic interests of the weaker sections so that they could be protected from social injustice. However, when the State provides unreasonable reservation to

weaker sections, it does injustice to the other sections removing the whole principle of social equality, for which the provisions were introduced.

It is ironic to state that the report of the first Backwards Classes Commission of 1953, the Kaka Kalelkar Commission, which used the criterion of caste for recommending reservation in jobs, was rejected by the Government of India. Home Minister GB Pant disapproved of the use of caste for identifying the backward, arguing that this may only perpetuate the existing distinctions of caste. However, the Commission's report stated the crystallisation of the ambitions of these other Backward Classes insofar as their political and social ambitions were concerned. The report of the second Commission, known as the Mandal Commission, set up in 1979 by the Morarji Desai government, advocated the adoption of some eleven criteria to determine social and educational backwardness and recommended the grant of 27% of jobs under the central government to be reserved for these cases. The report relied on the caste-based census of 1931 and identified about 52% of the country's population as belonging to other backward classes. The report languished for a decade until 1990 when it was retrieved by the VP Singh government which announced its intention to implement the same. The massive nationwide protests resulting in many cases of self-immolation and suicide did not prevent its implementation, strengthened as it was by the Indra Sawhney judgment of 1992. It was a massive social revolution of a kind unknown in our history, with 75% of our population getting preferential treatment in government appointments, though the reservation was limited to 50% of available vacancies.

The Commission recommended a variety of criteria such as castes or classes:

- who are considered as socially backward by others,
- who depend on manual labour for their livelihood,
- whose marriage takes place before the age of seventeen,
- where females' participation in work is at least 25 per cent above the State average,
- where children who never attended school are at least 25 per cent above the State average,

- where student drop-out is at least 25 per cent above the State average,
- where the number of matriculates is at least 25 per cent below the State average,
- where the average value of family assets is at least 25 per cent below the State average,
- where families in kutcha houses are at least 25 per cent above the State average,
- where the source of drinking water is beyond half a kilometre
- where the number of households availing consumption loans is at least 25 per cent above the State average.

The criteria for determining backwardness across the country for other backward classes is almost uniformly followed by the States as above.

With this background in place, we shall now turn to the specific articles of the Constitution dealing with these special provisions, starting with the castes and the classes, then moving on to the Tribes, and finally also casting a glance over certain other special provisions in the Constitution.

While Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth, Article **15 (4)** is a clause which enables the State to make special provisions by law for the advancement of socially and educationally Backward Classes of citizens and the Scheduled Castes and Scheduled Tribes in the matter of admission to educational institutions. On the same analogy, while Article 16 enunciates the principle of equality of opportunity in matters of public employment, **Article 16 (5)** does not prevent the State from making any reservation as well as in matters of promotion in favour of the Scheduled Castes and the Scheduled Tribes. **Article 46** which is a Directive Principle of State Policy, casts a responsibility on the State to promote the educational and economic interests of the Scheduled Castes and Scheduled Tribes and other weaker sections.

Article 330 pertains to the reservation of seats for Scheduled Castes and Scheduled Tribes in the House of People. There are three categories of persons that have been mentioned in this article, namely, the Scheduled Castes, the Scheduled Tribes, and specifically, the Scheduled Tribes in the autonomous districts of Assam. Clauses (2) and (3) clarify that the

reservation of such seats in the States for Scheduled Castes and Tribes concerned, shall be in the same proportion as their population to the total population of the State or Union Territory.

Article 331 makes a similar provision for not more than two members of the Anglo-Indian Community in the House of the People, through the process of nomination by the President of India.

Article 332 is analogous to Article 330 but with reference to the Legislative Assemblies of the State. Here too, three categories have been specified, the Scheduled Castes, the Scheduled Tribes, and the Scheduled Tribes of the autonomous districts of Assam. The number of seats reserved for the Castes and the Tribes shall be in proportion to the population of the State. In addition, there are certain clauses in the same article for the protection of the interest of Tribes in the States of Arunachal Pradesh, Meghalaya, Mizoram, Nagaland, Tripura, and Assam as well as the Bodoland Territorial Areas District.

Article 333 refers to the representation of the Anglo-Indian community in the Legislative Assemblies, analogous to Article 331 for the House of the People. In this instance, it is the Governor who, in his discretion, can make such nominations.

The purpose of such reservation is to guarantee a minimum number of seats to the Scheduled Castes or the Tribes as the case maybe. At the same time, it does not prevent members of these castes or tribes from contesting a general seat. The purpose of the reservation of constituencies is to ensure representation in the legislative assemblies to the members of the tribes and the castes so that they are enabled to make special efforts on their behalf for the upliftment of the population of these categories. The principle is that only one who belongs to these categories would be able to understand the special and complex relationships of these categories to the general classes, in the context of the historical injustices meted out to them over the centuries.

Article 334 as it originally stood, made such reservation for only ten years, i.e., up to 1960 from the date of the promulgation of the Constitution of India, 1950. However, from time to time, the reservation of seats for the Scheduled Castes and the Tribes was extended. The last extension was made through the 104th Constitutional Amendment Act and is now extant up to 2030. By the same amendment, the reservation of seats for Anglo-

Indians both in the House of the People and the Legislative Assemblies in the States was also removed, since the 2011 Census of India records this community's population as just about 269.

Thus, Articles 330, 332, and 334, along with the provisions for reservations in rural and urban local bodies arising out of the 72nd and 73rd Constitutional amendments, provide for reservation in the Union and State Legislatures and the said local bodies. For the local bodies, there is a provision for OBCs also to contest. As an example, we may say that out of the 543 seats in the Lok Sabha, 79 have been reserved for SCs and 41 for STs, in addition to other seats where SC and ST candidates can also contest.

Article 335 is a measure of affirmative action, that allows the Union and the States to take into consideration the claims of the members of the Scheduled Castes and Scheduled Tribes in the making of appointments to services and posts both at the Central and State level. However, it makes it clear that such appointments shall be consistent with the maintenance of efficiency in administration. The proviso in the article enables the Union and the States to allow relaxing the qualifying marks in any examination in matters of promotion to any class of services or posts in connection with the affairs of the Union or the States. It is the constitutional duty of the respective governments to consider the claims of the Castes and the Tribes for such an appointment, and is in keeping with Article 46, falling within the ambit of the Directive Principles of State Policy. Article 46 makes it incumbent on the State to promote with special care the educational and economic interests of the weaker sections of the people, particularly the Castes and the Tribes, to protect them from social injustice and exploitation.

There has been much litigation at the level of the Apex Court on these issues. The overlap with Article 16 (4) is one such matter that maybe flagged here. This clause of Article 16 states that "nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward calls of citizens which, in the opinion of the State, is not adequately represented in the services under the State. Article 16 falls under the section on Fundamental Rights and equality of opportunity in matters of public employment. It is, therefore, a justiciable right. On the other hand, Article 46, as a Directive Principle of State Policy, is not justiciable. But this difference causes no legal hindrance, as the fundamental right is further strengthened by Article 335 which also enables the relaxation of qualifying marks in an examination and the

lowering of standards for evaluation. However, a particular form or manner of reservation, if found to be unreasonably excessive, can be struck down.[xi] Ordinarily, a reservation over 50% would be considered excessive, though there is no formula on this point. The test of reasonableness has to be determined concerning the circumstances of each case, and unless there are extraordinary situations, the 50% limit should be normally applied.[xii]

The reconciliation of the prolonged controversy between the need for maintenance of efficiency, stipulated under Article 335, and the need for reservation as stated under Article 16 (4), was finally achieved in the Indra Sawhney case. Given the great impact that the judgment has made in the recruitment process into administrative and other services in the country, a summary of the judgment is attempted here. Reservation is not necessarily anti-meritorious, because efficiency is not identical to merit in an examination. The condition of maintenance of efficiency in administration has to be maintained not only for Scheduled Castes and Tribes but also Other Backward Classes (OBCs) and weaker sections who fall under Article 16 (4). The court realized that there will be some sacrifice of merit when the reservation for Backwards Classes is made, but this cost has to be paid for ensuring 'social justice' as an objective of our Constitution. For being entitled to reservation under Articles 16 (4) and 335, the claimants must belong to a backward class and such a class must be inadequately represented in the services of the State. The Indra Sawhney judgment also made it clear that the 50% limit can be exceeded in remote areas where the people maybe more backward than elsewhere. Where members of the Backward Classes such as SC or ST or OBC get selected in open competition by dint of their merit, they will not be counted against the 50% quota of reservation. Further, reservations made on other grounds such as persons with disabilities or ex-servicemen, etc., will not be considered under Article 16 (4). Also, significantly, unfulfilled reserved quota vacancies in a particular year can be carried forward to succeeding years.

This far-reaching judgment led to certain constitutional amendments in Article 16 by the addition of Clauses (4A) and (4B). They enabled the State to make reservations in promotions as well as to carry forward unfilled vacancies in certain years to be treated as 'a separate class of vacancies' which will be beyond the limit of 50% reservation. Article 335 was also amended by the insertion of a proviso to enable reservation in promotion as well.

Article 336 and **Article 337** pertain to special provisions for the Anglo-Indian community in certain services such as railways, post, and telegraph up to a maximum of ten per cent. Article 337 pertained to educational grants for the Anglo-Indian Community; the ten years limitation having expired; this Article has become non-operative.

Article 338 creates the National Commission for Scheduled Tribes. The article used to be once headed as 'Special Officer for Scheduled Castes and Scheduled Tribes', but two amendments have taken place here; one which changed the title to Commission, and the other to enable the separation of the Commissions into two, one for the Castes and the other for the Tribes, now placed in **Article 338A**. The purpose of the amendment was to specify with more clarity the role and functions of these commissions. Each of the Commissions has a Chairperson, a Vice-Chairperson, and three other members. These two Commissions shall investigate, evaluate and monitor all matters related to the safeguards of the Castes and Tribes, inquire into specific complaints regarding deprivation of rights, participate in the planning process of the socio-economic development programmes and their evaluation, present annual reports to the President, suggest recommendations for the effective implementation of these safeguards and other measures for their protection, welfare and development and such other functions as maybe specified by the President. The reports of these Commissions shall be placed by the President to each of the Houses of the Parliament and the Legislatures of the States concerned. In its enquiries, the Commissions have the powers of a Civil Court.

One of the sensitive issues arising out of these articles of the Constitution, and also related to the provisions of anticipatory bail for any person accused under the Prevention of Atrocities Act, 1989, was the fact that such persons were excluded from anticipatory bail in Section 438 of the Criminal Procedure Code, Cr.PC.[xiii] This stand was contested from time to time on the grounds that blanket refusal to grant anticipatory bail cannot be justified in every case. Consequently, in later judgments, such as the Pavas Sharma vs State of Chhattisgarh, it was held that "the Court is required to apply its mind to the relevant provisions of law… and if the material on record leads to the satisfaction that the complaint does not make out a prima facie case …the bar created under Section 18 of the Act of 1989 shall not apply, and in appropriate cases of exceptional nature, the benefit of anticipatory bail could be admitted to the applicant"[xiv] The situation gave relief under the processes of law to persons wrongfully accused under the Act.

Article 339 relates to the control of the Union over the administration of Scheduled Areas and the welfare of Scheduled Tribes, through the orders of the President who can appoint a Commission to report on the same. Under this Article, the Union has been empowered to issue directions to a State as to the drawing up and execution of schemes essential for the welfare of the Scheduled Tribes.

Article 340 also empowers the President to appoint a Commission to investigate the conditions of socially and educationally backward classes, and to make recommendations to remove such difficulties as they maybe facing and improve their conditions. This article gains its strength from Article 15 (4) under part III related to Fundamental Rights where it has been stated that "the State government can make special provisions for the advancement of socially and educationally Backward Classes of citizens, (other than Scheduled Castes and Tribes). The Commission can also recommend grants that should be made for this purpose. The recommendations of the Commission are to be submitted to the President who shall place the same before each of the Houses of Parliament.

It is under this article and in compliance with the Indra Sawhney judgment, that the Government of India has enacted the National Commission for Backwards Classes Act of 1993 for the identification of such backward classes, other than Scheduled Castes and Tribes, and their reservation for appointment or posts under the Government of India. The States have followed suit in their respective jurisdictions. The decisions of the Commissions at the National and State level are not immune from judicial review in case the approach adopted by them is not fair and adequate. It maybe kept in mind that the issue of the Backward Classes came to the fore after the publication of the Mandal Commission report, prepared in 1980 and published in 1990 by the VP Singh government. It led to widespread student protests but in the end, was fully upheld by the Courts. In a manner of speaking, it was a social revolution of affirmative action, whereby large sections of the population got preferential treatment in admissions to educational institutions and public employment. Of course, the reservation was limited to 50% of available seats or job vacancies with the condition of a certain cut-off income level.

Article 341 and **Article 342** are almost identical and refer to the powers of the President and the Governors to issue public notifications, for Scheduled Castes and Scheduled Tribes respectively, specifying the

sections of the population which, for the Constitution, shall be deemed to be Scheduled Castes or Scheduled Tribes. These articles grant a measure of affirmative action and enable positive steps to be taken by the State for the safeguard of the rights of these disadvantaged and backward communities. It maybe kept in mind that the clause under the Definitions article of the Constitution i.e., Article 366 (24) defines the Scheduled Castes as "castes, races or tribes, or parts of or groups within such castes, races, or tribes, as are deemed under Article 341 to be Scheduled Castes for the Constitution. Similarly, Article 366 (25) defines Scheduled Tribes as tribes or tribal communities or parts of or groups within such tribes or tribal communities in the Constitution. The Scheduled Castes Order, 1950 was promulgated by the President under this power. Once Parliament has included or excluded any particular caste, race, or tribe under the definition, the President shall thereafter have no powers to amend the list. As regards Scheduled Tribes, the list is contained in the Constitution (Scheduled Tribes) Order, 1950 as amended by the Scheduled Castes and Scheduled Tribes Order (Amendment) Act 63 of 1956, 108 of 1976, 18 of 1986, and 15 of 1990.

Analogous provisions for the Backward Classes exist as **Article 342A** which maintains that the President and the Governors of the States shall by public notification specify the socially and educationally Backward Classes, in relation to the Union or the State as the case maybe. Such a notification cannot be varied by any subsequent notification. This Article was inserted by the Constitution (One Hundred and Second Amendment) Act, 2018. There have been various judgments of the Supreme Court in this context. But the prevailing stand, as enunciated in the Davinder Singh case is that both the Union and the States have a constitutional directive for the upliftment of the Scheduled Castes and Scheduled Tribes and other Backward Classes. They have the right to provide reservations in the fields of employment and education. Further affirmative action can also be taken to achieve that goal. "Reservation is a very effective tool for the emancipation of the oppressed class". It also went on to say that "though we have full respect for the principle of stare decisis (the legal principle of determining points in litigation according to precedent), at the same time, The Court cannot be a silent spectator and shut eyes to stark realities. The constitutional goal of social transformation cannot be achieved without considering changing social realities.[xv]

There have been some concerns on the question of whether the Scheduled Tribes have lagged behind the Castes in matters of social acceptance and in gaining the rights assured to them by the Constitution. The Castes, known by the generic title of Dalit, (which term has been considered more acceptable than the word Harijan' coined for them by Gandhiji), have been comparatively more aggressive in garnering their constitutional rights. The Constitution provides for a certain set of articles that apply to both, namely, 15 (4), 16 (4), 19 (5), 46, 330, 332, 334, 335, and 338. And indeed, certain other provisions are applicable only for the Scheduled Tribes, namely, **Article 244** which is regarding the administration and control of Scheduled Areas and Scheduled Tribes in any State (other than the States of Assam, Meghalaya, Tripura, and Mizoram). These States have been excluded from the purview of Article 244 since there are other comparable special provisions for them, primarily in Article 371 B and G, for example (dealt with in the section on geographic and cultural rights). **Article 244 A,** which was inserted by the Constitution (Twenty-Second Amendment) Act, 1969, specifically deals with the power of the Parliament to create an autonomous State within the State of Assam comprising tribal areas, including the creation of a body, with a Council of Ministers, to function as the Legislature of that autonomous State. This body shall have the power to make laws specified in the State or Concurrent List and to define its executive power, provide for taxes and make all supplemental and consequential provisions. Another significant constitutional provision made only for the Scheduled Tribes can be seen in Article 275, which deals with the general subject of grants from the Union to certain States. However, the proviso to Clause (1) of Article 275 specifically makes mention of grants in aid for "capital and recurring sums as maybe necessary to enable the State to meet the costs of development as maybe undertaken by the State with the approval of the Government of India for the purpose of promoting the welfare of the Scheduled Tribes in that State or raising the level of administration of the Scheduled Areas therein." **Article 339** refers to the authority of the President to appoint a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States. Clause (2) of this Article also enables the Union to give directions to any State as to the drawing up and execution of schemes essential for the welfare of the Scheduled Tribes.

Yet doubts have lingered as to the relative position of Scheduled Tribes vis-à-vis the Scheduled Castes. As Xaxa has written, the numerical strength and political clout of the Castes have given them an advantage over the Tribes. The Scheduled Castes have produced national leaders such as Ambedkar, Jagjivan Ram, KR Narayanan, Mayawati, etc., but we do not come across leaders of that stature amongst the Tribes. In appointments to government posts too, on a national level, the representation of Tribes is lower than that of the Castes. This may also be because the Tribes have by and large been dependent on a mode of livelihood that is based in nature, i.e., land and forest, and geographically excluded from the rest of society. We can define them as food gatherers and hunters. On the other hand, the Castes who were subject to all forms of discrimination in pre-Independence India, were in a more advantageous position to take quicker advantage of the constitutional provisions of equality and non-discrimination.[xvi]

One of the more comprehensive examinations of the issue of reservation has been that of Sitapati and the following is a summation thereof.[xvii] Our constitution extends the benefit of reservation to three major communities, the Scheduled Castes (SC), the Scheduled Tribes (ST), and Other Backward Classes (OBC). The first, now referred to as the Dalits, constitute about 16.6% of our population with over a thousand castes, once considered untouchable under Hindu traditions. The second constitutes about 8.9% of our population with about 700 tribes. The third is perhaps more controversial. The OBCs, unlike SCs and STs, are not a distinct social group but suffer from backwardness socially and in terms of education. One report places them at 52% of the population.[xviii]

It is important to point out that the OBCs are defined differently at different places in the Constitution: Article 15 (4) refers to 'socially and educationally backward classes' while Article 16 (4) refers mainly to 'backward classes.' Again, unlike SCs and STs, the OBCs can be defined and listed by each of the States separately, for reservation in education and employment. Thus, a particular class can be backward in one State and not in another. Some States such as Tamil Nadu had initiated reservations for the Backward Classes as early as 1950. For most of the others, it was only in 1991 that the process started. There have been controversies as to this variable definition of backwardness, through the prevalent interpretation, as voiced through the Indra Sawhney case, that while caste cannot be the sole criterion in determining a backward class, it can be used as the

'dominant criterion.' The Mandal Commission extrapolated 1931 census data to arrive at its findings, based on the policy for OBCs implemented by the Union Government.

Some pressing concerns on reservation: There are legitimate concerns that in all three categories, some groups have benefitted disproportionately from the policy or reservation. Solutions can be offered to rectify this anomalous situation including, removing those who have cornered more benefits, excluding the wealthy (creamy layer), and to create-sub-groups for the especially disadvantaged within each group. We may not ignore the fact that there are other beneficiaries of reservation such as women, the disabled, ex-servicemen, etc. Many States have begun reservations for women in the Panchayati Raj Institutions. Some have implemented this in employment as well. There have been demands for reservations for Muslims, who are largely underrepresented in government services.

The State's duty for reservation in education to promote with 'special care the educational and economic interests of the weaker sections of the people', arises from Article 46. However, as this is a directive principle, the real power of the State to enforce reservation arises from Article 15 (4), inserted in the Constitution by the first amendment Act of 1951. This was a response to the Supreme Court's invalidation of certain appointments made in Madras State. Article 15 (5) also grants the power for reservations in private educational institutions introduced into the Constitution by the 93rd Amendment of 2005. Ever since the principle of reservation for education for all three groups (except in minority educational institutions protected by Article 30) has been universally upheld.

As far as employment is concerned, it is generally acknowledged that public employment is a prized objective, given the security and remuneration that it offers. The constitutional mandate for such reservation arises from Article 16 (4) which enables the State to make a reservation in appointments or posts in favour of any Backward Class of citizens, that is to say, SCs, STs, and OBCs. Similarly, Article 335, concerning the SCs and the STs only, makes it incumbent on the State to consider the claims of SCs and STs, 'in the making of appointments to services and posts in connection with the affairs of the Union or State,' along with providing for any relaxation in qualifying marks or lowering of standards of evaluation. It is significant to point out here that Article 335 enjoins the Union and the States to make such appointments 'consistently with the maintenance of

efficiency of administration'. Thus, the kind of employment that requires the 'highest level of intelligence, skill and excellence' is outside the scope of reservation under Article 335.[xix] The courts have prohibited reservations for single posts and have limited them for appointments in the Judiciary.

Reservations in the private sector have long remained contentious. As far as colleges are concerned, various judicial pronouncements had earlier held such reservations in unaided professional institutions as serious encroachments on the autonomy of the private professional educational institution. These include the cases of the TMA Pai Foundation, the Islamic Academy, and the PA Inamdar case, on the grounds that it violated the private institutions 'right to occupation' protected under Article 19 (1) (g). As we have seen above, the Parliament responded with the Ninety-Third Constitutional Amendment Act of 2005 which introduced Clause (5) in Article 15, thus opening the way for reservation in private educational institutions.

Reservation in private schools too was contested arising out of the provisions of the Right of Children to Free and Compulsory Education Act 2009, which mandated that 25% of the seats in private unaided schools must be reserved for children of economically weaker families. The two-judge decision upheld the validity of the Act (except for unaided minority institutions).[xx] The constitutionality of the matter, arising in Article 21A, was again agitated before the Supreme Court in the Pramati Educational Trust case, where a five-judge bench ruled unambiguously in favour of such reservation in private schools: "So long as such law forces admission of children of poorer, weaker and backward sections of society to a small percentage of the seats in private educational institutions to achieve the constitutional goals of equality of opportunity and social justice set out in the Preamble of the Constitution, such a law would not be destructive of the rights of the private unaided educational institutions under Article 19 (1) (g) of the Constitution."

The other area left untouched is reservation in private employment, so far not mandated by the Constitution, nor commented upon by the Supreme Court. Proponents of the policy argue that the growth of employment in the private sector far outpaces that in government and, therefore there is a need for such reservation. Others respond by saying that the global competitiveness of the Indian industry will be affected by such reservations.

We may also address the question of the need for reservations in India. As Satpati puts it, the overriding constitutional aim of formal equality as embodied in Articles 14 (equality before law), 15 (1) (prohibition of discrimination), 16 (1) (equality of opportunity), and 29 (2) (non-discrimination in admission into educational institutions), was balanced by the countervailing and balancing provisions in Articles 15 (4) (special provisions for SCs, STs, and Backward Classes), 16 (4) (provision for reservation of Backward Classes for appointments) and 46 (promotion of interests of SCs, STs, and weaker sections).[xxi] It can be stated clearly that the constitutional balance as envisaged by the framers of the Constitution in 1950, was not found adequate to deliver the concepts of social justice because complexities of relationships between castes, religions, and classes became more apparent and problematic with the passage of time and the growing of hitherto suppressed aspirations of these disadvantaged people. In parliamentary debates, the principles of formal equality and efficiency have taken the backseat when faced with the demands for social justice.

A more nuanced explanation for reservations in India is what is known as the doctrine of substantive equality. "The emphasis of this doctrine is not to claim equality by transcending caste, but by claiming equality by recognising caste."[xxii] This is exemplified by the reduction of caste inequalities, minimising the education gap between SCs and STs, the creation of a Dalit middle class, and the increasing transfer of wealth to lower classes.[xxiii] The Supreme Court provides a classic exposition in the NM Thomas case[xxiv], where Justice CJ Ray wrote: "The question of unequal treatment does not arise between persons governed by different conditions and different sets of circumstances". The implication is that social justice is not constitutionally limited by values of formal equality or efficiency; rather, it is a seamless web where these values are in harmony.

With time, the numerically significant but socially and educationally disadvantaged groups have begun to taste political power, and they have used the provisions of the Constitution to gain ascendency through elected institutions. We may say that the effect of this evolved majoritarian politics lead to improvements in the dilemma of inequality, possible only because of the constitutional provisions of reservation. Though the OBCs are substantially large in number, the SCs and the STs too have considerable clout in the population dynamics. The strength of their combined numbers

has attempted to solve, through legislative fiat, complex issues such as definitions of Backward Classes, promotions in service, carry-forward principles, etc.

Reservation of public posts in the government has always been a contentious issue for members of general communities, who feel that these reserved groups, namely the Scheduled Castes, the Scheduled Tribes, and the Other Backward Classes have taken an undue advantage over the limited employment opportunities available. After reservation, the number of seats available is just about 50% for the general categories. On the other hand, the reserved categories claim these posts as their right after having been discriminated against by the upper classes or castes for centuries and see such reservation only as their right. Another complaint that the general categories feel strongly about is that many persons belonging to the reserved categories come in through sheer merit into the top ranks in competitive exams without the benefit of reduced qualifications for the reserved categories. Yet their numbers are not counted against the prescribed quota for reserved categories. This can be better understood in terms of the two forms of reservation in India: the vertical reservation for SCs, STs, and OBCs; and horizontal reservation applicable to cross-cutting categories such as women, people with disability, etc.

One of the measures taken recently that sidesteps the class or caste-based reservations is to earmark a certain percentage of seats in the public job market for the Economically Weaker Sections (EWS) of society. This was put into place by the 103rd Constitution Amendment Act, 2019, by opening vertical reservations to groups not defined in terms of hereditary social group identity such as caste or tribe. The amendment explicitly removed individuals who are already eligible for one form of vertical reservation (for castes and tribes or OBCs) from the scope of EWS reservation. This was immediately challenged in the Apex Court, though a compromise proposal was made urging that the amendment be not revoked but interpreted in a manner that does not exclude SCs, STs, and OBCs from the scope of EWS reservation.[xxv] The economically weaker section is the section of the society in India that belongs to the un-reserved category. The prescription for identification of such persons is the cut-off annual family income limit of Rs. 8 lakh rupees. This category includes people that do not belong to the caste categories of ST/SC/OBC and who already enjoy the benefits of reservation. The government of India introduced a 10% reservation for

this category of people who belong to the EWS criteria. Persons who own assets such as more than 5 acres of agricultural land or residential area of more than 1000 sq. ft. or residential plot of more than 100 sq. yards notified municipalities, etc., are excluded from the benefit under such reservation. This reservation is over and above the 50% reservation mandatory for the ST/SC/OBC categories. This ensures that these existing reservations are not adversely affected by the reservation for the EWS. The decision regarding this measure was taken on 7 January 2019 by the Union Council of Ministers for government jobs and educational institutions.[xxvi] However, when the Supreme Court pronounced its judgment in this matter on 7 November 2022, with a slim margin of 3-2, it upheld the government's decision to exclude those who have got the benefit of reservation for SC or ST, or OBC from the benefits of reservation for the EWS of society. This means that the EWS quota does not violate the basic structure of the Constitution or the equality code for considering the economic criterion. Thus, the 103rd Amendment cannot be held to be discriminatory. The two dissenting judges, including Chief Justice UU Lalit, said the law was discriminatory and violative of the basic structure of the Constitution.

We may not forget that there are other forms of reservation both for elected positions as well as in government appointments. Most States have 33% reservation (and some have 50%) reservation for women in elected posts to urban and local bodies. Reservation for women in government appointments, in varying percentages, has also been the norm rather than the exception. The Supreme Court's decision to implement reservation for OBCs in elections to local bodies, in addition to the already existing reservation for SCs and STs, on the basis of the triple test is the latest position with regard to the continuing story of reservations. The matter was taken up by the Apex Court, *Rahul Ramesh Wagh v. State of Maharashtra*[xxvii]. The triple test is as follows: These triple conditions are: (1) Setting up a dedicated commission to conduct "rigorous empirical inquiry into the nature and implications of the backwardness qua local bodies, within the State"; (2) Making recommendations by the commission on the number of seats to be reserved for OBCs "local body wise"; and (3) ensuring that, cumulatively, seats reserved for SCs, STs, and OBCs do not exceed 50 per cent. This triple test, which has now become mandatory for all State Governments to follow, was born out of the issue of OBC reservations in Maharashtra. Only

recently, the Supreme Court allowed reservation in both Maharashtra and Madhya Pradesh for OBCs to the tune of 29% after the compliance of the triple test formula.

Minority Rights

We now turn to the subject of protection of the interests of minorities. Falling under Part III of the Constitution, these rights of minorities are within the section on Fundamental Rights. This section, comprising Articles 29 and 30, is entitled Cultural and Educational Rights. Yet, we may also add four articles, under the section Right to freedom of Religion, as strengthening the position of religious minorities: these are Article 25 (Freedom of conscience and free profession, practice and propagation of religion), Article 26 (Freedom to manage religious affairs), Article 27 (Freedom as to payment of taxes for promotion of any particular religion), Article 28 (Freedom as to attendance at religious instruction or religious worship in certain educational institutions) to the list of articles that protect minorities. While these four articles do not mention 'minority' specifically, they apply to them with regard to the manner in which they worship and manage their particular religious matters. We are here concerned with specific provisions which particularly refer to religious and linguistic minorities.

Article 29 reads that any section of the citizens residing in the territory of India or any part thereof having a distinct language, script, or culture of its own shall have the right to conserve the same. Clause (2) goes on to add that no citizens shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language, or any of them. **Article 30** declares that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. Clause (1A), introduced into the Constitution by the Constitution (Forty-fourth Amendment) Act, 1978, enjoins that if any property of an educational institution established and administered by a minority is being considered for compulsory acquisition, then the State shall ensure that the amount of compensation determined for this purpose would not restrict or abrogate this right. Clause (2) also exhorts the State not to discriminate while granting aid on grounds that the institution is under the management of a minority.

These two articles confer four distinct rights: the right of any section of citizens to conserve its language, script, or culture; the right of linguistic and religious minorities to establish and administer educational institutions of their choice; the right of an educational institution not to be discriminated against in the matter of grant of State aid; and the right of a citizen not to be denied admission into State maintained or aided educational institutions on the grounds of religion, race, caste or language. In the St Stephen's case, the Supreme Court had held that while preference given to minority candidates in their situations is violative of Article 29 (2), the institution is free to adopt its action procedure for admission of their students and permitted it to admit up to 50% from their community.[xxviii]

It is significant to note that the Constitution does not define minorities. Yet, we may say that it denotes an identifiable group of people or communities who are seen as deserving protection from a likely deprivation of their cultural, educational, and religious rights by other communities who are in the majority. The minorities initially recognised are Muslims, Christians, Anglo-Indians, and Parsis. Sikhs and Jains were introduced later as minorities. The Government of India under the National Minorities Commission Act, 1992 has already declared the Sikhs as a religious minority for the whole country. The Supreme Court has held that 'minority' is to be decided on a State level based on numerical inferiority: thus, the Sikhs are a minority in all States except Punjab.

Geographic and cultural rights

Article 370 has been controversial right from the start. It is included in Part XXI of the Constitution titled 'Temporary, Transitional and Special Provisions' and provides a special status to the State of Jammu and Kashmir which has always been a disputed area between India, Pakistan, and China. J&K had been administered as a State from 1954 onwards up to 31 October 2019 when its constitutional status was drastically altered.

A brief look into the history of the region is necessary. When the British left in 1947, the Princely States were free to choose whether to join India or Pakistan or remain independent. Where it chose to remain independent, the Princely State was granted autonomy to form its administrative system, except for Defence, Foreign Affairs, and Communications. However, for almost every one of the 562 Native States, (with a few exceptions such

as Hyderabad, Junagadh, and Kashmir), geography dictated where each Native State should accede to. The iron will of Sardar Patel aided by VP Menon, ensured that almost all of the Princely States falling within the boundaries of the new country chose to accede to India. However, Hari Singh, the Hindu Dogra king of Jammu and Kashmir, which was the largest of the Princely States in the sub-continent, had a unique problem: he was the ruler of a predominantly Muslim population. His hesitation in throwing his lot with India, and his signing 'a stand-still agreement' only confused matters more. Pakistan engineered an invasion through Pakistan tribals into the areas of the State. With his back to the wall, Hari Singh signed the Instrument of Accession in favour of India on 26 October 1947. It was accepted by the Government of India on the same day. The Instrument of Accession gave only limited powers to the Government of India, namely the three subject matters of Foreign Affairs, Defence, and Communications. It was similar to several hundred others signed between the Government of India and other Princely States. Whereas the other States later signed merger agreements, the relationship of Jammu and Kashmir with the Union of India was governed by special circumstances. Given them, Article 370 was incorporated into the Constitution.[xxix]

Only when the instrument was signed, could India send its forces into Kashmir and reclaim much of the areas that the Pakistan tribals had occupied. When the UN interceded, Pakistan was still in possession of some areas of the State now referred to as Occupied Kashmir. The UN Security Council resolution of 21 April 1948 required Pakistan to withdraw from the areas it had occupied and to create conditions for a free and impartial plebiscite. Sir Owen Dixon, with the agreement of the two countries, was appointed by the United Nations Security Council to supervise the implementation of the UN Security Council resolution. His report submitted in September 1950, recommended the partition of the valley rather than a plebiscite.

It was in such troubled circumstances, in October 1950, the Jammu & Kashmir National Conference, which was the largest political party of the State, recommended the creation of a constituent assembly for the drafting of a new constitution for the State. Karan Singh, son of Hari Singh, then Head of State of J&K, issued a proclamation for the formation of the constituent assembly in May 1951. These steps virtually put an end to the efforts of the United Nations to broker peace. Elections were held for 75 seats, all of which were won by the National Conference, headed by Sheikh

Abdullah. On 31 October 1951, he addressed the new assembly calling for a new constitution and a "reasoned conclusion regarding accession". The United Nations, which had all along been trying to intercede in the dispute between India and Pakistan was thrown off its tracks. This event virtually put an end to the efforts of the United Nations in this regard.

Sheikh Abdullah's address to the newly formed State constituent assembly indicates his preference for aligning with India. As deliberations were going on in the assembly, on 24 July 1952 an agreement, represented by all political parties, was reached with Jawaharlal Nehru, known as the Delhi Agreement. This was announced to the assembly by Sheikh Abdullah and the main features of the Delhi Agreement were informed to the Assembly. These included:

The Head of the State of J&K would be a person recommended by the State Legislature and recognized by the President of India; the Indian flag would have the same status in Kashmir as in any part of India, but the Kashmir State flag would be retained; citizenship would be common in two parts of the country, but the State Legislature would have the power to define and regulate the rights and privileges of the permanent residents in Kashmir; the Fundamental Rights as laid down in the Indian constitution would be extended to Kashmir, but these would not come in the State's programme of Land Reforms; power to reprieve or commute death sentence would belong to President of India; the Indian President's power to declare a state of Emergency in case of external danger or internal disturbances would be extended to Kashmir, but in regard to internal disturbances, it would be used only at the request of the State Government; residuary power would be retained by the State but it could transfer more rights to the Union; Supreme Court could adjudicate in regard to any disputes between the State and the Centre and other provincial Governments and on Fundamental Rights agreed to by the State. Further, the details of financial arrangements would be separately considered.[xxx]

Despite the convergence of views, within a few days, Sheikh Abdullah went back on the agreement he had arrived at. It was clear that he was being forced to reassess the Delhi Agreement because of growing communal activities in the State. These vacillations and refusal to accept the terms of the Delhi agreement resulted in the dismissal of the Sheikh Abdullah

government and the installation of Ghulam Bakshi as Prime Minister of the State. The Security Council's last-ditch efforts to bring both countries to the table did not succeed.

In February 1954, the State constituent assembly unanimously ratified the State's accession to India. J&K's constitution came into force on 26 January 1957. Part II, section 3 states that "the State of Jammu and Kashmir is and shall be an integral part of the Union of India'. In 1956 the constituent assembly finalised its constitution, which declared the whole of the former Princely State of Jammu and Kashmir to be 'an integral part of the Union of India'. Elections were held the next year for a Legislative Assembly. In November 1956 the constituent assembly resolved to dissolve itself, paving the way for the elections to a new Legislative Assembly.

From 26 January 1957 up to 5 August 2019, the Constitution of India granted a special status to the State of Jammu & Kashmir. It was the only State that had its constitution. According to Article 370, the power of the Parliament to make laws for the State was limited only to those matters in the Union and Concurrent list which are declared by the President to correspond to those matters to which the Dominion Legislature, at the time of the accession of the State to the Dominion of India, was able to make laws. The other provisions of the Constitution would apply to the State of Jammu and Kashmir with exceptions and modifications as prescribed by the President. Even this was subject to the concurrence of the J&K government.

Some other deviations may also be mentioned: declaration of emergency by the Government of India in the States could be made only with the consent of the State Government. Of the 111 seats in the Legislative Assembly, 24 were kept vacant for representatives of Pakistan-occupied Kashmir. Certain special rights were granted to the permanent residents of Jammu and Kashmir concerning employment under the State, acquisition of immovable property in the State, settlement in the State, and scholarship and other forms of aid as the State Government may provide. The 5th Schedule pertaining to the administration and control of Scheduled Areas and Scheduled Tribes and the 6th Schedule about the administration of tribal areas do not apply to the State of Jammu and Kashmir.

Clause (3) of Article 370 is of vital importance as it is this clause that enabled the Presidential notification of 6 August 2019, whereby all clauses of Article 370 ceased to be operative. It said that notwithstanding anything in the provisions of Article 370, the President could issue a public notification declaring that this Article would cease to operate. The accompanying proviso is that the recommendation of the Constituent Assembly shall be necessary before Clause (3) is invoked. Since the Constituent Assembly was already dissolved by 1956, it could be assumed that the legal heir to that assembly, a Legislative Assembly duly elected by the people would suffice. In the case at hand, the assembly had been dissolved and President's Rule under Article 356 was in place. The approval of the Government under the President's rule was taken to be approval of the assembly, required as a pre-condition before the provision of Clause (3) of Article 370 was invoked.

Thus the revised Article 370 reads as follows: All provisions of this Constitution, as amended from time to time, without any modifications or exceptions, shall apply to the State of Jammu and Kashmir notwithstanding anything contrary contained in Article 152 or Article 308 (both of which define the expression 'State' as not including Jammu & Kashmir) or any other article of this Constitution or any other provision of the Constitution of Jammu and Kashmir or any law, document, judgment, ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under article 363 (which protected agreements entered into by a ruler of a Native State with the Government of India, before the commencement of the Constitution) or otherwise.

This change of constitutional status though hotly contested in the Parliament was carried through. Both Rajya Sabha and Lok Sabha passed the Jammu and Kashmir Reorganisation Bill, 2019 which converted the State into two Union Territories: Jammu & Kashmir and Ladakh. They came into existence on 31 October 2019, (celebrated as National Unity Day) with separate Lt Governors. President's Rule under Article 356 of the Constitution of India ended in the State of Jammu and Kashmir on the night of 30 October 2019. President's Rule does not apply to and is not needed in a Union Territory as it is anyway controlled by the Central Government. The President issued an order stating that he will directly administer the Union Territory of Jammu and Kashmir until the legislative assembly is constituted in the Union Territory.

Article 371 is also required to be mentioned here. The 11 articles up to Article 371 J makes special provisions with respect to certain other States. Article 371 was introduced by the Constitution (Seventh Amendment) Act, 1956 which was an omnibus collection of amendments, needed to implement the reorganisation of States on a linguistic basis. Clause 21 of the Statement of Objects and Reasons of the Bill of the seventh amendment act stated: "It is proposed to replace Article 371 with another article making a special provision concerning the States of Andhra Pradesh and Punjab. This article will enable the President to constitute regional committees of the State Legislative Assembly and secure their proper functioning by directing suitable modifications to be made in the rules of business of Government and the rules of procedure of the Assembly." The new article enabled the President to provide for any special responsibility of the Governors of Maharashtra and Gujarat to set up separate development boards for Vidarbha and Marathwada in Maharashtra and Saurashtra and Kutch in Gujarat, while also providing for equitable allocation of funds and suitable arrangements for technical education and vocational training in these areas. These Boards would also submit their annual reports to the respective State Legislative Assemblies.

Article 371A requires special mention here. This article was introduced to protect the special and unique social and cultural identity of the Naga people. It was inserted by the Constitution (Thirteenth Amendment) Act, 1962. Article 371A states that no act of Parliament shall apply to the State of Nagaland in respect of the religious or social practices of the Nagas, its customary law, and procedure, administration of civil and criminal justice involving decisions according to Naga customary law, and ownership and transfer of land and its resources. It shall apply to Nagaland only after the State Assembly passes a resolution to do so and the Governor in consultation with the Council can direct that the Act in whole or only part shall apply to the Tuensang area.

This amendment arises out of an agreement reached by the Government of India in July 1960, with the Naga Peoples Convention. It was then agreed that the Naga Hills-Tuensang Area would be constituted into a separate State of Nagaland. It is the Governor of Nagaland who is charged with the responsibility of the law and order of the State until when the situation normalises. There is a provision for the Governor to report to the President when he is satisfied that the situation is normal so that he can be divested of this responsibility. He shall also constitute a regional council of thirty-five

members, chaired by the Deputy Commissioner of Tuensang district, with a Vice Chairman to be elected from the members. The administration of the area shall be carried on by the Governor who shall also ensure that the amounts granted by the Government of India shall be equitably distributed between the Tuensang district and other areas of the State. The Governor shall make regulations for the peace, progress, and good government of the Tuensang district. One of the members of the Legislative Assembly of Nagaland coming from The Tuensang district shall be appointed by the Governor on the advice of the Chief Minister for tendering advice on matters related to the said district.

Article 371B makes similar provisions with regard to the State of Assam which enables the President to provide for the constitution and functions of a committee of the Legislative Assembly of the State formed amongst members elected from the tribal areas mentioned in Part I of the Sixth Schedule of the Constitution, namely North Cachar Hills District, Karbi Anglon District, and the Bodoland Territorial Area district.

Article 371C makes special provisions with respect to the State of Manipur for the Hill Areas of the State and enables the Governor to constitute a committee from amongst the elected members of the Legislative Assembly of the State, belonging to these Hill Areas. The expression Hill Areas shall be those areas declared by the President.

Article 371D makes special provisions concerning the States of Andhra Pradesh and Telangana, with the President being enabled to provide equitable opportunities and facilities for the people belonging to different parts of the State in matters of public employment, education, etc., with different provisions for different parts of the State. This includes powers to organise any class or classes of posts in the civil service under the State into local cadres for different parts of the State. This also includes matters related to direct recruitment to posts in a local cadre under the State Government or the local authority or for admission to any University or other educational institutions under the State Government. The extent and manner of preference to be given to candidates who reside or have studied for long in an area can be decided by the President. To achieve these purposes, the President may order the constitution of separate Administrative Tribunals for the State of Andhra Pradesh and the State of Telangana, which can exercise jurisdiction, powers, and authority that shall not fall under the purview of the courts (except the Supreme Court).

The Tribunal can decide on matters related to appointment, allotment, or promotion in any civil service under the State Government or local authority. These Tribunals can receive representations for the redressal of grievances and make such orders as it deems fit. Orders of the Tribunal shall be sent to the State Government for confirmation and become effective within three months unless the State Government modifies it or annuls it. These orders of the State Government shall be laid before the Legislative Assembly of the State. Appointments, promotions, etc., issued before 1956 for posts under Hyderabad State, and those issued before the insertion of this Article i.e., 371D through the Constitution (Thirty-Second Amendment) Act,1973 were protected.

Article 371E provides for the establishment through the Act of Parliament of a Central University in Andhra Pradesh.

Article 371F makes special provisions with respect to the State of Sikkim and was inserted into the Constitution by the (Thirty-Sixth Amendment) Act, 1975. The statement of objects and reasons to the Act mentioned the unanimous resolution adopted by the Sikkim Assembly on 10 April 1975 which noted the persistent harmful activities of the Chogyal, the former ruler which were aimed at undermining the responsible democratic Government set up under the provisions of the May 8th Agreement of 1973 and the Government of Sikkim Act, 1974.

The Government of India had some months earlier, agreed to intercede at the request of the Chogyal for help in maintaining order under the worsening law and order conditions in the area. The Agreement of 8 May 1973 was a tripartite agreement signed between the Chogyal, the India Government, and the representatives of the three political parties of Sikkim, namely Sikkim Janta Congress, Sikkim National Congress, and the Sikkim National Party.

This agreement led to the formation of a 32-Member Assembly after due elections were held in 1974. The Government of Sikkim Act was passed on 4 July 1974, which amongst other provisions, empowered the Government of Sikkim vide Section 30, to seek participation in the representation of the people of Sikkim in the political institutions of India and India's parliament. The Assembly was satisfied that these activities of the Chogyal violated the objectives of the Agreement of 8 May 1973 and ran counter to the wishes of the people of Sikkim and impeded their democratic development and

participation in the political and economic life of India. The Assembly resolved that "The institution of the Chogyal is hereby abolished and Sikkim shall henceforth be a constituent unit of India, enjoying a democratic and fully responsible Government".[xxxi]

This resolution had been submitted to the people of Sikkim for approval conducted through a special poll on 14 April 1975, supervised by the Election Commission of India, which voted in favour of being considered as a constituent unit of India enjoying a democratic and fully responsible government. The results of the poll were conveyed to the Government of India and in keeping with the wishes of the people of Sikkim, it was decided to include Sikkim as a full-fledged State within India. Article 371F was inserted into the Constitution to enable all these political developments to reach a finality and to include the people of the hill State into the Union of India.

Article 371F recognised the members of the Assembly of Sikkim elected vide elections of April 1974 as the members of the Legislative Assembly of Sikkim State as constituted under the Indian Constitution. The State was allotted one seat in the Parliament. The Governor of Sikkim was given special responsibility for peace and for making an equitable arrangement for ensuring the social and economic advancement of the population of Sikkim. All properties and assets of the erstwhile kingdom would now be under the Government of Sikkim. While the laws prevailing earlier were continued, the President was enabled to make adaptations and modifications in these laws to bring them into accord with the Constitution of India.

Article 371G makes special provisions with respect to the State of Mizoram. It states that no Act of Parliament in respect of religious or social practices of the Mizos or their customary law and procedure, including ownership and transfer of land and administration of civil and criminal justice according to Mizo customary law shall be applicable on the State unless the Legislative Assembly of the State so decides by resolution.

Article 371H makes special provisions for the State of Arunachal Pradesh, emphasising the responsibility of the Governor of Arunachal Pradesh concerning law and order. He shall normally act in consultation with the Council of Ministers but has also been enabled to exercise his discretion in such matters.

Article 317I is with reference to the State of Goa only stating that the Legislative Assembly of the State shall have not less than thirty members. It was inserted into the Constitution by the Constitution (Fifty-Sixth Amendment) Act, 1987.

Article 371J is the last of the special provisions for certain States of India and was inserted by the Constitution (Ninety-Eighth Amendment) Act, 2012, and is with respect to the State of Karnataka. It enjoins the President to provide for any special responsibility for the Governor for the establishment of separate development boards for the Hyderabad-Karnataka area for ensuring equitable allocation of funds for the developmental expenditure of this area, as also for opportunities and facilities for the people of this area for public employment, education, and vocational training. It also enables the reservation of a proportion of seats in educational and vocational institutions for students belonging to the Hyderabad-Karnataka area by birth or domicile.

It may not be our way to state that after the abrogation of Article 370 which removed the special status of Jammu and Kashmir, there has been some apprehension whether the States mentioned in Article 371A to J would also face the same treatment. The Government of India has taken the necessary steps to assure the States concerned, especially the States of Northeast India, that their concerns would be protected.

Notes

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Chapter X:

Taxes, Finance, Trade, and Commerce in the Constitution

Introduction: This chapter deals with Part XII and Part XIII of the Constitution. Part XII is titled Finance, Property, Contracts, and Suits and primarily deals with how the financial scaffolding of the nation is constructed. Part XIII is titled Trade, Commerce, and Intercourse within the Territory of India. Though brief, it lays the groundwork for the trade and commercial activities that the country has been engaged with, in the past three-quarters of a century. Yet, it must be borne in mind that all the provisions of Part XIII are under the umbrella of the fundamental right enshrined in Article 19 (1) (g) which simply guarantees all citizens the right to practice any profession or to carry on any occupation, trade, or business. Of course, there would be reasonable restrictions as enumerated in Article 19 (6). Yet, in more ways than one, these two parts of the Constitution have been the foundation of the structure of the Indian economy that has, over the years, grown exponentially in strength and size, to become one of the leading economic powers of the world. In this chapter, we shall see how the Constituent Assembly grappled with these issues in their discussions during the framing of the Indian Constitution, seeing but dimly the path ahead, yet depending on common sense and a love of the country to move ahead with hope and optimism.

Historical Background: It was the war cry of the American struggle for Independence "No taxation without representation", that fortified the call for breaking away from the mother country and led to the creation of the United States. At the same time, while formulating the principles of good taxation in The Wealth of Nations in 1776, Adam Smith argued that taxation should follow the four principles: fairness, certainty, convenience,

and efficiency. [i] By fairness what he intended was that taxation should be compatible with the conditions of the taxpayer, including his capacity to pay that amount prescribed and in keeping with his personal and family needs. "The subjects of every State ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the State." This certainly implies that the taxpayer is abundantly informed about why and how the taxes imposed on him are levied. "The tax which every individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the quantity to be paid, ought to be clear and plain to the contributor and every other person." Convenience refers to the avoidance of harassment and difficulties in the collection process and the ease of compliance experienced by the taxpayer. "Every tax ought to be levied at the time, or in the manner in which it is most likely to be for the contributor to pay it." Finally, efficiency in tax collection means that the process of tax collection should not negatively impact the economy and must not cost more than the taxes themselves. High taxes are only likely to discourage industry. Ruinous tax rates will lead to tax evasion and black market activity. In this chapter, we shall look at how we have provided for the collection of taxes and other duties from the people of India for the governance of the country and the Inter-State and Centre-State relations in the realm of trade, commerce, and intercourse that have been defined in this regard in Part XII and Part XIII of the Constitution.

It cannot be denied that the Constitution framers have referenced provisions in other constitutions such as the American and Australian Constitutions while drafting the articles described here. Section 92 of the Australian Constitution states: 'Trade within the Commonwealth to be free. On the imposition of uniform duties customs, trade, commerce, and intercourse among the States, whether by ocean navigation or internal carriage, shall be absolutely free.'[ii] In the United States, Article I, Section 8, Clause (3) of the constitution states that the United States Congress shall have the power "to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States…To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[iii]

Other countries have their own trade and commerce policies based on political ideologies and economic self-interest. Trade pacts such as the WTO or regional trade agreements such as NAFTA or EU ensure the best possible trade practices for their member nations. The European Union is an economic conglomeration of 27 countries with one of the most open economies in the world committed to free trade. More than 70% of the imports enter the EU at zero or reduced tariff rates. In the United Kingdom, currently struggling with the aftereffects of Brexit, the Trade Act of 2021 makes provisions for the implementation of international trade agreements by establishing the Trade Remedies Authority and conferring functions on it. It also makes provision for the collection and disclosure of information relating to trade.[iv]

In the People's Republic of China, Article 6 of the Constitution states: "The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people. The system of socialist public ownership supersedes the system of exploitation of man by man; it applies the principle of "from each according to his ability, to each according to his work." [v] China's present trade and commerce policies are driven by four main principles, namely "pushing for indigenous innovation, driving self-sufficiency, enhancing national security, and market reform and opening." Indeed, in the last half-century, the Chinese nation has moved from a restrictive communistic ideology to one that has embraced enterprise, innovation, and growth. It has grown to be one of the most powerful and fast-growing economies of the world today.

While we compare such trade arrangements and international trade pacts, what is of particular relevance to us is how India provided basic trade and taxation principles within the framework of the Constitution.

As stated earlier, we shall discuss in this chapter, the provisions of Part XII and Part XIII of the Constitution. To enable us to get a better understanding from the historical perspective, we may cast a glance over the saga of our economic development since Independence, and especially after the commencement of the Constitution of India which provided a framework for the same, is an absorbing story. Those early leaders realised clearly that the essence of British imperialism lay in the subordination of the Indian economy to the British economy, "on the transformation of India

into a supplier of foodstuffs and raw materials to the metropolis, a market for the metropolitan manufacturers, and a field for the investment of British capital."[vi]

Therefore, the shape and content of the new independent economy for India was a matter of great concern as the framers of the Constitution pondered the matter. Undoubtedly, they rejected the Gandhian dream of an idealistic economy. "In Gandhi's idealised State, there would be no representative government, no constitution, no army, or police force; there would be no industrialisation, no machines, and certainly no modern cities. There would be no capitalism, no communism, no exploitation, and no religious violence. Instead, a future Indian nation would be modelled on India of the past. It would feature an agrarian economy, self-sustaining villages, an absence of civil law, and a moral framework that would express the collective will of the people."[vii] Gandhiji had eschewed both capitalism and socialism and suggested an Indian State grounded in unconventional economics advocating self-reliance. He wrote about public ownership of property and promoted the spinning of khadi and manual labour as the ideal method to achieve self-rule. By sweeping away the oppressive authority of the federalist government, decentralisation would benefit India's villages in a host of ways. "Society would be composed of innumerable…ever-widening, never-ascending village republics."[viii]

His foremost pupil and first Prime Minister of the new democracy, Jawaharlal Nehru strongly disagreed with him, saying that Gandhiji's economic ideas were "utterly wrong…and impossible of achievement."[ix] Though deeply impressed by the socialist philosophies in an evolving Europe, his model was that of the Soviet Union with centralised planning, five-year plans, and State investment in infrastructure, and irrigation projects. "The period between 1950 and 1965 was one of great optimism, as the basic institutional structure for development was put in place through the enunciation of new policies, setting up of new institutions, and enactment of the basic legal structure underlying economic activities. A certain degree of success was achieved during this period in rousing a somnolent economy, with economic planning, import substitution, and self-reliance as the basic guiding principles. However, even as other Asian countries began to exhibit their export-oriented high-growth strategies, Indian policies became more rigid and inward-looking, and consequently, the 1965 to 1980 period exhibited relative economic stagnation. The 1980s were a period of hesitant transition from the hitherto dirigiste

framework. However, we had to wait till 1991 for a full-blown balance-of-payment crisis that then induced the beginning of comprehensive economic reforms, setting in motion the transformation of India towards a modern open economy."[x]

How much of the transformation that our country's economy hinges upon the constitutional provisions regarding taxation or trade and commerce, is a debatable point. As we have seen, there never was any support for Gandhiji's older and simpler economic model based on production at the household and village level. But others contributed to the thinking process. Ambedkar argued for the growth of the modern industry. In 1934, M Visvesvaraya created a national plan to double national income in a decade. Subash Chandra Bose headed the National Planning Committee to examine how India could industrialise rapidly once Independence was achieved. It was, however, Nehru's vision of a socialistic India that finally prevailed, one that was based on rapid industrialisation, and powered by the State, which would occupy the commanding heights of the economy. National economic planning modelled closely on the model of the USSR, saw the formulation of five-year plans that drew the blueprint for the long-term development of the country. The phenomenal growth of the State sector powered by substantial investments in basic infrastructure in the first fifteen years, was followed in the next quarter of a century, under the shadow of two wars and the imposition of the Emergency by static growth and stagnation. It was only in 1991 that the energies of the private sector, hitherto kept under close control and shackled by a slew of restrictive economic and taxation policies, were unleashed. Although there are contradictions and obstacles, and the gap between the rich and the poor is still very high and growing, the fundamentals of Indian economic growth now are sound, and it has been recognised as one of the top five or six economies of the world.

Parts XII and XIII of the Constitution: We now look at the articles of the Constitution pertaining to taxation intended to generate the necessary capital to power the great economic changes in the country. Chapter I of Part XII begins with **Article 264,** which is merely a declaratory article stating that the Finance Commission mentioned in the Article, refers to the Commission constituted under Article 280, for the division of revenues between the Centre and the States.

Article 265 articulates the basic and foundational principle of any democratic form of government that taxes cannot be imposed except by the authority of law: No taxation without representation. The power to tax is an incident of sovereignty: this was expounded in the Supreme Court decision in the *New Delhi Municipal Committee vs State of Punjab*[xi] decision of December 1996. The court stated: "A federation pre-supposes two coalescing units: the Federal Government/Centre and the States/ Provinces. Each is supposed to be supreme in the sphere allotted to it/ them. Power to tax is an incident of sovereignty. The basic premise is that one sovereign cannot tax the other sovereign. Articles 285 and 289 manifest this mutual regard and immunity but in a manner peculiar to our constitutional scheme. While the immunity created in favour of the Union is absolute, the immunity created in favour of the States is a qualified one. We may elaborate: Article 285 says that "the property of the Union shall... be exempt from all tax imposed by a State or by any authority within a State" unless, of course, Parliament itself permits the same and to the extent permitted by it…The ban, if it can be called one, is absolute and emphatic in terms." In another case, the Supreme Court has also clearly stated that the power to tax cannot be inferred by implication; there must be a charging section specifically empowering the State to levy tax.[xii]

The authority to levy a tax must also be within the legislative competence of the concerned legislature and must be legally enacted. At the same time, the tax must not violate any Fundamental Rights or contravene any of the specific provisions of the Constitution. The famous Indian Express case of 1958, where the Wage Board had directed the said newspaper to substantially enhance the wages of the newspaper employees, is an example of this precept.[xiii] In other words, the taxation must not contravene Article 13, being inconsistent with or derogatory to the Fundamental Rights. It must not constitute an unreasonable restriction upon the right of business as mentioned in Article 19 (1). It must not deny equal protection under the laws as articulated in Article 14. Neither the Union nor the States can levy a tax on each other's properties. The sale of electricity cannot be taxed by a State, as exempted in Article 287.

Further, what has to be seen is the pith and substance of the levy along with the taxable event and the incidence of the levy. In the same way, it is not the intention or propriety of legislation but its legality or illegality

which renders it valid or invalid. It must be kept in mind that the word tax includes any form of duties, cesses, or fees, and they cannot be levied without any statutory authority.

The Supreme Court has also laid down some general principles in this regard. A tax is a payment for raising general revenue. It is a burden and is based on the principle of ability or capacity to pay. It is a manifestation of the taxing power of the State.[xiv] The essential characteristics of a tax are that it is imposed under statutory power without the taxpayer's consent and payment is enforced by law; it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax; it is part of the common burden, with the quantum of imposition upon the taxpayer to be based on his capacity to pay.[xv] Incidentally, royalty on mines has not been adjudged to be a tax as had been pronounced through a seven-judge decision of four High Courts working in concert, in the *India Cement Ltd vs State of Tamil Nadu* case. It has also been made clear that the levy and collection of the tax must be in strict conformity with the statute which authorises it along with the subordinate legislation.

Article 266 clearly states that all the revenues received by the Government of India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of India". Similarly, all such moneys received by the State shall form one "Consolidated Fund of the State". Clause (2) states that all other public money received by or on behalf of the Government of India or the government of a State shall be credited to the public account of India or the State as the case may be. Certain other funds have been considered to be outside the scope of this article such as amounts levied by a local authority or the CAMPA fund (Compensatory Afforestation Fund Management and Planning Agency).

Article 267 deals with the Contingency Fund, which authorises the Parliament to establish such a fund as an imprest to enable the President to make advances to be made to meet unforeseen expenses, of course, pending authorisation of such expenditure by Parliament. Clause (2) enables the legislature of a State to create a similar contingency for the State, to be placed at the disposal of the Governor, until similar authorisation by the Legislature of the State.

Article 268 refers to duties levied by the Union but collected and appropriated by the States. Clause (1) states that such stamp duties as are mentioned in the Union list shall be levied by the Government of India but shall be collected by the States, except in Union Territories where the collection shall be by the Union Government. The proceeds of such duties will be assigned to the States and shall not form part of the Consolidated Fund of India. Article 268 A, which was introduced for the collection of service tax vide the Eighty-Eighth amendment of the Constitution, was deleted by the hundred and first amendment when the GST tax was introduced.

Article 269 pertains to taxes levied and collected by the Union but assigned to the States. Taxes on the sale or purchase of goods (in Inter-State trade or commerce, except newspapers) and taxes on the consignment of goods (during Inter-State trade or commerce) fall in this category. For information, it is added here that the principles for determining when a sale or purchase takes place in the course of Inter-State trade or commerce were articulated as Section 3 of the Central Sales Tax Act 1956. Inter-State sale has two components: the movement of goods from one State to another and the transfer of the documents of the title to the goods during such movement. The net proceeds will not form part of the Consolidated Fund of India but shall be assigned to the States in accordance with the principle of distribution as may be formulated by Parliament by law.

Some of the taxes that fall in this category are listed herewith:

a) duties in respect of succession to property other than agricultural land;

b) estate duty in respect of property other than agricultural land;

c) terminal taxes on goods or passengers carried by railway, sea, or air;

d) taxes on railway fares and freights;

e) taxes other than stamp duties on transactions in stock exchanges and futures markets;

f) taxes on the sale or purchase of newspapers and advertisements published therein;

g) taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of Inter-State trade or commerce;

h) taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of Inter-State trade or commerce

It is relevant to point out that corporation tax is not included in income tax: this has been a bone of contention between the Union, and the States.

Article 269A was introduced by the 101st Amendment to the Constitution, thus enabling the rolling out of the Goods and Service Tax in the country. This article states that goods and service tax on supplies in the course of Inter-State trade or commerce shall be levied and collected by the Government of India and shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law, on the recommendation of the Goods and Service Tax Council. These amounts shall not form part of the Consolidated Fund of India or the States. Parliament can by law formulate the principles determining such sale and supply of goods. It is added here that this article must be read along with Article 246A which is a special provision inserted into the Constitution for enabling the Goods and Service Tax (GST) by the Hundred and First constitutional amendment of 2016, which empowers the Parliament and the Legislatures of the States to make laws regarding the goods and service tax. This too is sharable with the States.

Article 270 deals with Taxes levied and distributed between the Union and the States. It states that the taxes and duties mentioned in the Union List (except those referred to in Articles 268, 269, 269A, and 271) shall be levied and collected by the Government of India and shall be distributed between the Union and the States in the manner provided for in Clause (2). Clause (2) states that a certain percentage of the net proceeds of taxes and duties shall not be a part of the Consolidated Fund of India and shall be assigned and distributed to the States as prescribed in Clause (3). Clause (3) is the provision by which the Finance Commission is constituted as prescribed by the President who considers the recommendations of the Commission and directs for the distribution accordingly.

Article 271 is an enabling provision that empowers the Parliament to levy a surcharge on certain taxes and duties (other than the goods and service tax) for the Union and the entire proceeds shall form part of the Consolidated Fund of India. The fee could indicate the government's need to raise funds for additional services, a hike to cover the expense of rising commodity prices, such as a fuel levy, or an additional fee on your telephone bill for access to emergency services. The education cess on income tax is another significant example.

Article 272 is now no longer extant and referred to taxes that are levied and collected by the Union and may be distributed between the Union and the States. This was repealed by the eightieth Constitution amendment in 2000.

Article 273 was a special provision made in favour of the States of Assam, Bihar, and Odisha, which states that certain sums shall be charged on the Consolidated Fund of India each year as grants-in-aid of the revenues of those States in lieu of assignment of any share of the net proceeds of export duty on jute and jute products.

Article 274 stipulates that in bills where the taxation interests of the States are involved, the prior permission of the President shall have to be taken. This may involve the imposition or variation in the tax or duty, variation in the definition of 'agricultural income' in the context of income tax, or matters which affect the principles of distribution of money distributable to the States, etc.

