

CONSTITUTIONAL LAW

NATURE OF THE CONSTITUTION

Critically examine the federal character of the Indian Constitution. [10]

Dec 07, Dec 04, 01

Prof K.C Wheare termed the Indian Constitution as 'quasi-federal'. Do you agree with it? [10]

2K

Introduction: According to the traditional classification followed by the political scientists, constitutions are either unitary or federal. In a unitary constitution the powers of the Government are centralized in one government viz., the Central Government. The provinces are subordinate to the Centre. In a federal constitution, on the other hand, there is a division of powers between the Federal and the State Governments and both are independent in their own spheres.

There is a difference of opinion amongst the constitutional jurists about the nature of the Indian Constitution. One view is that it is a quasi-federal constitution and contains more unitary features than federal. The other view is that it is a federal constitution with a novel feature adopting itself to national emergencies. The view of the framers of the Constitution is that the Indian Constitution is a Federal Constitution. Dr. Ambedkar, the Chairman of the Drafting Committee, observed thus, "I think it is agreed that our Constitution notwithstanding the many provisions which are contained in it whereby the Centre has been given powers to override the Provinces (States) nonetheless, is a Federal Constitution.

But some constitutional jurists hesitate to characterize the Indian Constitution as federal. It is, therefore, necessary to ascertain firstly, what federal constitution is and what are its essential characteristics, and secondly, to examine whether our Constitution possesses those characteristics.

"By the Federal Principles", Prof. Wheare observes, "is meant the method of dividing powers, so that the general and regional Governments are each within a sphere co-ordinate and independent. Both the federal and the Regional Governments are co-ordinate and independent in their spheres and not subordinate to one another."

Thus the criterion to decide the nature of the Indian Constitution is by answering the question, 'Is the federal principle predominant in the constitution?' If so, that constitution may be called a 'federal Constitution.' If, on the other hand, there are so many modifications, in the application of the federal principle that it ceases to be of any significance, then the constitution cannot be termed as federal. This appears to be the most instructive and responsible way in which to use the term 'federal constitution.' It seems essential to define federal principle rigidly, but to apply the term 'federal constitution' more widely. Thus Dr. Wheare accepts that exceptions are permissible

provided federal principle is predominantly retained in the Constitution.

Essential Characteristics of a Federal Constitution

A federal constitution usually has the following essential characteristics:

Distribution of Powers

The distribution of powers is an essential feature of federalism. Federalism means the distribution of the powers of the State among a number of co-ordinate bodies each originating in and controlled by the Constitution. The basis of such distribution of powers is that in matters of national importance, in which a uniform policy is desirable in the interest of the units, authority is entrusted to the Union, and matters of local concern remain with the States.

Supremacy of Constitution

A federal State derives its existence from the Constitution, just as a corporation derives its existence from the grant by which it is created. Hence, every power, executive, legislative or judicial whether it belongs to the nation or to the individual State is subordinate to and controlled by the Constitution. The Constitution in a federal State constitutes the supreme law of the land. Prof. Wheare says, “that those two institutions - the supreme constitution and the written constitution are then, essential institutions to a federal Government. The supreme constitution is essential if the Government is to be federal; the written constitution is essential if a federal Government is to work well.”

A Written Constitution

A federal constitution must almost necessarily be a written constitution. The foundations of a federal State are complicated contracts. It will be practically impossible to maintain the supremacy of the Constitution, unless the terms of the Constitution have been reduced into writing. To base an arrangement of this kind upon understandings or conventions would be certain to generate misunderstandings and disagreements.

Rigidity

A natural corollary of a written constitution is its rigidity. A constitution, which is the supreme law of the land, must also be rigid. In a rigid constitution the procedure of amendment is very complicated and difficult. This does not mean that the constitution should be legally unalterable. It simply means that the power of amending the constitution should not remain exclusively with either the Central or State Governments. A constitution of a country is considered to be a permanent document. It is the supreme law of the land. This supremacy of the constitution can only be maintained if the method of amendment is rigid.

Authority of Courts

In a federal State the legal supremacy of the Constitution is essential for the existence of the federal system. The very nature of a federal State involves a division of powers between the Central and State Governments under the framework of the Constitution. It is, therefore, essential to maintain this division of powers between the two levels of Governments. This must be done by some independent and impartial authority above and beyond the ordinary bodies whether federal or State legislatures existing under the constitution. The judiciary has, in a federal polity, the final power to interpret the constitution and guard the entrenched provisions of the Constitution.

The Indian Constitution possesses all the essential characteristics of a federal constitution mentioned above. The constitution establishes a dual polity, a system of double Government with the Central Government at one level and the State Government at the other. There is a division of powers between the Central and the State Governments. Each level of Government is supreme in its own sphere. The Constitution of India is written and is supreme. The provisions of the Constitution, which are concerned with federal principles, cannot be altered without the consent of the majority of the States. The Constitution establishes a Supreme Court to decide disputes between the Union and the States, or the States *inter se* interpret finally the provisions of the Constitution.

But, as said earlier, some scholars hesitate to characterize the Indian Constitution as truly federal because according to them in certain circumstances the Constitution empowers the Centre to interfere in the State matters and thus places the States in a subordinate position, which violates the federal principle. They, therefore, use such expressions for it as ‘quasi-federal’, ‘unitary with federal features’ or ‘federal with unitary features.’ In the opinion of Prof. Wheare, “The Constitution establishes a system of Government which is almost quasi-federal a unitary State with subsidiary federal features rather than a federal State with subsidiary unitary features.” Jennings has characterized it as “a federation with a strong centralizing tendency.”

Unitary Features

In the following matters, it is pointed out that the Indian Constitution contains the modifications of the federal principle:

Appointment of Governors

The Governors of the States are appointed by the President (Articles 155 and 156) and answerable to him. This is, however, not a matter of much significance, for, the Governor is only the constitutional head of the State who shall normally act on the advice of his Ministers. There are provisions in the Constitution under which the Governor is required to send certain State laws for the assent of the President. The President has power to veto those State Laws. But whatever be the letter of the Constitution, in practice there are not many examples where the President has vetoed the State Laws.

Parliament's power to legislate in the national interest

Under Art. 249 Parliament is empowered to make laws with respect to every matter enumerated in the State List if the Rajya Sabha passes a resolution-by 2/3 majority that it is necessary in the national interest. There cannot be any objection to this provision. Firstly, No one will deny that if a subject in the State List assumes national character, the Parliament should make a law on it. In normal course this cannot be done unless the Constitution is amended. But in this provision we have devised an expedient way by which without formally amending the Constitution we can achieve the desired effect, namely, the acquisition by the Centre of the power to administer and legislate upon a subject, which has assumed national importance. Secondly, it should also be noted that this power is given to Parliament by the Council of States itself by passing a resolution supported by 2/3 majority of the members present. Thus, in effect by this device the Constitution is amended by the agreement of majority of the States. Therefore, it is difficult to understand how Article 249 places the State in subordinate position.

Parliaments' power to form new States and alter boundaries of existing States

The Parliament of India may form new States; it may increase or diminish the area of any State and it may alter the boundaries or name of any State (Art. 3). The very existence of the State thus depends upon the Union Government. The power conferred on Parliament to make territorial adjustment is better explained on the historical basis. The Government of India, for the first time, established a federal polity in India. It deliberately created the constituent units of the federation although they had no organic roots in the past. The framers of the Constitution were well aware of the peculiar conditions under which and the reasons for which the States were formed and their boundaries were defined and so they deliberately accepted the provisions in Article 3 with a view to meeting the possibility of the redistribution of the State territory after the integration of Indian States. The provisions in Art. 3 take into account the fact that the Constitution contemplated readjustment of the territories of constituent States, which might arise in future.

Emergency provisions

The Constitution envisages three types of emergencies:

- emergency caused by war or external aggression or armed rebellion.(Art. 352)
- emergency caused by failure of constitutional machinery in States (Art. 356)
- financial emergency (Art. 360)

When the proclamation of emergency is made under Art. 352, the normal distribution of powers between the Centre and the States undergo a vital change. Parliament is empowered to make laws with respect to any matter enumerated in the State List. The Centre is empowered to give directions to any State as to manner in which the State's executive power is to be exercised. Further, the President may by order direct that all or any of the provisions of Arts. 278 to 279 relating to distribution of revenue between the Centre and the State shall take effect with such exception or modifications, as he thinks fit. Under Art. 356, if the President is satisfied that Government of a State cannot be carried on in accordance with the provisions of the Constitution he can dismiss the State

ministry and dissolve the Legislature and assume all the functions of the State. Thus the normal distribution of powers between the Centre and the States, which is the basic element of a federal constitution, is completely suspended. It is alleged that these provisions enable the Union Parliament to convert the Union into a unitary State, which vitally affects the federal character of the Indian Constitution.

Conclusion: “The correct view,” observes Dr. V.N. Shukla, “is that emergency provisions which come into operation only on the happening of the specific contingencies, do not modify or destroy the federal system. It is rather a merit of the Constitution that it visualizes the contingencies when the strict application of the federal principle might destroy the basic assumption on which our Constitution is built. The Constitution by adopting itself to changed circumstances strengthens the Government in its endeavour to overcome the crisis.

For the above reasons we maintain that the Indian Constitution is federal in nature. Prof. Wheare coined a phrase ‘quasi-federation’ as applicable to India but he has nowhere defined what a ‘quasi-federation’ is. The term ‘quasi-federal’ is extremely vague as it does not denote how powerful the Centre is, how much deviation there is from the pure ‘federal model’ or what kind of special position a particular quasi-federation occupies between a unitary State and a federation proper. The fundamental principle of federation is that the powers are distributed between the Centre and the States and that is done by the Constitution. That is what the Constitution does. The States do not depend upon the Centre, for, in normal times the Centre cannot intrude. It may be that the Centre has been assigned a larger role than the States but that by itself does not detract from the federal nature of the Constitution, for it is not the essence of federalism to say that only so much, and more power, is to be given to the Centre.

In short, it may be concluded that the Constitution of India is neither purely federal nor purely unitary but is a combination of both. It is a union of composite State of a novel type. It enshrines the principle that in spite of federalism, the national interest ought to be paramount. Thus, the Indian Constitution is mainly federal with unique safeguards for enforcing national unity and growth.

SALIENT FEATURES OF THE INDIAN CONSTITUTION

Explain the salient features of the Indian Constitution. [16]

05, 04, Dec 03, 01

Introduction: A Constitution means a document having a special legal sanctity, which sets out the framework and the principal functions of the organs of the Government of a State and declares the principles governing the operation of those organs.

The Indian Constitution has certain unique features that set it apart from all the other Constitutions in the world.

The Longest Constitution in the World

The Indian Constitution is the longest and the most detailed of all the written Constitutions of the world. While the American Constitution originally consisted of only 7 Articles, the Australian Constitution 128 Articles, the Canadian Constitution 147 Articles, the Indian Constitution originally consisted of 395 Articles divided into 22 Parts and 9 Schedules. But after the Constitution 92nd Amendment Act, 2003 the Indian Constitution now consists of 446 Articles divided into 26 Parts and 12 Schedules.

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

1. The framers of the Indian Constitution have gained experience from the working of all the known Constitutions of the world. They were aware of the difficulties faced in the working of these Constitutions. This was the reason that they sought to incorporate good provisions of those Constitutions in order to avoid defects and loopholes that might come in future in the working of the Indian Constitution. Accordingly, they framed the Chapter of the Fundamental Rights on the model of the American Constitution, and adopted the parliamentary system of Government from the United Kingdom, they took the idea of the Directive Principles of State Policy from the Constitution of Ireland, and added elaborate provisions relating to Emergency in the light of the Constitution of the German Reich and the Government of India Act, 1935.
2. The Indian Constitution lays down the structure not only of the Central Government but also of the States. The American Constitution leaves the States to draw up their own Constitutions.
3. The vastness of the country and peculiar problems relating to the language has added to the bulk of the Constitution.
4. The Constitution contains a long list of Fundamental Rights and also a number of Directive Principles, which confer no justifiable rights upon the individual. Though these directives by their very nature could not be made legally enforceable yet the framers incorporated them in the Constitution with a view that it would serve as constant reminder to the future Governments that they will have to implement them in order to achieve the ideals of the welfare State as envisaged

in the Preamble of the Constitution. It was also felt that the smooth working of an infant democracy might be jeopardized unless the Constitution mentioned in detail things, which were left in other Constitutions to ordinary legislation. This explains why we have in our Constitution detailed provisions about the organization of the judiciary, the services, the Public Service Commissions, Elections and many transitory provisions and the like.

Parliamentary Form of Government

The Constitution of India establishes a parliamentary form of Government both at the Centre and the States. In this respect the makers of the Constitution have followed the British model in *toto*. The reason for this is that we were accustomed to this type of Government. The essence of the parliamentary form of Government is its responsibility to the Legislature. The President is the constitutional head of the State. The real executive power is vested in the Council of Ministers whose head is the Prime Minister. The Council of Ministers is collectively responsible to the Lower House, *i.e.*, Lok Sabha. The members of the Lower House are elected directly by the people on the basis of adult franchise normally for five years. The position is the same in the States. This Government is, therefore, called a responsible Government. On the other hand, the American Constitution establishes a Presidential type of Government based on the principle of separation of powers. The President is the real executive; elected directly by the people for 4 years. All executive powers are vested in him. He is not responsible to the Lower House, *i.e.*, the Congress. The members of his Cabinet are not members of the Legislature. They are appointed by the President and therefore, responsible to him.

At the outset it has to be made clear that the framers of the Constitution preferred the parliamentary system of government to the Presidential form, mainly for two reasons

- (1) the system was already in existence in India and people were well acquainted with it
- (2) it provides for accountability of ministers to the Legislature.

However, this hope of the framers have been belied. The happenings during the last two decades clearly demonstrate that the parliamentary form of government have almost failed. Efforts to remove its drawbacks have not been successful.

Unique Blend of Rigidity and Flexibility

It has been the nature of the amending process itself in federations, which had led political scientists to classify federal constitution as rigid. A rigid constitution is one which requires a special method of amendment of any of its provisions while in flexible Constitution any of its provisions can be amended by ordinary legislative process. A written constitution is generally said to be rigid. The Indian Constitution, though written, is sufficiently flexible. It is only a few provisions of the Constitution that require the consent of half of the State Legislatures. The rest of the provisions can be amended by a special majority of Parliament. The fact that the Indian Constitution has been amended 78

times during the period of 49 years of its working disapproves the view taken by Sir Ivor Jennings who had characterized our Constitution as rigid for the following reasons:

- that the process of amendment was complicated and difficult
- that matters which should have been left to ordinary legislation having been incorporated into the Constitution, no change in these matters is possible without undergoing the process of amendment.

Fundamental Rights

The incorporation of a formal declaration of Fundamental Rights in Part III of the Constitution is deemed to be a distinguishing feature of a democratic State. These rights are prohibitions against the State. The State cannot make a law, which takes away or abridges any of the rights of the citizens guaranteed in the Part III of the Constitution. If it passes such a law it may be declared unconstitutional by the courts. But mere declaration of certain fundamental rights will be of no use if there is no machinery for their enforcement. Our Constitution has, therefore, conferred on the Supreme Court the power to grant most effective remedies in the nature of writs *Habeas Corpus*, *Mandamus*, *Prohibition*, *Quo Warranto* and *Certiorari* whenever these rights are violated. It must, however, be clearly understood that fundamental rights are not absolute rights. They are subject to certain restrictions. Thus our Constitution tries to strike a balance between the individual liberty and social interest. The idea of incorporating a Bill of Rights has been taken from the Constitution of the United States. But the guarantee of individual rights in our Constitution has been very carefully balanced with the need for security of the State itself.

Directive Principles of State Policy

The Directive Principles of State Policy contained in Part IV of the Constitution set out the aims and objectives to be taken up by the States in the governance of the country. Unlike the Fundamental Rights, these rights are not justiciable. If the State is unable to implement any provisions of Part IV, no action can be brought against the State in a court of law. For this want of enforceability there has been much criticism. But the criticism is not justified. Though by their very nature they are not justiciable in the court of law, yet the State authorities have to answer for them to the electorate at the time of elections. The idea of a welfare State envisaged in our Constitution can only be achieved if the States endeavour to implement them with a high sense of moral duty.

A Federation with a strong Centralising Tendency

The most remarkable feature of the Indian Constitution is that being a federal Constitution it acquires a unitary character during the time of emergency. During the proclamation of emergency the normal distribution of powers between the Centre and the States undergoes a vital change. The Union Parliament is empowered to legislate on any subjects mentioned in the State List. The Central Government is empowered to give directions to States as to the manner in which it should exercise its executive powers. The

financial arrangements between the Centre and States can also be altered by the Union Government. Thus during the proclamation of emergency all powers are centralised in the Union Government and Constitution acquires a unitary character. This combination of federal and unitary system is unique feature of the Indian Constitution.

Adult Suffrage

The old system of communal electorates has been abolished and the uniform adult suffrage system has been adopted. Under the Indian Constitution every man and woman above 18 years of age has been given the right to elect representatives for the legislature. The adoption of the universal Adult Suffrage (Article 326) without any qualification either of sex, property, taxation or the like is a bold experiment in India, having regard to the vast extent of the country and its population, with an overwhelming illiteracy. This suffrage is wider than all the democratic countries, which have given right to vote to their people. In spite of many difficulties, this bold experiment has been successful. This is evident with the increased number of voters on the electoral rolls in the general elections.

An Independent Judiciary

Mere enumeration of a number of fundamental rights in a Constitution without any provision for their proper safeguards will not serve any useful purpose. Indeed, the very existence of a right depends upon the remedy for its enforcement. Unless there is remedy there is no right, goes a famous maxim. For this purpose an independent and impartial judiciary with a power of judicial review has been established under the Constitution of India. It is the custodian of the rights of citizens. Besides, in a federal Constitution it plays another significant role of determining the limits of power of the Centre and States.

A Secular State

A Secular State has no religion of its own as recognized religion of State. It treats all religions equally. The Preamble declares the resolve of the people of India to Secure to all its citizens 'liberty of belief, faith and worship.' Articles 25 to 28 of the Constitution give concrete shape to this concept of secularism. It guarantees to every person the freedom of conscience and the right to profess, practice and propagate religion. In a secular State, the State only regulates the relationship between man and man. It is not concerned with the relationship of man with God. One may worship God according to the dictates of his own conscience. However it is to be noted that the freedom of religion is not an absolute freedom, but subject to the regulatory power of the State. In the name of religion nothing can be done which is against public order, morality and health of the public. Secularism is also subject to 'democratic socialism.' Religious freedom cannot therefore be used to practise economic exploitation. The right to acquire, own and administer property by religious institutions is subject to the regulatory power of the State.

Single Citizenship

Though the Constitution of India is federal and provides for dual polity *i.e.*, Centre and States, but it provides for a single citizenship for the whole of India. The American Constitution provides for dual citizenship *i.e.*, the citizen of America and a State citizenship. On the other hand, there is only one citizenship in India *i.e.*, the citizenship of India. There is no State citizenship. Every Indian is the citizen of India and enjoys the same rights of citizenship no matter in what State he resides.

Fundamental Duties

The Constitution (42nd Amendment) Act, 1976 has introduced a Code of ten 'Fundamental Duties' for citizens. The fundamental duties are indeed to serve as a constant reminder to every citizen that while the Constitution has specifically conferred on them certain fundamental rights, it also requires the citizens to observe certain basic norms of democratic conduct and democratic behaviour.

Conclusion

Explain the Parliamentary form of Government under the Constitution of India. [6]

2K

Introduction: The Constitution of India establishes a parliamentary form of Government both at the Centre and the States. In this respect the makers of the Constitution have followed the British model in *toto*. The reason for this is that we were accustomed to this type of Government. The essence of the parliamentary form of Government is its responsibility to the Legislature. The President is the constitutional head of the State. The real executive power is vested in the Council of Ministers whose head is the Prime Minister. The Council of Ministers is collectively responsible to the Lower House, *i.e.*, Lok Sabha. The members of the Lower House are elected directly by the people on the basis of adult franchise normally for five years. The position is the same in the States. This Government is, therefore, called a responsible Government. On the other hand, the American Constitution establishes a Presidential type of Government based on the principle of separation of powers. The President is the real executive; elected directly by the people for 4 years. All executive powers are vested in him. He is not responsible to the Lower House, *i.e.*, the Congress. The members of his Cabinet are not members of the Legislature. They are appointed by the President and therefore, responsible to him.

At the outset it has to be made clear that the framers of the Constitution preferred the parliamentary system of government to the Presidential form, mainly for two reasons

- (1) the system was already in existence in India and people were well acquainted with it
- (2) it provides for accountability of ministers to the Legislature.

However, this hope of the framers have been belied. The happenings during the last two decades clearly demonstrate that the parliamentary form of government have almost failed. Efforts to remove its drawbacks have not been successful.

Drawbacks of Parliamentary Form of Government

Multiplicity of Political Parties

The existence of too many political parties has resulted in unstable governments and even created problems in the formation of governments. A number of State Governments have fallen due to the multiplicity of political parties. Till 1979 this evil was confined to States only but since 1979 this evil affected the Central Government also and four national governments have fallen.

Evil of Defection

The evil of defection has been threatening the very basis of our parliamentary system resulting in unstable governments. To cure this evil, the Parliament enacted the 52nd amendment in 1977 and added the Tenth Schedule to the Constitution, which provides that if a member of the legislative party voluntarily leaves his party or votes against the whip of the party or nominated member joins other party within sixth month of election he will lose his membership of the legislation. But one of the exceptions to the above rule is that if 1/3 of the members goes out of the party it will be called a split and not defection and the separated group will be a new entity.

Unfortunately, this provision of the Tenth Schedule has proved to be a boon for dishonest politicians who aspire for immediate political gain. A number of State Governments were toppled by the power-hungry politicians.

Lack of cohesiveness and leadership in National Parties

Lack of unity and cohesion in national parties and behaviour of the members of the different groups within the party have weakened the authority of the leader of the party who becomes the Prime Minister. It has been seen that the Prime Minister has to devote much of his time in solving party disputes and little time is left to him to look after nation's work. The Prime Minister has to satisfy different sections and groups among his party by giving them ministerial posts.

Illiteracy of Voters - National issues verses Local issues

A vast majority of our electorate is illiterate and politically immature and in exercising his right of franchise is swayed away on the basis of caste, religion and money etc. National issues are not at all considered by the electorates.

Growth of Regional Parties

The growth of local and regional parties arousing parochial and provincial feelings has also weakened the functioning of the parliamentary system. These regional parties are demanding more autonomy for the States and thus threaten the unity and integrity of the nation.

Criminalisation of Politics

Criminalisation of politics has also affected free and fair elections. Almost all political parties have connections with known criminals. Some political parties have given tickets to known criminals. These criminal leader spread violence in elections on a large scale. They resort to booth capturing, bogus voting etc.

Conclusion: Thus, in the light of the experience of functioning of parliamentary form of governments during the last two decades, it may be submitted, that the present system has not been working successfully and therefore it should be replaced with the Presidential form. An executive head directly elected by the people for a fixed term will be free from all these restraints and will be able to provide political stability thereby helping the nation towards fast economic development.

THE PREAMBLE OF THE CONSTITUTION

Questions

Preamble [10]

05, Dec 04

What is the role of the preamble in interpreting the Constitution? [6]

04, 03, Dec 02

Is the preamble a part of the constitution? [6]

Dec 06, Dec 01

Explain the objects and purpose of the preamble. [10]

Dec 05, 03

State the objectives of the Indian constitution as stated in the preamble. [6]

Dec 07, Dec 01

Discuss the values enshrined in the preamble of the constitution. [10]

Dec 06, Dec 02

Can the Preamble be amended under Art. 368 of the Constitution? Answer with reference to decided cases. [6]

Dec 01

Introduction: The Preamble to an Act sets out the main objectives, which the legislation is intended to achieve. It is a sort of introduction to the statute and many a times very helpful in understanding the policy and legislative intent.

The Constitution-makers gave to the Preamble to the Constitution ‘the place of pride.’ It embodies all the ideals and aspirations for which the country had struggled during the British regime. In *re Berubari* case, the Supreme Court has said that the Preamble to the Constitution is a key to open the minds of the makers, and shows the general purpose for which they made the several provisions in the Constitution.

The Preamble declares: ‘*We, the People of India having solemnly resolved to constitute India into a*

Sovereign Socialist Secular Democratic Republic and to secure to all its citizens:

Justice, social, economic and political;

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

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

Fraternity assuring the dignity of the individual and the unity and integrity of the Nation.

In our Constituent Assembly this twenty-sixth day of November, 1949 do Hereby, Adopt. Enact and Give to Ourselves this Constitution.'

Role of the Preamble in Interpreting the Constitution

The Preamble is the key to open the mind of the makers. But it does not mean that the preamble can override the express provisions of the Act. In *Berubari's* case the Supreme Court held that the Preamble was not a part of the Constitution and therefore it could never be regarded as a source of any substantive powers. Such powers are expressly granted in the body of Constitution. What is true about the powers is equally true about the prohibitions. It has limited application and can be resorted to where there is any ambiguity in the statute. If the terms used in the Constitution are ambiguous or capable of two meanings in interpreting them some assistance may be taken from the objectives enshrined in the Constitution and the construction, which fits the preamble, may be preferred.

But in *Kesavananda Bharti's* case, the Supreme Court rejected the above view and held that the preamble is a part of the Constitution. Though in any ordinary statute not much importance is attached to the preamble, all importance has to be attached to the Preamble in a Constitutional Statute. Sikri, C.J., observed, "It seems to me that the Preamble of our Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble."

Purpose of the Preamble

The Preamble serves the following purposes:

1. It indicates the source from which the Constitution comes, viz., the people of India:
2. It contains the enacting clause, which brings into force the Constitution.
3. It declares the great rights and freedoms, which the people of India intended to secure to all citizens and the basic type of government and polity, which was to be established.

