General Knowledge Today

GS-II: 1- Historical Underpinnings

Target 2016: Integrated IAS General Studies
Last Updated: March 21, 2016
Published by: GKTODAY.IN

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Model Questions

1. "The object of the regulating act was good, but system that it established was imperfect." Discuss Critically while elucidating how the defects of the Regulating Act were removed?
2. "One of the biggest problems created by the Regulating Act was the tussle between the Supreme Court and the Governor General in Council." Why there was a tussle and what was done towards their remedy? Discuss.
3. To what extent the Pitt's India Act was able to remove the deficiencies of earlier acts? Discuss in the light of its key provisions.
4. "For many reasons, the Charter Act 1833 was a watershed moment for the constitutional and political history of India." Elucidate.
5. What was the difference between the designations of Governor General and Viceroy during British India rule? Why same person was chosen to hold both the offices? Discuss.
6. "Government of India Act 1858 was a formal than substantial change." Comment.
7. Make a comparative examination of legislative powers of the councils under Indian Councils Acts of 1861, 1892 and 1909.
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9. The sacred heart of the reforms of 1909 was "benevolent despotism" and it was basically a subtle attempt to create a "constitutional autocracy". Discuss critically.
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16. Princely states as the 'Breakwaters in the Storm'? Discuss.
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18. Discuss the role of Warren Hastings and Lord Cornwallis in the evolution of Indian judicial system.

19. What was the Community Development Programme? Why it failed? Discuss.
20. Critically discuss the evolution of 3 tier Panchayati Raj System in India in the light of various committee reports.

Evolution of Indian Legislature

British came to India as traders and with the passage of time, they became it's rulers. In 1600 AD, the British East India Company was granted a charter to trade in East. The company obtained exclusive right to trade with India for 15 years. From time to time, this charter had to be renewed. Gradually East India Company also morphed into a territorial power in India. Its career as a territorial power in India had started with the victory in the battle of Plassey. However, post battle of Plassey, the affairs of the company went haywire and needed parliamentary control. Thus a series of acts, beginning from regulating act 1773, were passed to regulate the affairs of the company; renew its charters; provide for government in India; provide for civil and criminal laws and so. Thus, the constitutional history of India begins from the Regulating Act 1773.

Regulating Act 1773

Regulating Act of 1773 was the first landmark in the constitutional development of India. Via this act, the British Parliament for the first time interfered into affairs of India. The Prime Minister of England at the time of Regulating Act of 1773 was Lord North.

Administration of East India Company at the time of Regulating Act of 1773

Before we delve into the details of the act, lets understand how the East India Company was managed at that time. Administration of the East India Company in England was managed by a body of *24 directors called Court of Directors*. This Court of Directors was elected by shareholders of the company on annual basis. The collective body of these shareholders was called *Court of Proprietors*. The day to day functioning of the East India Company were done by the committees of the Court of Directors.

In India, three presidencies were established at Bombay, Madras and Kolkata under a President called *Governor General and his Council* or *Governor in-council*. All the powers were lodged into the Governor-in-Council and nothing could be transacted without the majority of the votes in the council.

These presidencies were independent of each other and each of them was an absolute government in its own limits, only responsible to the Court of Directors in England.

Circumstances that led to Regulating Act 1773

The battle of Plassey (1757) and the Battle of Buxar (1764-65) led to firm establishment of territorial dominance of East India Company in India. At that time, their territories in the country included parts of current states of Maharashtra, Gujarat, Goa, Karnataka, Tamil Nadu, Orissa, West Bengal, Bihar and Uttar Pradesh.

With these two important wars, the Nawab of Awadh became their ally while Mughal emperor Shah Alam became their pensioner. Bengal and Bihar came under the dual system of administration of

Clive whereby company got Diwani rights or the Fiscal administration rights while *Nizamat (territorial)* jurisdiction was with the puppet nawabs. However, this system had various problems which ultimately led to the Regulating Act 1773. These are as follows:

- This system not only created confusion but also left the people hapless against oppression by both company and nawabs. The British parliament could not remain a mute spectator and thus regulation of the trading company was necessitated.
- The servants of the company had become corrupt. Many of them retired and took away heaps of wealth to England and lived like Indian Nawabs, thus correctly nicknamed "English Nawabs" in England. In 1772, a secret parliamentary committee reported that the servants of the company including Clive had received large sums, Jagirs etc.
- The corruption was so much prevalent that the servants of the company led it on the brink of financial bankruptcy in early 1770s. Further, the famine of 1770 also reduced the revenue. In August 1772, the East India Company applied for a loan of One Million Pounds to the British government.

This was enough for the parliament to grab the opportunity, cross examine the doings of the company and its officials and then enact a legislation to regulate its affairs.

Objectives of the Act

The key objectives of the Regulating Act of 1773 included – addressing the problem of management of company in India; address the problem of dual system of governance instituted by Lord Clive; to control the company, which had morphed from a business entity to a semi-sovereign political entity.

Key Provisions

Creation of Office of Governor of the Presidency of Fort William

The presidencies of Bombay and Madras were made subordinate to the Presidency of Calcutta. The Governor of Bengal was designated the **Governor of the Presidency of Fort William** and he was to serve as Governor General of all British Territories in India. This Governor General was to be assisted by an executive council of four members. As per the act, Office of the Governor-General of the Presidency of Fort William was created in 1773, and on 20 October 1773, Warren Hastings became the first Governor General of India. The members of the council were Lt. General John Clavering, George Monson, Richard Barwell and Philip Francis. These members could be removed only by the British Monarch (King or Queen) on representation from Court of Directors.

Difference between Governor General and Viceroy

Commonly we call Warren Hastings as First Governor General of India. But the official title of Warren Hastings was the **Governor of the Presidency of Fort William**. This

office became **Governor General of India** in 1833 from the times of **Lord William Bentinck** and in 1858, when India was taken over by England; it remained **Viceroy and Governor-General of India till 1947**.

Governors-in-Council of Bombay and Madras were required to pay due obedience to the orders of Governor -General of Bengal.

Governor-General in council was given power to make rules, ordinances and regulations. These rules and regulations were required to be registered with the Supremes court and could be dissolved by the king-in council within 2 years.

Changes in voting qualifications

This act raised the qualifications for a vote in the Court of proprietors from £ 500 to £ 1000. Further, instead of the annual elections, the act provided the directors to hold office for four years and a quarter of the number of being annually re-elected. The Directors were required to submit copies of letters and advices received from the Governor-General in council.

Establishment of Supreme Court at Calcutta

The regulating act provided for establishment of a Supreme Court of Judicature at Fort William comprising one chief justice and three other judges. ***Sir Elijah Imphey*** was appointed as chief justice of this court. It had power to try civil, criminal, admiralty cases and it had to be a Court of Record. It was given supreme judiciary over all British subjects including the provinces of Bengal, Bihar and Orissa. The Supreme Court was also made to consider and respect the religious and social customs of the Indians. Appeals could be taken from the provincial courts to the Governor-General-in-Council and from there to King-in-Council.

Increased control over company

East India Company was kept under the Control of the King of England. The system of nominating high officials of the Company, Judges, Member of the Court of Directors started. The court of directors was also required to report on company's revenue, civil, and military affairs in India. The act prohibited receiving of presents and bribes by the servants of the company. No British subject was to charge interest at a rate higher than 12 per cent. The Act also settled the salaries of the Governor General, Governors, chief justice and other judges.

Importance of the Regulating Act

The Act of 1773 recognized the political functions of the company, because it asserted for the first time right of the parliament to dictate the form of government. It was the first attempt of British government to centralize the administrative machinery in India. The act set up a written constitution for the British possession in India in place of arbitrary rule of the company. A system was introduced to prevent the Governor-General from becoming autocratic.