Article 275 is an important article about the financial relationship between the Union and the States**.** It provides for grants-in-aid to be made available to the States from the Consolidated Fund of India. The Article states that such capital and recurring amounts can be given to meet the costs of development schemes for promoting the welfare of the Scheduled Tribes of the States or raising the level of administration of the Scheduled Areas. A second proviso refers to certain special arrangements to be paid to the State of Assam for meeting the excess of expenditure over revenues (for the period of two years before the commencement of the Constitution and thereafter too for raising the level of administration. The principles that shall govern the payment of the grants-in-aid shall be decided by the Planning Commission appointed by the President every five years.

Article 276 empowers the State Legislature to levy taxes in respect of professions, trades, callings, or employment. It specifically states that such a tax shall not be invalid on the ground that it relates to a tax on income, even as it has been clarified that the power of the State Legislature shall not be construed as limiting the power of the Parliament to make laws on the same subject. However, currently, the tax has been capped at Rs. 2,500 per year. This power is founded on List II Entry 60 and the purpose of Article 276 is to make it clear that the States can levy the tax on trade, callings, and employment and it shall not be invalidated because it is an income on tax. The limit of the prescribed amount will have to be maintained to make it constitutionally valid.

Article 277 is a savings clause to protect the taxes, fees, cesses, and duties that were being levied before the commencement of the Constitution; they will be continued to be levied until the Parliament may cease to do so by law. The purpose of this article is to prevent the dislocation of the finances of local government because this article prescribes new processes and procedures of taxation different from that existing before the Constitution came into effect.

Article 278 was repealed by the Constitution (Seventh Amendment) Act, 1956: it related to certain matters pertaining to the finances of States which had figured in Part B of the First Schedule.

Article 279 addresses the matter of computation of 'net proceeds' of any tax or duty which shall form the corpus for distribution amongst the States. For this purpose, the administrative cost of collection of the tax or duty is deducted to arrive at the actual 'net proceeds'. It will require certification by the Comptroller and Auditor General, which will be considered final.

Article 279A deals with constituting the Goods and Services Tax Council for the administration of the tax. The Union Finance Minister is the Chairperson. The Union Minister of State in charge of revenue or taxation is a member along with the Ministers in charge of Finance or Taxation nominated by the State Governments and the members shall choose the Vice Chairperson of the Council from amongst themselves. The Council has great importance in the administration of the goods and service tax in the country. It is the body which makes recommendations on taxes, cesses, and surcharges levied by the Union, the States, and the local bodies which may

be subsumed into the good and service tax. The council can recommend the imposition of, or exemption from, taxes on certain goods and services, prepare model Goods and Service Tax laws, and determine the principles of levy of the tax and the apportionment of the tax in Inter-State trade or commerce. Further, it can prescribe the turnover limit below which the tax is to be exempted, the floor rates with bands of goods and service tax, special rates to raise additional resources during any disaster or calamity, including special provisions for certain special category States or on any other matter. As and when the decision is taken to levy tax on petroleum crude, high-speed diesel, petrol, natural gas, and aviation turbine fuel, it is the Council that shall make recommendations on the same. The Council has been advised to be guided by the need for a harmonised structure of goods and service tax to lead to a harmonised national market for goods and services. It is the Council itself that shall devise the procedure to be followed by it. Every decision is to be taken by a majority of not less than three-fourths of the weighted votes of the members present and voting: the weightage is prescribed in the article as one-third for the Union Government and two-thirds for the State Governments. The Council shall also devise a methodology to settle disputes arising between the States or between the Government of India and the States.

The passage of the Constitution (Hundred and First Amendment) Act 2016 which introduced Article 246A and Article 269A was a significant event in the commercial and mercantile history of the nation. It enabled the introduction of the contentious Goods and Service Act which has changed forever the taxation profile of the country. The three taxes applicable under the system are the Central Goods and Service Tax, the State Goods and Service Tax, and the Integrated Goods and Service Tax. The new dispensation is proudly referred to as the one-nation, one-tax regime and is one in which erstwhile Value Added Tax, the luxury tax, purchase tax, and central taxes such as customs duty, central excise duties, and service tax have been subsumed. The respective powers of the Union Government and the States have been integrated into a harmonious model of taxation, entirely left to the wisdom of the Goods and Service Tax Council as envisaged under Article 279A, also put into place through the Constitution (Hundred and First) Amendment Act, 2016.

The principles of the Goods and Service Tax and the respective powers of the Union and State Governments regarding taxation were put to the test in the Supreme Court in the Mohit Minerals Private Limited case[xvi] decided in May 2022. Article 279A Clause (9) states that decisions in the GST Council shall be taken in the meeting 'by a majority of not less than three-fourths of the weighted votes of the members present and voting (Central government to have a weightage of one-third of the total votes cast and the States to have a weightage of two-thirds). R. Srinivasan[xvii] writes that the Supreme Court ruled that "the recommendations of the GST Council are not binding on the Union or the States." The Union Government had submitted to the Apex Court that the GST Council could function as a super Parliament/ Assembly and send binding recommendations on the laws, rules, and regulations in the matter of GST under 246A of the Constitution. In other words, the two tiers of the Indian Union can simultaneously legislate on matters related to GST, except with regard to the Integrated GST which lies in the exclusive purview of the Central Government. The Supreme Court noted: "...the GST Council must ideally function, as provided by article 279 A (6), in a harmonised manner to reach a workable fiscal model through cooperation and collaboration." The fact that the deliberations in the Council are on a political line cannot be ignored. States which are ruled by the same political dispensation as the Union remain, mute spectators, even as opposition States hotly contest proposals that are moved by the former. It is also a fact that the States have not received full compensation for the shortfall in GST collections during the pandemic. The Union Government and the States ruled by the BJP were not able to arrive at a consensus with the States ruled by non-BJP governments, for the extension of the period of compensation beyond June 2022. In such circumstances, the Supreme Court was of the view that the independent legislative powers of the Centre and the States stand contrasted with the GST Council's recommendations. It is only the "willful giveaway of the legislative power on commodity taxation to the GST Council" that makes the present arrangement workable. Yet, it must be conceded that the GST Council is not the forum for the direct representatives of the people to legislate in many matters. John Locke in the 17th century had said: "The legislative power cannot transfer the power of making any laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others…"[xviii]

Article 280 deals with the Finance Commission. Every five years, the President shall constitute a Finance Commission consisting of a Chairman and four members. The Parliament can prescribe the qualifications of the members for appointment. The main duty of the Commission is to make recommendations regarding the distribution of the net proceeds of taxes between the Union and the States and the allocation between the States of their respective shares of these proceeds. The Commission shall recommend the principles that should govern the grants-in-aid of the revenue of the States from out of the Consolidated Fund of India. The Commission shall also recommend the measures to be taken by the States to augment its consolidated fund to supplement the resources of the Panchayats and the Municipalities. **Article 281** states that the President shall cause to lay these recommendations with an explanatory memorandum before each House of Parliament.

The 15th Finance Commission began its deliberations under the shadow of three new developments: the disbanding of the Planning Commission, the abolition of the difference between plan and non-Plan expenditure, and the introduction of the Goods and Service Tax. The main functions of the Finance Commission can be summarized thus: The Commission recommends the distribution of tax revenue between the States and the Centre. The commission's major functions include the redressal of the imbalances between taxation capabilities and expense responsibilities of the Centre and the States. It also works toward maintaining equilibrium between states of public services. The functions also include any other topic pointed out by the President in the interests of India's fiscal state. All these recommendations are implemented through the order of the President and other executive orders. It also governs the principles of grants-in-aid to the States by the Centre from the Consolidated Fund of India.

The report of the 15th Finance Commission, headed by Chairman Shri NK Singh, may be perused as an example of the dispensation that the Commission has been granting in the past seventy-five years. The broad principles that have been adopted by this Commission as regards vertical devolution are a population of 2011 (15%), area (15%), Forest and Ecology (10%), Income distance (45%) Tax and fiscal efforts (2.5%), demographic performance (12.5%). The dispensation is for the period 2021-22 to 2025-26. As for horizontal devolution, the Commission has recommended 12.5%

weightage to demographic performance, 45% for income, 15% each for population and area, 10% for forest and ecology, and 2.5% for tax and fiscal efforts.

The recommendations of the Commission, as appearing in its report of 1 February 2021 state the following, and have been broadly accepted by the Government[xix]:

1. Sharing of Union Taxes: 41% of the net proceeds should be shared with the States, as against 42% recommended by the previous Commission, in view of the fact that the State of Jammu and Kashmir is no longer a State and has been converted into a Union territory.

2. Revenue Deficit grant post-devolution for 17 States for the said period: The Commission has observed that in the first year i.e., 2021-22, seventeen States are eligible for the grant and this number decreases to six States by the end of the period of the Commission's recommendations i.e., 2025-26.

3. Local bodies grants: Rs 4,36,361 crores has been recommended in the following manner: Rs 2,36,805 crores for rural local bodies, Rs 1,21,055 crores for urban local bodies and Rs 70,051 crores for health grants through local governments. In addition, Rs 8000 crores are earmarked for performance-based grants for the incubation of new cities and Rs 450 crores for shared municipal services. 60% of these grants to local bodies have been tied to sanitation, maintenance of Open Defection Free status, solid waste management, and attainment of star ratings as prescribed Ministry of Housing and Urban Affairs, drinking water, rainwater harvesting, and water recycling. Certain conditionalities have been imposed to enable the local bodies to access these funds including setting up State Finance Commissions, placing audited accounts online in the public domain, fixing minimum floor levels for property taxes, and improvement in the collection of property taxes.

4. Disaster-related grants have been allocated in the ratio of 75% for the Union and 25% for the States with the ratio being changed to 90:10 for the Northeastern and Himalayan States. A total of Rs 1,60,153 crores has been earmarked for this purpose.

5. Grants to States for specific sectors: Rs 1,29,987 crores has been allocated to the States for eight sectors namely health, school education, higher education, agriculture, PMGSY roads, aspirational districts, judiciary,
and statistics.

6. Modernisation Fund for Defence and Internal Security (MFIDS): This fund has been recommended to be constituted in the Public Account of India as a dedicated and non-lapsable fund to bridge the gap between projected budgetary requirements and budget allocation for this purpose. The indicated amount for the five-year period is Rs 2,38,354 crores out of which Rs 1,53,354 crores is to be transferred to the MFIDS from the Consolidated Fund of India.

7. Fiscal Roadmap: The commission has recommended the limit for net borrowings of the State Governments to be fixed at 4% of GSDP in 2021-22, 3.5% in 2022-23 and to be maintained at 3% over the remaining three years. Further, an additional 0.50 % of GSDP has been allocated to the States for the power sector in the years 2021-22 to 2024-25. A thorough review and restructuring of the FRBM Act has also been recommended.

The above has been reproduced here only as an example of the careful consideration of all financial and economic factors made by the Finance Commission to ensure that the objectives of the Constitution are achieved and that there is a rational distribution of the taxes of the Union to achieve national goals of equitable and sustainable development.

Article 282 empowers the Parliament and the State Legislatures to make grants for any public purposes even if the purpose is not one with respect to which they may make laws. The purpose of this article is to enlarge the authority to make such grants even beyond the lists specified in the Seventh Schedule. The definition of public purpose is left to the Government, subject to the control of the Legislature.

Article 283 stipulates that the custody of the Consolidated Fund of India and the Contingency Fund of India with all its functions (payment, withdrawal, custody, etc) shall be regulated by the Parliament. Clause (2) states the same intent with reference to the moneys of the States, which shall be regulated by the Legislatures of the States.

Article 284 directs that all moneys received by, or deposited with, any officer employed in connection with the affairs of the Union or of a State, or with any court, shall be paid in the public account of India or the States, as the case may be.

Article 285 exempts the property of the Union from any taxes imposed by the States. The word 'tax' is to be interpreted in a wide sense, including any imposition or levy like a tax.

Article 286 prevents the States from levying any tax on the supply of goods or services, or both, when such is outside the State or is in the course of the import of the goods or services or both, or export out of the territory of India. The Parliament may by law formulate the principles determining such sales. The article pre-amendment regulated the sale or purchase of goods in Inter-State sales and for goods of special importance (as declared by the Parliament) and limited the rate of taxation leviable on them, generally to four per cent. In such sales, it is only the Parliament that has the power to impose taxes. This clause is largely redundant now, as, after the introduction of GST, all sales are governed by the new provisions on taxation.

Article 287 prohibits the States from imposing any tax on the consumption or sale of electricity that is consumed by the Government of India or consumed in the construction, maintenance, or operation of any railway by the Government of India. Further, the price of electricity thus sold shall be reduced by the amount of tax than the price charged to other consumers of a substantial quantity of electricity.

Article 288 also prohibits the States from imposing any tax in respect of any water or electricity stored, generated, consumed, distributed, or sold to regulate or develop an Inter-State River or river valley. The Legislature if a State may impose any such tax, but it will have effect only after the assent of the President has been received.

Article 289 is a corollary of Article 285, exempting the properties of a State from any taxation by the Union. However, it does not prevent the Union from passing a law through the Parliament on commercial trades or businesses carried on by the government of a State. It is also provided in Clause (3) that the Parliament may exempt such taxes on trade or business if it is found to be incidental to the ordinary functions of the Government.

Article 290 is titled 'Adjustment in respect of certain expenses and pensions'. It has been introduced in the Constitution to provide for the expenses of courts or commissions that were operating before the commencement of the Constitution, or of persons who were serving in such institutions and for whom pension has to be provided. This shall be paid out of the Consolidated Fund of India or the States as the case maybe.

Article 290A is a specific provision made to pay certain sums out of the Consolidated Fund of Kerala and Tamil Nadu for the Dewasom fund established in these States for the maintenance of Hindu temples and shrines transferred to that State on 1 November 1956 from the State of Travancore-Cochin.

Article 291, now repealed, had provided for privy purses to ex-rulers and was deleted from the Constitution in December 1971, by the twenty-sixth constitutional amendment.

Chapter II of Part XII has only two articles, both extremely significant in the context of the financial management of the nation's finances. **Article 292** states that the executive power of the Union extends to borrowing upon the security of the Consolidated Fund of India, within such limits as may be fixed from time to time by the Parliament. **Article 293** does the same for the States. It also provides for the Government of India to make loans to any State, within the limits fixed by Article 292, or give guarantees in respect of loans raised by any State. The amount required for making such loans to the state shall be charged to the Consolidated Fund of India.

Chapter III of Part XII deals with the subject of property, contracts, rights, liabilities, obligations, and suits. **Article 294** lays down the principles that shall apply to property, assets, liabilities, and obligations under the new dispensation post-Independence. It states that from the commencement of the new Constitution all properties and assets that were earlier vested in the British Crown (here referred to as His Majesty), both at the level of the Dominion of India and in the Governors for the provinces, shall respectively vest in the Union and the corresponding State. Clause (2) repeats the same for rights, liabilities, and obligations as well. A proviso mentions that suitable adjustments shall be made because of the creation of the Dominion of Pakistan, East, and West Bengal, as well as East and West Punjab.

Article 295 makes similar arrangements for the Princely States. Here it is necessary to digress a little and describe the nature of the States that existed in the pre-Independence times under British rule. The four main types of States as defined were:

1. Part A - States comprising the former governors' provinces of British India which were governed by an elected Governor and State Legislature. These States were Bombay, Madras, Assam, Bihar, Madhya Pradesh (earlier Central Provinces and Berar), Punjab (earlier East Punjab), Uttar Pradesh (earlier the United Provinces), Orissa, and West Bengal.

2. Part B - States were former Princely States or groups of Princely States and were governed by a Rajpramukh, the ruler of a Constituent State and an elected legislature. He was appointed by the President of India. These States were Patiala and East Punjab States Union (PEPSU), Hyderabad, Jammu and Kashmir, Travancore-Cochin, Madhya Bharat, Mysore, Rajasthan, and Saurashtra.

3. Part C - States comprised both the former chief commissioners' provinces and some Princely States. These States were governed by a chief commissioner appointed by the President of India. These States were Ajmer, Bhopal, Bilaspur, Coorg, Delhi, Himachal Pradesh, Cutch, Manipur, Tripura, and Vindhya Pradesh.

4. The final category was a Part D State consisting only of the Andaman and Nicobar Islands. It was a State administered by a lieutenant governor appointed by the Central Government.

What Article 295 states is that all the property and assets of States listed in Part B of the First Schedule (about the Princely States) shall vest in the Union and so shall their rights, liabilities, and contractual obligations. This article intends to clearly state that there are certain liabilities, entered into prior to the commencement of the Constitution, by an Indian State, and which have been guaranteed by the Dominion of India, which will not be justiciable in a court of law. Such guarantees will devolve upon the Government of India. This protection has been expressly guaranteed in Article 363 as well.

Article 296 relates to properties affected by the laws of escheat or lapse or *bona vacantia* (property left without a clear owner: this includes assets of a dissolved company). Such property shall, if situated in a State, vest in that State, or otherwise in the Union.

Article 297 is concerning things of value lying within our territorial waters or the continental shelf and the resources of our exclusive economic zone, which shall vest in the Union. It also states that the limits of the territorial waters, the continental shelf, exclusive economic zone, maritime zone, etc can be specified by Parliament by law. It is a point to note the words 'continental shelf' was introduced into the article by the Constitution (Fifteenth Amendment) Act, 1963. This was further amended by the Constitution (Fortieth Amendment) Act, 1976 which clarified that all economic assets of the economic zone shall also vest in India.

Article 298 states that the executive power of the Union and each State shall extend to the carrying on of trade or business and to the acquisition, holding, and disposal of property and the making of any form of contracts for this purpose. These activities shall be subject to the legislation of the States concerned where such powers are of the States and in other cases, where the Parliament has the power to make laws, it shall be subject to the Union. The form in which the Article appears now arises from the Constitution (Seventh Amendment) Act, 1956. The statement of objects and reasons of the Amendment stated that the purpose was to make clear that the Union Government and the State Government are competent to carry on any commercial or industrial undertaking, whether or not it is related to a matter within the legislative competence of the Union or the State.

Article 299 deals with the subject of contracts made in the course of the exercise of the executive power of the Union or the States which shall be expressed to be made by the President or the Governor of a State as the case may be. However, Clause (2) states that neither the President nor the Governor shall be held personally liable in respect of such contracts or assurances. Nor shall any person making or executing such a contract be held to be personally liable.

Article 300 deals with suits and proceedings. It states that the Government of India and the Governments of the States may sue or be sued in relation to their respective affairs as the Dominion of India or the provinces, or

the Princely States, might have been sued, had the Constitution not been enacted. The Government of India Act of 1935 had expressly empowered the Government to enter into contracts with private individuals and Article 299 only maintains that position.

Chapter IV of Part XII of the Constitution has only one article, namely **Article 300A**, which deals with the Right to Property and was inserted by the Constitution (Forty-Fourth Amendment) Act, 1978. This is an article that had generated much debate in the country and has been a matter of litigation. Article 19 (f) of the Constitution originally had, along with other rights such as freedom of speech and expression peaceful assembly etc, guaranteed the right to acquire, hold and dispose of property as a Fundamental Right. But with the Forty-Fourth Amendment, the right to hold property ceased to be a Fundamental Right. Its replacement as articulated in Article 300A is, therefore, not part of the basic features of the Constitution, but only a constitutional right. Thus, this right is subject to restraints and regulations.[xx] It was held in this judgment that "right to property did not pertain to the basic structure of Constitution and it was subordinate to the common good…." Similarly, according to Hidayatullah, J. in his concurrent judgment in Golak Nath vs State of Punjab[xxi], the right to property is an acquired right and it is the weakest right, fit to be placed along with commerce clauses. Yet, Article 300A protects the citizen by stating that persons cannot be deprived of property except by authority of law.

Trade, Commerce, and Intercourse: We now move to Part XIII entitled Trade, Commerce, and Intercourse within the Territory of India which comprises six Articles from 301 to 306. **Article 301** guarantees free trade, commerce, and intercourse throughout India. The purpose of this Article is to articulate that the freedom granted herein is to ensure that the economic unity of the country may not be broken up by internal barriers.[xxii] In effect, this means that there is a limitation upon the exercise of legislative power, by Union or by a State. Article 301 guarantees freedom from laws that go beyond regulations which burden, restrict, or prevent trade movement between States and within States.[xxiii] "Although Article 301 is positively worded, in effect, it is negative as freedom correspondingly creates a general limitation on all legislative power to ensure that trade, commerce, and intercourse throughout India shall be free. Article 301, therefore, refers to freedom from laws that go beyond regulations which burden, restrict, or prevent the trade movement between States and within the State. Since

"freedom" correspondingly imposes "limitation", we have the doctrine of "direct and immediate effect" of the operation of the impugned law on the freedom of trade and commerce in Article 301. We may keep in mind the fact that Article 301 seems to overlap Article 19 (1) (g) which states that all citizens shall have the right to practice any profession or to carry any occupation, trade, or business. But there are two points of difference. Article 19 (1) (g) confers a Fundamental Right and is confined to citizens, while Article 301 confers a justiciable right that is not a Fundamental Right and extends to all citizens.[xxiv] Nevertheless, the freedoms under both these articles are subject to restrictions imposed by the State in the collective interest, though they cannot be arbitrary or excessive.

Article 302 appears contradictory to Article 301 as it empowers Parliament to impose restrictions on trade, commerce, and intercourse, between one state and another or within any part of the territory of India as may be required in the public interest. The two Supreme Court cases, namely the *Atiabari Tea* case of Assam and the *Automobile Transport* case of Rajasthan lays down certain judicial pronouncements in the matter of taxation of trade and commerce. The Supreme Court has held that legitimate 'regulation' in the public interest is not against the freedom declared in Article 301. Measures such as provisions for lighting, rules of the road, etc are regulatory but they facilitate movement rather than retard it. So are licensing provisions with compensatory fees. "Compensatory taxes which [did] not hinder the freedom of trade, commerce, and intercourse did not violate the provision of the Constitution.[xxv]

Article 303 takes forward the spirit of Article 301 by placing restrictions on the legislative powers of the Union and the States with regard to trade and commerce. It prohibits the Parliament and the legislatures of the States from making any law that gives preference to one State over the other or discriminating between one State and the other with reference to trade and commerce. Yet, **Article 304** authorises the Legislature of a State to impose any tax, or place any restrictions, on goods imported from other States or Union Territories, to not discriminate between goods thus so imported and goods manufactured or produced in the concerned State. The previous sanction of the President will be required by the State before introducing restrictions on the freedom of trade, commerce, or intercourse.

Article 305 saves existing laws and laws for State monopolies that existed before the commencement of the Constitution. **Article 306** which gave powers to Part B States to impose restrictions on trade and commerce was deleted by the Constitution (Seventh Amendment) Act, 1956, after the reorganisation of States was completed. **Article 307** empowers the Parliament to appoint such authority as it considers appropriate for carrying out the purposes of Articles 301 to 304.

Supreme Court Pronouncements: We may refer to some other significant decisions of the Supreme Court regarding these articles of the Constitution. In the *Bishamber Dayal* case[xxvi], the Apex Court held that the Fundamental Right to carry on trade or business guaranteed under Article 19 (1) (g) or the freedom of Inter-State trade, commerce, and intercourse under Article 301 of the Constitution, has its limitations. The liberty of an individual to do as he pleases is not absolute. It must yield to the common good. Absolute or unrestricted individual rights do not and cannot exist in any modern State. There is no protection of the rights themselves unless there is a measure of control and regulation of the rights of each individual in the interests of all. Whenever such a conflict comes before the Court, it must harmonise the exercise of competing rights. The Court must balance the individual's rights of freedom of trade under Article 19 (1) (g) and the freedom of Inter-State trade and commerce under Article 301 as against the national interest. Such a limitation is inherent in the exercise of those rights.

We have another example in the *Indian Cement* case of 1988[xxvii], where the principle behind free trade and commerce has been articulated: The title for Part XIII which contains the relevant Articles 301, 302, 303, and 304 is "Trade Commerce and intercourse within the Territory of India." The true purpose of the provisions contained in Part XIII of the Constitution, as elucidated in the different decisions of the Constitution Benches of this Court, is that the restriction provided for in Article 301can within the ambit be limited by law made by the Parliament and the State Legislature. No power is vested in the executive authority to act in any manner affecting or hindering the very essence and thesis contained in the scheme of Part XIII of the Constitution. It is equally clear that the declaration contained in Part XIII of the Constitution is against the creation of economic barriers and or pockets that stand against the free now of trade, commerce, and intercourse.

Yet another significant example is the *Jindal* case[xxviii] where a nine-judge bench had held that taxes are not within the ambit of Part XIII of the Constitution and the word 'free' in free trade does not mean free from taxation. Only such taxes as are discriminatory in nature are prohibited by Article 304 (a): this implies that non-discriminatory taxes would not violate Article 304. A tax on entry of goods into a local area for use or sale or consumption is permissible Further, States are well within their competence to design their fiscal legislation to ensure that the tax burden on goods imported and those produced within the State fall equally.

The nature of restrictions on trade was considered when it was pronounced that even where a restriction is imposed by law impacting on the freedom of trade as envisaged under Article 301it may be still constitutionally validified if it is required in the public interest such as prevention of evasion of tax, or to ensure that trade is canalised through registered dealers.[xxix] But the onus of showing that the restrictions on the freedom of trade, commerce, or intercourse are in the public interest and are reasonable.[xxx]

The above articles of the Constitution have generated much debate. Is there any apparent contradiction between the guarantee of freedom of trade and commerce as stated in Article 301 and Article 246 which empowers the Parliament and the Legislatures of States to make laws, and consequently, impose taxes, in matters enumerated in the three lists of the Seventh Schedule? It would be difficult to conceive of a situation where free trade and commerce between States or within States would involve the complete exemption of taxes and duties. "The word 'free' in Article 301 does not and cannot mean free from all laws…taxation as such is not inconsistent with the freedom under Article 301."[xxxi]

Trade as a Fundamental Right: A deeper examination of Article 19 (1) (g), as it appears in Part III of the Constitution, is desirable here in the context of free trade and commerce. It appears within the list of Fundamental Rights which grants every citizen the right to practice any profession or to carry on any occupation, trade, or business. Though a Fundamental Right, the State has the right to impose reasonable restrictions on the right, as has been detailed in Clause (6) of the same article. These two provisions i.e., Article 19 (1) (g) and Clause (g) may even appear to be contradictory and is the reason why it has generated so much litigation with an impressive clutch of case law in this regard. Much of the case law involves a delicate balancing of interest and effects.

Khanna analyses these issues and states that four considerations must be kept in mind in this context.[xxxii] First, when is an activity treated as a profession, occupation, trade, or business (POTB)? There is no clarity or predictability in the definitions that may help the State to place restrictions as and when required. There is a tendency for the courts to hold that social, moral, and historical considerations should be used in defining if a particular trade is to fall within the definition of an acceptable profession, trade, occupation, or business. Second, when can we say with certainty that the restrictions are reasonable? The courts have examined this matter and the breadth of the views expressed in various judgments leaves the observer disoriented. The main thrust is that it should not be arbitrary and must be related to the stated purposes of the legislation. The general approach is as follows: "Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness unless it strikes a proper balance between the freedom guaranteed in Article 19 (1) (g) and the social control permitted by Clause (6) of Article 19, it must be held to be wanting in that quality".[xxxiii] Third, how do these two provisions, namely 19 (1) (g) and (6) apply to a critical issue such as private educational institutions? Courts have consistently held that in India education has historically not been considered as a means of commerce, though it could be considered as an occupation and thus getting the protection of Article 19 (1) (g). However, it does not get the automatic right to be recognised or accredited by the State. It must be regulated in matters of transparency. admission procedures, the quantum of fees, etc., to ensure that commercialisation and profiteering are avoided. Fourth, there is an apparent contradiction in the recent trend to include more and more activities under the definition of POTB and thus granting these activities increasing freedom and thus constraining State intervention. Simultaneously, case law is edging towards weakening the protection and enhancing State intervention. We must also keep it in mind that the role of the State has been changing as we evolved as a nation.

The magisterial opus of *The Framing of the Constitution of India - A study*,[xxxiv] by a committee chaired by B Shiva Rao (with VKN Menon, JN Khosla, KV Padmanabhan, C Ganeshan and PN Krishna Mani as members) goes into detail about these matters as discussed in the Committee later in the Constituent Assembly. Under British rule, freedom of trade was the established practice with no inter-provincial duties or other trade barriers. But with the increasing demands for provincial autonomy, strengthened

by the Minto Morley and Montague Chelmsford reforms, it was felt that these matters should be placed on a statutory basis. When the Government of India Act of 1935 came into being, Article 297 prohibited the provincial governments from imposing barriers on trade within the country or levying any cesses or duties which discriminated between goods manufactured in one locality and similar goods produced elsewhere. However, Indian Princely States did levy export and import duties at their boundaries and derived considerable revenue from them.

Debates in the Constituent Assembly: We can look back to the debates in the Constituent Assembly on the subject where these same issues were hotly contested. When the sub-committee on Fundamental Rights met, this was one of the primary concerns of its members, led by KM Munshi, Alladi Krishnaswami Ayyar, and BN Rau. In March 1947, they discussed the draft provision prepared by Rau and adopted the following formulation: Subject to regulation by the law of the Union, trade, commerce, and intercourse among the units, whether by means of internal carriage or by ocean navigation, shall be free. Provided that any unit may by law impose reasonable restrictions thereon in the interest of public order, morality or health. [xxxv]

The influence of the relevant provisions of the Australian Constitution is discernible in this formulation. It was Alladi Krishnaswamy Ayyar who had suggested that goods entering a unit should not escape duties and taxes to which the goods produced in the concerned unit itself were subject. The committee also recommended that a certain period of transition has to be provided to not harm the revenues of certain States regarding internal customs duties. Such a proviso was necessary as many States were heavily dependent on such custom duties. In the Advisory Committee, which considered the report of the sub-committee, there was a difference of opinion. Rajagopalachari expressed the view that the units should be given the power to impose customs duties and other taxes for genuine revenue purposes, while many others felt that the grant of taxing power to the provinces might encourage unhealthy competition and weaken the federal idea. During discussions in the full house of the Constituent Assembly. Munshi moved two amendments: one, that the word 'reasonable' before restrictions be removed as it was vague; and two, that the right to tax goods coming from another unit would only be exercised under regulations and conditions which were non-discriminatory. Both amendments were adopted by the Assembly without much discussion. It is necessary to point

out that though all these provisions were discussed as a fundamental right, later, the Drafting Committee included these articles as independent and under a separate heading, under Inter-State Trade and Commerce.

Later, when the Draft Constitution was published and circulated for opinion, it was C Subramaniam who raised objections to it being adopted as an article under Fundamental Rights: he argued that when it is subjected to any law of Parliament or State Legislature, there is nothing of a fundamental nature left that could not be curtailed. Fundamental Rights were meant to take power away from the Union and the States and not to confer power on them. On the other hand, the members also felt that a Union of an all-India character was without meaning or purpose of trade and commerce throughout the Union was not to be free.

In the end, it was Ambedkar who placed this issue in the historical context. He said that though trade and commerce were not particularly germane to the issue of Fundamental Rights, it is necessary to draw attention to the condition laid down of the Indian Princely States who were willing to join the Union only in respect of three subjects, namely foreign affairs, defence, and communication. They were not prepared to permit the Union Parliament to extend its legislative and executive jurisdiction beyond these three subjects and would not, therefore, allow trade and commerce to be included in List I - the Union List- and made subject to the legislative authority of the Union Parliament. It was under these circumstances that the Drafting Committee agreed to bring freedom of trade and commerce under Fundamental Rights, thus giving effect to the large majority of the people. In its final form, all other matters were included in Part XIII with details regarding the procedural issues in the context of reasonable restriction, taxes, duties, etc on trade and commerce as a separate section, incorporating Articles 301 to 306.

On 8 September 1949, Ambedkar moved the proposals in the Assembly in this regard. The separate treatment in Part XIII faced criticism, especially from members such as Thakurdas Bhargava and PS Deshmukh. They moved amendments seeking the almost complete freedom of trade and commerce. Any restrictions, they argued would be derogatory to the very concept of that freedom.

The debates that followed revealed the diverging points of view that emerged. We shall try to overhear some of these arguments, as recorded in the Constituent Assembly debates, that reflect the thought and considerations of the members in their vigorous debates. Here are Ambedkar's views, as articulated on 16 October 1949 on certain general principles of tax on trade. "There are certain commodities which are so essential for the life of the community throughout India that they should not be subject to sales tax by the province in which they are to be found. Therefore it was felt that if there was any such article that was essential for the life of the community throughout India, then it is necessary that, before the province concerned levies any tax upon such a commodity, the law made by the province should have the assent of the President, so that it would be possible for the President and the Central Government to see that no hardship is created by the particular levy proposed by a particular province."

He went on to add: "It is quite true that some of the sales taxes which have been levied by the provinces …probably go beyond the provisions. It is therefore felt that when the rule of law as embodied in the Constitution comes into force all laws which are inconsistent with the provisions of the Constitution shall stand abrogated. On the date of the inauguration of the Constitution, this might create a certain amount of financial difficulty or embarrassment to the different provinces which have got such taxes and on the proceeds of which their finances to a large extent are based. It is therefore proposed as an explanation to the general provisions of the Constitution that notwithstanding the inconsistently or any sales tax imposed by any province … such a law will continue in operation until the 31st day of March 1951, that is to say, we practically propose to give the provinces a few months more to make such adjustments as they can and must in order to bring their law into conformity with the provisions of this article. [xxxvi]

Prof Shibban Lal Saxena thereafter recommended that "the Union Parliament shall have the power to amend the laws in respect of taxes on sale or purchase of goods to bring uniformity in the laws made by the various States of the Union or in the interests of the Union as a whole. It may be argued that if this power is not kept here then many States shall levy taxes which would amount to an excise tax or production tax in a way. What I want is only this, that when there are any such taxes which injure the Centre or which are injurious to trade, then this overall power … shall

come into play and I also say that the President shall have the final power, so that the Centre will have the power to intervene, if necessary."[xxxvii]

Mahavir Tyagi interjected stating: When we allow the Provincial Governments to pick a pie from the private pocket of an individual citizen, we should see to it that it is obtained only willingly and that every pie that we draw from the pocket of a private individual must ultimately go back to him either in the shape of services rendered to that individual or in the shape of an enhanced sum returned to him. Today in India hundreds of taxes are being realised, and the people do not get any substantial benefit out of these taxes, either in the shape of additional 'prosperity' which they are told to expect from the Government or any other kind of service. Whatever little service the State renders here in India is a further charge on the people…the incidence of taxation is the heaviest in India. India had never faced even in times of war, such an incidence of taxation as it is bearing today. And the Governments are rendering the least service in exchange for these taxes This House is the highest authority vested with all powers of Sovereignty; we are sitting as the Supreme Court to decide whether we can permit the provincial Governments to go on taxing the people without any ceiling limits. Because there is no ceiling limit on this sales tax, they can go on raising the tax and ultimately there may come a time when the people may not be able to give much, and our taxes in the Centre would consequently be adversely affected. If the provincial Governments go on raising their taxes at the present speed, the result would be that total paying capacity of the people would be exploited by Provincial Governments and the Central Government would thereby suffer. My point is that if we do not fix a limit, the Provincial Governments would go on taxing, and we would be doing sheer injustice to the people who are at our mercy and who will have no right to protest or withhold these taxes. It would be better if Dr. Ambedkar would reconsider the whole article and make it a 'uniform tax' and put it in the hands of the Central Government. The best thing would have been for the Central Government to enact a law so that the provinces would have a uniform pattern of taxation and the tax would be realised at one single point and about one single commodity. A commodity should not be taxed at every point whenever it is put up for sale."

Hridaya Nath Kunzru had this to say about the method of taxation that presaged the concept of a value-added tax: "In some of the countries, there are multiple-point sales taxes. Perhaps the economic condition of those countries permits the imposition of such taxes. But, in India, particularly

at present when prices are high, obviously it is undesirable that each of the processes that have to be gone through before the manufactured goods reach the hands of a consumer should be subjected to the payment of a tax on the sale or purchase of goods. I think it will be generally agreed that it is desirable that some restriction should be placed on the power of a State in this respect."[xxxviii]

Pandit Thakurdas Bhargava rose to argue that the authority of the Parliament and the Legislatures of the States to place restrictions on trade and commerce should be reconsidered. He was of the view that trade is a Fundamental Right, as included in the list of other Fundamental Rights, and should be considered sacrosanct: "I want, Sir, that so far as this freedom of trade, commerce, and intercourse is concerned, it should be absolutely free, only subject in times of scarcity or times of national emergencies to such restrictions as may be imposed in the public interest. Otherwise, in normal times no restrictions should be allowed if we really mean that we all belong to parts of the same country or we are living under the same government… I welcome [it] because it says that trade and commerce shall be free. But what I object to in this is the words "subject to the other provisions of this Part". I want the word "part" to be substituted by the word "Constitution". So far as the Constitution puts restrictions, I am ready to accept them, but this part puts so many restrictions upon this freedom of trade which is irksome and unnecessary. It is the same thing throughout this Constitution that what is given by one hand is taken away by the other. I want, Sir, that the rights given … should be restricted only by the 'restrictions which we have already placed' 'on them, but not to the extent in which they are sought to be restricted. Now I feel that such restriction will give rise to provincial jealousies, and provincial patriotism will do great injury to India as a whole."[xxxix]

PS Deshmukh stated as follows in the course of the debate on the same day. "Trade and commerce are not things which are decided once and for all; they are things that arise and grow from day to day. They may be varied; there may be circumstances and situations when the whole thing will have to be revised. This may arise so far as a particular State is concerned or in respect of more than one State. How pompously did we decide that there shall be "free trade" everywhere? It is not such an easy thing as that, and I

hope the advancement and progress of the various units of the Union varies considerably. Some of them are backward like Assam or Orissa where there are very few industries and very little trade is in the hands, at least of the indigenous population. We may have probably to give them some protection in order that they may rapidly come on par with other units. It may be necessary also from time to time to vary our provisions so far as aid and concessions to industries and other things are concerned. I, therefore, do not think that is right to bar all discrimination, as it is called (in fact it is not), barring all possibility of help to those who are backward and who are unable to compete with the more advanced, and who therefore stand in need of assistance. From that point of view, my amendment seeks to give Parliament a blank cheque and leave to it entirely the determination of the policy with regard to trade and commerce not only of the whole Union or in regard to any particular State or States, but so far as all States and their trade and commerce inter se is concerned."[xl]

TT Krishnamachari supported the power of the Parliament to place restrictions on trade and commerce in certain circumstances. "…I do feel that if the Government which is going to come into being as a result of this Constitution has to stay put for a long time, has to carry out the directives and purposes of this Constitution, it must be given enough power to control the economy of the country of the benefit of the masses of the country and not for the benefit of a few traders or merchants."[xli]

Alladi Krishnaswami Ayyar supported the provisions tabled by Ambedkar: "…I venture to state that these articles form a very well-thought-out scheme in regard to Inter-State trade and commerce. This problem of Inter-State trade and commerce has baffled constitutional experts in Australia, in America, and in other Federal Constitutions. My Friend Dr. Ambedkar, in the scheme he has evolved, has taken into account the larger interests of India as well as the interests of a particular State and the wide geography of this country in which the interests of one region differ from the interests of another region. There is no need to mention that famine may be raging in one part of the country while there is plenty in another part. It may be that manure and other things are required in one part of the country while profiteers from another part of the country may try to transport the goods from the part affected. At the same time, in the interests of the larger economy and the future prosperity of our country, a certain degree of freedom of trade must be guaranteed."[xlii]

In the long run, it is an analysis of the economic progress the country has made that may inform us whether or not the principles of trade and commerce espoused in the Constitution have had a positive impact on the people of India. The planning process, adopted from the Soviet Union by a socialist Nehru, set the nation on a unique path with heavy investment in the basic public infrastructure such as steel mills and irrigation projects, which then, was required to break free from the shackles of a colonial economy that the country had been subjected to over the past several centuries. Yet, the heavily centralised economy did not generate the required results with slow growth in GDP over the first few decades. The Hindu rate of growth is a term used by critics to describe the lower annual growth rate of the economy of India before the economic reforms of 1991. It stagnated at around 3.5% from the 1950s to the 1980s, while per capita income growth averaged around 1.3%. It is only after the Narasimha Rao government, spearheaded by his Finance Minister Manmohan Singh, bit the bullet and liberated the energies of the private sector, thus raising the growth rate of the country.

The mountain India had to climb was high. The British model of a colonial economy for India which drained all surpluses to the Crown, had to be replaced with one that was self-confident and growing. We were then a labour-intensive economy that produced jute and cotton textiles, while Britain produced high technology and capital-intensive goods. In the late 1930s, we were exporting food, drink, tobacco, and raw materials to the tune of almost 70% of our exports, while almost 65% of our imports were manufactured goods. Before Independence, the net savings of the Indian economy were only 2.75% of the Gross National Product. Capital formation was in the region of 6.75%.[xliii]

Some details interpolated from public domain data reveal the following details of the GDP growth rate.[xliv] In the decade 1961 to 1970 (for which details are available), the growth rate ranged from a low of (-) 2.64% in 1965 to a high of 7.83% in 1967, perhaps depressed by a devaluation of the rupee. From 1971 to 1980, the nation was recovering from a costly war with Pakistan that resulted in the liberation of Bangladesh but was also making investments that lead to the green revolution. This decade saw growth rates ranging erratically from a low of (-) 0.55% in 1972 to a high of 9.25 % in 1975. In the decade of the 1980s, we had moved away from negative growth rates, achieving rates ranging from 3.28% in 1984 to 9.63 % in 1988. A serious balance of payment crisis at the end of the decade

brought India to the edge of economic disaster before the new economic policies were set in place, nudged by the International Monetary Fund and other international organisations. In the decade 1991 to 2000, growth rates were better ranging from a low of 4 % to a high of 8.85% in 1999. The first decade of the new millennia saw growth consistent rates in the range of 7-8% and unprecedented creation of wealth raising millions of people, from below the poverty levels. With better fundamentals and stronger regulation in place, the country was able to weather the international recession that brought markets tumbling down elsewhere. In the current decade, with the pandemic raging across the globe, the situation has been very critical in India as far as its economy is concerned, 2020 saw a negative growth of (-) 7.96%.

The deleterious impact of demonetisation too caused damage to the small and informal sectors of the economy. Its continuing impact has depressed the economy in ways that are yet to be analysed, affecting nearly all sectors of the economy. A study led by Azim Premji University has looked at these issues in some detail.[xlv] The alarming rise in the fiscal deficit to 9.5% in 2020-21 (in revised estimates) revealed serious concerns in the growth story of the country. How the consolidated debt of the country, more than 45% of GDP, will be tackled and curbed, will be a major challenge for the Finance Minister. The aspiration of the 5% trillion dollar economy targeted for 2024 as articulated by the Prime Minister in 2019, appears now to be difficult, though at some later date, it is clear that we shall achieve that goal.

There is also a growing realisation that the country's growth cannot be measured only by GDP rates which tend to ignore the social dimension, especially in health and education, women's status, environment, etc. While the country has been raising its status and ranking in the Ease of Doing Business index, in certain other critical sectors such as food security, women's security and environmental concerns there has been marked deterioration when compared to other countries in the international context.

Yet, it cannot be said that the Constitution of India has hampered the economic progress of the country. Both Article 19 (1) (g) and Article 301 guarantee freedom of trade and commerce, thus removing all obstacles to the creation of a vibrant economy. A closely monitored economy, under the watchful eyes of the Reserve Bank, yet strong in its fundamentals, along

with the granting of freedom to private enterprise, is the model of economic growth we have adopted. It has been argued that it is not the provisions of the Constitution that have kept us from achieving our real potential. In the last three-quarters of a century, economic policies formulated by political parties with differing ideologies may have resulted in a fragmented and interrupted growth story that could otherwise have been a spectacular success story. Ensuring that the people who fall through the cracks are protected and cared for should be an important part of any nation's growth strategy. The sensitive provisions of the Directive Principles of State Policy and the soaring philosophy enshrined in the Fundamental Rights make adequate provisions in this regard, provided that the government in power is sensitive to these concerns.

Within these constraints, the concept of 'one nation one tax' has been wrested into place, and despite the voices of scepticism, and the stalling of the economy during the pandemic, it has now started realising enhanced revenues for the country. The international Index of Ease of Doing Business has seen India's position rising from 134 in 2014 to 100 in 2017 and 63 in the latest report. Indeed, the slowing of the international economy struggling under the impact of the pandemic is a mountain that we have to climb, just as all other countries too. The additional hazards of the war in Ukraine have raised serious issues regarding rising inflation, affecting the availability of energy resources, with its deleterious impact on interdependent international economic principles. The aspiration for a $ 5 trillion economy by 2024-25 is the target we have set for ourselves. The future holds the key to how we emerge from the current shadows to grasp our goal and find our true place as a modern and growing economy so that we can achieve the social and aspirational goals we set for ourselves when the Constitution was written.

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Chapter XI:

The 42nd Amendment

Introduction: The Constitution (Forty-fourth Amendment) Bill, 1976 (Bill No 91 of 1976) was introduced in the Parliament on 1 September 1976. It was enacted as the Constitution (Forty-second Amendment) Act, 1976. This amendment is regarded as the most controversial constitutional amendment in our modern history and brought about significant, substantial, and widespread changes to the structure and intent of the Constitution. It was vilified and challenged when the government of Smt. Indira Gandhi fell; but despite the many attempts made to nullify the changes brought in by the Amendment, some features of the original 42nd Amendment Act remain. When presented in Parliament, the Statement of Objects and Reasons[i] appended to the Bill attempted to explain the rationale for the sweeping changes being proposed. While we shall go into the statement in detail a little later, we must first understand the context in which these cataclysmic changes were initiated. Let this quotation be with us as we take a glance at the momentous amendment of the Constitution: It is apocryphally said that one of the judges who delivered the verdict in the Keshavananda Bharati case, Justice YV Chandrachud stated: "Government and judges might come and go but democracy, [and] the basic features of the Constitution should remain eternal".

The Political Backdrop: A brief note about the situation that existed immediately preceding, is vital to the understanding of the political context in which the Amendment Bill was laid on the table of the Houses of Parliament. Between 1967 and 1976, Prime Minister Indira Gandhi managed to wrest for herself near total control over the Government and the Indian National Congress, as well as the Parliament where she had a huge majority. The old guard of the Congress Party had been side-lined after she had split the party. The new party which most of the MPs had joined, encouraged sycophancy and loyalty. The increase in the powers of the Prime Minister's Office was very visible and her deification amongst the party members may surely have emboldened her to take these vast measures.

That she had a charismatic personality among the people could not be denied; it was further embellished by the many decisions that she took which demonstrated radical departures from the content and form of traditional government decisions. The nationalisation of banks, the abolition of the privy purse, the start of the green revolution, etc led her to be seen as pro-poor and with a tilt towards the disadvantaged, the poor, the Dalits, women, and minorities. The 1971 elections, charged with her call for '*garibi hatao'*, won for her an unbeatable majority in the Lok Sabha, 352 out of 518 seats. It also decimated her opponents in the party who had fought on behalf of a rump group, known as the 'Syndicate', which immediately lost all credibility. With this victory, she established herself as the most popular political leader in the country. In December of the same year, with a decisive military defeat of Pakistan and the creation of a newly independent country of Bangladesh, she was at her peak. The Economist defined her as the 'Empress of India'. Even the opposition parties who often called her a dictator, were awe-struck and referred to her as Durga.

Executive-Judiciary tussles: During this period we see the beginnings of the tussle between the judiciary and the legislature, with the latter requiring to amend the Constitution to uphold executive decisions that were negated by the former. The stage was set by the Supreme Court's decision in the *IC Golaknath vs State of Punjab* case decided on 27 February 1967[ii]. The point of dispute in general was whether Fundamental Rights could be taken away by the device of amendments to the Constitution. Specifically, the case arose out of the validity granted to the Punjab Security of Land Tenures Act of 1953 and the Mysore Land Reforms Act of 1962, by way of the Seventeenth Amendment to the Constitution in 1964, which included both these Acts within the ambit of the Ninth Schedule. The Ninth Schedule is derived from Article 31B of the Constitution which protects the Acts and Regulations listed in this Schedule from judicial review. This Amendment Act was immediately challenged in the Supreme Court. Finally, the contention upheld by the Court in an 11-bench decision was that Fundamental Rights cannot be abridged or taken away by the amending procedure in Article 368 of the Constitution. An amendment to the Constitution is also a law and is, therefore, hit by Article 13 (2) of the Constitution of India which clearly states that "The State shall not make any law which takes away or abridges the rights conferred by this Part

and any law made in contravention of this clause shall, to the extent of the contravention, be void". In effect, this meant that the Parliament would not be able to use constitutional amendments to curtail Fundamental Rights.

Yet, the Government was not put off by this judgment. It believed that these kinds of judicial pronouncements would not allow it to effectively implement the Directive Principles of State Policy, which in some cases may entail an invasion of Fundamental Rights. Thus, to remove this judicial obstacle, the 24th Amendment was brought in and was approved by the Parliament on 5 November 1971. In effect, it modified Articles 13 and 368 to authorize Parliament to freely amend the Fundamental Rights.[iii] As the statement of objects and reasons appended to that Bill stated, the provisions of Article 368 of the Constitution, which is the power of the Parliament to amend the Constitution, were being amended to clarify that such powers were not only with reference to the articles of the Constitution but also concerning the procedures thereof. It further made it incumbent on the President to give his assent to the Bill, making it clear that he had no option to withhold assent. Further, Article 13 of the Constitution, which prevents any law which is in derogation of the Fundamental Rights from being passed, was also amended to make it inapplicable to any amendment of the Constitution under Article 368, by adding a new sub-article (4) below article 13. As we know, Article 13 falls within Part III of the Constitution and pertains to Fundamental Rights. The new sub-article simply read: "Nothing in this article shall apply to any amendment of this Constitution made under Article 368." Thus, the might of the Legislature was used to negate the effect of the Supreme Court pronouncement.

Yet another tussle between the judiciary and Smt. Gandhi's government arose in 1970, soon after the abolition of the privy purse, which had earlier been granted to erstwhile princes of Native States. The Government issued a Presidential directive under Article 366 (22) on 6 September 1970, directing that with effect from that date all rulers shall cease to be defined as rulers. It may be recalled that Article 366 (2) defines the ruler of an Indian State. The President's directive meant the immediate de-recognition of all existing titles. An attempt to abolish princely titles had been made earlier also in the Parliament in 1970, but though it was passed by the Lok Sabha, it could not muster the requisite support from the Rajya Sabha. Aggrieved by this order, Madhav Rao Scindia, ruler of Gwalior, challenged the 6th September Presidential directive in the Supreme Court, on the grounds that the President does not have any powers to determine the status of

the rulers by cancelling or withdrawing recognition, simply to effectuate the policy of the Government to abolish the concept of Rulership. After hearing all parties, the Supreme Court pronounced the judgment on 15 December 1970, stating that the order of the President de-recognising the rulers is ultra vires and illegal and on that account inoperative and that the petitioners will be entitled to all their pre-existing rights and privileges, including right to privy purses as if the orders have not been made.[iv]

Faced with yet another judicial obstacle, the 26th Amendment to the Constitution was brought in by Smt. Gandhi argued in the Parliament for the abolition of the privy purse based on the principle of equal rights for all citizens and the need to reduce the government deficit. This Amendment deleted the provisions of Article 291 (which provided for privy purses), and Article 362 (which defined the rights and privileges of rulers of Native States) from the Constitution. In effect, this gave constitutional validity to the government's abolition of the privy purse and, once again, nullified the Supreme Court's orders.

However, the historic judgment in the *Keshavananda Bharti* case of 24 April 1973, put an end to the debate regarding these amendments to the Constitution when the 13-member Supreme Court bench pronounced, with a wafer-thin majority of 7-6, that the Parliament's power to amend the Constitution cannot be used to alter the basic structure of the Constitution.[v] It was a turning point in the judicial history of the country. The Chief Justice who had presided over the bench Justice SM Sikhri retired on the very next day, 25 April 1973. In a pique, Smt. Gandhi appointed Justice Shri AN Ray, the senior judge amongst those who held the minority view in the *Keshavananda Bharati* case, as the Chief Justice of India, superseding three judges senior to him, who were all members of the majority view in the case. This action, reflecting her blatant control of the judiciary, was met with severe criticism leading to a severe crisis in the country. It would not be out of place to say that in the short period thereafter and up to the end of the Emergency, the Supreme Court passed certain orders that reflected poorly on the high esteem that the Apex Court had hitherto enjoyed.

The infamous decision in the *ADM Jabalpur habeas corpus case*[vi], presided over by the self-same Chief Justice AN Ray, even went to the extent of pronouncing that given the declaration of Emergency, no person had any *locus standi* to move a writ petition under Article 226 before a High Court for habeas corpus, or any other writ or order or direction, to challenge

the validity of an order. The judgment reflected the subjugation of the Court to the political executive. It is only Justice Khanna's dissent that is still remembered: "This sacred land shall not suffer eclipse of the rule of law and that the Constitution and the laws of India do not permit life and liberty to be at the mercy of absolute power of the executive, a power against which there can be no redress in courts of law."[vii] It took almost forty years for the Supreme Court to hold that this judgment was flawed when deciding the *KS Puttuswamy vs Union of India* case in 2018 and to state in no uncertain terms: "No civilised State can contemplate an encroachment upon life and personal liberty without the authority of law. Neither life nor liberty are bounties conferred by the State nor does the Constitution create these rights. The right to life has existed even before the advent of the Constitution. In recognising the right, the Constitution does not become the sole repository of the right."[viii]

Civil Unrest: The increasing discord with the judiciary was but one aspect of the challenges that the government of the day faced. Many other simmering political struggles only started to get more pronounced. Some Congress members felt the time had come for a more powerful presidential system with a directly elected executive to lead the country. Yet, the mood of the country was different. The student-led agitation in Gujarat in late 1973 and early 1974, referred to as the *Nav Nirman* movement, led to the resignation of the Chief Minister and the ouster of the State Government. In a separate incident, Railway Minister Lalit Narayan Mishra was assassinated in a bomb attack. Soon thereafter, another student-led movement, under the leadership of Jai Prakash Narayan, began against the Bihar Government. JP, as he was popularly known, called for a total revolution demanding, a complete non-violent transformation of Indian society. Under his leadership were slogans shouted in the streets: *Singhaasan khali karo ki janta aa rahi hai* (vacate the throne, the people are coming) and janta *ka dil bol raha hai, Indira ka aasan dol raha hai* (The heart of the people are saying that Indira's position is teetering).[ix] Almost simultaneously, the nationwide Railways strike broke out, led by the fiery George Fernandes, trade union leader of the All-India Railwaymen's Federation. It was clear that the growing law and order situation in significant parts of the country was going out of control.

Allahabad Election Case: It was at this stage that the tipping point was reached. Raj Narain, a maverick politician who had lost to Smt. Gandhi in the 1971 parliamentary elections, filed cases against his opponent in the Allahabad High Court, challenging her election victory. The proceedings took about four years to complete. It was a rare sight to see the Prime Minister herself appearing before the court to submit evidence. Justice Jag Mohan Lal Sinha achieved renown by his judgment of 12 June 1975, which set aside the elections of Smt. Gandhi for misusing the governmental machinery in the election. The court declared her election results null and void, while at the same time directing that she could not contest any election in the forthcoming six years. It is moot to point out here that she was not found guilty of the more substantial allegations against her such as bribing voters, election malpractices, etc. She was found guilty of comparatively insignificant charges such as using State police to build a dais for her public meeting, use of electricity from the State electricity department, etc. It was a decision that would soon send the country into the dark hole of the Emergency.

The Allahabad Court's decision was challenged in the Supreme Court, which on 24 June 1975 upheld the High Court judgment. It was Justice VR Krishna Iyer who, as Vacation Judge, delivered the judgment which ordered that Smt. Gandhi be stripped of her benefits as MP and her right to vote in the Lok Sabha proceedings. The order also permitted her to appear before the Division Bench for relief. The judgment permitted her to continue as Prime Minister until her appeal over this decision itself was decided.[x] The decision resulted in an immediate reaction from the Government: the proclamation of Emergency was signed by President Shri Fakhruddin Ali Ahmed at midnight of the same day. It has been reported that the Cabinet itself came to know of this momentous decision only on the next day.

Before we come to the 42nd Amendment that was moved in Parliament during the height of the Emergency, a brief description of the events in the Allahabad election case is in order. "The government made desperate efforts to validate Indira Gandhi's election. While the appeal was pending in the Supreme Court, Parliament was made to enact the Constitution (Thirty-ninth Amendment) Act, 1975, inserting Article 329A by which a dispute about a Prime Minister's election (along with President and Vice-President) was retrospectively taken out of the jurisdiction of the courts. Simultaneously, the Parliament was also made to pass the Election Laws (Amendment) Act, 1975, an ordinary legislation by which the electoral

offences for which Indira Gandhi was disqualified by the Allahabad High Court, were retrospectively nullified. On November 7, Indira Gandhi's appeal was allowed by the Supreme Court, but not based on the Constitution (Thirty-ninth Amendment) Act, which was declared unconstitutional in view of *Kesavananda Bharati*. However, it was unexpectedly validated by the ordinary legislation amending the Representation of the People's Act."[xi] The Supreme Court, after observing the facts of this case, referred to Section 123 (7) of the Peoples Representative (Amendment) Act of 1975, and also Section 79 (b) of the Election Laws Amendment Act of 1975 which defines the term 'Candidate', as the person who has been duly nominated as a candidate for the elections. The Supreme Court held that it was on 1 Feb 1971 that the nomination was filed by Indira Gandhi. So, before this date, if any help or assistance is taken from the armed forces or govt. officials, it will not be considered corrupt practices. The judgment of the 5-member bench, chaired again by Chief Justice AN Ray, can be read at length in this regard.[xii]

Declaration of Emergency: It is not the intention of this chapter to examine the various acts of the Government in the 21 months that constituted the interregnum of the Emergency. Yet, a quick overview cannot be avoided. After its proclamation, the period was characterised by the gagging of the press, the suspension of Fundamental Rights, the draconian use of the Defence of India Rules (DIR), the Maintenance of Internal Security Act of 1971 (MISA), the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act of 1974 (COFEPOSA), and the arrest and incarceration of all senior opposition leaders. Elections to the Parliament and the State assemblies were postponed. The Prevention of Publication of Objectionable Matter Act (PPOMA) of 1975, and placing censorship beyond judicial review, made the gagging of newspapers final. The Presidential Order dated 8 January 1976, under Article 19 of the Constitution, suspended the enforcement of basic human freedoms such as freedom of speech and expression. On 4 February 1976 and later 4th November of the same year, the normal duration of the life of Parliament of five years was extended twice for a year "at a time". The government took to issuing presidential ordinances, completely bypassing the Parliament and ruling by decree. Trade unions and workers' rights were severely restricted. Two State governments of Gujarat and Tamil Nadu were suspended indefinitely, and President's rule was imposed. 26 political parties were banned, and it is estimated that about 1,40,000 political prisoners filled the jails

of India.[xiii] The five-point programme of Sanjay Gandhi, especially the forced sterilisation and slum clearance, evoked terror and discontent. The muscular clout the Government enjoyed was formidable: apart from the one million strength armed forces, the Prime Minister virtually controlled about 7,00,000 policemen at the centre, another 80,000 police in the States, intelligence inputs from the Research and Analysis Wing (RAW), and complete control over the media with censorship on the press and State control over TV and radio. An incapacitated and largely incarcerated Opposition was not in any position to offer resistance.

Even before the 42nd Amendment was brought in by the Smt. Gandhi Government, some earlier amendments, issued after the declaration of Emergency, clearly indicated the path the government was taking towards constitutional reform. "With the opposition MPs locked away, a series of Constitutional amendments were passed to prolong Smt. Gandhi's rule"[xiv] The 38th Amendment barred the judicial review of proclamations of emergency, as well as a review of ordinances or laws promulgated by the President or the Governors of the States during emergencies, that may contravene Fundamental Rights. It intended to legitimise the proclamation of Emergency and to codify and enlarge the State's powers to remove Fundamental Rights from citizens during the emergency period. In the same tone and tenor, the 39th Amendment held that the office of the Prime Minister could be challenged only by a body constituted by the Parliament, and not by the Supreme Court.

The sycophancy of the Congress Party towards their leader may have emboldened Smt. Gandhi to take the dangerous path toward a whole-scale revision of the Constitution. Even as early as 1966 when she was elected as Prime Minister, she had stated: "Sometimes I feel that our parliamentary system is moribund. Everything is debated and debated, and nothing gets done."[xv] Party President DK Barooah's statement that "India is Indira and Indira is India' and that the ideology of the party is "loyalty to Indira Gandhi" may have only strengthened the notion that she could do anything in the name of the welfare and interest of the people of India. It was all to no avail. The combination of events and personalities, and the remorseless surge of time undid all that she had attempted to do. All that she had achieved was washed away in the new spirit of unity that the opposition parties could muster. "In grabbing absolute power, Indira Gandhi let herself in for

absolute corruption and, on balance, when the balance sheet came to be drawn, the gains to the country for which she sought credit were like dust in the scale against the degradations into which she had dragged India".[xvi]

The 42nd Amendment: In the following paragraphs we take a critical look at some of the important changes that were brought into the Constitution as a result of the 42nd Amendment. It is relevant to mention here that the proposals for change came out of the recommendations of the Swaran Singh Committee. Sardar Swaran Singh was chairman of the committee constituted during the national emergency, which was entrusted with the responsibility of studying the Constitution of India. Soon after the declaration of the national emergency, this committee had been constituted under his chairmanship to study the question of amending the Constitution in light of recent experiences. Based on its recommendations, the government incorporated several changes to the Constitution, including the text of the Preamble, through the 42nd Amendment. This amendment, through its 20-page long detailed document, proceeded to give unprecedented powers to the Parliament.

One of the lasting legacies of the Proclamation of Emergency in the country was that it led to the 42nd Constitutional Amendment of 1976. Most of its provisions came into effect on 3 January 1977 while the others were enforced from 1 February 1977. It attempted to reduce the power of the Supreme Court and the High Courts to pronounce upon the constitutional validity of laws. It laid down certain Fundamental Duties as a corollary to the Fundamental Rights of Indian citizens. Many articles of the Constitution, including the Preamble were mutated, even as some new articles and sections were inserted. The Amendment's fifty-nine clauses reduced the powers of the Supreme Court giving greater weightage to the political executive and the concept of parliamentary dominance. It gave the Parliament almost total authority to amend any article of the Constitution, without fear of judicial review. Simultaneously, certain areas of responsibility assigned to the States by the seventh schedule were taken over by the Union Government which affected the balance of the federal system. And famously, the 42nd Amendment also altered the Preamble to the Constitution, changing the description of our country from a 'sovereign, democratic republic' to a 'sovereign, socialist, secular, democratic republic'. This last mentioned change raised much debate and discussion in the historical evolution of the Constitution and continues to excite discussion even today.