It is ordained by the people of India through their representatives assembled in a sovereign Constituent Assembly. The preamble declares in unambiguous terms that it is the people of India who have adopted, enacted and given to themselves the Constitution. It declares, therefore, that the source of authority under the Constitution is the People of India and there is no subordination to any external authority.

The Preamble of the Constitution declares India to be a 'Sovereign Socialist Secular, Democratic Republic.' Sovereign power is that which is absolute and uncontrolled. In the words of Cooley, "A State is sovereign where there resides within itself a supreme and absolute power acknowledging no superior." The word 'sovereign' emphasizes that India is no more dependent upon any outside authority. However, India is still a member of the

Commonwealth of Nations. But as it has been said, its membership of the Commonwealth of Nations is not inconsistent with her independent sovereign status.

Objectives enshrined in the Preamble

The following are the objectives, which the Preamble secures to every citizen:

- Justice - social, economic and political;
- Liberty - Of thought, expression, belief, faith and worship;
- Equality - Of status and of opportunity; and to promote among them all;
- Fraternity - Assuring the dignity of the individual and the unity and integrity of the Nation.

Democracy would indeed be hollow if it fails to generate this spirit of brotherhood among all sections of the people – the feeling that they are all children of the same soil and the same motherland. It becomes all the more essential in a country like India composed of many races, religions, languages and of different cultures. Article 1 of the Declaration of Human Rights adopted by the UNO embodies this noble and human principle that ‘all the human beings are born free and equal in dignity and rights, they are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’ It is this concept of brotherhood of man which is contained in the Preamble of the Constitution and is given practical shape by abolishing title (Article 18) and untouchability (Article 17) and many other social evils, which swayed the social arena of Indian Society. ‘Liberty, Equality and Fraternity’, which the Constitution seeks to secure for the people of India are to serve the primary objective of ensuring social, economic and political justice. Justice is the harmonious blending of selfish nature of man and the good of the society. The attainment of the collective good as distinguished from individual good is the main aim of rendering justice. Combining the ideals of political, social, economic democracy with that of equality and fraternity in the Preamble, Gandhiji described as “The India of My Dream,” namely, an India, in which the poorest shall feel that it is their country in whose making they have an effective voice: an India in which all communities shall live in perfect harmony.

Can the Preamble be amended under Article 368?

This question was raised for the first time before the Supreme Court in the historic case of *Kesavanand Bharati v. State of Kerala*. In that case the Attorney General argued that by virtue of the amending power in Article 368 even the Preamble can be amended. It was said that since the Preamble was a part of the Constitution it could be amended like any other provisions of the Constitution. The petitioners, however, contended that the amending power in Article 368 is limited. Preamble creates an implied limitation on the power of amendment. The Preamble contains the basic elements or the fundamental features of our Constitution. Consequently, amending power cannot be used so as to destroy or damage these basic features mentioned in the Preamble. It was urged that the Preamble cannot be amended as it is not a part of the Constitution. The Supreme Court,

however, held that the Preamble is a part of the Constitution and, therefore, on this point *Berubari opinion* was wrong.

On the question whether the preamble can be amended the majority held that since the Preamble is the part of the Constitution it can be amended but subject to this condition that the 'basic features' in the Preamble cannot be amended. The Court said, "the edifice of our Constitution is based upon the basic elements mentioned in the Preamble. If any of these elements are removed the structure will not survive and it will not be the same Constitution or it cannot maintain its identity. The Preamble declares that the people of India resolved to constitute their country into a Sovereign Democratic Republic. No one can suggest that these words and expressions are ambiguous in any manner. An amending power 'cannot be interpreted so as to confer power on the Parliament to take away any of these fundamental and basic characteristics of policy.'"

It is submitted that this view of the court is correct. The amending power cannot change the Constitution in such a way that it ceases to be a 'Sovereign Democratic Republic.' It can only be done by wrecking the Constitution.

The 42nd Amendment and the Preamble inserted three new words in the Preamble *i.e.*, Secularism, Socialism and Integrity. These concepts were already implicit in the Constitution. The amendment merely spells out clearly these concepts in the Preamble.

Conclusion

CITIZENSHIP

Citizenship Act, 1955 [10]

Dec 07, 03, Dec 01

Write a note on citizenship. [6]

Dec 05, 04

Modes of Acquisition and Termination of Citizenship [10]

01

Introduction: The population of State is divided into two classes - Citizens and aliens. A citizen of a State is a person who enjoys full civil and political rights. Citizens are different from aliens who do not enjoy all these rights. Citizenship carries with it certain advantages conferred by the Constitution. Aliens do not enjoy these advantages. The following fundamental rights are available only to citizens:

1. The right not to be discriminated against any citizen on grounds of religion, race, caste, sex or place of birth (Article 15)
2. The right to equality of opportunity in the matter of public employment (Article 16).
3. The right to six freedoms enumerated in Article 19, *i.e.*, freedom of speech and expression; assembly; association; movement; residence; profession.
4. Cultural and educational rights conferred by Articles 29 and 30.
5. There are certain offices under the Constitution which can be occupied by citizens only *e.g.*, office of the
 - President [Article 58 (1)(a)];
 - Vice-President [Article 67 (3)(a)];
 - Judges of the Supreme Court [Article 124 (3)] or of a High Court [Article 217 (2)];
 - Attorney General [Article 76 (1)];
 - Governor of a State [Article 157];
 - Advocate General of a State [Article 165].
6. The right to vote for election to the House of the People and the Legislative Assemblies of States is available to the citizens only and only they can become members of the Union and the State Legislatures.

The rights guaranteed by Articles 14 and 21 are available to *alien* also.

The Constitution does not lay down a permanent or comprehensive provision relating to citizenship in India. Part II of the Constitution simply describes classes of persons who would be deemed to be the citizens of India at the commencement of the Constitution, 26th January, 1950, and leaves the entire law of the citizenship to be regulated by law made by Parliament. Article 11 expressly confers power on the Parliament to make laws

to provide for such matters. In exercise of its power the Parliament has enacted the Indian Citizenship Act, 1955. This Act provides for the acquisition and termination of citizenship.

Citizenship Act, 1955

Parliament, in exercise of the power given to it under Article 11 of the Constitution, has passed the Citizenship Act, 1955, making provisions for acquisition and termination of citizenship after the commencement of the Constitution. The Act provides for the acquisition of Indian citizenship after the commencement of the Constitution in five ways, *i.e.* birth, descent, naturalization and incorporation of territory.

Amendment of Citizenship Act

The Citizenship (Amendment) Act, 2003 has almost overhauled the Citizenship Act, 1955. Its main aim is to provide double citizenship to 'overseas citizen of India' of specified countries mentioned in the new Fourth Schedule to the Act added by the amendment.

The Act has substituted new clauses for clauses (b) and (c) and proviso to (c) of Section 2 which says that 'illegal migrants means who entered into India

- (i) without valid passport or other travel documents as provided by any law
- (ii) and remained therein beyond the permitted period of time.

Citizens under the Citizenship Act, 1955

Citizenship by Birth - Section 3

The new Section 3 for the existing Section 3 provides that except as provided in subsection (2) every person born in India

- (a) on or after 26th Jan., 1950 but before 1st July, 1987
- (b) on or after 1st July, 1987 but before the commencement of the Citizenship Amendment Act, 2003 and either of whose parents is a citizen of India at the time of his birth
- (c) on or after the commencement of the Citizenship Amendment Act, 2003 where (i) both of his parents are citizens of India, or (ii) one of whose parents is a citizen of India and other is not an illegal migrant at the time of his birth, shall be a citizen of India by birth.

A person shall not be a citizen of India by virtue of this section, if at the time of his birth

- (a) either his father or mother possesses such immunity from suits and legal process as is accorded to an envoy of a foreign sovereign power accredited to the President of India and he or she, as the case may be is not citizen of India, or
- (b) his father and mother is an enemy alien.

Citizenship by Descent - Section 4

According to new sub-section (1) of Section 4, a person born outside India shall be citizen of India by descent

- (a) on or after 26th Jan., 1950 but before 10th of Dec 1992 if his father is a citizen of India at the time of his birth, or
- (b) on or after 10th day of Dec., 1992 if either of his parents is a citizen of India at the time of his birth.

Provided that if the father of a person referred to in clause (a) was a citizen of India by descent only, that person shall not be a citizen of India by virtue of this Section unless

- (a) his birth is registered at the Indian Consulate within one year of its occurrence or the commencement of this Act, whichever is later, or with the permission of the Central Government, after the expiry of the said period or
- (b) either of his parents is at the time of his birth, in service under Government in India.

Provided also that on or after the commencement of the Citizenship Act, 2003, a person shall not be a citizen of India by virtue of this section unless his birth is registered at an Indian Consulate in such form and manner as may be prescribed

- (i) within one year of its occurrence or the commencement of the Citizenship Act, 2003 whichever is later or
- (ii) with the permission of the Central Government, after the expiry of the said period.

But no such birth shall be registered unless the parents of such person declare that the minor does not hold the passport of another country. A minor who is citizen of India by virtue of this section and is also citizen of another country shall cease to be citizen of India if he does not renounce the citizenship of another country within six months of his attaining full age.

Citizenship by Registration – Section 5

The prescribed authority may on application register a citizen of India any person not being an illegal migrant who is not already such citizen by virtue of the Constitution or of any other provisions of this Act if he belongs to any of the following categories

- (a) a person of Indian origin who is ordinarily resident of India for seven years before making an application for registration
- (b) persons of Indian origin who is ordinarily resident in any country or place outside undivided India
- (c) person who is married to a citizen of India and is ordinarily resident of India for seven years before making an application for registration
- (d) minor children of persons who are citizens of India
- (e) a person of full age and capacity whose parents are registered as citizens of India under clause (a) of this sub-section or sub-section (1) of Section 6.

- (f) a person of full age and capacity who either of his parents, was earlier citizen of Independent India, and has been residing in India for one year immediately before making an application for registration.
- (g) A person of full age and capacity who has been registered as an overseas citizen of India for 5 years, and who has been residing in India for 2 years before making an application for registration.

For purposes of Clauses (a) and (c) an applicant shall be deemed to be ordinarily resident of India

- (i) if he has resided in India for 12 months immediately before making an application for registration
- (ii) he has resided in India during 8 years immediately preceding the said period of 12 months for a period of not less than 6 years.

Citizenship by Naturalization

Where an application in the prescribed manner is made by any persons of full age and capacity, 'not being an illegal immigrant', the Central Government may, if satisfied that the applicant is qualified for naturalization, grant him a certificate of naturalization. The qualifications for naturalization are the following:

- (a) he must not be a citizen of a country where Indian citizens are prevented from becoming citizens by naturalization.
- (b) he has renounced the citizenship of the other country .
- (c) he has either resided in India or has been in Government service for 12 months before the date of making the application for naturalization, or during 7 years prior to these 12 months, he has resided or has been in the Government service for not less than four years,
- (d) he must take an oath of allegiance,
- (e) he is of a good character,
- (f) he has an adequate knowledge of a language recognized by the Constitution,
- (g) that after naturalization being granted to him he intends to reside in India or to serve under the Government of India.

However, if in the opinion of the Central Government the applicant has rendered distinguished service to the cause of science, philosophy, art, literature, world peace or human progress, it may waive all of the above conditions for naturalization in his case (Section 6)

Citizenship by Incorporation of Territory

If any new territory becomes a part of India, the Government of India shall specify the persons of the territory to be citizens of India. (Section 7)

Termination of Citizenship

The Citizenship Act, 1955, also lays down how the citizenship of India may be lost whether was acquired under the Citizenship Act, 1955, or prior to it, under the provisions of the Constitution. It may happen in any of the three ways

- Renunciation

- Termination
- deprivation.

Renunciation of Citizenship

An Indian citizen of full age and capacity [who is also a citizen or national of another country] can renounce his Indian citizenship by making a declaration to that effect and having it registered. But if such a declaration is made during any war in which India is engaged, the registration shall be withheld until the Central Government otherwise directs. When a male person renounces his citizenship, every minor child of his ceases to be an Indian citizen. Such a child may, however, resume Indian citizenship if he makes a declaration to that effect within a year of his attaining full age that is 18 years. (Section 8)

Termination of Citizenship

If a citizen of India voluntarily acquires the citizenship of another country he shall cease to be a citizen of India. This provision, however, does not apply to a citizen who during a war in which India may be engaged voluntarily acquires the citizenship of another country. If any question arises as to whether, when or how any person acquired the citizenship of another country, it is to be determined by such authority and in such a manner as may be prescribed by the rules (Section 9)

Deprivation of citizenship

Deprivation is a compulsory termination of the citizenship of India. A citizen of India by naturalization, registration, domicile and residence, may be deprived of his citizenship by an order of the Central Government if it is satisfied that

- (a) registration or naturalization was obtained by means of fraud, false representation or concealment of any material fact;
- (b) he has shown himself by act or speech to be disloyal or disaffectionate towards the Indian Constitution;
- (c) during a war in which India may be engaged, he has unlawfully traded or communicated with the enemy
- (d) within five years of his registration or naturalization he has been sentenced to imprisonment for not less than two years;
- (e) he has been ordinarily residing out of India for seven years continuously.

Before making an order depriving citizenship, the Central Government is to give to the person concerned a written notice containing the ground on which the order is proposed to be made and in certain cases he might have his case referred to a Committee of Inquiry. The Central Government is then bound to refer the case to a Committee consisting of a Chairman and two other members. The Committee of Inquiry shall hold the inquiry and the Central Government is to be ordinarily guided by its report in making the order.

Conclusion

FUNDAMENTAL RIGHTS

Explain the term 'State' under Art 12 of the Constitution. Is 'judiciary' a State? [16]

02, Dec 04

Explain 'other authorities' in Art 12 of the Constitution. Is judiciary a State? [16]

Dec 04

Introduction: Individuals need constitutional protection against the State. The rights, which are given to the citizens by way of fundamental rights, as included in Part III of the Constitution are a guarantee against State action as distinguished from violation of such rights from private parties. Private action is sufficiently protected by the ordinary law of land.

Definition of State

Article 12 defines the term 'State' as used in different Articles of Part III of the Constitution. It says that unless the context otherwise requires the term 'State' includes the following

1. The Government and Parliament of India, *i.e.*, Executive and Legislature of the Union.
2. The Government and the Legislature of each State, *i.e.*, Executive and Legislature of States
3. All local or other authorities within the territory of India.
4. All local and other authorities under the control of the Government of India.

The term 'State' thus includes executive as well as the legislative organs of the Union and States. It is, therefore, the actions of these bodies that can be challenged before the courts as violating fundamental rights.

Authorities

According to Webster's Dictionary 'Authority' means a person or body exercising power to command. In the context of Article 12, the word 'authority' means the power to make laws, orders, regulations, bye-laws, notification etc., which have the force of law and power to enforce those laws.

Local Authorities

Local authorities as defined in Section 3 (31) of the General Clauses Act, refers to authorities like Municipalities, District Boards, Panchayats, Improvement Trust and Mining Settlement Boards. In *Mohammed Yasin v. Town Area Committee*, the Supreme Court held that the bye-laws of a Municipal Committee charging a prescribed fee on the wholesale dealer was an order by a State authority contravened Article 19 (1)(g). These bye-laws in effect and in substance have brought about a total stoppage of the wholesale dealer's business in the commercial sense. In *Sri Ram v. The Notified Area Committee*, a fee levied under Section 294 of the U.P. Municipalities Act, 1919, was held to be invalid.

Other authorities

In Article 12 the expression 'other authorities' is used after mentioning a few of them, such as, the Government, Parliament of India, the Government and Legislature of each of the States and all local authorities. In *University of Madras v. Santa Bai*, the Madras High Court held that 'other authorities' could only indicate authorities of a like nature, *i.e. ejusdem generis*. So construed, it could only mean authorities exercising governmental or sovereign functions. It cannot include persons, natural or juristic, such as, a University unless it is 'maintained by the State.' But in *Ujjambai v. State of U.P.*, the Court rejected this restrictive interpretation of the expression 'other authorities' given by the Madras High Court and held that the *ejusdem generis* rule could not be resorted to in interpreting this expression. In Article 12 the bodies specifically named are the Government of the Union and the States, the Legislature of the Union and the States and local authorities. There is no common genus running through these named bodies nor can these bodies so placed in one single category on any rational basis.

In *Electricity Board, Rajasthan v. Mohan Lal*, the Supreme Court held that the expression 'other authorities' is wide enough to include all authorities created by the Constitution or statute on whom powers are conferred by law. It is not necessary that the statutory authority should be engaged in performing governmental or sovereign function. On this interpretation the expression 'other authorities' will include *Rajasthan Electricity Board*, *Cochin Devasom Board*, *Co-operative Society*, which have power to make bye-laws under Co-operative Societies Act, 1911. The Chief Justice of a High Court is also included in the expression 'other authorities' as he has power to appoint officials of the Court. The President when making order under Article 359 of the Constitution comes within the ambit of the expression 'other authorities.' In effect, the *Rajasthan Electricity Board's decision* has overruled the decision of the Madras High Court in *Santa Bai's* case, holding a University not to be 'the State.' And finally, the Patna High Court, following the decision of the Supreme Court, has held that the Patna University is 'a State.'

The effect of these decisions was that the 'authorities' not created by the Constitution or by a statute could not be a 'State' within the meaning of Article 12 of the Constitution. This was a very restrictive interpretation of the expression 'other authorities' under Article 12 of the Constitution.

But in subsequent decisions the Supreme Court has given a broad and liberal interpretation to the expression 'other authorities' in Article 12. With the changing role of the State from merely being a police State to a welfare State it was necessary to widen the scope of the expression 'authorities' in Article 12 so as to include all those bodies which are, though not created by the Constitution or by a statute, are acting as agencies or instrumentalities of the Government. In modern times a government has to perform manifold functions. For this purpose it has to employ various agencies to perform these functions. The Court has, therefore, rightly taken the view that such juridical persons acting as the instrumentality or agency of the government must be subject to the same restrictions as the State.

In *Airport Authority's* case, the Court has held that if a body is an agency or instrumentality of government it may be an 'authority' within the meaning of Article 12 whether it is a statutory corporation, a government company or even a registered society. Accordingly, it was held that the International Airport Authority, which had been created by an Act of Parliament, was the 'State' within the meaning of Article 12. The Central Government had power to appoint the Chairman and other members of the Airport Authority. It has power to terminate the appointment of any member from the board. The capital needed by it was provided only by the Central Government.

Concerning the test to decide whether a body is an agency or instrumentality, the court laid down the following tests for determining whether a body is an agency or instrumentality of the Government

1. financial resources of the State is the chief funding source, *i.e.*, if the entire share capital of the corporation is held by Government,
2. existence of deep and pervasive State control,
3. functional character being governmental in essence, *i.e.*, if the functions of the corporation are of public importance and closely related to governmental functions,
4. if a department of Government is transferred to a corporation,
5. whether the corporation, enjoys monopoly status which is State conferred or State protected.

However, the Court said that these tests are not conclusive but illustrative only and will have to be used with care and caution.

Judiciary included in the word 'State'?

In America it is well-settled that the judiciary is within the prohibition of the 14th Amendment. The judiciary, it is said, though not expressly mentioned in Article 12 it should be included within the expression 'other authorities' since courts are set up by statute and exercise power conferred by law. It is suggested that discrimination may be brought about even (by) judiciary and the inhibition of Article 14 extends to all actions of the State denying equal protection of the laws whether it be the action of anyone of the three limbs of the State.

The question whether the judiciary was included within the definition of 'the State' in Article 12 arose for consideration of the Supreme Court in *Naresh v. State of Maharashtra*. It was held that even if a Court is the State a writ under Article 32 cannot be issued to a High Court of competent jurisdiction against its judicial orders, because such orders cannot be said to violate the fundamental rights. Mr. H.M. Seervai is of opinion that the judiciary should be included in the definition of 'the State' and a judge acting as a judge is subject to the writ-jurisdiction of the Supreme Court. The courts, like any other organ of the State, are limited by the mandatory provisions of the Constitution and they can hardly be allowed to override the fundamental rights under the shield that they have within their jurisdiction, the right to make an erroneous decision.

In view of the judgment of 7 Judges Bench of the Supreme Court in *A.R. Antulay v. R. S. Nayak*, where it has been held that the court cannot pass an order or issue a direction which would be violative of fundamental rights of citizens, it can be said that the expression 'State' as defined in Article 12 of the Constitution includes judiciary also.

Conclusion

Write a note on Doctrine of Eclipse. [6]

Dec 05, 04, Dec 04

Introduction: The doctrine of eclipse is based on the principle that a law, which violates Fundamental Rights, is not a nullity or void *ab initio* but becomes only unenforceable, *i.e.*, remains in a moribund condition. "It is over-shadowed by the fundamental rights and remains dormant; but it is not dead." Such laws are not wiped out entirely from the statute book. They exist for all past transactions, and for the enforcement of rights acquired and liabilities incurred before the present Constitution came into force and for determination of right of persons who have not been given fundamental rights by the Constitution, *e.g.*, non-citizens. It is only as against the citizens that they remain in a dormant or moribund condition but they remain in operation as against non-citizens who are not entitled to fundamental rights

The doctrine of eclipse was formulated in the case of *Bhikaji v. State of M.P* to answer the question of whether a law, which becomes unenforceable after the Constitution came into force can be again revived and made effective by an amendment in the Constitution. In that case provision of C.P. and Berar Motor Vehicles (Amendment) Act, 1947 authorized the State Government to make up the entire motor transport business in the Province to the exclusion of motor transport operators. This provision, though valid when enacted, became void on the coming into force of the Constitution in 1950 as they violated Article 19 (1)(g) of the Constitution. However, in 1951, Clause (6) of Article 19 was amended by the Constitution (1st Amendment) Act, so as to authorize the Government to monopolise any business. The Supreme Court held that 'the effect of the Amendment was to remove the shadow and to make the impugned Act free from all blemish or infirmity.' It became enforceable against citizens as well as non-citizens after the constitutional impediment was removed. This law was merely eclipsed for the time

being by the fundamental rights. As soon as the eclipse is removed the law begins to operate from the date of such removal.

RIGHT TO EQUALITY

"The state shall not deny any citizen equality before the law or the equal protection of the laws." - Discuss. [10]

Dec 07, Dec 04

Discuss the scope of Art 14 with the help of decided cases. [16]

05, Dec 03

Introduction: Articles 14 to 18 of the Constitution guarantee the right to equality to every citizen of India. Article 14 embodies the general principles of equality before law and prohibits unreasonable discrimination between persons. Article 14 embodies the idea of equality expressed in the Preamble. The succeeding Articles 15, 16, 17 and 18 lay down specific application of the general rules laid down in Article 14.

- Article 15 relates to prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
- Article 16 guarantees equality of opportunity in matters of public employment.
- Article 17 abolishes 'untouchability.'
- Article 18 abolishes title.

Equality Before Law - Article 14

Article 14 declares that 'the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.' Thus Article 14 uses two expressions 'equality before the law' and 'equal protection of the law.' The phrase 'equality before the law' finds a place in almost all written Constitutions that guarantees fundamental rights. Both these expressions have, however, been used in the Universal Declaration of Human Rights. The first expression 'equality before law' is of English origin and the second expression has been taken from the American Constitution. Both these expressions aim at establishing what is called 'equality of status' in the Preamble of the Constitution. While both the expressions may seem to be identical, they do not convey the same meaning. While 'equality before the law' is a somewhat negative concept implying the absence of any special privilege in favour of individuals and the equal subject of all classes to the ordinary law. 'Equal protection of the law' is a more positive concept implying equality of treatment in equal circumstances. However, one dominant idea common to both the expressions is that of equal justice. In *State of West Bengal v. Anwar Ali Sarkar*, Patanjali Sastri, C.J., has rightly observed that the second expression is corollary of the first and it is difficult to imagine a situation in which the violation of the equal protection of laws will not be the violation of the equality before law. Thus, in substance the two expressions mean one and the same thing.

Equality before law

The concept of equality does not mean absolute equality among human beings, which is physically not possible to achieve. It is a concept implying absence of any special privilege by reason of birth, creed or the like in favour of any individual, and also the equal subject of all individuals and classes to the ordinary law of the land. As Dr. Jennings puts it, "Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike. The right to sue and be sued, to prosecute and be prosecuted for the same kind of action should be same for all citizens of full age and understanding without distinctions of race, religion, wealth, social status or political influence."

Rule of Law

The guarantee of equality before the law is an aspect of what Dicey calls the Rule of Law in England. It means that no man is above the law and that every person, whatever be his rank or conditions, is subject to the jurisdiction of ordinary courts. "With us", Dicey wrote "every official from the Prime Minister down to constable or a Collector of taxes is under the same responsibility for every act done without legal justification as any other citizen." Rule of law requires that no person shall be subjected to harsh, uncivilized or discriminatory treatment even when the object is the securing of the paramount exigencies of law and order.

Professor Dicey gave three meanings of the Rule of Law

1. Absence of Arbitrary Power or Supremacy of the law - It means the absolute supremacy of law as opposed to the arbitrary power of the Government. In other words, a man may be punished for a breach of law, but he can be punished for nothing else.
2. Equality before the law - It means subjection of all classes to the ordinary law of the land administered by ordinary law courts. This means that no one is above law with the sole exception of the monarch who can do no wrong. Everyone in England, whether he is an official of the State or a private individual, is bound to obey the same law. Thus, public officials do not hold a privileged position in Great Britain. In Great Britain there is one system of law and one system of courts for all *i.e.*, for public officials and private persons.
3. The Constitution is the result of the ordinary law of the land - It means that the source of the right of individuals is not the written constitution but the rules as defined and enforced by the courts.

The first and the second aspects apply to Indian system but the third aspect of the Dicey's rule of law does not apply to Indian system as the source of rights of individuals is the Constitution of India. The Constitution is the Supreme Law of the land and all laws passed by the legislature must be consistent with the provisions of the Constitution.