This act unequivocally established the supremacy of the Presidency of Bengal over the others. In matters of foreign policy, the Regulating Act of 1773 made the presidencies of Bombay and Madras, subordinate to the Governor General and his council. Now, no other presidency could give orders for commencing hostilities with the Indian Princes, declare a war or negotiate a treaty. It established a supreme court at Fort William, Calcutta and India's modern Constitutional History began.

Defects in the Regulating Act 1773: Analysis

The object of the regulating act was good, but system that it established was imperfect. The act was a medley of inconstancies with numerous deficiencies. *Firstly*, the act rendered the Governor General powerless before his colleagues because he had no veto power. This brought difficult times for Warren Hastings. He was outvoted and overruled for most of the times by the members of his council. Further, come of the members were hostile towards Warren Hastings. *Secondly,* the provisions regarding the Supreme Court at Fort Williams were vague and defective. The law did not mention anything regarding the jurisdiction of the Supreme Court. It also did not demarcate the lines between powers of Governor and Supreme Court. The actions of the servants of the company were brought under the Supreme Court but this again tussle between Governor General and the court. *Thirdly,* the presidencies of Bombay and Madras continued to act on their discretion on pretext of emergencies. They also continued wars and alliances without caring in the least bit to Presidency of Bengal. *Fourthly,* the parliamentary control ineffective in the sense that there was no concrete arrangements to study and scrutinized the reports sent by Governor General in council. Lastly, there was nothing in the act which could address the people of India, who were paying revenue to the company but now were dying in starvation in Bengal, Bihar and Orissa.

How the defects of the Regulating Act were removed?

Some of these problems were addressed in an amendment of the Regulating Act in the form of Amending Act 1781 and other acts which followed it. The Amending Act of 1781 reduced the powers of Supreme Court much below Governor General in Council. The Pitts India Act 1784 gave veto power to the Governor General and the presidencies were made subordinate to the Governor General.

Amending Act 1781

The Amending Act of 1781 was passed by British Parliament on 5th July 1781 to remove the defects of Regulating Act 1773. It is also known as Declaratory **Act, 1781.** The key provision of this act was to demarcate the relations between the Supreme Court and the Council.

Key Provisions of the Act – Limiting Powers of Supreme Court

One of the biggest problems created by the Regulating Act was the tussle between the Supreme

Court and the Governor General in Council. This was done by curtailing several powers of the Supreme Court in favour of the Governor General in Council. These were as follows:

- Under the Regulating Act 1773, the servants of the company came within the jurisdiction of the Supreme Court, and this brought them under dual control of Governor General in Council and Supreme Court. The 1781 amendment exempted the actions of the public servants in the company in their official capacity.
- Revenue collectors (including Zamindars) and judicial officers of the company courts were also exempted from Jurisdiction of the SC.
- The court's geographic jurisdiction became limited to only Calcutta.
- Its appellate jurisdiction was also skirted. The amending act provided that appeals were to be taken from the provincial courts to the Governor-General in council.
- Further, the act empowered the Governor-General and Council to convene as a Court of Record to hear appeals from the Provincial Courts on civil cases. This means that appeal could be taken from the provincial courts to the Governor General & Council and that was to be the final court of appeal.
- The Act also asserted that Mohammedan cases should be determined by Mohammedan law and Hindu law applied in Hindu cases.
- Under the Regulating Act, the Governor General in Council was empowered to issue rules, ordinances and regulations but they were to be registered in the Supreme Court.

The above discussion makes it clear that Amending Act of 1781 was the first attempt in India *towards separation of the executive from the judiciary by defining the respective areas of jurisdiction.*

Pitt's India Act, 1784

Pitt's India Act 1784 or the **East India Company Act 1784** was passed in the British Parliament to rectify the defects of the Regulating Act 1773. It resulted in *dual control or joint government* in India by Crown in Great Britain and the British East India Company, with crown having ultimate authority. With this act, East India Company's political functions were differentiated from its commercial activities for the first time. The relationship between company and crown established by this act kept changing with time until the Government of India Act 1858 provided for liquidation of the British East India Company.

Key Provisions of the Pitts India Act

The formal title of the Pitt's India Act was : *"An Act for the better Regulation and Management of the Affairs of the East India Company and of the British Possessions in India, and for establishing a Court of Judicature for the more speedy and effectual Trial of Persons accused of Offences committed in the East Indies".*

Board of Control

In political matters, the company was till now working as somewhat sovereign. The Pitts India act made the company directly subordinate to the British government. For the purpose of Joint Government, a *Board of Commissioners for the Affairs of India* called **Board of Control** was created. This board was made of six people viz. the Chancellor of the Exchequer, the Secretary of State, and four Privy Councillors nominated by the King. The **Secretary of the State** was entitled as the President of the Board of Control. This Board of control was empowered to control all matters of civil or military government or revenues. The board was given full access to the company's records. It had the powers to send Governors to India and full authority to alter them.

Thus, in the dual control, the Company was to be represented by the **Court of Directors** and the Crown was represented by the **Board of Control.**

Alternation in Governor General-in Council

The Governor General's council was now reduced to *3 members*, one of whom was to be the commander-in-chief of the King's army in India. This process of reducing number of members from 4 to 3 was to *strengthen the position of the Governor General* because now, he was able to get any resolution passed even with the help of one member in his side. The Governor General was given the right of *casting vote*, in case the members present in a meeting of the council shall any time be equally divided in opinion. The Governor General Council was now under indirect control of the British Government through the Board of Control.

Greater Powers to Presidency of Calcutta

The Governors of Presidencies of Bombay and Madras were deprived of their independent powers and **Calcutta was given greater powers** in matters of war, revenue, and diplomacy, thus Calcutta becoming in effect, the capital of Company possessions in India.

Secret Committee

There was also a secret committee of the 3 directors, which had to transmit the orders of the Board to India. This Secret Committee was to work as a link between the Board of control and the Court of Directors.

Disclosing of Property

All civil and military officers of the East India Company were ordered to provide the Court of Directors a full inventory of their property in India and in Britain within two months of their joining their posts. Severe punishment was provisioned for corrupt officials.

Failure & Significance of Pitts India Act 1784: Analysis

The Pitt's India Act was deemed a failure. This was because; very soon it became apparent that the boundaries between government control and the company's powers were nebulous and highly

subjective. The British Government felt obliged to respond to humanitarian calls for better treatment of local peoples in British-occupied territories. The Board of control was alleged for nepotism. The act was a naive one, it divided the responsibility between the Board of Control, Court of Directors and the Governor General in Council but again without fixing the clear cut boundaries. The powers fixed were subjective and not objective.

Significance of the Act

The Act was significant for two reasons. *Firstly*, the company's territories in India were for the first time called the 'British possession in India' and *secondly,* British Government was given the supreme control over Company's affairs and its administration in India.

Act of 1786

In 1786, Lord Cornwallis was appointed as Governor-General and commander in chief in India. He is known for having instituted land , judiciary and administrative reforms and reorganized the British army and administration. He had a demand that powers of the Governor-General be enlarged to empower him, in special cases, to override the majority of his Council and act on his own special responsibility. The Act of 1786 was enacted to give him the power of working as Both Governor General & Commander in Chief.

Thus via act of 1786, Cornwallis became the first effective ruler of British India under the authority of Board of Control and the Court of Directors.

Charter Act of 1793

The Charter Act 1793 or the *East India Company Act 1793* was passed by British Parliament to renew the charter of East India Company. This act authorized the company to carry on trade with India for next 20 years.

Key Provisions

More Powers to Governor General

In this act, the Governor General was empowered to disregard the majority in the Council in special circumstances. Thus more powers were entrusted in him. The Governor General and respective governors of the other presidencies could now override the respective councils, and the *commander in chief* was not now the member of Governor General's council, unless he was specially appointed to be a member by the Court of Directors.