The bill for the Constitution (Forty-second Amendment) Act, 1976 was introduced in the Lok Sabha on 1 September 1976 by then Minister for Law and Justice Shri HR Gokhale. It sought to amend the Preamble and articles 31, 31C, 39, 55, 74, 77, 81, 82, 83, 100, 102, 103, 105, 118, 145, 150, 166, 170, 172, 189, 191, 192, 194, 208, 217, 225, 226, 227, 228, 311, 312, 330, 352, 353, 356, 357, 358, 359, 366, 368 and 371F and the Seventh Schedule. It also sought to substitute articles 103, 150, 192, and 226; and insert new Parts IVA and XIVA and new articles 31D, 32A, 39A, 43A, 48A, 51A, 131A, 139A, 144A, 226A, 228A, and 257A in the Constitution. In a speech in the Lok Sabha on 27 October 1976, Smt. Gandhi claimed that the amendment "is responsive to the aspirations of the people and reflects the realities of the present time and the future". The bill was debated by the Lok Sabha from 25th to 30th October 1976 and 1 and 2 November. Clauses 2 to 4, 6 to 16, 18 to 20, 22 to 28, 31 to 33, 35 to 41, 43 to 50, and 56 to 59 were adopted in their original form. The remaining clauses were all amended in the Lok Sabha before being passed on 2 November 1976. It was then debated by the Rajya Sabha on 4, 5, 8, 9, 10 and 11 November. All amendments made by the Lok Sabha were adopted by the Rajya Sabha on 10 November, and the bill was passed on 11 November 1976. The bill, after ratification by the States, received assent from then President Shri Fakhruddin Ali Ahmed on 18 December 1976 and was notified in the gazetteer on the same date. Sections 2 to 5, 7 to 17, 20, 28, 29, 30, 33, 36, 43 to 53, 55, 56, 57, and 59 of the 42nd Amendment came into force on 3 January 1977. Sections 6, 23 to 26, 37 to 42, 54, and 58 went into effect from 1 February 1977, and Section 27 from 1 April 1977.[xvii]

As constitutionally mandated under Article 368 Clause (2) of the Constitution, the Act was ratified by more than half of the State Legislatures. The State Legislatures that did not ratify the amendments are Gujarat, J&K, Kerala, and Tamil Nadu along with two union territories (at that time), namely Meghalaya and Nagaland.

We shall examine most of the changes made via this constitutional amendment in light of the Statement of Objects and Reasons and each of the proposed amendments. The Bill was dated 28 August 1976 and was moved by Law and Justice Minister HR Gokhale. As mentioned, there are a total of 59 amendments listed in the statement. The tenor and delivery of the opening paragraphs reflect a superior attitude in attempting to

explain the rationale for the proposed amendments to the citizens, who are required to be educated in very much the same manner in which a teacher educates her children. It begins thus:

"A Constitution to be living must be growing. If the impediments to the growth of the Constitution are not removed, the Constitution will suffer a virtual atrophy. The question of amending the Constitution for removing the difficulties which have arisen in achieving the objective of a socio-economic revolution, which would end poverty and ignorance and disease and inequality of opportunity, has been engaging the active attention of Government and the public for some years now."[xviii] The statement goes on to state that the democratic institutions of the Constitution have been subjected to many stresses and strains and that vested interests have been trying to promote selfish ends to the detriment of the public good. This having been explained, the statement articulates the intent to spell out "the high ideals of socialism, secularism and the integrity of the nation", and to make "the directive principles more comprehensive and give them precedence over [the] Fundamental Rights', which in recent times were allowed to be relied upon to frustrate socio-economic reforms. The determination to make special provisions for dealing with anti-national activities was also mentioned in the statement.[xix]

The statement makes no bones about the intention of the Government to clarify that the will of the people should prevail in matters relating to the amending power of the Parliament and that for this purpose the interpretative powers of judges of the courts will have to be regulated and circumscribed. In this line of thought, it was also proposed to take away the jurisdiction of the High Court as regards matters of the constitutionality and validity of central laws. In yet another attempt to circumscribe judicial authority, it was considered expedient to create separate specialised administrative and other tribunals, on the strength of the argument that the Courts are presently overloaded with work and there is a need to secure speedy disposal of cases in the context of socio-economic development and progress. Modifications of the writ power of the High Courts were also proposed to be modified.

The Preamble: The substantive sections of the Bill begin with the proposed amendments to the very heart and core of the Constitution, that is the Preamble to the Constitution. As mentioned earlier, the definition of India which had lasted for a quarter of a century, as a 'Sovereign

Democratic Republic' was substituted by the words 'Sovereign Socialist Secular Democratic Republic'. Further, for the words "unity of the Nation", the words "unity and integrity of the Nation" were to be substituted. For the two critical words 'socialist' and 'secular' inserted into the Preamble, much has been written. Suffice it to say that the matter had, almost three decades earlier, found the attention of the members of the Constituent Assembly when it had been discussed in much detail. A perusal of the record of those discussions would reveal why these words were omitted in the original text. "The debates saw Dr. B.R. Ambedkar reason that there was no need to include the term 'secular' as the entire Constitution embodied the concept of the secular State, which meant non-discrimination on grounds of religion and equal rights and status to all citizens. On the inclusion of the term 'socialist,' he said it is against the very grain of democracy to decide in the Constitution what kind of society the people of India should live in." Articulating his thoughts, he said: "It is perfectly possible today, for the majority of people to hold that the socialist organisation of society is better than the capitalist organisation of society. But it would be perfectly possible for thinking people to devise some other form of social organisation that might be better than the socialist organisation of today or tomorrow. I do not see therefore why the Constitution should tie down the people to live in a particular form and not leave it to the people themselves to decide it for themselves," he had said. His words had influenced the final decision to omit the two words."[xx]

It may be of particular interest to some readers that even currently, there is a petition pending in the Supreme Court pleading for the deletion of these two words. The conditions for registration of a political party specified by the Election Commission of India required all political parties to compulsorily follow socialism and secularism. This was added to Section 29-A (5) of the Representation of People Act of 1951, by an amendment in 1989. The petitioners, Balram Singh, Karunesh Kumar Shukla, and Pravesh Kumar have challenged the validity of this law and have also sought ECI and the Central government to respond to their petition. As recently as the first week of December 2021, BJP Rajya Sabha MP Shri KJ Alphonse has moved a private Bill to replace the word 'Socialist' with 'equitable' arguing that the word socialist has "political connotations and carries a historical baggage which is not acceptable to a large section of India." A decision on the Bill has been reserved.[xxi]

The political reasons that may have moved a beleaguered Prime Minister to make these amendments can be guessed. The word 'socialist' was perhaps to assure the people that the government would always be pro-poor and that social justice would inform all actions taken by the State; her call for '*garibi hatao'* seemed to symbolise her constituents. As for 'secular', it has been conjectured that the word was inserted into the Preamble to assuage the hurt feelings of the minorities, especially in the context of the sterilisation drive that her government had initiated under the prodding from her maverick son.

As to the change of 'unity of the nation' to 'unity and integrity', not much has been written. It can only be guessed that there was a perception arising from the worsening law and order situation that had disturbed the country in the days just preceding the declaration of Emergency. It was apprehended that the integrated and cohesive nature of the country was being broken up and that an unequivocal articulation of the same in the Preamble to the Constitution would underline the need to keep the country in 'unity and integrity'.

Fundamental Duties: Another of the most discussed and controversial of the amendments was the insertion of Fundamental Duties as Article 51A in the new Part IV A of the Constitution. The new insertion read as follows:

"PART IVA

FUNDAMENTAL DUTIES

51A. Fundamental Duties. - 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 brotherhood 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 wildlife, and to have compassion for living creatures;

h) to develop the scientific temper, humanism, and the spirit of inquiry 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.".[xxii]

Indeed, there are references to Fundamental Duties in other international documents such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The insertion of the duties in the Constitution was intended to serve as a counterpoint to the assertion that the citizen's privileges are only concerning Fundamental Rights, whereas the government was also emphasising the inherent responsibilities that lie with every citizen as regards certain Fundamental Duties. In recent times, the Union Government through the addresses of the President, the Prime Minister, and the Vice President, has been making a pitch for a wider articulation of Fundamental Duties. Shri Venkaiah Naidu has called for the Fundamental Duties to be included in the school curriculum along with displaying the same in educational institutions and other public places. Indeed, there have been arguments for and against the inclusion of Fundamental Duties in the Constitution. It is a basic proposition that all rights come with duties. Yet a person's fundamental right cannot be contingent on the performance of a duty. At the time of the Emergency, these duties may have carried an ominous meaning implying even punishment when a duty is not complied with. Today, it seems to be innocuous and merely aspirational in intent.

Yet, the insistence on adherence to the list of Fundamental Duties must have its corollary from the side of the State to ensure that the rights shall also be made accessible without let or hinder. A recent comment is pertinent here: "We may want to ask ourselves if the promise of a right to free expression imposes on the State something more than a duty to forbear from making an unwarranted restriction on that liberty." And again, the view that seems to dominate in liberal circles is that "the social revolution that the Constitution was meant to herald was underpinned by a belief that it is only a guarantee of rights - unimpeded by duty – that could help usher India into a free and egalitarian future."[xxiii]

Diminution of the Judiciary: By far the most contentious and disturbing aspect of the sweeping changes made by the 42nd Amendment was the deliberate attempt made on curbing the powers of the judiciary, particularly those of the State High Courts. It is an inescapable conclusion that can be reached considering the difficulties that Smt. Gandhi faced in the Allahabad High Court when her election to the Parliament was found to be illegal. The irony lies in the fact that while she was not found guilty of any of the corruption charges that the petitioner alleged, her disqualification, as we have already seen, hinged on comparatively trivial grounds related to the construction of the dais by the Public Works Department and the use of electricity from the Electricity Department of the State. The consequences were vast: within a short time, it led to the diminution of the powers of the High Court with regard to several of the constitutional powers that they had hitherto enjoyed.

Article 32A was a new insertion that excluded the jurisdiction of the Supreme Court from considering the constitutional validity of any State law unless there is a simultaneous question of the validity of Central law also in question. The barring of the jurisdiction of all High Courts from examination of the constitutional validity of central laws was yet another blow for the Judiciary; this was achieved by the insertion of a new article 131A, restricting such matters exclusively to the Supreme Court. To ensure that this fiat was complied with, further clauses of the same article made it incumbent on the High Courts to refer such matters to the Supreme Court for a decision in such matters. Simultaneously, the Advocate General could also move an application to the Supreme Court where he considers that matters pending with the High Courts do involve such constitutional matters and seek recourse from the Supreme Court to decide the case at its level. The new Article 139A also enabled the Advocate General to bring

to the notice of the Supreme Court such cases as are pending in different High Courts, whereby the cases would be withdrawn from the High Courts and decided by the Supreme Court itself.

Parliamentary sovereignty was the keyword, and indeed, the main objective, of the 42nd Amendment. The goal was to ensure that it would be very difficult for even the Supreme Court to nullify any constitutional matters passed by the Parliament or to be brought into question by the judiciary. The new Article 144A was designed to achieve this purpose. It was specified that there have to be at least seven judges of the Supreme Court who shall decide the constitutional validity of any Central or State law. Not only this but any such law would also be declared to be invalid only if a majority of not less than two-thirds of the sitting Judges hold it to be constitutionally invalid. A bare reading would make it evident that this was a deliberate attempt to restrict the autonomy of the judicial space. The exaltation of the legislative powers of the Parliament over the interpretative authority of the Judiciary was carefully protected by one amendment after another in the article of the Constitution. The addition of clause (4) under both Article 77 and Article 166 further constricted the independence of the judiciary to intervene in executive action at the Central and State levels respectively. "No court or other authority shall be entitled to require the production of any rules made under Clause (3) for the more convenient transaction of the business of the Government..." Article 226 was substituted by another article which appeared to grant vide powers to the High Court in various matters that come within its purview including the superintendence of subordinate courts; however, the new Article 226A made it abundantly clear that the High Court shall not consider the constitutional validity of any central law in any proceedings.

Tribunals: The inclusion of a new Part XIV A about the establishment of tribunals was deliberately constructed to prohibit the Supreme Court and the High Court from intervening in administrative and other matters. Hitherto, all such establishment and other matters were going to the High Courts or the Supreme Court for decision. The device of tribunals was created to remove such matters from the jurisdiction of the Courts by creating parallel adjudication mechanisms. The argument was that these matters did not receive timely and adequate attention when they were dealt with by the High Courts along with all other sundry matters and are delayed in the disposal. Article 323A provided for the creation of administrative tribunals to adjudicate matters concerning recruitment

and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union and the States. The creation of administrative tribunals for the Union and separate Tribunals for the States was enabled by the new article.

Further, provision was made in the new Article 323B about matters other than administrative issues, by enabling similar tribunals to be created for matters such as tax, foreign exchange, industrial and labour disputes, land reforms, the ceiling on urban property, foodstuffs, rent regulation, etc. There was even a provision for the creation of a separate tribunal to decide matters related to elections to either of the two houses of the Parliament or the houses of the State Legislatures. The argument that this would lead to a reduction in time for the disposal of such cases was genuine. They were, then, all being decided by the Supreme Courts and the High Courts, and transfer of the same to specialised tribunals (where provision was made in the respective appointment rules for retired or sitting judges to head them!) was a welcome measure as far as the merit of the argument was concerned. Yet, it cannot be denied that the additional reason for the creation of the Tribunals was to reduce in size and stature the exalted position that the High Courts and the Supreme Court enjoyed.

Seventh Schedule: The Seventh Schedule of the Constitution had been prepared after much consultation and draws upon the experience of British India in governing the sub-continent. It may be recalled that even in the days of the British East Indian Company there was an administrative arrangement where many subject matters were left to the Presidencies and some key elements of governance were exclusively the Governor General's oversight. With the Government of India Act of 1935 a formalised system of dyarchy was put in place which gave over authority over many subjects to the provincial assemblies, while retaining at the Central level, matters of national importance. The Act of 1935 had formally prepared a carefully considered list of subjects that the States could administer, while other subjects that impinge upon the nation as a whole, were left to the control of the Viceroy. In Independent India, the Constitution, under Article 246, provided for specific legislative matters to be taken up by the Parliament and those to be under the Legislatures of the States. The three lists mentioned in the Seventh Schedule enumerate these various subjects, lying in the ambit of the Union Government (List I), the State Governments (List II), and the subjects in which both can legislate, that is the Concurrent List (List III). Certain changes in the structure of the lists, brought in by the

42nd Amendment can be mentioned here. A new entry 2A in the Union List provided for the deployment of armed forces of the Union or the State in aid of civil power. In List II, the State List, it was clarified that 'public order' in the State would not include the use of any naval, military, or air force or any other armed force of the Union or subject to the control of the Union. Police were squarely placed on the State List. In Entry 3 of the State List, it was clarified that the administration of justice and organisation of justice, etc shall be not under State control. Certain other entries were deleted. The exclusive State authority over forests and the protection of wild animals and birds were altered by including these subjects in the Concurrent List. Similarly, concurrent powers were also given to both Centre and State in matters related to 'population control and family planning' and all levels of education. Similar treatment was also given to 'weights and measures except for the establishment of standards.'

Defining 'anti-national': The classic conundrum that dictators face is the definition of what constitutes anti-national activities. The 42nd Amendment proceeded to define this as any action that is intended to seek secession of any part of India, which threatens the sovereignty and integrity of India or is intended to overthrow by force the Government as by law established. The Amendment first added a new article 31D below 31C to save laws to be framed in respect of prohibition of anti-national activities or the formation of anti-national associations. It stated that such laws shall not "be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31."[xxiv] It went on to include within the definition of 'anti-national' such action as is intended to create an internal disturbance or the disruption of public services or disrupt harmony between different religious, racial, language, or regional groups or castes or communities. Accordingly, any association which deals with such activities would be an anti-national association. As a part of the Constitution, it was hoped that it bears the sanctity of law as established by the will of the people, and hence it could be used as a shield from what may be constituted as arbitrary action of the Government. There is a resonance with what may be considered by some as similar tendencies today when the term is used to define any person or association which speaks critically of the government. The dangers apparent in the use, misuse, and abuse of authority to take action

against those who exercise their fundamental freedoms in the criticism of the government can now be understood, keeping in mind the experience of the country in the heady days of the Emergency.

Other changes: Some of the other changes that the 42nd Amendment made may also be mentioned. There were certain significant additions in Part IV of the Constitution about Directive Principles of State Policy. In Article 39 of the Constitution, by adding a new clause (f), it was provided that children be given opportunities to develop healthily with freedom and dignity and without exploitation and moral and material abandonment and that childhood and youth should be protected against exploitation and moral and material abandonment. Similarly, a new Article 39A provided for the State to secure a legal system that promotes justice, and that it shall provide free legal aid, to ensure that opportunities for securing justice are not denied to any citizen because of economic or other disabilities. Another new article 43A was inserted, to promote the participation of workers in the management of industries. Yet again another new article 48A, provided for the protection and improvement of the environment forests, and wildlife.

In addition, the 42nd Amendment revoked the courts' power to determine what constituted an office of profit. Article 74 was amended, and it explicitly stipulated that "the President shall act in accordance with the advice of the Council of Ministers" though Governors of States were not provided the same powers. The mandatory acceptance of the advice of the Council of Ministers reduced the discretionary authority of the President to critically examine proposals received from the Government. The interval at which a proclamation of Emergency under Article 356 required approval from Parliament was extended from six months to one year. Article 357 was amended to ensure that laws made for a State, while it was under an emergency declared under Article 356, would not cease immediately after the expiry of the emergency, but would instead continue to be in effect until the law was changed by the State Legislature. The 42nd Amendment granted power to the President, in consultation with the Election Commission, to disqualify members of State Legislatures. Before the Amendment, this power was vested in the Governor of the State. Article 105 was amended to grant each House of Parliament, its members, and committees the right to "evolve" their "powers, privileges and immunities", "from time to time". Article 194 was amended to grant the same rights as

Clause 21 to State Legislatures, its members, and committees. Two new clauses 4A and 26A were inserted into Article 366 of the Constitution, which defined the meaning of the terms "Central Law" and "State Law" by inserting two new clauses 4A and 26A into Article 366 of the Constitution.

Some more of the amendments brought in by the 42nd Amendment may be mentioned here: It granted power to the President, in consultation with the Election Commission to disqualify members of State Legislatures. Before the Amendment, this power was vested in the Governor of the State. Article 105 was amended to grant each House of Parliament, its members, and committees the right to "evolve" their "powers, privileges and immunities", "from time to time". Article 194 was amended to grant the same rights as Clause 21 to State Legislatures, its members, and committees. Two new clauses 4A and 26A were inserted into Article 366 of the Constitution, which defined the meaning of the terms "Central Law" and "State Law", by inserting two new clauses 4A and 26A into Article 366 of the Constitution. The 42nd Amendment froze any delimitation of constituencies for elections to Lok Sabha and State Legislative Assemblies until after the 2001 Census of India, by amending Article 170 (relating to composition of Legislative Assemblies). The total number of seats in the Lok Sabha and the Assemblies remained the same until the 91st Amendment Bill (which was the 84th Amendment to the Constitution), passed in 2003, extended the freeze up to 2026. The number of seats reserved for the Scheduled Caste and the Scheduled Tribes in the Lok Sabha and State Legislative Assemblies was also frozen. The amendment extended the term of Lok Sabha and Legislative Assemblies members from five to six years, by amending Article 172 (relating to MLAs) and Clause (2) of Article 83 (for MPs). Incidentally, Article 312, which makes the provision for All India, was amended to include the All-India Judicial Service.

Admittedly, the changes were vast and purposive, to serve the administrative needs of Smt. Gandhi's government and to assert complete parliamentary sovereignty and executive dominance over the country. How these amendments would change the destinies of the poor people of the country was never clear. Yet, political unrest was brewing more furiously than ever. These undercurrents were probably never felt by those in absolute power. The cacophony of protests and the simmering discontent across the land could not be suppressed further. The elections in nearby Pakistan a little earlier seemed to indicate that it was a more democratic country than India and that must have hurt her pride and precipitated her into following

suit. Perhaps her immediate motive in ordering elections in March 1977 was to raise "a constitutional scaffolding to the power structure that she thought belonged to herself and her family".[xxv] International opinion gradually turned against Smt. Gandhi and in the end, good sense prevailed. The decision surprised opposition leaders as did their eventual victory in the elections. The main plank of the Opposition leading to the installation of the Janata Party Government was its promise to restore the Constitution to the condition that it was before the Emergency. The 42nd Amendment Act, it may be recalled, had come into force at the start of 1977. At that time, it was passed in the Lok Sabha with a tally of 366-4 and in the Rajya Sabha with 191-0. The Opposition had either boycotted the session or were behind bars. A few months later, when elections were ordered, it was time to test the contention that the will of the Parliament reflected the will of the people. Along with the announcement of elections, orders for the withdrawal of Emergency were issued. The ensuing elections in 1977 saw the conclusive defeat of Smt. Gandhi; most of the Union Ministers and Ministers of State also lost the elections. It signalled the end of three decades of Congress dominance of the Parliament. The Janata government was sworn in on a wave of goodwill and the expectations of a new dawn. Shri Morarji Desai was sworn in as Prime Minister.

Rolling back: With a new sense of freedom in the air, there was severe criticism all around, about the 42nd Amendment, the centre of which was the argument that the Parliament, which had extended its own life twice, had no right to make such sweeping changes. Some of these changes may have been acceptable in normal times but were certainly not permitted when the country was under the shadow of the Emergency. HV Kamath, one of the original members of the Constituent Assembly which had drawn up the Constitution of India, described the 42nd Amendment as " neither amending, nor mending, but ending the Constitution."[xxvi] In its election manifesto for the 1977 elections, the Janata Party had promised to "restore the fundamental freedoms', "to rescind the 42nd amendment", "to safeguard the freedom of the press", and committing to "the Gandhian path".[xxvii] It was now time to redeem that promise.

There were three views about the 42nd Amendment that informed the decisions of the Janata Party. One is the view expressed by Nani Palkivala: that the 42nd Amendment violated 'the basic structure doctrine' of the Constitution. Hence, he recommended that the amendment be invalidated through judicial review and court action. The constitutionality of the

Amendment came up before the Supreme Court in September 1977, six months after the new Government had been sworn in. Yet neither the Janata government nor the Supreme Court seemed willing to review the validity of the amendment then. The second view, expressed by MR Masani and the Left, was that it should be rescinded lock stock, and barrel, by a simple one-clause statute saying that the said amendment was repealed. This was not done, especially since the Janata Party did not have a majority in the Rajya Sabha and it was unlikely to get it passed. The third view was the one that the new Government adopted: The 42nd Amendment would be repealed piecemeal. Some parts of the amendment would be accepted, some deleted, and some fresh clauses added.[xxviii]

Even as such discussions were initiated, the Government moved swiftly to remedy matters. Its initial directives were decisive. All political 'detenus' languishing in jails were immediately released; fundamental freedoms that were suspended were restored. The PPOMA was repealed, censorship abolished, and reporting of Parliament restored. The Press Council was restored, the All India Radio and the Doordarshan as well as the Films Divisions were converted into autonomous bodies. MISA was allowed to lapse.

The 43rd Amendment sought to remove some of the most objectionable articles. It was a small bill that repealed six articles: 31D, 32A, 131A, 144A, 226A, and 228A – that had been inserted into the Constitution by the 42nd Amendment. Articles 145, 228, and 366 were amended to facilitate the omission of these six articles.[xxix] Article 31D enabled Parliament to legislate on matters concerning "anti-national activities" and "anti-national associations". Article 32A had prohibited the Supreme Court from considering the constitutional validity of State laws in writ proceedings for the enforcement of Fundamental Rights. Article 226A had placed a similar prohibition on High Courts from considering the constitutional validity of Central laws. Article 131A had barred High Courts from making judgments on the constitutional validity of Central legislation, giving exclusive jurisdiction for such laws to the Supreme Court. Article 144A required that the Supreme Court could only declare a Central or State law as unconstitutional if the decision was made by a bench with at least 7 judges and backed by a special majority of two-thirds of the bench. Article 228A had required that a High Court could only declare a State law as unconstitutional if the decision was made by a bench with at least 5 judges and backed by a special majority of two-thirds of the bench. These sensitive

and contentious issues having been taken care of in the 43rd Amendment, the easier parts of the reordering of the Constitution were done. The remaining amendments would require greater consultation.

A new policy emerged thereafter, which reflected the view that the Janata Party did not intend to completely repeal the Amendment but to hold on to some portions that it found necessary. For this purpose, it constituted a cabinet sub-committee under Charan Singh, the Home Minister (with Shanti Bhushan, Law Minister, LK Advani, Information and Broadcasting Minister, and P Chunder, Education Minister as members). Newspapers reported widely about these discussions: speculation was rife about whether emergency provisions should be maintained, whether the right to property should be deleted from the list of Fundamental Rights and whether the Centre's right to send police into the States should be repealed.[xxx] The 'October Package', as it was called, conceded that the words 'secular' and 'socialist' may remain in the Preamble; it proposed an amendment of 31C, which had made the Fundamental Rights subservient to the achievement of the objective of the Directive Principles, and limited it only to achieve the aims described in Article 39B and C (regarding the distribution of the ownership and control of the country's material resources and to ensure that the operation of the economic system does not result in the concentration of wealth and means of production); all references to anti-national activities were to be deleted; the President would be empowered to refer back, on a once-only basis, the proposals tendered by the Council of Ministers; the powers of the High Court and the Supreme Court were to be restored.

A mention must be made of the 44th Amendment Act too. Introduced in the Lok Sabha on 16 December 1977, it was passed in its entirety on 23rd August and remitted to the Rajya Sabha. It represented a partial compromise. The Rajya Sabha, where the Congress still retained a majority, refused to grant assent to three clauses, but they cleared the rest of the Bill. These three clauses, which would have amended Articles 31C, 366, and 368, failed to secure the required majority and continues in the books. Article 31C saves laws giving effect to certain directive principles despite being inconsistent with Article 14 (equality before the law) or Article 19 (protection of rights to freedom). Article 366 deals with definitions; Article 368 with the amending power of the Parliament. The intent of the 42nd Amendment prevailed despite the objection of the Janata Party. Similarly, Part XIV A, which had brought in Tribunals as an additional adjudication mechanism

was also sought to be repealed. However, it could not muster the requisite support in the Rajya Sabha and continues till today. The Government had no option but to concede the denial of support with regard to these changes, and to save time, concurred with the amendments as approved by the Rajya Sabha. Thus the 44th Amendment Act came into being. Incidentally, the fundamental right to own property, originally Article 19 (f) of the Constitution was deleted. Only procedural safeguards were retained: Article 300A states: "No person shall be deprived of his property save by authority of law." It was a momentous change that requires deeper analysis but is not the subject of this book, yet a comment is being made on the matter a little later.

Two of these deleted clauses require some discussion. It has been argued that Article 31C which had been brought in by the much-maligned 42nd Amendment, had disturbed the delicate balance between Fundamental Rights and Directive Principles. As it stood then, and as it stands today (since its amendment was not allowed in the Rajya Sabha), any law passed by the Parliament to achieve the purposes of the Directive Principles, cannot be held invalid even if it patently contravenes the Fundamental Rights. There are two contradictory views in this regard. Said Soli Sorabjee, "…ends are to be achieved by constitutional means, not by trampling upon basic rights. It is incomprehensible why the right to equality or of freedom of speech of freedom of movement is required to be violated in order to implement Directive Principles." [xxxi] But in the judgment in the *Minerva Mills vs Union of India* case[xxxii], Justice Chandrachud wrote: I cannot, therefore, subscribe to the proposition that if the Amendment in Article 31 C were held valid, it would have the effect of protecting every possible legislation under the sun and that would in effect and substance wipe out Articles 14 and 19 from the Constitution… I hold that, on the interpretation placed on the amended Article 31 by me, it does not damage or destroy the basic structure of the Constitution and is within the amending power of Parliament and I would therefore declare the amended Article 31 to be constitutional and valid." Yet, the majority decision in the case was that "the 1976 amendment extending the shield of Article 31C to all the Directives included in Part IV was unconstitutional so that Article 31C should be confined to its pre-1976 position, namely protecting only laws implementing Article 39 (b) to (c).[This] has not yet been overruled by any larger bench."[xxxiii]

The other clause that failed to muster majority support in Rajya Sabha and hence still stands in the Constitution, is the unfettered power of the parliament to alter the Constitution at will, basic features or not, and the courts are precluded from calling it into question. This is even though the *Keshavananada Bharati* case specifically prohibits the basic features of the Constitution from being altered.[xxxiv] A few years later, the Supreme Court declared unconstitutional the second of these two provisions of the 42nd Amendment which prevents any alteration to the basic structure of the Constitution. But yet it stands.

It was, however, the 45th Amendment Bill that corrected much of the damage. It was the result of many attempts to arrive at a consensus and was passed in the Lok Sabha without much opposition. When introduced in Parliament, the Law Minister stated: "Recent experience has shown that Fundamental Rights, including those of life and liberty, granted to citizens by the Constitution, are capable of being taken away by a transient majority. It is, therefore, necessary to provide adequate safeguards against the recurrence of such a contingency in the future and to ensure the people themselves have an effective voice in determining the form of government under which they are to live. This is one of the primary objects of this Bill."[xxxv]

It deleted the provisions of the 38th Amendment, namely the provisions that barred the jurisdiction of the courts from reviewing any law passed as a result of the Proclamation of Emergency. Also deleted were the provisions brought in by the 39th Amendment, which had excluded the office of the Prime Minister from judicial scrutiny. Articles 83 and 172 were amended to shorten the term of the Parliament and the State Legislatures from six years to the pre-Emergency period of five years. The process of the Proclamation of Emergency under Article 352 was made more stringent. The grounds for a lawful Emergency could only be 'armed rebellion' and not the vague 'internal disturbance'. To ensure that the same errors were not repeated, it was made mandatory to insist on a cabinet communication in writing to the President, recommending the Proclamation of Emergency. Both Houses of Parliament had to approve the same within a month and any extension had to be on a year-on-year basis. The Emergency could also be revoked if there were a resolution passed by a majority of the Lower House to that effect. Significantly, "the most important changes are in respect of Article 359, whereby the rights to life and personal liberty, protection against retroactive criminal laws, against self-incrimination

and double jeopardy cannot be suspended under a future Emergency. High Court writs can still be obtained and there will be no restrictions on the reporting of Parliament.[xxxvi]

What subsists: Yet, the vestiges of the 42nd Amendment remain, some intact and some with changes. The rewritten Preamble has withstood the test of time: the tenure of the Janata Party government as well as of other non-Congress governments have not managed to dislodge it. So too have the Fundamental Duties, introduced as a new Article 51A though much debate about it continues, especially in the context of its relationship with Fundamental Rights. The Tribunalisation of legal adjudication in administrative and other matters remains intact leading to the creation of several tribunals at the Central and State levels. Tribunals are judicial or quasi-judicial institutions established by law. They intend to provide a platform for faster adjudication as compared to traditional courts, as well as expertise on certain subject matters. In 2010, the Supreme Court clarified that the subject matters under Article 323B are not exclusive, and legislatures are empowered to create tribunals on any subject matter under their purview as specified in the Seventh Schedule of the Constitution. Currently, tribunals have been created both as substitutes for High Courts and as subordinate to High Courts. In the former case, appeals from the decisions of Tribunals lie directly with the Supreme Court. In the latter case, appeals are heard by the division bench of the corresponding High Court.[xxxvii] Similarly, the changes in the Seventh Schedule continue. Placing education, environment, and wildlife in the concurrent list has yielded positive results in the slew of environmental and wildlife conservation laws that have been issued in later days. But for this change, we may never have had the Right to Education Act of 2009.

Conclusion: If one wishes for a one-line summary of the intention and purpose of the 42nd Amendment, we may say that it was a last-ditch effort to place parliamentary sovereignty above all else in the constitutional form and structure of governance. This took the elaborate route of placing the Union Government in theory and principle above sub-national structures of government, even to the point of reducing the position of the State Governments, altering the lists in the Seventh Schedule which specified the areas of responsibility of the Centre and the States, lowering the exalted status of the Fundamental Rights of citizens, diminishing the principles of federalism, centralising powers at the Union level, reducing the independent powers of review of the Courts, introducing the concept

of Fundamental Duties, etc. The President himself had no choice but to accept the advice of the Cabinet. The abrogation of Fundamental and other constitutional rights during the Emergency, by resorting to Articles 358 and 359, was one of the most dictatorial acts in the history of independent India. The tenure of the Parliament and the State legislative houses was extended from five to six years. The philosophical underpinnings of the Nation-State were altered with the insertion of the words 'socialist' and 'secular', though the debate continues as to whether the inclusion of these two words has in any way adversely mutated the nature of our polity, or whether they have placed the country on a more stable, just and inclusive developmental trajectory. Some voices have pointed to the necessity for such concepts to be in the Preamble, especially when keeping in mind new developments such as monetisation of national assets for lease to private parties and the complex situation arising after the Citizenship Amendment Act, 2019 that respectively, raises some questions about the socialist and secular foundations of our society.

To date (as of October 2021) there have been more than a hundred[xxxviii] Amendments Acts to the Constitution ever since its enactment in 1950. The latest, i.e, the 105th Amendment Act, made changes in Articles 338B, 342A, and 366 to restore the powers of the States to make their own OBC lists. This too was done to annul the Supreme Court judgment of 5 May 2021, which had set aside the Maharashtra State's authority to grant quota of OBC status to Marathas. The struggle between the Judiciary and the Legislature thus continues! After this amendment, the States can prepare their lists of socially and educationally backward classes.

It is difficult to summarise the saga of these amendments and the rolling back of most of them, given the political changes that simultaneously were changing the landscape of the country's polity. Hart[xxxix] summarises the attempts to undo the 42nd Amendment. "The Janata Government's amendments first remove some of the particular devices Indira Gandhi used to clear the way for executive prerogative. The President may only be asked to proclaim a State of Emergency upon the decision of the Cabinet, conveyed to him in writing. While he is bound in this, as in other policy decisions, to follow Cabinet advice, he may first ask the Cabinet to reconsider the advice. Smt. Indira Gandhi's provision for protecting the Prime Minister (and Speaker, for form's sake) from the normal consequences of campaign law violations was repealed. The terms of Parliament and State legislatures were returned to five years. Protection was restored to press reporting of

parliamentary debates. The final clause of the 42nd Amendment, which ought to be remembered as a travesty of law, was repealed.

'If any difficulty arises in giving effect to the provisions of the Constitution as amended by this Act, .. the President may, by order, make such provisions, including any adaptation of any provision of the Constitution, as appear to him to be necessary or expedient for the purpose of removing the difficulty.'

This last clause would have granted the President the unbridled constitutional authority to issue any order whatsoever to protect the political intent of the government in power. It would have gifted the political executive with enormous and unchallengeable powers.

One of the more far-reaching changes that the Janata government introduced in the 44th Amendment was the removal of the right "to acquire, hold and dispose of property" from the list of Fundamental Rights of the citizens. It signalled the end of an era and seemed to indicate the thoughts of leadership less oriented to socialist ideology than to the thinking of rural Indians. "A right that John Locke set besides the right to life and liberty in the year 1679 [had] found its limit in the world of limited good."[xl] The implications of this are profound and are perhaps yet to be fully comprehended in the context of the philosophical role and duties of a government towards the people who vote it to power.

Hart also has some broad lessons and suggests four implications. One, the manifestation of contradictions within the fundamental law, or between the constitution and the norms of governmental organs, is an inevitable consequence of political development. They can be resolved by institutional adaptability, complexity, and autonomy. Two, constitutions can keep their legitimacy only when wider participatory institutions are involved in the changes; deeper and more extensive participation is the constant characteristic of political change. Three, what constitutional changes can be made by the people depends on the stage of their development and how evolved they are to accept these changes. To identify constitutional issues, and to transform them into the provisions of a code of constitutional law while understanding their impact on the lives of people is an elite task. And four, the opportunity to remake constitutional changes cannot come every year. There has to be "a powerful sense of trust in leaders by the people, and in the people by the leaders. Legal draftsmanship and accumulated wisdom of other times and places can be joined to a firm sense of the

capabilities of ordinary men and women. There may be other occasions for constitution making, but they must all be extraordinary occasions…. constitutions are acts of faith. They are more the products of the lives of people who have acquired confidence that they can see beyond crisis, than of books or the transferred experience of others."[xli]

It is on this sombre note that we can end this chapter. Yet, the last word must be given to Justice HR Khanna of the Supreme Court, the lone dissenting voice in the infamous Habeas Corpus case (presided over by Chief Justice AN Ray himself) that we have already referred to in Notes vi and vii. When the judgment was pronounced, it appeared that the Apex Court had almost succumbed to the pressure of the political executive. Even the *New York Times*[xlii] had commented on his lonely but courageous stand. At a conference in Delhi in March 1978, speaking about how to create a dynamic, durable, and ethical democracy, Justice Khanna stated: "It would be a mistake to rely too much on courts and the laws for the preservation of liberties. There is no modern instance, it is said, in which any Judiciary has saved a whole people from the grave currents of intolerance, passion, and tyranny which have threatened liberty and free institutions. The attitude of a society and its organised political forces rather than of its legal machinery is the controlling force in the character of free institutions. The ramparts of defence against tyranny are ultimately in the hearts of the people. The Constitution, the courts, and the laws can only act as aids to strengthen those ramparts; they do not and cannot furnish substitutes for those ramparts. If the ramparts are secure, anyone who dares to tamper with the liberties of the citizens would do so at his own peril."

Notes

i Original text of the Bill for amendment, accessible at https://legislative.gov.in/constitution-forty-second-amendment-act-1976

ii I.C Golaknath & others vs State of Punjab and Anrs (1967 AIR 1643; 1967 SCR (2) 762, accessible at https://indiankanoon.org/doc/120358/

iii From the brief on the series of constitutional amendments made from time to time available at https://www.constitutionofindia.net/blogs/desk_brief__the_24th_amendment

iv HH Maharajadhiraja Madhav Rao Scindia vs Union of India (1971 AIR 530, 1971 SCR (3) 9, accessible at https://indiankanoon.org/doc/660275/?type=print

v Keshavananda Bharathi vs State of Kerala (WP(C) of 1970), 24 April 1973 and accessible at https://indiankanoon.org/doc/257876/

vi Additional District Magistrate vs SS Shukla, 28 April 1976, accessible at https://indiankanoon.org/doc/1735815/

vii Ibid, quoting from the dissenting view of Justice Khanna in the judgement.

viii KS Puttuswamy vs Union of India (AIR 2017 SC 4161), accessible at https://indiankanoon.org/doc/127517806/

ix Gyan Prakash Kesharwani, "42nd Amendment, was it India's or Indira's amendment," *Journal of the Centre for Constitutional Research and Development*, accessible at https://ccrd.vidhiaagaz.com/42nd-amendment-of-indian-constitution/

x Indira Nehru Gandhi vs Raj Narain (1975 AIR 1590, 1975 SCC (2) 159, accessible at https://indiankanoon.org/doc/1240174/

xi "Mrs. Gandhi's election upheld, the unanimous verdict of Supreme Court" published on 8 November 1975 in Hindustan Times accessible at https://www.hindustantimes.com/india-news/htthis-day-nov-8-1975-mrs-gandhi-s-election-upheld-unanimous-verdict-of-supreme-court-101636308049920.html

xii Indira Nehru Gandhi vs Shri Raj Narain (Appeal (civil) 887 of 1975) delivered in the Supreme Court on 7 November 1975, accessible at https://indiankanoon.org/doc/936707/

xiii Balraj Puri, "A fuller view of the Emergency," *Economic and Political Weekly*, Vol 30, no. 28 (Jul 15, 1995): 1736-1744.

xiv Ramchandra Guha, *India After Gandhi*, (Picador, 2017).

xv Christophe Jaffrelot and Praniv Anil, *India's First Dictatorship*,(Oxford University Press, 2020), 282

xvi Hirendranth Mukherjee, *Portrait of Parliament: Reflection and Recollections, 1952-1977*, (Basumathi Co 1992).

xvii Details extracted from https://en.wikipedia.org/wiki/Forty-second_Amendment_of_the_Constitution_of_India

xviii Original text of the Bill for amendment, accessible at https://legislative.gov.in/constitution-forty-second-amendment-act-1976

xix Ibid.

xx Krishnadas Gopal, "Debates show why Preamble's original text left out two words" *The Hindu*, d 29 January 2015, accessible at https://www.thehindu.com/news/national/debates-show-why-preambles-original-text-left-out-the-two-words/article6831694.ece

xxi News report in many newspapers, here accessed from https://scroll.in/latest/1012062/opposition-protests-after-bjp-mp-seeks-to-introduce-bill-to-amend-preamble-to-the-constitution

xxii By the 86th Constitutional Amendment 2002, another fundamental duty was added to the list stating that it would be the fundamental duty of a parent or guardian "to provide opportunities for education to his child, or as the case may be, ward between the age of six to fourteen years." This was brought in during the tenure of the Atal Bihari Vajpayee government.

xxiii Suhrith Parthasarthy, "A false conflation between duties and rights," Editorial, *The Hindu*, 16 December 2021.

xxiv The Amendment Bill brought to Parliament, accessible at: https://legislative.gov.in/constitution-forty-second-amendment-act-1976

xxv Anuradha Gupta, from her book '*Revolution Through Ballot*', quoted by Balraj Puri, ibid.

xxvi Michael Henderson, "Setting India's Democratic House in order: Constitutional amendments," *Asian Survey* Vol 19, (University of California Press, October 1979): 52.

xxvii From the Janata Party Manifesto, accessible at https://larouchepub.com/eiw/public/1977/eirv04n09-19770229/eirv04n09-19770229_066-janata_party_manifesto.pdf

xxviii Rajeev Dhawan, " Amending the Amendment: The Constitution (Forty-Fifth Amendment) Bill, 1978," *Journal of the Indian Law Institute,* Vol 20, no. 2 (April-June 1978): 249-272.

xxix RC Bharadwaj, ed. *Constitution Amendment in India* (New Delhi, 6th Edition, Northern Book Centre), 196.

xxx Rajeev Dhawan, Supra: 253.

xxxi Michael Henderson, Supra: 954.

xxxii Minerva Mills vs Union of India, 31 July 1980 (1989 AIR 1789 and 1981 SCR (1) 206), accessible at https://indiankanoon.org/doc/1939993/.

xxxiii Durga Das Basu, *Shorter Constitution of India*, (Lexis Nexis, 16th Edition, 2021), 690.

xxxiv Michael Henderson, Supra: 954; quoting from *India News* 12 February 1979.

xxxv Statement of Objects and Reasons appended to the Constitution (Forty-fifth Amendment) Bill, 1978 (Bill No 88 of 1978) enacted as the Constitution (Forty-fourth Amendment Act, 1978, presented to the Parliament by Shri Shanti Bhushan, the Law and Justice Minister.

xxxvi Ibid: 953; quoting from *Himmat*, 23 March 1979.

xxxvii Note on Tribunals system in India, accessible at https://prsindia.org/billtrack/prs-products/the-tribunal-system-in-india-3750

xxxviii Accessible at Amendments / National Portal of India at www.gov.in

xxxix Henry C Hart, "The Indian Constitution: Political Development and Decay," *Asian Survey* Vol 20, no. 4 (April 1980): 428-540.

xl John Locke, *Second Treatise of Government*, ed. CB Macpherson (Indianapolis: Hacket Publishing Co., 1980): He was quoted in the Rajya Sabha debates when this matter was discussed.

xli Henry C Hart, Supra.

xlii New York Times editorial 30 April 1976: *"If ever India finds its way back to freedom and democracy that were the proud hallmarks of its first 28 years as an independent nation someone will surely erect a monument to Justice HR Khanna of the Supreme Court."*

Chapter XII:
The 73rd and 74th Constitutional Amendments

Introduction: While the Fundamental Rights enshrined in the Constitution were a fact of law, the Directive Principles of State Policy were always regarded as aspirational, to be achieved in due course in the fullness of time, when the country was ready for them. Relegated to the status of non-justiciable articles of faith, they largely remain ideals, though, with the passage of time, the goals of elementary education and the right to education have been achieved by statute. While the Constituent Assembly had a galaxy of eminent leaders of the freedom movement, the most notable absence was Gandhiji himself. Though the contribution made by him to the achievement of freedom for our colonial country was universally acknowledged, his ideals for an economic model for the country were not given much importance during the debates of the Assembly. A token mention was made in Article 40 of the Constitution which stated: 'The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government." Noble as these ideals were, we have seen elsewhere in this volume how the Gandhian ideals of the village republic were largely ignored when the superstructure of the Indian republic was fashioned by the Constituent Assembly. It was only T Prakasham who, while speaking on the subject of Panchayati Raj, had voiced these apprehensions: "…a very serious situation was created by not making the village republic or the village unit as the real basis of the Constitution… what is suggested in this direction by Dr. Rajendra Prasad himself was that the structure must begin from the foundations and must go up. That, Sir, is the Constitution which the departed Mahatma Gandhi

indicated and tried to work up for nearly thirty years."[i] Gandhi ji himself, as we have seen elsewhere in this volume while writing a foreword to the draft of a Gandhian Constitution for a Free India, written by Shriman Narayan Agarwal, then Principal of Commerce College, Wardha, had stated that this document was a thoughtful contribution to the many attempts of presenting India with constitutions. "He has done what, for want of time, I have failed to do…"

Historical antecedents: There are differing views about the impact and import of these constitutional amendments. British India had initiated the system of the franchise for local governments but had not extended the strength of financial autonomy to local bodies. Lord Ripon had commented that they were administratively irrelevant and were merely "designed as instruments of political and popular education."[ii] Yet, the British had taken many steps in this direction: some element of financial decentralisation was initiated in 1870 by Lord Mayo, then Viceroy of India; the constitution of local bodies in 1882 by Lord Ripon, also Viceroy; the recommendations of the Royal Commission on Decentralisation of 1909, etc. But substantial forward movement really began in 1919 with the Montague-Chelmsford reforms, placing local self-government under the provincial governments. The Government of India Act of 1935 permitted this arrangement without creating any legal structures or status for them. We may say that local bodies became training grounds for politicians who had ambitions to rise to state and national level politics.

It is with this background that we have seen how during the Constituent Assembly debates there were arguments revolving around the idea of the village republic of Gandhiji, which conflicted with Ambedkar's views who had remarked that the Indian village was but "a sink of localism, a den of ignorance, narrow-mindedness and communalism." The compromise formula worked out to include the provision of the village republic in the Directive Principles of State Policy.

There is a need to understand the issue of the compatibility of a Gandhian order with a constitutional order. This tension also reflects the conflict between Ambedkar and Gandhiji, each of whom had a different understanding of the essence of India. "Gandhi's vision romanticized the village, the centre price of Panchayati Raj. For Ambedkar, this Gandhian world did not exist…. for him, the village was the embodiment of repression." [iii] Later, he would go so far as to say, "I am glad that the draft Constitution

has discarded the village and adopted the individual as the unit."[iv] In the context of the 73rd Constitutional Amendment Act, this gains even greater significance. Indeed, one may argue that there is a contradiction between a formal constitution and the Gandhian aspiration, for the latter espoused internal and personal control as a higher goal than external controls.

The early days of devolution of powers: It took four and a half decades for real progress to be achieved in this regard. After India gained independence, it was estimated that by the early 60s, in the rural space, there were about 60,000 village Panchayats, 7,500 Panchayat Samitis, and 330 Zilla Parishads. The fate of the municipal bodies was not conducive to efficient administration as they were often superseded for political reasons. Inadequate staffing, lack of steady resources, untrained political leadership, a stringent caste system; and many other ills besieged the local bodies, especially in the rural environment. The Balwant Rai Mehta Committee of 1957 recommended a three-tier Panchayati Raj system: Panchayat at the village level, Panchayat Samiti at the block or intermediate level, and the Zilla Parishad at the district level, all organically linked to each other. In 1977, the Janta Party also tried to revitalise the Panchayati Raj system and appointed the Ashok Mehta Committee to suggest a viable organisation of grass-root level councils to involve the people in the process of development. It also recommended the participation of political parties so as to further extend the decentralisation of power. With the gradual enhancement of anti-poverty programmes implemented through the District Rural Development Agencies (DRDAs), it became necessary to integrate the Panchayati Raj Institutions (PRIs) into the developmental framework. Both the CH Hanumanth Rao Working Group on District Planning of 1983 and the GVK Rao Committee of 1985 reviewed the extant rural development agencies and recommended better integration between the three tiers.

The LM Singhvi committee of 1986 further submitted some recommendations for the involvement of PRIs at the planning and implementation levels. Yet the question about the relationship between PRIs and the traditional developmental agencies at the bloc and district level remained ill-defined. The DRDAs, created during the Sixth Five-Year Plan period, were working almost independently, without policy inputs provided by the block-level or panchayat-level institutions. Inadequate financial provisions also hampered the functioning of the PRIs. The inclusive nature of the programmes was also questioned as it was felt

that the really poor were still not getting the benefit of development even with the existence of these PRIs. "State-level organisations curb and blight the development of PR bodies and try to show that compared to them, PR institutions have very little power. The legislators representing an area who belong to the party in power demonstrate that they are above the Panchayats and the PR institutions. Their proximity to, and linkages with, relevant ministries provide them with ample power to create a psychological environment that tends to increase their following at the cost of PR officials."[v]

The LM Singhvi committee, as we have seen, had assessed the gaps and anomalies with regard to rural and urban local bodies and had recommended constitutional status for them. Its report went on to state: "Article 40 of the Constitution which enshrines one of the Directive Principles of State Policy, lays down that the State shall take steps to organise Village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. In light of the experience in the last forty years and in view of the short-comings which have been observed, it is considered that there is an imperative need to enshrine in the Constitution certain basic and essential features of Panchayati Raj Institutions to impart certainty, continuity, and strength to them."[vi]

When the Constitution Amendment Bill on Panchayat Raj was introduced in the Lok Sabha on 15 May 1989, Rajiv Gandhi observed that the country's population of about 800 million then, was represented by only about 5,000 to 6,000 public representatives. "He envisaged that democracy in the Panchayats on the same basis of sanctity as enjoyed by Parliament and State Legislature would bring in about seven lakh elected representatives. This would ensure the holding of regular and periodic elections and also provide for the reservation of Scheduled Castes and Scheduled Tribes on par with the Parliament and the State Legislatures."[vii]

Undoubtedly, it was Rajiv Gandhi who in 1992 undertook to realise that unfulfilled dream, when the 73rd Constitutional Amendment (and its urban sibling, the 74th) were proposed and later passed by the Lok Sabha. Some states had protested vehemently. However, both bills failed in the Rajya Sabha. The VP Singh government introduced a composite bill in September 1990 for both rural and urban self-government; however, the government fell in November. In May 1991, Rajiv Gandhi was assassinated. In June 1991, the Narasimha Rao government was sworn in, and in 1992, two

separate amendment bills, known now as the 73rd and 74th Constitutional Amendment Bills were introduced. They were referred to two Joint Parliamentary Committees which amplified the provisions and submitted their recommendations in July 1992. On 22nd and 23rd December 1992, they were passed by the Lok Sabha and the Rajya Sabha respectively, and received the assent of the President, thus becoming constitutional law. 17 states ratified the same (including West Bengal and Bihar, both opposition ruled) and the President signed the Act into existence on 24 April 1993. The requirement for the inclusion of PRIs into the Constitution was necessitated by the obvious reluctance of some of the states to empower them as it was feared that these PRIs would encroach into the political space of the legislators.

The 73rd and 74th Amendments have, in essence, constitutionalised Panchayats (as well as urban local bodies such as municipalities) as the third stratum of government, at and below the district level. It stands to the credit of the lawmakers of the day that the Act made it necessary for the States to constitute these bodies as institutions of self-government. We may, at this stage, examine the factors that went into the formulation of the 73rd Amendment Act. The statement of Objects and Reasons in the Bill for the 73rd Amendment stated: "Though the Panchayati Raj Institutions have been in existence for a long time, it has been observed that these institutions have not been able to acquire the status and dignity of viable and responsive people's bodies due to a number of reasons including the absence of regular elections, prolonged supersession, insufficient representation of weaker sections like Scheduled Castes, Scheduled Tribes, and women, inadequate devolution of powers and lack of financial resources."[viii]

The issues that plagued the Panchayati Raj system can be summarized as follows: irregular elections, insufficient devolution of funds, bureaucratic resistance, domination by the rural elites, and the unsatisfactory working of the Gram Sabha. Indeed, it is debatable whether, between the adoption of the Indian Constitution in 1950 and the 73rd Constitution Amendment of 1993, the situation of the poor and the oppressed really did improve very much. There were, and still are, serious issues of landlessness, rural indebtedness, displacement, migration, high female and child malnutrition, illiteracy, inadequate health and educational infrastructure, caste

oppression, etc. In this background, we may state that the strengthening of the Panchayati Raj institutions is a significant step taken to address these burning issues.

The 73rd Amendment attempted to address these issues in three significant measures: by providing for reservation for castes and tribes, by the creation of the State Election Commission and the State Finance Commission, and by having fixed terms for the elections. "It is in a way a hybrid: Gandhian in its focus on the village, Ambedkarite in its emphasis on constitutionalism. It takes the structure of representative government one step lower, to the third tier of the Gram Panchayat, while keeping an important place for the village Assembly (Gram Sabha). This has introduced a new dynamic in the transformation process, and, in spite of the manipulations described above, still represents the best opportunity to push India further towards the goal of equal citizenship."[ix]

The Amendment Acts introduced new Parts relating to Panchayats and municipal bodies in the Constitution to provide for all the new features of rural self-government mechanisms as detailed below. It must be kept in mind that these provisions of the Constitution do not mandate the implementation of self-government, but the delegation of the powers and functions of these bodies are left to the State legislatures. The States have the authority to legislate upon the exact nature and extent of the delegation, as had been upheld in the Apex Court in the Banumathi case.[x]

The provisions of the 73rd Amendment: A quick overview of the relevant provisions in the Constitution will help us gain a better understanding. Part IX deals with Panchayats and **Article 243** (a-g) specifies the relevant definitions. **243 (b)** defines a Gram Sabha as a body consisting of persons registered in the electoral rolls relating to a village comprised within the area of Panchayat at the village level. There is provision for an intermediate level between the village and the district as indicated in clause 243 (c). **Article 243A** clearly empowers the State Government to devolve powers and functions by law on the Gram Sabha. **Article 243B** enjoins that Panchayats at village, intermediate, and district levels shall be constituted in every State. For this purpose, through **Article 243C**, the legislature of the state can make provisions for the composition of such Panchayats. Representation of the MLAs and the MPs in such Panchayats (above village level) have also been provided for.

Article 243D takes a revolutionary step forward by providing for reservations for Scheduled Caste and Scheduled Tribe members in every Panchayat, in proportion to their population in the respective area of the Panchayat. It also stands to the credit of the wisdom of the lawmakers that one-third of the total number of such reserved seats are, in accordance with Clause (3) of Article 243D, reserved for women. At the same time, one-third of the total number of seats in every Panchayat were also reserved for women. The proviso under Clause (5) of Article 243D stipulates that such reservation shall be allotted by rotation to different Panchayats. This means that when a particular seat is reserved for SC or ST candidates or a woman, in the next elections, the reservation shall move on to other seats in the same Panchayat, at all three levels of village, intermediate, or district, in a clearly pre-determined order. The 73rd (as well as the 74th) amendment left the door open to State Legislatures for providing for reservation for other backward classes as mentioned in Clause (6) of 243D. **Article 243E** specifies 5 years as the duration of a Panchayat. **Article 243F** lists out disqualification criteria for membership in Panchayat, while **Article 243G** empowers the Legislature of the State to endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law is to contain provisions for the devolution of powers and responsibilities upon Panchayats. This article specifically empowers the Panchayats to prepare plans for economic development and social justice and to implement the same in relation to matters of economic and social activity specified in the Eleventh Schedule. As we are aware, the Eleventh Schedule lists out the 29 subjects where the Panchayats shall play a significant role. **Article 243H** is an enabling provision that empowers the Legislature of the State to authorise Panchayats to levy, collect, and appropriate taxes, duties, tolls, and fees in their respective areas.

In another very significant measure, **Article 243I** refers to the Constitution of a quinquennial Finance Commission in every State to review the financial position of Panchayats and to make recommendations on the principles which should govern the distribution of the net proceeds of the taxes, duties, tolls, and fees between the State and the Panchayats, as well as the assignment of these proceeds to the Panchayats. Provision for grants-in-aid to Panchayats from the consolidated fund of the State was also made according to Clause (c) of Article 243I. **Article 243J** refers to the audit of accounts of the Panchayats. **Article 243K** institutes a State

Election Commission, headed by a State Election Commissioner, for the superintendence, direction, conduct, and control of all elections to Panchayats. While **Article 243L** makes these provisions applicable to the Union Territories, **Article 243M** stipulates areas within the Indian Union where they shall not apply, such as certain tribal areas in the Northeast. **Article 243N** saves existing laws prevalent in Panchayats, even if inconsistent with the provisions of this part of the Constitution, for a period of one year or until the laws are amended by the competent Legislature of the State. **Article 243 O** bars interference by courts in electoral matters.

The provisions of the 74th Amendment: We now turn to the analogous provisions pertaining to urban local bodies in Part IX A of the Constitution as stated in Article 243P to Article 243 ZG. The statement of Objects and Reasons appended to the Constitution (Seventy-third Amendment) Bill, 1991 which was enacted as the Constitution (Seventy-fourth Amendment) Act, 1992 states that "in many States local bodies have become weak and ineffective on account of a variety of reasons, including the failure to hold regular elections, prolonged supersessions and inadequate devolution of powers and functions. As a result, Urban Local Bodies are not able to perform effectively as vibrant democratic units of self-government. Having regard to these inadequacies, it is considered necessary that provisions relating to Urban Local Bodies are incorporated in the Constitution…"[xi] The main intention of the amendment was for the purpose of putting on the relationship between the State Government and the Urban Local Bodies on a firm constitutional footing with respect to functions and taxation powers, as well as arrangements for revenue sharing, the ensuring of regular conduct of elections, ensuring timely elections in the case of supersession, and also for providing adequate representation for the weaker sections like Scheduled Castes, Scheduled Tribes, and women.

We shall now look at the specific articles of the Constitution in this regard**. Article 243P** deals with various definitions. Of them, Clause (e) defines a Municipality as an institution of self-government which is constituted under 243Q and may be as a Nagar Panchayat (for a transitional area in transition from a rural area to an urban area), a Municipal Council (for a smaller urban area) and a Municipal Corporation (for a larger area). **Article 243R** deals with the composition of the Municipalities stipulating that the seats in a Municipality shall be filled in by direct election from the territorial constituencies of its area, for which there shall be wards. Other members of the Municipality shall be persons with special knowledge in municipal

matters, MPs and MLAs as well as members of the Council of States and the Legislative Councils. **Article 243S** describes how the wards are to be constituted. The Legislature of the State can provide for the composition and territorial area of wards and how the ward seats are to be filled. **Article 244T** prescribes the reservation for Scheduled Castes and Scheduled Tribes members, in proportion to the population of these categories of that area. Further, one-third of all the seats are to be reserved for women. The Legislature of the State has also been empowered to provide for the reservation of seats for Backward Classes as well, as per Clause (6) of this article. The tenure of a Municipality shall be five years according to **Article 243U**. Provisions for the disqualification of members of a Municipality are available in **Article 243V**. **Article 243W** empowers the Legislature of the State to prescribe the powers, authority, and responsibilities of municipalities to enable them to function as institutions of self-government along with provisions for the devolution of powers and responsibilities on them so that they can prepare plans for economic development and social justice, as well as the performance of the functions and implementation of the schemes entrusted to them as listed in the Twelfth Schedule. The Twelfth Schedule lists 18 items on which the municipalities can take action for the preparation of plans and their implementation.

Article 243Y empowers the Legislature of the State to authorise the municipalities to impose, collect and levy taxes in accordance with procedure. The Legislature can also assign the revenues of other taxes collected by the state to the municipal bodies. Article 243Y, states that the State Finance Commission constituted under Article 243I for the panchayat bodies, shall also review the financial position of municipalities and make recommendations on the principles that shall govern the distribution between the state and the municipalities of the taxes, duties, tolls, and levies of the state. Grants-in-aid have also been provided as well as recommendations to improve the financial position of the municipalities.

Article 243Z provides for the audit of the municipal bodies while Article **243ZA** deals with elections to the municipalities through the State Election Commission referred to in Article 243 K. **Article 243ZB** mandates these provisions to be made applicable to municipalities in the Union Territories while **Article 243ZC** states that the same provisions will not apply on certain areas such as tribal areas of the Northeastern states. **Article 243ZD** deals with the constitution of District Level Planning Committees to consolidate the plans prepared by the Panchayats and the Municipalities

in the district and to prepare draft development plans for the district as a whole. This plan shall deal with matters related to spatial planning, sharing of water and other physical and natural resources, and provide for the integrated development of infrastructure and environmental conservation. The State Legislature is authorised to provide for the composition of such committees. Four-fifths of the total members of these committees shall be elected among members of Panchayats and Municipalities in proportion to the ratio of the population of rural and urban areas. For Metropolitan areas, **Article 243ZE** stipulates that there shall be a Metropolitan Planning Committee, to prepare draft development plans in the same manner as mentioned above. **Article 243ZF** saves existing laws prevalent in municipal bodies, even if inconsistent with the provisions of this part of the Constitution, for a period of one year or until the laws are amended by the competent legislature of the state. **Article 243ZG** bars interference by courts in electoral matters.

The practical experience gained by the country over the past few decades and the need to rectify obvious design issues in the matter of involvement of people's representative bodies in the rural development process led to much rethinking as the country evolved. It was in accordance with these aspirations that the empowerment of the Panchayati Raj Institutions was taken up in the 73rd Amendment to the Constitution.

It must be kept in mind that the Amendment Acts not only empowered the Panchayati Raj Institutions and the urban local bodies in the development process, but also put into place two constitutional provisions that ensured, firstly, that the elections to these bodies were held regularly in time by the State Election Commissioner, and secondly, assured the flow of funds through the mechanism of the State Finance Commission. The reservation of seats for the disadvantaged sections of society, as well as the reservation of 30% of the seats for women (in some States this has been enhanced to 50%), have been very welcome. Further, by placing the subject on the Concurrent list, it has been ensured that the States will not try to dilute the intent of the constitutional amendment. As for the 73rd Amendment, the new Ministry of Panchayati Raj was subsequently created, whose main function is to monitor the implementation of the amendments, to secure for the PRIs', economic and social justice, fund research studies, etc and ensure that the PRIs are financially viable through grants-in-aid as well exercising the power to impose taxes.

We may briefly undertake an examination of the sister Amendment Act, the 74th before we go on to more substantial issues. Undoubtedly, it has recovered less attention than the 73rd. Before the Amendment Acts came into existence, it would be seen that, unlike rural institutions which are mentioned in the Directive Principles of State Policy, the Constitution did not make local self-government in urban areas a clear-cut constitutional obligation. Entry 5 of the State List reads: "Local Government, that is to say, the Constitution and powers of Municipal Corporations, improvement trusts, district boards, mining settlement authorities, and other local authorities are for the purpose of local self-government or village administration." Yet, as already mentioned, there were innumerable examples of delayed elections, lack of funding, political machinations, etc in the matter of administration of these municipal bodies. After the amendment Act was discussed in the Joint Parliamentary Committee (with members from both Houses), it was passed in April 1993 and came into force on 1 June 1993.

The 74th Constitutional Amendment is in direct contrast to the earlier prevailing Gandhian philosophy of "India lives in its villages". As Shivaramakrishnan states, it may even be stated that the earlier public policy was to contain city growth and to remove the locational and other advantages that the cities enjoyed.[xii] The presence of Urban Development Ministries at both central and state levels augurs well in principle, but in the actual implementation, there are serious issues. Uncontrolled growth of urban areas, flagrant violation of legal provisions, the expansion of unorganised housing including slums, encroachment on public land, etc are common features of urban growth today. These issues continue to plague the administration of these urban bodies, though many programmes such as Jawaharlal Nehru National Urban Renewal Mission, Integrated Development of Small and Medium Towns, Low-Cost Sanitation Programme, Accelerated Urban Water Supply Programme, National Slum Development Programmes, Smart Cities Mission, etc., have been launched.