Equal protection of the Laws

The guarantee of equal protection of laws is similar to one embodied in the 14th Amendment to the American Constitution. This has been interpreted to mean subjection to equal law, applying to all in the same circumstances. It only means that all persons similarly circumstance shall be treated alike both in the privileges conferred and liabilities imposed by the laws. Equal law should be applied to all in the same situation, and there should be no discrimination between one person and another. As regards the subject matter of the legislation their position is the same. Thus, the rule is that the like should be treated alike, and not that unlike should be treated alike.

The rule of law imposes a duty upon the State to take special measure to prevent and punish brutality by police methodology. The Rule of Law embodied in Article 14 is the 'basic feature' of the Indian Constitution and hence it cannot be destroyed even by an amendment of the Constitution under Article 368 of the Constitution.

The words 'any person' in Article 14 of the Constitution denotes that the guarantee of the equal protection of laws is available to any person which includes any company or association or body of individuals. The protection of Article 14 extends to both citizens and non-citizens and to natural persons as well as legal persons. The equality before the law is guaranteed to all without regard to race, colour or nationality. Corporations being juristic persons are also entitled to the benefit of Article 14.

Exceptions to the Rule of law

The above rule of equality is, however, not an absolute rule and there are number of exceptions to it:

1. First, 'equality before the law' does not mean the 'powers of the private citizens are the same as the powers of the public officials.' Thus, a police officer has the power to arrest while no private person has this power. This is not the violation of the rule of law. But the rule of law does require that these powers should be clearly defined by law and that abuse of authority by public officers must be punished by ordinary courts in the same manner as illegal acts committed by private persons.
2. Secondly, the rule of law does not prevent certain classes of persons being subject to special rules. Thus, members of the armed forces are controlled by military laws. Similarly, medical practitioners are subjected to the regulations framed by the Medical Council of India, a statutory body, and are immune from the jurisdiction of ordinary courts. Article 361 of the Indian Constitution affords an immunity to the President of India and the State Governors. Article 361 provides that the President or the Governor shall not be answerable to any Court for the exercise and performance of the powers and duties of the office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. No criminal proceeding shall be instituted or continued against the President or the Governor of a State in any Court during his term of office. No process for the arrest or imprisonment of the President or the Governor of State shall be issued from any Court during his term of office.
3. Thirdly, today ministers and other executive bodies are given very wide discretionary powers by statute. A minister may be allowed by law 'to act as he

thinks fit' or 'if he is satisfied.' Such power is sometimes abused. Today, a large number of legislation is passed in the form of delegated legislation, *i.e.*, rules, orders or statutory instruments made by ministers and other bodies and not directly by Parliament. These rules did not exist in Dicey's time.

4. Fourthly, certain members of society are governed by special rules in their professions, *i.e.* lawyers, doctors, nurses, members of armed forces and police. Such classes of people are treated differently from ordinary citizens.

The Constitution itself contains provisions, which under certain circumstances, limit the effectiveness of Art. 14.

1. The scope of right to equality under Article 14 has been considerably restricted by the 42nd Amendment Act, 1976. The new Article 31-C added by the Amendment Act provides that laws made by the State for implementing the Directive Principles contained in clause (b) or clause (c) of Article 39 cannot be challenged on the ground that they are violative of Article 14. Such laws will thus be an exception to Article 14 of the Constitution. In *Sanjeev Coke Mfg. Co. v. Bharat Cooking Coal Ltd.*, the Supreme Court has held that "where Article 31-C comes in, Article 14 goes out."
2. Art. 359(1) provides that where a proclamation of emergency is in operation the President may, by order, declare that the right to move any court for the enforcement of such rights conferred by Part III (except Arts. 20 and 21) shall remain suspended. Thus, if the President of India issues an order, where a Proclamation of Emergency is in operation, enforcement of Art. 14 may be suspended for the period during which the Proclamation is in force.
3. Art. 361 lays down that the President and the Governors are exempted from any criminal proceeding during the tenure of their office.
4. Under International law, foreign sovereign and ambassadors enjoy full immunity from any judicial process. This is also available to enemy claims for acts of war.

Conclusion

'Article 14 permits classification, but prohibits class legislation.' Discuss.
[10]

Dec 04, 01, Dec 01, 2K,

How far does the Article 14 permit classification? Discuss with the help of decided cases. [10]

04

Introduction: Articles 14 to 18 of the Constitution guarantee the right to equality to every citizen of India. Article 14 embodies the general principles of equality before law

and prohibits unreasonable discrimination between persons. Article 14 embodies the idea of equality expressed in the Preamble.

Article 14 permits Classification but prohibits Class Legislation

The equal protection of laws guaranteed by Article 14 does not mean that all laws must be general in character. It does not mean that the same laws should apply to all persons. It does not mean that every law must have universal application for, all persons are not, by nature, attainment or circumstances in the same position. The varying needs of different classes of persons often require separate treatment. From the very nature of society there should be different laws in different places and the Legislature controls the policy and enacts laws in the best interest of the safety and security of the State. In fact, identical treatment in unequal circumstances would amount to inequality. So, a reasonable classification is not permitted but is necessary if society is to progress.

Thus, what Article 14 forbids is class-legislation but it does not forbid reasonable classification. The classification, however, must not be 'arbitrary, artificial or evasive' but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislation. Article 14 applies where equals are treated differently without any reasonable basis. But where equals and unequals are treated differently, Article 14 does not apply. Class legislation is that which makes an improper discrimination by conferring particular privileges upon a class of persons arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privilege granted that between whom and the persons not so favoured no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from such privilege.

Test of Reasonable Classification

While Article 14 forbids class legislation, it does not forbid reasonable classification of persons, objects and transactions by the legislature for the purpose of achieving specific ends. But classification must not be 'arbitrary, artificial or evasive.' It must always rest upon some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature. Classification to be reasonable must fulfill the following two conditions.

1. the classification must be founded on an intelligible differentia, which distinguishes persons or things that are grouped together from others left out of the group; and
2. the differentia must have a rational relation to the object sought to be achieved by the Act.

The *differentia*, which is the basis of the classification and the object of the Act, are two distinct things. What is necessary is that there must be a *nexus* between the basis of classification and the object of the Act, which makes the classification. It is only when there is no reasonable basis for a classification that legislation making such classification may be declared discriminatory. Thus, the Legislature may fix the age at which people shall be deemed competent to contract between themselves but no one will claim that

competency. No contract can be made to depend upon the stature or colour of the hair. Such a classification will be arbitrary.

The true meaning and scope of Article 14 have been explained in a number of cases by the Supreme Court. The propositions laid down in *Dalmia's* case governing a valid classification are as follows:

1. A law may be constitutional even though it relates to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others that single individual may be treated as a class by itself.
2. There is always presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles.
3. The presumption may be rebutted in certain cases by showing that on the fact of the statute, there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only particular individual or class.
4. It must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.
5. In order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of report, the history of the times and may assume every state of facts which can be conceived existing at the time of the legislation.
6. That the Legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.
7. While good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to be hostile or discriminating legislation.
8. The classification may be made on different basis, *e.g.*, geographical or according to objects or occupations or the like.
9. The classification made by a legislature need not be scientifically perfect or logically complete. Mathematical nicety and perfect equality are not required. Equality before the law does not require mathematical equality of all persons in all circumstances. Equal treatment does not mean identical treatment. Similarity, not identity of treatment is enough.
10. There can be discrimination both in the substantive as well as the procedural law. Article 14 applies to both.

Conclusion: If the classification satisfies the test laid down in the above propositions, the law will be declared constitutional. The question whether a classification is reasonable, and proper or not, must, however, be judged more on commonsense than on legal subtleties.

Can an individual be a class? Give reasons for your answer. [6]

Dec 01, 2K

Introduction: The constitutionality of every statute depends on whether there is a basis for the classification made in the statute. The basis of classification may be different e.g., geographical, vocational, difference in time, difference in nature of persons, trade and calling or occupations, etc.

A single individual may constitute a class

Chiranjil Lal v. The Union of India is the leading case on this point. The facts of the case were that owing to mismanagement in Sholapur Spinning and Weaving Company Limited the management threatened to close down the Mill. The Government of India passed the Sholapur Spinning and Weaving Co. (Emergency Provision) Act empowering the Government to take over the control and management of the company and its properties by appointing their own directors. The Act was challenged by a shareholder of the company on the ground that a single company and its shareholder was being denied equality before the law, because the Act treated him differently *vis-a-vis* other companies and their shareholders. It was pointed out that the law in the case had selected one particular company and its shareholders and had taken away from them the right to manage their own affairs but the same treatment had not been meted out to all other companies or shareholders in an identical manner.

The Supreme Court held the Act valid. It said that a law may be constitutional even though it applies to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class itself, unless it is shown that there are others who are similarly circumstanced. The presumption is always in the favour of the enactment and the burden is on the petitioner who attacks the validity of the legislation to place all materials before the Court, which would show that the selection is arbitrary and unreasonable. The Legislature is free to recognise the degree of harm and it may confine its restrictions to those cases where the need is deemed to be the clearest. In the present case the Sholapur Company formed a class by itself because the mismanagement of the Company's affairs prejudicially affected the production of an essential commodity and had caused a serious unemployment amongst labourers. Mukherjee, J., observed, "We should bear in mind that a corporation, which is engaged in production of a commodity vitally essential to the community, has a social character of its own and it must not be regarded as the concern primarily or only of those who invest their money in it. If its productions are large and it had a prosperous and useful carrier for a long period of time and is about to collapse not for any economic reason but through sheer perversity of the controlling, one cannot say that the legislature has no authority to treat it as a class by itself and make special legislation applicable to it alone in the interest of the community at large."

In *Ammeerunnisa Begum v. Mahboob*, on the death of the Nawab of Hyderabad a dispute between two rival parties regarding succession to his property arose which resulted in

protracted litigation. In order to put an end to this long-standing litigation the Hyderabad Legislature passed the Wali-ud-Dowla Succession Act, 1950. By this Act the claims of one party, *i.e.*, two ladies were dismissed and the property was adjudged to the other party. The Act was challenged on the ground that it deprived the petitioners the right to enforce their claims in a court of law and thus discriminated them from the rest of the community in respect of a valuable right which the law secures to all. The Government justified the classification mainly on the ground that the Act was passed to put an end to a long-standing litigation. The Supreme Court held the Act unconstitutional on the ground that it did not furnish any reasonable basis for the discrimination made by it. The Court said that the continuance of a dispute even for a long time between two sets of rival claimants to the property of a private person is not such an unusual circumstance by itself justifying its differentiation from all other case of succession disputes. The exceptional circumstances, which were present in the Chiranjit Lal's case, were not present in this case. Where the law affects the community as a whole the court will assume the existence of some reasonable ground for sustaining the classification made by it. In *Chiranjit Lal's* case the court justified its decision on the ground that the closure of the company had affected the production of an essential commodity and caused serious unemployment amongst labourers. In the present case, the dispute was between private parties and no interest of the community was involved.

Conclusion

'The state shall not discriminate against any citizen on grounds of religion, race, caste, sex or place of birth or any of them.' Discuss. [10]

Dec 05, 02, Dec 02,

Introduction: Article 15 provides for a particular application of the general principle embodied in Article 14. When a law comes within the prohibition of Article 15 it cannot be validated by recourse to Article 14 by applying the principle of reasonable classification. It is when the discrimination is based upon one of the grounds mentioned in Article 15; the reasonableness of the classification will be tested under Article 14.

The guarantee under Article 15 is available to citizens only and not to every person whether 'citizen or non-citizen' as under Article 14.

- The first clause of Article 15 directs the State not to discriminate against a citizen on grounds only of religion, race, caste, sex or place of birth or any of them.
- The second clause prohibits citizens as well as the States from making such discrimination with regard to access to shops, hotels, etc. and all places of public entertainment of public resort, wells, tanks, roads, etc.

The first clause of Article 15 mentions the prohibited grounds in any matter, which is exclusively within the control of the State. The second clause prohibits both the State and the private individual whosoever is in the control of the above-mentioned places.

- The third clause empowers the State to make special provisions for the protection of women and children.
- The fourth clause, which was added by the Constitution (1st Amendment) Act 1951, enables the State to make special provisions for the protection of the interests of the Backward Classes of citizens and is, therefore, an exception to Articles 15 and 29 (2) of the Constitution.
- The new Clause 5, which was added by the 93rd Amendment Act, provides that nothing in Article 15 or in sub-clause (g) of Clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally Backward classes of citizens or for the Scheduled Caste or the Scheduled Tribes in so far as such special provisions relate to admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in Clause (1) of Article 30.

Clause (1)

By clause (1) of Article 15 the State is prohibited to discriminate between citizens on grounds only of religion, race, caste, sex, place of birth or any of them. The word 'discrimination' means to make an adverse distinction or to distinguish unfavourably from others. If a law makes discrimination on any of the above grounds it can be declared invalid. Thus in *Nainsuphdas v. State of U.P.* a law, which provided for elections on the basis of separate electorates for members of different religious communities was held to be unconstitutional. Similarly, in *State of Rajasthan v. Pratap Singh* the Supreme Court invalidated a notification under the Police Act of 1861, which declared certain areas as disturbed and made the inhabitants of those areas to bear the cost of additional police stationed there but exempted all Harjans and Muslims. The exemption was given on the basis only of 'caste' or 'religion' and hence was contrary to Article 15 (1).

The word 'only' used in Article 15 (1) indicates that discrimination cannot be made merely on the ground that one belongs to a particular caste, sex, etc. In other words, if other qualifications are equal, caste, religion, sex, etc. should not be a ground for preference or disability. It follows from this that discrimination on grounds other than religion, race, caste, sex or place of birth is not prohibited. It means that discrimination based on any of these grounds and also on other grounds is not hit by Article 15 (1).

In *D.P. Joshi v. State of M.B.*, it was held that a law, which discriminates on the ground of residence, does not violate Article 15(1). In that case a rule of the State Medical College requiring a capitation fee from non-Madhya Bharat Students for admission in the college was held valid as the ground of exemption was residence and not place of birth. Place of birth is different from residence. What Article 15 (1) prohibits is discrimination based on place of birth and not that based on residence. Similarly, the requirement of a test in the regional languages for State employment, does not contravene Article 15 as the test is made compulsory for all persons seeking employment. A law relating to evacuee property is not repugnant to Article 15 (1) though actually most of the persons to whom the provisions of the law would apply are likely to be Muslims. The law did not apply to

Muslims alone on the ground of religion for if a non-Muslim falls within the definition of 'evacuee' then the law would equally apply to him.

Conclusion

Discuss the power of the State to make special provisions for the protection of Backward classes under Art 15(4). [16]

03

Introduction: Article 15 provides for a particular application of the general principle embodied in Article 14. When a law comes within the prohibition of Article 15 it cannot be validated by recourse to Article 14 by applying the principle of reasonable classification. It is when the discrimination is based upon one of the grounds mentioned in Article 15; the reasonableness of the classification will be tested under Article 14.

The guarantee under Article 15 is available to citizens only and not to every person whether 'citizen or non-citizen' as under Article 14.

- The first clause of Article 15 directs the State not to discriminate against a citizen on grounds only of religion, race, caste, sex or place of birth or any of them.
- The second clause prohibits citizens as well as the States from making such discrimination with regard to access to shops, hotels, etc. and all places of public entertainment of public resort, wells, tanks, roads, etc.

The first clause of Article 15 mentions the prohibited grounds in any matter, which is exclusively within the control of the State. The second clause prohibits both the State and the private individual whosoever is in the control of the above-mentioned places.

- The third clause empowers the State to make special provisions for the protection of women and children.
- The fourth clause, which was added by the Constitution (1st Amendment) Act 1951, enables the State to make special provisions for the protection of the interests of the Backward Classes of citizens and is, therefore, an exception to Articles 15 and 29 (2) of the Constitution.
- The new Clause 5, which was added by the 93rd Amendment Act, provides that nothing in Article 15 or in sub-clause (g) of Clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally Backward classes of citizens or for the Scheduled Caste or the Scheduled Tribes in so far as such special provisions relate to admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in Clause (1) of Article 30.

Clause (4) - Special Provision for advancement of Backward Classes

Article 15(4) is another exception to clauses (1) and (2) of Article 15, it was added by the Constitution (1st Amendment) Act, 1951, as a result of the decision in *State of Madras v. Champakam Dorairajan*. In that case the Madras Government had reserved seats in State Medical and Engineering Colleges for different Communities in certain proportions on the basis of religion, race and caste. The State defended the law on the ground that it was enacted with a view to promote the social justice for all sections of the people as required by Article 46 of the Directive Principles of State Policy. The Supreme Court held the law void because it classified students on the basis of caste and religion irrespective of merit. The Directive Principles of State Policy cannot override the Fundamental Rights. In another case an order requisitioning land for the construction of a Harijan Colony was held to be void under Article 15(1). To modify the effect of these two decisions, Article 15 was amended by the Constitution (1st Amendment) Act, 1951. Under this clause, the State is empowered to make special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. After the amendment it would be possible for the State to put up a Harijan Colony in order to advance the interest of the backward classes.

The provisions made in clause (4) of Article 15 are only an enabling provision and does not impose any obligation on the State to take any special action under it. It merely confers discretion to act if necessary by way of making special provision for backward classes. The class contemplated under the clause must be both socially and educationally backward.

Thus under clause 15(4) two things are to be determined

1. who are socially and educationally backward classes?
2. what is the limit of reservation?

What are Backward Classes is not defined in the Constitution. Article 340, however, empowers the President to appoint a Commission to investigate conditions of socially and educationally backward classes. On the basis of the report of the Commission the President may specify who are to be considered as Backward Classes. The decision of the Government is, however, a justiciable issue. The Court can consider whether the classification made by the Government is arbitrary or is based on any intelligible and tangible principle. In *Ram Krishna Singh v. State of Mysore*, the Mysore High Court held that the determination of backward classes made in 1959 on the basis of the Census Report of 1941 cannot be said to be based on any intelligible principle as considerable changes had taken place between 1941 and 1959.

Conclusion

Explain the equality of opportunity under Art 16(4) in the matter of public employment. [10]

Dec 01

Introduction: Article 16(1) guarantees equality of opportunity for all citizens in matters of ‘employment’ or ‘appointment’ to any post under the State. Clause (2) says that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for or discriminated against in respect of, any employment or office under the State. Clauses (1) and (2) of Article 16 lay down the general rule that no citizen can be discriminated against or be ineligible for any employment or office under the State on grounds only of religion, race, caste, sex, descent, place of birth or residence. Art. 16 (1) and (2) applies only in respect of employment or office under the State. Clauses (3), (4), (4-A), (4-B) and (5) of Art. 16 provide four exceptions to this general rule of equality of opportunity.

Clause (4) enables the State to make provision for the reservation of posts in government jobs in favour of any backward class of citizens, which, in the opinion the State, is not adequately represented in the services of the State. The newly added clause (4-A) (added by 77th Amendment 1995) empowers the State to make any provision for reservation in matters of promotions for SC and STs, which, in the opinion of the State, are not adequately represented in the services under the State.

The Constitution (81st Amendment) Act, 2000 has added a new clause (4-B) after Clause (4-A) in Art. 16 of the Constitution which seeks to end the 50% limit for Scheduled Castes and Scheduled Tribes and other Backward Classes in backlog vacancies, which could not be filled up due to the non availability of eligible candidates of these categories in the previous year or years.

Clause (5) saves a law from the operation of clauses (1) & (2) which provides for the incumbent of any office a religious qualification for appointment.

Clause (4) - Reservation for Backward Classes

Article 16(4) is the second exception to the general rule embodied in Articles 16(1) and (2). It empowers the State to make special provision for the reservation of appointments of posts in favour of any backward class of citizens, which in the opinion of the State are not adequately represented in the services under the State. Thus, Article 16(4) applies only if two conditions are satisfied

1. the class of citizens is backward;
2. the said class is not adequately represented in the services of the State.

The Second test cannot be the sole criterion.

In *Balaji's* case, the Supreme Court has held that the ‘caste’ of a person cannot be the sole test for ascertaining whether a particular class is a backward class or not. Poverty, occupation, place of habitation may all be relevant factors to be taken into consideration. Though the caste of a person cannot be the sole test for determining the backwardness of a class, but if an entire caste is found to be socially and educationally backward it may be included in the list of Backward Classes. However, the Court said that it does not mean that once a caste is considered a backward class then it should continue to be backward for all the times. The Government should review the test and if a class reaches the state of progress where reservation is not necessary it should delete that class from the list of the Backward Classes.

Article 16(4), must be interpreted in the light of Article 335 which says that the claims of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration consistently with the maintenance of efficiency of administration. The reservations for backward classes should not be unreasonable. It should be considered having regard to the employment opportunities of the general public.

The scope of Article 16(4) was considered by the Supreme Court in *Devadason v. Union of India*. In that case the constitutional validity of the 'carry forward rule', framed by the Government to regulate appointment of persons of backward classes in Government services was involved. This rule provided that if sufficient number of candidates belonging to the Scheduled Castes and Scheduled Tribes were not available for appointment to the reserved quota, the vacancies that remained unfilled would be treated as unreserved and filled by the fresh available candidates; but a corresponding number of posts would be reserved in the next year for Scheduled Castes and Scheduled Tribes in addition to their reserved quota of the next year. The result was to carry forward the unutilized balance, that is, unfilled vacancies in the second and third years at one time.

In the *Mandal* case, the Supreme Court has overruled *Devadason v. Union of India*, on this point. It has held that the 'carry forward rule' is valid so long as it does not in a particular year exceed 50 per cent of vacancies. The 50 per cento limit can only be exceeded in an extraordinary situation prevailing in a State.

Conclusion

Problem

1. 'A', a woman, marries 'B' who is entitled for benefit of reservation in employment, and claims for such benefit as his wife. Will she succeed? [6]

01

PROTECTION IN RESPECT OF CONVICTION FOR OFFENCES

Ex post facto Law [10]
Dec 05, 03

Introduction: Article 20 of the Indian Constitution provides the following safeguards to the persons accused of crimes:

- (a) *Ex post facto law*: Clause (1) of Article 20.
- (b) Double jeopardy: Clause (2) of Article 20.
- (c) Prohibition against self-incrimination: Clause (3) of Article 20.

Protection against Ex post facto law

Clause (1) of Article 20 of the Indian Constitution says that “no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

Article 20 (1) imposes a limitation on the law-making power of the Legislature. Ordinarily, a Legislature can make prospective as well as retrospective laws, but clause (1) of Article 20 prohibits the Legislature to make retrospective criminal laws. However, it does not prohibit imposition of civil liability retrospectively. *i.e.*, with effect from a past date. So, a tax can be imposed retrospectively.

An *ex post facto* law is a law, which imposes penalties retrospectively, *i.e.* on acts already done and increases the penalty for such acts. The American Constitution also contains a similar provision prohibiting *ex post facto* laws both by the Central and the State Legislatures.

The first part of clause (1) provides that “no person shall be convicted of any offence except for violation of ‘law in force’ at the time of the commission of the act charged as an offence. This means that if an act is not an offence at the date of its commission it cannot be an offence at the date subsequent to its commission. In *Pareed Lubha v. Nilambaram*, it was held that if the non-payment of the Panchayat Tax was not an offence on the day it fell due, the defaulter could not be convicted for the omission to pay under a law passed subsequently even if it covered older dues. The protection afforded by clause (1) is available only against conviction or sentence for a criminal offence under *ex post facto* law and not against the trial. Under the American law the prohibition applies even in respect of trial. The guarantee in American Constitution is thus wider than that under the Indian Constitution. The protection of clause (1) of Article 20 cannot be claimed in case of preventive detention, or demanding security from a person. The prohibition is just for conviction and sentence only and not for prosecution and trial under a retrospective law. So, a trial under a procedure different from what it was at the time of the

commission of the offence or by a special court constituted after the commission of the offence cannot *ipso facto* be held unconstitutional.

The second part of clause (1) protects a person from 'a penalty greater than that which he might have been subjected to at the time of the commission of the offence.' In *Kedar Nath v. State of West Bengal*, the accused committed an offence in 1947, which under the Act then in force was punishable by imprisonment or fine or both. The Act was amended in 1949, which enhanced the punishment for the same offence, by an additional fine equivalent to the amount of money procured by the accused through the offence. The Supreme Court held that the enhanced punishment could not be applicable to the act committed by the accused in 1947 and hence set aside the additional fine imposed by the amended Act.

But the accused can take advantage of the beneficial provisions of the *ex post facto* law. The rule of beneficial construction requires that *ex post facto* law should be applied to mitigate the rigorous (reducing the sentence) of the previous law on the same subject. Such a law is not affected by Article 20(1). The principle is based both on sound reason and common sense. In *T. Baral v. Henry An Hoe*, a complaint was lodged against the respondent under Section 16(1)(a) on August 16, 1975 for having committed an offence punishable under Section 16(1)(a) read with Section 7 of the Prevention of Food Adulteration Act as amended by the Amending Act of 1973. On the date of the commission of the alleged offence, *i.e.* on August 16, 1975, the law in force in the State of West Bengal was the Amendment Act which provided that such an offence would be punishable with imprisonment for life. On April 1, 1976 enacted Prevention of Food Adulteration (Amendment) Act, 1976, which reduced the maximum punishment of life imprisonment as provided by the West Bengal Amendment Act to 3 years imprisonment. It was held that the accused could take advantage of the beneficial provision of the Central Amendment Act and thus he had the benefit of the reduced punishment.

In *Ratanlal v. State of Punjab*, a boy of 16 years was convicted for committing an offence of house-trespass and outraging the modesty of a girl aged 7 years. The Magistrate sentenced him for 6 months rigorous imprisonment and also imposed fine. After the judgment of Magistrate, the Probation of Offenders Act, 1958, came into force. It provided that a person below 21 years of age should not ordinarily be sentenced to imprisonment. The Supreme Court by a majority of 2 to 1 held that the rule of beneficial interpretation required that *ex post facto* law could be applied to reduce the punishment. So an *ex post facto* law, which is beneficial to the accused, is not prohibited by clause (1) of Article 20.