Provisions Regarding Company

The company was allowed to increase its dividend to 10%. A provision in the Charter act of 1793 was made that the company, after paying the necessary expenses, interest, dividend, salaries, etc from the Indian Revenues will pay *5 Lakh British pounds* annually out of the surplus revenue to the British Government. However, the act also had a provision, that Crown could order the application of the

whole of the revenue for the purpose of defense if the circumstances posed such demands. Expenses, interest, dividend, salaries, etc were to be borne by the Indian Exchequer. If a high official departed from India without permission, it was to be treated as resignation.

Separation of revenue and judiciary functions

This act reorganized the courts and redefined their jurisdictions. The revenue administration was divorced from the judiciary functions and this led to disappearing of the **Maal Adalats**.

Act of 1797

At the time of enactment of Act of 1797, the territorial jurisdiction of the Calcutta Supreme Court covered the whole of Bengal, Bihar and Orissa. By this act, the jurisdiction of the Calcutta Supreme Court was extended to province of Benares and to all other places which might thereafter be subject to Presidency of Bengal. This act also reduced the number of Judges of the Supreme court at Calcutta from 4 to 3 which included one Chief Justice and 2 other judges.

Act of 1800 and Establishment of Supreme Court of Madras & Bombay

The Act of 1800 or *Government of India Act 1800* was passed by British Parliament to establish a Supreme Court at Madras.

Background

A rudimentary system of judiciary was established in the Presidencies of Madras and Bombay via the Charter Act of 1753. This system needed changes and there was an urgent need of new lawyers and judges to deal with the increasing cases. The Madras Council had brought this matter to Court of Directors in East India Company in 1791 which in turn brought in notice of the parliament. Via the Act of 1797, the British Parliament authorized the Crown to issue charters for the purpose of establishing a Recorder's Court at Madras and Bombay. On February 1, 1798, the King issued charter and two Recorder's Courts were established in Madras and Bombay by the end of that year. Each Recorder's court was made of one Recorder, one Mayor and three Aldermen of the Corporation. The Recorder, who used to be a barrister with at least five years standing, was appointed by the Crown and was the President of the Recorder's Court.

The jurisdiction of the Recorder's Court was almost same as that of Supreme Court of Calcutta. They were able to entertain all civil, criminal, admiralty, maritime, ecclesiastical and equity cases. Like the Supreme Court of Calcutta, this court was also subject to few restrictions such as:

- It could not entertain the matters related to Governor-General and Council in their official capacity.
- The matters relating to Hindus and Muslims were to be decided by their own laws.

Appeals against the judgments of the Recorder's Court could be filed before the Privy Council under

the same conditions as they could be filed against the judgment of the Supreme Court. In this way, except the composition, the Recorder's courts at Madras and Bombay were replica of the Supreme Court of Fort Williams at Calcutta.

The recorders court had hardly functioned for two years that the British Parliament decided to change them into Supreme Courts. As per this, the Parliament Passed Act of 1800 to authorize the Crown to establish a Supreme Court at Madras. On 26th December,1800 King George III issued a Charter which established the Supreme Court at Madras. This court came into existence on 4th September, 1801. However, in Bombay, the Recorder's Court functioned till 1824. In 1823, the Parliament had authorized the Crown to establish the Supreme Court by a Charter and accordingly, the King issued a Charter on 8th December, 1823 establishing a Supreme Court at Bombay which came into being on 8th May, 1824.

Powers and Functions of Supreme Courts at Madras and Bombay

The Constitutional powers, function, limitations and jurisdiction of the two courts established at Madras and Bombay were the same as that of the Supreme Court at Calcutta. The Act of 1823 had specifically mentioned in section 17 that the Supreme Court at Madras and Bombay, shall have the power to do, execute, perform and fulfil all such acts, authority, duties, matters and things whatsoever as the Supreme Court at Fort William might be authorised or empowered to do, execute, perform and fulfil within the Territory of Fort William in Bengal or places subject to or dependent upon its Government. This provision placed the three Supreme Courts in the same position.

These Supreme Courts functioned until 1862 when they were replaced by the High Courts at all the three places.

Charter Act 1813

Charter Act 1813 or East India Company Act 1813 was passed by the British Parliament to renew the charter of British East India Company and continue the rule of the same in India.

Background

The earlier charter act of 1793 had given the East India Company a monopoly to trade with East for a period of 20 years. However, the rise of Napoleon Bonaparte had brought hard days to the businessmen of England. Napoleon Bonaparte had put in place the *Berlin decree of 1806* & *Milan Decree of 1807,* which forbade the import of British goods into European countries allied with or dependent upon France, and thus installed the so called Continental System in Europe.

Due to these hardships, the British Traders demanded entry to the ports of Asia and dissolve the monopoly of the East India Company. Apart from these hardships, the theory of Free trade policy of Adam Smith had also became quite popular in those days. The supporters of this policy started giving

arguments on how ending the monopoly of East India Company in trade with India could bring help the growth of British commerce and industry.

However, East India Company opposed these arguments giving logic that its political authority and commercial privileges cannot be separated. The controversy was later resolved by allowing all the British merchants to trade with India under a strict license system.

Key Provisions

End of Monopoly of East India Company

Charter act of 1813 **ended the monopoly** of the East India Company in India, however the company's monopoly in trade with china and trade in tea with India was kept intact. Thus, trade with India for all commodities except Tea was thrown open to all British subjects. This lasted till 1833 when the next charter abolished the trade of the company.

Permission to Christian Missionaries

The act also granted permission to the persons who wished to go to India for promoting moral and religious improvements. (Christian Missionaries)

Other Provisions

- This act regulated the company's territorial revenues and commercial profits. It was asked to keep its territorial and commercial accounts separate.
- The company debt was to be reduced and dividend was fixed @10.5% per annum.
- There was also a provision that Company should invest Rs. 1 Lakh every year on the education of Indians.
- This act also empowered the local governments to impose taxes on the persons subject to the jurisdiction of the Supreme Court.

Nothing substantial was changed in terms of governance in India except that the Charter Act 1813 for the first time explicitly defined the constitutional position of the British territories in India. The Act also empowered the Local Governments in India to impose taxes on persons and to punish those who did not pay them.

Charter Act of 1833

Charter Act 1833 or the *Saint Helena Act 1833* or G*overnment of India Act 1833* was passed by the British Parliament to renew the charter of East India Company which was last renewed in 1813. Via this act, the charter was renewed for 20 years but the East India Company was deprived of its commercial privileges which it enjoyed so far.

Key Provisions

End of East India Company as a Commercial Body

The British Government had done a careful assessment of the functioning of the company in India.

The charter was renewed for another 20 years, but it ended the activities of the company as a commercial body and it was made a purely administrative body. With this, British were allowed to settle freely in India.

India as a British Colony

The charter act of 1813 legalized the British colonization of India and the territorial possessions of the company were allowed to remain under its government, but were held "*in trust for his majesty, his heirs and successors*" for the service of Government of India.

Governor General of India

This act made the Governor General of Bengal the **Governor General of British India** and all financial and administrative powers were centralized in the hands of Governor General-in-Council. Thus, with Charter Act of 1833, Lord William Bentinck became the "First Governor General of British India".

Fourth Member in Governor-General in Council

The number of the members of the Governor General's council was again fixed to 4, which had been reduced by the Pitt's India act 1784. However, certain limits were imposed on the functioning of the 4th member. For example, the 4th member was not entitled to act as a member of the council except for legislative purposes. For the first, this fourth members of the council was Lord Macaulay.

Split in Bengal Presidency

The Charter Act of 1833 provided for splitting the Presidency of Bengal, into two presidencies viz. Presidency of Fort William and Presidency of Agra. However, this provision was later suspended and never came into effect.