The immediate impact of the implementation of the two amendment acts was the sudden increase in the number of duly elected public representatives in these local bodies. "From a mere 4000 MLAs and MPs, the number of our elected representatives exploded to nearly 3.2 million. We progressed from being representationally sparse to one of the most intense democratic participatory systems envisaged. The scope was provided for the participation of women and marginalised sections of

society in government."[xiii] Perhaps there is no other country in the world that has registered this massive enhancement of public representation in self-government institutions through universal adult franchises. In essence, the constitutional amendment constitutionalised Panchayats as a third stratum of government at and below the district level. Thereafter, there are three strata of government put into place: the Union, the States and the Panchayats, and urban local bodies.[xiv]

An important aspect of these amendments has been the financial strengthening for urban and rural bodies of the third tier, through dispensations made both by the Central Finance Commission as well as the awards of the State Finance Commissions. It has become clear that any restructuring of Union and State finances cannot have relevance without reference to the domain of Panchayati Raj and urban local bodies. As Oommen asks, without reference to the 2.4 lakh local government institutions in the country that are constitutionally mandated to plan for 'economic development and social justice', how can we address the issues of macroeconomic stability and equitable growth? Can Finance Commissions impose their reform package on State Governments in a multi-layer lateral federal structure?[xv] The State Finance Commissions have more or less adopted the normative standards established by the Central Finance Commissions in so far as eligibility and terms and conditions are concerned. These are significant issues that still plague the deliberations wherever these issues are discussed.

Yet the question has been asked whether the somewhat elaborate provisions dilute the objective of self-government. This can be answered only if we are sure as to the true purpose of Panchayats, whether they are for development purposes only or for the wider purpose of self-government. The Balwant Rai Mehta committee in 1957, had recommended democratic decentralisation to a three-tier structure, but for handling development work only. The Ashok Mehta Report did not make any major recommendation beyond this, other than suggesting a draft constitution amendment. The legendary ideologue EMS Namboodiripad objected stating that apart from certain fields such as defence, foreign affairs, etc., "all the rest should be transferred to the states, and from there to the district and lower levels of elected administrative bodies."[xvi] The 73rd Amendment reaffirmed this thought, and specified the areas and subjects

that can be transferred to the Panchayats; this was the minimum that each State Legislature should transfer to the third tier and it was left to their wisdom to transfer even more areas of governance.

Some questions: This is a striking feature of the amendments and one that is required to be emphasised. The provisions introduced in the Constitution from 243 to 243ZG are basic features and are to be supplemented by laws made by the respective State legislatures, which are to define the details regarding the powers and functions of the various bodies. What must be kept in mind is that according to the division of labour between the Centre and the States, the subject of self-government institutions in both urban and rural bodes is an exclusive State subject under Entry 5 of List II of the Seventh Schedule. Therefore, in terms of the design of the Constitution, the centre cannot enact any law to create rights and liabilities with regard to these subjects. In such circumstances, what the Union Government has done is to insert Part IX and IX-A in the Constitution and to outline the scheme to be implemented by the various states, which they can affect and put into place by making laws, or by amending existing statutes, so as to bring them into conformity with the scheme enunciated in the Constitution. Because this important element of self-government has been left to the discretion of the states, we can understand why many states have not carried forward the objective of self-government, beyond merely paying lip service.

The other thought that needs to be mentioned is that the 74th Amendment for municipalities divides the governing space below the state level into two parts, rural and urban, thereby making the importance of that space difficult to grasp. All previous thinking has stressed the continuum between the two, and the only way this gap was to be bridged was to give the idea of district planning a constitutional status and to enable the panchayats and municipalities to prepare these developmental plans and to consolidate them into a single district developmental plan. Yet, the Panchayats, with the State-level departments and a central rural development ministry, are locked into a 'rural only' bind. This is despite the fact that in 1961 a Rural-Urban Relationship Committee had recommended that urbanisation should be a continuous process of transition from rural to urban and that the whole should be treated as one unit. The Ashok Mehta committee too had seen this issue as a rural-urban continuum instead of an urban-

rural dichotomy.[xvii] Without addressing this issue squarely, the haphazard growth of urbanised villages is bound to happen. It is the states which have to step in with suitable legislative, administrative, and financial backing to resolve this conundrum.

Lasting effects of the Amendments

a) **Women's representation:** Apart from the truly significant step to involve grassroot level elected functionaries into the constitutional framework at the third tier, there are, as we have already seen, three fundamental changes that have been effected which give heft and substance to the amendment acts. The first of these is the reservation of women in the structure of the third tier. Article 15 (3) of the Constitution empowers the state to make special provisions for women. This constitutional mandate recognises that women in India are required to be enabled and empowered socially and economically so as to ensure their full participation in the life of the nation. In 1959, the Balwant Rai Mehta Committee recommended that two out of the 20-member Panchayat Samiti committee may be nominated or co-opted from amongst women. Similarly, the Ashok Mehta Committee in 1978 recommended that in every Panchayat, two women who had polled the highest number of votes, even though they may have not succeeded in the elections should be co-opted. The National Perspective Plan for Women (1988) recommended 30 per cent reservation for women in these bodies. Some States such as Karnataka and Andhra Pradesh went on to provide some form of reservation for women in the Gram Panchayats. It was only when the 73rd and 74th Amendment Acts came into being that the provisions were made constitutional with 30 per cent reservation enshrined in the Constitution for them. Later, many States, (such as Andhra Pradesh, Assam, Bihar, Chhattisgarh, Gujarat, Haryana, Himachal Pradesh, Jharkhand, Karnataka, Kerala, Maharashtra, Odisha, Punjab, Rajasthan, Sikkim, Tripura, Uttarakhand, West Bengal, Madhya Pradesh, Assam, Bihar, Tamil Nadu, and Telangana) raised the percentage of reservation of seats and offices of Chairperson to 50 per cent.[xviii] According to a survey of the Ministry of Panchayati Raj in 2020, out of the total available seats in PRIs of 31.87 lakhs, women occupy 14.53 lakhs seats.[xix] The general understanding is that in the more forward-looking States where reform is welcome, there is a

perceptible change in the style, manner, and content of functioning of such rural bodies. Pattanaik found that "women's leadership in Panchayats is transforming India. These elected women - now role models to the other women in their communities - are altering the development agenda to address issues critical to village life. The success stories number in millions. Women …. are ensuring that roads are repaired, electricity is brought to their villages, schools are built, latrines installed, medical services are available, water sources are made safe, local savings groups are formed, and the list goes on and on."[xx] Political empowerment of women of such a scale is rarely seen in the world. Thirty years down the line, in most States, fourth or fifth generation of Panchayats are in place. This augurs well for the country. Much, however, remains to be done.

b) State Finance Commissions: The second of the major changes wrought by the amendment is the setting up of State Finance Commissions (SFC) to institutionalise and bolster the financial strength of these institutions. The Commission is constituted by the Governors of the States after every five years. The Commission consists of a Chairman and a maximum of four members. As constitutionally mandated, the SFC is to make recommendations to the Governor regarding the principles that should govern the distribution of tax proceeds, including duties, tolls, fees, etc levied by the State, between the State and its PRIs and urban local bodies. In the rural space, this will be at all three levels, i.e., village, block, and district level. For urban bodies, it shall be for all municipal bodies, big and small within the district. Further, it shall also recommend the grant in aid to the PRIs and urban bodies from the consolidated fund of the State. Principles regarding taxes, duties, tolls, and levies to be levied by the PRIs and urban bodies themselves are also to be recommended by the SFC. Suggestions for improving the financial position of these institutions can also be made. The Governor of the State shall place the recommendations of the SFC on the table of the State Legislature, as well as action taken by the State Government on the recommendations of the Commission.

As an example, we may glance at the work of the State Finance Commission (SFC) in Rajasthan. Currently, the 6th State Finance Commission, which was constituted on 12 April 2021, is in position with a Chairman and two members. The report of the 5th State

Finance Commission for the period 2015-20 gives an overview of the thinking of the Commission as regards the position of the revenues and expenditures of these local bodies.[xxi] As the Chairperson's preface to the report states, some Rs. 27,000 crores are the extent of the devolution of funds to the local urban and rural bodies envisaged in the reference period. Apart from the standard terms of reference of the Commission, additional terms were also given. These pertained to the identification of services rendered by PRIs and ULBs, the requirement of funds for the delivery of these services, and the gaps in the resources of these services. The measures needed to fulfil this gap were also to be recommended by the SFC, along with suggesting the system of accounts maintenance. The SFC was also to recommend measures for better fiscal management, consistent with the need for speed, efficiency, and cost-effectiveness in the delivery of services.

The parameters and weights for district-wise distribution of funds to PRIs were determined by the Commission as follows:

Population	40%
Geographical Area	15%
Child sex ratio:	10%
SC population	5%
ST population	5%
Infant mortality rate	5%
Girls' education	5%
Decline in decadal population growth	5%
Deprivation (7 criteria of SECC 2011)	10%

Amongst the three tiers of the PRIs, the distribution shall be 5% for the Zilla Parishad, 20% for the Panchayat Samitis, and 75% for the Panchayats.

As regards urban bodies, and keeping in mind the changing ratio of population between rural and urban bodies, it was recommended that 30% of the devolved funds should go to the urban local bodies. The Fourth State Finance Commission had recommended 50 per cent devolution on population, 10 per cent on geographical area, and 10 per cent on average revenue mobilisation basis for the Urban Local Bodies. Out of the total kitty of the funds available for urban bodies, the Fifth Rajasthan State Finance Commission decided to allocate 70 per cent of funds on the basis of population and area on a ratio of 55 % and 15 % respectively. Out of the balance of 30 per cent, it was recommended that 20 per cent be distributed among the municipal bodies on a population basis and 10 per cent in proportion to the deviation of average per capita own income of municipalities measured from the Municipality having the highest average per capita income. Thus, it was felt that this 10 per cent amount will go to the Municipalities with a weak revenue base and will act as a support grant.[xxiii] The SFC also recommended that out of the devolved funds for urban and rural bodies, resources may be utilised on a priority basis towards specified schemes at the National and State level on priority. These include the use of IT for e-governance, drinking water, Swachh Bharat, Awas Yojana solar energy, gender sensitisation, youth development, etc.

The summary of the interim report of the 5th SFC of Rajasthan, for example, makes the following recommendations for the year 2016-17: An amount of Rs 3700 crores are to be allocated to the PRIs and ULBs; that this be shared between them in the ratio 75.1:24.9; that 55% and 40% be allocated for Basic and Development functions and National/State priorities respectively; that the functioning of PRIs is strengthened through e-governance and information technology, etc.[xxiv]

The final report of the 5th Finance Commission for Rajasthan for the period 2015-2020 provided for Rs 12960 crores, to be divided between Zilla Parishads at 5% (Rs 648 crores), Panchayat Samitis at 20% (Rs 2592 crores) and for Gram Panchayats at 75% (Rs 9720 crores). In the same manner, the report provided for Municipal Corporations an amount of Rs 1581 crores, for Municipal Councils Rs 1014 crores, and for other municipalities Rs 2958 crores.

Undoubtedly, such recommendations, issued by SFCs across the country, have furthered the intent and objective of the Constitutional amendments by giving sharper attention to problems and issues of the rural and urban bodies in a much more focused manner than had ever been attempted before the amendments were passed on 1992.

c) **State Election Commissions:** The third very significant systemic and institutional change that the 73rd and 74th Constitution Amendment Acts ushered in was the creation of the State Election Commission to conduct elections for the PRIs and ULBs. The powers and functions of these commissions under Articles 243K and 243Z of the Constitution of India are identical to those vested in the Election Commission of India under Article 324. The superintendence, direction, and control of the conduct of elections including preparation of voter lists for all the local self-government institutions vest with the Commission. The main purpose of these election commissions is to conduct elections to the local bodies in a free, fair, and unbiased manner. The State Election Commissions conduct elections to three types of rural institutions, district, block, and gram panchayats as well as four types of urban local bodies namely Municipal Corporations, City Municipal Councils, and Town councils and Town Panchayats. A State Election Commission consists of Chief Electoral Officer and as many members and staff as are required by the Acts of the respective State Governments. State Election Commissioners are independent persons not holding position or office in any Central or State Government organisations. To take the State Election Commission Gujarat as an example, their website reveals that the 31 districts of the State have 980 electoral divisions. The seats are reserved for women, for Scheduled Castes and Schedules Tribes (as well as women amongst SC and ST) with unreserved seats as well. There are 231 Taluka Panchayats with 4774 electoral divisions. Similarly, there are 6 Municipal Corporations, with 144 wards and
576 seats.

In this context, we may also mention the fixed tenures imposed on the elected representatives of the urban and local bodies through Articles 243E and 243U. Elections have to be conducted before the end of, or within six months of the end of, this period. State Governments often claim delays on the basis of one reason or the other. High Courts have, however, been quite clear that the elections have to be held

as prescribed by the Constitution. The Constitution understood the nature of the enormous litigation generated by electoral processes and had barred the jurisdiction of courts on matters concerning the validity of laws related to delimitation, allotment of seats, or any matter that calls into question the elections to any local bodies.

Some questions: Sivaramakrishnan[xxv] has argued that the language of Articles 243G and 243W makes it mandatory for the States to devolve powers and responsibilities on the local bodies according to the lists in Schedules XI and XII. However, the courts, by and large, have taken a different view. The Allahabad High Court has clearly held that Article 243G is an enabling provision and the States have leeway, not on just how and when the power devolves to local bodies, but on whether to devolve such powers at all: "The Legislature of the State is not bound to endow the Panchayats with the powers referred to in Article 243G and it is in its discretion to do so or not."[xxvi] The failure to devolve functions to local bodies has led to States replacing them with parallel bodies that carry out the same functions, as for example executive controlled water bodies in urban areas, though the provision for the local bodies to carry out this function exists under Item 5 of Schedule XI. Similarly, though district and metropolitan planning committees are provided for in Part IX A of the Constitution, most State Governments have development agencies to carry out this function.[xxvii] To compound difficulties, the Supreme Court decision in the Bondu Ramaswamy case has in effect endorsed an act of the Karnataka State legislature, to remove town planning powers from the elected Municipality for the city of Bangalore.[xxviii] In effect, the Supreme Court has found Articles 243G and 243W as insufficient mandates to interfere with the State's legislative powers to devolve functions at its own pace.

This in turn leads us to the general question about the overall impact of the two amendments on the federal structure of the nation. The addition of the third tier of government was bound to lead to some confusion as regards the careful balancing of powers and functions between the Centre and the States. This becomes underlined, when we consider that all matters related to rural and urban bodies are under the legislative and executive jurisdiction of the States, as per Entry 5 of the State List in Schedule VII to the Constitution. In order to pass these two amendments, at least half of the States had to give consent, and such consent was in fact obtained. In fact,

the government of the day could have clearly decided the extent to which the authorisation to the States was to be extended. That these amendments constitute an invasion into the Legislative Powers of the States is something that the Government then would have been aware of. Yet, as Rajiv Gandhi noted, "the Centre and the States share the responsibility for bringing Panchayati Raj to fruition. The constitutional framework for Panchayati Raj is primarily the responsibility of the Centre. The legislative details fall in the province of the States."[xxix] As Sivaramakrishnan concludes, 'The consequence of this is that the local bodies have the constitutional status of being a third tier of the government but are simultaneously subordinate to the State Governments in several functions and aspects."[xxx]

Some Supreme Court pronouncements: We may glance at some of the judicial pronouncements that the Apex Court has made in this regard. In a case from Gujarat, the Court asserted that while these parts of the Constitution emphasise 'no interference', the District Panchayat cannot arrogate to itself the status of an independent or autonomous body such as a State in a federation.[xxxi] The Court has also emphasised that the system of Panchayats as envisaged in this Part makes it incumbent on the Panchayat to establish a strong and accountable system of governance so as to ensure a more equitable distribution of resources in a manner beneficial to all.[xxxii] When a Panchayat in Uttar Pradesh challenged the validity of the amendment on the grounds that it violated the basic structure of the Constitution, the Court decided that the provision came into being by an amendment and hence cannot be said to be a part of the basic structure of the Constitution. It is an enabling provision and the State, by exercising power under the enabling provision, is empowered either to eliminate, modify or cancel.[xxxiii] The constitution of a panchayat area on the basis of population is not ultra vires of Article 423C: Further, the process of delimitation of a panchayat area is a function of the State Government.[xxxiv] When a proposal for a no-confidence motion against a chairman of a panchayat was challenged, the Court held that it is wholly compatible and consistent with the provisions of Part IX of the Constitution.[xxxv] In another significant judgment, the Apex Court held that Article 243D is a distinct and independent constitutional basis for reservation in Panchayat Raj Institutions and cannot be compared to the provisions of Article 15 (4) and 16 (4) in the context of affirmative action measures.[xxxvi] The provision in the Haryana Panchayati Raj Act, 1994, regarding the disqualification of a candidate to contest elections to the Panchayat on account of having more than two children, is within the

legislative competence of the State Legislatures.[xxxvii] Role differentiation between elected representatives and civil servants was also brought out in the correct perspective in a Gujarat case, the former dealing with policy formulation and the latter with implementation.[xxxviii] These are but a few examples of the intervention of the Supreme Court in a highly charged subject that altered the political profile of the country at the grass-root level.

Report Card: At this stage, it would be relevant to mention that the implementation of the intent of the amendments has been staggered and uneven across the States of the country, with perhaps more progress being achieved as far as the 73rd amendment is concerned and less with the 74th. The transfer of funds, functions, and functionaries, as envisaged in the amendments, has not yet been achieved. While block grants to these local bodies continue to be devolved, it is subject to severe financial control by the State Finance Departments. Independent control over receipt and expenditure heads in the budget has not yet been made available to the rural and urban bodies. The functionaries of the departments, whose duties and responsibilities have been assigned to the local bodies, have not been transferred in any State to these local bodies: though they continue to work with these local bodies, they are under the full administrative control of the parent departments within the government. Of the 29 subjects identified for the rural bodies and the 18 for the urban bodies, hardly a handful in effect have been transferred to the local bodies. The staff of identified departments, now finding themselves under the day-to-day administrative control of the elected representatives of these bodies, have protested in many States and have managed to ensure that ultimate control is retained within the government departments themselves. The presence of another layer of public representatives has indeed made the lives of the lower functionaries more difficult, as they are often caught between the elected members of the legislative assemblies and the elected representatives of these local bodies.

It stands to the credit of the Panchayati Raj Ministry, that it has consistently attempted to analyse the performance of the 73rd Amendment Act. In its annual report, available online for the period up to 2015-16, an attempt has been made to comparatively rank the States in matters of their commitment to the intent of the Act. From 2006 onwards, the Ministry of Panchayati Raj has been undertaking the preparation of a Devolution Index (DI) through independent institutions. The DI ranks States on the

enabling environment that has been created under the framework of the Constitution. For three years from 2006-2007 to 2008- 2009, the National Council of Applied Economic Research (NCAER) developed and prepared the Devolution Index (DI). For the next four years, 2009-10 to 2012-13, the Indian Institute of Public Administration (IIPA) was entrusted to carry out the assessment. Initially, the index used the 3Fs framework i.e., functions, finances, and functionaries. In 2014, the work was taken up by the Tata Institute of Social Sciences (TISS) with a specific request to look for illustrative evidence-based ranking of the status of devolution in the country, focussing on the ground situation in a few panchayats in each tier across various States to figure out the extent of powers they actually exercise. The Devolution study 2015-16 is a continuation of the study in 2014-15.

The study looked at actual progress in implementing the operative core of decentralisation covering the transfer of functions, institutions, functionaries, and finances to PRIs in the subjects listed in the XIth Schedule. Further, it also examined the role of the institution of the Panchayat and its various statutory committees at the local level and its capacity in managing local level administration. Budgeting processes were also analysed. A comparative State-wise index was thus developed on four different aspects of the functioning of PRIs: Devolution of functions, transfer of functionaries, devolution of finances to PRIs, the comparative achievement of States in establishing systems of infrastructure, governance, and transparency. It would be in order to glance at the final conclusions of this report: "Through this extensive study, States have been ranked based on the cumulative performance in Devolution, as well as the incremental index. Through the cumulative index of devolution, we broadly arrive at States which have made substantive progress in the operational core of decentralisation as well as creating support systems for devolution. While both dimensions are fundamental to the devolution, the dimension which influences the aggregate index stronger is the operational core, and rightly so since devolution theory clearly indicates that "effective transfer of functions based on the principle of subsidiarity", "unambiguous control of the Panchayat over the functionaries discharging the functions", "financial authorisation of the Panchayat commensurate to the functional responsibility" and the "ability of the Panchayat to function as cutting edge partners with the line department as autonomous agencies in decision making" are critical to effectiveness in devolution. So far, we have been able to achieve this only

in a handful of States viz., Kerala, Karnataka, Maharashtra, Tamil Nadu, and Gujarat.[xxxix]

In such circumstances, doubt remains as to whether the intent and purpose of the Constitutional amendments have been achieved. Local governments have indeed been set up on a constitutional basis; but until the devolution of powers to local bodies is completed, and that too by the State Governments on their own or through judicial pronouncements, the total effect is that these bodies are "mere shells without substance". This is particularly true of urban bodies. A broad comparison between the urban and rural spaces in terms of empowerment of these local bodies seems to indicate that the rural capacity stands more enlarged and evolved than the rural. "Municipalities continue to be political and financial dependencies of the State with very few powers and responsibilities even in the provision of basic services. Thus, it must be conceded that the Seventy-Third and Seventy-Fourth Amendments have been failed attempts to widen and deepen federalism."[xl]

It is, however, universally acknowledged that there is a great need for capacity building: "It is only when elected representatives have the full responsibility of not only deciding upon what work to undertake but also to raise finances for it, by taxes or otherwise, in a hard budget constraint situation, that changes become possible."[xli] Narayana has tried to understand the reasons for some of these now-well-known failures of the amendments. "The passing of laws, however, has not led to local self-governance, owing to three distinct set of factors: lack of devolution of powers and resources; lack of capacity building; and poor involvement of women."[xlii]

In the final analysis, it may be said that in intent, if not in implementation, these amendments were radical departures from the existing framework of governance and provides a template on which more institution building is not only expected but is essential. If 'power to the people' is to remain not merely a catchword, but a necessary article of faith and action, then our political leaders have much to do to redeem the promise of this constitutional pledge.

Notes

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Chapter XIII:

1857 To 1947 - Constitutional and Legislative Antecedents

Introduction: The purpose of this chapter is to describe the statutory and legislative developments that took place in our country in the ninety years between 1857 and 1947. In these nine decades, momentous events were being played out in the political arena. In the early part of this epoch, the freedom movement was still in its fledgling state. The Indian National Congress formed in 1885, was but a collection of elite Indians who felt the need for an organized resistance to the Imperial powers. It would take a more democratic shape and form much later. It is not the intention of this chapter to examine the great political movements that in these decades spread like a conflagration across the colony. It shall not attempt to describe, except in passing, the popular agitations that were simultaneously taking place, as enslaved people were finding utterance in the task of seeking self-determination. This period in Indian history made it clear without a doubt, that the rising voices for self-rule were not likely to desist until freedom was granted. Gandhiji's arrival from South Africa galvanized the country. We shall, however, not be describing the non-cooperation movement or the unrest arising out of the massacre at Jallianwala Bagh or the Dandi salt march, or even the Quit India movement. Much has already been written about the great struggles against colonial rule that were rolled out during this epochal period. Nevertheless, our attention will be more focused on the major legislative and statutory events that marked this period in the march towards independence, first slow and fraught with difficulties, and later with the unstoppable roar of a river in flood.

It must not be forgotten that even before the great conflagration of 1857, there were enlightened administrators who could see the writing on the wall. We may recall the words of one of the more empathetic representatives of the British East India Company's colonial leadership in India. Sir Thomas Munroe[i] in the early 1800s had once remarked that the British empire will have to ensure that the people of India shall one day "become sufficiently enlightened to frame a regular government for themselves, and to conduct and preserve it". Lord Elphinstone in 1819 had remarked: "The most desirable death for us to die of should be the improvement of the native reaching such a pitch as would render it impossible for a foreign nation to retain the government."[ii] The need to hand over the responsibility of some areas of governance from the central dispensation to the provinces, and specifically to the Indian representatives of the people, was growing. We may conjecture whether, in the long run, this may have been a concept that the British were not averse to considering. The two Great Wars had broken their appetite for Empire. And, when the freedom movement became a great groundswell across the subcontinent, the British could no longer dig in their heels and hold the fort. More important domestic considerations, such as the reconstruction of a country broken by the ravages of war and the rebuilding of their domestic economy would take centre stage in London.

1. The Government of India Act of 1858

We, therefore, begin with the Government of India Act of 1858. The so-called Sepoy's Mutiny of 1857, rightfully rechristened the First War of Independence, had shaken British complacency. The 1958 Act transferred the control of the country from the East India Company to the Crown, installing Queen Victoria as Empress of India. It was the then British Prime Minister Lord Palmerston who had initially introduced the bill for the transfer of power. Yet, domestic political developments forced him to resign, and it was then left for Edward Stanley (who would later become the first Secretary of State for India) to introduce another bill, originally titled "An Act for the Better Governance of India", which was passed on 2 August 1858.

The prominent features of the Act[iii] may be summarized as follows: The British East India Company's territories in India were to be vested in the Queen. The Company would cease to exercise any power

in these territories. All the property and other assets of the East India Company were transferred to the Crown, which also assumed the responsibilities created by treaties, contracts, etc. India was to be governed in the Queen's name. The country would be governed on her behalf by the Parliament of Great Britain, acting through a new political appointee, the Secretary of State for India in London, who would oversee all the activities of the country managed executively through the Viceroy at Delhi. This Secretary of State received the powers and duties that were earlier vested with the Company's Court of Directors, but vastly enhanced in view of direct rule by Great Britain. A council of fifteen members was appointed to assist the Secretary of State for India. The council became an advisory body in Indian affairs. For all the communications between Britain and India, the Secretary of State became the real channel. The Secretary of State for India was even empowered to send secret despatches to India directly without consulting the Council. He was also authorised to constitute special committees of his Council.

Henceforth, it would be the Crown that would appoint the chief executive heads for the provinces, known as the Governors of the Presidencies. At the national level, the executive head was the Viceroy, re-designated from the earlier Company nomenclature of Governor-General. A special cadre was created, known as the India Civil Service, under the control of the Secretary of State, which would be charged with the actual administration of the country's affairs.

We have already referred to Queen Victoria's lofty proclamation; it may be important to note that she had also promised racial equality of opportunity to Indians, even in the matter of the selection of civil servants for the Government of India. She had announced: "…and it is our further will that, so far as may be, our subjects, of whatever race or creed, be freely and impartially admitted to offices in our service, the duties of which they may be qualified, by their education, ability, and integrity, duly to discharge"[iv]. Theoretically, the ICS had opened its doors to qualified Indians; but competitive examinations could be given only in Britain and only to male applicants between the ages of 17 and 22 who would have to stay the course over a series of rigorous hurdles. These stringent conditions ensured that by 1869,

only one Indian candidate could win a coveted admission to the ICS. British royal promises of equality were thus subverted in actual implementation by its jealous and apprehensive civil servants.

With direct responsibility in its hand, the British Government, from time to time, also took other statutory measures to ensure the efficient working of the Empire in India. Parliamentary select committees such as the one constituted to inquire into and report upon the operation of The Government of India Act of 1858 is an example. The immediate issue discussed was the question of inadequate control exercised over the expenditure of the revenues of India. A committee was established after a discussion in Parliament in February 1879, where the main principle articulated by the Chancellor of the Exchequer was: "I think the cardinal principle on which we ought to go is this—that we ought to concentrate authority where we intend to fix responsibility. If you impose on a particular body in the State responsibility for the administration of your affairs, you must give full power to that body."[v]

It may be said, that the initial years of British government rule under Queen Victoria, saw the advent of institution-building through various statutory and other measures. In her proclamation after the Government of India Act of 1858 came into being, she clearly stated: "We hold ourselves bound to the natives of our Indian territories by the same obligations of duty, which bind us all to our other subjects and whose obligations by the blessing of God, we shall faithfully and conscientiously fulfil."[vi] Yet, it cannot be wholly denied that the main purpose of the Government of India Act of 1858, was a retaliation to the revolution and the need for the colonial power to reassert its might and dominance. Within a few years, its purpose was revealed. Not only was the British Army brutal in its punishments against the mutineers, but it laid in place a rigorous system of law and order to ensure that peace is not hereafter broken and that the Crown is respected and feared. It went far in enforcing the rule of British law and hardening the colonial spirit of the administrators. The instruments that were employed to foster these principles included legal measures such as the institution of statutes of the Indian Penal Code, the Criminal and Civil Procedure Codes, the Indian Evidence Act, etc., which came into force in these early years of the Empire and were used to enforce British law on the people of India.

Yet, political powers soon realised that it could not all be a mere exercise of the big stick; there had to be a real movement towards the goal of respecting the rightful aspirations of the people of India. The Enlightenment had been spreading across Europe for some time now, where eternal human principles of freedom and expression, respect for the individual, and the right of the people to self-determination were some of the ideals that were espoused and preached. As the supreme colonial power in Europe, where other European nations were also vying with each other for control of land and resources in Asia and Africa, Great Britain was caught in a cleft stick. Dominance in world economic supremacy would not go hand in hand with lofty principles of human rights and the call for a world vision moving towards the equality of man. These principles could not be seen to be negated or abandoned in the colonial practices that the British enforced against the will of the people they ruled.

Thus, it was that the 1858 Act was followed by a series of legislative measures that met, to some extent, the aspirations of the Indian people to participate in the processes of governance. In this context, we examine two legislations that expanded Indian participation in the Executive Councils at the provincial level.

2. The Indian Councils Act of 1861

This was an Act of the Parliament of the United Kingdom that restructured India's executive council to function as a cabinet-run on the portfolio system. This cabinet had six "ordinary members", who each took charge of a separate department in the Government, headquartered at Calcutta, as it was known then: home, revenue, military, law, finance, and public works. The military Commander-in-Chief sat in with the council as an extraordinary member. The Executive Council was enlarged by the addition of a fifth member. The Viceroy was allowed, under the provisions of the Act, to overrule the council on affairs if he deemed it necessary. He was also allowed to issue ordinances lasting six months if the Legislative Council is not in session in an emergency.

After the conflagration of 1857, Sir Syed Ahmed Khan, an Islamic reformer, who is regarded as the founder of the two-nation theory, advised the British Government to involve Indians too in the administration of India. In his pamphlet 'The Causes of the Indian Revolt',[vii] he pointed out that the reluctance of the British to admit Indians into the Legislative Council prevented them from having any say in Government policies that touched them directly and was the major cause behind the revolt.

The then Secretary of State for India Sir Charles Wood believed that the Act was of immense importance: It is reported that he said "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."[viii]

The 1861 Act restored the legislative powers of Bombay and Madras Presidencies which had been taken away by the Charter Act of 1833. Simultaneously, the legislative council at Calcutta was given authority to pass laws for British India as a whole, though Bombay and Madras were given the power to make laws for only their respective presidencies. However, from India's point of view, the Act did little to improve the influence of Indians in the legislative council. The role of the council was limited to advise, and no financial discussion could take place.

3. The Indian Councils Act of 1892

This Act introduced various amendments to the composition and function of the legislative councils in British India. The Governor-General was also empowered to invite different bodies in India to elect, select or delegate their representatives and to make regulations for their nomination.[ix] The Act was passed in 1892 in response to nationalist movements beginning to surface across British India.

Under the regulations adopted, the Governor-General's council was to consist of nine ex-officio members (the Governor-General, six members of the Executive Council, the Commander-in-Chief, and the head of the province in which the council met), six official additional members, and ten non-official members of the Legislative Councils of Bengal, Bombay, Madras and the North-Western province.

This scheme would be overturned by the passage of the Indian Councils Act of 1909, arising out of the Morley-Minto reforms – which introduced indirect elections to Indian councils along with special electoral preferences for Muslim minorities and various commercial and functional interests. In addition to these changes, the Act relaxed restrictions imposed by the Indian Councils Act of 1861 in allowing councils to discuss – but not vote on – each year's annual financial statement. Councillors could also present questions within certain limits to the Government on the matter of public interest after giving six days' notice, but none of them was given the right to ask supplementary questions.

4. The Constitution of India Bill 1895

The author of the Constitution of India Bill 1895 is not known, though Annie Besant, one of the early Home Rule proponents, has suggested that there are some indications that it may have been written by Bal Gangadhar Tilak, especially because of his association with the objective and coinage of 'swaraj'. The document is perhaps the first articulation of nationalist aspirations ever made at the beginning of the freedom movement, even before the arrival of Gandhiji in India from South Africa. Then, the call for self-government was well within the bounds of the British Empire.

The document[x] contains 110 articles and includes several individual and Fundamental Rights, such as freedom of expression, the right to own property, the sanctity of one's home, equality of law, etc., all of which, over time, may surely have influenced the Constituent Assembly members who drafted the 1950 Constitution. Sathe regards it as the first non-official attempt at drafting a new Constitution of India.[xi] Similarly, Rohit De has observed that it is the first articulation of a constitutional imagination by Indians now aspiring for their own free nation.[xii]

In retrospect, the words used in the Preamble of the draft Constitution may appear as if they were negating the very principle of independence: It reads as follows: "Be it enacted by the Queen's Most Excellent Majesty, by and with advice and consent of the Lords Spiritual and Temporal and Commons, in the British Parliament

assembled and by the authority of the same…" Consequently, India has been defined as the Empire of India and as a national association of all Indians. The term 'Indian' is defined as those born in India, or the children of an Indian father and the natural children of an Indian mother, born in a foreign country who may acquire a domicile in the Empire, or the children of an Indian father who shall be in a foreign country in the service of the Empire, although they may not acquire a domicile in the Empire. The country was to be divided into provinces, divisions, districts, talukas, and village groups. All religions, creeds, and faiths are equally recognised in the Empire, following modes of worship that may be domestic, private, or public.

The 1895 draft of the Constitution of India Bill was divided into 4 powers which are delegations of the nation, namely sovereign, legislative, judicial, and executive power, and shall be vested in the Parliament. The division of work between them has been defined thus: The legislative power shall make laws, rules, and regulations, the judicial power shall interpret, declare and enforce them, and the executive power shall administer them, as interpreted and declared by the judicial power. Further, the Judicial and the Executive powers shall be subordinate to the Legislative power.

Several provisions of this Constitution are centred on the citizen. He has every right to participate in the affairs of the nation and is required to bear arms to maintain and defend the empire against all enemies. He may express his thoughts by words or writings, without liability to censure, but shall be answerable for abuses which he may commit in the exercise of this right. All his actions shall be by the law. His house is 'an inviolable asylum.' The law shall be equal to all. A citizen cannot be imprisoned or sentenced without the crime having been proved against him, according to law and only by a competent authority. Every citizen has the right to be admitted to public office and shall not be exempted from contributing to the expenses of the State 'in proportion to his substance'. He will have the right to present any claims, petitions, or complaints to the sovereign, the parliament, or any legislative, judicial, or executive authority.

State education shall be free in the Empire while primary education shall be compulsory. Every citizen has a right to give one vote for electing a member to the Parliament of India and one to the Local

Legislative Council. In those days when the spirit of nationalism had not become strong enough to give forceful utterance to nationalist aspirations, the nature of sovereign power was defined in the draft Constitution, as 'the Sovereign of Great Britain and Ireland, who is the supreme head of the Indian nation.' The Viceroy of India shall be the representative of the Sovereign of Great Britain and Ireland in India and would be the President of both

Houses. The Vice President was to be selected by the Parliament. The Viceroy was also given the power to veto any Act of Parliament in India as well as to initiate any legislation. In a formal function, he was to be the President of the Parliament. The Viceroy of India was to be the head of the Parliament during the tenure of his office and would be assisted in judicial administration by the Privy Council and in executive administration by the Cabinet of Ministers. Insofar as legislative powers were concerned, they were to be delegated to the Parliament of India. The Parliament was to consist of two Houses: the Upper House and the Lower House. Only those who have been citizens of India for ten years and are above the age of twenty-five could be members of both Houses.

The Upper House was to be composed of representatives of three main categories, namely,

a) members chosen by the people to continue in office for life;

b) official members from amongst Privy Council Judges and Cabinet Ministers; and

c) Members chosen for life to represent the following professions, trades, and interests, i.e., advocates and barristers, medical practitioners, municipal commissioners, representatives from the universities, members from the chambers of commerce as well as members nominated by the Sovereign.

d) In addition, each Division could send two representatives and each District one representative to the Upper House.

The Lower House was to be an assembly composed of Members chosen by the people to continue in office for three years and Members chosen to represent the same professions as identified for

the Upper House, as mentioned above. Further, each Division could send two representatives and each District one representative to the Lower House.

The Parliament was to be assigned the task of making, suspending, or revoking laws, rules, and regulations relating to the preservation of the Constitution of the Empire and a wide variety of subjects as detailed out in Clause 49 of the draft act. The budget, referred to as the financial statement, was to be presented in the Parliament by the Finance Minister, with a printed copy of the same given to each Member. All members would have the right to discuss these financial matters and all decisions are to be by way of a majority vote. They would also have the right to ask questions regarding any matter related to the Government. Significantly, Clause 54 states 'The Parliament may examine the Government of the Empire, and reform the abuses introduced into it."

The judicial functions of the Parliament shall be conducted by a Council of Judges called the Privy Council, who shall hold their offices for life, and they shall be official members of the Parliament. The Chief Judge of the Privy Council shall be called the Lord High Chancellor of India and the Puisne Judges, the Vice-Chancellors. They were to be elected in the same manner as the non-official representatives of the Parliament. The President of the Parliament shall be the head of the Privy Council and in his absence the Lord High Chancellor. The Privy Council is also the court of appeal over the High Court decisions.

Executive Administration was to be conducted through a wide range of departments of the Empire, the following Departments shall be established : (1) Financial; (2) through a Cabinet of Ministers consisting of the Prime Minister in charge of the General Administration and other Ministers respectively in charge of the various departments. The Cabinet Ministers were to hold their offices during life. The Cabinet's functions are to execute laws made by the Parliament and to make rules and regulations consistent with the laws of the Parliament.

Each Province of the Empire was to have a local legislative council to be composed of representatives separately elected by the people of the division, the district, and the Talukas, as well as the Governor of the province along with executive councillors, the secretaries of the

departments, the chief executive officers and the judges of the High Court. The Governor of the Province shall be the highest administrative authority in the Province. Representation from various trades and professions was also ensured. Local Legislative Council was to make rules and regulations, vote for expenses of the province, etc. The members of the Council would have the same powers as the Members of Parliament concerning the finances of the province. In the council, it was the official in charge of the local finances who would present the budget.

As far as the Judiciary was concerned, the highest authority was to be vested in the Sovereign and the Parliament of India exercised through the Privy Council. Subordinate to this were the High Courts, one for each province, whose Chief Justice and judges were appointed for life. They would be inducted from barristers, advocates, or Vakils of the High Court with at least ten years of experience. The task of the Courts was to interpret, declare and enforce when necessary, all the laws and regulations passed by the parliament and the local legislative councils. Each High Court would have appellate, extraordinary, revisional, and superintending jurisdiction over all Courts subordinate to it. Similarly, each District shall have a District Court of Justice. Under it would be the Taluka Courts.

As for the Executive, its highest authority would be vested in the Sovereign and the Parliament of India and exercised through the Cabinet of Ministers. There shall be a Governor for each Province, subordinate to the Cabinet of Ministers with a local Executive Council of five members, assisted in the administration of the Province by the Chief Secretary in charge of General Administration and Secretaries in charge of the various Departments, (also ex-officio Members of the Local Legislative Council.) Each Division would be under the administrative charge of a Chief Executive Officer, subordinate to the Governor. A District Executive Officer would be in charge of a District. Similarly, each Taluka shall be in the administrative charge of an official called the Taluka Executive Officer, subordinate to the District and Chief Executive Officer. A Village Officer would be in charge of a group of villages.

Legislative procedures were also described regarding the introduction of bills in Parliament, their passage through the Lower and Upper Houses, and the sanction of the Sovereign. The salaries of the members were also prescribed. Journals describing the proceedings of the Parliament were always to be made available to the public, and the Legislative Councils were prescribed. It was made abundantly clear that all State Officials are, by their offices, the official representatives of the people.

5. The Indian Councils Act of 1901

The second most significant document leading to the evolution of an Indian Constitution was referred to as the Indian Councils Act of 1901. It emerges out of the Minto-Morley reforms, thus named after Lord Minto and Lord John Morley. Lord Minto was the Viceroy of India and Lord John Morley was the Secretary of State in British India, when these reforms were introduced, conceding the need to accommodate the role of Indians in the governance of the sub-continent. In the early 20th century, strident nationalists were becoming vocal in their demands for the representation of Indians in the Government. While the extremists in this movement were condemned, it was recognised by the British that political concessions would have to be made.

The report of the Viceroy and the Secretary of State was packaged as the Minto-Morley reforms and became the substance of the Indian Councils Act of 1909. With just eight articles and two schedules, it recognised the principle of elections of members to the central and provincial legislative councils. It increased the size of the councils, both at the central and provincial levels, along with creating executive councils at Bombay, Madras, and West Bengal, with a Vice President at both central and provincial levels. The Vice President so appointed was to be deemed to be the senior member of the Council and the member highest in rank.

The number of additional members was restricted to a maximum of four only, out of which two should have been in the service of the Crown for at least twelve years. The strength of members of the various councils was fixed as follows: Sixty for the Legislative Council of the Governor-General and fifty each for the Councils of Fort Saint

George, Bombay, Bengal, United Provinces of Agra and Oudh, Eastern Bengal & Assam, and Punjab. The Legislative Council of Burma was allotted thirty members.

The Act was followed by a set of rules and regulations that fleshed out the intent of the Act, the extent of a public franchise, qualifications for the members, along with, significantly, a separate electorate for the Muslims. The Executive Council would assist the Lieutenant-General in all administrative matters including the making of rules and regulations for the convenient transaction of business. The Governor-General in Council or the Governors in Council were authorised to make rules for meetings of their respective legislative councils for the discussion of the annual financial statement of their respective local governments. Further, they could take up any matter of general public interest, and prescribe the procedure of asking questions, with conditions and restrictions as may be prescribed in the rules applicable to the several councils. All proclamations, regulations, and rules made under this Act, would have to be laid before both Houses of Parliament as soon as maybe after they are made.

Indian nationalists had a mixed response to the Act: they were happy about increased representation in Government but protested about separate Muslim electorates, limited franchises, and the very restrictive qualifications for members. It is important to point out that the Indian Councils Act of 1909, was another piece of legislation in line with other Council Acts legislated earlier such as the Indian Councils Acts of 1861, 1869, 1871, 1874, 1892, and 1904. However, these earlier Acts did not promote the concept of self-government and hence cannot be considered as legislative antecedents leading up to the 1950 Constitution of India.

Coupland has opined that even British officials underplayed the representative character of the central and provincial councils, calling them mere "durbars rather than parliaments", and felt that Indians were not ready for self-government.[xiii] Lord Morley himself was not enthusiastic about the reforms: "If it could be said that this chapter of reforms led directly or necessarily up to the establishment of a parliamentary system in India, I, for one, could have nothing at all to do with it."[xiv]

6. The Congress-League Scheme 1916 (Indian National Council & All India Muslim League)

The Congress League Scheme of 1916, also known as the Lucknow Pact, had been jointly prepared by the Indian National Congress and the All-India Muslim League. A few years earlier, in 1913 in its Lucknow Session, Mohammad Ali Jinnah had decided to cooperate with the Congress in the call for self-government. In the same year, he attended the session of the Congress at Bombay and had thus paved the way for collaboration between the two parties, against the common enemy. Both political organisations ensured that the 1915 meetings of their respective parties were held in Bombay, and also arranged for joint meetings, where committees were constituted to prepare a scheme for reforms. The committee reports were jointly approved and came to be known as the Congress-League Schemes of 1916.

The document called for separate electorates and proportional representation for minorities in the provincial and federal legislatures. It demanded equality with other British dominions, abolishing the Council of the Secretary of State and encouraging the induction of Indian members into the Indian Civil Service and other political positions in the government. Unfortunately, it did not articulate the demand for rights. Indeed, as Owen argued, the Scheme of 1916 ushered in a period of Hindu-Muslim cooperation in the struggle for independence, which did not persuade the British in any way. That the Pact was even negotiated is perhaps more striking that it should later break down, since it was well known that the two parties who made the Pact were quite fundamentally arrayed against each other in the notions of their identity. “In terms of the objects of these two organisations, the Congress under moderate leadership had worked for a secular India and had repeatedly deplored recognition of communal or religious distinctions in political matters, whereas the Muslim League asserted that Indian Muslims must work as members of the Muslim Community for the representation and safeguards for that community as such.[xv]

The demands placed forward in the Lucknow Pact document were presented in seven parts, four dealing with the composition and functioning of the Legislature and the Executive and three with other significant issues such as the office of the Secretary of State, the relationship between India and the Empire and Military matters etc, can be summarised as follows:

The Provincial Legislative Councils should consist of four-fifths elected and one-fifth nominated members, with not less than 125 members in the major provinces and from 50-75 in the smaller provinces. The elected members should all be elected by the people on a broad franchise. Adequate provisions for the election of important minorities and Muslims through a special electorate should be made. Its term of office was proposed to be five years. The Head of the Provincial government should not be the President of the Legislative Council. He shall be a Governor who shall not ordinarily belong to the Indian Civil Service or any of the permanent services. In every Province, there would be an executive council chaired by the Governor, and members of the Indian Civil Service shall not ordinarily be members of this council. Not less than one-half of the members of the Executive Council shall consist of Indians to be elected by the elected members of the Provincial Legislative Council. This council shall constitute the executive government of the Province.

All sources of revenue, other than customs, post, telegraph, mines, salt, opium, railways, army and navy, should be to the credit of the provinces. The revenues should not be divided, but fixed contributions from the provinces may be given to the Government of India. The Provincial Council should have full authority to deal with all matters related to internal administration, including powers to raise loans, impose taxation and vote on the budget. Consent of the Government shall not be required for the presentation of bills to the Council, except money bills. The resolutions of the Provincial Legislature shall be binding in the executive government unless vetoed by the Governor in Council. They shall have to receive the assent of the Governor unless vetoed by him. It was also proposed that a special meeting of the Provincial Council could be summoned by requisition of not less than one-eighth of the members.

As for the Imperial Council, its strength shall be 150, and four-fifths of them shall be elected. The franchise for the Imperial Legislative Council should be widened as far as possible on the lines of electorates for Muslims for the Provincial Legislative Councils, and the elected members of the Provincial Legislative Councils should also form an electorate for the return of members to the Imperial Legislative Council. One-third of the members should be Muslims, elected by separate electorates. The President of the Imperial Council should be elected by the Council itself. All bills, except a Money Bill, may be introduced by the Council itself and shall receive the assent of the Governor-General before it becomes law.

The following matters shall be under the exclusive control of the Imperial Legislative Council: Matters regarding uniform legislation for the whole of India; provincial legislation affecting inter-provincial fiscal relations; and questions affecting Imperial Revenue; questions regarding Imperial expenditure; revision of Indian tariffs and customs and resolutions relating to the administration of the country as a whole. Other resolutions passed by the Legislative Council should be binding on the executive government unless vetoed by the Governor-General in Council. Significantly, the document provided for the Crown to exercise veto power over resolutions of the Provincial Councils as well as the Imperial Councils. The Imperial Council itself was prohibited from interfering in the Government of India's directives in matters of war, and the making of peace and entering into treaties, as well as military, foreign and political relations of India.

The scheme also dealt with the Government of India where it was clearly stated that the Governor-General of India shall be the head of the Government of India. Half of his Executive Council should be Indians, elected by the members of the Imperial Legislative Council. Ordinarily, they should not be members of the Indian Civil Service. Appointments in the Imperial Civil Services shall vest in the Government of India. The Government of India shall not ordinarily interfere in the local affairs of a province but shall be limited to general supervision and superintendence. An independent audit of the Accounts of the Government of India was recommended. Executive officers should not have judicial powers and all judicial officers would be under the administrative control of the highest court on the land.

The 1916 Scheme strongly recommended that the Council of the Secretary of State should be abolished. The salary of the Secretary of State should fall within the British Government's financial estimates. His position vis-a-vis the Government of India should be analogous to the position of the Secretary of State for the Colonies about the governments of the Dominions. He may be assisted by two Under-Secretaries, one of whom should always be an Indian. In all matters related to Imperial Affairs, India should be as adequately represented as the Dominions. Indians should be placed on a footing of equality in respect of status and rights of citizenship with other subjects of His Majesty the King throughout the Empire. As regards Military and other matters, it was proposed that both commissioned and non-commissioned ranks should be thrown open to Indians and hence adequate provisions for their selection, training and instruction should be made in India.

The significance of the Pact was that the Congress for the first time explicitly conceded the principle of communal representation, something that it had grudgingly accepted as part of the Morley-Minto package of Constitutional reforms. But most of the Congress leaders who had supported communal representation went back on their support soon afterwards in the Indian Franchise Committee (known as the Southborough Committee) which was constituted to work out details of the post-war package of constitutional reforms known as the Montague-Chelmsford reforms. This unexpected and startling volte-face of many of the Congress leaders over the Lucknow Pact requires an explanation. Prima facie, one could accuse them of having agreed to the Pact in bad faith, an accusation made by the South Indian Liberal Federation, the political vehicle of the Madras non-brahmins which claimed that the Pact was "a compromise based on tactical considerations and the theory of 'united front' and that individual Congressmen were keen to get rid of the communal electorates"[xvi]

7. The Government of India Act of 1919

This is the next major document that can be cited as a constitutional antecedent to the Indian Constitution of 1950. This Act is the codified version of the Montague-Chelmsford reforms, named after Edwin Charles Montague and Lord Chelmsford, who were Secretary of State

and Viceroy of British India respectively. In the Montague Chelmsford reforms, reframed as the Government of India Act of 1919, the British claimed that the principle of self-government was introduced. Of course, both the Congress and the Muslim League parties disagreed. Yet, a conscious attempt was made by the British Government to project this Act as "a step in the progressive realisation of responsible government in India as an integral part of the empire."[xvii]

The reasons for the British Cabinet to approve so radical an announcement are not hard to find. Britain was in the midst of a more damaging war than she had ever experienced. It depended on India for over one million troops and large sums of money. The home rule movement had produced a militant mass upsurge that was defined by the colonial government as extremist. But crush it they could not since British rule in India could only function with the active collaboration of an elite and at least the passive acquiescence of the masses. The reforms were an acceptable ideal which could counter the extremist demand for immediate home rule. Thus, it was that Chelmsford proposed a formula that read as follows: "The only goal to which we can look forward is to endow India, as an integral part of the British Empire, with the largest measure of self-government compatible with the maintenance of the supremacy of British rule. The special circumstances of India must govern the form of self-government with which she shall eventually be endowed."[xviii]

Out of further deliberations, the final announcement that emerged from the Cabinet mentioned the policy of His Majesty's Government of the increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions with a view to the progressive realisation of responsible government in India as an integral part of British India." The Montague-Chelmsford reforms differed from the Morley-Minto policy of associating Indians in government, by giving Indians responsibility for governing themselves. The great principle of dyarchy was established for the first time here, and today it can be seen to be the basis of the demarcation of the functions of the government between the Union and the States as amply and explicitly stated in the Constitution.

It needs to be pointed out that the Act of 1919 made amendments to the Government of India Act of 1915 and the Government of India (Amendment) Act of 1916. Section 45 (2) of the 1919 Act makes this clear. Every amendment brought forward by the 1919 Act shall be construed as if the said enactment or word had been enacted in the Government of India Act of 1915, in the place so assigned, thus giving all the amendments retrospective effect from 1915.

Thus, the Preamble to the Government of India Act of 1919 stated as follows: "Whereas it is the declared policy of Parliament to provide for the increasing association of Indians in every branch of Indian administration, and the gradual development of self-governing institutions with a view to the progressive realisation of responsible government in British India as an integral part of the empire…"

The Act provided "for the classification of subjects, in relation to the functions of government, as central and provincial subjects, to distinguish the functions of local governments and local legislatures from the functions of the Governor-General in Council and the Indian legislature."[xix] It is pointed out here that the term 'local governments' here refers to the units or the provinces and not to the modern usage of the term which signifies local urban or rural bodies. The Act of 1919 thus acknowledged and set in motion the principle of dyarchy. It allowed the devolution of authority in respect of these provincial subjects to local governments including for the allocation of revenues to these governments. It expressly stated that the Governor-General could use the agency of local governments for achieving the purposes of the central subjects and for the allocation of revenues for achieving the purpose of administration. It provided for devolution, allocation and transfer of revenues, contributions payable by local governments, the exercise of authority over members of the public services, etc.

Each Governor would have a legislative council with a tenure of three years, which he can convene as he thinks fit. The first president of this council shall be nominated by the Governor and later shall be elected by the members of the council. This legislature will have the power to make laws for peace and good government. However, it cannot make laws for the imposition of any new tax, or those that affect the public

debt of India, or those affecting the naval, military and air forces or relations with foreign powers and the Princely States. Neither could they pass laws affecting any central subject, or any subject reserved for the Governor-General.

The estimated annual expenditure and revenue of each province in the form of a statement shall be laid before the council and the proposals for the appropriation of the revenues in the form of demands shall be approved through voting in the council. The Governor shall have the power to authorise emergency expenditure including demands that are essential to the discharge of his duty. Certain heads of expenditure do not require council approval, such as contributions payable to the Governor-General in council, salaries of judges etc. Standing orders for the conduct of business in the Council shall be made initially by the Governor and later by the members of the Legislative Council. Clause 11 (7) guarantees freedom of speech in the Governor's legislative councils and no person shall be liable to any proceedings in any court because of his speech or vote in any such council. The Governor has the authority to return for reconsideration any bill passed by the council or can reserve the bill for the consideration of the Governor-General. If the Governor-General does not grant his assent within a period of six months, it shall lapse. He also can reserve the Act for "the signification of His Majesty's pleasure" and it shall not have any validity until His Majesty in Council has granted assent. In case the legislative council refuses to introduce any bill for discussion, the Governor can certify the passage of the bill stating that it is essential for the discharge of his responsibility, and such a bill becomes an Act of the local legislature. Such an Act shall be forwarded by the Governor-General for the signification of His Majesty, upon receipt of which the Act shall have the same force and effect as an act passed by the Legislature.

The Governor-General in Council has the authority to constitute a new province or place a part of a Province under a Deputy Governor if this is deemed necessary. He also can declare any territory to be a 'backward tract' thereby providing for exceptions and modifications to the Act.

The Central Legislative Assembly would consist of the Governor-General and two chambers, the Council of State, and the Legislative Assembly. Any Bill to be deemed to be passed shall have to be agreed to by both chambers. The Legislative Assembly was to have one hundred and forty members, of whom the non-elected members shall be forty (twenty-six of whom shall be official members) and the rest elected members. The first President of the Legislative Assembly would be appointed by the Governor-General and thereafter elected by the Assembly for a period of four years. He would be supported by a Deputy President who would preside over the Assembly in the absence of the President.

The Council of State shall consist of not more than sixty members, nominated or elevated, and not more than twenty shall be official members. Where the Legislative Assembly has a tenure of three years, the Council of State shall continue for three years, although the Governor-General can dissolve it earlier or, if required, extend its term. No officials are qualified to be members of either house. As for the Executive Council of the Governor-General, all members shall be nominated. Provision for the salaries to be paid to them also finds mention in the Act. The qualifications of the members of the Houses and all related matters such as filling of vacancies, the procedure for deciding disputes etc are to be made by rules. So also, the procedure for regulating the course of business and preservation of order in the chambers etc are to be made by rules. Standing orders for the conduct of business are also to be prepared as rules. The provisions of the Act provide for how Bills are passed by each of the houses and where subject to the satisfaction of the Governor-General, they may be referred to as a joint sitting of both houses or returned for reconsideration.

Section 30 of the Act mentions the office of the Secretary of State and his salaries and the salaries of the supporting staff. He has been given the discretion to determine the quorum required for the meetings of the Council of India. The Secretary of State in Council exercises the powers of superintendence, direction, and control, vested in the Secretary of State and the Secretary of State in Council, in such manner as is necessary to give effect to the purposes of this Act. The rules of business related to transferred subjects are to be laid before both Houses of Parliament as soon as may be after they are made and

may be annulled by His Majesty in Council if it is not deemed fit for issuance. His Majesty may also appoint the High Commissioner for India in the United Kingdom and provide for his salaries, his powers, and duties by order. All persons in the civil service of the Crown in India hold office during His Majesty's pleasure and may be employed in any manner within the scope of his duty. He has some protection of service as he cannot be dismissed by any authority subordinate to that by which he was appointed. It is the Secretary of State in Council who makes rules for regulating the civil services in India, the methods of their recruitment, their conditions of service, pay and allowances and discipline and conduct, though some rules can be delegated to the Governor-General in Council or to local governments, or the Indian legislature or local legislatures to make laws regulating the public services. Interestingly, the Act also makes provisions for the appointment to the Indian Civil Service of persons domiciled in India. In this connection, the Act also provides for the establishment of a public service commission which shall discharge the functions of recruitment and control of public services in India.

Section 39 of the Act also provides for the Secretary of State in Council to make the appointment of an Auditor-General in India.

A self-review of the working of the 1919 Act was provided for in the clauses of the Act itself in Section 41. Ten years after the passing of this Act, the Secretary of State, may, with the concurrence of both Houses of Parliament, and the approval of His Majesty, suggest the names of persons to act as a commission, whose task it will be to inquire into "the working of the system of government, the growth of education, and the development of representative institutions in British India". The commission shall report on the desirability to establish the principle of responsible government, including the question of whether the establishment of second chambers of the local legislatures is or is not desirable.

While the first and second schedules of the 1919 Act were procedural in nature to give effect to the intention and objects of the Act, the third Schedule listed out certain offices that would be reserved only for the members of the Indian Civil Service. These included offices such as Secretary, Joint Secretary, and Deputy Secretary in every department except the Army, Marine, Education, Foreign, Political, and Public

Works Departments. Three offices in the Accountant Generals were also similarly reserved for the Indian Civil Service as were officers such as Members of the Board of Revenue, Financial Commissioner, Commissioner of Revenue, Commissioner of Customs, Opium Agent, and Secretary in every department except the Public Works or Marine Department, Secretary to the Board of Revenue, District or Sessions Judge, Additional district or Sessions Judge, District Magistrate, Collector of Revenue or Chief Revenue officer of a district.

8. The Commonwealth of India Bill (National Convention, India) 1925.

The next important document that has had a resonance on the final Constitution of India of 1950 can be cited as The Commonwealth of India Bill (National Convention, India) 1925. The Convention was chaired by Tej Bahadur Sapru and consisted of 256 members, largely legislators and ex-legislators, including representatives from the Home Rule Movement and the Indian Women's Association. The draft document was submitted to a sub-committee appointed by the All-Parties Conference, 1925 with Annie Besant as Chairperson, which made certain changes and re-submitted the same to the National Convention in 1925.

With 127 Articles organised into ten chapters, it was a comprehensive document touching upon all themes expected in a constitutional document. There was a section on Fundamental Rights, including the right to elementary education, freedom of expression, gender equality, non-discrimination, etc. Sadly, many of these rights were made subject to restrictions. The franchise was also limited by conditions of income, property ownership, literacy, and education. Though presented in the British Parliament by Mr. George Lansbury, it did not go beyond the first reading stage as the Labour Party was defeated in the elections. Yet it cannot be denied that it had much influence on subsequent efforts, especially the Motilal Nehru Report of 1928, which adopted many of its recommendations verbatim.[xx]

The document voiced "the ancient and recognised right of self-government", but within the construct of the "King Emperor as Sovereign and the Protector of the Commonwealth," and desired

"to provide for the exercise of that right from the village upwards," to taluka, district, province, and India. This, the document stated, was necessary for the dignity, peace, and contentment of the people of India, as well as for the continued amity of the British and Indian Nations. India should be placed on equality with the self-governing dominions, as a free State owing allegiance to His Majesty the King-Emperor. It endorsed the need for the legislature, the Executive, and the Judiciary to be independent of each other for the preservation of liberty and the efficient discharge of the functions of government. The title of the Bill as presented was The Commonwealth of India Act. The Indian and Provincial legislatures would take whatever action was necessary to bring the Act into force after approval by the British Parliament and assent of the Crown. All previous acts in this regard shall be repealed.

Some basic principles of freedom were enunciated in the opening sections of the document. It stated: No person shall be deprived of his liberty, nor shall his dwelling or property be entered into or sequestered, except by law through duly constituted courts. Freedom of conscience and the free profession and practice of religion were to be guaranteed to every person. The right of free expression of opinion, and to assemble peaceably and without arms, or to form associations or unions, etc was guaranteed. All persons were to have the right to free elementary education, and the competent authority would enforce this right. All persons were assured an equal right to the use of roads, the courts of justice, and all other places of business or resort dedicated to the public, without disturbance to public order. It proclaimed that all persons are equal before the law and that there shall be no disqualification or disability based on sex.

The legislative power of the Commonwealth would be vested in a Parliament which shall consist of the King, a Senate, and a Legislative Assembly, referred to as "Parliament," or "the Parliament of the Commonwealth". The Viceroy would be the King's representative in the Commonwealth, with such powers and functions of the King as His Majesty would assign to him. The Viceroy can decide the time of the sessions of Parliament, its prorogation as well as its dissolution. Once the Commonwealth is established, the Parliament shall be summoned: it shall meet at least once a year.

It is the Viceroy, acting on the advice of the Cabinet, who shall issue writs for the elections of members to the Legislative Assembly and the Senate. The Senate would be composed of persons who have rendered conspicuous public service. The members of the Senate shall be assigned to several Provinces, their number to be decided as per law made by the Parliament according to the law made by Parliament. The term of office of the Senate shall be six years. One-half of its members shall be elected by proportional representation every three years. The Legislative Assembly shall be composed of members assigned to the several Provinces by a law to be made by Parliament. It shall continue for a period of five years from the first meeting of the Assembly. It is the Provincial Legislatures which shall make laws for fixing the constituencies in its Province.

The first task of the Legislative Assembly is to choose a member to be the Speaker of the House. In addition, the Assembly shall also choose a Deputy Speaker to perform the duties of the Speaker in his absence. Every member of the Parliament shall have to subscribe to an oath or affirmation before the Viceroy. He shall enjoy the powers, privileges, and immunities as those enjoyed and possessed by a member of the British House of Commons. In particular, no person shall be liable to any proceedings in any Court by reason of his speech or vote, or by reason of anything contained in any official report of the proceedings of Parliament.

Each House of Parliament may make rules and orders regarding how its powers, privileges, and immunities can be exercised and upheld, the conduct of its business and proceedings, etc. The Parliament shall have the power to make laws for the peace, order, and good government of the Commonwealth, except in matters related to the armed forces.

As regards financial matters, it was envisaged that only a member of the Cabinet can introduce a bill for the appropriation of revenues or for imposing taxation. No Bill can become law until it has been passed by both Houses of Parliament. In case of disagreement between the two houses, the Viceroy can convene a joint meeting of both Houses, where a decision can be arrived at by a majority of the members of both houses. Thereafter, the Bill passed by both Houses of Parliament shall be presented to the Viceroy for the King's assent.

The Executive Power of the Commonwealth is vested in the King and is exercisable by the Viceroy as the King's representative. He can act only on the advice of the Cabinet. The Viceroy shall perform all executive powers and duties relating to the Government or revenues of India. The Cabinet shall consist of the Prime Minister and not less than seven Ministers of State for the Commonwealth. The Prime Minister is to be appointed by the Viceroy, and the Ministers of State shall also be appointed by him, on the advice of the Prime Minister. The Cabinet shall be collectively responsible for the administration of the executive departments of the Commonwealth subject to the provisions of the Act. In case of a vote of no-confidence being passed in the Legislative Assembly, the Prime Minister shall request the Viceroy to dissolve the Legislative Assembly.