Conclusion

What is 'protection against Double Jeopardy'? [6]

Dec 07, 02, 2K

'No person shall be prosecuted and punished for the same offence more than once.' Discuss with reference to decided cases. [10]

04

Introduction: Article 20 of the Indian Constitution provides the following safeguards to the persons accused of crimes:

- (a) *Ex post facto law*: Clause (1) of Article 20.
- (b) Double jeopardy: Clause (2) of Article 20.
- (c) Prohibition against self-incrimination: Clause (3) of Article 20.

Protection against Double Jeopardy - Clause (2)

Article 20(2) of our Constitution says “no person shall be prosecuted and punished for the same offence more than once.” This clause embodies the common law rule of *nemo debet vis vexari*, which means that no man should be put twice in peril for the same offence. If he is prosecuted again for the same offence for which he has already been prosecuted he can take complete defence of his former acquittal or conviction.

The American Constitution incorporates the same rule in the Fifth Amendment that “no person shall be twice put in jeopardy of life or limb.” The protection under clause (2) of Article 20 is narrower than that given in American and British laws. Under the American and the British Constitution the protection against double jeopardy is given for the second prosecution for the same offence irrespective of whether an accused was acquitted or convicted in the first trial. But under Article 20(2) the protection against punishment is given only when the accused has not only been ‘prosecuted’ but also ‘punished’, and is sought to be prosecuted second time for the same offence. The use of the word ‘prosecution’ thus limits the scope of the protection under clause (1) of Article 20. If there is no punishment for the offence as a result of the prosecution clause (2) of Article 20 has no application and an appeal against acquittal, if provided by the procedure is in substance a continuance of the prosecution. The word ‘prosecution’ as used with the word ‘punishment’ embodies the following essentials for the application of double jeopardy rule. They are:

1. The person must be accused of an ‘offence.’ The word ‘offence’ as defined in General Clauses Act means ‘any act or omission made punishable by law for the time being in force.’
2. The proceeding or the prosecution must have taken place before a ‘court’ or ‘judicial tribunal’
3. The person must have been ‘prosecuted and punished’ in the previous proceeding.
4. The ‘offence’ must be the same for which he was prosecuted and punished in the previous proceedings.

In *Muqbool Husain v. State of Bombay*, the appellant brought some gold into India. He did not declare that he had brought gold with him to the customs authorities on the airport. The customs authorities confiscated the gold under the Sea Customs Act. He was later on charged for having committed an offence under the Foreign Exchange Regulations Act. The appellant contended that second prosecution was in violation of

Article 20(2) as it was for the same offence, *i.e.* for importing gold in contravention of Government notification for which he had already been prosecuted and punished as his gold had been confiscated by the customs authorities. The Court held that the Sea Custom Authorities were not a court or judicial tribunal and the adjudging of confiscation under the Sea Customs Act did not constitute a judgment of judicial character necessary to take the plea of double jeopardy. Hence the prosecution under the Foreign Exchange Regulation Act was not barred.

Similarly, proceedings before departmental and administrative authorities cannot be a proceeding of judicial nature.

In *Venkataraman v. Union of India*, the appellant was dismissed from service as a result of an inquiry under the Public Service Enquiry Act, 1960, after the proceedings were held before the Enquiry Commissioner. Later on, he was prosecuted for having committed the offence under Indian Penal Code and the Prevention of Corruption Act. The Court held that the proceedings taken against the appellant before the Enquiry Commissioner did not amount to a prosecution for an offence. The enquiry held by the Commissioner was in the nature of fact finding to advise the Government for disciplinary action against the appellant. It cannot be said that the person has been prosecuted. Hence, the second prosecution of the appellant was held not to attract the application of the double jeopardy protection guaranteed by Article 20(2).

Article 20(2) will have no application where punishment is not for the same offence. Thus if the offences are distinct the rule of double jeopardy will not apply. Thus, where a person was prosecuted and punished under Sea Customs Act; and was later on prosecuted under the Indian Penal Code for criminal conspiracy, it was held that second prosecution was not barred since it was not for the same offence.

Likewise, clause (2) of Article 20 does not apply where the person is prosecuted and punished for the second time and subsequent proceeding is mere continuation of the previous proceeding, e.g. in the case of an appeal against acquittal. Thus where a number of persons were punished for smuggling currency notes, arms and ammunition and were later on prosecuted for criminal conspiracy for carrying out their trade, it was held that the second prosecution was not forbidden although it related to the same offence, *i.e.* smuggling currency notes, etc. for which they had already been prosecuted and punished.

Conclusion

SAFEGUARDS AGAINST ARBITRARY ARREST AND DETENTION

What are the rights of an arrested person under Art 22 of the Constitution? [10]

Dec 01

Explain briefly the rights against arbitrary arrest and detention. [16]

05

Introduction: According to Article 21 no person can be deprived of his life or personal liberty except according to procedure established by law. This means that a person can be deprived of his life or personal liberty provided his deprivation was brought about in accordance with the procedure prescribed by law. Article 22 provides those procedural requirements, which must be adopted and included in any procedure enacted by the Legislature. If these procedural requirements are not complied with, it would then be deprivation of personal liberty, which is not in accordance with the procedure established by law. Thus Article 22 prescribes the minimum procedural requirements that must be included in any law enacted by the Legislature in accordance with which a person may be deprived of his life and personal liberty. Article 22 deals with two separate matters;

1. persons arrested under the ordinary law of crimes;
2. persons detained under the law of 'Preventive Detention.'

The first two clauses of Article 22 deal with detention under the ordinary law of crimes and lay down the procedure which has to be followed when a man is arrested and the remaining clauses (3), (4), (5), (6) deal with persons detained under a preventive detention law and lay down the procedure which is to be followed when a person is detained under that law.

Rights of Arrested Persons under ordinary laws

- (a) Clauses (1) and (2) of Art. 22 guarantee four rights on a persons who is arrested for any offence under an ordinary law the right to be informed 'as soon as may be' of ground of arrest,
- (b) the right to consult and to be represented by a lawyer of his own choice,
- (c) the right to be produced before a Magistrate within 24 hours,
- (d) the freedom from detention beyond the said period except by the order of the Magistrate.

The above fundamental rights guaranteed to arrested persons by clauses (1) and (2) of Article 22 are available to both citizens and non-citizens and not to persons arrested and detained under any law providing for preventive detention.

The Rights to be Informed of Grounds of Arrest

This is necessary to enable the arrested person to know the grounds of his arrest and to prepare for his defence. Article 22 is in the nature of a directive to the arresting authorities to disclose the grounds of arrest of a person immediately. The words used in Article 22 (1) are 'as soon as may be', which means as nearly as is reasonable in the circumstances of a particular case. If the grounds of arrest are delayed it must be justified by 'reasonable circumstances.' This right of being informed of the grounds of arrest is not dispensed with by offering to make bail to the arrested person.

In a notable judgment in *Joginder Kumar v. State of U.P.*, the Supreme Court has laid down guidelines governing arrest of a person during the investigation. This is intended to strike a balance between the needs of police on one hand and the protection of human rights of citizens from oppression and injustice at the hands of law enforcing agencies. The Court has held that a person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the police officer effecting the arrest that such arrest was necessary and justified.

The National Police Commission in its third report has pointed out that power of arrest is one of the chief source of corruption in the police. According to the report, nearly 60 percent of the arrests are either unnecessary or unjustified.

The Court has laid down the following guidelines to be followed in making arrest of a person

1. An arrested person being held in custody is entitled, if he so request to have one friend, relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where he is being detained.
2. Police officer shall inform the arrested person when he is brought to the police station of this right.
3. An entry shall be required to be made in the police diary as to who was informed of the arrest.

These protections form power flow from Arts. 21 and 22(a) of the Constitution and must be enforced strictly.

The Court directed that it shall be the duty of the Magistrate, before whom the arrested person is produced to satisfy himself that these requirements have been complied with.

The Court said that these guidelines shall be followed in all cases of arrest till legal provisions are made in this behalf. These requirements shall be in addition to the rights of arrested persons found in the various police manuals.

The Court made it clear that these requirements are not exhaustive. The Directors Generals of Police of all the States in the country shall issue necessary instruction requiring due observances of this requirement.

In addition, departmental instructions shall also be issued than a police officer making an arrest should also record in the case diary the reasons for making the arrest.

This Judgment of the Supreme Court will protect innocent citizens from being arrested and harassed by the police merely on the suspicion of complicity in an offence.

Right to be Defended by a Lawyer of his own choice

In America, if a person is arrested he must be afforded opportunity to consult lawyer of his own choice and if he is unable to employ a counsel it is the duty of court to employ a lawyer for him. Prior to the *Maneka Gandhi's* decision in India the view of the Court was that it was not bound to provide the help of a lawyer unless a request was made by him. But as a result of the ruling of the Supreme Court in *Maneka Gandhi's* case and a series of cases following that case it is clear that the courts will be bound to provide the assistance of a lawyer to a person arrested under an ordinary law also.

In *Hussainara Khatoon v. Home Secretary, Bihar*, the Supreme Court has held that it is the constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation, to have free legal services provided to him by the State and the State is under constitutional duty to provide a lawyer to such person if the needs of justice so require. If free legal services are not provided the trial itself may be vitiated as contravening Art. 21.

The protection of this Article is also not available to a person who has been convicted by a competent court and detained.

Right to be Produced before a Magistrate

In addition to the furnishing of the grounds of arrest the arrested person must be produced before the Magistrate within 24 hours of his arrest. It can be extended beyond 24 hours only under the judicial custody. It affords a possibility, if not an opportunity, for immediate release in case the arrest is not justified.

No detention beyond 24 hours except by order of the Magistrate

This means that if there is necessity of detention beyond 24 hours it is only possible under judicial custody. The expression 'arrest and detention' in Articles 22 (1) and (2) was held not to apply to a person arrested under a warrant issued by the court on a criminal or quasi-criminal complaint or under security proceedings. Article 22 is designed to give protection against the act of the Executive or order of non-judicial authorities and applies to a person who has been accused of a crime or of offence of criminal or quasi-criminal nature or some act prejudicial to the State or public interest.

Thus under Art 22(1) and (2) the arrested person has a right to be produced before the nearest magistrate within a period of 24 hours. This would enable the arrested person to get a speedy trial. This means that if there is failure to produce the arrested person before the nearest magistrate within twenty-four hours it would make the arrest illegal.

In *State of Punjab v. Ajab Singh*, the Supreme Court held valid the Abducted Person (Recovery and Restoration) Act, 1949, under which an abducted person could be arrested and delivered to the office-in-charge of the nearest Camp. The arrest of an abducted person under the Act was held not to constitute 'arrest and detention' because the person was not accused of any offence of a criminal or quasi-criminal nature. Likewise, the removal of a minor girl from a brothel under the Bengal Suppression of Immoral Traffic Act, 1923, was held not to constitute 'arrest and detention' under Article 22. The reason is that person who is arrested under a warrant of a court is informed of the grounds of his arrest.

The period of 90 days or 60 days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the police. Thus after the expiry of first 15 days it should be only under judicial custody.

This is a welcome ruling of the Supreme Court, which will save many under-trial prisoners from police atrocities as they cannot be kept for a undue long period in police lock-up and would also help in speedy investigation of crimes.

Exceptions

Clause (3) of Art 22 provides two exceptions to the rule contained in clauses (1) and (2). It says that the rights given to arrested person under clauses (1) and (2) are not available to following persons:

- an enemy alien,
- a person arrested and detained under a Preventive Detention law.

An enemy alien may, however, seek the protection under clauses (4) and (5) of Art. 22 if arrested under a law of Preventive Detention, but subject to the law passed by the Parliament.

Conclusion

What are the Constitutional safeguards against arbitrary arrest and detention? [16]

Dec 03

Introduction: Clauses (4) to (7) of Article 22 provide the procedure, which is to be followed if a person, is arrested under the law of 'Preventive Detention'. There is no authoritative definition of the term 'Preventive Detention' in Indian law. The word 'preventive' is used in contra-distinction to the word 'punitive.' It is not a punitive but a preventive measure. While the object of the punitive detention is to punish a person for

what he has already done, the object of preventive detention is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved nor any charge is formulated. The sole justification of such detention is suspicion or reasonable probability of the detenu committing some act likely to cause harm to the society or endanger the security of the Government, and not criminal conviction which can only be warranted by legal evidence.

Though the Constitution has recognised the necessity of laws as to Preventive Detention, it has also provided safeguards to mitigate their harshness by placing fetters on legislative power conferred on the Legislature. Clauses (4) to (7) guarantee the following safeguards to a person arrested under Preventive Detention Law

- Review by Advisory Board.
- Communication of grounds of detention to detenu.
- Detenu's right of representation

Review by Advisory Board

Clause (4) of Art 22 has been amended by the Constitution (44th Amendment) Act 1978.

Prior to 44th Amendment Act, 1978

Clause (4) provided that no law providing for preventive detention shall authorize the detention of a person for a longer period than 'three months' unless an Advisory Board constituted of person who are or have been qualified to be High Court Judge has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention. If in the opinion of Advisory Board the detention was not justified the Government was bound to revoke the detention order. If the Advisory Board reported that the detention was justified then the detaining authority would determine the period of detention. However, the period of detention could not be indefinite. The detention cannot exceed in any case beyond the maximum period prescribed by any law made by Parliament for that class of detenu under sub-clause (b) of clause (7). Any law providing for detention for a longer period of 3 months without obtaining the opinion of the Advisory Board must provide the class or classes of cases and also the circumstances under which a person may be detained for more than 3 months. It means that the Parliament must provide both

- (a) the classes or cases, and
- (b) the circumstances under which detention for a longer period of 1 months can be made.

Clause 7 of Article 22 contained an exception to clause (4). It empowered the Parliament to enact a law and provide for a detention for more than three months without the opinion of the Advisory Board. Thus the opinion of the Advisory Board was not necessary in the cases

- (1) when period of detention does not exceed three months,

- (2) when Parliament by law prescribed the maximum period for which a person may be detained under clause (4) (b).

The above amendment has not yet been brought into force.

After the 44th (Amendment) Act, 1978

The 44th Amendment Act, 1978, has substituted a new clause for clause (4) which now reduces the maximum period (or which a person may be detained without obtaining the opinion of the Advisory Board from months to 2 months. The detention of a person for a longer period than two months can only be made after obtaining the opinion of the Advisory Board.

The Amendment has also changed the composition of the Advisory Board. The Advisory Board shall now be constituted in accordance with the recommendation of the Chief Justice of the appropriate High Court. It shall consist of a Chairman and not less than two other members. The Chairman of an Advisory Board shall be sitting Judge of the appropriate High Court and the other members shall be a sitting or retired Judges of any High Court. Thus an Advisory Board as envisaged under the Amendment Act of 1978 shall now be an independent and impartial body, *i.e.* free from executive control.

The Amendment has thus abolished the provision for preventive detention without reference to an Advisory Board as provided in unamended sub-clause (a) of clause (7) of Art. 22. The amendment therefore deletes sub-clause (a) of clause (7) of Article 22. Under Art 22(7) (a) Parliament was empowered to make law for preventive detention without obtaining the opinion of an Advisory Board beyond the period of three months. After 44th Amendment a person can be detained beyond the period of two months only after obtaining the opinion of an Advisory Board. The deletion of clause (a) of Art 22 (7) has thus removed the greatest blot on preventive detention in India.

The amendment thus provides for two categories of preventive detention:

1. detention for a maximum period of two months under a law made by a legislature
2. detention for a period longer than two months provided the Advisory Board gives its opinion in favour of it.

The Advisory Board will decide whether the detention is justified or not. It is a safeguard against executive highhandedness. If the Advisory Board reports that the detention is not justified, the detained person must be released. If it reports that the detention is justified the detaining authority will determine the period of detention.

The Advisory Board is bound to submit its report before the expiration of the said period of two months. Failure to do so would render the detention illegal. In absence of Advisory Board's clear opinion that there was sufficient cause for the continued detention of the detenu, it was held that their detention for more than one year was without legal sanction and hence illegal.

Grounds of detention must be communicated to the detenu

Article 22(5) gives two rights to the detenu

- (a) the authority making the order of detention must 'as soon as may be' communicate to the person detained the grounds of his arrest, that is, the grounds which led to be subjective satisfaction of the detaining authority
- (b) to give the detenu 'the earliest opportunity' of making a representation against the order of detention, that is, to be furnished with sufficient particulars to enable him to make a representation.

The clause (5) imposes an obligation on the detaining authority to furnish to the detenu the grounds for detention 'as soon as possible'. The grounds of detention should be very clear and easily understandable by the detenu. The sufficiency of the particulars conveyed to a detenu is a justiciable issue, the test being whether they are sufficient to enable the detenu to make an effective representation. 'Communicate' is a strong word. It requires that sufficient knowledge of the basic facts constituting the grounds should be imparted effectively and fully to the detenu in writing in a language, which he understands, so as to enable him to make a purposeful and effective representation. If the grounds are only verbally explained to the detenu and nothing in writing is left with him in a language which he understands then that purpose is not served, and the constitutional mandate in Article 22(5) is infringed. Thus where the detenu did not know sufficient English to understand the grounds communicated to him, it was held that there was not sufficient compliance with the requirements laid down in the Constitution. Similarly, in *Lallubhai Jogibhai Patel v. Union of India*, the detenu did not know English but the grounds of detention were drawn in English and the detaining order stated that the Police Inspector while serving the grounds of detention fully explained the grounds in Gujarati to the detenu; but no translation of the grounds of detention into Gujarati was given to the detenu. It was held that there was no sufficient compliance of Article 22(5), and hence the order of detention was invalid. In *Kubic Darusz v. Union of India*, the grounds of detention was served to the detenu in English and he acknowledged the receipt thereof putting his signature in English. After one month thereafter, he made a representation that he knew only Polish language and not English. It was held that there was no violation of Article 22(5) as the detenu had working knowledge of English but he was showing ignorance.

The grounds of detention must be in existence at the time of making the order. No part of such ground can be held back nor can new ground be added thereto.

Right of Representation

The other right given to the detenu is that he should be given the earliest opportunity of making a representation against detention order. It means that the detenu must be furnished with sufficient particular of ground of his detention to enable him to make a representation, which on being considered may give him relief.

The 'grounds' under Article 22(5) means all the 'basic facts' and materials which have been taken into account by the detaining authority in making the order of detention and on which, therefore, the order of detention is based. Nothing less than all the basic facts and materials, which influenced the detaining authority in making the order of detention, must be communicated to the detenu. This is the plain requirement of the first safeguard

in Article 22(5), The second safeguard in Article 22(5) requires that the detenu shall be afforded the earliest opportunity of making representation against the order of detention. No available delay, no shortfall in the materials communicated shall stand in the way of the detenu in making an earlier, yet comprehensive and effective representation in regard to all the facts and materials, which may have influenced the detaining authority in making the order of detention depriving him of his freedom. These are the legal safeguards enacted by the Constitution-makers against arbitrary or improper exercise of the vast power of preventive detention, which may be vested in the Executive by a law of Preventive Detention.

The reason why grounds are required to be communicated 'as soon as possible' is two-fold.

- Firstly, it acts as a check against arbitrary and capricious exercise of power. The detaining authority cannot whisk away a person and put him behind bars at its own sweet will. It must have grounds for doing so.
- Secondly, the detenu has to be afforded an opportunity of making a representation against the order of detention. But if the grounds are not supplied to him it is not possible for him to make effective representation and in fact the right to make representation would become illusory.

The 'materials and documents' relied on in the order of detention must be supplied to the detenu along with the 'grounds'. The supply of 'grounds' *simpliciter* would give him not a real but merely an illusory opportunity to make a representation and would thus make the procedure unjust and unreasonable which would be liable to be struck down. Inordinate delay in considering the representation under Section 8 of N.S.A. by the detaining authority will make detention order invalid.

Similarly, the non-supply of the copies of documents relied on by detaining authority will make the detention illegal.

Conclusion

Problem

1. 'X', an abducted person was not produced before the Court within 24 hours. Can he seek protection under Art 22 of the Constitution? [6]
Dec 01,

RIGHT TO FREEDOM OF RELIGION

Discuss the right to freedom of religion under Art 25 of the Constitution of India with the help of decided cases. [16]

05, Dec 02, 2K

Introduction: The concept of secularism is implicit in the Preamble of the Constitution, which declares the resolve of the people to secure to all its citizens 'liberty to thought, belief, faith, and worship.' The 42nd Amendment Act, 1976, has inserted the word 'Secular' in the Preamble. This amendment is intended merely to spell out clearly the concept of secularism in the Constitution. In *S. R. Bommai v. Union of India*, the Supreme Court has held that "secularism is a basic feature of the Constitution." There is no mysticism in the secular character of the State. In India, a Secular State was never considered as an irreligious or atheistic State. It only means that in matters of religion it is neutral. It is the ancient doctrine in India that the State protects all religions but interferes with none.

Freedom of Religion in India

Article 25 (1) guarantees to every person the freedom of conscience and the right to profess, practice and propagate religion. The right guaranteed under Art 25 (1) like other constitutional rights, is not absolute. This right is, subject to public order, morality and health and to the other provisions of Part III of the Constitution. Also, under sub-clauses (a) and (b) of clause (2) of Article 25 the State is empowered by law

- (a) to regulate or restrict any economic, financial, political or other secular activity, which may be associated with religious practice:
- (b) to provide for (i) social welfare and reform, and (ii) to throw open Hindu religious institutions of a public character to all classes and sections of Hindus.

Religion

The term 'religion' is not defined in the Constitution and indeed it is a term, which is hardly susceptible to any rigid definition. The Supreme Court has defined it broadly. Religion is a matter of faith with individuals or communities and it is not necessarily theistic. A religion has its basis in "a system of beliefs or doctrines, which are regarded by those who profess that religion as conducive to their spiritual well being", "but it will not be correct to say that religion is nothing else but a doctrine of belief. A religion may only lay down a Code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship, which are regarded as integral part of religion, and those forms and observances might extend even to matters of food and dress. Religion is thus essentially a matter of personal faith and belief. Every person has right not only to entertain such religious belief and ideas as may be approved by his judgment or conscience but also exhibit his belief and ideas by such overt acts, which are sanctioned by his religion. Thus, under Art 25 (1) a person has a two-fold freedom

- (a) freedom of conscience;
- (b) freedom to profess, practice and propagate religion.

The freedom of 'conscience' is absolute inner freedom of the citizen to mould his own relation with God in whatever manner he likes. When this freedom becomes articulate and expressed in outward form it is 'to profess and practice religion.' To 'profess' a religion means to declare freely and openly one's faith and belief. He has right to practise his belief by practical expression in any manner he likes. To 'practise' religion is to perform the prescribed religious duties, rites and rituals, and to exhibit his religious beliefs and ideas by such acts as prescribed by religious order in which he believes. To 'propagate' means to spread and publicize his religious view for the edification of others. But the word 'propagation' only indicates persuasion and exposition without any element of coercion. The right to propagate one's religion does not give a right to convert any person to one's own religion. There is no fundamental right to convert any person to one's own religion. What Art 25 (1) guarantees is not right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. Article 25 guarantees 'freedom of conscience' to every citizen, and not merely to the followers of one particular religion. It, therefore, postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion that would impinge on the 'freedom of conscience,' guaranteed to all the citizens of the country alike.

The protection of Articles 25 and 26 is thus not limited to matters of doctrine of belief. It extends also to acts done in pursuance of 'religion' and, therefore, contains a guarantee for rituals and observances, ceremonies and modes of worship, which are integral part of religion. What constitutes an essential part of religions or religious practice has to be decided by the courts with reference to a doctrine of a particular religion and include practices, which are regarded by the community as a part of its religion.

In a judgment of far reaching importance in the *National Anthem Case*, the Supreme Court has held that no person can be compelled to sing the National Anthem "if he has genuine, conscientious religious objection." In the instant case, three children belonging to the 'Jehova's witnesses' of the Christian community were expelled from the school for refusing to sing the National Anthem. They challenged the validity of their expulsion on the ground that it was violative of their fundamental right under Article 25 (1). A circular issued by the Director of Public Instructions had made it compulsory for all children in schools to sing the National Anthem. They had stood up respectfully when the National Anthem was being sung every morning at their school but they did not join in the singing of it. They refused to sing the National Anthem as according to them it was against the tenets of their religious faith, which did not permit them to join in any rituals except if it be in their prayer to Jehova, their God. The Kerala High Court held that was their fundamental duty under Constitution to sing the National Anthem. It held that if the pupil belonging to the religious group refused to participate in the singing of the National Anthem it would have a very bad influence on the other pupils and the Head Mistress was therefore within her right not to permit them to attend the class until they gave in writing that they will participate in the singing of the National Anthem in the school. The conduct

of the children is not showing unqualified respect to the National Anthem, the High Court said, would endanger the security of the Nation in that the same will develop among the citizens a tendency to ignore the mandates of the Constitution thereby defeating the object (discernible from the preamble and other provisions) to accomplish which the people gave the Constitution themselves. If religious practices run counter to public order, morality, health or a policy of the Government to uphold the sovereignty and integrity and unity of the Nation then the said religious practices must give way for the benefit of the people and the nation as a whole.

On appeal however, the Supreme Court reversed the High Court decision and held that there is no legal obligation in India for a citizen to sing the National Anthem. The right under Art 25 (1) cannot be regulated by executive instructions, which had no force of law. The Court said that by standing up while the National Anthem was being sung the children had shown proper respect to the National Anthem and had thus not violated the fundamental duties laid down in Article 51-A of the Constitution. Their conduct did not amount to an offence under the Prevention of Insults to National Honour Act, 1971 as they did not prevent the singing of the National Anthem nor caused disturbance to the assembly in the singing of the National Anthem. Accordingly, the Court directed the authorities to re-admit the children in the school and to allow them to pursue their studies. The judgment of the Supreme Court will have far-reaching consequences. In ruling so, the Supreme Court relied heavily on the decisions of the American Supreme Court.