Enhanced Power of Governor General of India

Charter Act of 1833 distinctly spelt out the powers of the Governor-General-in-Council. He could repeal, amend or alter any laws or regulations including all persons *(whether British or native or foreigners),*all places and things in every part of British territory in India, for all servants of the company, and articles of war. However, the Court of Directors acting under the Board of control could veto any laws made by the Governor-General-in-Council.

Codifying the Laws

The charter act of 1833 is considered to be an attempt to codify all the Indian Laws. The British parliament as a supreme body, retained the right to legislate for the British territories in India and repeal the acts. Further, this act provided that all laws made in India were to be laid before the British parliament and were to be known as Acts. In a step towards codifying the laws, the Governor-General-in-Council was directed under the Charter act of 1833, to set up an **Indian law Commission**.

India's First Law Commission

India's first law commission was set up under Charter act of 1833 and Lord Macaulay was made its Chairman. The other members of this commission were English barrister Cameron, Macleod of Madras service, William Anderson of Bombay Service and Sir William McNaughton of the Calcutta Service. Sir William McNaughton did not accept the appointment.

The objectives of the law commission was to inquire into the Jurisdiction, powers and rules of the courts of justice police establishments, existing forms of judicial procedure, nature and operation of all kinds of laws. It was directed that the law Commission shall submit its report to the Governor General-in-council and this report was to be placed in the British parliament.

Indians in the Government service

The section 87 of the Charter Act of 1833, declared that "no native of the British territories in India, nor any natural born subject of "His majesty" therein, shall by any reason only by his religion, place of birth, descent, colour or any of them be disabled from holding any place, office or employment under the company". Thus, the Charter act of 1833 was the first act which made provision to freely admit the natives of India to share an administration in the country. The act laid down that Court of Directors should nominate annually 4 times as many candidates as there were vacancies, from whom one should be selected by competitive examination. The charter act of 1833 also provided the **Haileybury college of London** should make quota to admit the future civil servants. However, this system of an open competition was not effectively operated in near future.

Mitigation of Slavery

This act also directed the Governor General-in-Council to adopt measures to mitigate the state of slavery, persisting in India since sultanate Era. The Governor General-in-Council was also directed to pay attention to laws of marriage, rights and authorities of the heads of the families, while drafting any laws.

More Bishops:

The number of British residents was increasing in India. The charter act of 1833 laid down regulation of establishment of Christian establishments in India and the number of Bishops was made 3.

Significance of Charter Act 1833: Analysis

For many reasons, the Charter Act 1833 was a watershed moment for the constitutional and political history of India. *Firstly,* the elevation of Governor General of Bengal as Governor General of India was a major step towards consolidation and centralization of the administration of India. *Secondly,* end of East India Company as a commercial body effectively made it the trustee of the crown in the field of administration. *Thirdly,* this act for the first time made provision to freely admit Indians into

administration in the country. Indians could enter into the civil service but the process was still very difficult. *Fourthly,* this act for the first time separated the legislative functions of the Governor General in Council from the executive functions. Also, the law commission under Lord Macaulay codified the laws.

Charter Act 1833: Was it beginning of Parliamentary System?

The charter act 1833 had for the first time separated the legislative functions of the Governor General in Council from the executive functions Governor General in Council from the executive functions. In effect, as Lord Macaulay viewed it, it was creation of two councils viz. Executive and Legislative, but they were without any clear indication as to the 'partition of power' between them. However, in view of Lord William Bentinck, the Charter Act had not altered the character of the Council. In his view, it was one and same for the executive and legislative purposes; and in that capacity, it was able to make peace and war and do all those functions which were hitherto done without requiring the interference of the same Council in its legislative capacity to give validity to its legislations. We can say that it was the *embryonic stage of India's parliamentary system,* a stage where major organs and structures within the growing body were not differentiated. However, the true beginning of parliamentary system in India happened only after Charter Act of 1853.

Charter Act of 1833: Analysis of the Law Making Power of Governor General

The Charter Act of 1833 created a strong central authority in British India; it marked the culmination of the process begun in 1773 (Regulating Act). The Governor-General of Bengal became the Governor-General of India, but he continued to be Governor of Bengal. His Council was strengthened by the addition of one Member. Under Pitt's India Act (1784) the Governor-General's Council was composed of three 'Ordinary Members' and one 'Extraordinary Member' (the Commander-in-Chief). Under the Charter Act of 1833, the number of 'Ordinary Members' was raised to four, and the Commander-in-Chief remained an 'Extraordinary Member'; it was also provided that the Governor of the Presidency of Madras or Bombay or Agra would act as an 'Extraordinary Member' if the Council assembled within his territorial jurisdiction.

The executive, financial and legislative powers of the Governor-General in Council were strengthened.

The Act made five important provisions in regard to lawmaking.

- *Firstly*, the exclusive power of making laws for the Company's territories in India was vested in the Governor-General in Council subject to the overriding authority of Parliament and the veto of the Council of Directors.
- *Secondly,* as a consequential provision, the Governors in Council of Madras and Bombay were

deprived of the power of making Regulations.

- *Thirdly,* the system of registration and publication of laws in the Supreme Courts was abolished.
- *Fourthly,* a new member was added in the Governor-General's Council called the 'Fourth Ordinary Member', who would be a legal member unencumbered with executive business and engaged solely in the making of laws.
- *Fifthly,* the provisions were made for the appointment of a Law Commission for consolidation and codification of Indian laws.

Taken together, all these provisions make a full fledged legislative reform. The Section 43 of the act empowered the Governor-General in Council "to make laws and regulations for repealing, amending or altering any laws or regulations whatever now in force or hereafter to be in force." However, there were several limitations on the Governor General in Council.

First, the Governor-General in Council would not have the power of 'repealing, modifying or suspending any of the provisions of any act for punishing mutiny and desertion of officers or related to territories or the inhabitants under rule of the company or any prerogative of the Crown. Although the sovereignty of the Crown over the territories of the Company had already been declared unequivocally by the Charter Act of 1813, the charter act 1833 gave extended scope to the statutory restrictions.

Second, Governor-General in Council could not make any law giving power to any court other than Supreme Court without previous sanction of the Court of Directors. It was also not supposed to sentence a European subject of Britain or their children with death.

Third, all laws and regulations made by the Governor General in Council were subject to disallowance by the Court of Directors; but it would no longer be necessary to have them registered or published in 'any court of justice'.

Finally, Parliament reserved its right to control, supersede, repeal or alter any time any law or Regulation whatsoever made by the Governor General in Council.

Subject to all these restrictions, it was provided that all laws and regulations made by the Governor-General in Council shall be of the same force and effect within and throughout the territories as any Act of Parliament would.

In summary, despite the reservation of Parliament's supreme authority and of the right of the Court of Directors to issue directives, the Governor-General in Council were, for all practical purposes, given independent legislative power for the whole of British India. The Supreme Court had lost its share in law-making and the requirement of registration and publication of Regulations in the

Supreme Court was formally abolished.

Charter Act of 1853

Charter Act of 1853 was the last charter act passed for East India Company. It was passed on expiry of charter act of 1833. The charter was renewed but no substantial changes were made. However, this was for the first time, that this charter act, unlike other charter acts, did not fix any limit for the continuance of the administration of the company in India. The act provided that the Indian territories will remain under the Governance of the company, until the parliament otherwise directed.

Reduction in Number of Directors

In England, Charter Act of 1853 reduced the number of Directors of the Company from 24 to 18. Out of these 18, six were to be appointed by the crown.