The Bill provided for a High Commissioner for India in the United Kingdom appointed by the Viceroy, on the advice of the Cabinet, for the performance of such duties as may be assigned to him. In a nod to the dominance of British supremacy in India, the Bill stated that the commander-in-chief of the military, naval, and air forces of the Commonwealth shall be the Viceroy, as the King's representative.

As far as the Judiciary was concerned, there was provision for a Supreme Court, consisting of a Chief Justice and not less than two Justices. These Justices shall be appointed by the King and cannot be removed except on the grounds of proven misbehaviour or incapacity. The Supreme Court shall have jurisdiction to hear and determine appeals from all judgments, decrees, orders, and sentences. It shall have original jurisdiction, in all matters, such as issues arising from any treaty or matters affecting consuls or other representatives of other countries; matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party; matters between Provinces, or where a writ of mandamus or prohibition or injunction is sought against an officer of the Commonwealth. One of the sections of the Act dealt with personal law and it is significant today in the context of the growing discussions regarding a uniform civil: '… when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject."

The legislative powers of the Parliament, under the original jurisdiction of the Supreme Court, extend to making laws in any matter arising under this constitution; or involving its interpretation; or arising under any laws made by Parliament; or of Admiralty and maritime jurisdiction as well as those relating to the same subject matter claimed under the laws of different Provinces.

The Act made provisions relating to the finances of the Commonwealth as well as trade and commerce as well. All revenues or moneys received by the executive Government of the Commonwealth shall form one consolidated revenue fund, vested in the Viceroy, which can be appropriated for the purposes of the Commonwealth. Such revenues include all tributes and other payments in respect of any territories which would have been receivable by or in the name of the East India Company, all fines and penalties incurred by any Court of Justice in the Commonwealth including all forfeitures for crimes, of any movable or immovable property; and all movable or immovable property in the Commonwealth escheating or lapsing for want of an heir or successor; as well as all property vested in His Majesty under the Government of India. The costs, charges, and expenses involved in the collection, management, and receipt of the consolidated revenue fund are the first charge and shall in the first instance be applied to the payment of the expenditure of the Commonwealth. These revenues shall be utilised for clearing the debts of the East India Company, and for meeting the expenses in respect of any treaties, covenants, contracts, grants, or liabilities existing at the commencement of that Act. So also, it should care for all expenses, debts, and liabilities lawfully contracted and incurred on account of the Government of India. No liability can be discharged unless appropriation is made by law.

The document also recommended the appointment of a commission every five years to make recommendations regarding dividing the existing and other possible sources of revenue between the Commonwealth and the Provincial Governments. These recommendations are to be placed before Parliament for its approval. Here for the first time, we see the germ of the idea of the Finance Commission, so very essential to the functioning of the Union, the States, and their combined financial health.

We also find the beginnings of delineating various administration subjects at different levels of the governmental hierarchy in respect of self-government. The units of administration below the level of the province are the Village Panchayat, the Taluka, and the District along with municipal bodies. There is a detailed articulation of the powers of each of these levels. For example, the Village Panchayat was allotted powers related to primary schools, libraries, parks, recreation grounds, sanitation and conservancy, sanitation at fairs and festivals, medical village dispensary, village cattle ponds, registration of births and deaths, co-operative stores and banks, wells, tanks and canals, cottage industries, village fairs, cattle stands, village forests and grazing grounds, etc.

At the level of the Taluka were delegated powers related to lower secondary or middle school education, control over markets and fairs, hospitals and dispensaries, the decision of disputes between villages, control in cases of epidemics, supplies of seeds, main roads between villages, small irrigation channels, promotion of village industries, co-operative stores, and banks for helping village stores and banks.

At the district level or municipalities, were assigned the powers of higher secondary or high school and college education, technical college, co-ordination of taluka police, district police or special reserve, larger hospitals, and dispensaries, an inspection of foodstuffs, control of epidemic diseases, public health, settlement of disputes between taluka boards, co-ordinating local stores and banks and other village enterprises of an industrial or commercial nature and model farms, supply of information needed by cultivators, craftsmen and others, forests, district roads, district waterways and railways, district bridges, levying cess, etc.

In what we may describe as the first attempts to create lists of subjects such as we can see in the Union List and the State List, powers to legislate on certain identified subjects have been allotted to the Legislative Councils and, at the higher level, to the Parliament. For example, at the legislative council were allotted powers related to the constitution and powers of sub-provincial units of government, improvement trusts, medical administration, university education, public works such as roads and bridges, water supplies, irrigation and canals, water

storage and water power, land revenue administration, famine relief, agriculture, co-operative societies, forests, land acquisition, excise, administration of justice, including organisation of courts of civil and criminal jurisdiction within the province; registration of deeds and documents, registration of births, deaths, and marriages, religious and charitable endowments, mineral resources, industries, weights and measures, inland waterways, police, prisons, control of members of All-India and Provincial Services serving within the Province.

As regards the powers of the Parliament to legislate, certain areas had been identified such as trade and commerce with other countries and among the provinces, taxation, export of goods, borrowing money on public credit, postal and telegraphic services, naval, military and air defence, census and statistics, currency, coinage, and legal tender, banking other than Provincial banking, incorporation of banks, the issue of paper money, insurance other than Provincial insurance, weights, and measures, bills of exchange and promissory notes, external relations including naturalisation and aliens, foreign corporations, immigration and emigration, and Inter-Provincial migration, relations with States in India, the control of railways, control of petroleum and explosives, geological survey, central police organisations, control of arms and ammunition, a survey of India, All-India services, etc.

This Constitution, while declaring that there shall be no communal electorates, also made a transitory provision for five years for reserving seats for minorities (referred to as *Musalmans* and Europeans). Any legislation on religion shall be referred to a committee of the House in which it was introduced.

9. The Revolutionary (Hindu Socialist Republican) Association 1925

We may also briefly mention here the constitution prepared by the Hindu Socialist Republican Association (HSRA). Their document expressed the Association's views on foreign rule and freedom. It read more like a declaration or a manifesto than a constitutional document. It began with these powerful words: "Chaos is necessary to the birth of a new star and the birth of life is accompanied by agony

and pain. India is also taking a new birth and is passing through that inevitable phase when chaos and agony shall play their destined roles, when all calculations shall prove futile, when the wise and the mighty shall be bewildered by the simple and the weak, when great empires shall crumble down and new nations shall arise and surprise humanity with the splendour and glory which shall be all its own." It advocated an organised and armed revolution as the means to obtaining freedom. The immediate object of the revolutionary party in the domain of politics was to establish a federal Republic of the United States of India through an organised and armed revolution. "The basic principles of this Republic will be universal suffrage and the abolition of all systems which make the exploitation of man by man possible, e.g., the railways and other means of transportation and communication, the mines, and other kinds of very great industries such as the manufacture of steel and ships; all these shall be nationalised. In this Republic the electors shall have the right to recall their representatives, if so desired, otherwise the democracy shall become a mockery." The British came down very heavily on this organisation.

10. Nehru Report of 1928

The Government of India Act of 1919 had a provision for a review of the working of the Act after a period of ten years since its promulgation. Thus in 1927, the British government appointed the Simon Commission to review the Act and make recommendations for constitutional reforms. Indian nationalist leaders were shocked that the Commission did not include a single Indian member. The British replied by stating that Indians were not capable of preparing a constitutional document and challenged them to draw up a draft themselves. This was articulated by Lord Birkenhead, Secretary of State for India when he spoke in the House of Lords in 1925: "*...let them* [Indians] *produce a constitution which carries behind it a fair measure of general agreement among the great peoples of India...*" The response to this challenge was the Nehru Report of 1928. In December 1927, in the Madras session of the Congress, a decision was taken to constitute an all-party conference to consider the writing of a constitution for which a committee chaired by Motilal Nehru was

constituted with Sir Ali Imam, Tej Bahadur Sapru, Subash Chandra Bose, M R Jayakar and Annie Besant as members. Jawaharlal Nehru was the committee's secretary.

The document called for equal dominion status for India on the lines of the other dominions of the British Empire such as Canada, Australia, New Zealand, etc., with a Parliament with powers to make laws for peace, order, and good government along with an executive responsible to that Parliament. This was one of the very first documents that made a strong plea for Fundamental Rights arguing that all the powers of government are derived from the people. Hence, it proclaimed that "No person shall be deprived of his liberty, nor shall his dwelling or property be entered, sequestered or confiscated, save in accordance with the law." Further, "Freedom of conscience and free profession and practice of religion are, subject to public order or morality, hereby guaranteed to every person." Again, it stated: "The right of free expression of opinion, as well as the right to assemble peaceably and without arms, and to form associations or unions, is hereby guaranteed for purposes not opposed to public order or morality." The right to free elementary education without distinction of caste or creed was explicitly stated. Discrimination in treatment before the law was prohibited and men and women would have equal rights as citizens. That the State shall have no religion was one of the clear messages in the Report. A list of legislations that the Parliament would make laws on was listed such as laws on "the maintenance of health and fitness for work of all citizens, securing of a living wage for every worker, the protection of motherhood, the welfare of children, and the economic consequences of old age, infirmity and unemployment and Parliament shall also make laws to ensure fair rent and fixity and permanence of tenure to agricultural tenants."

The legislative power of the Commonwealth would be vested in the Parliament, defined as the King, a Senate, and the House of Representatives. The King shall appoint the Governor-General for the administration of the Commonwealth. The Senate, with a tenure of seven years, shall have 200 members elected by proportional representation with the single transferable vote, and the House of Representatives, with a tenure of five years, would have 500 members to be elected by the constituencies. In times of emergency, it would have the power to annul the executive and legislative acts of a

provincial government. Provisions were made for passing legislation on the normal business of the State as well as for bills for money and taxation matters.

The executive powers are to be executed by the Governor-General, who would act on the advice of the Executive Council. This Council would consist of the Prime Minister, to be appointed by the Governor-General, and six Ministers to be appointed on the advice of the Prime Minister. The Governor-General would appoint all members of the executive and would also be commander in chief of the armed forces.

The members of the Legislative Council of each province shall be elected by the people. The legislature shall have the power to make laws for peace and good government. In each of the provinces, there shall be a governor to be appointed by the Governor-General in the council. It is the Governor who appoints the Chief Minister while the Ministers are appointed by him on the advice of the Chief Minister. The executive power of the province shall be vested in the Governor acting on the advice of the provincial Executive Council. There shall be an Executive Council for every province consisting of not more than five ministers appointed by the Governor.

As far as the Judiciary is concerned, there shall be a Supreme Court with a Lord President and judges to be appointed by the Governor-General in the council. This court shall have jurisdiction to hear all appeals from all judgments, decrees, orders, etc. Where it feels that a particular matter is to be decided only by the King, it shall refer such matters to him. In the same manner, there shall be High Courts in every province with a Chief Justice and other judges. There is a provision for an advocate general also in the High Courts.

There were many other provisions covering all aspects of the new proposed Commonwealth. All property stands vested in His Majesty just as all revenues, including tributes and the revenues of the erstwhile East India Company, shall vest in the Governor-General in Council. The defence of the country shall be under the supervision of a Committee of Defence headed by the Prime Minister and six other members. Members of the armed forces shall continue to enjoy their salary and other privileges as usual. All officers of the public services shall, at the establishment of the Commonwealth, become officers of

the Commonwealth. A Public Service Commission shall be appointed for the reorganisation and re-adjustment of the departments of public service. As for the Indian Princely States, the Commonwealth shall continue to exercise the same rights and privileges as had hitherto been exercised. As regards communal representation, while some seats would be reserved for Muslims, it was made clear that there would be only joint electorates.

We see in this document too, how the subjects of administration are apportioned between the Central Government and the State Provinces. Some of the important subjects under central oversight were listed as follows: Trade and commerce with other countries; Taxation, for items such as customs, revenue, excise, income-tax, super-tax corporation profits tax, opium, etc; export of goods, currency, banking, shipping, and navigation; railways, posts, and telegraphs, the defence of India; commonwealth level of public services, legislation regarding marriage, divorce, etc., registration of land, arms and ammunition, labour legislation, industrial matters, etc. Some of the items termed as provincial subjects were land revenue, excise, local taxation, forests, agriculture, fisheries, water supplies, public works, cooperative societies, famine relief, local self-government, public health, education, police, administration of justice in the provinces, development of industries, etc.

There was much discussion in intellectual and political circles on the Nehru report, though it received a mixed response. While some called it the final death of communal egotism and the birth of national consciousness, others said that the challenge of Lord Birkenhead had been met and that the Magna Carta of our liberty had been drawn up. However, the Muslims rejected their report completely as there was no mention of separate electorates for the minorities, which was in effect a reversal of the Congress-League Pact (or the Lucknow Pact as it was known). Coupland[xxi] saw the report as "the frankest attempt yet made by Indians to face squarely the difficulties of communalism". However, in the final analysis, it "had little practical result."

Yet, it laid down certain basic requirements of a constitution. As Granville Austen put it, the section on Fundamental Rights was "a close precursor of the Fundamental Rights of the Constitution of India: ten of the nineteen sub-clauses reappear materially unchanged and

three of the Nehru rights are included in the Directive Principles".[xxii] Chandoke, argues that "the inclusion of social and cultural rights in a predominant liberal constitution appears extraordinary."[xxiii] Similarly, Niraja Jayal states that in the context of the international discourse of rights around the late 1920s, the Nehru Report was a rather "exceptional document in its early envisioning of social and economic rights."[xxiv] It is significant to note that some of the authors of the Nehru Report were also responsible for other important constitutional documents. Annie Besant had already submitted the Commonwealth of India Bill of 1925 by then. Tej Bahadur Sapru would later be the chairman of the committee that drafted the Sapru report of 1945. M R Jayakar and Jawaharlal Nehru were members of the Constituent Assembly that drafted the final Constitution of India.

11. Irwin Declaration (Lord Irwin, 1929)

The brief statement made on 31 October 1929 by Lord Irwin, then Viceroy of India regarding the status of India within the British Empire, is also significant here as one of the documents that are relevant in the context of drafting a new Constitution of India. Its purpose was to placate the leaders of the nationalist movement who were becoming increasingly vocal in demanding dominion status for India. As we have seen, the 1928 Nehru report emphasised this, demanding that India should have the same constitutional status as other countries, such as the Dominion of Canada and the Commonwealth of Australia. After the passing of the Government of India Act of 1919, this demand became more focused and an essential part of the vocabulary of the freedom movement.

Lord Irwin's statement was a five-line document in simple non-legal language, which attempted to clarify that while the British government intended to facilitate dominion status for India, it would not be possible to indicate a timeline. The statement referred to the declaration of the British Government of 20 August 1917 known as the Montague Declaration, which was issued in the context of the intention of the British Government "to increase association of Indians in every branch of administration with a view to the progressive realisation of responsible governments in India as an integral part of the British Empire.

Thus, the Irwin Declaration stated:

"In view of the doubts which have been expressed both in Great Britain and in India regarding the interpretation to be placed on the intentions of the British government in enacting the statute of 1919, I am authorised on behalf of His Majesty's Government to state clearly that in their judgment it is implicit in the Declaration of 1917 that the natural issue of India's constitutional progress as there contemplated is the attainment of Dominion status."

Walter Reid has attempted to trace the developments that took place before and after the Irwin Declaration.[xxv] The Declaration triggered political developments both in Britain and India. Irwin himself probably intended that the Declaration should not materialise any time soon. In Britain, the political class was against dominion status for Indians, though there was sympathy stirring for the Indians amongst the more liberal sections of society. In India though, nationalist leaders welcomed the Declaration: all future negotiations would be about the formalisation of the dominion status principle and the framing of a new Constitution. Political developments thereafter led to the Purna Swaraj declaration.

12. Declaration of Purna Swaraj (Indian National Congress) 1930

On 19 December 1929, in its Lahore session, the Indian National Congress, having been disappointed over the breakdown of negotiations over the question of Dominion status, passed the historic Purna Swaraj resolution. This was publicly announced on 26 January 1930, a date which would come to be remembered as Republic Day, when the Constitution of India came into being. Lord Irwin's vague announcement earlier in the year, that India would be granted dominion status, had come to nought in discussions. The Congress then changed its demand and sought complete independence. It was a landmark declaration and led to a large-scale political movement against colonial rule. It spoke out against British rule and pointed out the economic, social, and cultural injustice inflicted on the Indians.

Writers such as Mithi Mukherjee[xxvi] would see this event as a critical component in the changing strategy of the Independence movement where the demand for freedom was no longer a matter of charity from the British but a matter of justice for the Indian people.

The document was short, just 750 words, reading more like a manifesto. It called for severing ties with the British and claimed complete independence, *Purna Swaraj.* It spoke on behalf of the Indian people and made its intention clear for launching the civil disobedience movement. The first paragraph stated eloquently: " We believe that it is the inalienable right of the Indian people, as of any other people, to have freedom and to enjoy the fruits of their toil and have the necessities of life, so that they may have full opportunities of growth. We believe also that if any government deprives a people of these rights and oppresses them the people have a further right to alter it or to abolish it. The British government in India has not only deprived the Indian people of their freedom but has based itself on the exploitation of the masses and has ruined India economically, politically, culturally, and spiritually. We believe, therefore, that India must sever the British connection and attain *Purna Swaraj* or complete independence."

In the four areas of the character of the country, namely spiritual, cultural, political, and economic, India's status, the document stated, had never been so reduced as under the British regime. "The tallest of us have to bend before foreign authority. The rights of free expression of opinion and free association have been denied to us, and many of our countrymen are compelled to live in exile abroad and cannot return to their homes." It made it clear that in the future the struggle for complete independence would be carried out through non-violent means. "We hold it to be a crime against man and God to submit any longer to a rule that has caused this fourfold disaster to our country. We recognize, however, that the most effective way of gaining our freedom is not through violence. We will, therefore, prepare ourselves by withdrawing, so far as we can, all voluntary association from the British Government, and will prepare for civil disobedience, including non-payment of taxes. We are convinced that if we can withdraw our voluntary help and stop payment of

taxes without doing violence, even under provocation, the end of this inhuman rule is assured. We, therefore, hereby solemnly resolve to carry out the Congress instructions issued from time to time for the purpose of establishing *Purna Swaraj*."

13. Karachi Resolution 1931

The 1931 Karachi session of the Indian National Congress led to the Karachi Resolution, a semi-legal document that reiterated the commitment to *Purna Swaraj*. Certain political events had cast their shadow over the session. Gandhiji had just been released from jail after his Salt Satyagraha movement. Second, his Pact with Lord Irwin ended the civil disobedience movement. And thirdly, the British Government had just executed Bhagat Singh and his associates, Rajguru, and Sukhdev, in connection with the Lahore conspiracy case. The document emphasised Fundamental Rights and civil liberties as also socio-economic civil rights such as protection for industrial and agricultural workers, abolishing child labour, and free elementary education. Prompted by Gandhiji, the resolution also advocated the prohibition of intoxicating drinks and drugs.

We may glance at some of the pronouncements made in the resolution. It began with the statement that "the Congress is of the opinion that in order to end the exploitation of the masses, political freedom must include real economic freedom of the starving millions." These include Fundamental Rights such as freedom of association, freedom of speech and press, freedom of conscience, and practice of religion without any disability attached to any person of any faith. It advocated equal rights and obligations of all citizens, without any bar because of gender, as well as access to public roads, public wells, etc. The right to bear arms was also recommended. The State should be neutral in matters of religion. Industrial labour should get a living wage, and healthy work conditions with security from old age, sickness, and unemployment. They should have the right to form unions with mechanisms for arbitration in disputes. Conditions of serfdom for labour should be banned. Women workers should be protected with provisions for maternity leave. Child labour should be prohibited.

There must be a sharp reduction of land revenue and rent along with, interestingly, a progressive income tax on agricultural income above a fixed income. Adult suffrage was demanded along with free primary education. Expenditure on the military was demanded to be reduced by half along with expenditure on salaries and in civil departments. The indigenous cloth industry is to be protected by excluding foreign yarn and cloth. There must be a complete prohibition of intoxicating drinks and drugs. Duty on salt was to be abolished. The rupee-pound ratio was to be regulated by the State to help Indian industries. Key industries and minerals must be controlled by the State. Interest rates must be controlled.

It has been contended by Maclean that the Gandhi-Irwin Pact which put an end to the civil disobedience movement had irked the leftist elements in the Congress Party. They, including Jawaharlal Nehru, were persuaded to accept and ratify the Pact only after a heart-to-heart talk between Gandhiji and Nehru led to the resolution that in return emphasised Fundamental Rights during the Karachi session.[xxvii] It has been conjectured that Subash Chandra Bose was also of the same opinion. However, Judith Brown has argued that the resolution was the result of a collaboration between Gandhiji and Nehru and had nothing to do with negotiation or compromise related to the Gandhi-Irwin Pact.[xxviii] Nevertheless, it can be stated with confidence that the socio-economic provisions of the Karachi Resolution were directly responsible for influencing the Constituent Assembly to draw up Part IV of the Indian Constitution relating to the Directive Principles.

14. Poona Pact of 1932 (BR Ambedkar and MK Gandhi)

The Poona Pact arose out of differences between Gandhiji and Ambedkar in the matter of political representation of the depressed classes, a term then used to define the Dalits, Untouchables, and Scheduled Classes. The trouble arose out of the announcement known as the Communal Award made by Ramsay Macdonald, the British Prime Minister, that gave the depressed classes separate electorates for the central and provincial legislatures. Ambedkar and the other leaders of these classes welcomed the award. However,

this was unthinkable for Gandhiji who felt that the award would only deepen the difference between caste Hindus and the depressed classes. Gandhiji was already in prison for his political activities and, on 20 September 1932, he announced, a fast unto death or until the clauses regarding separate electorates for the depressed classes were removed from the award. Given the popular support amongst the depressed classes for separate electorates, the British Government felt that any change could be considered only if there is an agreement between Gandhiji and the leaders of the depressed communities in this regard. Political leaders of the time felt that this would be possible only if there were an agreement between Gandhiji and Ambedkar. The latter was unwilling initially, but when faced with the fact of Gandhiji's adamant stand, he agreed to negotiate. In the end, an agreement was reached, known as the Poona Pact of 1932 that discarded the concept of separate electorates.

The Poona Pact contained only nine points, most of which dealt with the manner and quantum of representation of the depressed classes in the central and provincial legislatures. The Pact put forward a system of reservation of seats for the depressed classes on the principle of joint electorates, arriving at a number of 148 seats for them, 78 more than the Macdonald Award had proposed. The Pact also called for their non-discrimination in public services and recommended a fair representation of these communities in public service, a principle that would find a place in the Constitution of 1950. It further recommended earmarking of the State's educational grant for the depressed classes. When the British Government set aside the provisions of separate electorates, Gandhiji broke his fast. The effect of this can be seen in the Government of India Act of 1935, when separate electorates were given to the Muslims and Sikhs, but not to the depressed classes. The leaders of the depressed classes were disappointed: even though they got more seats reserved than had been originally awarded, they had always considered separate electorates as a critical instrument for their political representation.

Some details of the Pact are mentioned below: In the provincial electorates, seats for the depressed classes were reserved as follows: Madras 30; Bombay with Sind 25; Punjab 8; Bihar and Orissa 18. In the Central legislature seats were reserved as follows: Central Provinces 20; Assam 7; Bengal 30; United Provinces 20. Total 148.

The modality of elections for both the provincial legislatures as well as the Central legislature was that all members of the Depressed Classes registered in the general electoral roll of a constituency would form an electoral college that will elect a panel of four candidates belonging to the Depressed Classes for each of such reserved seats by the method of the single vote. The four persons getting the highest number of votes in such primary elections shall be the candidates for election by the general electorate, comprising both the members of the depressed communities as well as all other voters. It was urged that no disabilities would be attached to any member of the Depressed Classes regarding elections to local bodies or appointments to the public services. Further, in every province, an adequate sum shall be earmarked for providing educational facilities to the members of Depressed Classes.

Undoubtedly, the Pact was a significant moment in India's political history. The tensions between the depressed classes and the caste Hindus would continue to plague the freedom movement and the negotiations between the British and the political leaders of the country. They continue to do so even today. It must be stated that the Pact underlined the claim that the depressed classes were, in fact, a political minority whose interest could not be ignored while drawing the political map of the future of India.

15. Government of India Act of 1935

The 1935 Act came into effect in 1937 and was based on a report of the joint select committee, led by Lord Linlithgow, set up by both Houses of Parliament. The report itself was the result of the Committee's scrutiny of the White Paper, which had been prepared by the British government after the deliberations of the three Round Table conferences (1930-32). The Act contained 321 sections in 11 parts and with 10 schedules and was one of the longest and most comprehensive pieces of legislation passed by the British Parliament after prolonged discussions.

In its essence, it created a federation of India of two levels: a central executive and parliament, and below it the Provinces and the Princely States. The dyarchy system at the provincial level initiated by the

Government of India Act of 1919 was discarded, while at the same time allowing for the emergence of popularly elected provincial legislatures. However, dyarchy was introduced at the central level, through key subjects such as defence, foreign affairs, etc., which were under the direct control of the Governor-General with emergency powers. The requisite conditions for voting rights of citizens were relaxed and led to an expansion of the electorate to about 14% from the erstwhile 3%. Separate electorates were provided for Muslims and Sikhs, but not for the depressed classes as had been demanded by Ambedkar (but refused by Gandhiji).

The very first section of the Act declared that all rights, authority, and jurisdiction belong to His Majesty the King, Emperor of India and that the Secretary of State, the Governor-General, and the Governors shall be exercising these powers on behalf of the King. There shall also be a Commander-in-Chief of His Majesty's forces appointed by the King. The Act enabled the King to declare the Federation of India, consisting of the Provinces and the Indian Princely States. Each ruler of the Princely States shall have to sign an Instrument of Accession, declaring his acceptance of acceding to the Federation. By this, he would be accepting that the Federal Legislature may make laws for his State and that it may exercise federal authority in relation to his State. Once signed, the validity of the instrument cannot be called into question.

While it is the Governor-General who exercises authority on behalf of His Majesty, he in turn, can delegate his functions to subordinate authorities. The executive authority of the Federation extends to the making of laws by the Federal Legislature, the raising of naval, military, and air forces bearing on the Indian establishment, and the exercise of all rights as are exercisable by treaty, grant usage etc. However, the executive authority of the ruler of a federated State shall continue to be exercised by him, except in matters where the federal legislature has powers.

In the administration of federal matters, there would be a Council of Ministers to aid and advise the Governor-General, though where the Governor-General acts at his discretion, he cannot be called into question. The ministers shall be chosen and summoned by the Governor-General and shall be sworn as members of the council. They

shall hold office during his pleasure. The Governor-General's functions concerning defence and ecclesiastical matters shall be exercised by him in discretion and he could have three councillors to assist him in these matters.

His special functions have been listed in the Act as follows: the prevention of any grave menace to the peace or tranquillity of India; the safeguarding of the Federal Government's financial stability and credit; the safeguarding of the legitimate interests of minorities; the safeguarding of the rights of members of the public services; the prevention of action that would subject goods of British origin from discriminatory treatment when imported into India; the protection of the rights of any Indian State and its Ruler; the securing of matters in which he acts in his discretion, etc. Such discretionary actions shall, however, be under the general control of the Secretary of State for India.

For matters of finance, the Governor-General may appoint a financial adviser who shall advise him in safeguarding the financial stability and credit of the Federal Government. He can also appoint an Advocate-General to give advice on legal matters and to represent the Federal Government in all the courts.

All executive action taken by the Federal Government shall be taken in the name of the Governor-General with all orders authenticated in this regard by rules to be formulated for this purpose. He can make rules for the convenient transaction of business in government and for allocating work to his Ministers, and require them to provide all such information as are required by him.

The federal legislature shall consist of His Majesty, represented by the Governor-General, and two Chambers, to be known respectively as the Council of State and the Federal Assembly. The number of members in the Council of State was fixed as 156; and in the Federal Legislature as 250 for the provinces and 125 for the Princely States. The Council of State was designed to be a permanent body not subject to dissolution, and approximately one-third of its members shall retire every third year. It could choose two members to be the President and the Deputy Speaker. On the other hand, Federal Assembly was to continue for five years and to be dissolved thereafter. The Federal Assembly could

also choose its own Speaker and a Deputy Speaker. All members had to subscribe to an oath as prescribed in the schedule of the Act. The Governor-General had the right to address both or either of these chambers. All matters in both chambers were to be determined by a majority of votes of the members present and voting, other than the President or Speaker or person acting as such. At least one-sixth of the members have to be present for any discussion to take place.

Disqualification of members was possible for certain specified reasons such as holding any office of profit under the Crown in India, if he is of unsound mind, or if he is an undischarged insolvent, or is convicted of any offence or illegal practice.

Section 28 of the Act clearly states that there shall be freedom of speech in the Legislature and that no member of the Legislature shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature. All members of both Chambers shall be entitled to receive such salaries and allowances.

The Act describes in detail the legislative process. A bill can originate in either chamber but shall be considered to be passed only when both chambers have approved it. After its passing in one chamber, it shall be transmitted to the other chamber where in case of amendments being proposed, they will have to be approved by the other chamber as well. However, where the Governor-General is of the view that a bill may affect his functions to act with judgment or discretion, he may notify the chamber accordingly. He can also summon the Chambers to meet in a joint sitting, where if it is passed by a majority of the total number of members of both Chambers present and voting, it shall be deemed for the purposes of this Act to have been passed by both Chambers. When a bill is passed by both chambers, the Governor-General can either declare his assent or withhold his assent, or he reserves the bill for the signification of His Majesty. He can also return the bill for reconsideration to the chambers.

In financial matters, every year, the Governor-General shall cause to be laid before both chambers of the Federal Legislature, a statement of the estimated receipts and expenditure of the Federation for that year. This statement shall show the sums required to meet the charged expenditure and other expenditures to be made from the revenues of

the Federation while distinguishing revenue expenditure from other expenditures. Charged expenditure does not require the approval of the chambers and includes the salary and allowances of the Governor-General, the debt charges for which the Federation is liable, (including interest, sinking fund charges, and redemption charges, etc.), the salaries and allowances of ministers, of counsellors, etc., the salaries, allowances, of judges of the Federal Court, and the pensions payable to judges of any High Court. It also includes expenditure on defence and ecclesiastical affairs. Charged expenditure also includes sums payable to His Majesty for discharging the functions of the Crown in its relations with the Indian States; grants for purposes connected with the administration of any areas which are excluded areas; and any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal.

All expenditures other than charged expenditure shall be submitted in the form of demands for grants to the Federal Assembly and thereafter to the Council of State, where the members have the power to assent or to refuse to assent to or modify any demand. Where there is a difference of opinion between the two chambers, the Governor-General can summon the two Chambers to meet in a joint sitting for deliberating and voting on the demand. The majority of the combined members shall be deemed to be the decision of the two Chambers.

Where additional expenditure is required over and above that which has been authorized, the Governor-General shall place this additional demand before both chambers of the Federal Legislature as a supplementary statement showing the estimated amount of that expenditure and seeking approval. The recommendation of the Governor-General shall be required for all Bills making provision for imposing or increasing any tax; for regulating the borrowing of money or the giving of any guarantee; or for declaring any expenditure to be charged expenditure.

As regards the general procedure of both chambers, rules can be made by them for regulating their procedure and conduct of business, for securing the timely completion of financial business, and for all general matters. All proceedings were to be conducted in the English language. The conduct of any judge of the Federal or High Courts was not to be discussed. Further, if the Governor-General in his judgment feels that

discussion on any Bill would affect the discharge of his responsibility for the prevention of any grave menace to the peace or tranquillity of India or any part thereof, he may direct that no proceedings shall be taken about that Bill. The validity of any proceedings in the Federal Legislature shall not be called into question on the ground of any alleged irregularity of procedure. Further, no officer or other member of the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

The Governor-General also has legislative powers independent of the chambers. When he is satisfied that circumstances exist where immediate action is required, he can promulgate such ordinances as are required. Such ordinances shall have to be passed by the legislatures within six months thereafter.

The powers given to the Governor-General in the 1935 Act, when there is a breakdown of the constitutional machinery of the Federation, or any part of the Federation is required to be specially mentioned. When he is satisfied that such a situation has arisen in which the government of the Federation cannot be carried on by the provisions of this Act, he may by Proclamation assume to himself the powers vested in any Federal body or authority. He can suspend in whole the operation of any provisions of this Act relating to any Federal body or authority. Yet he is prohibited from assuming to himself powers vested in a Federal Court or to suspend the operation of any provision of this Act relating to the Federal Court. Such proclamations have to be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament. Such as proclamation, however, shall cease to operate at the expiration of six months, unless extended by a resolution passed by both Houses of Parliament, for a further period of twelve months.

Part III of the Act pertains to the Provinces. These Provinces have been listed as Madras, Bombay, Bengal, the United Provinces, the Punjab, Bihar, the Central Provinces and Berar, Assam, the Northwest Frontier Province, Orissa, and Sind. Importantly, it was proclaimed that Burma shall cease to be part of India. The provincial arrangements were described in the Act. The Governor is the head of the executive of a province, and he shall exercise his authority on behalf of His Majesty the Governor, either directly or through officers subordinate to him.

There shall be a council of ministers to aid and advise the Governor, except where he is required to act at his discretion, and his decision in the question of whether it is a matter of his discretion or not shall be final. The Governor in his discretion may preside at meetings of the council of ministers. The Governor's ministers shall be chosen by him and sworn in as members of the council. They shall hold office during his pleasure.

The Governor's special responsibilities include the prevention of any grave menace to the peace of the Province; the safeguarding of the legitimate interests of minorities; securing the interest of the members of the public services; the protection of the rights of any Indian State and its ruler etc. Any instructions proposed to be issued to a Governor shall be laid by the Secretary of State before Parliament. The validity of anything done by the Governor of a Province shall not be called into question, though any act to be done in his discretion shall be under the general control of the Governor-General, who shall ensure that such action is not inconsistent with any instructions issued by his Majesty.

The Governor of a Province may appoint an Advocate-General to advise on legal matters. He can exercise his judgment on matters related to the police force. He can take any action to combat the threat of crimes of violence in his area. He can also nominate any person to speak on his behalf in the provincial legislature, though such a person cannot vote in the proceedings. It has been made clear in the Act that all executive action of the Government of a Province is taken in the name of the Governor. They are to be authenticated by rules to be made in this regard. He can also issue rules of business for the convenient transaction of the business of the province, including how the ministers shall have to furnish information to him on various matters.

The provisions related to the provincial legislatures also require special attention. Every province shall have a provincial legislature. While there would be two chambers (to be known as Legislative Council and Legislative Assembly) in the Provinces of Madras, Bombay, Bengal, the United Provinces, Bihar, and Assam, in all other provinces there would be only one chamber. Every Legislative Assembly would have a tenure of five years, whereas every Legislative Council shall be

a permanent body not subject to dissolution, where one-third of its members shall retire every third year. The Governor may address both or either of the chambers. Every minister and the Advocate-General shall have the right to speak in and take part in the proceedings of the Legislative Assembly or a Legislative Council. Every Provincial Legislative Assembly shall choose two members of the Assembly to be Speaker and Deputy Speaker. In a Legislative Council, these titles shall be President and Deputy President. Every member of a Provincial Legislative Assembly or Legislative Council shall take an oath as prescribed in the schedule to the Act. Disqualification is attracted when a member is of unsound mind or is declared insolvent or holds an office of profit or is convicted of an offence. There shall be freedom of speech in every Provincial Legislature, and no member shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature. The members shall also receive salaries and allowances.

The legislative procedure described in the Act states that concerning financial and other Bills, where there are two chambers, it may originate in either Chamber of the Legislature. A Bill shall not be deemed to have been passed, unless it has been agreed to by both Chambers, either without amendments or with such amendments only as are agreed to by both Chambers. Where there is only one chamber, the approval of the House goes to the Governor who in his discretion shall declare either that he assents in His Majesty's name to the Bill, or that he withholds assent therefrom, or that he reserves the Bill for the consideration of the Governor-General: He can also return the Bill with a message for reconsideration of any specified provisions. When a Bill is reserved by a Governor for the consideration of the Governor-General, the Governor-General can either state that he assents in His Majesty's name to the Bill, or that he withholds assent therefrom, or that he reserves the Bill for the signification of His Majesty.

In financial matters, it is the Governor who causes to be laid in the legislature a statement, known as the annual financial statement, of the estimated receipts and expenditures of the Province for that year. The statement shall separately show the charged expenditure as well as other expenditures to be voted in the legislature. The Governor can also, when needed, lay a demand for supplementary grants where additional finances are required. Bills for imposing

or increasing any tax, or for regulating the borrowing of money or the giving of any guarantee by the Province, shall not be introduced in a Legislative Council. Some special provisions were made for Anglo-Indians and European communities. The Governor of a Province was also responsible for the safeguarding of the legitimate interests of minorities.

As regards general procedure, either chamber may make rules for regulating procedure and conduct of the business, for securing the completion of financial business, etc. All proceedings in the Legislature of a Province shall be conducted in the English language. No discussion was to be permitted with respect to the conduct of any judge of the Federal Court or a High Court in the discharge of his duties. If the Governor in his discretion apprehends that discussion of a Bill would affect the peace or tranquillity of the Province, he may direct that no proceedings shall take place in that matter. The officers of a Provincial Legislature shall not be subject to the jurisdiction of any court in respect of the exercise of those powers by them.

The Governor of a Province too has legislative powers similar to those granted to the Governor-General when he is satisfied that he must exercise these powers. But he should not promulgate any ordinance, without instructions from the Governor-General, acting at his discretion. Such an ordinance shall cease to operate after six weeks unless it is then passed by the Legislative Assembly. In other matters, such ordinances have to be passed within six months by the Assembly.

The Governor also had specific authority in excluded areas, which were primitive areas where it was felt that the normal operation of civil and other laws may not be feasible. Earlier, the British government had declared certain areas scheduled area in keeping with this thought. No law of the Federal or Provincial Legislature can apply to such excluded areas. The Governor may make regulations for the peace and good government of any area in a Province which is, for the time being, an excluded area, or a partially excluded area, and any regulations so made, may repeal, or amend any Act of the Federal Legislature, or of the Provincial Legislature, or any existing Indian law, which is for

the time applying to the area in question. The Governor could make regulations for the administration of such backward areas which had to be submitted to the Governor-General for his assent.

Chapter VI dealt with provisions to be resorted to by the Governor in a province in the event of the failure of constitutional machinery analogous as to those prescribed for the Governor- General. In such circumstances, he can assume to himself all or any of the powers normally exercised by any provincial body the powers for suspending the operation of any provisions of the Act. Of course, he could not exercise these powers to the High Courts. Such a proclamation by the Governor had to be sent to the Secretary of State who would inform the Parliament accordingly. Its validity was only for six months unless extended by the Assembly for a further one year.

There were other provisions for Chief Commissioners' Provinces, where some special arrangements were in place, such as Coorg, Ajmer, Andaman & Nicobar, Baluchistan, etc. The Governor-General could act in his discretion in such areas.

It is important to understand here that the legislative powers of the Federation and the Provinces were marked out in Part V of the Act. The general principle was that the Federal Legislature may make laws for the whole or any part of British India or for any Federated State, and a Provincial Legislature may make laws for the Province or any part thereof. The Federal Legislative List as it appeared in the 1935 Act was almost identical to the Union List (or List I) of our Constitution. Similar provisions existed for the Provincial List (or List II) and the concurrent list (List III). Yet, there was an enabling provision that in times of grave emergency, such as war or internal disturbance, it was left to the Governor-General to make laws in the province. In areas where there is any doubt about the nature of the law, then it is the federal law that shall prevail. The Act provided for a proclamation of emergency in such circumstances to be forthwith communicated to the Secretary of State. For matters not mentioned in the three lists, the Governor-General could empower either the Federal Legislature or a Provincial Legislature to enact a law concerning any legislation.

The 1935 Act also thought it fit to place some restrictions on the Indian legislative bodies such as bringing amendments repugnant to any provisions of any Act of Parliament extending to British India or any acts or ordinances of the Governor or the Governor-General or any measure affecting the police force. Further, nothing in the 1935 Act shall be taken to affect the power of the Parliament to legislate for British India. Nor can any legislature make any law affecting His Majesty or his family or derogating his powers. Similarly, protection was granted to British subjects in the matter of entry into British India, and for protection of their industries located in the country.

Part IV of the Act related to the administrative relations between federation, provinces, and states explicitly that the laws of the Federal Legislature shall be always held in respect. The governors of the provinces were directed to pay attention to the tribal areas. Officers of the Federation or the provinces or the Princely States may be conferred powers for the executive administration of these areas. The executive authority of the Provinces and the States shall have to comply with directions given by the Federal Government, including directions to a Province as to the construction and maintenance of means of communication and functions with respect to naval, military, and air force works. Where a federated State fails to fulfil its obligations, the Governor-General can issue directions to the ruler of the State. The Federal Government can also allow the Province or the States to carry out construction and use of transmitters for broadcasting, though the Governor-General can impose restrictions deemed necessary to prevent any grave threat to peace and tranquillity. The Governor can take necessary action to prevent interference in the water supply to the people of any place. The setting up of an Inter-Provincial Council to consider and resolve disputes between Provinces and discuss matters of common interest can be established where representatives of the States can also participate.

The distribution of revenues between the Federation and the federal units was an important feature of the Act. All revenues and public moneys raised or received by the Federation, and the provinces were to be considered for this purpose.

Certain duties such as stamp duty, terminal taxes on goods or passengers, and taxes on railway fares and freights, have to be levied and collected by the Federation, but its net proceeds shall not form part of its revenues but shall be assigned to the Provinces and the Federated States, and shall be distributed to the provinces. Similarly, taxes on income other than agricultural income shall be levied and collected by the Federation but would be assigned to the Provinces and the Federated States. Corporation tax shall not be levied by the Federation in any Federated State until ten years have elapsed from the establishment of the Federation. The Governor-General in Council would prescribe the percentage to be allocated to the Provinces. Duties on salt, federal duties of excise, and export duties shall be levied and collected by the Federation, but they can be distributed to the provinces. There was a provision for grants-in-aid of the revenues of the provinces to assist them in their expenditures. All the proceeds of the mentioned taxes were net of the cost of collection. The Federation also had to pay His Majesty the requisite amounts required for the functions of the Crown with regard to the Indian States.

The Governor-General was charged with the responsibility of appointment of the Governor and Deputy Governors of the Reserve Bank of India and all matters related to the coinage or currency of the Federation. He should ensure that the Secretary of State has sufficient moneys to make such payments that may be necessary to meet any liability. His Majesty in Council could make such provisions for defining and regulating the relations of the monetary systems of India.

Financial provisions were also made to enable the Secretary of State in Council, as also the executive government of the provinces, to borrow on the security of the revenues of India, though this was to be limited to ceilings to be fixed by an Act of the Federal Legislature. The Federation could also grant guarantees in respect of loans raised. The Auditor-General for carrying out duties related to audit and accounts were to be appointed by His Majesty. He would perform such duties and exercise such powers in relation to the accounts of the Federation and of the Provinces as prescribed by an Order of His Majesty in Council. His reports are to be furnished to the Governor-General or the Governor as the case may be who shall cause them to be laid before the Federal Legislature or the Provincial Legislature.

All lands and buildings of the Federation were vested in His Majesty for the Government of India for use by the Federation or the Provinces. Only the Governor-General could give consent for the sale or disposal of any of these properties. Similarly, all moneys in the public account of which the Governor-General in Council was custodian shall be hereafter vested in His Majesty for the purposes of the Government of the Federation. Again, all liabilities of loans, guarantees, and other financial obligations shall be secured upon the revenues of the Federation and all the Provinces. Matters about the railways were to be henceforth managed by the new Federal Railway Authority. Its members were to be appointed by the Governor-General and from amongst them he would appoint a President. The Authority would ensure that all expenditure is met out of the receipts on the revenue account. For this purpose, it can establish a fund, to be known as the Railway Fund, with all moneys received by the Authority, to enable them to discharge the Authority's functions. The Act also provided for a Railway Tribunal for settling all legal matters related to the railway.

Part IX of the Act dealt with the Courts starting with the Federal Court, consisting of a Chief Justice and other judges to be appointed by His Majesty. The Federal Court shall have exclusive and original jurisdiction in any dispute between the Federation and any of the Provinces or any of the Federated States. The Federal Court in the exercise of its original jurisdiction shall not pronounce any judgment other than a declaratory judgment. Appeal over its decision can lie with His Majesty in Council. All authorities civil and judicial are to act in aid of the Federal Court and its orders are to be enforced by all courts and authorities.

As regards the High Courts in British India, their locations were specified as Calcutta, Madras, Bombay, Allahabad, Lahore, and Patna, the Chief Court in Oudh, the Judicial Commissioner's Courts in the Central Provinces, and Berar, in the North-West Frontier Province and Sind. Every High Court shall be a court of record and shall consist of a Chief Justice and such other judges as His Majesty appoints. No High Court was given powers in any matter concerning the revenue and its collectio,n etc.

Part X deals with the services starting with the Defence Services under the Commander-in-Chief. His Majesty could grant commission in any of the branches of the armed forces. It is the Secretary of State who specifies the rules, regulations, and conditions of service of all or any of His Majesty's Forces in India. All expenditure in this regard shall be charged on the revenues of the Federation. Thereafter, there is mention of the Civil Services, each member of which holds his post during His Majesty's pleasure. No such member of the civil service can be dismissed by any lower authority. Such a person has to be given reasonable authority. The Governor-General shall make appointments to the civil service of the Federation for all posts under the Crown of India. In the case of posts under the Province, it is the Governor who makes such appointments which are to be governed by rules to be made in this regard, in consultation with the Federal Public Service Commission. It is the Secretary of State who shall make appointments to the services known as the Indian Police Service, the Indian Civil Service, and the Indian Medical Service. He shall make rules specifying the number and character of all civil posts under the Crown. The Act also makes clear that there shall be separate rules for the judges of the Federal and High Courts. High Court judges are to be appointed by the Governor of the Province, exercising his judgment, and the High Court shall be consulted before a recommendation as to the making of any such appointment is submitted to the Governor. The Provincial High Courts shall be consulted in the matter of the appointment of subordinate judicial service officers.

The Act also makes special provisions as to the Political Department which was in charge of the Crown's relations with the Indian Native States. So also, there were provisions for the appointment of ecclesiastical persons such as chaplains and ministers who were to be appointed by the Secretary of State, and such persons were to be considered as an All-India Service. So too, there were some provisions of the office of the Secretary of State, his advisers, and his department.

There was a separate section dealing with the relationship of the Crown with the Indian States. It specified that if required, the Governor-General shall provide the assistance of armed forces in the exercise of the executive authority of the Federation to cause the necessary forces to be employed accordingly, but the net additional expense, if any, incurred in connection with those forces by reason

of that employment shall be deemed to be expenses of His Majesty incurred in discharging the said functions of the Crown. It is His Majesty's representatives, mainly officers of the Political Service, who will represent the Crown in its relations with the Indian States.

Aden which used to be part of British India ceased to be so with the coming into being of this Act. Sind was separated from the Presidency of Bombay and was formed into a Governor's Province to be known as the Province of Sind. The joint province of Orissa and Bihar was separated and formed into separate Provinces of Bihar and Orissa.

One of the empowering features of the 1935 Act was the matter of enlarging the franchise of voters. The Act made provisions for delimitation of territorial constituencies, prescribing qualifications for entitling persons to vote in elections as well as the specific qualifications for being elected, the filling up of vacancies, the conduct of elections, the expenses of the candidates, the prevention of corrupt practices and deciding upon disputes and doubts.

Certain miscellaneous matters were also dealt with. The Act recognised personal law attaching to members of any community as well as the Governor-General or the Governor for the safeguarding of the legitimate interest of the minorities. It declared that no person shall be deprived of his property in British India save by authority of law. It stated too that no compulsory acquisition of land can be carried out without fixing a fair amount of compensation. The Act made provisions for a High Commissioner for India in the United Kingdom to be appointed by the Governor-General, who shall perform all functions on behalf of the Federation. There was mention of a Sheriff of Calcutta in the Act. The Act specified that no proceedings shall lie in any court in India against the Governor-General or the Governor of a Province, or the Secretary of State, in respect of anything done by them during their terms of office in the performance of, or purported performance of, the duties. Where the Governor-General in Council and the Governor-General, act in their discretion, the validity of their actions shall not be called in question.

The Government of India Act, which came into effect on 4 August 1935, was one of the most voluminous documents emerging from the British Parliament. It provided substantial input for the drafting

of a new Constitution for an independent India. A significant portion of our Constitution, especially those related to the administrative arrangements of the country is taken from the Government of India Act of 1935. But the general public response was against it. Except for the National Liberation Federation, most political parties did not take kindly to the Act. The Indian National Congress dismissed it as a slave constitution that attempted to strengthen and perpetuate the economic bondage of India. Nehru called it "a machine with strong brakes and no engine". Dr. Rajendra Prasad commentated on the special position given to the Indian Native States saying that "it will be a kind of federation in which the unabashed autocracy will sit entrenched in one-third of India and peep in now and then to strangle the popular will in the remaining two-thirds." However, the Congress decided to take advantage of the provisions in the Act for contesting for elected positions within the provincial and central legislatures, and then attempt to strengthen the position of the nationalist movement from within. These elections were held in January and February 1937, signalling a more proactive participation of the political leaders in the administration of the country. They did not approve of the overriding powers of the Governors and Governor-General to veto important legislations. They also abhorred the Communal award that granted separate electorates for minorities.

Most interpreters of history see the Act as a significant step in the development of our constitutional aspirations, though it was a legislative attempt by the British to protect their interests. Muldoon, for example, sees the Act as a means by which the British sought a continuation of their control of India and the deflection of the challenge to the Raj posed by Gandhiji, Nehru, and the nationalist movement.[xxix]

16. Constitution of Free India: A draft (MN Roy, 1944)

MN Roy was an Indian Marxist revolutionary who was also an activist and political theorist. In 1944 he published the draft of an Indian constitution, through the Radical Democratic Party, of which he was a member. He argued that the document would achieve three

purposes, namely, remove political parties who stand between the British and the people of India on matters of great importance as our constitutional future and the transfer of power; the articulation of a new and radical vision for our constitution; and expedite the transfer of power to the Indian people. He naively believed that the British would hand over power when presented with his draft.

His draft had thirteen chapters, seven dealing with the structure of the Union and its executive and legislative powers. In addition, there were chapters on Fundamental Rights and aspects related to society, the judiciary, etc., all of which aimed at placing ultimate power with the sovereignty of the people. "All authority emanates from the people." Proclaiming the complete sovereignty of the people, it also advocated their inalienable right to alter the political organisation of society and praised the right to revolt against tyranny and oppression as sacred.

According to this draft, the Council of States was to be elected from the provincial assemblies. The Federal Assembly will be elected every four years. The Council of States and the Federal Assembly will meet in Joint sessions with the Governor-General as the Supreme People's Council. The foundation of the State is organised democracy. The land and the underground resources are the collective property of the people. Basic industries were to be under State control. Agriculturists were entitled to hold land without any disability, subject to payment of tax. Minimum wages fixed by law would ensure a standard of living for all labourers. Social security for the old and sick was to be statutorily protected. Public health would be a charge on the public revenues. "The freedom of press and speech is guaranteed to all but the enemies of the people." The right of association was guaranteed. The inviolability of the homes of citizens and private correspondence was to be protected by law. All citizens would have freedom of speech. Both men and women had identical rights and responsibilities of citizenship for men and women. "The ownership of land, underground riches, and railways are hereby transferred to the people." As a result, the Federal Government or the Provincial Government shall complete the transaction and transfer of rights within one year by paying fair compensation to the previous private owners, whether individual or corporate.

The Governor-General is the chief executive of the Federal Union of India. The Government of the Federal Union will be carried on by a Council of Ministers. The Council of Ministers shall in be responsible to the Supreme People's Council. The responsibility of the Council of Ministers is collective. All the Provinces, federated or otherwise, are fully autonomous and uniformly democratic according to the provisions of this Constitution. Each province will have a Governor, who will be the chief executive of the Province and will be elected by all the men and women inhabitants, who have attained the age of eighteen years. The highest judicial authority in the Federal Union of India shall be the Supreme Federal Court. The Supreme Federal Court will consist of the Chief Justice of India and four or more federal judges.

The administration was to be run by a network of people's committees, elected by the people. Significantly, while it believed in the separation of powers at the level of the federation, at the provincial levels it was joint. The local people's committees will also perform the function of local self-government in their respective jurisdiction, including sanitation and public health, education primary and secondary; building and maintaining roads and public parks; promotion of producers' and consumers' co-operative societies; maintenance of public order (local police administration); administration of law in cases of petty crime, etc.

Undoubtedly, MN Roy's document was a radical and populist manifesto proclaiming a new India; but in the end, it was impractical and only of academic interest. At best it gives but an indication of the different strands of politics and philosophy that informed the final version of the Constitution of India.

17. The Constitution of the Hindustan Free State Act of 1944

A committee constituted by the Bhopatkar Satkar Nidi, a trust that had close links with the Hindu Mahasabha, produced a document in 1944, known as the Hindustan Free State Act, of 1944. It was chaired by DV Gokhale and was mandated to frame a constitution that would unify the divergent elements and interests of the country.

The other members were Bhopatkar, Kelkar, and Dhamdhere. The first of these members went on to represent Savarkar in Gandhiji's assassination case. Its form and content were more or less on the lines of the Government of India Act of 1935, with 111 articles, parts, and chapters. The government that it advocated was democratic, republic, and federal with residuary powers at the centre. It promoted universal adult suffrage and provided for a wide range of Fundamental Rights. Yet, a noticeable shortcoming was that it did not provide for any social, economic, or political affirmative action. It is perhaps the only constitutional document produced by the Hindu nationalist movement. It has been suggested that it was adopted by the 1944 Bisalpur Session of the All-India Hindu Mahasabha. Though there are some similarities with the 1950 Constitution of India,[xxx] yet, the document had little bearing on the political and constitutional developments of those days.

The document begins with the words: "Whereas all sovereignty vests in the people…" and "Whereas it is the inalienable right of the people of Hindustan to have freedom and to enjoy the fruits of toil and to have the necessities of life, so that they may have full opportunities for self-expression and growth…" A citizen was defined as "every person, without distinction of sex, domiciled within the limits of the jurisdiction of the Hindustan Free State at the date of the coming into operation of this Constitution, who was born in Hindustan or either of whose parents who were born in Hindustan…"The citizen's Fundamental Rights were listed as follows: All men and women shall have equal rights as citizens; they are equal before the law and possess equal civic rights without discrimination. They shall have an equal right of access to public places and shall enjoy the right to free elementary education. They would have the right to keep and bear arms by the regulations made on that behalf. The responsibility of health, securing a living wage, the welfare of mothers and children, etc., are all the responsibility of the State. Agriculturists shall have laws to ensure fair rent and fixity and permanence of tenure to agricultural tenants. All persons are by nature free and independent and have certain inherent rights such as the enjoyment of life and liberty, possessing property, and obtaining happiness. None can be deprived of his liberty of person except by law. No one can enter his property save as per law. The right to free expression and association

was guaranteed. Freedom of conscience and the free profession and practice of religion and the protection of culture and language are guaranteed to every citizen. There shall be no State religion for the Hindustan Free State or any of its Provinces.

The legislative power was entrusted to a body known as the Congress, consisting of the President and two chambers known as the Senate and the House of Representatives. The former is a permanent body where one-third of the members shall retire every third year, whereas the latter shall continue for five years. Executive authority shall be vested in the President to be elected by all voters of the House of Representatives and his term of office shall be six years from the date he takes office. A Council of Ministers, consisting of ministers of whom one is to be called the Prime Minister, shall be collectively responsible to the House of Representatives and shall aid and advise the President. The Prime Minister shall be appointed by the President on the advice of the leader of the majority party in the House of Representatives. The Prime Minister shall nominate and appoint other ministers, who along with himself shall be members either of the House of Representatives or of the Senate.

There shall be a Supreme Court consisting of a Chief Justice and other judges with original jurisdiction in any dispute between the Federal Government and a Provincial Government, or between provinces as well as appellate powers over decisions of subordinate courts. It is the President who appoints the Attorney-General.

Interestingly, it conferred on the people the initiative to make proposals for laws or constitutional amendments through the mechanisms of referendums. The citizens also had the right to recall public representatives. The Constitution also declared that all property vested in the King of England shall vest in the Hindustan Free State. The Constitution also separately listed the legislative jurisdiction of the Federal Legislature and the Provincial legislatures.

18. Political Demands of Scheduled Castes (Scheduled Castes Federation, 1944)

The creation of this document arose out of a sense of dissatisfaction felt by the section of the population known as the Dalits who pushed forward their impassioned demand for justice in a cultural and social environment that had persecuted and oppressed their members for generations. In 1944, the Working Committee of the All India Scheduled Castes Federation passed a series of resolutions outlining the safeguards for untouchables in the new Constitution. It was BR Ambedkar who had founded the Federation and organised the passing of these resolutions collectively known as 'Political Demands of the Scheduled Castes'. This was presented in the form of an appendix to his book 'What the Congress and Gandhi have done to the Untouchables', published in 1945[xxxi]. He intended that the demands and concerns of these neglected and long-oppressed people of India should find a significant place in the ongoing negotiations between the Indian political leaders and the British Government.

The document consisted of twelve resolutions which at the outset made it clear that the Scheduled Castes would not accept any Constitution that did not contain protection for their community, including treating them as 'a distinct and separate element' at par with the minority community of the Muslims and granting them proportional representation and separate electorates both at the central and provincial legislatures. Reservation in the public services of both Union and State Governments was also demanded. Interestingly, the demands included a constitutional provision for separate and exclusive settlements for the members of this community. Undoubtedly, this document focussed primarily on the sectional interests of one community, standing in sharp contrast to all other documents of the same period.

The 'Political Demands' document expressed its emphatic view that the Scheduled Castes are a distinct and separate element in the national life of India and that they are a religious minority in a sense far more real than the Sikhs and Muslims can be. This has been enunciated as early as 1917 in the Montagu-Chelmsford Report which stated that the goal of India's political evolution is the grant of separate

representation to the Scheduled Castes as a recognized minority, separate from the Hindus. It made it clear that no Constitution would be acceptable to them unless it is accepted by the Scheduled Castes themselves and recognised as a distinct and separate element. Separate seats should be provided for them in the legislatures, the executive, the municipalities, and public services. The Constitution should also have budgetary provisions for earmarking a definite sum in the central and provincial budgets for the secondary, university, and advanced education of the Scheduled Castes. It also sought the reservation of Government lands for separate settlements of the Scheduled Castes through a Settlement Commission. It pleaded that the above should be regarded as Fundamental Rights. The creation of separate legislatures was also necessary to achieve this goal. The Working Committee of the Federation also expressed its complete confidence in Ambedkar and authorized him to negotiate with other political parties or their leaders on behalf of Scheduled Castes as and when the necessity arises."

As Bandhopadhya puts it, the document finds its place within the larger context of the freedom movement while pushing 'the idea of a separate identity to its most extreme limit, in the same way as the Muslim League was pushing its Pakistan demand.[xxxii] For some reason, the resolution did not gain the desired results when the Scheduled Caste Federation lost almost all the seats reserved for the community to Indian National Congress candidates. Nevertheless, Ambedkar took up the cause once more and submitted a fresh document to the Constituent Assembly titled 'States and Minorities' that borrowed much from the document on 'Political Demands' where he yet again pushed forward the provisions for separate representation in the legislatures. It was largely due to his efforts that Part XVI of the Constitution makes 'Special Provisions Relating to Certain Classes' that contained many measures for the upliftment of the Scheduled Castes.

19. States and Minorities (Dr. BR Ambedkar, 1945)

The theme for the protection of the rights of the Scheduled Castes was assiduously carried forward by Ambedkar in his paper called States and Minorities which had been earlier published in 1945 as a separate

book but was submitted by him in 1947 to the Constituent Assembly's sub-committee on Fundamental Rights. The sub-committee had been directed to draw up a list of Fundamental Rights for the Constitution of India. Needless to state, there were many inputs from the Political Demands resolutions that we have referred to above, though his paper went far beyond this limited view.

The document was entitled the Constitution Of The United States Of India and stated that Provinces and the States "shall be joined together into a Body Politic for Legislative, Executive and Administrative purposes" under the name of The United States of India which shall be an indissoluble union to achieve self-government and good government. Its goal was to maintain the right of every citizen to life, liberty, and pursuit of happiness and free speech and free exercise of religion; to remove social, political, and economic inequality by providing better opportunities to the submerged classes; to make it possible for every subject to enjoy freedom from want and freedom from fear, and to provide against internal disorder and external aggression, and to establish this Constitution for the United States of India. This draft constitution recognised the Fundamental Rights of the citizens abolishing any privileges or disabilities arising out of rank, birth, person, family, religion, or religious usage and custom.

The State cannot abridge the privileges or immunities of citizens, nor deny any person equal protection of the law. It cannot deprive any person of life, liberty, and property without due process of law. All citizens shall have equal access to all institutions, conveniences, and amenities maintained by or for the public and cannot be disqualified to hold any public office by reason of religion, caste, creed, sex, or social status. It declared that the Union Government shall guarantee protection against persecution of a community as well as against internal disorder or violence arising in any part of India. No law can be made abridging the freedom of speech, of the press, of association, and of assembly. Liberty of conscience and the free exercise of religion shall be guaranteed by the government. The State shall not recognise any religion as the State religion.

Wherever there was an invasion of these Fundamental Rights, remedies were also provided for in this document. This was to be protected by the Supreme Court and the other courts of the land, which shall ensure

that there is protection against unequal treatment and discrimination, and economic exploitation. Key and basic industries were to be run by the government, and farming was to be through collective farms allotted without distinction of caste or creed with no system of the landlord, tenant, and landless labourer. The document demanded that there should be an official name Superintendent of Minority Affairs who would prepare an annual report, to be placed on the table of the legislatures, on the treatment of minorities by the public and of any transgressions of safeguards or any miscarriage of justice due to communal bias by Governments or their Officers. Governments were enabled to spend money for purposes beneficial to Minorities.

The Scheduled Castes would have representation in the Legislature equal to the ratio of their population and there would be separate electorates for the same. In the executive too, at all levels from Union services to State services and local municipalities, they shall have minimum representation equal to the ratio of their population. The Governments shall make adequate provisions in their budgets for secondary and college education, in proportion to the population of the Scheduled Castes.

The 'States and Minorities' document reads like a mini-constitution and presents a comprehensive constitutional superstructure for the protection and empowerment of the Scheduled Castes. As we have seen, Ambedkar also prescribed a series of measures to be taken for remedies against the encroachment of these rights, while advocating for State socialism and economic democracy. Appearing in those times, this document perhaps makes the most forceful expression of social and economic rights for the Scheduled Castes. Many of these provisions were not accepted by the Constituent Assembly, though later legislations took measures for the protection of the Scheduled Castes and Tribes through statutes such as the Prevention of Atrocities (Scheduled Castes and Scheduled Tribes) Act of 1989.

20. Gandhian Constitution for Free India (Shriman Narayana Agarwal, 1946)

Misleadingly titled, the document was not written by Gandhiji, though he wrote a foreword to the document. Shriman Narayana Agarwal published this draft in 1946, stating that it was based on Gandhiji's idea. In his foreword, Gandhiji wrote that the document was based on Agarwal's "study of my writings" and that it was "not inconsistent with what I would like to stand for." He warned the reader: " The disadvantage lies in the reader mistaking the particular writing being my view in every detail. Let me then warn him against making any such mistake." Yet, Gandhiji stated that "I regard Principal Agarwal's to be a thoughtful contribution to the many attempts at presenting India with constitutions."