In *Ramesh v. Union of India*, the petitioner a practicing advocate of High Court filed a public interest litigation under Art. 32 for issue of a writ in the nature of prohibition restraining the respondents, namely, the Union of India, the Director-General of Doordarshan, New Delhi and the producer from telecasting or screening the serial titled 'Tamas' and to enforce petitioners fundamental right under Articles 25 of the Constitution. The serial 'Tamas' is based on a novel written by Sri Bhisam Sahni. It depicts how during partition of India communal violence was generated by fundamentalists in both the communities. It was held that although in this case there was no violation of Art. 25 but accepted that the petitioner has a right to draw attention of the Court to ensure that the communal atmosphere is kept clean and unpolluted. In this case the Court held that there was no such danger as the respondents had not acted with malice or bad motive in screening the serial. Instead it gives lesson to the people that such things should not be repeated.

Conclusion

State the constitutional provisions relating to right to freedom of religion with its limitations. [10]

Dec 04

Is the right to convert a person to his own religion a fundamental right? [6]

05, Dec 02

Introduction: The concept of secularism is implicit in the Preamble of the Constitution, which declares the resolve of the people to secure to all its citizens 'liberty to thought, belief, faith, and worship.' The 42nd Amendment Act, 1976, has inserted the word 'Secular' in the Preamble. This amendment is intended merely to spell out clearly the concept of secularism in the Constitution. In *S. R. Bommai v. Union of India*, the Supreme Court has held that "secularism is a basic feature of the Constitution." There is no mysticism in the secular character of the State. In India, a Secular State was never considered as an irreligious or atheistic State. It only means that in matters of religion it is neutral. It is the ancient doctrine in India that the State protects all religions but interferes with none.

Freedom of Religion in India

Article 25 (1) guarantees to every person the freedom of conscience and the right to profess, practice and propagate religion. The right guaranteed under Art 25 (1) like other constitutional rights, is not absolute. This right is, subject to public order, morality and health and to the other provisions of Part III of the Constitution. Also, under sub-clauses (a) and (b) of clause (2) of Article 25 the State is empowered by law

- (a) to regulate or restrict any economic, financial, political or other secular activity, which may be associated with religious practice:
- (b) to provide for (i) social welfare and reform, and (ii) to throw open Hindu religious institutions of a public character to all classes and sections of Hindus.

Restrictions on Freedom of Religion

Religious liberty subject to public order, morality and health

In the name of religion no act can be done against public order, morality and health of the public. Thus Section 34 of the Police Act prohibits the slaughter of cattle or indecent exposure of one's person in a public place. These acts cannot be justified on plea of a practice of religious rites. Likewise, in the name of religion 'untouchability or traffic in human beings' *e. g.*, system of *Devadasis* (as prevalent in South India) cannot be tolerated. This freedom is also subject to the 'other provisions of this Part', *e.g.* right to freedom of speech and expression, freedom of assembly and association, freedom to carry on profession, trade and business. The freedom to practice religion cannot affect the exercise of these freedoms by others. These rights are subject to the reasonable restrictions under clause (2) of Art 19.

Right to propagate one's religion does not give right to anyone to 'forcibly' convert any person to one's own religion. Forcible conversion of any person to one's own religion might disturb the public order hence could be prohibited by law.

Forced conversion not allowed

In *Rev Stainislaus v. State of M.P* the validity of the two Acts - the Madhya Pradesh Dharma Swatantrya Adhiniyam, 1968 and the Orissa Freedom of Religion Act, 1967 -

passed by State Legislatures of Madhya Pradesh and Orissa respectively was challenged on the ground that they were violative of the fundamental right of the appellant guaranteed under Art 25 (1) of the Constitution. These Acts were passed to prohibit forcible conversion of any person to one's own religion. The appellant was prosecuted for the commission of offences under the Madhya Pradesh Act. He contended that right to 'propagate' one's religion meant the right to convert person to one's own religion and was a fundamental right under Art 25 (1) of the Constitution. Secondly, he argued that the State Legislature had no competence to enact such a law, as it did not fall within the purview of Entry I of List II and Entry 1 of List III of Seventh Schedule. It is covered by Entry 97 of List I so Parliament alone had the power to make the law and not the State Legislature.

Rejecting the contentions of the appellant the Supreme Court held that impugned Acts fell within the purview of Entry I of List II as they were meant to avoid disturbances to the public order by prohibiting conversion from one's religion to another in a manner reprehensible to the conscience of the community. These two Acts do not provide for the regulation of religion and therefore do not fall under Entry 7 of List I. Dealing with the meaning of the words 'public order' the Court held that if a thing which disturbs the current way of the life of the community, and does not merely affect an individual amounts to disturbance of the public order. Thus if an attempt is made to raise communal passions, *e.g.* on the ground that some one has been 'forcibly' converted to another religion, it would, in all probability, give rise to an apprehension of a breach of the public order, affecting the community at large. Therefore, legislation prohibiting forcible conversion of one's own religion in the interest of public order can be passed and is valid.

Following *Rev Stainislaus* ruling the Supreme Court bench comprising of Chief Justice V.N. Khare and Justice S.B. Sinha held that the *Orissa Freedom of Religion Act, 1967* which provided that a person wanting to convert to a particular religion must make a declaration which would be verified by the police also, is valid and overruled the decision of the Orissa High Court. The Court said "What Article 25 grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets" Article 25 (1) guarantees 'freedom of conscience' to every citizen and not merely to the followers of one particular religion. The Article postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, that would impinge on the freedom of conscience guaranteed to all citizens of the country alike.

Regulation of economic, financial, political and secular activities associated with religious practices - Clause (2)(a)

The freedom to practise extends only to those activities, which are the essence of religion. It does not cover secular activities, which do not form the essence of religion. It is not always easy to say which activities fall under religious practice or which are of secular, commercial or political nature associated with religious practice. Each case must be judged by its own facts and circumstances. In *Mohd. Hanif Quareshi v. State of Bihar*,

the petitioner claimed that the sacrifice of cows on the occasion of *Bakrid* was an essential part of his religion and therefore the State law forbidding the slaughter of cows was violative of his right to practise religion. The court rejected this argument and held that the sacrifice of cow on the *Bakrid* day was not an essential part of Mohammedan religion and hence could be prohibited by State under clause (2)(a) of Article 25. In *Adelaid Co. v. Commonwealth*, it was held that a person could not be allowed in exercise of his freedom of religious practice and profession to carry on an anti-war propaganda in the guise of religion when the nation is at war. Thus the political activities though arising out of religious belief by a particular organization were held not to be protected by the Constitution.

In *State of W.B. v. Ashutosh Lahiri*, respondents challenged the validity of the exemption of slaughter of cows from the operation of the West Bengal Animal Slaughter Control Act, 1950, on *Bakrid* day. The petitioners contended before the High Court that the State of West Bengal had wrongly invoked Section 12 of the Act, when it exempted from the operation of the Act, the slaughter of healthy cows on the occasion of *Bakrid* on the ground that such exemption was required to be given for the religious purpose of the Muslim Community. Following its decision in the case of *Mohd. Hanif Quareshi v. State of Bihar*, the High Court held that the slaughter of cows by members of Muslim Community on *Bakrid* day was not an essential requirement of Muslim religion and therefore such exemption was invalid. The respondents, the State of West Bengal and the Muslim Community filed an appeal in the Supreme Court against the judgment of the High Court.

The Supreme Court approved the decision of the High Court and dismissed the appeal. The Court held that before exercising the power of exemption under Section 12, it must be shown that such exemption is necessary to be granted for subserving an essential, religious, medicinal or research purpose. If granting of such exemption is not essential or necessary for effectuating such a purpose no such exemption can be granted so as to bypass the thrust of the main provisions of the Act. For such an exercise non-essential religious practices cannot be made the basis. The slaughtering of cows on the *Bakrid* day is optional and not obligatory. It is not essential or required for religious purpose of Muslims. Art. 25 exempts only the essential religious practices from State regulation.

Social Welfare and Social Reforms - Clause (2)(b)

Under Clause (2)(b) of Art 25 the State is empowered to make laws for social welfare and social reform. Thus under this clause the State can eradicate social practices and dogmas, which stand in the path of the country's onwards progress. Such laws do not affect the essence of any religion. This clause declares that where there is conflict between the need of social welfare and reform and religious practice, religion must yield. Social evils cannot be practised in the name of the religion. In *State of Bombay v. Varasu Bapamali*, an Act, which prohibited bigamy, was held valid under Clause (2)(b), Polygamy is not an essential part of the Hindu religion, and therefore it can be regulated by law. In an American case of *Reynolds v. United States*, a State law made it a criminal offence to marry with another while having a living spouse. The appellant was punished for

attempting to take a second wife under the sanction and command of his religion. The Supreme Court held that his punishment was valid under the statute, which prohibited bigamy. The Court said, "Congress was deprived of all legislative power over mere opinion but was left free to reach actions which were in violation of social duties or subversive of good order." Prohibition of civil practices such as *Sati* or system of *Davadas* has been held to be justified under this clause.

Under this sub-clause, the State is empowered to throw open all Hindu religious Institutions of a public character to all classes and sections of Hindus. It ensures an Individual's legal right to enter into a temple unobstructed irrespective of his caste, untouchability, social inequality or under-privileged class. The Hindu Temples, the Sikh Gurdwara, the Jain Temples and Budh Vihars can be thrown open to all sections of Hindus. The expression, 'Hindu' includes Jain, Sikh and Buddhists.

The right protected under this clause is a right to enter into a temple for the purpose of worship. But it does not follow from this that, that right is absolute and unlimited in character. No one can claim that a temple must be kept open for worship at all hours of the day and night or that he should be permitted to perform those services personally which the Acharya alone could perform. The State cannot regulate the manner in which the worship of the deity is performed by the authorized *pujaris* of the temple or the hours and days on which the temple is to be kept open for *darshan or puja* for devotees.

The right of Sikhs to wear and carry *Kirpans* is recognised as a religious practice in Explanation 1 of Article 25. This does not mean that he can keep any number of *Kirpans*. They are entitled to keep one sword, and they cannot possess more than one *Kirpan* without a license.

Conclusion

CULTURAL AND EDUCATIONAL RIGHTS

Discuss the rights of minorities of 'establish and manage' educational institutions. [16]

Dec 03

Write a note on cultural and educational rights. [6]

Dec 04

Introduction: Article 29 (1) guarantees to any section of the citizens residing in any part of India having a distinct language, script or culture of its own, the right to conserve the same, *i.e.* language, script or culture. A minority community can preserve its language, script or culture by and through educational institutions. Therefore, the right to establish and maintain institutions of their choice is necessary concomitant to the right to preserve its distinctive language, script or culture. This right is guaranteed to them by Article 30 (1) which says that all minorities whether based on religion or language shall have the right to establish and administer educational institutions of their choice. This right is further protected by Article 30 (2), which prohibits the State in granting aid to educational institutions from discriminating against any educational institutions on the ground that it is under the management of a minority whether based on religion or language. This right is, however, subject to clause (2) of Article 29, according to which no citizen shall be denied admission into any educational institutions maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. Art. 29 applies only to citizens while Article 30 applies to both citizens and non-citizens.

In *S. P. Mittal v. Union of India* the Society, challenged the validity of Auroville (Emergency Provisions) Act, 1980 on the ground that it was violative of its right under Arts. 29 and 30 of the Constitution. The Society was established to preach and propagate the ideals and teaching of Sri Aurobindo and the Mother through its numerous centres in India and abroad. An international cultural township Auroville was set up in Pondicherry and huge amount of money was received by the Society for the development of the Auroville Ashram. On receiving complaints about mismanagement of the affairs of Society the Central Government enacted the impugned legislation for taking over the management of the Society and the Auroville Ashram. It was held that the Act was not violative of the rights of any section of citizens to conserve its own language, script or culture conferred by Art. 29. The benefit of Art. 30 (1) can be claimed by the community only on providing that it is a religious or linguistic minority and that the institution was established by it. Since the Auroville or the Society were not religious denominations the taking over of their management did not violate Articles 29 and 30 of the Constitution.

Right of Minorities to establish and manage Educational Institutions

Article 30 (1) guarantees to all linguistic and religious minorities the 'right to establish' and the 'right to administer' educational institutions of their own choice. The right is conferred by this clause on two types of minorities-religious and linguistic minorities. The right conferred upon the above minorities is to establish and administer educational institutions of their choice. The word 'establish' indicates the right to bring into existence, while the right to administer an institution means the right to effectively manage and conduct the affairs of the institution. The administration connotes management of the affairs of the institution. The management must be free of control so that the founders of their community can mould the institution as they think fit in accordance with their ideas of how the interest of the community in general and the institution in particular will be served. Thus, it leaves it to the choice of the minority to establish such educational institutions as will serve both purposes, namely, the purpose of conserving their religion, language or culture, and also the purpose of giving through general education to their children in their own language.

In *D.A. V. College, Bhatinda v. State of Punjab*, the University declared that Punjabi would be the sole medium of instruction in the affiliated colleges. The Court held that the right of the minority to establish and administer educational institution of their choice includes the right to have a choice of medium of instruction also and the University Circular was directly infringing upon the rights of minorities to have instructions in Hindi as their own language and, therefore, was violative of Articles 22(1) and 30(1). The right under Article 30(1) is available to both the pre-Constitution and post-Constitution institutions.

Clause (2) of Article 30 prohibits the State from discriminating in the matter of grant of aid to any educational institution on the ground that it is managed by a religious or linguistic minority.

In *State of Bihar v. Syed AsadRaza*, it has been held that for creation of post in a minority institution for appointment prior approval of the Vice-Chancellor is not necessary and the persons so appointed would be entitled to grant in aid in view of Art 30(1) of the Constitution. Clause (2) of Art. 30 provides that the State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language the agreement between minority institution and the university requiring prior approval of the Vice Chancellor before enforcement of the Act does not subsist after coming into force of the Bihar State Universities Act, 1976, which provides that for appointment of a teacher prior approval of the State Government is not necessary.

In *Bramchari Sidheswar v. State of West Bengal*, popularly known as the *Ram Krishna Mission* case the Supreme Court has held that the Ram Krishna Mission established by Swami Vivekanand to propagate Vedanta values as expounded by Ramkrishna is not a minority religion separate and distinct from Hindu Religion, but a religious sect or denomination of the Hindu religion and therefore not entitled to claim the fundamental right under Art. 30(1) of the Constitution of establishing and administering educational institutions in their choice. Sri Ram Krishna could be regarded as a religious teacher who

expounded, practiced and preached the principles of Vedanta on which Hindu religion is founded. A three judge bench comprising Justice Kuldip Singh, Justice N. Venkatacharya and Justice S. Saghir Ahmad had set aside a judgment of the Calcutta High Court which had held that Ramakrishna Mission being a religion distinct and separate from the Hindu religion was a minority in West Bengal based on religion.

Conclusion

DIRECTIVE PRINCIPLES OF STATE POLICY

Discuss the importance of Directive Principles of State Policy. Explain its relation to fundamental rights. [16]

Dec 03, Dec 04

Introduction: The Directive Principles of State Policy contained in Part IV of the Constitution set out the aims and objectives to be taken up by the States in the governance of the country. This novel feature of the Constitution is borrowed from the Constitution of Ireland, which had copied it from the Spanish Constitution.

The idea of welfare State envisaged by our Constitution can only be achieved if the States endeavour to implement them with a high sense of moral duty.

At one time it was thought that the State was mainly concerned with the maintenance of law and order and the protection of life, liberty and property of the subject. Such a restrictive role of the State is no longer a valid concept. Today we are living in an era of a Welfare State, which has to promote the prosperity and well being of the people. The Directive Principles lay down certain economic and social policies to be pursued by the various Governments in India; they impose certain obligation on the State to take positive action in certain directions in order to promote the welfare of the people and achieve economic democracy.

Relation between Directive Principles and Fundamental Rights

The directive principles differ from fundamental rights in this respect, that while Fundamental Rights are justifiable, Directive Principles are non-justifiable.

According to Article 37, the Directive Principles, though they are fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making law, but they are expressly made non-justifiable. On the other hand, fundamental rights are enforceable by the courts (Article 32) and the courts are bound to declare as void any law that is inconsistent with the fundamental rights. The Directive Principles are not so enforceable by the courts nor can the courts declare as void any law, which is otherwise valid on the ground that it contravenes any of the directives. For instance, if a person is illegally detained, a writ of *habeas corpus* can be obtained by the detinue. But, if the Government does not separate judiciary from the executive or introduce free and compulsory education the courts cannot help the aggrieved. In *State of Madras v. Champakam Dorairajan*, the Supreme Court observed as follows, "The Directive Principles of the State Policy, which by Article 37 are expressly made unenforceable by Courts cannot override the provisions found in Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate writs, orders or directions under Article 32. The Chapter on Fundamental Rights is sacrosanct and not liable to be abridged by legislative, or executive act or orders, except to the extent provided in the

appropriate Article in Part III. The Directive Principles of State Policy have to conform and to run as subsidiary to the Chapter on Fundamental Rights. In our opinion that is the correct approach in which the provision found in Part III and IV have to be understood. However, so long as there is no infringement of any fundamental right to the extent conferred by the provisions in Part III, there can be no objection the State acting in accordance with the directive principles set out in Part IV, but subject again to the legislative and executive powers and limitations conferred on the State under different provisions.”

In that case it was held in case of any conflict between fundamental rights and directive principles the fundamental rights would prevail. But a year later, when the Court dealt with Zamindari Abolition cases its attitude was considerably modified. In the *State of Bihar v. Kameshwar Singh*, the Court relied on Article 39 in deciding that a certain Zamindari Abolition Act had been passed for a public purpose within the meaning of Article 31. Finally, in *Re Kerala Education Bill* the Supreme Court observed that though the directive principles cannot override the fundamental rights, nevertheless, in determining the scope and ambit of fundamental rights the court may not entirely ignore the directive principles but should adopt “the principles of harmonious construction and should attempt to give effect to both as much as possible.”

While Part III contains negative injunctions to the State not to do various things, Part IV contains positive commands to the State to promote what may be called a social and welfare State. Though these directives are not enforceable by the courts, yet these principles have been declared to be fundamental in the governance of the country (Article 37). It is the duty of the State to apply these principles in making laws. If any Government ignores them they will certainly have to answer for them before the electorate at the time of election.

It is, therefore, not correct to criticize these principles as meaningless and useless. It is wrong to say that there is no sanction behind them. In this age of democracy vigilant public opinion is the real force behind an institution, which stands for the benefit of the individual. The Government in a parliamentary system is under a constant fire of criticism. The actions of the Government are subject to scrutiny by the masses and the distinguished leaders of the different parties. If the Government pursues a policy in accordance with the principles of the Constitution, people tolerate it, otherwise they oust it in the next elections. Since the Directive Principles have been embodied in the Constitution, the Governments are bound to implement them. There may not be the legal force behind them but the highest tribunal - the public opinion - stands behind them. No Government can afford to ignore these directives, if it is not keen to doom its future, for all time to come.

There is no antithesis between the Fundamental Rights and the Directive Principles. They are meant to supplement one another. Granville Austin, has described the fundamental rights and the directive principles as the ‘conscience of our Constitution’.

In *Kesvananda Bharti v. State of Kerala*, the Supreme Court has said that ‘fundamental rights and directive principles aim at the same goal of bringing about a social revolution and establishment of a Welfare State and they can be interpreted and applied together. They are supplementary and complimentary to each other. It can well be said that directive principles prescribed the goal to be attained and the fundamental rights lay down the means by which that goal is to be achieved.

In *Unni Krishnan v. State of A.P* the Supreme Court has reiterated the same principle that ‘the fundamental rights and directive principles are supplementary and complementary to each other and the provisions in Part III should be interpreted having regard to the preamble and Directive Principles of the State Policy.’

The Directive Principles are also relevant to consider what are reasonable restrictions under Article 19. Article 19 permits the imposition of reasonable restrictions on the fundamental rights. A restriction, which promotes any objective embodied in the Directive Principles, is usually considered reasonable by courts of law. Thus in the *State of Bombay v. Balsara*, the Supreme Court gave weight to Article 47 which directs the State to bring about prohibition of consumption of intoxicating drink except for medical purposes - to support its decision that the restriction imposed by the Bombay Prohibition Act was a reasonable restriction on the right to engage in any profession or carry on any trade. In *Bijoy Cotton Mills v. State of Ajmer*, the Supreme Court upheld the constitutional validity of the Minimum Wages Act, 1948, because it was enacted to give effect to directive principles of State Policy in Art. 43 of the Constitution. It was held that the fixation of wages for labourers did not violate freedom of trade under Article 19 (5).

Conclusion

Discuss the importance of Directive Principles of State Policy. Discuss the role of the Supreme Court in implementation of directives with the help of decided cases. [16]

02

Introduction: The Directive Principles of State Policy contained in Part IV of the Constitution set out the aims and objectives to be taken up by the States in the governance of the country. This novel feature of the Constitution is borrowed from the Constitution of Ireland, which had copied it from the Spanish Constitution.

The idea of welfare State envisaged by our Constitution can only be achieved if the States endeavour to implement them with a high sense of moral duty.

At one time it was thought that the State was mainly concerned with the maintenance of law and order and the protection of life, liberty and property of the subject. Such a restrictive role of the State is no longer a valid concept. Today we are living in an era of a

Welfare State, which has to promote the prosperity and well being of the people. The Directive Principles lay down certain economic and social policies to be pursued by the various Governments in India; they impose certain obligation on the State to take positive action in certain directions in order to promote the welfare of the people and achieve economic democracy.

Implementation of Directives

Guided by the Directives the Central and the State Governments have tried to the best of their resources to implement large number of Directives. Under Article 39 (b) the Governments have abolished the old institution of hereditary proprietors, such as, Zamindars, Jagirdars etc., and made the tillers of the soil real owners of the land. This reform has, by this time, been carried out almost completely throughout India. Side by side with this, laws have been enacted in many States for the improvement of the conditions of the cultivators. In order to prevent concentration of land holdings even in actual cultivation many States have enacted legislation fixing a ceiling, that is to say, a maximum area of land, which may be held by an individual owner. Untouchability, the age-old curse of the Indian Society, has now been made an offence punishable by law. The Government has fixed minimum wages for our worker, modernized our labour laws and improved the conditions of labour. Panchayats have been established in the remotest villages of our country. They have been vested with the powers of civil administration, such as, medical relief, maintenance of village roads, streets, tanks and wells, provisions for primary education, sanitation and the like. They also exercise some judicial powers. For the promotion of cottage industries the Government has established several Boards, viz., All India Khadi and Village Industries Board, Small Scale Industries Boards, Silk Board, All India Handicrafts Board, All India Handlooms Board etc. Many States have passed laws for compulsory education. Slaughter of cows and calves in some of the States has been prohibited. In some States as Andhra Pradesh, Gujarat, Haryana, Punjab, Kerala, Madras, Mysore and Maharashtra, Judiciary has been separated from the Executive.

A large number of laws have been enacted to implement the directives contained in Article 40.

The objectives laid down in Art. 40 have now been fulfilled by enacting the Constitution 73rd and 74th Amendment Acts, 1992 known as the Panchayati Raj and Nagarpalika Constitution Amendment Act, 1992. These Amendments provide constitutional sanction to democracy at the grass root level.

The amendment according to the Government was made to facilitate the socio-economic reforms to be introduced by the Government. It was alleged that courts were standing in the way of implementing the Directive Principles and hence the amendment becomes necessary.

Conclusion

FUNDAMENTAL DUTIES

Fundamental Duties [10]

Dec 05, Dec 03, Dec 04

Introduction: This new Part IV-A, which consists of only one article, Article 51-A, was added to the Constitution by the 42nd Amendment, 1976. This Article for the first time specifies a Code of ten fundamental duties for citizens. Article 51-A says that it shall be the duty of every citizen of India

- (a) to abide by Constitution and respect its ideal and institutions, the National Flag and 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 wild life, and to have compassion for living creature;
- (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 achievements.

The Constitution (86th Amendment) Act, 2002 has added a new clause (k) to Article 51-A, which provides “who is parent or guardian to provide opportunities for education to his child or as the case be, ward between the age of six and fourteen years.”

Needs for Fundamental Duties

Rights and duties are correlative. The Fundamental duties, are, therefore, intended to serve as a constant reminder to every citizen that while the Constitution specifically conferred on them certain fundamental rights, it also requires citizens to observe certain basic norms of democratic conduct and democratic behaviour.

It was argued that in India people lay emphasis only on rights and not on duties. It is submitted that this view is wrong. The performance of one's duties even in partial disregard of one's rights and privileges has been traditional in this country. Since time immemorial the emphasis in Indian Society in accordance with the dictates of the ancient scriptures has been on the individual's 'Kartavya', this is, performance of one's duties

towards society, the country and especially towards one's parents. The Gita and the Ramayana enjoin people to perform their duties without caring for their rights.

These traditional duties have been given constitutional sanction. "If one takes care to see, he will discover in the Constitution not only his rights but also his duties. A look at the Constitution will also thus answer the complaint of some persons that Constitution has conferred rights on the individual but has not set out the duties of the individuals towards the society. By the Preamble the Constitution secures to all the citizens: 'liberty of thought, expression, belief, faith and worship.' These are fundamental rights of the citizens. The rest of the preamble emphasizes only the duties, 'justice, social economic and political.' In addition to this, the fundamental rights guaranteed by the Constitution are not absolute rights. The State is empowered to impose reasonable restriction and curtail these rights in the interest of society. Restrictions may sometimes amount to prohibition.'