Separate Governor for Presidency of Bengal

The Charter act of 1853 provided for appointment of a separate Governor for the Presidency of Bengal, distinct from the Governor General. However, the court of Directors and the Board of Control were authorized to appoint a lieutenant governor, till the appointment of a Governor was made. Please note that the Lieutenant governor was appointed in 1854, but no Governor was appointed for Bengal till 1912.

Power to constitute a new Presidency

This act also empowered the Court of Directors either to constitute a new Presidency (In lines of Presidency of Madras or Bombay) or appoint a Lieutenant Governor. No new presidency was constituted but in 1859, a new Lieutenant governor was appointed for Punjab.

Expansion of Governor General's Office

Charter Act of 1853 marks the expansion of the Council of the Governor General for legislative purposes. The fourth member was placed at an equal status with other members. The council of legislative purposes which had 6 members now was expanded to 12 members.

These 12 members were :

1. The Governor General =1
2. The commander in Chief =1
3. Members of the Governor General's Council=4
4. Chief Justice of the Supreme Court (Calcutta)=1
5. A regular judge of the Supreme court Calcutta=1
6. Representative members drawn from the company's servants with 10 years minimum tenure and appointed by the local governments of Bengal, Madras, Bombay and North Western provinces=4

Total =12

Genesis of Indian Civil Services

The previous charter act of 1833 had laid down that the Court of Directors should nominate annually 4 times as many candidates as there were vacancies, from whom one should be selected by competitive examination. The charter act of 1833 also provided the **Haileybury college of London** should make quota to admit the future civil servants. However, this system of an open competition was never effectively operated. A committee under the chairmanship of Lord Macaulay had prepared the regulations in this context. The report said that:

- Haileybury should cease to be maintained as higher education college for the ICS
- There should be a broad general education rather than specialized education for the ICS recruits
- The recruitment should be based upon an open competitive examination to bring out the best candidates and not through mere superficial knowledge
- The appointments should be subject to a period of probation.
- Charter Act of 1853 deprived the Court of Directors of its right of Patronage to Indian appointments and now it was to be exercised under the regulations. This was the Birth of Civil Services which was thrown in 1854 for open competition.

New provinces

By that time, the administrative situation got hard due to annexation of new territories to the company's possession in India. The Charter Act of 1853 empowered the Governor General of India-in Council to take over by proclamation under his immediate authority and management of the territories for the time being. He was authorized to issue necessary orders and directions for its administrations or provide for its administration. This resulted in creation of Assam, the central provinces, and Burma.

Significance of Charter Act 1853

The Charter Act 1853 indicated clearly that the rule of the Company was not going to last a long time. The power and influence of the company were curtailed. British Crown could nominate six Directors. Further, marks the beginning of Parliamentary system in India because of the key feature that Legislative Council was clearly distinguished from the Executive Council. The Governor General was relieved of the administrative duties of Bengal. He was to devote his whole time to work for the Government of India.

Government of India Act, 1858

The Government of India Act 1858, marked the beginning of new chapter in the constitutional

history of India. The Act known as the *Act for the Good Government of India*, provided for liquidation of East India Company, and transferred the powers of government, territories and revenues to the British Crown.

Background

The growing resentment in England against the Company rule reached its climax with the mutiny of 1857. The mutiny was suppressed but it sent ripples of fear to London and convinced the British that administration of the *India must be taken over by the Crown.* The British prime Minister, Palmerstone introduced a Bill in 1858 in the parliament for the transfer of Government of India to the Crown. However, before this bill was to be passed, Palmerstone was forced to resign on another issue. Later, Lord Stanley introduced another bill which was originally titled as "*An Act for the Better Government of India*" and it was passed on August 2, 1858. It is called Government of India Act 1858 or 1858 Act. On September 1, 1858, the court of directors {of East India Company} held its last solemn assembly and the East India Company issued its last instructions to the servants in the East; and offered to its sovereign an empire in these words: "*Let her Majesty appreciate the gift-let her the vast country and teeming millions of India under her direct control, but let her not forget the great corporation from which she has received them, nor the lessons to be learnt from its success*"

Abolition of Company Rule

Government of India Act 1858 provided that India was to be governed directly and in the name of the crown. This act abolished the company rule, abolished the Court of directors and abolished the Board of control. This act abolished the Dual Government introduced by the Pitt's India act. The principle of Doctrine of Lapse was withdrawn, liberty was given to Indian rulers subject to British suzerainty and it also opened some door for Indians in Government services.

Office of Secretary of State for India

The act provided the Crown will govern India directly through a *Secretary of State* for India, who was to exercise the powers which were being enjoyed by the Court of Directors and Board of control. The office of secretary of state was vested with complete authority and control over Indian administration, thus he was now the political head of the India. He was also a member of the British cabinet and was responsible ultimately to the British Parliament.

Lord Stanley was made first Secretary of state for India. He had been earlier the President of the Board of Control.

Fact Box: Secretary of State for India and Burma

The first Secretary of state was Lord Stanley, who prior to 2 August 1858, served as **President** of the Board of Control. The Secretary of State was now the political head

of the India. In 1935, the Government of India Act 1935 provided a new Burma Office, in preparation for the establishment of Burma as a separate colony, but the same Secretary of State headed both Departments and was styled the Secretary of State for India and Burma. The first secretary of state for India and Burma was Lord Dundas. The India Office of the Secretary of State for India and Burma came to an end in 1947, when we got independence and now the Secretary of state of India and Burma was left to be Secretary of Burma. Viscount Ennismore was the first and last Secretary of Burma, as Burma got independence in 1948.

Council of India of Secretary of State

The GOI Act 1858 provided for Council of India of the Secretary of the State. It was to be consisted of 15 members, 7 of them were to be elected by the Court of Directors and the rest of 8 members were to be appointed by the Crown. More than half the members must have lived in India for 10 years and must not have left the country more than ten years before the date of appointment. Each member was to be paid £ 1200 a year out of Indian revenues. Secretary of State of India was empowered to preside at the meetings of the Indian Council. He was to have a vote and also a casting of vote in case of a tie. He was also empowered to send and

receive secret messages and dispatches from Governor General and was not bound to communicate these to the Indian Council.

Centralization

The Government of India act established the control of British Parliament over Indian affairs. The members of Parliament could ask questions from Secretary of State for India regarding Indian administration. The right of appointment to important offices in India was also vested either in the crown or in the secretary of state of India-in-Council. The administration of the country was now highly centralized. There was a provision of creation of an Indian Civil Service under the control of the Secretary of State.

Changes in offices of Governor General and Viceroy

The Secretary of State for India was a cabinet minister in the British Government while his agent in India was the Governor General in India. Thus, Governor General worked as a representative of the British Government much like today's governors work as representatives of the President of India. The Governor-General of India was responsible for administration of the country.

Along with this, a new office of Viceroy was created to work as a diplomat to parley with the princely states.

However, it was provided that the both the offices to be held by same person. The objective of having same person occupy two offices was to avoid any conflict of interest as it used to be between

the Governor General and Chief Justice of Supreme Court of Fort Williams in initial days of East India Company. {Warren Hastings and Lord Impey used to lock horns then}.

Viceroy was made *responsible to Secretary of State for India*. Viceroy was to be a direct representative of the British Crown in India. Lord Canning thus became the first Viceroy of India.

Significance of the Government of India Act, 1858

The Government of India Act 1858 was largely confined to the improvement of the administrative machinery by which the Indian Government was to be supervised and controlled in England. It did not alter in any substantial way the system of government that prevailed in India.

Analysis: GOI Act 1858: A formal than a substantial change?

The Government of India Act 1858 was a formal than substantial change. Crown had already steadily increasing its control over the Company's affairs since the beginning of its territorial sovereignty. The main rules under which India was governed before the passing of the Act of 1958 were already those of the British parliament. The British administrators, including Governor-General, were nominally followed the instructions of the East India Company. In fact they were strictly following the instructions of the British cabinet with its Indian Minister who was the President of the board of Control and through them to Parliament. The various statutes, Charter Acts had already substantially reduced the influence of East India Company.