Agarwal expressed his disapproval of trying to manufacture Western constitutions and applying them to Indian constitutions, especially when our traditions existing from ancient times were more relevant. According to him, all forms of governance had been experimented in India, including monarchy, autocracy, democracy, republicanism, and even anarchy. The document's purpose was to try "to evolve a Swadeshi Constitution based on our national genius, culture, and traditions". The Gandhian constitution was a 60-page document with 22 chapters and included sections on basic principles, Fundamental Rights, and Duties, Central and Provincial Governments, Judiciary, etc.

After making many observations on the subject of political philosophy across the world and conceding that "democracy is the only type of government which can harmonise the interests of the individual and the State," he goes on to write about the Gandhian way, based on non-violence and decentralisation. He expressed the view that the organisation of decentralised rural commonwealths is highly conducive to equitable economic distribution. Decentralised cottage industries, "eschewing the two extremes of laissez-faire and totalitarian control", show the way. The document pronounced that all citizens shall be equal before the law, irrespective of caste, colour, creed, sex, religion, or material wealth, and shall not suffer any disability on account of religion, caste, or creed. Freedom of speech, assembly, and discussion was to be guaranteed. Every citizen was entitled to

free basic education, known as 'Nai Talim', and shall have the right to a minimum living wage. Surprisingly, the right to bear arms was also included as a fundamental right. However, these Fundamental Rights were contingent on the performance of certain Fundamental Duties such as being faithful to the State in times of emergencies or aggression and contributing to State funds for promoting public welfare.

The basic unit of administration was the village in the panchayat, with an elected president. It would have maximum local autonomy with the right to appoint the chowkidar, patwari, and police officials. It would run a basic school and maintain a library. It would assess the agricultural rent and collect the same from the people. It has to make proper arrangements for irrigation, provide good seeds and efficient implements through co-operative shops, etc., as well as organise khadi and local industries. Empowered with wide legal powers, both criminal and civil, its task was to provide speedy justice to villagers. Taluka and District Panchayats would coordinate all such activities. The document prescribed the functions of these institutions as well. The presidents of the District Panchayats and Municipal councils would send their representatives to the Provincial Council. The Provincial Council's responsibilities are to guide and supervise the activities of the District Panchayats, to provide for tackling emergencies, to arrange for University education, to provide for adequate irrigational facilities, etc. The boundaries of the provinces were to be fixed according to linguistic territories. The Provincial Panchayat would be unicameral and shall be the Legislature of the Province with full powers regarding its constitutional powers.

As for the central government, named the All-India Panchayat, the provincial government would send their representatives. The All-India Panchayat shall be a voluntary federation of the Provinces and States; its functions shall be mainly to defend the country against foreign aggression, to maintain a force for internal law and order in times of emergencies, to co-ordinate the provincial plans of economic development, to run the 'key' industries of national importance, to regulate currency, customs, and international trade etc. It shall be the chief legislature to enact all laws. Its ministers represent the best talent of the country, irrespective of party or communal considerations.

As for justice, it is the Gram Panchayats that would be entrusted with the task of dispensing justice. No separate judicial panchayats are necessary. The recommendation in the document for elections was that direct election would only be at the village level and indirect for the taluka, district, province, and the All-India level. Elections will be based on adult franchise irrespective of any distinctions relating to caste, creed, sex, religion, socio-economic position, or education. The All-India Panchayat would have full control over the National Police. As regards minorities, it was suggested that it could be worked out by a Committee of the Constituent Assembly and where necessary, left to a Board of International Arbitration.

As for public services, Free India would have the full option to continue, or to discontinue, the services of the present officials in the Provincial or All-India services. New public officials for Villages, Talukas, and Districts shall be directly appointed by the Village, Taluka, and District Panchayats respectively. Recruitment to Public Services shall be made solely on grounds of qualifications, efficiency, character, and spirit of national service.

The Gandhian Constitution may be regarded as an attempt to re-imagine alternative and grassroot level institutions that would govern the country, with people's participation in a decentralised mode. It did not receive much critical examination or popular response, despite bearing Gandhiji's name. It is understood that there was some discussion on the document in the Constituent Assembly, especially when the system of Panchayati Raj was discussed. However, these proposals were rejected by Ambedkar and most of the members. Yet, Panchayati Raj was placed on the list of Directive Principles of State Policy along with other Gandhi-inspired ideas such as alcohol prohibition and cottage industries. As Mirchandani said, the concepts were revived in the Indian polity in the 1970s, and an organisation known as Servants of the People, which had been founded by Lala Lajpat Rao, and was headed by Biswanath Das, a member of the Constituent Assembly, prepared a document entitled 'Place of duty in our lives and the Constitution of India' which had some traction in the literature on that subject for a brief period.[xxxiii]

21. Sapru Committee Report (Sir Tej Bahadur Sapru, 1945)

The intention behind the drafting of the 1945 Sapru Committee report was to try to resolve the burning issues pertaining to minorities that had been the persistent bone of contention in the Indian political and constitutional debates. It was clear that the main political parties, the Indian National Congress, and the Muslim League, would not be able to offer solutions on this subject, as they held deeply entrenched positions that were inflexible. The impasse was created by communal issues specifically related to the future of Indian Muslims. The failure of the Gandhi-Jinnah talks in 1944 only added fuel to the fire. Thus, a non-party conference was convened to examine and suggest a course of action. The committee that drafted the report was led by Tej Bahadur Sapru, a well-known lawyer, and included about 30 members who were not of political parties but had distinguished themselves in public affairs. They included members such as M R Jayakar, John Mathai, Frank Anthony, Gopalaswamy Ayyangar, and Sachidananda Sinha, all of whom went on to become members of the Constituent Assembly. The Committee was given the brief to examine the whole communal and minorities question from a constitutional and political point of view, by being in touch with the different parties and their leaders, including minorities interested in the question, and present a solution.

The committee produced a report that was exhaustive and detailed running into more than 340 pages with about 20 appendices and detailed expositions of various aspects of the country's constitutional future. One of the appendices named 'Recommendations' was a distillation of the report summarising the legal-constitutional document and expounding on the leading principles of the new constitution. There was too a section on Fundamental Rights which included freedom of speech and expression, religious freedom, and equality. Significantly, it also examined the question of dividing basic rights into justiciable and non-justiciable rights. Though no recommendations were made in this direction, it was a pointer for the Constituent Assembly to pursue the matter further.

The Report unequivocally rejected the Muslim demand for Pakistan stating that this division of India would only result in endangering the peace and progress of the country. It also rejected the demand for separate electorates for Muslims in the Union legislature and in its place recommended joint electorates with reservation of seats. It also recommended the creation of a constitution-making body that would be represented by both Hindus and Muslims. A Minorities Commission was also suggested to make periodic assessments of the welfare of the minorities and make recommendations for improvements.

The report began with certain interim recommendations such as the release of all political prisoners, the immediate royal proclamation of India as an independent State and Dominion, the re-functioning of the provincial legislatures which had been suspended, the re-establishment of popular ministries, etc. The Indian Princely States may be permitted to accede to the Union on agreed terms and conditions.

The then Executive Council at the centre should be replaced by a national government, for which two alternatives were suggested. One, that His Majesty should proclaim a federation of India, without insisting on the joining of Princely States, and that steps should be taken to hold elections to the two Houses of the Federal Legislature and to appoint a Council of Ministers. Alternatively, the Executive Council, except the Governor-General, should consist only of Indians, who have the confidence of the Central Legislature. Further, the Political Adviser to the Crown Representative should be an Indian with the rank and status of an Executive Councillor. Until the establishment of full self-government, no non-Indian should be recruited into the ICS.

The recommendation that a constitution-making body should be created was significant. It was to have a strength of 160 members, with equal representation for Hindus and Muslims, but with others representing all sections of society including Scheduled Castes, business, and industry, Christians and Sikhs, backward areas, tribes etc. All decisions were to be taken with a three-fourths majority. It may be noted that this provision was bitterly opposed by many Hindus "on the ground that it makes one Muslim equal to two Hindus"; but, as Norman Brown pointed out, the Committee believed that "it would

pay for the Hindus to be generous if by so doing they could bring the Muslim into cooperation, rather than to insist upon abstract justice at the risk of intercommunal conflict and perhaps even civil war."[xxxiv]

The Union shall have a Head of the State with all such powers and duties as may be conferred on him by the Constitution Act, with the advice that he shall conform to the traditions and conventions binding on the Constitutional Head of an allied State. The central legislature would have two Houses, named the Union Assembly and the Council of States, with a certain formula so as to maintain its representational nature. The report recommended lists of all matters to be decided by the Union and the Units (States) to be embodied in the Constitution, with the Union having only a minimum number of subjects such as foreign affairs, defence, currency, customs, etc. All custom barriers are to be abolished to enable free trade. A Public Services Commission at the Central and State level was recommended for recruitment into government service.

The Union Cabinet should have representation from Hindus, Muslims, Scheduled Castes, Sikhs, and Christians. It would be collectively responsible to the Legislature. It is to be led by a Prime Minister who can command a stable majority in the Legislature. There shall also be a Minster to look after the affairs of the Indian Princely States. A portfolio of Defence under a Minister responsible to the Legislature was recommended, with actual control to be under a commander-in-chief. A national army was recommended to be created as early as possible.

As regards the Judiciary, the report recommended the constitution of a Supreme Court for the Union and a High Court, in each of the Units. The Chief Justice of India is to be appointed by the Head of the State and the Chief Justice of a High Court is to be appointed by the Head of the State.

A substantial recommendation was made in the report related to Fundamental Rights. It recommended rights such as the liberties of the individual; the freedom of press and association; equality of rights of citizenship of all nationals irrespective of birth, religion, colour, caste, or creed; full religious toleration, including non-interference in religious beliefs, practices, and institutions;

protection to language and culture of all communities. It further recommended specific declarations for the welfare of the Scheduled Castes and Minorities. The precise formulation of these rights was to be undertaken by a special committee of experts at the time of the framing of the new Constitution. A Minorities Commission was also recommended at the central level and for the provinces for reviewing periodically all policies about minorities pursued in the Legislatures and the administration.

The report also made a plea to His Majesty to set up an Interim Government in India and proceed to establish machinery to draft the new Constitution based on the principles underlying these proposals, to enact it in Parliament and to put it into operation at the earliest possible date.

The Sapru Committee Report of 1945, along with the earlier Nehru Report of 1928, were two of the major aspirational constitutional documents that inspired the final Constitution of 1950. While we have a little earlier seen Norman Brown's comments on the Sapru report, he has also observed that the report may be considered to be the most reflective and sustained Indian presentation of the constitution which has been published.[xxxv] Other scholars, such as Ray Smith, however, observe that the report received scant attention, was largely ignored, and did not create any significant impact on the political dialogue of the day.[xxxvi] One of the reasons for its cold reception, as mooted by VP Menon, was the absence of any top-ranking Muslim in the Committee. Its complete rejection of the idea of a separate country for the Muslims along with the suggestion of separate electorates for them, made that community hostile to the report. The Congress too was indifferent to it.[xxxvii] It has been conjectured that in an atmosphere less charged with communal feelings, the report may well have "elicited the approbation of the thinking Indians."[xxxviii] However, it can be stated with confidence that when the Constituent Assembly was set up to frame the Constitution of India, the report would certainly play a positive role and an indirect influence on the Constitution's thought process.

22. Outline of a New Constitution (Shri BN Rau, 1946)

Sir Benegal Narsing Rau, the Indian Civil servant, jurist, and diplomat, was the sharp intellect that provided much of the inputs that went into the framing of the Indian Constitution. While he was working as Officer on Special Duty (Reforms) in the Governor-General's Office, he prepared a paper entitled 'Outline of a New Constitution' in January 1946, which was later published in 'India's Constitution in the Making', a most comprehensive volume edited by Shiva Rao. When the Constituent Assembly was set up, BN Rau went on to become its Constitutional Advisor. Post-Independence, he also served as India's representative to the United Nations Security Council.

Rau prepared the document under consideration here in the context of the elections that were being held then for the provincial Assemblies where the Indian National Congress and the Muslim League were locked in bitter clashes, mainly on the question of the constitutional future of India and the demand for a separate Pakistan. Rau's Outline is a 19-page document, which analyses and examines the entire question with explanatory notes, articles, and clauses. The appendix to the note highlights two matters: one, the conception of India as a commonwealth of three entities, and second, the nature of the Federation to be created.

The outline envisages the ultimate structure of India as a Commonwealth consisting of the Hindustan Federation, the Pakistan Federation, the Indian States, and tribal areas. Each of the federations shall be independent Sovereign States whose boundaries and relations with each other in regard to general matters such as defence, external affairs, etc., were to be defined by the agreement. The executive authority of the Union shall be exercised by the Head of the Union and there shall be a Council of Ministers to aid and advise him in the exercise of his functions. The allocation of portfolios shall be made by the Head of the Union after consulting the ministers of all four groups as mentioned below. The Indian federation territories shall be divided into four, namely A: the Central Group, (Madras, Bombay, the United Provinces, Bihar, the Central Provinces and Berar, Orissa, Delhi, Ajmer-Merwara, Coorg, and Panth Piploda); B: the Western Group, (Panjab,

the North-West Frontier, Sind, and British Baluchistan); C: the Eastern Group (Bengal, Assam, and the Andaman and Nicobar Islands); and D: the Indian States and Tribal Areas. The executive authority of the Union shall be co-extensive, with its legislative authority over units in Group A, B, and C. As for Group D, the Union's Executive will be about the territorial integrity of the States with the dynastic succession of the Rulers being preserved. The internal sovereignty of the rulers was to be respected.

There has been little analysis of this outline except for Suman Sharma who has suggested that Rau's Outline would have significantly influenced the Cabinet Mission Proposals on the constitutional future of India. As we shall see, these inputs do find a place in the Mission Proposals.[xxxix]

23. Draft of Indian Women's Charter of Rights and Duties (All India Women's Conference) 1946

In 1927, for the first time in India, a collection of women from diverse political and civil society lines had come together intending to outline the political, social, and economic future of the Indian woman. In its 18th session, the All-India Women's Conference had authorised the setting up of a committee to draft a document in the form of a charter setting out their rights as citizens of a free India. This charter which came out in 1946 was about ten pages long and placed into a dozen sections. Written in a semi-legal style it attempted to draw a link between the status of women and the overall backwardness of women in the country. While some chapters were specifically directed towards women relating to 'women and work' and 'women as homemakers', there were also sections of the document that were aimed towards all citizens in general. Some of these related to universal adult suffrage, equal pay for equal work, inheritance rights, the banning of discriminatory marriage, and the call to the government to ensure the financial security and health of the woman.

The draft begins with the declaration that the "woman is as much a human being as a man," and that the progress of society depends upon both men and women being able to develop their full personalities. The

section on Fundamental Rights states that all citizens are equal before the law, irrespective of caste, creed, or sex. As regards civic rights, it demanded that every man and woman of twenty-one and above would have the right to vote in all elections at every level and that women should be represented in these bodies. As for education, there shall be no basic difference between the education of men and woman as their duties as citizens are the same. Basic education should be free and compulsory. So also, for health: a nationwide plan of free health services should be adopted. The right of women to work was emphasised along with the principle of equal pay for equal work. The work of a housewife as a homemaker is as important as any other. A woman should have the same rights as a man, including holding, acquiring, and inheriting property.

Some provisions closely resemble the Fundamental Rights and Directive Principles of State policy which is not surprising, as some of the committee members were also members of the Constituent Assembly. It also took inputs from other constitutional documents such as the Karachi Resolution of 1931 that had proposed a comprehensive scheme of social and economic rights. It is interesting to note, as Kothari has observed, that as the United Nations was in the process of preparing a Universal Declaration of Human Rights, the Indian delegation comprising Hansa Mehta, Rajkumari Kaur, and Lakshmi Menon, prepared and submitted a key document that had a significant role in the drafting of the final document.[xl]

24. Cabinet Mission Plan (Cabinet Mission, 1946)

After the Second World War, the elections held in the United Kingdom brought in the Labour Party to form the government with Clement Atlee as Prime Minister. One of its first declarations was to grant full freedom to India and to set up a Constituent Assembly to draft a Constitution for the new Country. A Cabinet Mission was set up under the chairmanship of Lord Pethick-Lawrence, Secretary of State for India to make this happen. The other members were Sir Stafford Cripps, President of the Board of Trade, and AV Alexander, First Lord of the Admiralty. This Cabinet Mission made a formal statement to the Viceroy, Lord Wavell on 16 May 1946 that contained proposals for the constitutional future of India.

The major difficulty that the Cabinet Mission had to face was the intractable views of the two main political parties, the Indian National Congress, and the All-India Muslim League. While the Muslim League wanted a separate Sovereign State for the Muslim-majority provinces of India, the Congress wanted a united India. When the Mission's attempts failed at the Shimla Conference, it prepared its proposal referred to as the Cabinet Mission Plan. The document of about nine pages articulated twenty-four points. While some were explanatory in nature, others included the steps to be taken for the formation of the Constituent Assembly and the nature of its functioning. Point No 15 was at the core of the proposals. It proposed the basic form of the Constitution, in the main relating to the federal structure of India. It rejected the demand for a separate nation of Pakistan and called for the setting up of a united Indian Union consisting of the British Provinces and the Princely States. The proposal suggested a unique federal setup, while also introducing the concept of grouping units with Provinces and Princely States who would be free to join the groups under the Union while having their own Legislature and Executive with much autonomy.

Initially, the Congress and the League were inclined to agree with this proposal, but the Congress backed out stating their opposition to the grouping of Provinces based on religion. The Muslim League did not agree to changing any part of the proposal and hence consensus could not be achieved. The Cabinet Mission's attempt to reach an agreement did not succeed. In the meantime, the process for setting up the Constituent Assembly began and an interim government was installed with Jawaharlal Nehru as Prime Minister. The opposition by the Muslim League was immediate and they gave the call for 'Direct Action Day', triggering violence in many parts of the country.

The Cabinet Mission Plan, also known as the State Plan, had a significant influence over the deliberations of the Constituent Assembly, especially in the debates around the Objective Resolution of Nehru and the nature of federalism. At one level, it was agreed that the Constituent Assembly itself was a creation of the State Plan and that as far as possible it would adhere to the outline of the Plan, while also waiting for Muslim participation in the deliberations. Yet, at another level, the Assembly asserted that its legitimacy came from the people of India and not from the State Plan.

The State Plan of the Cabinet Mission recommended that there should be a Union of India, embracing both British India and the Princely States which should mainly deal with the subjects of foreign affairs, defence, and communications. It should also have the necessary wherewithal and powers to raise the finances required for these areas of administration. The Union should have a legislature comprising members from British India and States' representatives as well as an Executive. Major communal issues in the Legislature should be decided by a majority of the representatives present and voting from each of the two major communities, as well as a majority of all members present and voting. All other subjects and residuary powers should vest in the provinces. The Provinces should be free to form groups with Executives and Legislatures, and each group could determine the provincial subjects to be taken in common. The Constitutions of the Union and the groups should enable any province, which through its Legislative Assembly, could call for reconsideration of the terms of the Constitution after an initial period of ten years and at ten-yearly intervals thereafter.

The Cabinet Mission Plan is a significant step in the evolution of the constitutional history of India. It is critical in the study of various aspects of our constitutional history, the evolution of our law, politics, and history, and especially in matters of the partition of the sub-continent and aspects of federalism. From the British point of view, their self-interest is apparent as stated by Reid when he wrote that the Cabinet Mission Plan was in the main "to secure Britain's defence interests in India and the Indian Ocean area."[xli] Granville has argued that the Cabinet Mission, comprising of only Britons with no Indian representation, should never have attempted to mediate between the Congress and the Muslim League as it was foredoomed to failure.[xlii] Yet the document is still relevant to students of Indian constitutional history who wish to understand the origins of our Constitution.

25. Preliminary Notes on Fundamental Rights (BN Rau) 1946

We have already briefly glanced through BN Rau's 'Outline of a New Constitution.' It is undoubted now that the intellectual and analytical mind of BN Rau contributed significantly to the framing of the Indian Constitution, especially in the matter of Fundamental Rights. We are aware of Rau's trip to the United States where he sought the advice of eminent constitutional law professors and jurists, especially Justice Frankfurter, in the matter of the Indian Constitution that was then being framed by the Constituent Assembly.[xliii]

Rau's notes differentiated between two classes of rights: "certain rights that require positive action by the State and which can be guaranteed only so far as such action is practicable… others merely require that the State shall abstain from prejudicial action." An example of the first is the right to work, which requires the State to find the means of making reasonable provisions for the same. An example of the second is the deprivation of liberty without due process of law. The first cannot be normally enforced by law while the second can be. While many constitutions, such as the Constitution of the USSR and the Weimar Constitution, combine both kinds under the common heading of Fundamental Rights, the Irish Constitution recognises the differentiation and deals with the first as Fundamental Rights and the second as 'directive principles of social policy', the latter being excluded from the purview of the courts. Rau's concept paper encouraged the members of the Constituent Assembly's sub-committee on Fundamental Rights to accept this distinction, referring to the two categories as 'justiciable' and 'non-justiciable'.

Rau listed out some examples of these non-justiciable rights, such as international peace and security and the elimination of all causes of communal discord, along with the right to work, the right to free and compulsory primary education, the right to maintenance in old age and during sickness or lack of capacity to work, the special care the educational and economic interests of the weaker sections of the people and, in particular, of the Scheduled Castes and the aboriginal tribes, the protection of the culture and language and script of the various communities and linguistic areas in India**.** The State shall regard the

raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties. As for the strictly enforceable Fundamental Rights, Rau refers to available judicial literature and quotes from Daniel Webster, Francis Leiber, Lord Bryce, Dicey, etc., and states that in the peculiar circumstances of India, there may well be a demand for a Bill of Rights enforceable in courts. He warns that even though there is sufficient material to this task, "its drafting will require great care and must be reserved for a future occasion."

26. Manipur State Constitution 1947

We may also mention the efforts of the Maharaja of Manipur who, sensing that the withdrawal of the British from India was near, ordered the setting up of a committee, chaired by FF Pearson, a British civil servant, and Chief Minister of Manipur, which would draft a constitution for Manipur, while also examining the choice of whether Manipur should join the Indian Union or remain independent. The draft prepared by this Committee was called the Manipur State Constitution Act of May 1947. The document proposed a constitutional monarchy, with the Maharaja having reduced powers in Manipur's affairs. It included a chapter on Fundamental Rights, with provisions for the protection of liberty and equality before the law. It proposed special treatment and greater autonomy for the hill tribes which would be separately regulated by the Manipur State Hill (Administration) Regulation, 1947. The entire exercise was short-lived and by 1949, the Maharaja signed the treaty of accession and merged with the Indian Union. The Manipur State Constitution Act of 1947, fell into oblivion.

27. Indian Independence Act of 1947 (UK Parliament)

After British Prime Minister Clement Atlee announced in February 1947 that the British would leave India by June 1948, the political activities in the country peaked. When Lord Mountbatten arrived in India, he galvanised the political scenario by advancing the date of the Indian independence to 15 August 1947. All parties welcomed the

decision; however, the Congress wanted the British to leave behind a unified India, while the Muslim League was adamant that the sub-continent should be divided into India and Pakistan. The question of partition was put to the provincial Legislative Assemblies of Bengal, Punjab, and Sind. All three assemblies approved the partition of their respective provinces, into parts that would remain with India and those Muslim-majority areas which would go over to Pakistan. The Indian Independence Act of 1947 was the legislation that was passed by the British Parliament that legally set up the two independent dominions. The Act codified the withdrawal of the British from India and its partition into two dominions. After 15 August 1947, Lord Mountbatten continued as Governor-General till the end of 1948, when he gave his place to C Rajagopalachari who assumed the charge that Mountbatten left behind. India remained a dominion until January 1950, when the Constitution of India came into effect and Dr Rajendra Prasad became the first President of the new independent constitutional republic.

The 1947 Act was 22 pages long and formulated around 20 sections and three schedules. It set the date of 15 August 1947 for its coming into effect and also placed the seal on the partition of the sub-continent into two dominions of India and Pakistan. It also approved the partition of Bengal, Punjab, and Sind. While doing so, it also made the necessary changes to the Government of India Act of 1935 and transferred legislative powers to the constituent assemblies of the two new dominions.

Undoubtedly the Act was one of high significance in the political history of the country and marked the watershed moment of the Indian freedom struggle, putting an end to the long colonial history of the country under the suzerainty of the British. It also settled finally the question of the separation of Pakistan as a separate entity and led to many decades of tension and animosity between the two countries, which continues to this day.

The Act did not substantively cut the link between India and Britain as India remained a dominion under the Governor-General, the representative of the Crown. The 1947 Act set up the two independent dominions, known respectively as India and Pakistan. It defined the areas falling within Pakistan, by the division of the provinces of

Bengal, Punjab, and Sind. It also paved the way for the accession of Indian Native States to either of the two new Dominions. A Governor-General was designated for each of the two Dominions, to represent His Majesty for the government. Lord Mountbatten was the Governor-General for both India and Pakistan. He was given the authority to issue any orders to implement the provisions of the Act.

The temporary powers of legislation were given to the Dominions regarding the framing of their new Constitutions. Except for the new laws made by the Dominions, the provisions of the Government of India Act of 1935 would continue to operate: this was a provision included in the 1947 Act so that the normal functions of governance and administration across the two dominions would not be adversely affected. In a gesture of empathy for the fledgling new dominions, the Act provided that no law of the Dominions would be considered void even if it was repugnant to the law of England. Likewise, no law of the United Kingdom would be extended to the Dominions. No further appointment to the civil services under the Crown in India made by the Secretary of State would be henceforth made. Salary and pension of the Judiciary of the Federal and High Courts, the officers of the Indian Civil Service, and the Armed forces were protected. It explicitly stated that His Majesty's Government in the United Kingdom would henceforth have no responsibility with regard to the government of any of the territories which, immediately before that day, were included in British India. The suzerainty of His Majesty was finally ended.

To ensure that the daily administration was not affected there was a provision to designate a person to continue the performance of government or governments and the making of payments, including the management of debt. The Auditor of Indian Home Accounts was also authorised to continue his normal functions. The existing law of British India before this Act shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions until other provisions are made by laws of the Legislature of the Dominions.

The need of India to assert its independence from its colonial masters was demonstrated by two actions: one, it did not submit the draft of the Constitution prepared by the Constituent Assembly to the

British Parliament as was stipulated in the 1947 Act; and two; the Act itself was repealed through Article 395 of the Constitution. When the Constitution was enacted, it explicitly ended the dominion status of India and transformed the country into a free, independent, and proud republic.

28. Draft Constitution of the Republic of India (Socialist Party, 1948)

Even as the Constituent Assembly was drafting its new Constitution, the tensions between the Indian National Congress and the Socialist Party of India were simmering on issues related to the ideological contents of the new constitution. The latter felt that what was being attempted fell far short of the economic and egalitarian idea integral to the freedom movement. It accused Congress of pandering to the interest of the capitalist class and not reflecting the revolutionary mood of the country in the draft constitution under preparation. In such circumstances, it drafted its document, with a foreword by Jayaprakash Narayan.

This draft socialist constitution was about 56 pages long with 27 chapters. Unlike the draft of the Constituent Assembly, the Fundamental Rights section also included economic rights providing for private property and enterprise, subject, however, to the "general interest of the republic and its toiling masses." It also had a section similar to the Directive Principles of State Policy, which, however, was unambiguous in its intention to establish a socialist order. This was clearly against the concept of most of the members of the Constituent Assembly, whose ideas were expressed by Ambedkar when he clearly stated that the intention of the Directive Principles of State Policy was not to establish a socialist economy. In a twist of fate, through the 42nd Constitution Amendment Act passed by the Smt. Indira Gandhi's Government in 1976, the word 'socialist' was unambiguously embedded into the Preamble of the Constitution, making it clear the economic path to be followed by the country was one of the socialist order.

The intention of the draft socialist constitution was expressed in its introductory passage which clearly stated the intent to establish a democratic socialist order, wherein social justice will prevail, and all citizens will lead comfortable, free, and cultured life, and enjoy equality of status and opportunity and liberty of thought, expression, faith, and worship. A single uniform citizenship with common and equal rights, privileges, and responsibilities, was assured to all citizens, though special facilities could be provided to the aboriginal tribes and backward communities. Untouchability was to be abolished in any form. The citizens were guaranteed, freedom of speech and expression, freedom of the press, freedom to assemble peacefully and to form associations and unions etc. The State is secular, and the worship of any religion by any individual shall be considered equal before the law. The separate section on Directive Principles of State Policy stated that the State shall endeavour to promote the welfare, prosperity, and progress of the people by establishing and maintaining democratic socialist order. There would be a general economic plan, relying on the State and cooperative sector with control over the private economic sector. Important minerals, natural resources, etc., would be transferred to public ownership. Private enterprise would be controlled to secure maximum satisfaction for the people. For all these purposes, statutory Planning Commissions and Economic Councils would be established by the legislatures. There was a separate section for international relations. The draft also provided for legislative powers to be divided between the federal and the provincial units by suggesting a federal list, a concurrent list, and a unit (State) list. The relationship between the federal authority and the units was also attempted to be stated in the draft constitution. So also, there was a separate section on the financial management of the country.

As regards the executive, there would be a Rashtrapati at the federal level, with Governors in provinces, and Rajpramukh in Native States. Public representatives were to be elected by single transferable vote through an electoral college. The Prime Minister and the Ministers in the Cabinet are to be appointed by the constitutional head of the government. They would be responsible to the Legislature. As regards the Judiciary, the Supreme Court of India would have jurisdiction to decide finally upon all matters arising out of international law or

treaties including extradition between the Republic and a Foreign State. The High Courts of Units shall have such jurisdiction, original and appellate as are vested in those courts by law. Public Service Commissions were provided for appointment to public services. The section on financial administration provided consolidated revenue funds at the federation and provincial level, with provision for an independent audit.

29. Draft Constitution of India of 1948

As we have seen, the idea of a Constituent Assembly was conceived of in the Cabinet Mission Plan of 1946, though we find echoes of it in the writings of MN Roy in 1934 and the demand of the Indian National Congress in 1935. Viceroy Lord Linlithgow had, in his statement known as the August Offer, proposed to allow Indians to draft their own Constitution. However, it was under the Cabinet Mission Plan that elections were held for the formation of the Constituent Assembly. The members of the Assembly were selected through indirect elections by a single transferable vote with proportional representation. The initial membership was 389 which, however, got reduced to 299 after some of the Muslim members stopped participating and later went over to Pakistan. Dr Sachchidananda Sinha was the first temporary Chairman and later Dr Rajendra Prasad was elected as President with Harendra Coomar Mookerjee as Vice President.

The Assembly met for the first time on 9 December 1946. It was Jawaharlal Nehru, who on 13 December 1946, articulated the hope of the country in his words while introducing the Objective Resolution in the Assembly. "The first task of this Assembly is to free India through a new constitution, to feed the starving people, and to clothe the naked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity. This is certainly a great task."[xliv]

The Constituent Assembly had eight Committees for drafting the Constitution of India, namely, the committees for the Union Constitution, for Union Powers, the States, a Steering Committee, Rules of Procedure, Provincial Constitution, an Advisory Committee on Fundamental rights, all recommendation of which were to be put together by a Drafting Committee. During the course of its

deliberations, momentous events were taking place. A Partition Committee was formed on 7 June 1947, with two representatives from each side and the Viceroy in the chair, to decide about the division thereof. We know how Sir Cyril Radcliffe was appointed to chair two boundary commissions, one for Bengal and the other for Punjab, a task he completed, without mediation from any other country or the United Nations, in the five weeks after his arrival in India in July 1947. As soon as the process of partition was to start it was to be replaced by a Partition Council with a similar structure. Both constitutions were intended to bring about greater independence for the new States. Although under British law, the new constitutions did not have the legal authority to repeal the Act. The repeal was intended to establish them as independent legal systems based only on home-grown legislation. The Act has not been repealed in the United Kingdom, where it still has an effect, although some sections of it have been repealed.

The first draft of the Constitution, sent to the Drafting Committee, was put together by BN Rau in October 1947 and reflected the decisions taken by the Assembly on the reports of the various committees referred to above on their respective subjects. The Drafting Committee, after careful consideration, sent the revised Draft Constitution of India in February 1948 to the President of the Constituent Assembly. This Draft contained 315 articles organised around eighteen Parts and eight Schedules and covered all aspects expected in a constitutional document, including matters related to the legislatures at both the Central and Provincial level, Fundamental Rights and Centre-State relations. Wherever there was any deviation from the draft submitted by Rau, footnotes and explanatory details were given. Simultaneously, the document was made available to provincial governments, central ministries, the courts and the general public for perusal, along with an invitation to provide feedback and suggestions. The suggestions received were reviewed by the drafting Committee and Amendments were prepared.

Finally, on 4 November 1948, Dr Ambedkar formally introduced the Draft in the Assembly. There were mixed reactions. The most opposition was from those members who were unhappy to see that the political and administrative structure was not based on the principles of Panchayati Raj. From 15 November 1948 onwards, the

Assembly took up detailed deliberations article by article. The Draft was finally passed and adopted by the Constituent Assembly on 26 November 1949. Its last session was on 24 January 1950. Two days later on the 26th of January, our Constitution came into existence and we became the Republic of India. It had taken 165 sittings to finally produce the document we refer to as the Constitution of India.

There was criticism that the British rushed through the process and left the sub-continent in haste, resulting in large-scale communal violence and carnage on both sides of the border. The fact was that Britain's new Labour government "deep in wartime debt simply couldn't afford to hold on to its increasingly unstable empire."[xlv] In this 'shameful flight'[xlvi], they were able to proclaim that the demands of freedom for the people of the subcontinent had been graciously acceded to, in keeping with the universal principles of freedom and self-rule. "It is a fact that the British Government was in a hurry to leave India…splitting India made sense to the British as it could not conceive of an all-powerful Indian nation…"[xlvii] That their Indian Empire, the jewel in the Crown, was riven in two, with blood being shed everywhere, did lessen the significance of the moment, and much would be written about the betrayal in later years. But history was made and India was now free to pursue its own 'tryst with destiny'.

The push and pull of the movement towards self-rule, with the rising popular sentiment in India on the one hand, and, on the other, the series of concessions made, or forced to be made, by the British, was a century-long struggle, at least in the nature of the organised resistance and non-cooperation put up by the Indian. The movement gained strength from the 1920s onwards reaching its peak in the thirties and forties. That Jinnah was a spoiler in the game who complicated the long drawn-out processes cannot be denied, especially his concept of the two-nation theory that went against the grain of a united India as was espoused by the Indian leadership. Often it seemed that the British were playing a double game, by supporting the minorities against the wishes of the majority community. The *divide et impera* strategy the British had been employing all these years muddied the water even to the very last stages of the end game.

But it must be mentioned here that were it not for the presence of tall political leaders in India who were willing to play the long game and negotiate at each stage of the struggle, and the wise statesmen of the Crown who knew that the days of Empire were running out, the peaceful transition of power may not have been achieved. In the ninety years after 1857, this give and take yielded many results, starting from conceding Indian membership in the Provincial and Imperial councils and leading to grant of the consent for the creation of the Constituent Assembly. The ebb and tide of history and the changing perceptions of the elite in Britain played a role in speeding up the process of granting independence to India. Simultaneously, the determined role of Gandhiji, Nehru and the other stalwart leaders ensured that there was never a pause in the movement towards self-rule. The game plan was always steadily and slowly moving towards the idea of freedom. India finally did win independence, but the price it had to pay was partition: both its eastern and western wings were clipped away to separately form a theocratic State based on Islamic belief. The contradictions between these two halves themselves became apparent when in 1971 they separated into independent nations.

Today, nothing may remain of the great British Empire in India. But that is not so. Many statutes and legislations that helped govern the country - including the Indian Penal Code, the Indian Evidence Act, the Civil and Criminal Procedure Codes, the Central and State Legislatures - and the instruments of governance encompassing the Westminster form of democracy, the executive, judicial and legislative structures, the grand hierarchy of courts, the financial superstructure of the Reserve Bank and the systems of accounts and audit, all continue unchanged. However, it is in Article 395 of the Constitution that the end of the British Raj is formally enunciated. It states unequivocally: "The Indian Independence Act of 1947, and the Government of India Act of 1935 together with all enactments amending or supplementing the latter Act…..are hereby repealed." A nation, both ancient and new at the same time, was finding its feet and seeking its destiny unfettered by the chains of the past.

It is not proposed to go into the details of the Draft Constitution. In this compendium of gleanings from the Constitution, we are examining the varied aspects of the document as it appears in its final form. Yet, it is necessary to state that the recorded debates of the Constituent Assembly provide a rich and complex record of the nature and how complicated philosophical issues relating to the structure of the new country were being forged. The debates on Nehru's Objectives Resolution, the arguments on the nature of the Centre-State relationship, the concept of accountability to the Parliament, the role of the President, the responsibility of the Cabinet to aid and advise the President, the rule of law, the great Fundamental Rights and the Directive Principles of State Policy, the independence of the Judiciary, the structure of the executive etc., all provide a window into how the scaffoldings of our new Republic were being constructed. If we are to understand the nature of our polity and how our country is governed, then a detailed appreciation of what went into its making is inescapable. We must know our past if we wish to know its present and future.

Notes

i The main source for the historical documents referred to in this chapter is the website accessible at https://www.constitutionofindia.net/historical_constitutions maintained by the Centre for Law and Policy Research supported by the Fredrich Naumann Foundation, South Asia. The other references are as below:

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xviii Chelmsford Collection Vol 2, Formula 7/7/16: Robert Danzig, Ibid: 19-37.

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xxi Coupland, Supra.

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Chapter XIV:

The Writing Of The Constitution Of India

Introduction - The idea of a Constituent Assembly: The concept of the creation of a Constituent Assembly for India is intimately connected with the three famous revolutions of the 17th and 18th centuries, namely the English Revolution of 1648, the American Revolution of 1776, and the French Revolution of 1789. It can be stated that most of the democratic states of Europe which came into existence, thereafter have been created by constituent assemblies and their constitutions have significant contributions originating from these revolutions.

Undoubtedly, a Constituent Assembly cannot function unless it possesses sovereign authority: Nehru himself stated this precept: "Obviously such an Assembly can only function satisfactorily as a sovereign body for the particular object for which it is elected…It means a nation on the move, throwing away the shell of its past political and possible social structure and fashioning for itself a new garment of its own making. It means the masses of a government in action through their elected representatives." [i]

The evolution of the idea of an Indian Constituent Assembly can be traced to the articulations of some Indian statesmen after the First Great War. The British politicians of those days had first enunciated the principle of Self-Determination for all nations, big and small, in the context of the suppression of freedom by German brute force.[ii] Yet, it was the British themselves who rejected it, as can be seen in the Preamble to the Government of India Act of 1919, which proclaimed that "…the time and manner of each advance can be determined only by Parliament, upon whom responsibility lies for the welfare and advancement of the India people."[iii] However, this rejection only strengthened the resolve of nationalists: wrote Gandhi ji in 1922: "Swaraj will not be a free gift of the British Parliament. It will be a declaration of India's full expression…The British Parliament,

when the settlement comes, will ratify the wishes of the people of India as expressed not through the bureaucracy, but through her freely chosen representation."[iv]

It was in 1924, that the Swaraj Party, (the Parliamentary wing of the Indian National Congress) first put forward the demand in the Central Legislative Assembly for the convening of a convention or conference for recommending, with due regard to the protection of the rights and interests of the minorities, a scheme for a Constitution of India. This demand was to be submitted to the British Parliament for enactment as a statute. The demand was further reiterated in 1925 by the Indian Reforms Committee, popularly known as the Muddiman Report. The then Secretary of State for India, Lord Birkenhead, not only rejected the proposal but also threw out an insolent challenge to the Swarajists "to produce a constitution which carries behind it a fair measure of general agreement among the great peoples of India."[v] He took this a step forward when he pressed for the appointment of an all-white Parliamentary Commission, under Sir John Simon, which, however, was largely boycotted by most political parties. It was at this point that MN Roy put forward the idea of an Indian Constituent Assembly to prepare a constitution for a free India.

Lord Birkenhead's challenge was accepted by the Congress Party, and it went on to produce the Nehru Report of 1928, which did receive much support and was rejected by the Muslim leaders of the time. To some Congressmen, the idea of a Constituent Assembly was interpreted merely as an all-party conference. Thus, for several years, it did not capture the attention of the leaders of political parties. It was only in May 1934 that the idea of a Constituent Assembly was included in the resolution passed at the conference held at Ranchi by the Swarajist Home Rule Party, as a counterpoise to the White Paper of the British Government, prepared after the conclusion of the three Round Table Conferences. It stated: "This Conference claims for India, in common with other nations, the right of Self-Determination and is of the opinion that the only method of applying that principle is to convene a Constituent Assembly, representative of all sections of the Indian people, to frame an acceptable constitution."

Immediately after, the All-India Congress Committee constituted a Parliamentary Board to highlight two issues, namely the rejection of the White Paper and the summoning of a Constituent Assembly for framing the new Constitution. The 1935 Government of India Act was rejected by the

political parties as it gave no place to the aspirations of the Indian people regarding the new Constitution. This was voiced through the resolution of the Indian National Congress at Faizpur on 28 December 1936 which said: "The Congress reiterates its entire rejection of the Government of India Act 1935, and the Constitution that has been imposed on India against the declared will of the people of the country… Indian people. The people can only recognise a constitutional structure that has been framed by them and which is based on the independence of India as a nation, which allows them full scope for development according to their needs and desires…The Congress stands for a genuine Democratic State in India where political power has been transferred to the people as a whole and the Government is under their effective control. Such a State can only come into existence through a Constituent Assembly, elected by adult suffrage and having the power to determine finally the constitution of the country."

Thereafter, there was a comparative lull in the demand for the Constituent Assembly as the political leaders were more involved with the elections and the needs of day-to-day administration in the provinces. The British Government too felt that the Indian parties would ultimately agree to a dominion constitution under the Statute of Westminster of 1931 which set the basis of the relationship between the Commonwealth realms and the Crown. It removed nearly all of the British Parliament's authority to legislate for the Dominions and had the effect of making the Dominions largely sovereign nations in their own right.

But this lull was dramatically altered with the entry of Europe into the Second World War and India's entry into it without the consent of the people or the elected representatives. Immediately the Congress withdrew all support for the British Government; all the ministries at the level of the provinces resigned. The resolutions of the All-India Congress Committee of September and November 1939 stated this position clearly: "The Committee wish to declare again that recognition of India's independence and the right of her people to frame their constitution through a Constituent Assembly is essential to remove the taint of Imperialism from Britain's policy and to enable the Congress to consider further cooperation. They hold that the Constituent Assembly is the only democratic method of determining the constitution of a free country, and no one who believes in democracy and freedom can possibly take exception to it."

The August Offer of the then Viceroy of India, Lord Linlithgow was an attempt to pacify the Indians, even as Britain was facing the challenges of Nazi Germany. It contained the provisions for the formation of a Constituent Assembly after the Second World War was over. The August Offer was rejected by the Indians as the political atmosphere became charged with the demands for independence and the formation of the Constituent Assembly. The Cripps Proposal of 1942 was yet another proposal of the British Government to win the support and cooperation of the Indians. It offered the creation of an Indian Union with dominion status and the promise of the creation of a Constituent Assembly. It failed and led to the Quit India Movement initiated by Gandhiji.

It was only after the end of the Second World War and with the Labour Party under Clement Atlee as Prime Minister coming to power in Britain, that things started moving. A Cabinet Mission was constituted which went to India and later submitted its proposals, conceding the demand for the formation of a Constituent Assembly. The Cabinet Mission consisted of Lord Pethick-Lawrence (Secretary of State for India), Sir Stafford Cripps (President of the Board of Trade), and AV Alexander (First Lord of the Admiralty). Their proposals, known as the Cabinet Mission Plan, broadly recommended that the Constitution of India should take the form of a Union of India, both British and [Native] States, which should deal with foreign affairs, defence, and communications, the rest of the subjects vesting in the Provinces. The Union Executive and Legislature should have representatives from all constituents. The provisions of the Constitution can be reviewed after a period of ten years. The Cabinet Mission Plan also recommended the formation of the Constituent Assembly. It would be to mention the broad details of the Cabinet Mission Plan as it has great bearing in the work of the framing of the Constitution. Its main purpose was to lay down the future steps leading to the elections to the Constituent Assembly and its preliminary functioning. Its main principles were: a) to allot to each province a total number of seats in proportion to its population roughly in the ratio of one to a million, as the nearest substitute for representation by adult suffrage; b) to divide the provincial allocation of seats between the main communities in each province in proportion to their respective population; c) to provide that the representation allotted to each community in a province shall be elected by the members of the

community in its Legislative Assembly; and d) the method of selection in the case of representatives of Princely States was to be determined by consultation.

The core of the Plan was Point 15 which proposed the basic structure of the Constitution of India. It consists of 6 sub-points all relating to the federal structure of India. While the Plan rejected Pakistan, it proposed a unique federal set-up that it hoped would be acceptable to the Congress Party and the Muslim League: it introduced the concept of grouping/ sections; provinces and Princely States were free to form groups under the Union, having a legislature and executive, enjoying significant autonomy. It proposed a three-tier administrative structure with the Federal Union at the top tier, individual provinces at the bottom tier, and groups of provinces as the middle tier. The 3 groups proposed, called Group A, B, and C, were respectively for Northeast India, Eastern India, and the remaining portions of India.

"The Plan was initially accepted by the Muslim League and the Congress Party. However, the Congress Party soon rejected the 'grouping' part of the plan; specifically, it was concerned about, and opposed, the grouping of provinces on the basis of religion. The Muslim League was not open to changing any part of the Plan and so any consensus between the Congress and the Muslim League was doomed to failure. Further attempts by the Cabinet Mission at reconciliation failed. Nehru had not agreed to the suggestion of the Cripps plan of 1942 that the Constituent Assembly be comprised of 200 members and preferred a larger group of 300 or even 400 members. He knew that while the actual writing would be by a committee constituted by the Assembly, the presence of a large body would necessarily mean more ideas thrown into the common pool and extreme views are not likely to prevail. Several other principle issues were also discussed at this stage even before the Assembly came into existence. Would the discussion permit dissent to be expressed? Should the proceedings of the Assembly be on camera? What would be the role of the Indian Native States in the discussions? These preliminary questions also helped the British government to make announcements knowing what the likely repercussions would be.

The formation of the Constituent Assembly: In July 1946, elections took place according to the above formula. The members of the three communal categories in the legislatures, namely Muslim, Sikh, and Hindus (which

last category included all other communities), would elect separately, according to their percentage of the population of the Provinces and their proportion to the provincial delegation. When the elections to the provincial assemblies took place in July 1946, out of the total of 1585 seats, the Congress won 923 seats. As a result, out of the 212 general seats (for all communities except Muslims and Sikhs), the Congress won 202. The Congress had also fielded their candidates in 4 Muslim seats and 1 Sikh seat, which they won, thus raising their total to 208. The Muslim League won 7 and the remaining 16 seats went to small groups such as Sikhs, Unionists, Communists, Scheduled Caste Federation, and Independents. After partition, and the departure of the Muslims from that part of the sub-continent, the majority of the Congress rose to 82%. The Native States nominated their 93 members in the non-elected segment of the Assembly, after negotiations on how their seats were to be divided amongst the States.

Nonetheless, the proceedings of the Constituent Assembly began. On 9 December 1946, the Constituent Assembly was formally convened, and the first session continued till 23rd December. Dr Rajendra Prasad was unanimously elected as President and its deliberations were momentous and transformative. In 1946 an interim government was set up, with Jawaharlal Nehru as the Prime Minister. He held out the white flag to the Muslim League assuring them that "we invite even those who differ from us to enter the Constituent Assembly as equals and partners with us with no binding commitments."[vi] The Muslim League refused to be part of both; it initiated 'Direct Action Day' triggering large-scale violence across the country. The Plan, also referred to as the 'State Paper', had a significant influence over the deliberations of the Constituent Assembly during its initial stages, particularly the debates around Nehru's Objective Resolution and federalism. The Assembly acknowledged that it was a creation of the Plan; it wanted to, as far as possible, adhere to the Plan's proposals as means of maintaining its legal legitimacy and to keep the door open for the Muslim League to join its proceedings. At the same time, the Assembly also asserted that its legitimacy was derived from the people of India and not the Plan."[vii]

On 3 June 1947, Lord Mountbatten announced his plan which included, despite all efforts to deny it, the partition of the country. It also announced the day of Independence as 15 August 1947. With the attainment of Independence, the Constituent Assembly was relieved of all limitations

on its powers and had full freedom to frame the Constitution of India according to the will and wishes of the people. Lord Mountbatten was appointed as the first Governor-General of independent India and Pandit Jawaharlal Nehru, its first Prime Minister. A year later, with the departure of Lord Mountbatten, C Rajagopalchari. took over as Governor-General. The Constituent Assembly completed its work and formally adopted the Constitution on 26 November 1949. From Dominion status, India became an Independent Republic on 26 January 1950.

The Framing of India's Constitution: A study, is the authoritative work that describes the actual writing of the constitution.[viii] It describes the great task of framing free India's constitution in detail. The initial challenges involved the reluctance and later boycott of the Assembly by the Muslim League, the burning issue of partition of the country, the relationship of the new Republic with the Princely States, as well as India's membership in the Commonwealth. The process began with the Viceroy inviting the members to attend the first meeting of the Assembly at 11 am on 9 December 1946 in the Constituent Assembly Chamber in the Council House, New Delhi. As expected, the members of the Muslim League did not attend. It was in such circumstances that Nehru moved the Objectives Resolution on 13 December 1946. The continued absence of the Muslim League members caused much consternation to the government in power who were unable to decide on the course of action. In such circumstances, the British Government decided to act with courage. On 20 February 1947, the British Prime Minister announced that British power in India would terminate on a date not later than June 1948. Transfer of power would be made to an Indian Government resting on the sure foundations of the support of the people and capable of maintaining peace and administering India with justice and efficiency. Nehru welcomed this declaration and urged the Constituent Assembly to complete its task with speed and despatch.

The work begins: BN Rau, the Constitutional Adviser drew up a questionnaire, bearing on the salient features of the proposed Constitution which would provide a basis for the guidance of the members. One last ditch effort was made in March 1947 to invite the Muslim League's representatives to enter into the discussions in the Assembly. On 30 April 1947, based on an independent memorandum prepared by BN Rau, a resolution was passed by the Constituent Assembly to report on

the main principles of the Union Constitution. On the same day, it was decided to establish a separate committee with twenty-one members to whom a questionnaire was sent to report on the main principles of a provincial constitution.

As we have seen, in March 1947, Lord Mountbatten joined as the new Viceroy. The renewed large-scale communal riots convinced him not to delay the transfer of power. The Constituent Assembly was also moving to the idea that the country would have to be partitioned which may involve the partition of some provinces such as Bengal and Punjab. Mountbatten made it clear that Britain would not wait until the completion of the work of the Constituent Assembly and announced the 15th of August as the date of the transfer of power. Muslim League too agreed to the date of transfer while opposing the partition of Bengal and Punjab and authorised Jinnah to take all necessary steps to accept the plan as a compromise. The Independence of India Act of 1947 set the basic format for the new countries now being born.

With this announcement, the Constituent Assembly became a truly sovereign body free from all external control. At last, after twenty-eight months of sustained and exacting labour, uninterrupted by even the great tragedy of Gandhi's assassination (on 30 January 1948), the final session of the Constituent Assembly was able to declare on behalf of the people of India that ''we do hereby adopt, enact and give to ourselves this Constitution". It was the achievement in full measure of an aspiration that had undergone radical alterations in the interval between the two wars.[ix]

The Assembly and its Committees: This chapter looks at the processes involved in the writing of the Constitution of India. As we have seen, the elections to the Constituent Assembly were completed by June 1946 (except for Punjab). The Congress was anxious to frame the Constitution as early as possible, even as Jinnah attempted unsuccessfully to postpone the meeting of the Constituent Assembly. The task became easier when the Muslim League withdrew support for the Cabinet Mission plan and left Congress to carry forward the task of writing the Constitution for India. By July 1946, it had set up an Experts Committee consisting of Nehru as Chairman and AM Asaf, KM Munshi, N Gopalaswamy Ayyangar, KT Shah, DR Gadgil, Humayun Kabir, and K Santhanam as members. "This committee in its two meetings in July and August, drew up the procedure to be followed. The Assembly would, according to the committee, first elect

a temporary or acting Chairman, preferably by agreement between the two parties, from amongst its members. A resolution would then be adopted prescribing the procedure for the election of a permanent Chairman. The Assembly would also elect one or more Vice-Chairmen. The next item of business would be to form committees — a Steering Committee of fifteen, with a quorum of five members, a Staff and Finance Committee, consisting of the Chairman, the Vice-Chairman, the Secretary-General, and nine other members, and a Procedure Committee. A Secretary-General was also to be elected. It was contemplated that the Assembly would then proceed to elect a Fundamental Rights Committee with a membership of forty-five, all of whom need not necessarily be members of the Assembly. This committee was to consist of three Sections, one dealing with Fundamental Rights, the second with the protection of minorities, and the third sub-committee with the special interests of tribal and excluded areas. The Assembly was then to address itself to the task of defining the objectives; these would be in the form of an appropriate resolution, a draft of which was also prepared. The Experts Committee proposed that the next task of the Assembly would be to indicate the scope covered by the subjects to be reserved for the Union in terms of the Cabinet Mission's plan of 16 May 1946. After this, the Assembly would divide itself into Sections for the purpose of framing the Provincial Constitution."[x]

The first meeting was held on 9 December 1946 and ended on 23rd during which time Dr. Rajendra Prasad was elected Chairman of the Assembly, which post was later re-designated as President. The Objectives Resolution was moved by Nehru on 13th December, though its consideration was moved to a later date to enable wider discussion. The Committee on the Rules of Procedure was constituted on 11th December, and it submitted its report on 21st December, which was adopted by the Assembly on 23rd. These rules enabled the Provinces and the Native States to formulate and express their views on matters related to the constitution. A negotiating committee was set up on 21st December to discuss with the representatives of the Princely States the question of their participation in the Assembly discussions. The three Sections mentioned above could determine their procedure.

The Steering Committee, chaired by the President, whose duty it was to arrange the business of the Assembly, was elected on 21st January. The Objectives Resolution of Nehru was adopted on 23 January 1947. The members of the three advisory committees (on Fundamental Rights, Minorities and Scheduled Tribes & Excluded Areas) were elected on 21st

January. Another Committee, called the Order of Business Committee, consisting of Gopalaswami Ayyangar, KM Munshi and Biswanath Das was constituted to recommend the order of further business in the Assembly and was directed to submit its report before the Assembly met again. Yet another committee, known as the Union Powers Committee, was constituted on the subjects to be assigned to the Union at the centre as it was felt that an understanding of these subjects was necessary for framing the Union and Provincial constitutions.

The Constituent Assembly next met on 28 April 1947 and remained in session for five days up to 2nd May. In this period, after having reached an understanding of the Native States, representatives of these States took part in the proceedings of the Assembly. Some discussions were also held on the recommendations of the Committees on Fundamental Rights, though there was no finalisation on the matter. Gopalaswamy Ayyangar presented the report of the Union Powers Committee but cautioned that the decision in the same should be postponed in the eventuality of the partition of the country, as it would then be necessary to deviate from the conformity of the Cabinet Mission's Plan. The Order of Business Committee presented its report on 30 April 1947. It noted the British Government's declaration that power would be transferred before June 1948 and that therefore, the work of completion of the framing of the Constitution should be completed by the end of October 1947. The Committee, therefore, suggested that the task of incorporation of the reports of the various committees should be held in September to finalise the draft. Accordingly, a resolution was passed by the Assembly on 30th April authorising the President to form two committees, a Union Constitution Committee and a Provincial Constitution Committee which would submit the report before the next session.

The role of Rau: BN Rau's intellectual imprint can be seen in every document that the Constituent Assembly produced. One of his first tasks was to formulate a questionnaire on the principles to be followed by these two committees. The questionnaire was divided into five parts, namely a) Head of the Union, b) Executive, c) Legislature, d) Judiciary, and e) Amendments to the Constitution, with several questions appearing on the relevant subject matter in each part. Wherever necessary brief explanatory notes were inserted under each question. The questionnaire dealt only with the Constitution of the Centre; but most of the questions naturally applied to the provincial sphere also. Members of the Legislatures were given three weeks for their replies. It was considered unnecessary at that

stage to frame any questions regarding Group Constitutions until the Sections referred to in the Cabinet Mission's plan had decided to set up such Constitutions.

Few replies were received by the end of May 1947. Hence, BN Rau prepared and circulated on 2nd June, a memorandum embodying his ideas on the main principles which should guide the members of the committee regarding the Union Constitution and the Provincial Constitution. On 3rd June, the British Government announced that the country would be partitioned, and a new Dominion of Pakistan would be created. This announcement had a deep impact on the members of the Assembly. This meant that the Cabinet Mission's suggestion of sectioning the different areas of the country was now no longer feasible. Both the committees of the Union Constitution and the Provincial Constitution unanimously decided that India would be a federation with a strong Central Government and Legislature, that there would be three legislative lists on the lines of the Government of India Act, 1935; and that residuary powers would vest in the Centre and not in the Provinces. The position of Indian States continued to be much the same as before. It was contemplated that they would accede on the subjects of defence, external affairs, and communications and that any further cession of jurisdiction to the Union would be like a voluntary act. The failure of the Cabinet Mission Plan freed the Constituent Assembly from all handicaps and curbs and enabled it to devise a constitutional structure according to its own choice and needs. The preservation of the unity of India became one of the foremost requirements to be embodied in the Constitution.

The next session of the Assembly was in the second half of July 1947; the Assembly would consider the three reports of the Union Powers Committee, the Union Constitution Committee, and the Provincial Constitution Committee. It was suggested that once these were considered, the Drafting Committee could begin its work. It was also recommended that a committee should peruse the final draft before submission to the full Assembly.

Freedom at midnight: The next meeting of the Assembly was held on 14 August 1947 and terminated on the 30th of the same month. At the stroke of midnight, the first act of the Assembly was to redeem the Nation's pledge for a tryst with destiny: it was the moment of India's attainment of independence. Each of the members took a pledge dedicating themselves anew to the service of the nation in this fashion: "At this solemn moment,

when the people of India, through suffering and sacrifice have secured freedom, I . … a member of the Constituent Assembly of India, do dedicate myself in all humility to the service of India and her people to the end that this ancient land attain her rightful and honoured place in the world and make her full and willing contribution to the promotion of world peace and the welfare of mankind".[xi]

Committees in session: In the meetings convened in the rest of the month, discussions were held on the report of the Union Powers Committee, on the issue of minorities and the rights to be guaranteed to them, as also the report on the Advisory Committee on the Directive Principles Of State Policy. Some matters pertaining to Fundamental Rights were referred back to the Committee for more deliberations. Of critical importance was the report of the Committee on the functions of the Constituent Assembly under the Indian Independence Act of 1947. This committee, appointed by the President, consisted of G. V. Mavlankar, Hussain Imam, Purushottamdas Tandon, B. R. Ambedkar, Alladi Krishnaswami Ayyar, N. Gopalaswami Ayyangar, and B. L. Mitter. Its functions were to report on the position of the Constituent Assembly under the Independence Act. The major questions which the committee considered related to the changes in procedure necessitated by the fact that as of 15th August, the Constituent Assembly would also function as the Legislature of the Indian Dominion. On 29th August, the Assembly also appointed a Drafting Committee consisting of Alladi Krishnaswami Ayyar, N. Gopalaswami Ayyangar, B. R. Ambedkar, K. M. Munshi, Muhammad Saadulla, B. L. Mitter, and D. P. Khaitan. Later, N. Madhava Rau was appointed in B. L. Mitter's place. Another vacancy caused by the death of D. P. Khaitan was filled by T. T. Krishnamachari. The committee's task was "to scrutinize the draft of the text of the Constitution of India prepared by the Constitutional Advisor giving effect to the decisions taken already in the Assembly and including all matters which are ancillary thereto or which have to be provided in such a Constitution, and to submit to the Assembly for consideration the text of the Draft Constitution as revised by the Committee."

Between 30th August and 4 November 1947, the Secretariat of the Constituent Assembly prepared a draft that was considered by the Drafting Committee clause-by-clause until a revised draft was ready by February 1948. Meanwhile, several committees were considering other important issues, such as financial issues, problems of backward areas and tribes of Assam, and the changes to be affected in the systems of

the Chief Commissioner's provinces to bring them in line with the new requirements, etc. The draft of February 1948 was widely circulated to all the Ministries, the Provincial Governments and legislatures, the Federal Court, High Courts, etc. Later a special committee, comprising mostly members of the Union Powers Committee, and the Union and Provincial Constitution Committees, to secure the widest possible concurrence on certain issues on which the Constituent Assembly had not had time to deliberate. This committee met on 10th and 11th April 1948 and discussed matters including important issues such as the appointment of Governors. Eventually, it was decided that the draft Constitution prepared in February 1948 would be presented as the official version of the Drafting Committee: all other proposals and recommendations would be placed before the Assembly as motions for amendments. Thus, starting from 15 November 1948 and lasting up to 17 October 1949, (with three breaks) the clause-by-clause consideration of the Draft Constitution was taken up by the Constituent Assembly.

On the political front, the merger of the Native States through instruments of accession had begun. Soon it became evident, that with the persuasion of Sardar Patel and VP Menon, the States were to become integral parts of the new Union. The Constitution and the Fundamental Rights enshrined therein would also become applicable to the Native States. The same type of democratic institutions being set up for the Union would also apply to the Provinces as well. Within the Constituent Assembly, a decision was taken that there would be no special privileges or reservations for religious minorities. The work of Constitution writing had to be enlarged to provide for all these radical developments. In the Drafting Committee's report of 11 May 1949, it was recommended that special safeguards would be required only for backward and depressed sections of society such as the Scheduled Castes and Tribes. This epoch-making decision was adopted by the Constituent Assembly on 25 May 1949.

Federal relations: Another very significant issue that engaged the attention of the Assembly was the question of Centre-State relations. In July 1949, the Drafting Committee held a conference with the Premiers of the Provinces and some Indian States and representatives of Central Ministries to discuss various matters, especially those governing the administrative and financial relationship between the new Union Centre and the States. The discussions covered a wide range; they included among other things financial relationships, the legislative lists, the exercise of taxing powers,

the emergency provisions, and the composition of Legislative Councils in States. Items which claimed Special attention were the exercise of the powers of States to levy sales taxes, and the liability of the property of the Union to State taxes and of State property to taxation by the Union. "Yet another subject that claimed a considerable amount of attention and evoked a great deal of feeling was the language issue. This issue was kept out of formal discussion in the Assembly until the very end, but the indications were that it might threaten to divide the whole Congress party sharply on regional lines. Fortunately, it was found possible to evolve a formula which proved acceptable to all — even if the acceptance was in some respects half-hearted."[xii]

After the adoption of all the many provisions that emerged during discussions, the Assembly adjourned for about four weeks to enable the Drafting Committee to re-order the text of the draft constitution and incorporate all the amendments. The final version contained 395 articles and eight schedules and was submitted to the President of the Constituent Assembly on 3 November 1949. The entire document was considered by the Assembly on the 14th and 15th of November and put to vote on the 16th. Discussions on the motion for passing the new Constitution were concluded on 26th November and were adopted with the enthusiastic support of all members.