Enforcement of Duties

The duties incorporated in the Constitution by the 42nd Amendment are statutory duties and shall be enforceable by law. Parliament, by law, will provide penalties to be imposed for failure to fulfill those duties and obligations. The success of this provision would, however, depend much upon the manner in which and the person against whom these duties would be enforced.

For the proper enforcement of duties, it is necessary that it should be known to all. This should be done by a systematic and intensive education Of the people that is by publicity or by making it a part of the syllabi and curriculum of education. The Law Minister has himself suggested this. Most of the people of this country are illiterate and not politically conscious of what they owe to society and country. Homes, Universities, officers and their places of work should all be made centres for imparting in the performance of their obligations.

In *M. C. Mehta (2) v. Union of India*, the Supreme Court has held that under Art. 51-A (g) it is the duty of the Central Government to introduce compulsory teaching of lessons at least for one hour in a week on protection and improvement of natural environment in all the educational institutions of the country. It directed the Central Government to get textbooks written on that subject and distribute them to the educational institutions free of cost. In order to arouse amongst the people, the consciousness of cleanliness of environment, it suggested the desirability of organizing.

Conclusion

THE UNION EXECUTIVE, THE PRESIDENT, VICE- PRESIDENT AND COUNCIL OF MINISTERS

State the qualifications required to become the President. [10]

Dec 07

Write about the impeachment of the President. [6]

01

Introduction: Article 52 of the Constitution says that there shall be a President of India. He is the head of the State. The executive power of the Union, Article 53 says, shall be vested in the President and it shall be exercised by him in accordance with the Constitution either directly or through officers subordinate to him. It has been held in *Emperor v. Sibnath Banerjee*, that the expression 'officers subordinate to him' includes a minister also.

The expression 'executive power' is not defined in the Constitution. Article 73, however, provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws and includes the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty of agreement. Thus the executive power of the Union, which is exercisable by the President, is co-extensive with the legislative powers of the Union. The executive power of a modern State is not capable of any precise definition. In *Ram Jawaya Kapur v. State of Punjab*, even the Supreme Court also finds it difficult to explain the context of the executive power. The Court has observed, "It may not be possible to frame an exhaustive definition of what executive functions mean and imply. Ordinarily, the executive power connotes the residue of governmental functions that remain after the legislative and judicial functions are taken away." It is neither necessary nor possible to give an exhaustive enumeration of the kinds and categories of executive functions, which may comprise both the formulations of the policy as well as its execution. Under Articles 73 and 163 the executive power is not confined merely to administration of laws already enacted but it includes determination of the Government policy, initiation of legislation, maintenance of law and order, promotion of social and economic welfare, the direction of foreign policy, in fact, the carrying on or supervision of the general administration of the State.

Qualifications

Article 58 lays down the qualifications, which a person must possess for being elected to the office of the President of India;

- (a) He must be a citizen of India.
- (b) He must have completed the age of 35 years.

- (c) He must be qualified for election as a member of the House of the People (*i.e.* he must be registered as a voter in any Parliamentary Constituency).
- (d) He must not hold any office of profit under the Government of India, or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

But the following persons shall not be deemed to hold any office or profit and hence qualified for being a candidate for Presidentship. They are

- (a) the President and Vice President of the Union,
- (b) the Government of any State,
- (c) the Minister of the Union or of any State [Art. 58].

Condition of President's Office

Article 59 says that the President cannot be a member of either House of Parliament or of a House of the Legislature of any State. If a member of either House of Parliament or of a State Legislature is elected President he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as President. The President shall not hold any other office of profit.

Term of office of the President

Article 56 says that the President shall hold office for a term of five years from the date on which he enters his office. Even after the expiry of his term he shall continue to hold office until his successor enters the office. He is also eligible for re-election. He may be elected for any number of terms. The President in India may, however, resign his office before the expiry of his normal term of five years by writing to the Vice-President. He may be removed from his office for the violation of the Constitution by the process of impeachment.

Procedure for Impeachment of the President

Article 61 of the Constitution lays down the procedure for the impeachment of the President. The President can be removed from his office by a process of impeachment for the violation of the Constitution. The impeachment charge against him may be initiated by either House of Parliament. The charge must come in the form of a proposal contained in a resolution signed by not less than 1/4th of the total number of the members of the House and moved after giving at least 14 days advance notice. Such a resolution must be passed by a majority of not less than 2/3rd of the total membership of the House. The charge is then investigated by the other House. The President has the right to appear and to be represented at such investigation. If the other House after investigation passes a resolution by 2/3rd majority declaring that the charge is proved, such resolution shall have the effect of removing the President from his office from the date on which the resolution is so passed.

Conclusion

Discuss the powers of the President under the Indian Constitution. [10]
01

Discuss the Ordinance making power of the President. [10]
04

Pardoning power [10]
05

Can pardoning power of the President be subject to judicial scrutiny? [6]
04

Introduction: Article 52 of the Constitution says that there shall be a President of India. He is the head of the State. The executive power of the Union, Article 53 says, shall be vested in the President and it shall be exercised by him in accordance with the Constitution either directly or through officers subordinate to him. It has been held in *Emperor v. Sibnath Banerjee*, that the expression ‘officers subordinate to him’ includes a minister also.

The expression ‘executive power’ is not defined in the Constitution. Article 73, however, provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws and includes the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty of agreement. Thus the executive power of the Union, which is exercisable by the President, is co-extensive with the legislative powers of the Union. The executive power of a modern State is not capable of any precise definition. In *Ram Jawaya Kapur v. State of Punjab*, even the Supreme Court also finds it difficult to explain the context of the executive power. The Court has observed, “It may not be possible to frame an exhaustive definition of what executive functions mean and imply. Ordinarily, the executive power connotes the residue of governmental functions that remain after the legislative and judicial functions are taken away.” It is neither necessary nor possible to give an exhaustive enumeration of the kinds and categories of executive functions, which may comprise both the formulations of the policy as well as its execution. Under Articles 73 and 163 the executive power is not confined merely to administration of laws already enacted but it includes determination of the Government policy, initiation of legislation, maintenance of law and order, promotion of social and economic welfare, the direction of foreign policy, in fact, the carrying on or supervision of the general administration of the State.

Powers Of The President

Executive powers

The Constitution has conferred extensive executive power on the President. The executive power of the Union of India is vested in him. He is the head of the Indian Republic. All executive functions are executed in the name of the President, authenticated

in such manner as may be prescribed by rules to be made by the President (Art. 77). He has power to appoint the

- Prime Minister and on his advice other Ministers of the Union,
- the Judges of the Supreme Court, and the High Courts,
- the Governors of the States,
- the Attorney General,
- the Comptroller
- Auditor-General,
- the Chairman and Members of the Public Service Commission,
- the Members of the Finance Commission and Official Commissions,
- Special Officer for Scheduled Castes and Scheduled Tribes,
- Commission to report on the administration of Scheduled Areas,
- Commission to investigate into the conditions of backward classes,
- Special Officer for linguistic minorities;

The above-mentioned officials hold their office during the pleasure of the President. This means that he has the power to remove them from their post. This power is, however, to be exercised subject to the procedure prescribed by the Constitution. It is, however, to be noted that he has to exercise his executive powers on the advice of the Council of Ministers.

Military Powers

The President is the Supreme Commander of the Defence Forces of the Country. He has powers to declare war and peace. However the exercise of these powers by the President is 'regulated by law.' The Parliament is empowered to regulate or control the exercise of the military powers by the President. The military power of the President is thus subordinate to his executive power, which is exercisable by him on the advice of the Cabinet.

Diplomatic Powers

As the head of the State, the President sends and receives Ambassadors, and other diplomatic representatives. All treaties and international agreements are negotiated and concluded in the name of the President though subject to ratification by Parliament.

Emergency Powers

Part XVIII (*i. e.*, Articles 352 to 360) of the Constitution arms the President with enormous emergency powers. The emergencies envisaged under the Constitution are of three kinds:

- (1) emergency arising out of war, external aggression or armed rebellion,
- (2) emergency due to failure of constitutional machinery in the State,
- (3) financial emergency.

If the President is satisfied that the security of India is threatened by foreign attack, armed rebellion or war [Art. 352 (1)] or if either on the receipt of report of the Governor of the

State or otherwise he is satisfied that a situation has arisen in which the Government of State cannot be carried on in accordance with the provisions of the Constitution [Art. 356 (2)] or a situation has arisen whereby the financial stability of India is threatened [Art. 360 (1)] he may proclaim an emergency. A proclamation of emergency may be revoked by a subsequent proclamation. Such a proclamation must be laid before each House of Parliament and ceases to operate at the expiration of one month unless approved by the two Houses. The President may, during the period of emergency suspend the right to move the courts for the enforcement of fundamental rights [Art. 359 (except Arts. 21 and 22)]. He may give directions to any State as to the manner in which the State should exercise its executive powers.

In the case of emergency arising out of failure of constitutional machinery in the State the President may assume any of the powers vested in the Governor. The Power of State Legislature shall be exercised by or under the authority of President. Such a proclamation ceases to operate at the expiry of two months unless approved by both Houses of State Legislature [Arts. 356, 357]. Under the proclamation of financial emergency the Union Government may give such financial direction to the State as it deems fit. The President may direct the reduction of salaries of any class of State officials, the Judges of the Supreme Court and the High Court. He may require all State money Bills to be reserved for consideration of the President.

Legislative Powers

The President of India is a component part of the Union Parliament. In theory he possesses extensive legislative powers. He has power to summon and prorogue the Parliament and he can dissolve the Lok Sabha. Article 85 (1), however, imposes a restriction on his power. The President is bound to summon Parliament within six months from the last sitting of the former session. If there is a conflict between the two Houses of Parliament over an ordinary Bill he can call a joint sitting of both Houses, to resolve the deadlock (Art. 108). At the commencement of each session the President addresses either House of Parliament or a joint session of the Parliament. In his address to joint session of Parliament he outlines the general policy and programme of the Government. His speech is like that of the King in England and is prepared by the Prime Minister. He may send a message to either House of Parliament (Art. 86).

Every Bill passed by both Houses of Parliament is to be sent to the President for his assent (Art. 111). He may give his assent to the Bill, or withhold his assent or in the case of a bill other than a money-bill, may return it to the House for reconsideration on the line suggested by him. If the bill is again passed by both the Houses of the Parliament with or without amendment, he must give his assent to it when it is sent to him for the second time. A bill for the recognition of a new State or alteration of State boundaries can only be introduced in either House of the Parliament after his recommendation [Art. 3]. The State Bills for imposing restrictions on freedom of trade and commerce require his recommendation (Art. 304). He nominates 12 members of the Rajya Sabha from among persons having special knowledge or practical experience of Literature, Science, Art and Social Services [Art. 80 (3)]. He is authorized by the Constitution to nominate two anglo-

Indians to the Lok Sabha, if he is of opinion that the anglo-Indians community is not adequately represented in that House (Art. 331). The President has to lay before the Parliament

- the Annual Finance Budget,
- the report of Auditor-General,
- the recommendations of the Finance Commission,
- Report of the Union Public Service Commission,
- report of the Special Commission for Scheduled Castes and Scheduled Tribes,
- the report of the Commission of the Backward Classes
- the report of the Special Officer for linguistic minorities.

Ordinance - making Power of the President - Art. 123

The most important legislative power of the President is his Ordinance-making power. If at any time, when both Houses of the Parliament are not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may issue such Ordinance as the circumstances appear to him to require. The Ordinances issued by him shall have the same force as an Act of Parliament. Such Ordinances, however, must be laid before both Houses of Parliament and shall cease to operate, at the expiry of six weeks from the date of re-assembly of Parliament, unless a resolution disapproving it is passed by both Houses before the expiration of six weeks. The President may, if he likes, withdraw such an Ordinance at any time. An Ordinance promulgated under Art. 123 is a law having the same force and effect as an Act of Parliament. It cannot be treated as an executive action or an administrative decision. The Ordinance-making power has been vested in the President to deal with unforeseen or urgent matters.

The Ordinance-making power is exercised by the President on his own 'satisfaction'. The court cannot inquire into the reasons for the subjective satisfaction of the President or into the sufficiency of those reasons. The existence of necessity for promulgating the Ordinance is not justiciable. The validity of an Ordinance cannot be tested on grounds similar to those on which an executive or judicial action is tested. The question whether a statute is constitutional or not is always a question of power of the Legislature concerned depending on the subject-matter of the statute, the manner in which it is accomplished and the mode of enacting it. The motive of the Legislature in passing a statute is beyond the scrutiny of courts. The propriety, expediency and necessity of a legislative act are for the determination of the legislative authority and are not for determination by the Courts. An Ordinance passed under Arts. 123 and 213 stands on the same footing. Thus the validity of an Ordinance cannot be challenged on the grounds of non-application of mind, more so when it has been promulgated on the basis of a policy decision taken by the government.

An Ordinance can be issued only when both the Houses of the Parliament are not in session. It follows from this that an Ordinance can be issued when only one House is in session because a law cannot be passed by one House alone. It is to be noted that the

satisfaction is not the personal satisfaction of the President. In reality, it is the satisfaction of the Cabinet on whose advice the President exercises his Ordinance-making power.

The Ordinance-making power of the President is co-extensive with the legislative power of the Parliament, that is to say, that it may be related to any subject in respect of which Parliament has power to legislate. Hence, an Ordinance will be void in so far it makes any provision which under the Constitution the Parliament is not competent to make. [Cl. (3)]. Thus an Ordinance cannot violate the fundamental rights.

The power to issue an Ordinance is power of the executive to legislate. The power is plenary within its field and there are no limitations upon that power except those to which legislative power of the State is subject to. Therefore, though an Ordinance can be invalidated for contravention of constitutional limitations it cannot be invalidated on grounds of non-application of mind or *mala fides*. An executive act can be struck down on the ground to non-application of mind, not the Act of a Legislature.

In no country, except India, the Executive is vested with legislative power. The Indian Constitution expressly confers power to make Ordinances on the President. The power to make Ordinances is justified on the ground that the President must be armed with powers to meet with serious situation when the Houses of Parliament are not in session. It is not difficult to imagine the cases when ordinary law-making powers may not be able to deal with a situation, which may suddenly and immediately arise. Art. 123 cannot be said to be undemocratic. In such circumstances, the executive must have power to take immediate action by issuing Ordinances. With all the constitutional safeguards there is possibility of abuse of the Ordinance-making power by the executive.

Pardoning Power

Under Article 72 President has power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence

- (1) by Court Martial;
- (2) an offence against any law relating to a matter to which the executive power of the Union extends;
- (3) in all cases in which the sentence is one of death.

THE OBJECT OF CONFERRING THE 'JUDICIAL' POWER ON THE PRESIDENT IS TO CORRECT POSSIBLE JUDICIAL ERRORS, FOR NO HUMAN SYSTEM OF JUDICIAL ADMINISTRATION CAN BE FREE FROM IMPERFECTIONS.

- A pardon completely absolves the offender from all sentences and punishments and disqualifications and places him in the same position as if he had never committed the offence.
- Commutation means exchange of one thing for another. Here it means substitution of one form of punishment for another of a lighter character, *e. g.*, for rigorous imprisonment - simple imprisonment.
- Remission means reduction of the amount of sentence without changing its character *e. g.*, a sentence of one year may be remitted to six months.

- Respite means awarding a lesser punishment on some special grounds, *e. g.*, the pregnancy of a woman offender.
- Reprieve means temporary suspension of death sentence, *e. g.*, pending a proceeding for pardon or commutation.

Pardoning Power - subject to judicial review

In a significant judgment in *Epuran Sudhar v. Government of Andhra Pradesh*, the Supreme Court has held that the pardoning powers of the President under Article 72 and the Governors under Article 161 is subject to judicial review. Pardoning power cannot be exercised on the basis of caste or political reasons. In the instant case a Congress worker was convicted for murder of a worker of the Telgu Desham. He was awarded death sentence by the Court. He was granted pardon by the then Governor Mr. Shinde, who is at present Minister of Power under the U.P.A. Government. The murdered person's son had challenged the constitutional validity of the Governor's pardoning power in the High Court of Andhra Pradesh. The High Court had quashed the order of pardoning of the Governor on the ground that it was exercised on the political ground. The Government of Andhra Pradesh filed an appeal against the judgment of the High Court in the Supreme Court. The Supreme Court, upholding the judgment of the High Court, held that if the pardoning power has been exercised on the ground of political reasons, caste and religious considerations, it would amount to violation of the Constitution and the Court will examine its validity.

Conclusion

THE STATE EXECUTIVE

Explain the powers of the Governor with special reference to Ordinance making power. [10]

Dec 07, Dec 01

Introduction: The pattern of the Government in the State is the same as that for the Union, that is, a parliamentary system. The Executive Head is Constitutional Head, who is to act according to the advice of the Council of Ministers. The Constitution of India, by Art. 153, creates the office of the Governor. Thus each State shall have a Governor. However, one person can be appointed Governor for two or more States [Art. 153 Proviso]. The executive power of the State is vested in the Governor. He shall exercise the executive power either directly or through officer subordinate to him [Art. 154]. The expression 'officer subordinate to him' includes a Minister of the State.

Appointment of a Governor

The Governor of a State is appointed by the President of India [Art. 155]. He is neither elected by the direct vote of the people nor by an indirect vote by a specially constituted Electoral College as in the case with the President. He is a nominee of the Central Government.

In *Hargovind v. Raghukul*, it has been held that the office of Governor of a State is not an employment under the Government of India and it does not come within the prohibition of Clause (d) of Art. 319, and therefore, a member of the State Public Service Commission can be appointed as the Governor. The office of Governor is an independent office and is not under the control or subordinate to the Government of India.

Qualifications

According to Article 157 a person to be eligible to be appointed as Governor must be

- (a) citizen of India,
- (b) must have completed the age of 35 years.

The Governor must not be a member of either House of Parliament or of a House of the Legislature of any State. If a member of either House of Parliament or of a House of the Legislature of any such State is appointed as Governor, he shall be deemed to have vacated his seat in the House on the date on which he enters upon his office as Governor. He shall not hold any other office of profit (Art. 158).

The Governor is entitled to such emoluments, allowances and privileges as may be determined by the Parliament by law. The salary of the Governor at present is fixed at Rs. 6,000 per month. He is also entitled to free use to his official residence. The salary and allowances of the Governor cannot be reduced during his term of office [Art. 158 (4)].

The Governor, before entering upon his office, is required to take an oath or affirmation in the presence of the Chief Justice of the High Court or if he is not present, in the presence of the senior most Judge of the High Court.

Tenure and Removal

Article 156 of the Constitution says that the Governor shall hold office during the pleasure of the President. Subject to this rule, the tenure of the office of the Governor is fixed for five years from the date on which he enters upon his office. He may be removed from his office at any time by the President. The President acts on the advice of the Cabinet. The Governor may, however, resign his office by writing to the President. The five-year term provided for the Governors under clause (3) is subject to exercise of pleasure by the President under clause (1) of Art. 156. The Presidential pleasure is unjustifiable. It is not regarded or controlled by the procedure laid down in Art. 311. The Governor has no security of tenure and no fixed term of office.

Powers of The Governor

“Shortly speaking, the powers of the Governor of a State are analogous to those of the President excepting that the Governor has no diplomatic military or emergency power. The powers of the Governor can be classified under four heads: Executive, Financial, Legislature and Judicial.”

Executive Power

The executive power of the State is vested in the Governor and is to be exercised by him directly or through officers subordinate to him [Art. 154]. Article 162, says that the executive power of the State extends to matters with respect to which the legislature of the State has power to make laws. All executive actions of the Government of a State shall be expressed to be taken in the name of the Governor. Orders and instruments, made and executed in the name of the Governor, shall be authenticated in the manner specified in the rules made by the Governor. The validity of an order of instrument, which is so authenticated, shall not be called in question on the ground that it was not made or executed by the Governor. [Art. 166 (1) and (2)]. The provisions of Art. 166 (1) and (2) are, however, directory and not mandatory. This means that even if an order is not expressed in the way mentioned in these provisions it is not invalid. In such a case, it should be proved that it was made by the proper authority, under clause (3) of Art. 166. If not proved then the order can be challenged in the Court on the grounds mentioned in clause (2) of the Article. Authentication only signifies that the order is made by the Governor but if in making the order the Governor has not acted according to law the order can be challenged [Art. 166 (1)]. Under Art. 166 (3) the Governor is authorized to make rules for the more convenient transaction of the business of the Government of the State and for its allocation among Ministers.

Bureaucrat Politician Relation

Regarding the bureaucrat political relationship the Court observed that in the system of Indian Democratic Government as contemplated by the Constitution Senior Officers occupying key positions such as Secretaries are not supposed to mortgage their own discretion, volition and decision making authority to politicians for carrying out commands having no sanction in law. The Conduct Rules of Central Government Services command the civil servants to maintain at all times absolute integrity and devotion to duty and do nothing which is unbecoming of a Government servant. No Government servant shall while performing his official duties or in the exercise of power conferred in him act otherwise than his best judgment except when he is acting under the direction of his official superior.

The Supreme Court in *Ram Jawaya Kapur v. State of Punjab*, has held that our Constitution has adopted the British system of Parliamentary form of Government and the basic principle of this type of Government is that the President and Governors are constitutional heads and the real executive powers are vested in the Council of Ministers. In *Shamsher Singh v. State of Punjab*, the Supreme Court has held that the President and the Governors are only constitutional heads and they exercise their powers and functions with the aid and advice of the Council of Ministers and not personally save in cases where the Governor is required by the Constitution to exercise his functions in his discretion. The appointment as well as removal of the members of the Subordinate Judicial Service is an executive function of the Governor to be exercised on the advice of the Council of Ministers. Wherever the Constitution requires the 'satisfaction' of the President or the Governor, the satisfaction is not the personal satisfaction of the President or Governor but it is the satisfaction of the Council of Ministers.

Financial Powers

A money Bill cannot be introduced in the Legislative Assembly of the State without the recommendation of the Governor. No demand of grant can be made except on the recommendation of the Governor [Art. 203 (3)]. The Governor is required to cause to be laid before the House or Houses of the Legislature 'annual financial statements', known as Budget [Art. 202].

Legislative Powers

The Governor summons the Houses or each House of the Legislature of State to meet at such time and place as he thinks fit. However, six months must not lapse between the last sitting in one session and the first in the next session. He may prorogue the Houses or either House and dissolve the Legislative Assembly [Art. 174 (1) and (2)]. He has right to address the State Legislature. No Bill can become law without the assent of the President. He has right to reserve certain bills for the assent of the President [Art. 200]. He nominates 1/6 of the members of the Legislative Council [Art. 171].

The most important Legislative power of the Governor is his Ordinance making power. His Ordinance-making power is similar to that of the President. Under Article 213, whenever the Legislature is not in session and if the Governor is satisfied that circumstances exist which require him to take immediate action he may legislate by

Ordinances. However, the Governor cannot issue an Ordinance without previous instructions from the President in cases in which

- (a) Bill would have required his previous sanction,
- (b) Bill would be required to be reserved under the Constitution for the assent of the President.

Every Ordinance is to be laid before both Houses of the State Legislature and shall cease to operate at the expiry of six weeks from the re-assembly of the Legislature or earlier than six weeks if a resolution disapproving it is passed by the Legislative Assembly. The Governor may withdraw the Ordinance at any time before the expiry of six weeks. The Ordinance issued by the Governor shall have the same validity as an Act of the Legislature.

The Pardoning Power

Article 161 says that the Governor shall have the powers to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to matters to which the executive power of the State extends. The executive power of the State extends to matters with respect to which the legislature of the State has power to make laws [Art. 162].

A similar power is conferred by Art. 72 on the President of India. But there is a difference between the pardoning powers of the President under Art. 72 and the pardoning power of the Governor of a State under Art. 161. Under Art. 72 the President's power is wider than that of the Governors of States.

- Firstly, the President has exclusive power to grant pardon in cases where the sentence is a death sentence while the Governor cannot grant pardon in case of a death sentence.
- Secondly, the President can pardon punishments of sentences inflicted by Court Martial. The governors have no such power.

In respect of suspension, remission and commutation of sentence of death both have concurrent power.

A pardon is an act of grace and therefore it cannot be demanded as a matter of right. The effect of pardon is that it not only removes the punishment but in the eye of law places the offender in the same position as if he had never committed the offence. The executive can exercise the pardoning power at any time after commission of an offence, either before legal proceedings are taken or during their tendency or either before or after conviction.

Ordinance-making power of the Governor

The Ordinance-making power of the Governor under Art. 213 is similar to that of the President under Art. 123. The Governor can issue Ordinance only when two conditions are fulfilled:

1. The Governor can only issue Ordinances when the Legislative Assembly of a State is not in session or where there are two Houses in a State both Houses are not in session.
2. The Governor must be satisfied that circumstances exist which render it necessary for him to take immediate action. The Court cannot question the validity of the Ordinance on the ground that there was no necessity or sufficient ground for issuing the Ordinance by the Governor. The existence of such necessity is not a justiciable issue. The exercise of Ordinance-making power is not discretionary. The Governor exercises this power on the advice of the Cabinet.

An Ordinance shall have the same force and effect as an Act of the Legislature. It can override the judgment of the High Court under Article 266.

The Ordinance shall be laid before the Legislative Assembly of the State or where there is a Legislative Council in the State, before both Houses and, shall cease to operate at the expiration of six weeks from the re-assembly of the Legislature, unless it is approved earlier by the Legislature. The Ordinance may be withdrawn at any time by the Governor. The Ordinance-making power of the Governor is extensive with the Legislative powers of the State Legislature. He can only issue Ordinance on the subjects on which the State Legislature is empowered to make laws *e.g.*, State List and Concurrent List. Both Central and State Legislatures can make laws on subjects mentioned in the Concurrent List. According to Art. 213 (3), therefore, an Ordinance will be invalid to the extent, it makes any provision, which would be invalid if enacted by the State Legislature. But such an Ordinance will not be invalid if it has been issued by the Governor in pursuance of instructions from the President.