Indian Council Act 1861

The *Indian Councils Act 1861* was passed by British Parliament on 1st August 1861 to make substantial changes in the composition of the Governor General's council for executive & legislative purposes. The most significant feature of this Act was the association of Indians with the legislation work.

Reasons for Enactment of Indian Councils Act

The Government of India Act 1858 had introduced significant changes in the manner in which India was governed from England, however, it did not alter in any substantial way the system of government that prevailed in India. Further, in the aftermath of the Mutiny of 1857, there was a general perception in England that it would be very difficult to secure the government in India without the cooperation of Indians in administration. These were the main reasons behind enacting some legislation which could overhaul the system of administration in India. Some other reasons were as follows:

Centralized law making was defective

The Charter act of 1833 had centralized the legislative procedures and deprived the governments of Madras and Bombay of their power of legislation. The idea behind centralizing the law making was secure uniformity of laws in the whole territory of East India Company but this system proved to be defective. It had only one representative each of the four provinces and it failed to make laws suiting

to local conditions. Thus, there was need to allow the provinces to make laws for themselves.

Governor General in Council was overburdened

The Governor General in Council was failing in its legislative functions and was not able to work satisfactorily die to cumbersome procedures leading to delay in enactments.

Absence of representation

It also had no representation of the people in it. There was a growing demand that some representative element should be introduced in legislative council.

Key Provisions

Expansion of executive council of Governor General / Viceroy

The executive council of Governor General was added a fifth finance member. For legislative purpose, a provision was made for an addition of 6 to 12 members to the central executive. At least half of the additional members were to be non-officials. These members were nominated by the Viceroy for the period of two years. Further, the Governor General / Viceroy had been given some more powers such as:

- He was authorized to nominate a president to preside over the meetings of the Executive council in his absence.
- He had the power of making rules and regulations for the conduct of business of executive council.
- He could create new provinces for legislative purposes and to appoint Lieutenant Governors for them. He was also empowered to alter, modify or adjust the limits of the provinces.
- He could promulgate ordinances, without the concurrence of the legislative council, during and emergency.
- Though the central council was empowered to legislate on all subjects concerning all persons and courts in British India but every bill passed required the assent of viceroy.
- He could withhold his assent or exercise his veto power if he felt that the bill affected the safety, peace and interest of British India.
- He had to communicate all laws to secretary of state for India who could disallow them with the assent of the crown.

Introduction of Portfolio System

The Act empowered the Governor-General to delegate special task to individual members of the Executive council and hence all members have their own portfolio and death with their own initiative with all but the most important matters. This was the first beginning of Portfolio system in India.

Process of Decentralization

The Governments of Bombay and Madras were given the power of nominating Advocate-General

and not less than 4 and not more than 8 additional members of the Executive council for purpose of legislation. These additional members were to hold office for two years. The consent of the Governor and the Governor-General was made necessary for all legislation passed or amended by the Governments of Madras and Bombay. Further, the act provided for the establishment of new legislative councils for Bengal, North-Western Frontier Province and Punjab, which were established in 1862, 1866, and 1897 respectively.

No distinction between Central and Provincial subjects

No distinction was made between the central and provincial subject. But measures concerning public debt, finances, currency, post-office, telegraph, religion, patents and copyrights were to be ordinarily considered by the Central Government.

Critical Examination of the Indian Councils Act 1861

The Act of 1861 was important in the constitutional history because it enabled the Governor-General to associate the people of the land with work of legislation. And by vesting legislative powers in the Governments of Bombay and Madras which ultimately culminated in grant of almost complete internal autonomy to the provinces in the 1937.

However, the legislative councils were merely talk shops with no power to criticize the administration or ask for some information. Their scope was fixed in legislation purpose alone; they had no right to move some kind of vote of no confidence. Further, there was no statutory / specific provision for the nomination of Indians.

This nomination power of the Viceroy could be used only to placate the princes who could help the British to keep their stronghold. Further, the ordinance making power of the Governor General allowed him to make laws it his own whim. In summary, the Indian Councils Act 1861 failed to satisfy the aspirations of the people of India.

Indian Council Act 1892

Indian Councils Act 1892 was passed by the British Parliament to increase in the size of the legislative councils. This act marks the beginning of representative form of Government in India.

Background

Indians were gradually becoming aware of their rights with the growth of nationalism. Indian National Congress had adopted some resolutions in its sessions in 1885 and 1889 and put its demand. The major demands placed were as follows:

- A simultaneous examination of ICS to be held in England and India
- Reforms of the legislative council and adoption of the principle of election in place of nomination
- Opposition to the annexation of Upper Burma

- Reduction in the Military expenditure.

The second demand mentioned above reflected the dissatisfaction of the Indians over the existing system of governance. The Indian leaders wanted admission of a considerable number of the elected members. They also wanted a right to discussion on budget matters. Viceroy Lord Dufferin set up a committee. The committee was given the responsibility to draw a plan for the enlargement of the provincial councils and enhancement of their status. The plan was drawn, but when it was referred to the Secretary of State for India, he did not agree to introduction of the Principle of direct election. However, principle of representation by way of indirect election was accepted with some limitations.

Salient Provisions

- The act provided for additional members in the central as well as provincial legislative councils.
    - Central Legislative Council → minimum 10, maximum 16
    - Bombay → 8
    - Madras → 20
    - Bengal → 20
    - North Western province →15
    - Oudh →15

- The powers of the legislative councils was increased. The members could not discuss the budget without right to vote on it. They were also not allowed to ask supplementary questions.
- They could ask questions on domestic matters with prior permission of the Governor General. They were also allowed to ask questions on public interest.
- The Governor General in Council was empowered to make rules for nomination of the members subject to approval of Secretary of State for India.
- A system of indirect elections was introduced to elect the members of the councils. The universities, district board, municipalities, zamindars and chambers of commerce were empowered to recommend members to provincial councils.
- Functions of the provincial legislative councils were enlarged and they were empowered to make new laws or repeal the old ones with the prior permission of Governor General.
- Governor General was empowered to fill the seat in the case of Central legislative and by the Governor in the case of provincial legislature.

Critical Appraisal of the Act

The act of 1892 can be said to be a first step towards the beginning of the representative government in India. However such representation was via only indirect elections and there was nothing for a

common Indian. The system of indirect election prevented direct contact between the public and the representatives. In many ways, this act also served as a reason behind rise of militant nationalism in coming times. The Congress policy of petition, prayer and protest was seen as a weakness by the British Government. This was evident from the following note by BG Tilak: *".....political rights will have to be fought for. The moderates think that these can be won by persuasion. We Think that they can only be obtained by strong Pressure..."*

Never the less, the act at least provided the Indians an opportunity to share councils at the highest levels and thus laid down the foundations of the representative government. The number of Indians was increased in the legislative councils. The Act was an important milestone that led to the establishment of parliamentary government at a larger stage.

Indian Council Act 1909

The *Indian Councils Act 1909* or *Morley-Minto Reforms* or *Minto-Morley Reforms* was passed by British Parliament in 1909 in an attempt to widen the scope of legislative councils, placate the demands of moderates in Indian National Congress and to increase the participation of Indians the governance. This act got royal assent on 25 May 1909.