The Preamble: In the next section of this chapter, we shall consider some of the major features of the Constitution as they emerged from the discussions in the Constituent Assembly. As a separate chapter on the Preamble finds its place within the pages of this book, it is not being referred to here. Suffice it to say that in BN Rau's original draft of 30 May 1947, the Preamble read as follows: "We, the people of India, seeking to promote the common good, do hereby, through our chosen representatives, enact adopt and give to ourselves this Constitution." The Union Constitution Committee accepted this Preamble, with the understanding that the final version would be based on the Objectives Resolution that Nehru had presented at the initiation of discussions in the Constituent Assembly. This version continued during its deliberations and was substantively modified only after its deliberations in February 1948. The Drafting Committee felt that the Preamble should be restricted to defining the essential features of the new State and its basic socio-political objectives and that the other matters dealt with in the resolution could be more appropriately provided for in the substantive parts of the Constitution. Accordingly, the Preamble,

as formulated by the committee and included in its February 1948 Draft of the Constitution, read as follows: B. Shiva Rao (ed.), The Framing of Indian Constitution, (Government of India, 1966 Vol. 3), 9.[xiii] The addition of the term 'fraternity' was new as, in the view of members of the Drafting Committee, the need for fraternal concord and goodwill in India was never greater than at that time and was hence required to be mentioned in the Preamble. Similarly, there was much discussion on the use of the word 'Republic' and its possible impact on India's relationship with other remaining countries in the Commonwealth. It stands to the credit of India in the international comity of nations that the governments of the various countries in the Commonwealth issued a declaration at the end of April 1949, announcing their acceptance and recognition of India's continuing membership of the Commonwealth even after the adoption of her new republican constitution. A more detailed discussion of the Preamble to the Constitution is available in this book.

The Union and its Territory: We may begin with the task that the Assembly undertook to provide an integrated constitutional structure for the Union and its territory. During the Raj, and as envisaged under the Government of India Act, of 1935, the territories comprised in 'India' fell into three broad categories. Three-fifths of the sub-continent consisted of Governors' Provinces and Chief Commissioners' Provinces. These areas formed part of His Majesty's dominions and were subject to the legislative and executive jurisdiction of the Central and Provincial Legislatures and Governments in India. The remaining two-fifths painted yellow on the Indian map, consisted of the Native Indian States. There were over five hundred of these States, ruled by princes and chiefs, exercising governmental powers in varying degrees. Big or small, they were all subject to the paramountcy of the British Government, exercised through the Crown Representative who was the Governor-General. In addition, there were also some tribal areas, predominantly in the Northeast, the Northwest Frontier Province, and Baluchistan. The 1935 Act depicted them as governed by the British Government arising out of powers accrued through "treaty, grant, usage, sufferance or otherwise." In actuality, the extent of royal authority depended on the area concerned and, on the arrangements, entered into with the respective tribal communities. The Cabinet Mission statement of May 1946 had envisaged a scheme for the administration of the tribal areas to be drawn up by the Advisory Committee on Fundamental Rights, Minorities, and Tribal and Excluded Areas.

Indeed, the Mission statement had envisaged a Union of India including British India and the Indian Native States, with the Union exercising only functions related to defence, external affairs, and communications. The decision of the accession of each of the Native States was to be voluntary and no powers were to be exercised by the Union in any of these States, except where such jurisdiction was ceded. The recommendation was that no parts of the Constitution would be forced on those not willing to accept them. This was particularly painful for the nationalist leaders of the times as they had conceived of an India with cohesive unity and integrity and a strong centre. They had, nevertheless, accepted this in the hope that the Muslim League would cooperate in keeping the country united. Accordingly, the memorandum of BN Rau, the Constitutional Advisor on the subject drawn up on 30 May 1946 reflected the following position: "The Union hereby established shall be a sovereign independent State known as the Union of India and shall embrace all the territories included in India under the Government of India Act of 1935: but save as otherwise provided by or under treaty or agreement, only the territories included for the time being in Schedule I shall be subject to the jurisdiction of the Union." Schedule I as drafted by him showed all the provinces of the Governors and the Chief Commissioners. As regards the Indian Native States, they were clubbed under the description 'acceding States' though there was no certainty about their inclination to accede. In effect, there were four categories of territories: the 'willing' parts of British India, the parts of British India whose willingness could not be taken for granted, the Indian States, and the tribal areas. When this matter came up for discussion in the Union Constitution Committee in June 1947, there were the three following questions to be considered: was India to be described as a Union or a federation; should it be called India or by any other name; what territories are to be included in it?

By July 1947, the Committee had taken the view that the new country be referred to as a federation of States known as India including territories mentioned in Schedule I, which were the Governors' provinces, the Chief Commissioners' provinces, and the Indian Native States, the last subject to their instruments of accession or any other method of ratification. Meanwhile, the Indian Independence Act of 1947, made it clear that India would comprise of all territories included in British India before 15 August 1947. The areas exempted were West Punjab, East Bengal, Sind, North-West Frontier Province, the district of Sylhet in Assam, and British Baluchistan,

which would all form part of Pakistan. There was some discussion on the nature of partition: whether two new States would be created or whether one part of the Unified State would be broken off, leaving the Original State intact as a political entity. When the matter was discussed in the United Nations, the legal view was that India retained its character and its treaty obligations and that it is Pakistan that would have to submit an application for admittance to the United Nations.[xiv]

BN Rau's draft of October 1947 stated as follows:

1. As from the date of commencement of this Constitution, 'India' shall be a Federation.
2. The territories of the Federation shall consist of—
    a) the Provinces, hereinafter called Governors' Provinces,
    b) the Provinces, hereinafter called Chief Commissioners' Provinces, and
    c) the Indian States for the time being included in the First Schedule to this Constitution, hereinafter called the Federated States.
3. On and after such date as may be appointed on this behalf by Act of the Federal Parliament, each unit of the Federation shall be called a 'State'. The First Schedule listed the States in three Parts, comprising respectively
    a) the Governors' Provinces, the Chief Commissioners' Provinces of Delhi,
    b) Ajmer-Merwara (including Panth Piploda) and Coorg, and
    c) the Indian States which were within the Dominion of India immediately before the commencement of the Constitution.

For the knowledge of the reader, it is added here that the Constitution (Seventh Amendment) Act, 1956, removed all these distinctions and simply stated that the territory of India would comprise the territories of the States, the Union Territories, and such other territories as may be acquired.

Meanwhile, the Indian Native States came around to the principle that sovereign powers were vested in the people of their States and not in their rulers. All of them agreed that their constitutions should be framed by the Constituent Assembly itself as an integral part of the Indian Constitution and their position as constituent units should be the same as that of the rest of the country. "As Vallabhbhai Patel told the Constituent Assembly on 12 October 1949, unlike the scheme of 1935, the new Constitution was not an alliance between democracies and dynasties, but a real union of the Indian people, built on the basic concept of the sovereignty of the people."[xv]

Significantly, the Drafting Committee decided to use the term 'Union' instead of 'Federation'. The suggestions made by some members to re-naming the country, such as the Union of India, 'Bharat', 'Bharatvarsha', 'Hindustan' etc were not agreed to. It was Ambedkar who explained the significance of the usage as it is seen now: "The Drafting Committee wanted to make it clear that though India was to be a federation, the federation was not the result of an agreement by the States to join in a federation, and that the federation not being the result of an agreement, no State, has the right to secede from it. The Federation is a Union because it is indestructible. Though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people a single people living under a single imperium derived from a single source."[xvi] The matter was settled finally on 17 September 1949 when Ambedkar suggested the revised clause: "India, that is Bharat, shall be a Union of States."

As to the admission or establishment of new States into the Union, BN Rau's memorandum included a clause for allowing Parliament to admit such new areas on such terms and conditions as it thinks fit.

Citizenship: The concept of Indian citizenship arose only after the adoption of the Constitution on 26 November 1949. Earlier, the legal position was that as British India was under the Crown, its people were British subjects, whose nationality was governed by the British Nationality and Status of Aliens Act of 1914 as passed by the Parliament of the United Kingdom and amended from time to time. The basic principle was that any person born within British territory became a British subject. The Indian Native States were not considered British territory, but the people of these States enjoyed only the status of British-protected persons. Thus, the Immigration into India Act of 1924, as well as its repealing act, the Reciprocity Act of 1943,

allowed the entry and residence of British subjects domiciled in other British possessions. the 1914 Act referred to above denoted a common British nationality for all subjects of the Crown throughout the Empire and the Commonwealth.

Unfortunately, after the Government of India Act of 1935, the Indian Legislature could make no changes in the law affecting nationality. Thus, citizenship was one of the first subjects that was considered by the Constituent Assembly, and it took almost two years to reach any finality. The sub-committee on Fundamental Rights too had much to say on this matter, especially as to whether the States could have any say in this matter through their own Legislature. Alladi Krishnaswami Ayyar clinched the issue by insisting that there could only be one citizenship for India as a whole. One important issue discussed was whether citizenship should be based on blood and race, regardless of the place of birth (as in many European countries) or whether it should be based on grounds of birth (as in the American system). The provision was modified by C Rajagopalachari and his version read: "Every person born in the Union or naturalised in the Union according to its laws and subject to the jurisdiction thereof, shall be a citizen of the Union". Some members argued that this was too broad a definition and may cover people who have foreign parents who would enjoy all the benefits of Indian citizenship, while also retaining the citizenship of the country of their parents. It was then decided to refer the matter to a small committee of jurists, comprising members such as S Varadachari (former judge of the Federal Court) as Chairman, Bakshi Tek Chand, BL Mitter, Alladi Krishnaswami Ayyar, KN Katju, KM Munshi and BR Ambedkar. The recommendation of this committee was considered by the Assembly but could not be finalised as some members felt that its definition was not comprehensive enough.

In such circumstances, the Constitutional Advisor BN Rau prepared a new draft with three clauses: Clause 1 providing for citizenship as on the date of commencement of the Constitution; Clause 2 providing for citizenship for persons born after the commencement of the Constitution; and Clause 3 for matters related to the acquisition and termination of citizenship. The decision regarding the partition of India as a result of the declaration made by the British Government on 3 June 1947 necessitated a relook at the citizenship clause. Many suggestions were received from individuals too which were considered during discussions. It was clear that there may be many cases of marriages solemnised in Pakistan but where the family

moves to India for resettlement in India after partition, as also those from India who move to Pakistan after partition. The influx of refugees from West Pakistan into Assam was also a matter of concern for the Assembly.

The final form in which citizenship was dealt with in the Constitution can be seen in Articles 5 to 11. Article 5 deals with citizenship at the commencement of the Constitution conferring the same to every person who has domicile in the territory of India, or who was born in the territory of India or who is ordinarily resident thereof for not less than five years at the commencement of the Constitution. Article 6 grants rights of citizenship to persons who have migrated to India from Pakistan. Article 7 deals with migrants to Pakistan who return for resettlement or permanent return. Article 8 refers to persons of Indian origin residing outside India but who have been registered as Indian by diplomatic or consular approval. Article 9 debars citizenship to Indians who have accepted citizenship in foreign countries. Article 10 assures the continuance of the rights of citizenship. Article 11 enables the Parliament to regulate the right of citizenship by law.

By way of information, it is necessary to add that through an Act of Parliament, the Citizenship Act of 1955, provisions were introduced for the acquisition and termination of Indian citizenship under certain circumstances. We are aware of the various controversies that the Citizenship (Amendment) Act, of 2003 has generated in the country along with the National Register of Citizenship. Further, the Amendment Act of 2019 seeking to make illegal migrants from other countries eligible for citizenship (with notable exceptions), has also generated heated discussions.

Fundamental Rights: A separate chapter on Fundamental Rights is available in this book and hence it is being dealt with here only briefly. The inclusion of Fundamental Rights in the Indian Constitution had long been a matter of contention between the nationalist leaders and the British Raj. The 1833 Charter Act enjoined the British East India Company that no native of British India shall be disabled from holding any place, office, or employment under the Company. The 1858 Proclamation of Queen Victoria declared equal and impartial protection under the law for all her subjects. In a notable concession, Section 298 (1) of the Government of India Act, 1935 mentioned that no subject of His Majesty could be debarred from holding any office under the Crown on grounds of religion, place of birth,

descent, colour, etc. Nevertheless, in Pre-Independence India there was no justiciable charter of Fundamental Rights. BN Rau summarised these developments in his report on Human Rights of December 1947. With time, the demand from the Indians became more insistent, as can be seen in the 1895 Constitution of India Bill (pushed on by Annie Besant), initiated in the British Parliament, but never passed, which sought to guarantee freedom of expression, inviolability of one's house, right to property, equality before the law and regarding admission to public offices, right to present claims, petitions and complaints and the right to personal liberty. The special session of the Indian National Congress in Bombay in August 1918 demanded that there should be a section in the Government of India Act 1919, which would declare Fundamental Rights for the people of India. The inclusion of such rights in the Constitution of the Irish Free State of 1921 also had an impact on Indian leaders. The Commonwealth of India Bill finalised in 1925 had a specific provision for the declaration of rights, almost identical to the similar provisions of the Irish Constitution. The 1927 resolution passed by the Congress at Madras emphasised that the basis of the future Constitution of India must be a strong set of Fundamental Rights. So too did the Nehru Committee Report of 1928 which emphasised that Fundamental Rights should be such as can never be withdrawn under any circumstances.

On the contrary, the infamous Simon Commission did not support the guaranteeing of Fundamental Rights on the ground that an abstract declaration of such rights had no meaning without the will and the means to enforce them. The subject came up in the three Round Table Conferences, especially the second one, where Gandhiji had circulated a memorandum demanding that the new Constitution should "include a guarantee to the communities concerned of the protection of their cultures, languages, scripts, education, profession, and practice of religion and religious endowments" and protect personal laws and that the protection of political and other rights of minority communities should be the concern of the Federal Government.[xvii] Yet, the Joint Select Committee of the British Parliament on the Government of India Bill of 1935, did not again favour the matter of a constitutional guarantee of Fundamental Rights for Indians. The Committee resorted to the argument moved by the Indian Native States that they were opposed to the application of Fundamental Rights in their areas. However, they did concede that certain rights may be included such as there not being any disqualification for

jobs based on gender, no deprivation of property, etc. These were indeed included in the Government of India Act of 1935. The Sapru Committee of 1945 also raised the issue of Fundamental Rights in its report. It is only in the Cabinet Mission of 1946 that it was recognised for the first time by the British Government that the new Constitution should include a written guarantee of Fundamental Rights. It also recommended the setting up of an advisory committee within the Constituent Assembly. Thus, when the Objectives Resolution of Nehru was finally discussed and approved on 22 January 1947, it pledged to draw a Constitution for the country's future governance wherein "shall be guaranteed and secured to all the people of India justice, social, economic and political, equality of status, of opportunity and before the law: freedom of thought, expression, belief, faith, worship, vocation, association, and action, subject to the law and public morality" and wherein adequate safeguards would be provided for minorities, backward and tribal areas, and depressed and other classes."[xviii]

The sub-Committee on Fundamental Rights consisted of J B Kripalani, M R Masani, K T Shah, Rajkumari Amrit Kaur, Alladi Krishnaswami Ayyar, Sardar Harman Singh, Maulana Abul Kalam Azad, B R Ambedkar, Jairamdas Daulatram and K M Munshi. In its first meeting of February 1947, the sub-committee decided to divide Fundamental Rights into two categories, justiciable and non-justiciable. Initial discussion preferred different rights for the Union and the Provinces; however, this idea was soon discarded by all members who preferred a set of Fundamental Rights uniformly applicable to all. This was sought to be achieved by inclusion in the first clause on the subject to mention that the word 'State', on whom falls the responsibility of upholding these rights, would include the Union, the Provinces, and all local forms of Government. The first draft of the sub-committee was circulated on 3 April 1947 and re-discussed in light of comments from the members. Thereafter, the final draft was submitted to the Chairman of the Advisory Committee on 16 April 1947. This draft was also seen by the sub-committee on Minorities and comments sent thereon.

"The Advisory Committee deliberated on the recommendations made by the two sub-committees and accepted the recommendations for (i) classification of rights into justiciable and non-justiciable rights, (ii) certain rights being guaranteed to all persons and certain others only to citizens and (iii) all such rights being made uniformly applicable to the

Union and the units. The committee also accepted the drafts of clauses 1 and 2 — the former providing for the definition of 'the State', 'the Union' and 'the law of the Union' and the latter for laws or usages inconsistent with the Fundamental Rights being void — in the form recommended by the sub-committee…The Advisory Committee incorporated these recommendations in its Interim Report to the Constituent Assembly submitted on 23 April 1947. The interim report dealt only with justiciable rights i.e., Fundamental Rights strictly so-called. Later, on 25 August 1947, the Advisory Committee submitted a supplementary report mainly dealing with non-justiciable rights i.e., the Directive Principles of State Policy or the "Fundamental Principles of Governance"[xix]

The recommendations were first discussed in the full Constituent Assembly in April, May and June 1947 and approved with certain modifications. But it was enjoined on the Drafting Committee that the final versions should again be brought up for approval before the Constituent Assembly. Further intensive discussions took place in November and December 1948 and then in August, September and October 1949. The final version was approved in the final session of the Assembly in November 1949. An important aspect of the subject of Fundamental Rights needs explanation here. It was made clear in the early discussion on the subject that the State was debarred from making any law which abridged any of the Fundamental Rights. However, it was clarified through a proviso that this would not prevent the State from making any law for the removal of any inequality, disparity or discrimination arising out of any existing law. However, on an amendment moved by LK Maitra, the proviso was removed. All other provisions were approved by the Assembly. After discussing the subject of Fundamental Rights, described by Ambedkar as the most criticized part of the Constitution, for as many as thirty-eight days (eleven days in the sub-committee, two in the Advisory Committee and twenty-five in the Constituent Assembly), "the Assembly ultimately adopted the comprehensive and impressive array of Fundamental Rights spread over twenty-two articles and divided broadly into seven categories of rights viz., (i) right to equality, (ii) right to freedom, (iii) right against exploitation, (iv) right to freedom of religion, (v) cultural and educational rights, (vi) right to property and (vii) right to constitutional remedies."[xx]

Directive Principles of State Policy: Whereas political freedom as a concept has been with us for a few centuries now, the accompanying idea of social justice is relatively newer. Indeed, ancient sayings, scriptures,

religious writings, etc., have emphasised this right from ancient times, it is only in the twentieth century that they have come to be included in the constitution of countries. In the freedom movement of the country too, these objectives of social development came to be included from time to time. The 1937 Constitution of Ireland was the first to make the clear distinction between Fundamental Rights and the Directive Principles of State Policy, the first being justiciable and the latter excluded from the purview of the courts. in the Sapru report of 1945, such a distinction was made in India too. In the context of the Constitution of India, it was BN Rau who in one of his pamphlets, referred to this issue and recommended the classification of rights into these two parts.

The members of the sub-committee on Fundamental Rights at first did not favour the inclusion of the latter in the Constitution. Alladi Krishnaswami Ayyar, Masani, Munshi, and Ambedkar themselves initially took this view. Munshi wrote about this in his note to the sub-committee maintaining that such general declarations were ineffective and not understood by the general populace.[xxi] Gradually, however, most of the members of the sub-committee came around to the view that it was not practicable to categorize declarations of social and economic policies as justiciable rights. By April 1947, the committee, having largely completed its work on Fundamental Rights, turned its attention to the formulation of the Directive Principles of State Policy and adopted several clauses. Some more directive principles were added to this list on the following day when it was decided also to add at its beginning a Preamble to define the position to be accorded to these principles as being intended for the general guidance of the appropriate Legislatures and Governments in India. The draft prepared by the sub-committee stated that "the State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

Some members such as Rajkumar Amrit Kaur and Mrs. Hansa Mehta were not satisfied and expressed the view that even though these rights were not enforceable, they were fundamental in character and that a suitable provision should be included to enjoin the States to act in the direction of fulfilment of these aspirations. They stated that religion was one of the reasons for the backwardness of the people and that therefore, the need for a Uniform Civil Code should be transferred to the part dealing with justiciable rights. This view was not accepted by the Minorities

sub-committee to whom the report was sent, and it held the view that though the Uniform Civil Code was highly desirable, its application should be voluntary.

As we have seen, the reports of the sub-committees on Fundamental Rights and Minorities were considered by the Advisory Committee: "It fully endorsed the general principle which laid stress on the fundamental nature of the directives but made certain changes. Two clauses were deleted — those relating to freedom of marriage and the promotion of internal peace and security by the elimination of every cause - of communal discord-while the clause imposing on the State a duty to provide free and compulsory primary education within a period of ten years from the commencement of the Constitution, which earlier had been included among justiciable rights, was included as a directive principle. With these changes, the list of the 'fundamental principles of governance" was incorporated in the committee's supplementary report submitted to the Constituent Assembly on 25 August 1947."[xxii]

In the Constituent Assembly, the debate on the issue continued, with the main arguments being about the utility of such principles if they were not to be implemented by law. The comments of Biswanath Das are an example: "I am not satisfied with the opinion of the legal savants and great authorities on the law in this House who interpret the functions of Government as justiciable and non-justiciable. They have said that we cannot include what the Government has to do for the people in the Union Constitution of India. I think it is the government's primary duty to remove hunger, render social justice to every citizen, and secure social security…"[xxiii]

In BN Rau's Draft Constitution prepared in the light of these discussions, all the provisions of Fundamental Rights and Directive Principles were included in Part III, which was divided into three chapters: the first containing general principles, the second on Fundamental Rights, and the third on Directive Principles of State Policy. Later, after his tour of the US, Canada, Ireland, etc., matters related to the position of Directive Principles in relation to Fundamental Rights received some more clarity. It was necessary to examine the issue of probable contradictions between Fundamental Rights and Directive Principles. He, therefore, suggested the inclusion of a new paragraph to make it clear that in a conflict between the Fundamental Rights, which are for the most part rights of the individual, and the principles of policy, which are intended for the welfare of the State

as a whole, the general welfare should prevail over the individual right. However, this suggestion of Rau was not considered in the Draft Constitution of February 1948. This draft was circulated to elicit comments and again faced criticism about the unenforceable nature of the Directive Principles. Two new suggestions came up at this stage: one regarding the inclusion of animal husbandry and the abolition of cow slaughter within the Directive Principles and two, that the State should secure the separation of the Judiciary from the Executive within three years from the commencement of the Constitution. As we shall see, these were later added.

It is significant to note the reply of BN Rau to the general criticism that the Constitution was not a place for moral precepts and sermons that were not, in fact, enforceable. He stated that these directive principles were akin to the Instruments of Instructions issued by the Sovereign to the Governors and the Governor-General for their guidance. An example is the instruction given to them regarding the "advancement and social welfare of those classes who on account of the smallness of their number or their lack of educational, or material, advantages or from any other cause especially rely on our protection." They served a useful purpose enjoining the State to take special care of the economic rights of the people.

When the Draft Constitution was introduced in the Assembly on 4 November 1948, Ambedkar. "The inclusion of such instructions in a Constitution such as is proposed in the Draft becomes justifiable for another reason. The Draft Constitution as framed only provides a machinery for the government of the country. It is not a contrivance to install any particular party in power as has been done in some countries. Who should be in power is left to be determined by the people, as it must be, if the system is to satisfy the tests of democracy. But whoever captures power will not be free to do what he likes with it. In the exercise of it, he will have to respect these Instruments of Instruction which are called Directive Principles. He cannot ignore them. He may not have to answer for their breach in a court of law. But he will certainly have to answer for them before the electorate at election time. What great value these Directive Principles possess will be realized better when the forces of right contrive to capture powers."[xxiv]

When the draft was discussed clause by clause by the Constituent Assembly for five days starting from 19 November 1948, it was suggested that the word 'directive' should be replaced by 'fundamental'. Ambedkar did not agree arguing that the word 'directive' would make it clear that the actions

of all future legislatures and executives should be according to these principles. During discussions, some suggestions regarding enlarging the Directive Principles were accepted: these included the organisation of village panchayats and their endowment with powers and authority to enable them to work as units of self-government; the encouragement of cottage industries on cooperative lines (strengthened with Ambedkar's insistence on securing a living wage to workers, good conditions of work, decent standard of living, etc) and the prohibition of intoxicating drinks and injurious drugs. Also added was agricultural and animal husbandry on modern lines along with the abolition of cow slaughter. The separation of the Judiciary from the Executive was also agreed to be included.

There were several suggestions regarding the inclusion of the Directive Principles of other political ideas such as the establishment of a democratic and socialist order. KT Shah wanted the ownership and control and management of material resources to be included. "Ambedkar, opposing these suggestions, said that the main object of incorporating the directive principles in the Constitution was to lay down that future governments should strive for the achievement of the ideal of economic democracy, but not to prescribe any particular or rigid method or way, whether individualist, socialist, or communist, to achieve it."[xxv]

As could be expected there was much heated debate on a Uniform Civil Code. Muslim members such as Mohammed Ismail, Mahboob Ali Bag, B Pocket Saheb, and Hussain Imam opposed it as it would impinge on the right of a community to follow their law. As far as Muslims were concerned, they contended that all their laws, dealing with succession, inheritance, marriage, and divorce were dependent on their religion. "Accordingly, the imposition of a Uniform Civil Code would not only conflict with the freedom of religious practice guaranteed by draft article 19 but would also amount to tyranny over those who wanted to follow their laws." Munshi replied that we must unify and consolidate the nation by every means without interfering with religious practices. Alladi Krishnaswami Ayyar said that there should be no objection to including the need for the State to endeavour to secure a Uniform Civil Code. Ambedkar argued that even at that point in time there was in existence a uniform code of laws applying to almost every aspect of human relationships such as civil and criminal codes, laws of transfer of property, etc. There was nothing in the draft under discussion to suggest that the State would enforce a uniform code upon all citizens merely because they were citizens. "It was possible," he said, " that

a future Parliament might make a provision that, to begin with, the code would apply only to those who declared that they were prepared to be bound by it."[xxvi] After much discussion, and with some drafting changes, the sixteen directive principles as they appear today were included in the Constitution as Articles 36 to 51 in Part IV of the Constitution.

The President and the Union Executive: Ambedkar himself had observed that every student of constitutional history needs to ask two questions: one, what is the form of the constitution; and two, what is the form of the government envisaged in the constitution. We know that administration in the British Raj in India was carried on through the Governor-General in Council and that all the members of the executive council were appointed by the Crown. He was to be under the general control of, and comply with such particular directions, as may be issued by the Secretary of State. The Governor-General was in no way answerable to the Central Legislature, which in addition to elected members, also included several nominated official and non-official members. Though in the United Kingdom, the powers of the Sovereign were exercised almost entirely by the Council of Ministers, in India, especially through the Government of India Act of 1935, "the exercise of executive powers was cautiously devised through a complicated mechanism of administrative and legislative controls, with the ultimate authority vesting in the British Parliament. It then committed certain matters to the discretion of the Governor-General and the Governors; such as, for instance, their power of veto over legislation, the regulation of matters relating to defence, external affairs, and the administration of tribal areas (in the case of the Governor-General) and excluded areas (in the case of the Governors). The matters in which the Governor-General and Governors acted in their discretion were outside the area of ministerial responsibility and the Governor-General and Governors dealt with them with the assistance of civil servants who were also appointed by them. The Ministers were thus totally excluded from any voice in the administration of these discretionary subjects. In addition, the Act contained a declaration that even in the area of administration entrusted to Ministers, certain special responsibilities were to vest in the Governor-General and the Governors. These special responsibilities could be invoked for specified purposes, among which were the prevention of a grave menace to peace and tranquillity, the protection of the legitimate interests of the minorities and the services, the safeguarding of British commercial interests, etc." [xxvii] In the administration of functions committed to them in their discretion and

the exercise of their functions in their individual judgment, the Governors were accountable to the Governor-General and the latter to the Secretary of State for India and through him to the British Parliament. In areas other than where they were to act at their discretion, the responsibility lay with the Ministers. The relations of the Governor-General and the Governors with their Ministers were not regulated by the Act but were left to be governed by a separate Instrument of Instructions issued by the Crown. And it was the general convention that the Governor-General and the Governors consulted and took into consideration the views and opinions of the elected Ministers in the central and provincial legislatures.

In the many decades of British rule in India, the Indians had become familiar with the mechanisms of governance and the tradition of parliamentary rule. Thus, it was expected that the members of the Constituent Assembly would be more than willing to consider and accept the concept of an executive responsible to the Legislature. BN Rau's questionnaire circulated to the members of the Union Constitution committee suggested that the executive power of the Central Government would be exercised by a Council of Ministers, to be called the Cabinet, which would be responsible to the lower chamber of the Central legislature, whose members would be elected by adult franchise. There were indeed discussions on the need for some discretionary powers to be assigned to the President. These were envisaged as circumstances involving grave menace to peace and tranquillity, the safeguarding of financial stability, and the monetary credit of the Union, safeguarding the legitimate interests of the minorities. Rau's memorandum suggested the formation of a Council comprising the Prime Minister, the Deputy Prime Minister, if any, the Chief Justice of the Supreme Court, the presiding officers of the two Houses of the Legislature and the Advocate-General, and some members that the President may appoint at his discretion. This idea was adopted from the Irish Constitution. In the first meeting of the Union Constitution Committee held on 8th and 9th June 1947, all members approved the idea of a parliamentary type of government with the President having no special powers. The idea of an Advisory Council to assist the President was shot down. When the Constituent Assembly discussed the report of the Union Constitution Committee on 28 June 1947, there was general support for the form of parliamentary government, though some Muslim members suggested that

the Cabinet should have representation of the major communities and that it should be elected by the Legislature under the system of proportional representation through a single transferable vote.

It is interesting to note how the apprehensions of the minority community were expressed in these discussions. Karimuddhin argued that the disturbances then prevalent in the country arising out of a weak executive manned by Ministers who depended on the support of people who believed in communal tensions. Mahboob Ali Baig supported this view and spoke of the advantages of a Cabinet that would represent all sections of the people thereby leading to stability. Hussain Imam suggested that as in the United States, the President should have the discretion to nominate his Ministers and that this would be more democratic and based on better and sounder principles. Jawaharlal Nehru, as Chairman of the Union Constitution Committee strongly opposed these suggestions. In the end, the Assembly approved the concept of a parliamentary executive collectively responsible to the Lower House of the central Legislature.

Ambedkar spoke authoritatively on the subject when the Draft Constitution was placed before the Assembly on 4 November 1948. "Under the Draft Constitution, the President occupies the same position as the King under the English Constitution. He is the Head of the State, but not of the Executive. He represents the nation but does not rule the nation; He is the symbol of the nation. His place in the administration is that of a ceremonial device on a seal by which the nation's decisions are made known… The President of the Indian Union will be generally bound by the advice of his Ministers. He can do nothing contrary to their advice nor can he do anything without their advice."[xxviii] There were some differences in perception: for example, Ramnarayan Singh and Shibban Lal Saxena spoke in favour of a presidential system and criticised people who form parties and manipulate votes and get a majority in the Legislature and form the Government.

There was also a difference of opinion as to whether the President be appointed by indirect elections through MPs and MLAs or should be directly elected by the people. Gopalaswamy Ayyangar had earlier suggested the formation of an electoral college consisting of members of the Lower House of the Central legislature and a fixed percentage of the population of the provinces and the Indian Native States. A sub-committee consisting of Ambedkar, Gopalaswami Ayyangar, and Munshi examined this proposal and recommended that the electoral college for the election

of the President should consist of the members of the Legislatures of the units, or where a Legislature was bicameral, the members of the Lower House. To secure uniformity in the scale of representation of the units, the votes of the members of several Legislatures would be weighted in proportion to the population. The Union Constitution Committee accepted this recommendation, with the addition that the members of both Houses of the Federal Legislature should also be included in the electoral college for the office of the President.

Nehru's views on the subject, as expressed in the Assembly on 21 July 1947 are significant and interesting: "We have given anxious thought to this matter and we came to the very definite conclusion that it would not be desirable, first because we want to emphasise the ministerial character of the government, that power resided in the Ministry and the Legislature and not in the President as such. At the same time, we did not want to make the President just a mere figurehead like the French President. We did not give him any real power, but we have made his position one of great authority and dignity. You will notice from this Draft Constitution that he is also to be Commander-in-Chief of the Defence Forces, just as the American President is. Now, therefore, if we had an election by an adult franchise and yet did not give him any real powers, it might become slightly anomalous and there might be just extraordinary expense of time and energy and money without any adequate result. Personally, I am entirely agreeable to the democratic procedure; but there is such a thing as too much of a democratic procedure and I greatly fear that if we have a wide-scale waste of time, we might have no time left for doing anything else except preparing for the elections and having elections." He also expressed his support for indirect election of the President: "the members of all the Legislatures from all over India would become voters. Nehru commended the proposal as the right method to choose a good man who will have authority and dignity in India and abroad".[xxix] The term of office of the President was also determined to be five years, based on the suggestion given by BN Rau on 30th May 1947, which was duly approved by the Union Constitution Committee and the Constituent Assembly. The suggestion that the President would be eligible for re-election without limit as to the number of times, was also accepted. The qualifications for eligibility as a candidate for President were also decided in due course after much discussion. So also, were provisions relating to his impeachment in cases of a serious nature.

It would be appropriate to mention here the nature of discussions regarding the Vice-President also. It was KM Pannikar and Shyama Prasad Mookerjee who insisted on the inclusion of the position of Vice-President, though this post was not included in the questionnaire circulated by BN Rau initially. Pannikar also suggested that it should be the Vice-President who would preside over meetings of the upper chamber of the Union Legislature. Further, in the absence of the President, it would be the Vice-President who would perform the duties and responsibilities of the President. BN Rau replied that in a parliamentary form of government, there should be no place for a Vice-President between the President and the Council of Ministers. The Union Constitution Committee in its meeting of 8 June 1947 did accept the need for a Vice-President and accordingly recommended that he should be elected by both houses of Parliament in a joint session through a proportional system of representation. He would preside over the sittings of the upper house and also act as President in the event of his absence, death, resignation, etc., K. M. Panikkar had suggested, in his reply to the questionnaire issued by the Constitutional Adviser on 17 March 1947, that the Head of the State should be the one expression of unity of the country: the *de jure* nominal head of the executive; and also that he should be the Commander-in-Chief of the Defence Forces of the Union. Adopting this lead, the Union Constitution Committee recommended that subject to the provisions of the Constitution the executive authority of the Federation would vest in the President; and it added that the supreme command of the Defence Forces of the country should also be specifically vested in the President. In subsequent discussions, other attributes of the President's, office including the remission or suspension of sentences were also discussed and approved. Since the constitutional position of the President has been spelt out in other chapters in this book, no further elaboration is being attempted here.

The Governor and the State Executive: BN Rau, the Constitutional Advisor circulated the memorandum on the Provincial Constitution on 30 May 1947. The general mood of the members of the Constituent Assembly was in favour of a strong centre, especially in the context of Pakistan breaking away, a decision that was expected, but was formally announced a few days later on 3 June 1947. Munshi said: "We have now a homogeneous country, though our frontiers have shrunk - let us hope only for the moment - and we can look forward to going on unhesitatingly towards our cherished goal of strength and independence"[xxx] It may be recalled that the Cabinet

Mission Plan had envisaged that the provinces would have a large measure of autonomy, with all subjects, other than defence, foreign affairs, and communication, being administered by them. The Native States, especially the smaller ones, would have the option to have a common administration with the neighbouring province. The political system would be similar to the one envisaged at the Centre, that is, a Council of Ministers responsible to the Legislature. The Governors were to be elected by the system of proportional representation and would hold office for five years. They were to be aided and advised by the Ministers. The Governor would also have his discretionary powers in matters related to peace and tranquillity and the administration of excluded areas. In such activities, he would be advised by a body designated as the Council of States, comprising eminent personalities. However, BN Rau apprehended difficulties in areas where the Governor would act at his discretion, and against the advice of his Ministers.

This memorandum was discussed in the Provincial Constitution Committee in the first week of June 1947. Since the date of Independence was announced, the Constituent Assembly was keenly aware that any form of restrictions imposed by the Cabinet Mission Plan would disappear and there would be no need for ratification by the British Parliament. Three options were discussed in the meetings of the Committee: one, that the Governor, elected by the people through an adult franchise, should have complete executive powers to be exercised through Cabinet that he would nominate; two, that he should be the constitutional head acting on the advice of the Cabinet which in turn was responsible to the legislature; and three, that the Central Government should have a wide range of authority over the provinces and the Governor so that he can function as a liaison between the Provinces and the Central Government. However, in such circumstances, he would have to be nominated by the Centre. At a joint meeting of both the Union and Provincial Constitution committees, it was decided that India should be a federal structure with a strong Centre. The Governor should not be appointed by the Centre but be chosen by the provinces through indirect elections. The modalities for the indirect election of the Governor were further discussed in a sub-committee comprising BG Kher, NN Katju, and P Subbarayan. They were of the opinion that an electoral college should elect the Governor on a scale of one elector for every 10,000 adults. The Provincial Constitution Committee proceeded

to discuss attendant matters such as filling in vacancies of the Governor and the nature of the discretionary powers to be vested in him during threats to law and order and his duties towards minority communities.

All these matters were submitted to the Constituent Assembly on 15 July 1947 where Sardar Patel presented the salient features of the report, explaining the nature of the Governor's relationship with the Ministers. The report explained that the discretionary powers of the Governor would be restricted to the following: the prevention of any grave menace to the peace and tranquillity of the Province or any part thereof; the summoning and dissolving of the provincial legislature; the superintendence, direction, and control of elections; the appointment of the Chairman and members of the Public Service Commission and the provincial Auditor-General. Patel was aware of the resentment of the members who were against this unpopular feature of the 1935 Government of India Act which granted discretionary powers to the Governors of the Provinces. He took care to explain that it was not the intention of the Committee to perpetuate this system and that it would be resorted to only in cases of disturbance to law and order. Even appointments mentioned above would be by the recommendations of the Cabinet.

During discussions, some members expressed the view that the Governor's Ministers should be appointed by election using a single transferable vote. Syed Karimuddin urged that the representatives of every party in the legislature should find a place in the Cabinet. This was strictly opposed by Sardar Patel and most of the members. There was also some discussion on the emergency powers of the Governor to take over the administration of the Province in cases of grave threat to peace and tranquillity. On all such approved recommendations, the Drafting Committee made some suggestions which were a substantial departure from the discussions in the Constituent Assembly. On the method of choosing Governors, the committee commented that some of its members felt that the co-existence of a Governor elected by the people and a Chief Minister responsible to the Legislature might lead to friction. The committee therefore suggested an alternative method of appointing Governors: the Legislature should elect a panel of four persons by the method of proportional representation and the President of the Union would appoint one of them as Governor.[xxxi] The terms of eligibility for appointment as Governor, the period of his tenure, the process for impeachment, the manner of filling his vacancy, the provisions for his salary and allowances, etc., were also finalised by

the Drafting Committee. His powers of clemency in suspending sentences were also discussed at this time.

A special committee meeting considered all the differing opinions on 10th and 11th April 1948 and made certain recommendations, in the main questioning the process of election of the Governor through proportional representation. It was decided that this maybe left for the final decision in the Assembly meeting scheduled for 30 May 1949. It was Brajeshwar Prasad who moved the amendment for the appointment of the Governor directly by the President under his hand and seal. This was in keeping with general views that the President's choice should be unrestricted and unfettered and that it was necessary to maintain the authority of the Government of India intact over the States. The amendment evoked a considerable volume of support. Alladi Krishnaswami summarised the arguments in support of this stand, stating that if the Governor was elected, he would have to contest on a party ticket and there is the possibility that the members of the Legislature who belong to another party would not extend any support to him. "The whole basis of the constitutional structure was harmony between the Legislature and the Executive. If the choice of the Governor was left to the President and his Cabinet, they might choose a person of undoubted ability and position in public life who at the same time had not been mixed up in provincial party struggles or factions; a person who was likely to act as a friend and a mediator of the Cabinet and help in the smooth working of the Cabinet Government." Nehru's views coincided with his: "It would be infinitely better if a Governor was not intimately connected with the local politics and factions in a State, but was a more detached figure, acceptable to the State, no doubt, but not known to be a part of its party machines." When the matter was voted upon, Brajeshwar Prasad's amendment for the appointment of a Governor by the President was approved by the Constituent Assembly.[xxxii] Other attendant changes were also agreed to by the members of the Assembly. The idea of a Deputy Governor was dropped.

The executive power of the States was decided to be extended to the matters concerning which the Legislature of the State has the power to make laws. This would also cover the exercise of such rights, authority, and jurisdiction as are exercisable under any agreement entered into with any Native State or group of Native States. It may be noted that by this time, considerable progress had been made in the integration of Native States into the Indian Union. Many of them had been merged into the

adjoining Provinces and several had been united to form Unions of States. The process was still in progress "but there was very good reason to hope that by the time the Assembly finally adopted the Constitution, the rapid political changes taking place in the Indian States would result in a new India consisting of a comparatively small number of viable administrative units, in the place of the crazy patchwork of a large number of disparate States with different standards of Government. It was also hoped that all these units would in future have the same form of popular, democratic, and responsible government."[xxxiii]

In iterative meetings of the Drafting Committee, the proposals for discretionary powers for the Governor were whittled down gradually. Ambedkar was of the view that the Governor would not exercise any functions at his discretion and that according to the principles of the Constitution, he would be required to follow the advice of his Council of Ministers in all matters. As a result, in the Constitution, as adopted finally, full ministerial responsibility without any discretionary powers for the Governor was established over the whole field of State administration. But despite this radical change in the content of the powers of the Governor, the reference to the Governor exercising certain functions in his discretion remains and can be seen in the Article numbered today as 163. Ambedkar summed up the position with reference to all the above suggestions stating that the Ministers should hold office only during such time as they commanded the confidence of the majority in the Legislative Assembly. The Governor would act in accordance with the advice tendered to him by the Council of Ministers. The original provision for providing an Instrument of Instructions in the form of advice to the Governor, as was provided in the 1935 Government of Act, was dropped altogether.

The Attorney-General and Advocate-General: Advocate-Generals had for long been appointed to the provinces of Madras, Bengal, and Bombay by warrant of the sovereign as a parallel to His Majesty's Attorney General in England. "In practice, the functions of the Advocate-General were to advise the Provincial Governments on any legal problem which might be referred to him, to represent the Crown in original civil cases in the High Court to which the Crown was a party, and also in any specially important criminal appeals in the High Court." The 1935 Government of India Act too provided for one in each province. BN Rau's memorandum proposed to continue with this practice. Both the Union and Provincial Constitution Committees accepted this recommendation, with the added proviso that

with the resignation of the provincial Ministry which had appointed him, he too should give way. Later, this provision was abandoned leading to his continuance at the pleasure of the Governor. At the Union level, this functionary was designated as Attorney General, as followed both in the United States and the United Kingdom.

The Comptroller and Auditor-General: In the days before the Government of India Act of 1935, it was the Secretary of State for India who had vast powers related to the financial management of India. After the 1935 Act came into force, there was set up the office of the Auditor-General, one of whose principal functions was to ensure that the boundary lines between the Secretary of State and the authorities in India were maintained. He was the final arbiter for audit in India and an important part of the machinery through which the Legislatures enforced discipline and economy in public finance. Keeping the post-independent was important and hence it was the Crown that appointed him with the same permanency of tenure as a judge of the Federal Court. The 1934 Joint Select Committee on Indian Constitutional Reform, on whose recommendations the 1935 Act was promulgated, had advised that the provincial Auditor-General should be no less independent than the federal authority. The Government of India Act of 1935 stipulated that the audit reports of the Federation and the Provinces should be laid before the respective Legislatures. The independence of the Auditor-General was further sought to be secured by making him ineligible for further office under the Government. Though BN Rau's memorandum recommended that both the provincial and the central Auditor-General should be appointed by the President, the Provincial Constitution Committee amended this to the effect that the provincial appointee would be appointed by the Governor.

All these recommendations came up for discussion before the Constituent Assembly on 30 May 1949 when several amendments were moved by TT Krishnaswami and B Das. The designation was changed from Auditor-General to Comptroller and Auditor-General as control over governmental spending was also the brief of the post. He would take an oath similar to that taken by the judges. His salaries, allowances, etc., would be charged, and not voted, on the revenues of India. Others who contributed to the discussion were KT Shah, HN Kunzru, and Lakshminarayan Sahu leading to the conclusion that the administrative powers of the Comptroller and Auditor-General would be finally subject to the law made by the Parliament,

The Union Parliament: The Central Legislature had been originally created by the Government of India Act of 1919, with both nominated and elected members and consisted of two houses, namely the Council of States (with 60 members) and the Legislative Assembly (with 145 members, of which 41 were nominated and 26 were officials). Some seats in the Council of States were elected by only Muslim electorates. The Governor-General appointed some members to represent Christians, the Depressed Classes, labour interests, and the chambers of commerce. The Governor-General had wide powers of appointing the President and also making rules regarding the transaction of business, etc.

The Government of India Act of 1935 contemplated a federation comprising both the Indian provinces directly ruled by the British as well as the Indian Native States. "Under this Act, the area of control of the Legislature over the Executive was severely limited. What the Act visualized for the Centre was a kind of dyarchy, with a considerable portion of the field of administration of the Central Government reserved for the Governor-General acting 'in his discretion' (i.e., outside the area of ministerial responsibility) where the Governor-General was answerable to the Secretary of State for India and through him to the Government and Parliament of Great Britain. This discretionary area extended to 'defence, external affairs, ecclesiastical affairs and the administration of tribal areas.'[xxxiv] These areas were not subject to legislative oversight.

It was clear that these models would not provide a satisfactory basis for the legislative houses of an independent India. Thus, BN Rau's memorandum of 17 March 1947 invited suggestions regarding the nature and character of legislative houses at Union and Provincial levels, including representation of different communities and interests; the composition, franchise, electorate, constituencies, methods of election, allocation of seats, term of office; the relative powers of the two Houses and the provision to be made for resolving deadlocks.

Although the response to the questionnaire was poor, Rau then prepared a memorandum for the use of the Union Constitution Committee. This envisaged a Parliament consisting of the President and two houses, at that stage named the Senate and the House of Representatives. The former would have 280 members, 168 from the Provinces and 112 from the Indian States. The latter would have representatives from the

Indian provinces and the Native States in the proportion of one for every 750,000 population. The procedural provisions for the Parliament more or less followed the pattern of the Government of India Act of 1935. Along with the memorandum were also circulated some of the principles prepared by N Gopalaswami and Alladi Krishnaswami Ayyar, which proposed that the House of Representatives should be elected from the territorial constituencies, with seats being reserved for Minorities. This part was based on the Constituent Assembly's resolution on the Report of the Advisory Committee on Fundamental Rights, Minorities, and Tribal and Excluded Areas. The strength of the Senate would be half of the House of Representatives.

On 9 June 1947, the Union Constitution Committee discussed these matters broadly agreeing on the following: the names of the two houses would be the Council of States and the House of the People, with 250 members and 400-500 members respectively. The Vice-President would be the Chairman of the Council of States. Both Houses would have equal powers, though money bills would originate only in the House of the People. A sub-committee consisting of Ambedkar, Gopalaswami Ayyangar, KM Munshi, and KM Panikkar was directed to work out the details of representation in the Council of States. This sub-committee, meeting on June 10th suggested that in this House the units should have representation based on one member for every whole million of the population up to five million, plus one member for every two additional million, subject to a total maximum of twenty for a unit."[xxxv] This necessarily meant that the smaller Indian States would have to be grouped. Ten members would be selected by nomination of the President.

When the report was discussed in the Constituent Assembly on 21 May 1947, there was much opposition to the second chamber, condemned by some members as a cog in the wheel of progress. Gopalaswamy Ayyangar replied to these criticisms: the purpose of the second chamber, he said is to "give an opportunity, perhaps, to seasoned people who may not be in the thickest of the political fray, but who might be willing to participate in the debate with an amount of learning and importance which we do not ordinarily associate with a House of the People. That is all that is proposed regarding this second chamber."[xxxvi] He proposed to also limit the membership of the Council of States to 250 and to keep this figure

roughly half of the membership of the House of the People. They were to be selected by the members of the State Legislature, and where the State had a bicameral system, by the members of the lower legislative house.

The strength of the House of the People was to be fixed so as to not exceed 500. The Provinces and the Native Indian States were to be divided into territorial constituencies in such a manner as to provide a member for roughly every 750,000 of the population. Ayyangar suggested that the Union Constitution Committee should work out the details of this principle decision. The suggestions in this regard were given a legal shape by BN Rau in October 1947 whose draft provided that twenty-five members of the Council of States were to be chosen from functional panels representing knowledge of national language and arts, agriculture, labour, industry, and commerce, public administration, etc. The rest of the members were to be representatives of the Provinces. The Council of States would be a permanent body, not subject to dissolution, with one-third of the members retiring every two years. It would be presided over by the Vice-President. At that stage of the draft, it was suggested that members of the House of the People be selected by adult suffrage with seats to be reserved for Muslims, Scheduled Castes, Scheduled Tribes, and a few Indian Christians. It could be dissolved by the President. The draft included provisions regarding the legislative procedure, financial and general procedures. The special powers of the House of the People regarding Money Bills were also clarified as meaning any bill imposing or increasing tax, or for the regulation of borrowings or the giving of financial guarantees. The Draft also emphasised that an annual financial statement of the estimated receipts and expenditures of the Federation should be placed before both Houses, showing expenditure "charged" upon the revenues of the Federation and other expenditures with separate explanations.

While the Drafting Committee was considering these matters, BN Rau visited other countries such as the US, Ireland, and Britain to study the working of the constitution of these countries. It was De Valera of Ireland who suggested that the term of House of the People be five, and not four years as had been hitherto contemplated. It was based on the report of Rau that the Union Constitution Committee decided to do away with functional panels representing certain interests and to include the provision for the President to nominate twelve members with experience in such matters as education, agriculture, literature and arts, engineering, etc. Later, this was revised to merely state that the fifteen members would be selected

by nomination of the President without mentioning any special interest group. Qualifications of members of the Houses were also finalised at this stage.

There was some interesting discussion on the representation to be given to the Native Indian States. Initially, it had been proposed that they should be given about 40% of the seats of the Upper Chamber, but with time, many of these States had merged with the Indian Union and thus it was decided that the provision of 40% granted to these Native States be deleted. T. Krishnamachari explained "that the Union Constitution Committee had gone into this matter on December 1, 1948. The committee could not go into the details of a revised scheme of allocation of seats in the Council of States as, owing to mergers of various types, the position of the Indian States was still unsettled. The committee, while reiterating its previous decision that the representation of units would be based on one representative for every million of the population up to five million of the population plus one representative for every additional two million of the population thereafter, considered it unnecessary to adhere to the other decision that the maximum number of representatives from any one unit should be limited to twenty-five."[xxxvii] Mahavir Tyagi and Mahboob Ali Baig moved amendments to the effect that the seats in the Upper Chamber be filled based on proportional representation by the single transferable vote: this was accepted by Ambedkar.

The qualifications to be a member of the Parliament were also decided in the following manner: "The new article moved by Ambedkar in this matter provided that in order to be qualified for being chosen as a member of Parliament, a person should be a citizen of India, not less than 25 years old in the case of the House of the People and 35 for the Council of States (this latter requirement was reduced to 30 years on an amendment moved by Shrimati Durgabai) and should fulfil such other qualifications as might be prescribed in a law made by Parliament. The Assembly accepted this amendment."[xxxviii]

As for the House of the People, today it may be surprising to consider that some of the members of the Assembly pleaded for the seats to be filed with proportional representation so as to avoid the evils of majoritarianism thus depriving the minorities of their due share. Kazi Syed Karimuddin, KT Shah, and HJ Khandekar were those who supported this view, though for different reasons. Ananthasayam Ayyangar and Ambedkar opposed this

stating that this necessarily presupposed higher levels of literacy and that reservation of seats for some Backward Communities had already been agreed to and any change in that formula at this stage would not be proper. The power for extending the life of the Parliament, in times of emergency, was given to the Parliament itself, and not to the President as was originally envisaged.

Loknath Mishra moved an amendment which made it clear that where the President returned a Bill to Parliament for reconsideration, it would be incumbent on him to assent to it if it was passed again by the Parliament. Ambedkar moved the proposal to have a separate and independent secretariat staff for each House of the Parliament, as had already been provided for in the States. The Drafting Committee also provided for freedom of speech in Parliament stating that no member would be liable for any court proceedings in respect of anything said, or vote given, by him in Parliament or any committee of Parliament.

As to budget provisions, Ambedkar's series of amendments provided for voting for the sums required by the Government of India in the form of demand for grants. Once approved, the schedule of grants would be authenticated by the President. These suggestions were approved by the Drafting Committee and placed before the Constituent Assembly. The provision for the creation of a Consolidated Fund of India comprising all revenues of the Government, loans etc was also approved. Appropriation of public moneys were to be by an act of Parliament. The device of a vote on account providing for a lump sum amount to be made available under each grant, sufficient to enable the Government of India to incur expenditure for a short period, was also provided for.

The various territories of the Union were divided into Part A, B and C, that is to say, for Governors' provinces, the Indian States, and the provinces of the Chief Commissioner respectively. It may be interesting to note that a few years later in 1956, through the Constitution (Seventh Amendment) Act, with the full integration of all the native rulers, the nomenclature was changed to 'States' and 'Union Territories'.

State Legislatures: Rau's questionnaire solicited the opinion of not only the Union Legislature but also the Legislatures of the States. A few replies were received, supporting universal suffrage and reservation of seats as well as joint electorates for minorities. In the memorandum of 30 May 1947,

the principles proposed by Rau were that there should be one member for every 100,000 population and that the tenure of the State Assembly should be five years. The Government of India Act of 1935 had provided for a bicameral system in Madras, Bombay, Bengal, and the United Provinces; whether the system should be continued or not was left to the wisdom of the Constituent Assembly. The general presumption was that under the new Constitution, the main provisions of the relevant provisions of the 1935 Act would apply to the State Legislatures as well. The language prescribed was either Hindi or English and at that stage of the proceedings, no thought was given to local languages. The Governor was empowered to conduct the elections. The Legislatures were also empowered to decide from time to time upon matters related to delimitation, qualifications for members, the conduct of elections etc. The Provincial Constitution Committee considered these matters in June 1947. The committee decided that as a general rule, there should be only a single chamber of the Legislature in the States, called the Legislative Assembly, with one member representing a 1000,000 population. On the question of the second chamber, the committee agreed that they might be constituted in States where special circumstances existed. A sub-committee consisting of BG Kher, Pattabhi Sitaramayya, P Subburayan, and Kailash Nath Katju further examined the question of the second chamber: it recommended that where the second chamber was to be considered, it should have not more than a quarter of the seats of the Legislative Assembly. The seats of the second chamber would be filled on a three-way basis: functional representation (for certain sectors such as agriculture, industry, education, etc), proportional representation elected by the members of the Legislative Assembly, and by nomination by the Governor on the advice of the Ministers. The sub-committee also felt that the local State language should also be permitted. Other recommendations of BN Rau were accepted.

These recommendations were discussed by the Constituent Assembly on the 18th and 21st of July 1947 and adopted with minor amendments. The role of the Governor regarding elections was removed because the Union Constitution Committee was separately considering an independent Election Tribunal. A very important point was put forward during the discussions by K Santhanam about the right of the Governor to return a bill for reconsideration to the Legislative Assembly in order to allow it to reconsider a hasty decision. However, if the Assembly passed it again, the Governor would have to give his consent to the same.

Based on these discussions, BN Rau prepared his draft providing for territorial constituencies of a 100,000 population, reservation of seats for Muslims, Scheduled Castes, and Tribes with a maximum strength of 300 and a minimum of 60 for the smaller States. One-half of the strength was to be from panels of persons knowing certain subjects such as literature and culture, agriculture, labour, industry, finance, banking, etc. One-third was to be filled up by members of the Assembly by the method of proportional representation utilizing the single transferable vote, and one-sixth was to be filled by the Governor through nomination. All these matters were deliberated finally by the Drafting Committee in January 1948. It adopted provisions that were by and large similar to the provisions adopted for the Parliament. For Money bills, the final powers of approval would vest in the lower house, as in the case of Parliament. As to whether the States should have a second chamber or a Legislative Council, the decision was left to the members of the different provinces. The States of Madras, Bombay, West Bengal, the United Provinces, Bihar, and East Punjab decided in favour of legislative councils for these States. It may be pointed out here that there was a considerable difference of opinion in the Constituent Assembly about the need for a second chamber.

Franchise and Elections: In the Government of India Act of 1935, the conduct of elections was left to the executive, provincial or central, as the case may be. In the Constituent Assembly the consensus was that the right to vote should be treated as a Fundamental Right and that to ensure the exercise of this right free from influences, there should be an independent machinery to administer the elections. In initial discussions in the Fundamental Rights sub-committee, KM Munshi had stated that every citizen has the right to choose the Government and the legislators of the Union and his State on the footing of equality by the law of the Union or the unit, as the case may be, in free, secret, and periodic elections. On 29 March 1947, the sub-committee approved that universal suffrage should be guaranteed by the Constitution, that the elections should be free, secret, and periodic, and that it should be managed by an independent commission set up under the Union law. It further recommended that persons above 21 shall have the right to vote. The Minorities sub-committee too approved these recommendations, further adding that the Election Commission should be quasi-judicial in nature.

The Advisory Committee considered all these matters and unanimously accepted all the above recommendations. There was some discussion as to whether the Fundamental Rights section of the Constitution was the right place to include electoral matters. Rajagopalachari was of the view that electoral matters could not find a place in the Fundamental Rights chapter. Ambedkar, however, was emphatic that adult franchise should be a part of the Fundamental Rights and that so that "the elections may be free in the real sense of the word, they shall be taken out of the hands of the Government of the day and that they should be conducted by an independent body, which we may here call an Election Commission."[xxxix] This difference of opinion persisted until Govind Ballabh Pant suggested a compromise solution that these recommendations may be sent separately for inclusion at the appropriate place in the Constitution. Accordingly, the same was included in the model provincial constitution vesting the Governor with the powers to appoint the election tribunals, just as the President would act in his discretion for appointing such tribunals at the Union level. In the end, however, the Union Constitution Committee recommended that all powers of supervision, direction, and control introspect of central and provincial elections should be vested in a commission to be appointed by the President. There was no role of the Governor in this final recommendation. In its final form, the Election Commission would consist of a Chief Election Commissioner and such number of other Election Commissions as might be appointed by the Union Government. Arguments against a single electoral body for the country were made by members such as Kuladhar Chaliha, HN Kunzru, and HV Pataskar.

Joint Electorates: In the 1862 Indian Councils Act, it was provided that Government could nominate persons to important public bodies such as municipalities, district boards, etc., and representation was to be provided for certain classes and interests. Muslim representation was also mentioned, though no rights were conferred on the community. After a Muslim deputation led by Aga Khan met the Viceroy Lord Minto, separate representation for the Muslim electorate was agreed to in the 1909 Councils Act, even as they retained their rights to also vote in the general electorate. The Lucknow pact, also known as the Congress-Muslim League Scheme of 1916, extended the principle to provincial elections. The Montague Chelmsford Report strongly condemned communal electorates. The Nehru Report of 1928 laid down the concept of joint electorates; it was strongly opposed by Jinnah who demanded separate representation

for the Muslims. The Communal Award of 1932, which was reflected in the 1935 Government of India Act, granted separate electorates to Muslims, Europeans, Sikhs, Indian-Christians, and Anglo-Indians. By this time, the Indian National Congress also seems to have accepted the idea, though this was only as a compromise to effect some agreement with the Muslim League. But with the demand for a separate nation for Muslims, all hopes of an agreement vanished.

The Cabinet Mission tasked the Advisory Committee to examine the question of joint or separate electorates. The Advisory Committee by an overwhelming majority condemned the idea of separate electorates and recommended that all elections to the Central and Provincial legislators be held based on joint electorates. Accordingly, Vallabhbhai Patel moved a motion in the Constituent Assembly on 27 August 1947. The Assembly, however, was not unanimous in supporting the motion. B Pocket Sahib and Chaudhari Khaliquzzaman were in favour of the Muslims having separate electorates in view of the fact that they had enjoyed this right for the past half a century and should not now be deprived of the same. Patel was uncompromising: "Can you show me one free country where there are separate electorates? If so, I shall be prepared to accept it. But in this unfortunate country if this separate electorate is going to be persisted in, even after the division of the country, woe betide the country; it is not worth living in."[xl] The proposal for separate electorates was rejected by the Assembly.

In light of these discussions, the Drafting Committee felt that the provision for joint electorates was of such a fundamental nature that it should be provided for specifically in the Constitution. It did so through a draft article moved on 16 June 1949. The Advisory Committee on Fundamental Rights, Minorities and Tribal and Excluded Areas too had reached the momentous decision some weeks ago, deciding to abolish reservation of seats for any religious minorities. It was adopted without any discussion and now finds a place in Article 325.

Adult Franchise: The legislatures of the British Raj provided only for a restricted franchise, estimated by the Joint Committee on Constitutional Reform of 1933-34 as only 3% of the population. The Simon Commission had recommended this to be increased to 10%, arguing that the low levels of literacy were not conducive to expanding the electorate. Indian opinion, however, had for long been recommending universal adult franchises,

exemplified by the Nehru Report of 1928, which had pressed for the same in all the provincial legislatures and the lower house of the Central Legislature. Ultimately, the Cabinet Mission statement of 16 June 1946 also came around to this viewpoint. During the Constituent Assembly debates, this mood was unanimously prevalent, with both the sub-committees on Fundamental Rights and Minorities recommending the same. It was included, according to the recommendations of the Special Committee, not in the section on Fundamental Rights, but in another comprehensive section dealing with elections to the legislatures. Every person not less than 21 years, and not otherwise ineligible because of unsoundness of mind, crime, or corrupt practices, was thus entitled to be registered as a voter.

Legislative Powers of President and Governors: British Rule in India had conferred vast legislative powers on the Governor-General and the Governors. In 1833, under the Charter Act, the former's office was strengthened by the appointment of additional members whose duties were mainly legislative matters, while simultaneously reducing the legislative powers of the Governors of Madras and Bombay. By another Charter Act of 1853, the Chief Justice of Bengal, one puisne judge, and four officials, one each from Madras, Bombay, Bengal, and the Northwestern provinces were set up for all judicial matters. The 1861 Charter Act restored the legislative powers of Madras and Bombay while at the same time increasing the strength of the Governor-General's office to up to twelve members. Powers of issuing temporary ordinances, with a tenure of up to six months were also approved to be passed by the Governor-General's office. It was only in 1892 that some element of elected members was introduced into the legislative council which allowed some kind of elective processes, combined with nomination, to induct five more members into the Indian Legislative Council. The 1909 Minto Morley Reforms formalised the elective element in the Legislative Councils, but the 1921 Montague-Chelmsford reforms only strengthened the legislative powers of the Governor-General in certain circumstances.

The 1935 Government of India Act provided for three areas of legislative competence: one, ministerial responsibility to the Legislature; two, special legislative responsibility of the Governor-General exercised in his discretion and where he could overrule the Ministry; and three, where he could personally control the administration without reference to his Ministers. This included powers to issue ordinances.

This last issue exercised the members of the Constituent Assembly: how much powers of ordinance making should be given to the President. Rau, the Constitutional Advisor, and members felt that there may be circumstances where an ordinance is to be passed when the Parliament is not in session. Here, the President would be empowered to issue the ordinance on the advice of his Council of Ministers, subject to confirmation by the Parliament within six months. This was accepted and approved by the Union Constitution and presented to the Constituent Assembly. HV Kamath and HN Kunzru were critical of granting these powers to the Executive and also asserted that this period of six months was too long. B Pocket Sahib proposed that an ordinance adversely affecting the right of a citizen to personal liberty should not be issued through ordinances. Hukum Singh wanted these powers to be exercised only after consultation with the Council of Ministers. Ambedkar replied that such powers would only be issued when the Parliament was not in session, and it became necessary to issue the ordinances. Further, the President could issue ordinances only in consultation with the Council of Ministers, and hence the elements of consultation with the popular government would be observed. As far as Governors were concerned, a similar provision was included for them too, with regard to the administration of the States. The only change was in matters where the permission of the President was necessary before issuing the ordinance at the State level by the Government, such permission would be taken prior to the issue of the ordinance.