The Governor cannot issue an ordinance without the instructions from the President in the following cases:

- (a) a Bill containing the same provision would have required the provisional sanction of the President for its introduction into the Legislature,
- (b) he would have deemed it necessary to reserve a Bill for the consideration of the President,
- (c) an Act of the Legislature of the State containing the same provisions would have been invalid unless having been reserved for the consideration of the President and had received the assent of the President.

The Ordinance-making power vested in the executive is meant to be exercised in exceptional circumstances, *i.e.*, where immediate action is necessary. It is not difficult to imagine the cases when ordinary law-making powers may not be able to deal with a situation, which may suddenly arise. The fears expressed by members of the Constituent Assembly that the Ordinance-making powers might be abused by the executive is not unfounded.

The case of *D.C. Wadhava v. State of Bihar*, furnishes a glaring example of the abuse of the Ordinance-making power by the Executive. The petitioner a professor who carried a detailed research in the matter challenged the practice of the State of Bihar in promulgating and re-promulgating ordinances on a large scale without enacting them into Acts of the legislature and keeping them alive for an indefinite period of time. He pointed

out that the Governor of Bihar had promulgated 256 ordinances between 1967 and 1981 and all these were kept alive for periods ranging between 1 to 14 years by repromulgating them from time to time. Out of these 256, 69 were repromulgated several times and kept alive with the prior permission of the President of India. The five-judges bench of the Court held that such a practice was a 'subversion of the democratic process' and 'colourable exercise of power and amounted to fraud upon the Constitution and, therefore, unconstitutional.' The Court called it 'usurpation by the executive of the law-making function of the legislature.' The power to promulgate an ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be 'perverted to serve political ends.'

The judgment of the Court would go a long way in preventing the Government's 'manipulative practice' of circumventing the provisions of the Constitution regarding maximum time limit for the continuance of ordinances.

Conclusion

THE STATE JUDICIARY

Habeas Corpus [10]

Dec 06, 05,

Introduction: Article 226 provides that notwithstanding anything in Article 32 every High Court shall have power, throughout the territorial limits in relation to which it exercises jurisdiction to issue to any person or authority including the appropriate cases, any Government, within those territories, directions, orders of writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari* or any of them

(a) for the enforcement of fundamental rights conferred by Part III,

(b) for 'any other purpose.'

Thus the jurisdiction of a High Court is not limited to the protection of the fundamental rights but also other legal rights as is clear from the words 'any other purpose.' Those words make the jurisdiction of the High Court more extensive than that of the Supreme Court, which is confined to only for the enforcement of fundamental rights. The words 'for any other purpose', refer to enforcement of a legal right or legal duty. They do not mean that a High Court can issue writs for any purpose it pleases.

Habeas Corpus

'*Habeas Corpus*' is a Latin term, which literally means 'you may have the body.' The writ is issued in form of an order calling upon a person by whom another person is detained to bring that person before the Court and to let the Court know by what authority he has detained that person. If the cause shown discloses that detained person has been detained illegally the Court will order that he be released. Thus the main object of the writ is to give quick and immediate remedy to a person who is unlawfully detained by the person whether in prison or private custody.

In *Kanu Sanyal v. District Magistrate, Darjeeling*, the Supreme Court, however, held that while dealing with the application of writ of *habeas corpus*, production of the body of the person alleged to be unlawfully detained was not essential. In that case the top-ranking Naxalite leader Kanu Sanyal was arrested in 1971 and was detained without trial in the Visakhapatnam Jail. He moved to the Supreme Court for a writ under Art. 32 of the Constitution challenging the legality of his detention and praying for the Court's order for his production before the Court. The Court issued the rule *nisi* but not the production or the detenu. Counsel appearing for the detenu, contended the production of the body of person alleged to be illegally detained was an essential feature of writ of *habeas corpus* under Art. 32 of the Constitution and that the Court can dispose of the petition only after the petition was produced in person before it. Bhagwati, J., held that in writ of *habeas corpus* under Art. 32, the production of the body of the person detained before the Court was not necessary for hearing and disposing of the writ-petition by the Court. The

production of body of a person illegally detained is not an essential feature of the writ of *habeas corpus*.

Who can apply for the Writ

The general rule is that an application can be made by a person who is illegally detained. But in certain cases, an application of *habeas corpus* can be made by any person on behalf of the prisoner, *i.e.* a friend or a relation.

In an application for a writ of *habeas corpus* the Supreme Court will not follow strict rules of pleading nor place undue emphasis as to question as to on whom the burden of proof lies. Even a postcard written by a detainee from jail would be sufficient to activate the Court into examining the legality of detention. The Supreme Court has consistently shown great anxiety for personal liberty and refused to throw out a petition merely on the ground that it does not disclose a *prima facie* case. This practice marks a departure from that obtaining in England where observance of the strict rules of pleading is insisted upon in a writ of *habeas corpus*. But in view of the peculiar socio-economic conditions prevailing in this country the court has adopted a liberal approach. Where large masses of people are poor, illiterate and ignorant and the access to the courts is not easy on account of lack of financial resources it would be most unreasonable to insist that the petitioner should set out clearly and specifically the grounds on which he challenges the order of detention. The burden of proof to justify detention has always been placed on the detaining authority.

Technicalities and legal necessities are no impediments to the Court entertaining even an informal communication as a proceeding for *habeas corpus* if the basic facts are found. The writ of *habeas corpus* cannot only be used for releasing a person illegally detained but it will be also used for protecting him from treatment inside jails. “The dynamic role of judicial remedies after *Batra's* case imparts to the *habeas corpus* writ a versatile vitality and operational utility that makes the healing presence of the law live up to its reputation as bastion of liberty even within jails”, declared Krishna Iyer.

When it will Lie

The writ of *habeas corpus* will lie if the power of detention vested in an authority was exercised *mala fide* and is made in collateral or ulterior purposes. But if the detention is justified the High Court will not grant the writ of *habeas corpus*. If the following conditions are satisfied the detention is illegal:

- If the detention is made in accordance with the procedure established by law. The law must be a valid law and the procedure must be strictly followed [Art. 21].
- The detention is lawful if the condition laid down in Art. 22 are complied with.

The detention becomes unlawful if a person who is arrested is not produced before the Magistrate within 24 hours of his arrest and he will be entitled to be released on the writ of *habeas corpus*.

The legislature, which deprives a person of his personal liberty by law, must be competent to make that law. If the law is unlawful the detention will be unlawful.

An appeal lies against an order of the High Court granting or rejecting the application for issue of the *habeas corpus* under Arts. 132, 133, 134 or 136.

Conclusion

Discuss the powers of the High Court to issue the writ of *Mandamus*? When can the Court refuse to issue a writ? [16]

Dec 05, 03

Introduction: Article 226 provides that notwithstanding anything in Article 32 every High Court shall have power, throughout the territorial limits in relation to which it exercises jurisdiction to issue to any person or authority including the appropriate cases, any Government, within those territories, directions, orders of writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari* or any of them

(a) for the enforcement of fundamental rights conferred by Part III,

(b) for ‘any other purpose.’

Thus the jurisdiction of a High Court is not limited to the protection of the fundamental rights but also other legal rights as is clear from the words ‘any other purpose.’ Those words make the jurisdiction of the High Court more extensive than that of the Supreme Court, which is confined to only for the enforcement of fundamental rights. The words ‘for any other purpose’, refer to enforcement of a legal right or legal duty. They do not mean that a High Court can issue writs for any purpose it pleases.

Mandamus

The word ‘*mandamus*’ means ‘the order’. The writ of *mandamus* is thus an order by a superior court commanding a person or a public authority (including the Government and public corporation) to do or forbear to do something in the nature of public duty or in certain cases of a statutory duty. For instance, a licensing officer is under a duty to issue a licence to an applicant who fulfils all the conditions laid down for the issue of such licence. But despite the fulfillment of such conditions if the officer or the authority concerned refuses or fails to issue the licence the aggrieved person has a right to seek the remedy through a writ of *mandamus*.

When it will Lie

The writ or order in the nature of *mandamus* would be issued when there is a failure to perform a mandatory duty. But even in cases of alleged breaches of mandatory duty the

party must show that he has made a distinct demand to enforce that duty and the demand was met with refusal.

1. A writ of mandamus can only be granted when there is in the applicant a right to compel the performance of some duty cast upon the authority. The duty sought to be enforced must be a public duty, that is, duty cast by law. A private right cannot be enforced by the writ of mandamus.
2. Writ of *mandamus* can be issued to public authority to restrain it from acting under a law, which has been declared unconstitutional.

Thus, a writ of *mandamus* can be granted only in cases where there is a statutory duty imposed upon the officer concerned, and there is a failure on the part of that officer to discharge the statutory obligation. The chief function of a writ is to compel performance of public duties prescribed by statute and to keep subordinate tribunal and officers exercising public functions within the limits of their jurisdiction. It follows, therefore, that an order of *mandamus* may be issued to compel the authorities to do something, which imposes a legal duty, and aggrieved party has a legal right under the statute to enforce its performance.

The High Courts have the power to issue a writ of *mandamus* where the government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion *mala fide* or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion of the policy for implementing such discretion.

When it will Not Lie

A writ of *mandamus* will not be granted in the following circumstances:

1. When the duty is merely discretionary in nature the writ of *mandamus* will not lie. In *State of M. P. v. Mandawara*, the M. P. Government made a rule making it discretionary to grant dearness allowance to its employees at a particular rate. The Supreme Court held that the writ of *mandamus* could not be issued to compel the Government to exercise its power.
2. A writ of *mandamus* does not lie against a private individual or any private organization because they are not entrusted with a public duty.
3. A writ of *mandamus* cannot be granted to enforce an obligation arising out of contract.

Conclusion

Writ of Quo-Warranto [10]

Dec 04

Introduction: Article 226 provides that notwithstanding anything in Article 32 every High Court shall have power, throughout the territorial limits in relation to which it exercises jurisdiction to issue to any person or authority including the appropriate cases, any Government, within those territories, directions, orders of writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari* or any of them

- (a) for the enforcement of fundamental rights conferred by Part III,
- (b) for 'any other purpose.'

Thus the jurisdiction of a High Court is not limited to the protection of the fundamental rights but also other legal rights as is clear from the words 'any other purpose.' Those words make the jurisdiction of the High Court more extensive than that of the Supreme Court, which is confined to only for the enforcement of fundamental rights. The words 'for any other purpose', refer to enforcement of a legal right or legal duty. They do not mean that a High Court can issue writs for any purpose it pleases.

Quo warranto

The words '*quo warranto*' means 'what is your authority'. By this writ a holder of an office is called upon to show to the court under what authority he holds the office. The object of the writ of *quo warranto* is to prevent a person to hold an office, which he is not legally entitled to hold. If the inquiry leads to the finding that the holder of the office has no valid title to it, the Court may pass an order preventing the holder to continue in office and may also declare the office vacant. If the holder of a public office was initially disqualified to hold that office, the writ of *quo warranto* would not be issued if at a subsequent stage that disqualification was removed and after the removal of the disqualification the incumbent concerned could have been appointed on the same post. The doctrine is that in cases where the initial disqualification is removed it would be open to the authorities concerned to appoint the same person immediately even if the court grants the writ of *quo warranto* as desired by the petitioner. The general principle is that the court would not pass any decree which becomes futile.

Who can Apply

A writ of *quo warranto* can be claimed by a person if he satisfies the Court that:

1. the office in question is a public office; and
2. it is held by a person without legal authority.

The writ of *quo warranto* is not issued in respect of an office of a private character. Thus in *Jamalpur Arya Samaj Sabha v. Dr. D. Ram*, the High Court refused to issue a writ of *quo warranto* against the members of the working committee of the Bihar Arya Samaj Sabha, a private association.

An application for the writ of *quo warranto* challenging the legality of an appointment to an office of a public nature may lie at the instance of any private person, although he is not personally aggrieved or interested in the matter. It is not necessary that the petitioner for *quo warranto* must have legal right in the office. Any member of public can challenge

the right of a person to hold a public office. In *G. D. Karkare v. Shevde*, the appointment of Advocate-General of M. P. was challenged by private individual who had no legal interest in that office. The Court issued a writ of *quo warranto* against the Advocate - General.

A writ of *quo warranto* is never issued as a matter of course and it is always within the discretion of the court to decide after having considered the facts and circumstances of each case, whether the petitioner concerned is the person who could be entrusted with such a writ, which is always issued only in the interest of the public in general. The Court may refuse to grant a writ of *quo warranto* if it is vexatious or where the petitioner is guilty of laches, or where he has acquiesced or concurred in the very act against which he complains or where the motive of the petitioner is suspicious. Thus where the holder of an office has been continuing in office for a long time and there is no complaint against him the court refused the writ as it would have been vexatious.

Conclusion

PRIVILEGE OF THE LEGISLATURE

Examine the privileges and immunities of the legislators provided under the constitution of India. [10]

Dec 07, Dec 05, 03

Introduction: Originally, Article 105 (3) provided that the privileges of the Houses or Parliament and its members were to be those, which were enjoyed by the members of the House of the Commons in England on January 26, 1950 until defined by Parliament by law. The 44th Amendment Act, 1978, has amended this Article and has omitted completely any reference to the House of Commons in future. For this purpose, the amendment substitutes the words “shall be those of that House and its members and Committees immediately before the coming into force of the Constitution (44th Amendment) Act, 1978” for the words “shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and Committees, at the commencement of this Constitution” in Cl. (3) of Art. 105. The 44th Amendment thus retains all the existing privileges, which were enjoyed by the members of Legislatures in India. As regards new privileges it provides that they can be defined by a parliamentary law. A similar change has been made in Cl (3) of Art. 194 which relates to privileges of the State Legislatures. This means that the privileges of each House of Parliament as State Legislatures will now be the same as existed immediately before the coming into force of the 44th Amendment. Thus, the new and old privileges provided to the Legislators may be summarized as

Freedom of Speech

In England this privilege of the House of Commons is well established. It has been given statutory recognition by Bill of Rights in 1689, which says that the freedom of speech or debates in Parliament ought not be impeached or questioned in any court or out of Parliament.

The Indian Constitution expressly guarantees this privilege in Art. 105, which says, “there shall be freedom of speech in Parliament and that no member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any Committee thereof.”

This Article thus gives absolute immunity from courts for anything said within the four walls of the House during the course of proceedings of the House or its Committees. So what is protected is the speech within the House. Outside the House a member of House is as good as any other citizen and if a member repeats or publishes a defamatory speech made by him within the House, he does so on his own responsibility and risk and will be held liable for prosecution under Section 500 of the Indian Penal Code.

It is to be noted that Clause (1) of Art. 105 is expressly made ‘Subject to the provisions of this Constitution and to the rules and Standing Orders regulating the procedure of

Parliament.’ One of such a constitutional restriction on freedom of speech is imposed by Art. 121. Article 121 prohibits any discussion in Parliament with respect to the conduct of a Judge of the Supreme Court or a High Court in discharge of his duties, except when a motion to present an address to the President for his removal is under consideration of the House. The freedom of speech is also subject to the rules of procedure of a House made under Art. 203. Under Rules 349 to 356 of the Lok Sabha use of unparliamentary language or unparliamentary conduct of a member is prohibited.

Right of Publication of its Proceedings

Article 105 (2) expressly provides that no member of Parliament shall be liable to any proceeding in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be liable in respect of the publication by or under the authority of either. House of Parliament in any report, paper, votes or proceedings. The protection under this Article does not extend to publication made by a private persons without the authority of a House. In *Surendra v, Nabakrishna*, an editor of a newspaper was held guilty of committing Contempt of Court for publishing a statement of the House. It was held that there were many advantages to the public, which has the deepest interest in knowing what passes in Parliament, if a true report of parliamentary proceedings are published in a newspaper. Accordingly, the Parliamentary proceedings (Protection of a Publication) Act, 1956 was passed which provided that no person shall be liable to any proceeding civil or criminal in any court in respect of the publication of substantially true report of the proceedings of either House of Parliament unless it is proved that publication of such proceeding expressly ordered to be expunged by the Speaker.

Freedom from Arrest

This privilege is well established in England. A Member of Parliament cannot be arrested or imprisoned on a civil proceeding within a period of 40 days before and 40 days after the session of Parliament. If a member is arrested within this period he should be released so that he might be free to attend Parliament. This privilege is available against civil arrest and does not extend to arrestor imprisonment on a criminal charge, or for contempt of court or to preventive detention. If a member of a House commits a crime he will be arrested like an ordinary person. In India also, it has been held that the privilege does not extend to arrest or imprisonment on a criminal charge or for detention under Preventive Detention Act.

In *K. Anandan Nambiar v. Chief Secretary Government of Madras*, the petitioners, who were members of Parliament, were detained under Defence of India Rules, 1962. They challenged the order of detention on the ground that a legislature could not be detained so as to prevent him from exercising the constitutional rights as legislator while the Legislative Chamber to which he belonged was in session. The Court held that if a person was detained under a valid detention order, he could claim no special status higher than that of an ordinary citizen and that he was as much liable to be arrested and determined under it as any other citizen. If an order of detention validly prevents a member from

attending a session of Parliament, no occasion would arise for the exercise by him of the right of freedom of speech.

Right to exclude strangers from its proceedings and hold secret sessions

This right has been used by the House of Parliament in England to go into secret session to discuss some important matters. The House of Parliament in India enjoys a similar power. However, in modern times secret sessions are held only on exceptional occasions because the voters must be kept informed of what their representative are doing in the Legislature.

Right to prohibit to publication of its Reports and Proceedings

In England, the House of Commons has the right to prohibit the publication of its report, debates or other proceedings. In the famous *Searchlight* case, the question was whether the publication by a newspaper of those parts of the speech of a member in the House, which were ordered to be expunged by the Speaker, constituted breach of privilege of the House. The Supreme Court held that the publication of expunged portion of speech constituted a breach of the privilege of the House. The effect in law of the order of the Speaker to expunge a portion of the speech of a member may be as if that portion has not been spoken. In India, the House of Parliament have definitely the power to prohibit the publication of proceedings.

Right to regulate Internal Proceedings

The House has an exclusive right to regulate its own internal proceedings and to adjudicate upon such matters. The courts will not interfere with takes place inside the House. In *Bradlaugh v. Gosset*, plaintiff, Mr. Bradlaugh was prevented from entering the House by the order of the House of Commons. The plaintiff asked the Court to declare that the order of the House was invalid. The Court held that the House of Commons was not subject to the control of court in matters relating to its own internal proceedings; the House of Commons has exclusive right of being the exclusive judge of the legality of its own proceedings. No court of law can interfere in the right of the House to regulate its internal affairs.

In India, Article 122 says that the validity of the proceedings in Parliament cannot be called in question in a court of law on the ground of any alleged irregularity of procedure.

Right to punish Members or Outsider for contempt

The House of Commons has power to punish a person whether member or stranger for its 'contempt' or for 'breach of privilege'. This power is truly described as the, 'Keystone of Parliamentary Privilege', for this power is used by the House to enforce its privileges. The House is the sole judge of the question whether any of its privileges has been infringed and the court cannot question the decision of the House on the point. The expression 'Contempt of Courts' is of very wide meaning and includes and act or

omission which obstructs or impedes performance of its functions or obstructs or interferes with any member or officer of the House in the discharge of his duties or which has a tendency directly or indirectly to produce such results. The House can issue a general unspeaking warrant to arrest a person held guilty of committing contempt of the House and no court can go into its validity. However, if the reasons are mentioned in the committal warrant and are proved unlawful, the Court can give redress to the person concerned.

Each House has power to punish its member for 'contempt or breach' of privilege. A member may be suspended or expelled from the House, or may be sentenced to jail. The effect of expulsion of a member from the House is that his seat becomes vacant. Expulsion, however, does not disqualify him from contesting elections for the same House.

Conclusion

THE EMERGENCY PROVISIONS

Under what circumstances may an 'Emergency' be declared? What are the effects of such a declaration on fundamental rights? [16]

Dec 06, Dec 04, Dec 02, 2K, Dec 04

Introduction: One of the chief-characteristics of the Indian Constitution is the way in which the normal federal Constitution can be adapted to emergency situation. It is the merit of the Constitution that it visualizes the circumstances when the strict application of the federal principles might destroy the basic assumptions on which our Constitution is built.

The Constitution of India provides for three types of emergency:

1. National Emergency - Due to war, external aggression or armed rebellion; Art. 352
2. State Emergency - Due to the failure of constitutional machinery in States; Art. 356
3. Financial Emergency - Art. 360

National Emergency

Art. 352 provides that if the President is satisfied that a grave emergency exists whereby the security of India or any part of India is threatened, either by war or external aggression or armed rebellion, he may make a Proclamation of Emergency in respect of the whole of India or any part of India as may be specified in the Proclamation. The Proclamation of Emergency made under clause (1) may be varied or revoked by the President by a subsequent Proclamation [Cl. (2)].

A Proclamation of Emergency can be made even before the actual occurrence of event contemplated in Art. 352 have taken place if the President is satisfied that there is imminent danger of war or external aggression or armed rebellion. Thus actual occurrence of the events mentioned in Art. 352 is not essential. An imminent danger of war or external aggression or armed rebellion is enough for the proclamation of emergency.

The President shall not issue a Proclamation under clause (1) or a Proclamation varying such Proclamation unless the decision of the Union Cabinet (i. e., the Council consisting of the Prime Minister and other Ministers of Cabinet rank appointed under Art. 75) that such a Proclamation may be issued has been communicated to him in writing. This means that the emergency can be declared only on the concurrence of the Cabinet, and not merely on the advice of the Prime Minister as was done by the Prime Minister Smt. Indira Gandhi in June, 1975. She had advised the President to proclaim emergency without consulting her Cabinet.

Suspension of Right of Enforcement of Fundamental Rights (Art. 359)

Article 359 empowers the President to suspend the right to enforce fundamental rights guaranteed by Part III of the Constitution. It says that while the Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the fundamental rights as may be mentioned in the order (except Articles 20 and 21) and all proceedings pending in any court for the enforcement of such rights shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order. An order suspending the enforcement of fundamental rights may extend to the whole or any part of the territory of India. An order made under clause (1) shall, as soon as possible, be laid before each House of Parliament.

The Constitution (38th Amendment) Act, 1975 added a new clause (1-A) in Art. 359 which provides that while an order under clause (1) is in operation, nothing in Part III shall restrict the power of the State to make any law or to take any executive action. Any such law shall cease to have effect to the extent of incompetency, as soon as the order ceased to operate except as respects things done or omitted to be done before the law ceased to have effect.

The 44th amendment has made two significant changes in Art. 359

- First, it provides that under Article 359 the President does not have the power to suspend the enforcement of the fundamental rights guaranteed in Arts. 20 and 21 of the Constitution.
- Secondly, it provides that suspension of any fundamental right under Article 359 will not apply in relation to any law which does not contain a declaration that such a law is in relation to the Proclamation of Emergency in operation when it is made or to any executive action taken otherwise than under a law containing such a recital.

Thus laws not related to the emergency can be challenged in a court of law even during the emergency. This amendment was a sequel to the decision of the Supreme Court in the *Habeas Corpus* case. The amendment is intended to remove the recurrence of such a situation in future.

In *A. D. M. Jabalpur v. Shukla*, popularly known as the *Habeas Corpus* case the respondents challenged the validity of the Proclamation of Emergency by the President under Article 352 made on 25th June, 1975, and the order of detention made against them thereunder. The respondents were detained under Section 3 of the MISA. They filed applications in different High Courts for the issue of the writ of *habeas corpus*. A preliminary objection was raised on behalf of the State that the President's Order was a bar to invoke writ jurisdiction of the High Courts. The High Courts held that notwithstanding the continuance of emergency and the Presidential Order suspending the enforcement of rights conferred by Articles 19, 21, and 22 the High Court could examine whether an order of detention was in accordance with the provisions of the MISA or whether the order was *mala fide* or was made on the basis of relevant materials by which the detaining authority could have satisfied that the order was necessary. The State appealed to the Supreme Court.

The main questions for the consideration of the Supreme Court were two:

- First, whether in view of the Presidential Order, dated 27th June, 1975 and 8th January, 1976 made under clause (1) of Article 359 any writ-petition under Article 226 would lie in a High Court for *habeas corpus* to enforce the right to personal liberty of a person detained under the Act on the ground that the order of detention was not in compliance with the Act.
- Secondly, if such a petition was maintainable what the scope of judicial security particularly in view of the Presidential order mentioning Art. 22 and Section 16-A of the MISA. Section 16-A of MISA prohibited the detaining authority to communicate grounds of detention to the detenu.

The Supreme Court by a 4:1 majority held that in view of the Presidential Order dated 27th June, 1975 no person had any *locus standi* to move any writ-petition under Article 226 before a High Court for *habeas corpus* or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order was not under or in compliance with the Act or was illegal, or was vitiated by *mala fides* factual or legal or has based on extraneous considerations.

The respondents had argued that the present appeal should be decided in the light of the Court's rulings in the *Makhan Singh's* case. In *Makhan Singh's* case the court had held that if a detenu challenged his detention on the ground that it violated statutory provisions or the detention was vitiated with malice the challenge could not be barred because of the Presidential Order under Article 359(1). The Court, however, held that the decision in *Makhan Singh's* case did not apply in the present case. The 1962 Presidential Order was a conditional order as it related to only those persons who had been detained under Defence of India Act. The Presidential Order of June 27, 1975 was a 'blanket' order and was not confined to persons detained under a particular law. Mr. Justice Khanna, in his dissenting judgment, however, held that the difference in phraseology in the Presidential Order dated June 27, 1975 and that of the 1962 Presidential Order could not justify the conclusion that because of the new Presidential Order a detention order need not comply with the requirement of the law providing for preventive detention.