Background

Though the Indian Councils Act of 1892 had introduced limited representation with indirect elections, it failed to placate the Indians who were much more conscious of their rights by now. There was a lot of resentment against reign of Lord Curzon, who had already irked the public by the foolish idea of partition of Bengal. There was a rise of extremism in the congress. Government, on one hand wanted to suppress the extremists but on other hand wanted to pacify the moderates. Meanwhile, Gopal Krishna Gokhale went to England and met Mr. Morley, the Secretary of State for India. Viceroy Lord Minto also emphasised the need of making some reforms. Both the Viceroy and the Secretary of State for India decided to work out some scheme to reform the Legislative councils. This culminated as Indian Councils act 1909. The idea was to give locals some more power in the legislative affairs. A provision was made for the expansion of legislative councils at the both the levels viz. central as well as provincial.

Salient Provisions

Expansion of the Legislative Councils

The act enlarged the size of the legislative council both Central and Provincial. The number of members in the Central Legislative Council was raised from 16 to 60. The number in Provincial legislative council was not uniform. Legislative councils of Bengal , Bombay and Madras was increased to 50 members each. The provincial legislature of U.P. was to have 50, of Assam, Burma and Punjab 30 each.

Communal Representation

For the first time, the Indian Councils act gave recognition to elective principle for the appointment of nonofficial members to the councils. However, it introduced separate and discriminatory electorate. The electorate was decided on the basis of class & community. For the provincial councils a provision of three categories was made viz. general, special and chambers of commerce. However, for the central council, a fourth category Muslims was added. This was for the first time that, the seats in the legislative bodies were reserved on the basis of religion for Muslims. Separate constituencies were marked for the Muslims and only Muslim community members were given the right to elect their representatives.

The separate electorate for Muslims had a long lasting impact on India's polity. It recognized the Muslim community as a separate section of the India and triggered the cancer of Hindu-Muslim disharmony which ultimately culminated in the partition.

Under the separate electorates, Muslims could vote exclusively for the Muslim candidates in constituencies specially reserved for them. The idea was to establish that the political, economic and cultural interests of the Hindus and Muslims were distinct. The unity between Hindus and Muslims is a illusion and this act sowed the seeds of the Muslim Communism.

Other Features

- The act empowered the members to discuss the budget and move resolutions before it was approved finally. They were given rights to ask supplementary questions and move resolutions to on matters related toloans to the local bodies.
- The members given right to discuss matters of the public interest however, the house was not binding on the government.Rules were also framed under the act for the discussion of matters of general public interest in the legislative councils.
- No discussion was permitted on any subject not within legislative competence of the particular legislature any matter affecting the relations of the Government of India with a foreign power or a native state, and any matter under adjudication by a court of law.

Critical Analysis of the Act

The Minto-Morley Reforms of 19O9 could not come up to the expectations of the Indians. What the people of India demanded was that there should be set up a responsible government in the country. But the sacred heart of the reforms of 1909 was "benevolent despotism" and it was basically a subtle attempt to create a "constitutional autocracy".

Further, though non-official majority was given in the Provincial Councils, the practical result was nothing. The non-official majority was nullified by the fact that it included nominated members. There was no real majority of those who represented the people.

A shadow rather than substance

The *reforms of 1909 afforded no answer and could afford no answer to the Indian political problem.* The real political solution was lying in complete self-rule and accountable governance but the 1909 Act was only a face saving device. The position of the Governor- General remained unchanged and his veto power remained undiluted and the Act was successfully maintained relentless constitutional autocracy. Under such circumstances narrow franchises, indirect elections, limited powers of the Legislative Councils ushered a complete irresponsible government. The Act rather added new political problem with the introduction of the separate electorate system. While the parliamentary forms were introduced, no responsibility was conceded. At the same time there were no connection between the supposed primary voter and a man who sits as his representative on the Legislative Council. In such a situation, the political participation, awareness and education remained a distant dream. In nutshell, it can be said that 1909 Act was '*the shadow rather than the substance'.*

Merits of Minto-Morley Reforms

Nevertheless, the *Minto-Morley Reforms* had some of their merits. They mark an important stage in the growth of representative institution, and one step ahead towards the responsible association of elected Indians with the administration. Further, it also gave recognition to the *elective principle as the basis of the composition of legislative council* for the first time. It gave some further avenues to Indians to ventilate their grievances. They also got opportunity to criticise the executives and make suggestions for better administration. The enlargement of the legislatures furthered the demand of complete indianization of the legislature.

Government Of India Act 1919

Government of India Act 1919 was passed by British Parliament to further expand the participation of Indians in the Government of India. Since the act embodied reforms as recommended by a report of Edwin Montagu {Secretary of State for India} and Lord Chelmsford {Viceroy and Governor General}, it is also called as *Montague-Chelmsford Reforms* or simply *Mont-Ford Reforms.* The most notable feature of the act was "end of benevolent despotism" and introduction of responsible government in India. This act covered 10 years from 1919 to 1929.

Background

Edwin Samuel Montagu had remained the Secretary of State for India between 1917 and 1922. He was a critic of the entire system by which India was administered. On 20 August 1917, he made a historic declaration in the House of Commons in British Parliament which is called "Montague declaration". The theme of this declaration was increasing association of Indians in every branch of administration and gradual development of self governing institutions and responsible government

in India.

In November 1917, Montague had visited India to ascertain views from all sections of polity including talks with Gandhi and Jinnah. A detailed report on Constitutional Reforms in India {Mont-Ford Report} was published on 8th July, 1918. This report became the basis of Government of India Act 1919. Key features of this report were as follows:

- Increasing association of Indians in every branch of administration.
- Gradual development of self governing institutions with a view to the progressive realisation of responsible government in India as an integral part of the British empire.
- Progress towards responsible government in successive stages.

Preamble

The Government of India Act 1919 had a separate Preamble. Key points of the preamble were as follows:

- India to remain as an integral part of British Empire.
- Gradual decentralization of authority with loosening the supreme hold of the central government. Thus, the preamble of this act suggested for a decentralized unitary form of government.

- The time and manner towards goal of responsible government will be decided by the British Parliament.
- Partial responsibility in provinces, but no change in character of the central government.

Introduction of Dyarchy: Reserved and Transferred Subjects

In Government of India Act 1919 the spheres of the central and provincial governments were demarcated by a division of subjects into "central" and "provincial". Generally speaking, the central subjects included all subjects directly administered by the Government of India or in which extra-provincial interests were dominant. The provincial subjects included subjects in which the interests of the provinces essentially predominated.

The Dyarchy was for the Provincial Governments. The provincial subjects were divided into two categories viz. reserved and transferred. The reserved subjects were kept with the **Governor** and transferred subjects were kept with **Governor acting with the Indian Ministers.**

Element of Responsibility in Dyarchy

Dyarchy was a gradual transition from irresponsible to responsible government. The provinces were thought to be suitable for experimenting with such scheme. Thus, the provincial subjects were divided into reserved and transferred subjects. The elements of responsibility was as follows:

- The members in control of the reserved subjects were made responsible to British parliament through secretary of state.

- The ministers who controlled the transferred subjects were made responsible through the legislative councils to an Indian electorate.

While subjects such as Land revenue administration, famine relief, irrigation, administration of justice, law and order, newspapers, borrowing, forests etc. were kept in reserved list; the subjects such as education, public health & sanitation, public works, agriculture, fisheries, religious endowments, local self governments, medical services etc. were kept in transferred list.

In other words, the subjects which were considered of key importance for the welfare of the masses and for maintaining peace and order in the state were classified as reserved, while subjects in which there was more local interest were treated as transferred.

Changes in Secretary of State for India

No substantial changes were made in the office of Secretary of State for ZIndia. However, his salary was made a charged expenditure on British revenue this time. Further, the legislative council got the opportunity to criticise him at the time of budget.

Changes in Indian Council

The Indian Council was to be made of not less than 8 and not more than 12 members. Half of the members should have 10 years standing in the Indian public service. Further, their tenure was reduced from seven to five years; and salary was increased from £1000 to £1200. Also the number of Indians on the council was increased from two to three.