The Judiciary: The unitary character of the Government of India was indisputable, and the validity of any Act of the Legislature could not be questioned in a court of law, as had been expressly provided for in the Government of India Act of 1919. The suggestion of a Supreme Court for India was taken up in the Nehru report of 1928 and it received official shape when it was included in the White Paper compiled after the three Round Table Conferences (1930-32). It suggested the creation of two courts at the Centre: one, a Federal Court as the ultimate judicial authority for the interpretation of the Constitution and all matters related to the relationship between the Centre, the Provinces, and the Indian Princely States; and two, a Supreme Court with jurisdiction confined to British India on matters other than those which fell under the jurisdiction of the Federal Court. It would also remove difficulties that were experienced in moving such matters to the Privy Council in faraway England. The creation of the Supreme Court though, was left to the decision of the Federal Legislature,

if it felt that it was necessary. In the end, the Government of India Act of 1935 provided only for a single Federal Court with original, appellate, and advisory powers, where all judges were to be appointed by the Crown.

The Constituent Assembly set up a special committee to consider the roles and responsibilities of the Supreme Court comprising of S. Varadachariar, a former judge of the Federal Court, Alladi Krishnaswami Ayyar, B. L. Mitter, K. M. Munshi (all three of them being senior advocates) and BN Rau, the Constitutional Adviser who had also held judicial office. The Committee recommended that the constitutional validity of law should be examined not only by the Supreme Court but also by the High Courts. The Committee also emphasised the advisory role of the Supreme Court to advice the government on legal issues, which would be considered by the full court. Appointment of judges would be by the President in consultation with the Chief Justice. Various other establishment issues regarding salary and allowances, etc., were also finalised. It was universally felt that after India becomes a Republic, the role of the Privy Council should end and all matters pending before it should be transferred to the Supreme Court. After a full examination of all these proposals, the Drafting Committee came up with twenty-one articles covering all aspects of the Supreme Court. At that time, the powers of the Supreme Court did not extend to the territories of the Native States, although within a short time, with the Native States acceding to the Indian Union, this situation did not arise.

The draft of these sections of the Constitution was circulated. Some suggestions were received through a joint memorandum representing the views of the Federal Court and the High Courts and others. Generally speaking, there was agreement on the broad principles espoused in the draft.

The High Courts: The issues related to the High Courts were simpler as these courts had been functioning for almost a century, with a creditable reputation for independence and propriety. These high courts were largely established by Provincial legislatures and the Central legislature's role was restricted only to those subjects where central law was involved. The Constituent Assembly was, therefore, more concerned with matters related to the independence of these courts. BN Rau had recommended that the provisions of the 1935 Act may be followed to the extent feasible. The Provincial Constitution Committee proposed that in order to maintain fairness, it should be the President who appoints the Chief Justice of the

High Courts. Alladi Krishnaswamy Ayyar and KM Munshi moved three proposals: one, that the High Courts should have the right to issue writs or any remedies throughout the area of their jurisdiction; two, that their authority on matters of revenue, restricted by Article 224 of the 1935 Act, should no longer apply; and three; that the High Courts should have the powers of superintendence over subordinate courts. These suggestions were approved and adopted by the Assembly. Following the decision of the Constituent Assembly, the Draft Constitution prepared by BN Rau laid down that all appointments of High Court judges would be made by the President of India; and that he would, before making such appointments, consult the Chief Justice of the Supreme Court and the Governor of the Province. Other matters related to the age of retirement, salaries, removal of judges from office, etc., were also finalised. Post-retirement, the judges were not permitted to practice in a court of law.

The Subordinate Courts: In the early days of Constitution framing, not much attention was paid to the matter of the subordinate courts. The conference of the Judges of the Federal Court and the Chief Justices of the High Courts in March 1948 had drawn attention to this matter. It recommended that this matter should be placed exclusively in the hands of the High Courts with the powers of appointment and dismissal, posting, promotion and grant of leave in respect of the entire subordinate judiciary including the district judges. The Drafting Committee accepted these recommendations. It may be recalled that even the Simon Commission and the Joint Select Committee on Indian Constitutional Reform of 1934 had expressed the paramount importance of an independent and fair-minded judiciary at the level of the subordinate courts, especially as they are most closely in contact with the people. The district, and sessions judge, exercising both civil and criminal matters, were appointed by the Governor of the Province at his discretion, though in consultation with the High Court. On the revenue side, the District Magistrate and subordinate magistrates were appointed by the provincial provinces without any consultation. "It was a common practice for revenue officers to be invested with powers to try criminal cases as well as to supervise the work of the lower magistracy. Thus, the district magistrate was also the collector and principal district officer, and the chief revenue officer of the taluk normally exercised the powers of a second-class magistrate. As Ambedkar observed in the Constituent Assembly, the magistracy was intimately connected with the general system of administration."[xli] The Joint Committee had

recommended that these subordinate magistrates should be appointed by the Public Service Commission and on promotion and postings the district and sessions judge can be consulted. The significant issue of separation of the judiciary and the executive was also touched upon by the Assembly, by the proposal for inclusion among the directive principles that the State should take steps to effect the complete separation of the judiciary from the executive within a period of three years.

The Indian Princely States: At the time when the Constituent Assembly was in session, there were over 550 Princely States which had been classified by the Indian States Committee, known as the Butler Commission, as follows: There were 108 rulers who were members of the Chamber of Princes in their own right; 127 States were represented by twelve members of their order in the Chamber; estates and jagirs numbered 327. Administration varied from State to State: Some had legislative bodies, some had advanced systems of Judiciary, and the rest had varying degrees of administrative efficiency. The common principle was that they were not part of His Majesty's Dominions, though they were considered part of India as stated in various enactments. All powers were inherent in the Ruler. Yet the British Government exercised paramountcy over all of them based on treaties, *sanads,* and traditional usage and practices. This was appropriated by the British on the grounds that the sovereignty of the British Crown was supreme in India. The Rulers had no say in foreign relations which were fully vested in the British Government. The British sourced this power from the Foreign Jurisdiction Order in the Council of 1902 which authorised the Governor-General to exercise on behalf of the Crown such powers and jurisdiction as he thought fit, including legislative, judicial, and administrative matters. Political agents were appointed to ensure that the administration of these states was in accordance with the interests of the Crown. All matters related to these Princely States were exercised by the Governor-General in Council. The Butler Commission had been appointed to review all these arrangements and it heard the contentions of the rulers protesting over the nature of the paramountcy. But these objections were not heeded: "Paramountcy must remain paramount; it must fulfil its obligations, defining or adapting itself according to the shifting necessities of the time and the progressive development of the States."[xlii] It was this committee that had clearly expressed the view that their relationship with the paramount power should not be transferred without their consent to the new government of India. The 1934 Joint Committee on Constitutional

Reform suggested that the rights and authority of Native States should be vested in a separate authority under the British Government. Thus the 1935 Act created a new functionary called the Crown Representative to exclusively deal with the Native States, although it was the Governor-General who held both assignments. The Political Department of the British Government was managed entirely through this new office.

The Union Territories: Throughout British India at the time just before Independence, there were certain areas directly under the Central Government, administered through Chief Commissioners. These were Delhi, Ajmer-Merwara, Coorg, British Baluchistan, the Andaman-Nicobar islands, and Panth Piplodia. The Government of India Act of 1935 mentioned the nature of the direct administration of these areas. In his memorandum, BN Rau had not suggested any change in this aspect and gave the President all powers in this matter. In July 1947, in the joint meeting of the Union and Provincial Constitution Committees, Deshbandhu Gupta suggested, and it was agreed, to form a committee to consider and report on the constitutional arrangements for such areas. The committee comprised of Pattabhi Sitaramayya as Chairman and N Gopalaswami Ayyangar, K Santhanam, Deshbandhu Gupta (from Delhi), C. M. Poonacha (from Coorg) and Mukut Bihari Lai Bharghava (from Ajmer-Merwara) as members. The broad consensus reached was that the Centre must have a special responsibility for the good government and financial solvency of these areas. "The committee took note of the desire of the Government of India to have a separate area for the seat of the capital of the Federation and recognised the special importance of Delhi as such, but it was opposed to the people being deprived of the right of self-government enjoyed by the rest of their countrymen living in the smallest of villages."[xliii]

In the meanwhile, the influx of refugees into Delhi as a result of the Partition was complicating things and Nehru expressed the view that it may be better to leave the matter regarding Delhi open for the Parliament to intervene at the appropriate moment. Accordingly, Ambedkar moved an amendment that vested in the parliament the power to create any law for these areas. As on 26 January 1950, the areas included in Part C of the First Schedule were: Ajmer, Bhopal, Bilaspur, Coorg, Delhi, Himachal Pradesh, Kutch, Manipur, Tripura, and Vindhya Pradesh. Some of these areas were later merged with the Neighbouring States or converted into Independent States.

The Scheduled and Tribal Areas: The British had identified certain backward tracts of land in the sub-continent largely inhabited by tribal and aboriginal populations isolated from the mainstream. The government of the day aimed to protect them from the twin dangers of alienation of their land to more civilised sections of society, and the predatory nature of the moneylender. At the same time, the aim was also to protect their identity. This required special treatment that was enabled by the Scheduled Districts Act of 1874, which treated these areas as a separate class where British laws with suitable amendments could be imposed, thus investing the Executive to exclude the normal operation of law so as to give these people special protection. The 1918 Montague Chelmsford Report mentioned that political reforms could not be extended to these special areas. Some areas were excluded from political representation and the budget for such areas was not even voted upon in the Central and provincial legislative houses. However, by 1930, the Simon Commission report had emphasised the need for educating the people of these areas towards the goal of becoming self-reliant. The Commission, therefore, suggested that the responsibility for these areas should lie with the Centre, though it should be working through the Governors of those provinces where they were located. Thus, the Government of India Act of 1935 classified these areas as excluded and partially excluded areas. In the former, the Governor acted at his discretion; in the latter, there was ministerial responsibility even as the Governors acted with special care for these areas. In addition, there were also 'tribal areas': they did not form part of British India and neither the parliament in Britain nor the legislatures in India exercised any control. The Governor-General exercised whatever control he could at his discretion.

Thus, the Cabinet Mission statement of May 1946 required the Constituent Assembly to pay special attention to these areas. The Advisory Committee set up three committees to examine this issue: one, for the tribal and excluded and partially excluded areas of Assam; two, for the areas of the Northwest Frontier Province; and third, for the areas other than in Assam. In a joint meeting. These committees realised that the ultimate solution to the problem of these backward areas lay in development, not isolation. The committees recommended that it should be the responsibility of the Centre to draw up schemes for the development of these areas and ensure that they were implemented by the Provinces. As for the tribals, it was felt that such a population was not restricted to convenient blocks of territory, but also lived in scattered areas and non-excluded areas. Yet, they needed

to be treated as a whole and given special representation. As KM Munshi said: " We want that the Scheduled Tribes in the whole country should be protected from the destructive impact of races possessing a higher and more aggressive culture and should be encouraged to develop their own autonomous life; at the same time, we want them to take a larger part in the life of the country adopted. They should not be isolated communities or little republics to be perpetuated forever."[xliv]

When the draft constitution was debated in the Assembly in November 1948, Ambedkar introduced the concept of a separate Minister in the provinces to be in charge of tribal welfare, in addition to being in charge of the Scheduled Castes. The Fifth Schedule, as it finds its place today, deals entirely with the administration and control of Scheduled Areas and Scheduled Tribes, where the Governor has to submit a special report to the President on the administration of these areas. In each province, it was also envisaged that there would be a Tribal Advisory Council with a strong tribal element. It would advise the Government about the application of laws to the Scheduled Areas, and it was incumbent on the Government to follow its advice. The transfer of land in a Scheduled Area from a tribal to a non-tribal was not permitted. The State Government was also prohibited from allotting land in a Scheduled Area to non-tribals, except after consulting the Tribes Advisory Council. There was an intense debate at the Assembly on various aspects related to these backward areas. With the clarifications made during these discussions, adjustments were made in the various schedules accordingly so as to address all these issues and concerns.

Relations between Union and the States: From the time of the early Regulation Acts starting from 1773 onwards, the Government in India was subject to the control of the British Parliament. The Montagu-Chelmsford Report conceded the need for the gradual development of self-governing institutions. The Government of India Act of 1919 provided for considerable devolution of powers to the Provinces, with a certain measure of autonomy to the Ministries for the transferred subjects but retained a full measure of control to the Central government. It is the Governor-General in Council who in fact, discharged the responsibilities for good governance. Various bodies and fora, such as the Simon Commission, the Butler Committee, and the three Round Table Conferences deliberated on this issue at length. It was the 1935 Government of India Act that set up a federal polity in India with a Central Government and the Provinces discharging their duties,

though the Central government was empowered to act at its discretion. The outbreak of the Second World War disrupted these deliberations for a while. Thus, when the Constituent Assembly was set up under the Cabinet Mission's Plan of 16 May 1946, the organization of the Central Government in British India remained the same as it was under the Act of 1919, with the distribution of legislative and administrative powers between the Centre and the Provinces as envisaged under the 1935 scheme.

As regards legislative relations, it was BN Rau who made the first tentative attempt to define the nature of the Union Government subjects, which were largely foreign affairs, defence, and communication. Rau also drew attention to the question of the Union's power to raise finances by direct taxation. The need for a strong Centre was strongly expressed by all the members of the Assembly. Most significantly, in the initial discussions, the Assembly also felt the need to state clearly that the laws of the Union would be equally applicable to the Indian Native States as well. The matter became more contentious when the representatives of the Indian Native States joined in the deliberations. The Chairman of the Union Powers Committee, Nehru himself had posed two questions: one, whether there should be a strong Centre; and two, if so, what powers it should have. It was apprehended that these efforts were contingent on the decision of whether the country would be partitioned or not. Still, the Union Powers Committee proposed and received the consent of the Assembly to draw up a list of matters regarding the extent and scope of the centre's powers. The first report of the Committee listed out the subject that should fall under the purview of the Union. KM Panikkar pleaded for the rejection of the idea of a federal principle as it would only weaken the country. The departure from the model of an exclusive government that the British had run was inevitable. Yet, complete delegation to the Provinces was also not feasible. Gopalaswami Ayyangar emphasised the principle that the Union would have the power to levy whatever taxes or revenues that were considered necessary. It would not be dependent merely on the contributions of the Provinces. It was also generally agreed that the Union's jurisdiction would ultimately extend to all matters and in the event that there is a conflict between the Union and the Provinces, the Union's laws would prevail.

In a joint meeting of the Union and Provincial Constitution Committees in early June 1947, it was decided that the Constitution should provide for a federal structure with a strong centre, that there would be three exhaustive lists, i.e., federal, provincial, and concurrent (with residuary

powers with the centre), and that the Indian Native States would be at par with the Provinces with regard to the federal legislative list. It was on 20 August 1947, five days after independence that the Assembly discussed the legislative lists. An overwhelming body of Native States had acceded to the Dominion, and most had sent their representatives to the Assembly. The Drafting Committee deliberated on all these issues in January and February 1948. The three lists of the Rau's enumerating legislative powers were adopted by the Drafting Committee with some changes and reproduced in the Seventh Schedule of its Draft Constitution as List I or the Union List, List II or the State List, and List III or the Concurrent List. This Draft was also circulated to all the Ministries, which had their comments to offer. Members of the public too offered their comments. Ambedkar handled the criticism about excessive centralisation: "…the Draft Constitution had struck a fair balance between the claims of the Centre and the units. While the Centre was not given more responsibilities and power than were strictly necessary, conditions in the modern world rendered centralisation of power inevitable and that trend was bound to operate in India, irrespective of the provisions of the Constitution."[xlv] All debates concluded, with many major and minor changes having been effected, these matters were adopted in the Assembly and included as Articles 245 to 255 in the Constitution.

The nature of the administrative relationship between the Union and the States came up late as all the members were engaged in the basic features of the Constitution. Later, on the basis of the analogous provisions of the 1935 Government of India Act, Gopalaswamy Ayyangar and Alladi Krishnaswami prepared a memorandum suggesting some basic rules to govern the relationship. In sum, it meant that the Federal Government could devolve upon any State government the powers to exercise on behalf of the former, any functions that it wishes to and that it would be the responsibility of the State to ensure its compliance. The direct antecedent was sub-section (1) and (3) of Section 124 of the Government of India Act of 1935. Directions could also be issued by the former to the latter in this regard. The Union Constitution and the Powers Committees deliberated on the nature of these relationships. At this stage, Munshi's suggestion that the President can enforce the compliance of federal directions was not included. It was only in November of 1949 that the Drafting Committee brought in, what is now Article 365, wherein the eventuality of the State not complying with federal directions, the President could decide that the

Government of a State cannot be carried on according to the constitution. Where functions are proposed to be devolved from the federal authorities to a State unit, while there could be consultations, it was decided that consent of the State may not be necessary. The terminology of this relationship was also changed from 'Federation' and' Federal Parliament', to 'Union' and 'Parliament.' The designation of 'units' was also changed to 'States'. "The Draft Constitution had struck a fair balance between the claims of the Centre and the units. While the Centre was not given more responsibilities and power than were strictly necessary, conditions in the modern world rendered centralization of power inevitable and that trend was bound to operate in India, irrespective of the provisions of the Constitution."[xlvi] Arrangements for settling water disputes were added. The machinery of an Inter-State Council was also provided for. Articles 256 to 263 of the Constitution as it stands now, deal with all these issues related to the administrative relations between the Union and the States.

Financial relations: Financial relations between the Union and the States more or less followed the three legislative lists as they had been included in the Government of India Act of 1935. The Union List gave the Centre exclusive powers with respect to duties of customs, excise non-agricultural income, taxes on capital assets, etc. The Provincial List included land revenue, excise on alcohol liquor, lands and buildings, sales of goods taxes on professions, road vehicles, entertainment, stamp duties, etc. Federal taxes fell into various categories: taxes and duties collected by the Centre but entirely distributed to the Provinces. These included estate duties, stamp duties, a certain percentage of income tax, etc. There was also the category that would be retained by the Centre such as corporation taxes. The Central Government could also make grants-in-aid to the units for specific purposes. There was included also a provision regarding the borrowing of the States and the Centre upon the security of the revenues of the Centre. It was thought necessary to provide mechanisms for the sharing of revenues of the Centre with the States. Gopalaswamy Ayyanger advised the appointment of a committee to look into the whole question of the distribution of revenue.

In October of 1947 another expert committee was constituted to look into the financial provisions. It comprised NR Sarkar, a former member of the Viceroy's executive council, and two senior officers of the Indian Audit and Accounts Service, VS Sundaram and MV Rangachari. This committee received representations from the provinces, the Indian Native

States as well as the Ministry of Finance. The Committee concluded that a substantial transfer of revenue from the Centre to the Provinces was inevitable, especially to fund developmental programmes that had been virtually suspended during the Second World War. It was also necessary to place in the hands of the Provincial Governments adequate resources so that they did to have to depend on the "variable munificence or affluence of the Centre".[xlvii] The committee recommended the nature and quantum of resources to be transferred to the provinces and other matters attendant, including how the divisible central taxes are to be apportioned. The Centre was advised to provide for specific purpose grants in aid to the Provinces where required. It was this committee that recommended the setting up of a Finance Commission to be entrusted with three main functions; namely, the allocation between the Provinces of centrally administered taxes; considering applications for grants in aid for the Provinces; and considering and reporting on other matters referred by the President. The committee also observed that the provision of borrowing would apply not only to the Centre but also to the Provinces. In times of emergency, the President would have to be empowered to suspend or vary the financial provisions relating to the distribution of revenues.

When the Drafting Committee began its deliberations on this subject in January 1948, it recorded its inability to agree with the Committee's view regarding the distribution of revenues. It was felt that it would be better to adhere to the status quo as had been suggested by the Constitutional Adviser BN Rau at least for a period of five years. Most of the other details suggested by the Expert Committee were found acceptable, or partially modified by the Drafting Committee. various comments were received on this draft from persons such as TT Krishnamachari, K Santhanam, Mrs Durgabai, Ramalinga Chettiar, B Gopala Reddy, etc. The main opposition was to the retention of the status quo in the distribution of revenues and the limited role assigned to the Finance Commission. In 1949, these provisions were also discussed in the Premiers' Conference convened by the Drafting Committee. Some sharp differences also came to light in this meeting, and this necessitated Ambedkar's commitment that the provisions would be once again looked into in light of the representation from the provinces. Some voices raised the question of devolution of these resources to the third level of government such as the local bodies. This

was raised by Sidhva and Shibban Lal Saxena. However, everyone agreed on the abolition of excise duties on common salt, moved by the struggle on the tax by Gandhiji.

The nature of the extensive debates that took place at various stages of the drafting of these financial provisions, revealed the intense interest of the members of the Assembly as well as the Legislative Assemblies of the Provinces and other interest groups. Today, Articles 263 to 293 cover all aspects of the financial relations between the Union and the States.

Trade, Commerce, and Intercourse within the Territory of India: Freedom of trade, without trade barriers, was always the practice in British India even from the days of the East India Company. When provincial autonomy was granted to the Provinces, the Government of India Act of 1935 prohibited Provincial Governments from imposing barriers to trade within the country. Yet, the Indian Native States, not bound by the 1935 Act, did levy export, and import duties at their respective boundaries. So, one of the early tasks of the Constituent Assembly was to consider freedom of trade and commerce: KM Munshi, Alladi Krishnaswamy Iyer, and BN Rau had already prepared notes on the subject. Rau's formulation was that all such trade would be free. Iyer suggested that goods entering one State from another must not escape duties if the same goods were taxable in the destination State. This was accepted and it was also stated that the Indian Native States would have to follow the same formula too. It was conceded that a grace period would have to be provided to the Native States to fall in line with the new arrangements. Rajagopalachari insisted that the States should be given the freedom to levy taxes on trades as this prohibition would deprive them of much-needed revenues. KM Panikkar felt, however, that this would weaken the federal idea. The concept of imposing restrictions on trade and commerce was taken up in case of instances of public order, morality, or health. Part XIII of the Constitution comprising Articles 301 to 307 deals with this subject. The embargo that had been placed by the Cabinet Mission Plan to restrict central legislative authority to only foreign affairs, defence, and communication, meant that the Assembly could not take up matters of trade and commerce. Ambedkar suggested that the only way out was to make trade and commerce a part of the Fundamental Rights which were universal. It is in this context that we see the insertion of the clause now seen as (g) in Article 19 which pertains to the right to practice any profession, or to carry on any occupation, trade, or business.

The Services: The bureaucratic structure of the British period of Indian history was originally set up within the East India Company. But it became a civil service of the Crown of India formally after the Government of India Act of 1919 which enabled the Secretary of State for India to make rules for setting up the civil services. The Act also provided for the Indianisation of the services in all branches of the administration. The Indian Civil Service and the Indian Police Service were the first of the All-India Services which provided the framework for the basic administration of the country. Since the 1919 Act promised the progressive transfer of power to the Indian Central government and the Provincial Governments, many of the field departments were left to ministerial control, rather than being controlled from London. The Government of India Act of 1935 formalised this position, with the Governor-General authorised to make appointments with respect to central services and the Governors in respect of the provincial services. The Secretary of State was responsible for recruitment in the Indian Civil Service and the Indian Police as also the civil branch of the Indian Medical Service.

As a consequence of independence, there was a severe depletion of personnel, occasioned by the departure of all British offices. That being the background when the Union Constitution Committee discussed the matter, it recommended, acting on the clear directives of Sardar Patel, that there would be an All-India Service, mainly the Indian Civil Service and the Indian Police Service, to be regulated by Central Law. It was based on the idea that superior posts in the Provincial Governments and at the centre would be manned by the All-India Service Officers and each province would send to the centre an adequate number of personnel to man the central posts. Gopalaswamy Iyyengar supported this stand in the discussions in the Constituent Assembly. BN Rau incorporated all these thoughts in his first draft on the subject, providing for two sections, one for the Defence Forces and the second for the Civil Services. The section on Civil Services contained three clauses: one, the President to create the All-India Services with all provisions of recruitment and conditions of services; two, the recruitment of the other Civil Services; and three, the provision that appropriate legislatures could make laws regulating conditions of service (but not recruitment).

The Drafting Committee omitted the section on the defence services leaving it to separate legislative action. As decided by them, the civil servant was protected from arbitrary dismissal and the protection that major penalties

could be imposed on him only after reasonable opportunity was given. The legislatures concerned could make detailed provisions for the services. To provide for the independence of judicial officers, separate provisions were to be made in the Constitution. The Ministry of Home Affairs was very emphatic that the setting up of the Indian Administrative Service and the Indian Police Service should be provided for in the Constitution. Again, Sardar Patel argued for keeping the service matters of the All-India Services outside the purview of the provincial services. "Any pricking of the conscience on the score of provincial autonomy or on the need for sustaining the prestige and powers of Provincial Ministers is therefore out of place. I am also convinced that it would be a grave mistake to leave these matters to be regulated either by Central or Provincial legislation. Constitutional guarantees and safeguards are the best medium of providing for these services and are likely to prove more lasting."[xlviii] Those of the officers who chose to continue under the new dispensation, Indian and British, were guaranteed their subsisting rights as when they had been recruited. There was some opposition to granting this protection to offices who had ruled over India under the British Raj; however, it was later agreed to, on the grounds that this had been committed by leaders of the nationalist movement during discussion with the British government. On 7th and 8th September 1948, these were considered by the Constituent Assembly and approved.

Public Service Commissions: It was the Government of India Act of 1919 arising out of the Montagu-Chelmsford report, that first mooted the idea of a Public Service Commission to recruit qualified men through the competitive process who would also be given protection from political influences. However, this was not acted upon. Later, the Lee Commission on Superior Services in India of 1924 recommended a Public Service Commission to undertake recruitment functions. In 1926, a Public Service Commission had been set up with powers to recruit officers to the All-India Services and Class I Central Services. The Simon Commission recommended similar commissions for recruitment to the provincial-level administrative services. The 1933 White Paper, formulated on the basis of the three Round Table Conferences, provided for a Commission at the Central level and provincial levels. This was endorsed by the Joint Select Committee in 1934 which led to the provisions being included in the Government of India Act of 1935. The functions of the Commissions were set out in detail and embraced practically all matters affecting recruitment

and conditions of service. The Constituent Assembly did not find it necessary to go into this matter in any great detail in light of these well-settled provisions of the law. The Provincial Commissions, it was decided, would be appointed by the Governors on the advice of the Cabinet, just as the Union Commission is to be appointed by the President on the advice of the Central Cabinet. The Commissions conducted examinations for appointments to the civil services and advised the respective governments on recruitment to civil services and civil posts, as well as the principles of making appointments, promotions, transfers, and the suitability of candidates for such appointments, etc.

In May 1948, a conference of the Chairman of the Federal Public Service Commission and the Chairmen of the Provincial Commissions was conducted, and suggestions were invited for incorporation into the Constitution. These suggestions were moved as amendments and discussed in the Assembly on 22nd and 23rd August 1949 leading to the recasting of all provisions discussed so far. On the nature of the representation in the Commission, the proposal that half of the members should be from the official element (those who have worked in government) was keenly discussed, with some wanting this to be increased while others were for reducing the ratio. The official ratio was kept as "as nearly as may be one-half the membership". Other discussions finalised the service conditions of the chairmen and the members, the manner of removing them, etc. Restrictions on the future employment of the chairmen and members were also imposed. It was also decided that the roster of appointments apportioning percentages of vacancies to various communities would not be left to the Commissions but would be decided by the Government. It was also decided that the Commissions would submit annual reports to President, or the Governors, who would place them before the legislatures concerned.

Minorities: Perhaps the most vexatious problem that the nationalist leaders faced in the freedom struggle was the issue of Muslim minorities. Although there had been tension between the majority community and the Muslims for centuries, it became more apparent after the conflagration of 1857. When in October 1908 Lord Minto recommended that separate electorates should be granted to the Muslims, it became more official. With time, the recognition of communal claims became the basic policy of the British, with more and more communities such as the Sikhs, the Christians, the depressed classes, etc., who were all treated as minorities started raising

these issues. The dyarchy system introduced in 1919 placed the burden of redress of the grievances of such people on the Governors of the Provinces. In 1925, a certain percentage of government jobs was reserved for Muslims, in direct appointment to the Government. The 1932 Communal ward accorded representation through separate constituencies for Europeans, Sikhs, Indian Christians, and Anglo-Indians. The Government of India Act of 1935 featured minority rights and safeguards as one of its important pillars. Of course, the allocation of separate electorates to the depressed classes was amended under the Poona Act which, however, allowed them more seats.

Yet, after 1937, the situation worsened with the rise of the Muslim League under Mohammed Ali Jinnah. In 1940, the Muslim League adopted the famous Pakistan resolution urging that geographically contiguous areas should be demarcated into regions to constitute Independent States. In the same year, Lord Linlithgow assured the Muslims that while the Constitution of India would be framed by the Indians themselves, the British Government could not contemplate the transfer of power to any system of government whose authority is denied by large elements of India's national life. Even during wartime, the Cripps proposal of 1942 emphasised the need for adequate protection of racial and religious minorities as a condition precedent for the transfer of power. The 1946 Cabinet Mission statement envisaged a Union of India with limited powers to the centre and more autonomy to the provinces: it is felt that this was a concession for the Muslims to assuage their fears. The statement expressed the apprehension of the Muslims that they might become submerged in a purely unitary India where the superior numbers of the Hindus would place them in a dominant position. [xlix]

When the Constituent Assembly session began, the boycott by the Muslims made the situation perilous. Yet, in keeping with the policy of the Congress, the Objectives Resolution moved by Nehru on 13 December 1946 clearly stated that adequate safeguards shall be provided for the Minorities. It is in this context that the Advisory Committee on Fundamental Rights, Minorites, Tribal, Excluded, and Partially Excluded Areas was constituted, with Govind Ballabh Pant stating that "unless the minorities are fully satisfied, we cannot make any progress: we cannot even maintain peace in an undisturbed manner."[l] The Committee would consist of fifty members of which seven were to be representatives of the Muslims. The Advisory Committee also constituted various sub-committees of which

one was the Minorities sub-committee. This sub-committee was chaired by HC Mookherjee, a Christian leader from Bengal. A questionnaire was devised to elicit the views of the members on matters related to minority communities. It may be recalled that in those days the term 'minorities' included not merely the religious minorities, but also the depressed classes. It was natural, therefore, that most of the discussions were centred around the need for amelioration of the conditions of these disadvantaged groups of people. There was no representation from the Muslim League in these discussions. In this chapter, we are touching only upon those issues pertaining to the Muslims.

KT Shah and M Ruthnaswamy argued for two-fold protection for the religious minorities: one, for the right to profess, preach and propagate their religion; and two, to promote their religious and social culture. The setting up of an independent administrative machinery for the protection of minority rights was also considered. The sub-committee recommended that along with Scheduled Castes and Tribes, the Muslims should also get reservations in the Legislature, in accordance with the percentage of the population. Christians were largely not in favour of reservation, though the reservation was made for the Anglo-Indian population. Reservation for the Muslims was not agreed to with feelings towards them turning acrimonious in the wake of Partition. Ultimately, the question of religious minority reservation was debated. Sardar Patel said: "In the long run it would be in the interests of all to forget that there is anything like a majority or a minority in this country and that in India there is only one community." In the debate that followed, the majority of speakers representing religious minorities offered full support to the proposal to abolish reservation on communal grounds. Jawaharlal Nehru described this consensus as "a historic turn in our destiny".

The Official Language: One of the sharpest controversies in the Assembly discussions was about the definition of the official language. The sub-continent boasted several significant languages, broadly divided into two groups: the Sanskrit-based languages and the Dravidian languages. With British rule, English supplanted all other languages, while, in due course, it also served as a force of national unity and for developing a national identity. Meanwhile, the Hindi-Urdu question too had become a communal matter. In 1925, the Congress officially adopted the following resolution: "The proceedings of the Congress shall be conducted, as far as possible, in Hindustani. The English language or any provincial language may be

used if the speaker is unable to speak Hindustani or whenever necessary. Proceedings of the Provincial Congress Committee shall ordinarily be conducted in the language of the Province concerned. Hindustani may also be used."[li] However, this was not implemented, and English continued to be used in all formal Congress meetings. The party was riven with those who wanted a combination of Hindi and Urdu and those who preferred only the Devanagari script.

The language to be used in the Constituent Assembly was decided to be Hindustani or English, though the Chairman was permitted to allow a member to speak in his mother tongue. The Fundamental Rights sub-committee was given a draft by KM Munshi stating that "(i) Hindustani, written either in the Devanagari or the Persian script should, as the national language, be the first official language of the Union; (ii) English would be the second official language for a transitional period to be prescribed by the Union by law ; (iii) the Union would have the power to declare that all its official records should be maintained in Hindustani, in both the Devanagari and the Persian scripts, and until the law provided otherwise, also in English."[lii] Ambedkar was critical: he expressed the view that Hindustani should be the official language of the Union and its units. The current linguistic diversity would make the Indian administration impossible. KM Pannikar dissented stating that this would only lead to grave conflicts between the Union and the States. Consequently, Sardar Patel removed the language issue from the list of Fundamental Rights.

BN Rau's memorandum had suggested Hindi and English be used in the Union Parliament and the Provincial legislature, though the Provincial Constitution Committee also permitted the use of provincial language or languages. The impending partition of the country hardened hearts and many members insisted that only Hindi, written in the Devanagari, should be used. Govind Das and Thakurdas Bhargava proposed the ban on English after five years. There was much acrimony in the discussion and Patel suggested that the question of the language to be used may be postponed. The views expressed by members can be divided into three groups: one, those who wanted the Constitution to specifically provide for Hindi as the official language of the country; two, those who were willing to use English as a transitional arrangement; and three, those from the South who vehemently opposed the imposition of Hindi on them, terming it, as TT Krishnamachari did, as 'language imperialism.'

The Congress Working Committee resolution of 5 August 1949 only stated that there shall be a State language in which the business of the Union shall be conducted, without specifying what that language should be. Govind Das, as President of the All-India Sahitya Sammelan got passed a resolution from about a hundred representatives of different languages that Hindi should be the national language. A special committee was appointed to draft an appropriate article to resolve this issue, comprising members of the Drafting Committee and some others. This committee decided that only English would be used for a further ten years which could be extended by another five years, after which Hindi would be used. There was a debate on whether international forms of numbers be used or the Arabic numerals. There were more detailed discussions that attempted to arrive at some form of consensus. This stated that Hindi (with Devanagari script) would be the official language of the Union, with the provision that English could also be used for a period of fifteen years. Thereafter, a Commission was to be appointed to make recommendations regarding increasing the use of Hindi. A State could adopt any regional language or languages or English as its official language. Another Directive Principle could be added so as to promote the development of Hindi.

The controversy, however, did not die down. While many, including Nehru, were willing to go along with the above, others were adamant about the use of Hindi. It was finally decided that the matter may be put up to the Constituent Assembly where every member could vote according to his or her conscience. This was done on 12 September 1949. Gopalaswamy Ayyangar moved the matter in the Assembly, stating that he had agreed to the abandonment of English with a heavy heart, "because it involved our bidding goodbye to a language on which I think we have built and achieved our freedom." Nehru urged that we have to win the goodwill of those who speak Hindi, Urdu, or Hindustani. Govind Das pointed out that "passing the Constitution in a foreign language after the end of our slavery and attainment of Independence would forever remain a blot on us." After prolonged discussion, the motion as moved by Ayyangar was approved and today finds its place in Part XVII consisting of Articles 343 to 351, with the Eighth Schedule containing the list of languages.

This part clearly states that the official language of the Union shall be Hindi in the Devanagari script. The continued use of English for fifteen years was permitted. The constitution of a commission for promoting Hindi was provided for along with a parliamentary committee to study

the recommendations of the Commission and it would pass on their recommendations to the President for issuing directions. The States were permitted to adopt any language or Hindi for their uses. The language used by the Union shall be the language for communication between one State and another and the Union and the States. In the Supreme Courts and the High Courts, the language was to be English. In Legislative Assemblies of the States, where other languages have been permitted, the English translation shall be the authoritative version. Public grievances could be written in any language. Every State shall provide facilities for providing instruction in the mother tongue. The President would appoint a special officer for linguistic minorities.

Emergency Provisions: One of the questions that engaged the Constituent Assembly was what sort of powers the Centre should exercise to act swiftly and restore normalcy, in the face of external aggression or internal revolt. The 1909 and 1919 Acts empowered the Governor in the Provinces and the Governor-General at the central level to act with ample authority in such cases. With the 1935 Act, which came into force on 1 April 1937, two questions assumed importance: one, the enablement of the Centre to take control over provincial policies; and two, to make provision if the machinery of the Provincial Government failed. The 1935 Act provided for the Federal legislature to make laws in such conditions and for the Central government to assume executive power in the provinces. The Governors were authorised to act even without the advice of the Council of Ministers. When World War II was declared, the Governors took over the provincial administration, working with the civil services.

On 9 June 1947, the provincial constitution committee considered this question, and in consultation with the Union Constitutional Committee decided that "if the Governor apprehended a grave menace to the peace and tranquillity of a Province or any part of it, he would send a report to the President and further action would be taken by the President, that is the Government at the Centre. In such action, the Governor was not required to consult the Council of Ministers.[liii] However, Vallabhbhai Patel was clear that the Governor could not act wholly in his discretion or act against the advice of his Council of Ministers. The final view taken was that the Governor would send a report on the matter to the President who would immediately take action, the specific nature of which was left to the Union Constitution Committee to decide. KM Munshi suggested an amendment according to which the Governor, if satisfied in his discretion

that a grave situation had emerged where it was not possible to carry on the Government by the advice of his Ministers, could assume to himself by proclamation all powers of the provincial administration for a period of two weeks and communicate his report to the President. It was expected that the President would take suitable action in this regard. HN Kunzru and Govind Ballabh Pant opposed the investment of the Governor with such wide discretionary powers. However, the Chairman of the Provincial Constitution Committee Sardar Patel accepted KM Munshi's amendment.

At the level of the Union Constitution Committee, BN Rau's memorandum had conferred the special responsibility of peace and tranquillity in the whole country on the President. In keeping thereof, Gopalaswami Ayyangar and Alladi Krishnaswamy Ayyar proposed that after the President had by proclamation declared an emergency, the Union Parliament could make laws for any State or part of the States. KT Shah wanted to restrict this to only three months. KM Pannikar wanted the President to be responsible, in such circumstances, for the day-to-day administration of the affected State. K Santhanam pointed out that while in the recommendation of the Provincial Constitution Committee, the Governor's powers for initiating action in an emergency for two weeks along with a report to the President had been prescribed, the Union Constitution Committee had not specified the action of the President on such reports. He proposed that in such cases, the President may act for the suspension of the provincial legislature, and the promulgation of an ordinance to apply to the Province, as well as the issuing of any orders and instructions to the Governor and other officials of the Province. This action of the President would be for a period of six months through ratification of the Union Parliament. The legislative powers of the Province would be taken over by the Union Parliament, whose laws would cease to operate after a period of six months unless specifically extended by resolutions of both Houses of Parliament.

It may be recalled that the question of whether the Governor should be elected or nominated by the President was under discussion then. It was finally decided that he would be nominated by the President, acting on the advice of the Council of Ministers. Thereafter, the question of vesting him with discretionary powers was dropped. Thus, the proposal of vesting the Governor with powers to take over the administration at this discretion for a period of two weeks was dropped. In such a situation it became necessary to enable the President to intervene in the affairs of the States, either through his satisfaction or through the report of the Governor. The

President would be acting not entirely in his discretion in declaring an emergency in the Provinces but would be guided by his central Council of Ministers. In discussions, the need for suspension of Fundamental Rights in such emergencies was hotly debated and despite the fears expressed by some of the members, the majority view was that in case of crises affecting the nation, it may be necessary to suspend Fundamental Rights such as freedom of speech. It was also decided that the proclamation of emergency could be made in cases of threat to financial stability too. As Ambedkar explained, this was on the lines of the analogous provisions of the National Recovery Act of 1930 in the United States. In conditions of emergency, the Union acquired the power to issue directions to a State over the whole field of its executive power.

Amendments to the Constitution: While BN Rau had invited suggestions from the members about the process to be followed for amendments to the Constitution, there were few responses. Some such as BG Kher and RK Chaudhary proposed a two-thirds majority in each house of the Parliament, while KM Pannikar wanted the State Legislatures to also ratify. Gopalaswami Ayyangar and Alladi Krishnaswami Ayyar wanted constitutional amendment proposals to be first approved by a two-thirds majority in each House of the Union Legislature and then by the Legislatures with not less than two-thirds of the States according to approval. KN Rau's memorandum of 30 May 1947 suggested an embargo on any amendment for a period of three years, except for those required to remove difficulties. It was also decided that a two-thirds majority would mean two-thirds of the members present and voting. BN Rau's view was that the process of amending the Constitution in the initial years should not be very rigid as things were still evolving. "We have to remember that the present Constituent Assembly is not based on adult suffrage, the members having been elected by the various Legislatures which, in their turn, were elected on a very restricted franchise. The Parliament of the new Union of India, on the other hand, will be based on an adult franchise. If a Constituent Assembly based on a restricted franchise can, by a simple majority, frame the original Constitution, it is illogical to lay down that the Constitution so framed shall not be amended by a Parliament based on adult franchise except by a specially difficult process involving special majorities and, in some cases, special ratification."[liv]

As it stands today, an amendment to the Constitution can be initiated in either House of Parliament. It has to be passed in each House by a majority of the total membership of that House as also by a majority of not less than two-thirds of the members of that House present and voting. This is known as the special majority. The Bill is then presented to the President who gives his assent. If the amendment seeks to make any change in any of the provisions mentioned in the provision to Article 368, it must be ratified by the Legislatures of not less than one-half of the States. Although there is no prescribed time limit for ratification, it must be completed before the amending Bill is presented to the President for his assent. Where the rights of the States are involved, as explicitly laid out in Article 368, then the ratification of legislatures of not less than half of the States is also required.

In conclusion: It must be kept in mind, that apart from the regular meetings of the various committees that worked day and night in the drafting of the new Constitution, innumerable informal meetings minimised differences of which there is no record. The greatest achievement of the Constitutional drafting process was the empowerment of the people with democratic rights of adult suffrage which was extended to all citizens of India above the age of 21. From a mere 35 million voters in the 1946 Provincial Legislative Assemblies elections, the number swelled to 176 million in the first general elections of 1952. There can be no greater expression of faith in the principle of the will of the people prevailing, than this act of profound courage. It may be surprising to note that even Ambedkar was not a supporter of the universal adult franchise.

Jawaharlal Nehru's Objectives Resolution had set the tone: he had expressed the view that in order to ensure that "certain fundamental social and political ends [are] to be achieved by independent India, the Constitution was devised as the agency by which these objectives could be democratically translated into practice, through a machinery which would enjoy the support of the people."[lv] It is also important to note that the Constitution did not recommend a way to achieve this goal through a defined political system, such as socialism or capitalism. Neither did it recommend an economic reorganisation of society, such as village republics, which probably had the assent of Gandhiji himself. Equally significant was the non-partisan nature of the members of the Constituent Assembly. Despite the massive majority that Congress had achieved in the provincial elections, it took care to gather together a body of stellar experts of different political affiliations to work out the details. The presence

of men like Alladi Krishnaswami Ayyar, N Gopalaswami Ayyangar, HC Mookherjee, S Radhakrishnan, HN Kunzru, Syama Prasad Mookerjee, and others, including Ambedkar himself, undoubtedly enhanced the authority of the Constituent Assembly and enhanced the general acceptability of the Constitution. The numerical strength of the Congress gave the proceedings much-needed stability. Debates in the Constituent Assembly were completely free under the benign oversight of Rajendra Prasad. Agreements were reached by consensus and no decision was forced upon the members.

Meanwhile, the integration of the Indian Native States, one of the most difficult tasks in the process of nation-making was being achieved through the towering personality of Sardar Patel. It was finally announced by Patel that there is now a difference between the [Native] States as understood before, and the Provinces. The language issue, which saw many sharp exchanges in the Assembly was also accepted by the members of the Assembly based on the Munshi-Ayyangar formula we discussed earlier. What was on the mind of many, and most significantly Ambedkar, was the question of caste and social inequalities. On 25 November 1949, in his last speech to the Constituent Assembly, he spoke thus: "We have in India a society based on the principle of graded inequality which means elevation for some and degradation for others". He referred to Indians as a people "divided into several thousands of castes". "If we wish to preserve the Constitution in which we have sought to enshrine the principle of government of the people, for the people, and by the people, let us resolve not to be tardy in the recognition of the evils that lie across our path and which induce people to prefer government for the people to government by the people, nor to be weak in our initiative to remove them. That is the only way to serve the country."

"Rajendra Prasad was equally conscious of these difficulties. He referred to the fissiparous tendencies in the various elements of the country's life-communal differences, caste differences, language differences, provincial differences, and so forth. And he, therefore, found it appropriate to close the proceedings of the Assembly with a prayer, mixed with a certain measure of optimism, that the country might be given men of strong character, men of vision, men who would not sacrifice the interests of the country at large for the sake of smaller groups and areas and who would rise above the prejudices born of these differences."[lvi]

Ambedkar's three warnings to the people of India still resonate. It would be to quote him in full. "The first thing in my judgment we must do is to hold fast to constitutional methods of achieving our social and economic objectives. It means we must abandon the bloody methods of revolution. It means that we must abandon the method of civil disobedience, non-cooperation, and satyagraha. When there was no way left for constitutional methods for achieving economic and social objectives, there was a great deal of justification for unconstitutional methods. But where constitutional methods are open, there can be no justification for these unconstitutional methods. These methods are nothing but the Grammar of Anarchy and the sooner they are abandoned, the better for us.

The second thing we must do is to observe the caution that John Stuart Mill has given to all who are interested in the maintenance of democracy, namely, not "to lay their liberties at the feet of even a great man, or to trust him with the power which enables him to subvert their institutions". There is nothing wrong in being grateful to great men who have rendered life-long services to the country. But there are limits to gratefulness….For in India, Bhakti, or what may be called the path of devotion or hero-worship plays a part in its politics unequalled in magnitude by the part it plays in the politics of any other country in the world. Bhakti in religion may be a road to the salvation of the soul. But in politics, Bhakti or hero-worship is a sure road to degradation and to eventual dictatorship.

The third thing we must do is not be content with mere political democracy. We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy."[lvii]

On 26 January 1950, "we the people" became a Republic.

Annexure I:
Members of the Constituent Assembly

Madras	O. V. Alagesan, Ammu Swaminathan, M. Ananthasayanam Ayyangar, Moturi Satyanarayana, Dakshayani Velayudhan, G. Durgabai, Kala Venkatarao, N. Gopalaswamy Ayyangar, D. Govinda Das, Jerome D'Souza, P. Kakkan, T. M. Kaliannan, K. Kamaraj, V. C. Kesava Rao, T. T. Krishnamachari, Alladi Krishnaswamy Iyer, L. Krishnaswami Bharathi, P. Kunhiraman, Mosalikanti Thirumala Rao, V. I. Munuswamy Pillai, M. A. Muthiah Chettiar, V. Nadimuthu Pillai, S. Nagappa, P. L. Narasimha Raju, B. Pattabhi Sitaramayya, C. Perumalswamy Reddy, T. Prakasam, S. H. Prater, Raja Swetachalapati, R. K. Shanmukham Chetty, T. A. Ramalingam Chettiar, Ramnath Goenka, O. P. Ramaswamy Reddiyar, N. G. Ranga, Neelam Sanjeeva Reddy, Sheik Galib Sahib, K. Santhanam, B. Shiva Rao, Kallur Subba Rao, U. Srinivas Mallya, P. Subbarayan, C. Subramaniam, V Subramaniam, M. C. Veerabahu Pillai, P. M. Velayudapani, A. K. Menon, T. J. M. Wilson, M. Muhammad Ismail, K. T. M. Ahmed Ibrahim, Mahboob Ali Baig Sahib Bahadur, B. Pocker Sahib Bahadur, V. Ramaiah, Ramakrishna Ranga Rao
Bombay	Balchandra Maheshwar Gupte, Hansa Mehta, Hari Vinayak Pataskar, Dr. B. R. Ambedkar, Joseph Alban D'Souza, Kanayalal Nanabhai Desai, Keshavrao Jedhe, Khandubhai Kasanji Desai, B. G. Kher, Minoo Masani, K.M. Munshi, Narahar Vishnu Gadgil, S. Nijalingappa, S. K. Patil, Ramchandra Manohar Nalavade, R. R. Diwakar, Shankarrao Deo, G. V. Mavalankar, Vallabhbhai Patel, Abdul Kadar Mohammad Shaikh, Abdul Kadir Abdul Aziz Khan

Bengal	Mono Mohan Das, Arun Chandra Guha, Lakshmi Kanta Maitra, Mihir Lal Chattopadhyay, Satis Chandra Samanta, Suresh Chandra Majumdar, Upendranath Barman, Prabhudayal Himatsingka, Basanta Kumar Das, Renuka Ray, H. C. Mookerjee, Surendra Mohan Ghose, Syama Prasad Mookerjee, Ari Bahadur Gurung, R. E. Platel, K. C. Neogy, Raghib Ahsan, Somnath Lahiri, Jasimuddin Ahmad, Naziruddin Ahmad, Abdul Hamid, Abdul Halim Ghaznavi
United Provinces	Maulana Hifzur Rahman Seoharwi, Ajit Prasad Jain, Rai Bahadur Raghubir Narain Singh, Algu Rai Shastri, Balkrishna Sharma, Banshi Dhar Misra, Bhagwan Din, Damodar Swarup Seth, Dayal Das Bhagat, Dharam Prakash, A. Dharam Dass, R. V. Dhulekar, Feroz Gandhi, Gopal Narain, Krishna Chandra Sharma, Govind Ballabh Pant, Govind Malviya, Har Govind Pant, Harihar Nath Shastri, Hriday Nath Kunzru, Jaspat Roy Kapoor, Jagannath Baksh Singh, Jawaharlal Nehru, Jogendra Singh, Jugal Kishore, Jwala Prasad Srivastava, B. V. Keskar, Kamla Chaudhry, Kamalapati Tripathi, J. B. Kripalani, Mahavir Tyagi, Khurshed Lal, Masuriya Din, Mohanlal Saksena, Padampat Singhania, Phool Singh, Paragi Lal, Purnima Banerjee, Purushottam Das Tandon, Hira Vallabha Tripathi, Ram Chandra Gupta, Shibban Lal Saxena, Satish Chandra, John Matthai, Sucheta Kripalani, Sunder Lall, Venkatesh Narayan Tiwari, Mohanlal Gautam, Vishwambhar Dayal Tripathi, Vishnu Sharan Dublish, Begum Aizaz Rasul, Hyder Hussain, Hasrat Mohani, Abul Kalam Azad, Nawab Mohammad Ismail Khan, Rafi Ahmad Kidwai, Z H Lari

Punjab (Now East Punjab)	Bakshi Tek Chand, Jairamdas Daulatram, Thakur Das Bhargava, Bikramlal Sondhi, Yashwant Rai, Ranbir Singh Hooda, Lala Achint Ram, Nand Lal, Baldev Singh, Giani Gurmukh Singh Musafir, Sardar Hukam Singh, Sardar Bhopinder Singh Mann, Sardar Rattan Singh Lohgarh Chaudhry Suraj Mal, Begum Aizaz Rasul
Bihar	Amiyo Kumar Ghosh, Anugrah Narayan Sinha, Banarsi Prasad Jhunjhunwala, Bhagwat Prasad, Boniface Lakra, Brajeshwar Prasad, Chandika Ram, K. T. Shah, Devendra Nath Samanta, Dip Narain Sinha, Guptanath Singh, Jadubans Sahay, Jagat Narain Lal, Jagjivan Ram, Jaipal Singh Munda, Kameshwar Singh of Darbhanga, Kamaleshwari Prasad Yadav, Mahesh Prasad Sinha, Krishna Ballabh Sahay, Raghunandan Prasad, Rajendra Prasad, Rameshwar Prasad Sinha, Ramnarayan Singh, Sachchidananda Sinha, Sarangdhar Sinha, Satyanarayan Sinha, Binodanand Jha, P. K. Sen, Sri Krishna Sinha, Sri Narayan Mahtha, Shyam Nandan Prasad Mishra, Hussain Imam, Syed Jaffer Imam, S. M. Latifur Rahman, Mohd Tahir Hussain, Tajamul Hussain, Choudhry Abid Hussain, Hargovind Mishra.
Central Provinces and Berar	Ambica Charan Shukla, Raghu Vira, Rajkumari Amrit Kaur, Bhagwantrao Mandloi, Brijlal Biyani, Thakur Cheedilal, Seth Govind Das, Hari Singh Gour, Hari Vishnu Kamath, Hemchandra Jagobaji Khandekar, Ghanshyam Singh Gupta, Laxman Shrawan Bhatkar, Panjabrao Deshmukh, Ravi Shankar Shukla, R. K. Sidhva, Dada Dharmadhikari, Frank Anthony, Kazi Syed Karimuddin, Ganpatrao Dani
Assam	Nibaran Chandra Laskar, Dharanidhar Basu-Matari, Gopinath Bardoloi, J. J. M. Nichols-Roy, Kuladhar Chaliha, Rohini Kumar Chaudhury, Muhammad Saadulla, Abdur Rouf

Orissa	Bishwanath Das, Krishna Chandra Gajapati Narayana Dev, Harekrushna Mahatab, Laxminarayan Sahu, Lokanath Mishra, Nandkishore Das, Rajkrishna Bose, Santanu Kumar Das
Delhi	Deshbandhu Gupta
Ajmer-Merwara	Mukut Bihari Lal Bhargava
Coorg	C. M. Poonacha
Mysore	K.C. Reddy, T. Siddalingaya, H. R. Guruv Reddy, S. V. Krishnamoorthy Rao, K. Hanumanthaiya, H. Siddhaveerappa, T. Channiah
Jammu and Kashmir	Sheikh Muhammad Abdullah, Motiram Baigra, Mirza Afzal Beg, Maulana Mohammad Sayeed Masoodi
Travancore-Cochin	Pattom A. Thanu Pillai, R. Sankar, P. T. Chacko, Panampilly Govinda Menon, Annie Mascarene, P. S. Nataraja Pillai, K.A. Mohamed, P.K.Lekshmanan
Madhya Bharat	Vinayak Sitaram Sarwate, Brijraj Narain, Gopikrishna Vijayavargiya, Ram Sahai, Kusum Kant Jain, Radhavallabh Vijayvargiya, Sitaram Jajoo
Saurashtra	Balwantrai Mehta, Jaisukhlal Hathi, Amritlal Vithaldas Thakkar, Chimanlal Chakubhai Shah, Samaldas Gandhi
Rajputana	V. T. Krishnamachari, Hiralal Shastri, Sardar Singhjhi of Khetri, Jaswant Singhji, Raj Bhadur, Manikya Lal Varma, Gokul Lal Asava, Ramchandra Upadhyaya, Balwant Singh Mehta, Dalel Singh, Jainarain Vyas
Patiala and East Punjab States Union	Ranjit Singh, Sochet Singh Aujla, Kaka Bhagwant Roy
Bombay States	Vinayakrao Balshankar Vaidya, B.N. Munavalli, Gokulbhai Bhatt, Jivraj Narayan Mehta, Gopaldas Ambaidas Desai, Paranlal Thakurlal Munshi, Balasaheb Hanumantrao Khardekar, Ratnappa Kumbhar

Orissa States	Lal Mohan Pati, N. Madhava Rau, Raj Kunwar, Sarangadhar Das, Yudhishthir Misra
Central Provinces States	Ratanlal Kishorilal Malviya, Kishori Mohan Tripathi, Thakur Ramprasad Potai
United Provinces States	Bashir Hussain Zaidi, Krishna Singh
Madras States	V. Ramaiah
Vindhya Pradesh	Avdesh Pratap Singh, Shambu Nath Shukla, Ram Sahai Tiwary, Manoolal Dwivedi
Cooch Behar	Himmat Singh K. Maheshwari
Tripura and Manipur	Girija Shankar Guha
Bhopal	Lal Singh
Kutch	Bhavanji Arjan Khimji
Himachal Pradesh	Yashwant Singh Parmar

Annexure II:

Committees of the Constituent Assembly

1. Union Power Committee – Jawaharlal Nehru
2. Union Constitution Committee – Jawaharlal Nehru
3. Provincial Constitution Committee – Sardar Patel
4. Drafting Committee – Dr. B.R. Ambedkar
5. Advisory Committee on Fundamental Rights, Minorities and Tribal and Excluded Areas - Sardar Patel.

   This committee had the following sub-committees:

   - Fundamental Rights Sub-Committee – J.B. Kripalani
   - Minorities Sub-Committee – H.C. Mukherjee
   - North-East Frontier Tribal Areas and Assam Excluded & Partially Excluded Areas
     Sub-Committee – Gopinath Bardoloi
   - Excluded and Partially Excluded Areas (Other than those in Assam) Sub-Committee – A.V. Thakkar

6. Rules of Procedure Committee – Dr. Rajendra Prasad
7. States Committee (Committee for Negotiating with States) – Jawaharlal Nehru
8. Steering Committee – Dr. Rajendra Prasad

Minor Committees

- Committee on the Functions of the Constituent Assembly – G.V. Mavalankar
- Order of Business Committee – Dr. K.M. Munshi
- House Committee – B. Pattabhi Sitaramayya
- Ad-hoc Committee on the National Flag – Dr. Rajendra Prasad
- Special Committee to Examine the Draft Constitution – Jawaharlal Nehru
- Credentials Committee – Alladi Krishnaswamy Ayyar
- Finance and Staff Committee – Dr. Rajendra Prasad
- Press Gallery Committee – Usha Nath Sen
- Committee to Examine the Effect of Indian Independence Act of 1947
- Committee on Chief Commissioners' Provinces – B. Pattabhi Sitaramayya
- Commission on Linguistic Provinces – S.K. Dar
- Expert Committee on Financial Provisions – Nalini Ranjan Sarkar
- Ad-hoc Committee on the Supreme Court – S. Varadachari
- Ad-hoc Committee on citizenship – S Varadachari

Drafting Committee

- The Drafting Commission was established by the Constitutional Council on August 29, 1947, chaired by Dr. B. Ambedkar, to prepare the drafting of the Constitution. It had seven members. Dr. B.R. Ambedkar (Chairman), Gopalaswamy Ayyangar, Alladi Krishnaswamy Ayyar, Dr. K.M. Munshi, Syed Mohammad Saadullah Madhava Rau (He replaced B.L. Mitter who resigned due to ill-health)and T. Krishnamachari (He replaced D.P. Khaitan who died in 1948)

- The drafting committee is the most important body, as it is entrusted with the final task of drafting a new constitution based on reports submitted by other committees.
- The first draft was published in February 1948 and the citizens of India had eight months to discuss the draft and propose amendments.
- In response to comments and suggestions from the public, the committee prepared a second draft, which was published in October of the same year.

Notes

The most important source for the writing of this chapter is *The Framing of India's Constitution: A study,* prepared by a committee headed by S Shiva Rao, a member of the Constituent Assembly, with five others as members. It was published by a group of publishers in Australia, Canada & the US, New Zealand and UK in 1968. The Indian Institute of Public Administration, New Delhi, played the leading role in facilitating this work. Its foreword was by Dr. S Radhakrishnan. This had been referred to extensively and can be considered the most authoritative work on the writing of the Constitution of India. Also significant as a resource is BN Rau's *India's Constitution in the Making* also referred to in this chapter.

i Jawaharlal Nehru, in his foreword to a book by YG Krishnamurthy 'Constituent Assembly and Indian Federation.' New Book Company, 1940 (original from the University of Michigan).

ii Gurumukh Nihal Singh, "The Idea of an Indian Constituent Assembly," *The Indian Journal of Political Science,* Vol. 2, no. 3 (January-March 1941): 255-272.

iii Preamble to the Government of India Act, 1919 (9 and 10 Geo.V Ch 101).

iv As quoted by Dr Rajendra Prasad in his inaugural address to the members of the Indian Constituent Assembly.

v Lord Birkenhead's speech in the House of Lords on 7 July 1925.

vi From the introduction to BN Rau's *India's Constitution in the Making* by B Shiva Rao, Orient Longmans Private Limited, May 1960.Quoting Jawaharlal Nehru's broadcast.

vii The Constitution of India website, 16 May 1946 Cabinet Mission Plan (Cabinet Mission, 1946), accessible at https://www.constitutionofindia.net/historical_constitutions/cabinet_mission_plan__cabinet_mission__1946__16th%20May%201946

viii S Shiva Rao, *The Framing of India's Constitution: A study.* A member of the Constituent Assembly, with VKN Menon, JN Khosla, KV Padmanabhan, C Ganeshan and PN Krishna Mani as members. It was published by a group of publishers in Australia, Canada & the US, New Zealand and the UK in 1968. The Indian Institute of Public Administration, New Delhi, played the leading role in facilitating this work. Its foreword was by Dr. S Radhakrishnan.

ix Ibid: 92.

x Ibid: 108.

xi Ibid: 114.

xii Ibid: 118.

xiii Ibid:128.

xiv Rosalyn Higgins, *The Development of International Law through Political Organs of the United Nations,* (London, Oxford University Press, for the Royal Institute of International Affairs, 1963).

xv S Shiva Rao, Supra: 130.

xvi BR Ambedkar, *Constituent Assembly Debates,* 4 November 1948 as quoted in 'BR Ambedkar Selected Speeches' accessible at https://prasarbharati.gov.in/whatsnew/whatsnew_653363.pdf

xvii Pattabhi Sitaramaya, *The History of the Indian National Congress (1885-1935),* Vol I, 463-64.

xviii Constituent Assembly Resolution on the Objectives Resolution of Nehru of 13 December 1946) passed unanimously on 22 January 1947.

xix S Shiva Rao, Supra: 177.

xx Ibid: 179.

xxi Ibid: 321.

xxii Ibid: 326.

xxiii Constituent Assembly Debates, accessible at https://www.constitutionofindia.net/constitution_assembly_debates

xxiv BR Ambedkar in the Constituent Assembly debates of 4 November 1948 accessible at https://indiankanoon.org/doc/843976/

xxv S Shiva Rao, Supra: 332.

xxvi Ibid: 333.

xxvii Ibid: 335.

xxviii Ibid: 342.

xxix Ibid: 345.

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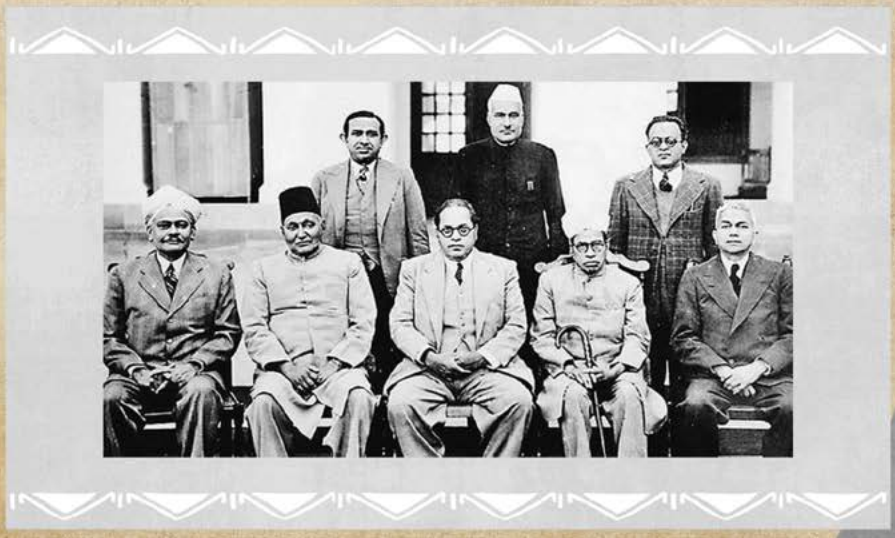

A photo of the drafting committee of the Constituent Assembly with its chairman BR Ambedkar in the centre.(Wikimedia Commons)

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