It was also argued that the object of Article 359(1) was to bar moving the Supreme Court under Art. 32 for the enforcement of fundamental rights without affecting in any manner the enforcement of common law and statutory right to personal liberty under Article 226 before the High Court. In brief, the contention was that Art 21 was not the sole repository of the right to personal liberty. The Court, however, rejected this argument and held that Art. 21 was the sole repository of the right to life and personal liberty. The moment the right to move any Court for enforcement of Article 21, was suspended, no one could move any court for any redress.

In view of the 44th Amendment the law laid down in *Habeas Corpus* case is no longer considered a good law. Henceforth, Arts. 21 and 22 cannot be suspended during the Proclamation of Emergency. Consequently, a person will be entitled to challenge the validity of his detention even during the operation of an emergency.

Failure of Constitutional Machinery in State

Article 356 says that if the President, on receipt of a report from the Governor of a State or otherwise is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution, he may issue a Proclamation. By that Proclamation:

1. The President may assume to himself all or any of the powers vested in or exercisable by the Governor to anybody or authority in the State.
2. The President may declare that the powers of the Legislature of the State shall be exercised by or under the authority of Parliament.
3. The President may make such incidental and consequential provisions as may appear to him to be necessary or desirable for giving effect to the object of Proclamation.

The President cannot, however, assume to himself, any of the powers vested in the High Court or suspend the operation of any provisions of the Constitution relating to the High Court.

When the Proclamation of Emergency is made under Art. 356 (1), the powers of the State Legislature are to be exercised by Parliament. Parliament can confer on the President the power to make laws for the States. Parliament may also authorize the President to delegate such powers to any other authority as specified by himself [Art. 357 (1)(a)]. If the Lok Sabha is not in session the President may authorize expenditure from the Consolidated Fund of State, pending sanction of such expenditure by Parliament.

The Proclamation issued under Art. 356 (1) may be revoked or varied by the President by a subsequent Proclamation.

Financial Emergency

Article 360 provides that if the President is satisfied that a situation has arisen whereby the financial stability or credit of India or part of the territory thereof is threatened, he may by a proclamation make a declaration to that effect.

The 44th Amendment makes Art. 360 self-contained. It provides that the proclamation of financial emergency shall cease to be in operation at the expiry of two months unless it has been approved by both Houses of Parliament. Such a proclamation may be revoked or varied by the President by a subsequent proclamation. But if the Lok Sabha is dissolved during the period of two months and resolution is approved by the Rajya Sabha, but not by the Lok Sabha the proclamation shall cease to operate at the expiry of 30 days from the date on which the new Lok Sabha sits unless before the expiry of 30 days a resolution approving proclamation is passed by the Lok Sabha.

During the period when such a proclamation is in operation, the executive authority of the Union shall extend to giving direction to any State to observe such canons of financial propriety as may be specified in the directions and be deemed necessary by the President for maintaining financial stability and the credit of the State. Any such direction may

include a provision for the reduction of salaries and allowances of all or any class of persons serving in a State, including the Judges of the Supreme Court and High Courts. It may also require that all Money or Financial Bills are to be reserved for the consideration of the President after they are passed by the Legislature of the State.

The duration of a proclamation of financial emergency will be in operation for two months and unless approved by President it shall cease to operate at the expiry of two months period.

“The Constitution of India is unique in respect that it contains a complete scheme for speedy re-adjustment of the peace-time governmental machinery in movements of national peril. These provisions may appear to be particularly in a Constitution, which professes to be built upon an edifice of fundamental rights and democracy. But the provisions must be studied in the light of India's past history. It is good that the Constitution guards against the forces of disintegration. Events may take place threatening the very existence of the State and if there are no safeguards against such eventualities the State together with all that is desired to remain basic and immutable, will be swept away.

Conclusion

Discuss the power of the President to promulgate state emergency under Art. 356. Explain its consequences. [16]

Dec 05

Examine the power of the President to promulgate Emergency on the grounds of failure of constitutional machinery in the State. [16]

03, 2K

Discuss the constitutional provisions relating to state emergency. [10]

05

Introduction: One of the chief-characteristics of the Indian Constitution is the way in which the normal federal Constitution can be adapted to emergency situation. It is the merit of the Constitution that it visualizes the circumstances when the strict application of the federal principles might destroy the basic assumptions on which our Constitution is built.

The Constitution of India provides for three types of emergency:

1. National Emergency - Due to war, external aggression or armed rebellion; Art. 352

2. State Emergency - Due to the failure of constitutional machinery in States; Art. 356
3. Financial Emergency - Art. 360

Failure of Constitutional Machinery in State

Article 356 says that if the President, on receipt of a report from the Governor of a State or otherwise is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution, he may issue a Proclamation. By that Proclamation:

4. The President may assume to himself all or any of the powers vested in or exercisable by the Governor to anybody or authority in the State.
5. The President may declare that the powers of the Legislature of the State shall be exercised by or under the authority of Parliament.
6. The President may make such incidental and consequential provisions as may appear to him to be necessary or desirable for giving effect to the object of Proclamation.

The President cannot, however, assume to himself, any of the powers vested in the High Court or suspend the operation of any provisions of the Constitution relating to the High Court.

When the Proclamation of Emergency is made under Art. 356 (1), the powers of the State Legislature are to be exercised by Parliament. Parliament can confer on the President the power to make laws for the States. Parliament may also authorize the President to delegate such powers to any other authority as specified by himself [Art. 357 (1)(a)]. If the Lok Sabha is not in session the President may authorize expenditure from the Consolidated Fund of State, pending sanction of such expenditure by Parliament.

The Proclamation issued under Art. 356 (1) may be revoked or varied by the President by a subsequent Proclamation.

It is to be noted that the word 'satisfaction' in Art. 356 (1) does not mean the personal satisfaction of the Governor but it is the satisfaction of the cabinet. The satisfaction of the President can, however, be challenged on two grounds that

- (1) It has been exercised *mala fide*
- (2) Based on wholly extraneous and irrelevant grounds, because in that case it would be no satisfaction of the President.

In *S. R. Bommai v. Union of India* the Karnataka High Court has held that the proclamation issued under Art. 356 is not wholly outside the part of judicial scrutiny and the Court can examine whether the reasons disclosed for issuing proclamation have rational nexus with the satisfaction reached under Article 356.

It is to be noted that under Article 356 the President acts on a report of the Governor or otherwise. This means that the President can act even without the Governor's report. This

is justified in view of the obligation of the Centre imposed by Art. 355 to ensure that the Government of the State is carried on in accordance with the provisions of the Constitution. In view of it the Centre's ultimate responsibility to protect the constitutional machinery of the States, the framers thought it proper not to restrict and confine the action of the Centre merely on the Governor's report. The Governor might not make a report sometimes. The President can, therefore, act even without the Governor's report, if he is satisfied that such events occurred in a State, which involve the special responsibility placed upon the Centre to maintain the State under the Constitution.

A proclamation issued under Article 356 shall be laid before each House of Parliament and shall remain in operation for 'two months' unless before the expiry of the period it has been approved by both Houses of Parliament [Clause (3) of Art. 356]. Any such Proclamation may be revoked or varied by a subsequent Proclamation. If any such Proclamation is issued at the time when Lok Sabha is dissolved or the dissolution takes place during the period of two months and the Proclamation is passed by the Rajya Sabha but not passed by the Lok Sabha, the Proclamation shall cease to operate at the expiry of 30 days from the date on which the new Lok Sabha meets after the reconstruction unless before the expiry of 30 days it has been also passed by the Lok Sabha. If the Proclamation is approved by the Parliament it will remain in operation of 'six months.' Parliament may extend the duration of Proclamation for 'six months' at a time but no such Proclamation shall in any case remain in force for more than three years. After the expiry of the maximum period of three years, neither the Parliament nor the President shall have power to continue a Proclamation and the constitutional machinery must be restored to the State.

44th Amendment, 1978

This amendment had amended Article 356 and restricted its scope. It substitutes the word 'six months' for the words 'one year' as it existed originally. Thus it restores the position as it stood before the 42nd Amendment. A Proclamation of Emergency will, if approved by Parliament, continue for six months from the date of the issue. For the further continuation of emergency, it must be approved by Parliament each time. It has added a new clause (5) to Art. 356 in place of the existing clause (5), which is now omitted. This clause (5) provides that a resolution for the continuance of the emergency beyond one year shall not be passed by either House of Parliament unless

- (a) a Proclamation of Emergency is in operation at the time of the passing of such resolution; and
- (b) the Election Commission certifies that the continuance in force of the Proclamation under Art. 356 during the period specified in such resolution is necessary on account of difficulties in holding general elections to the Legislative Assembly of the State concerned.

This means that the extension of the emergency beyond the period of one year is possible only if the conditions mentioned in clause (5) are present. Prior to this Amendment there

was no such condition imposed and the Government could extend the period up to the maximum of three years without sufficient cause.

Conclusion

THE AMENDMENT OF THE CONSTITUTION

Explain the procedure for amendment of the Indian Constitution. Can the Parliament amend Fundamental Rights? [16]

Dec 07, 03, Dec 03

Briefly discuss the basic constitutional features of the Constitution of India, which cannot be amended by Art 368. [10]

Dec 01

Introduction: Provision for amendment of the Constitution has been made with a view to overcome the difficulties, which may be encountered in the future while working with the Constitution. No generation has monopoly of wisdom nor has it a right to place fetters on future generations to mould the machinery of the government according to their requirements. If no provisions were made for the amendment of the Constitution, the people would have to recourse to extra constitutional methods like revolution to change the Constitution.

For the purpose of amendment, the various Articles of the Constitution are divided into three categories:

1. Amendment by Simple Majority - Articles that can be amended by the Parliament by simple majority as those required for passing of any ordinary law. The amendments contemplated in Articles 5, 169 and 239-A, can be made by simple majority. These Articles are specifically excluded from the purview of the procedure prescribed in Article 368.
2. Amendment by Special Majority - Articles of the Constitution, which can be amended by special majority as, laid down in Article 368. All constitutional amendments other than those referred to above, come within this category and must be effected by a majority of the total membership of each House of Parliament as well as by a majority of not less than 2/3 of the members of that House present and voting.
3. By Special Majority and Ratification by States - Article that require, in addition to the special majority mentioned above, ratification by not less than 1/2 of the State Legislatures. The States are given an important voice in the amendment of these matters. These are fundamental matters where States have important power under the Constitution and any unilateral amendment by Parliament may vitally affect the fundamental basis of the system built up by the Constitution. This class of Articles consists of amendments, which seek to make any change in the provisions mentioned in Article 368.

Procedure for Amendment

A Bill to amend the Constitution may be introduced in either House of Parliament. It must be passed by each House by a majority of the total membership to that House and by a majority of not less than 2/3 of the members of that House present and voting. When a Bill is passed by both Houses it shall be presented to the President for his assent who shall give his assent to Bill and thereupon the Constitution shall stand amended. But a Bill, which seeks to amend the provisions mentioned in Article 368, requires in addition to the special majority mentioned above the ratification by 1/2 of the States.

Article 368, however, does not constitute the complete Code. The process of amending the Constitution is the legislative process governed by the rules of that process.

Thus it is clear that most of the provisions of the Constitution can be amended by an ordinary legislative process. Only a few provisions which deal with the federal principle require a special majority plus ratification by the States. The procedure to amend these provisions is in conformity with the federal principle. The procedure to amend the Constitution is, however, not so difficult as in America or Australia. The difficult procedure of referendum followed in Australia and Switzerland or constitutional conventions followed in America, have not been adopted in Indian Constitution. Most of the provisions of the Indian Constitution can be amended by the special majority. Though different from the ordinary Legislative process, the special majority rules do not result in very rigid method of amendment as is clear from the fact that the Constitution has been amended as many as 58 times within the period of 40 years. Even the procedure to amend the constitution with the consent of the States, though more rigid than the special majority rule, is not so difficult as that of American or Australian procedure to amend that Constitution.

Thus, it may be said that the Indian Constitution-makers have sought to find a *via media* between the two extremes-extreme flexibility and extreme rigidity, as this, it is hoped, will duly meet the needs of a growing society. .

Amendment of Fundamental Rights

The question whether fundamental rights can be amended under Article 368 came for consideration of the Supreme Court in *Shankari Prasad v. Union of India*. In that case the validity of the Constitution (1st Amendment) Act, 1951, which inserted *inter alia*, Articles 31- A and 31- B of the Constitution was challenged. The Amendment was challenged on the ground that it purported to take away or abridge the rights conferred by Part III, which fell within the prohibition of Article 13 (2) and hence was void. It was argued that the 'State' in Article 12 included Parliament and the word 'Law' in Article 13 (2), therefore, must include constitution amendment. The Supreme Court, however, rejected the above argument and held that the power to amend the Constitution including the fundamental rights is contained in Article 368, and that the word 'Law' in Article 13 (8) includes only an ordinary law made in exercise of the Legislative powers and does not include constitutional amendment which is made in exercise of constituent power. Therefore, a constitutional amendment will be valid even if it abridges or takes away any of the fundamental rights.

In *Sajjan Singh v. State of Rajasthan*, the validity of the Constitution (17th Amendment) Act, 1964 was challenged. The Supreme Court approved the majority judgment given in *Shankari Prasad's* case and held that the words 'amendment of the Constitution' means amendment of all the provisions of the Constitution. Gajendragadkar, C.J said that if the Constitution – makers intended to exclude the fundamental rights from the scope of the amending power, they would have made a clear provision in that behalf.

In *Golak Nath v. State of Punjab*, the validity of the Constitution (17th Amendment) Act, 1964, which inserted certain State Acts in Ninth Schedule was again challenged. The Supreme Court by a majority of 6 to 5 prospectively overruled its earlier decision in *Shankari Prasad's* and *Sajjan Singh* cases and held that the Parliament had no power from the date of this decision to amend Part III of the Constitution so as to take away or abridge the fundamental rights. Subba Rao, C. J., supported his judgment on the following reasoning:

1. The Chief Justice rejected the argument that power to amend the Constitution was a sovereign power and the said power was supreme to the legislative power and that it did not permit any implied limitations and that amendments made in exercise of that power involve political questions and that therefore they were outside of judicial review.
2. The power of Parliament to amend the Constitution is derived from Article 245, read with Entry 97 of List I of the Constitution and not from Art. 368. Article 368 lays down merely the procedure for amendment of the Constitution. Amendment is a legislative process.
3. An amendment is a 'law' within the meaning of Article 13(2) and therefore, if it, violates any of the fundamental rights it may be declared void, The word 'law' in Article 13(2) includes every kind of law, statutory as well as constitutional law and hence a constitutional amendment which contravened Article 13(2) will be declared void.

The Chief Justice said that the fundamental rights are assigned transcendental place under our Constitution and, therefore, they are kept beyond the reach of the Parliament. The Chief Justice applied the doctrine of Prospective Overruling and held that this decision will have only prospective operation and, therefore, the 1st, 4th and 17th Amendments will continue to be valid. It means that all cases decided before the *Golak Nath* case shall remain valid.

The minority, however, held that the word 'law' in Article 13(2) referred to only ordinary law and not a constitutional amendment and hence *Shankari Prasad's* and *Sajjan Singh's* cases were rightly decided. According to them, Article 368 deals with not only the procedure of amending the Constitution but also contains the power to amend the Constitution.

Conclusion

Explain the 'Basic Structure theory'. Do you consider these are effective limitations over the Parliament's power to amend the constitution? [16]

Dec 04

What is the 'basic structure theory'? Can its amendment be challenged? Refer to decided cases. [16]

04

"The parliament's power to amend the constitution is supreme, but subject to certain implied conditions." Critically examine the statement with the help of leading cases. [16]

Dec 04

Examine the extent to which the Constitution may be amended by the Parliament. [6]

Dec 07

Introduction: The validity of the Constitution (24th Amendment) Act, 1971, was challenged in *Keshvanand Bharati v. State of Kerala*, popularly known as the Fundamental Right's case. The petitioners challenged the validity of the Kerala Land Reforms Act 1963. But during the pendency of the petition the Kerala Act was amended in 1971 and was placed in the Ninth Schedule by the 29th Amendment Act. The petitioners were permitted to challenge the validity of Twenty Fourth, Twenty Fifth and Twenty Ninth Amendment to the Constitution also. The question involved was as to what was the extent of the amending power conferred by Article 368 of the Constitution? On behalf of the Union of India it was claimed that amending power was unlimited and short of repeal of the Constitution any change could be effected. On the other hand, the petitioner contended that the amending power was wide but not unlimited. Under Article 368, Parliament cannot destroy the 'basic feature' of the Constitution. A Special Bench of 13 Judges was constituted to hear the case. Out of the 13 judges (2 judges) delivered separate judgments.

The Court by majority overruled the *Golak Nath's* case, which denied Parliament the power to amend fundamental rights of citizens. The majority held that Article 368 even before the 24th Amendment contained the power as well as the procedure of amendment. The 24th amendment merely made explicit what was implicit in the unamended Article 368-A. The 24th Amendment does not enlarge the amending power of the Parliament. It is declaratory in nature. It only declares the true legal position, as it was before that amendment, hence it is valid. The Court held that, under Art. 368, Parliament is not empowered to amend the basic structure or framework of the Constitution. It held that the first part of the twenty-fifth Amendment Act is valid, but held that the second part, namely, 'no such law, containing the declaration that it is for giving effect so such policy shall be called in question in any Court on the ground that it does not give effect to such policy' is invalid.

As regards the scope of amending power contained in Article 368, six judges held that there are inherent or implied limitations on the amending power of Parliament and Article 368 does not confer power to amend the Constitution so as to damage or destroy the essential elements or basic features of the Constitution. Khanna, J., held that though there is no implied limitation on the amending power, but the power to amend does not include the power to abrogate the Constitution. The word 'amendment', he said, postulated that the old Constitution must survive without loss of indemnity and it must be retained through in the amended form and, therefore, the power does not include the power to destroy or abrogate the basic structure or framework of the Constitution. The remaining six judges held that there are no limitations, express or implied on the amending power. Thus the court by majority of 7 to 6 held that the Parliament has wide powers of amending the Constitution and it extends to all the Articles, but the amending power is not unlimited and does not include the power to destroy or abrogate the 'basic feature' or 'framework' of the Constitution. There are implied limitations on the power of amendment under Art 368. Within these limits Parliament can amend every Article of the Constitution. Whether there are implied limitations on the amending power or not would depend upon the interpretation of the word 'amendment'.

Delivering the leading majority judgment Sikri. C. J. said, "in the Constitution the word, 'amendment' or 'amend' has been used in various places to mean different things. In some articles, the word 'amendment' in one context has a wide meaning and in another context it has a 'narrow meaning'. In view of the great variation of the phrases used all through the Constitution it follows that the word 'amendment' must derive its colour from Article 368 and the rest of the provisions of the Constitution. Reading the Preamble, the fundamental importance of the freedom of the individual, its inalienability and the importance of the economic, social and political justice mentioned in the Preamble, the importance of directive principles, the non-inclusion in Article 368 of provisions like Articles 52, 53 and various other provisions, an irresistible conclusion emerges that it was not the intention to use the word 'amendment' in the widest sense. It was the common understanding that the fundamental rights would remain in substance as they are and they would not be amended out of existence. It seems also to have been a common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare State. In view of the above reasons, a necessary implication arises on the power of Parliament that the expression 'amendment of this Constitution' has consequently a limited meaning in our Constitution and not the meaning suggested by the Attorney - General. The expression 'amendment of this Constitution' in Article 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble and the Directive Principle applied to fundamental rights, it would mean that while fundamental rights, cannot be abrogated reasonable abridgements of fundamental rights can be effected in public interest. "If this meaning is given", the Chief Justice said "it would enable the Parliament to adjust fundamental rights in order to secure what the Directive Principles direct to be accomplished, while maintaining the freedom and dignity of every citizen." On behalf of the Union and the States, it was urged that the conceptions of basic elements and fundamental features are illusive conceptions and therefore it would be very

unsatisfactory test for the Parliament to comprehend and follow. The Chief Justice said, that the concept of amendment within the contours of the Preamble and of the Constitution cannot be said to be a vague and unsatisfactory idea which Parliamentarians and the public would not be able to understand. He said that the argument that because something cannot be cut and dried or nicely weighed or measured and therefore does not exist is fallacious. There are many concepts of law, which are not capable of exact definition, but it does not mean that it does not exist. It was also argued that every provision of the Constitution is essential, otherwise it would not have been put in the Constitution. The Chief Justice further said, “But this does not place every provisions of the Constitution in the same position. 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.

Basic Structure of the Constitution

What then are the essentials of the basic structure of the Constitution? Although the Judges enumerated certain essentials of the basic structure of the Constitution, but they also made it clear that they were only illustrative and not exhaustive. They will be determined on the basis of the facts in each case. In *M. Nagraj v. Union of India* a 5 Judge Bench of the Supreme Court has explained the basic feature theory again in detail as follows. ‘Basic structure’ are systematic principles underlying and connecting provisions of the Constitution. They give coherence and durability to Constitution. These principles are part of constitutional law even if not expressly stated. This doctrine has essentially developed from the German Constitution. It is not based on literal words. These principles are part of constitutional law even if not expressly stated. The Theory of Basic Structure is based on the concept of Constitutional identity. The main object behind the theory is continuity and within that continuity of identity.

In *Keshwanand Bharti*, the Judges has enumerated certain essentials of basic structure. According to Sikri, C. J., the basic structure of the Constitution consists of the following features:

- (1) Supremacy of the Constitution,
- (2) Republican and democratic forms of the 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.

According to *Shelat and Grover, JJ.*, the following are the illustrations of the basic structure of the Constitution, *i.e.*,

- (1) Supremacy of the Constitution,
- (2) Republican and Democratic form of Government and sovereignty of the country,
- (3) Secular and federal character of the Constitution,
- (4) Demarcation of power between the Legislature, the Executive and the Judiciary,
- (5) Dignity of the individual secured by various freedoms and basic rights in Part III and the mandate to build a welfare State contained by Part V,
- (6) Unity and integrity of the nation.

According to *Hegde and Mukherjee, JJ.*, the following are the examples of the basic structure:

- (1) Sovereignty of India,
- (2) The democratic character of our policy,
- (3) The Unity of the country,
- (4) Essential features of individual freedoms secured to the citizens,
- (5) Mandate to build a welfare State. However, they said that these limitations are only illustrative and not exhaustive.

According to *Mr. Jagmohan Reddy, J.*,

- (1) A sovereign democratic republic
- (2) Parliamentary democracy

Khanna, J., concurred with the majority decision but delivered a separate judgment. He said, "The amendment of the Constitution necessarily contemplates that the Constitution has not to be abrogated. (Indeed, this much has been conceded by the Attorney-General). The word 'amendment' postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subject to alterations. As a result of the amendment, the old Constitution cannot be destroyed, and done away with; it is retained though in the amended form. The words 'amendment of the Constitution' with all their wide sweep and amplitude cannot have the effect of destroying and abrogating the basic structure or framework of the Constitution. It would not be competent under the garb of amendment, for instance, to change the democratic government into dictatorship of hereditary monarchy nor it would be permissible to abolish the Lok Sabha and the Rajya Sabha. The secular character of the State according to which the State shall be discriminated against any citizen on the ground of religion only cannot likewise be done away with. Provision regarding the amendment of the Constitution does not furnish a pretence for subverting the structure of the Constitution nor can Article 368 be so construed as to embody the death wish of the Constitution or provide sanction for what may perhaps be called its lawful *harakiri*. Such subversion or destruction cannot be described to be amendment of Constitution as contemplated by Article 368."

His Lordship further held that the power of amendment under Art. 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution the power of amendment is plenary and includes within itself the power to amend various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential feature. No part of a fundamental right can claim immunity from a mandatory process by being described as the essence or core of that right. The power of amendment would also include within itself the power to add, alter or repeal the various articles. There are no implied inherent limitations on the power of amendment apart from those, which inhere and are implicit in the word 'amendment'. The said power can also not be restricted by reference to 'natural or human rights'. Apart from the part of the Preamble, which relates

to the basic structure or framework of the Constitution, the preamble does not restrict the power of amendment.

However, he held that the right to property did not pertain to the basic structure of framework of the Constitution.

The Supreme Court has added the following features as basic features of the Constitution to the list of basic features laid down in the *Keshavananda Bharati*'s case

1. Rule of law
2. Judicial Review
3. Democracy, which implies free and fair Election.

It has been held that the Jurisdiction of the Supreme Court under Article 32, is a basic feature of the Constitution.

In *Minerva Mills Ltd v. Union of India*, Supreme Court has held that the following are the basic features of the Constitution:

1. limited power of Parliament to amend the Constitution;
2. harmony and balance between fundamental rights and directive principles;
3. fundamental rights in certain cases;
4. power of judicial review in certain cases.

Independence of judiciary is part of the basic structure.

The doctrine of basic structure has been vehemently criticized. It has been said that the court has not precisely defined as to what are the essential features of the basic structure and if this doctrine is accepted every amendment is likely to be challenged on the ground that it effects some or the other essential features of the basic structure. In other words, it is urged, that the amending power of the Parliament cannot be subjected to this vague and uncertain doctrine.

It is, however, submitted that the criticism of the doctrine of basic structure cannot be justified on the ground that it lays down a vague and uncertain test. The basic structure of the Constitution is not a vague concept. The fact that a complete list of the essential elements constituting the basic structure cannot be enumerated is no ground for denying that these do not exist. There are many concepts of law which cannot still be defined precisely, but they do exist and play very important part in our law.

Conclusion: If the historical background, the Preamble, the entire scheme of the Constitution and the relevant provisions thereof including Art. 368 are kept in mind then there can be no difficulty, in determining what are basic elements of the basic structure of the Constitution. These words apply with greater force to the doctrine of the basic structure, because, the federal and democratic structure of the Constitution, the separation of powers, the secular character of our State are very much more definite than either negligence or natural justice.