Governor General's Executive Council

A provision was made for inclusion of three Indians in the six member Council of the Governor General. The advocates of Indian high Courts of less than 10 years standing were eligible to be appointed as Law Minister in the Council. The Indian Councillors were entrusted with only some unimportant departments.

Central Legislature

Via the Government of India Act 1919, a bicameral legislature was set up at centre with two houses viz. Legislative Assembly and Council of State. This was a primitive model of India's Lok Sabha and Rajya Sabha.

Legislative Assembly

Legislative Assembly was the lower house with *three years* as its tenure. It was made of 145 members of which 41 were nominated and 104 were elected. The 41 nominated members included 26 officials and 15 non-officials. Governor General was authorised to make nominations from Anglo Indians, Indian Christians and Labour to the legislative assembly to safeguard their interests.

The elected members included 52 General Members, 30 Muslims, 9 Europeans, 7 Landlords, 4 Representatives of India Community and 2 Sikhs. This means that the distribution of the seats was

not based on population but importance in the eyes of the government.

Council of State

The Council of state of upper house had 60 members of which 33 were elected while 27 were nominated. Out of the 33 elected members, 16 were general, 11 Muslims, 3 Europeans and 1 Sikh. Out of 27 nominated members, 17 were officials and 10 were non-officials. The tenure of Council of State was five years.

Powers of the Assembly and Council

The Legislative Assembly and Council of State enjoyed similar and concurrent powers *except in matters of finance*. A bill needed to be passed on both the houses before becoming a law. The budget was presented in both the houses in same day, however, all other money bills were first introduced in lower house and then in upper house. Voting on grants could take place only in legislative assembly. Further, if a money bill was passed by assembly but rejected or returned by the assembly with some amendments, the amendment were not acceptable to the assembly until so certified by the Governor General.

Financial Powers

The act separated, for the first time, provincial budgets from the Central budget and authorised the provincial legislatures to enact their budgets. But the financial powers of the central legislature were also very much limited. The budget was to be divided into two categories, votable and non-votable. The votable items covered only one third of the total expenditure. Even in this sphere the Governor-General was empowered to restore any grant refused or reduced by the legislature, if in his opinion the demand was essential for the discharge of his responsibilities.

Conflict between Legislative Assembly and Council

There were three instruments to resolve the deadlock between the two houses. These instruments were: Joint Committees, Joint Conferences and Joint Sittings. Joint committees meant to avoid the possibility of deadlock. Joint Conferences meant to solve the differences by agreeing to a conference of equal number of representatives of both the houses and Joint Sittings was *convened by the Governor as a last resort* within six months of the difference.

Elections and Franchise

Under the Government of India Act 1919, the franchise was restricted. There was no universal franchise, no adult suffrage and no voting powers for women. The qualifications for voting were as follows:

- They should have a property with rental value, taxable income or paid land revenue of at least Rs. 3000 in a year.
- They must have past experience in the legislative council.

- They must have membership of university senate.
- They should hold certain offices in local bodies.
- They should have some specified titles.

The above qualifications were so much restrictive that there were only 1700 voters for election of 33 members.

Powers of the Governor General

No bill of the legislature could be deemed to have been passed unless assented to by the governor general. However, the later could enact a Bill without the assent of the legislature. He possessed the power to prevent the consideration of a Bill or any of its part, on the plea that it was injurious to the peace and tranquillity of the country. He could disallow a question in the legislature. He had the power to withhold his assent to any bill passed by the legislature without which it could not become an Act. He also had the power to disallow an adjournment motion or debate on any matter. He could enact a law, which he considered essential for the safety and tranquility of the empire even if the legislature had refused to pass it.

Other Important Provisions

- The act provided for the establishment of a Public Service Commission in India for the first time.

- This act also made a provision in its part V, that a statutory commission would be set up at the end of 10 years after the act was passed which shall inquire into the working into the system of the government. The Simon commission of 1927 was an outcome of this provision.
- The communal representation was extended and Sikhs, Europeans and Anglo Indians were included. TheFranchise (Right of voting) was granted to the limited number of only those who paid certain minimum "Tax" to the government.

Critical Assessment

The above description makes it clear that the Government of India Act provided for partial transfer of Power to the electorate through the system of Dyarchy. It also prepared the ground for the Indian Federalism, as it identified the provinces as units of fiscal and general administration. But the growing nationalism was not satisfied. The Act of 1919 had three major defects from the nationalist point of view: (a) absence of responsible government at the center, (b) separate electorates for different communities. Although the Mont-ford Report had declared that the separate electorate was a very serious hindrance to the development of the self-governing principles, yet separate electorate came to be significant feature of the Indian political life. The introduction of diarchy in the province was too complicated to be smoothly worked.

Analysis: Merits (despite limitations) of GOI Act 1919

Despite of several limitations, the GOI Act 1919 had some merits. The GOI act 1919 marked the end of the policy of benevolent despotism, and thus began the genesis of the responsible government in India. It was for the first time, that elections to the legislatures were known to the people and this created political consciousness among the masses. However, those people who had a property, taxable income & paid land revenue of Rs. 3000 were entitled to vote. The number of the Indian in the was raised to 3 in the Governor General in Council of 8. These Indian members were entrusted to some portfolios such as labor, health and industry.

It was the GOI Act 1919, whereby, the Indians came in direct contact with administration for the first time. This was a very useful experience. It was also for the first time that a number of Indian women got the right to franchise for the first time.

Now, under the Indian ministers , some of the far reaching measures were taken such as enactment of Madras State Aid to Industries Act, 1923, the Bombay Primary Education act, the Bihar and Orissa village administration Act, the Bombay local boards act, 1923, etc.

Government of India Act 1935

Government of India Act 1935 was passed by British Parliament in August 1935. With 321 sections and 10 schedules, this was the longest act passed by British Parliament so far and was later split into two parts viz. Government of India Act 1935 and Government of Burma Act 1935.

The Government of India Act 1935 derived material from four key sources viz. Report of the Simon Commission, discussions at the Third Round Table Conference, the White Paper of 1933 and the reports of the Joint select committees. This act ended the system of dyarchy introduced by GOI Act 1919 and provided for establishment of a **Federation of India** to be made up of provinces of British India and some or all of the Princely states. However, the federation never came into being as the required number of princely states did not join it.

Salient Features

Salient Features of the Government of India Act 1935 were as follows:

- Abolition of provincial dyarchy and introduction of dyarchy at centre.
- Abolition of Indian Council and introduction of an advisory body in its place.
- Provision for an All India Federation with British India territories and princely states.
- Elaborate safeguards and protective instruments for minorities.
- Supremacy of British Parliament.
- Increase in size of legislatures, extension of franchise, division of subjects into three lists and retention of communal electorate.

- Separation of Burma from India

All India Federation

The proposed all India federation included 11 provinces of British India, 6 Chief Commissioners Provinces and those princely states who might accede to the federation. For princely states, the accession to the Federation was voluntary. The federation could not be established until:

- A number of states, the rulers whereof were entitled to choose not less than half of the 104 seats of the council of state , and
- The aggregate population whereof amounted to be at least one half of the total population of all the Indian stales had acceded to the federation.

The term on which a state joined the Federation were to be laid down in the Instrument of Accession. Joining the federation was compulsory for the British Provinces and chief commissioners provinces.

Dyarchy at Centre

Under this act, the executive authority of the centre was vested in the Governor General on behalf of the Crown. The federal subjects were divided into two fold categories of *Reserved* and *Transferred* subjects. The Reserved list comprised of subjects such as administration of defence, external affairs, ecclesiastical affairs and matters related to tribal areas. These subjects were to administered by Governor General in his discretion with the help of three counsellors appointed by him. *They were not responsible to legislative*.

The administration of the transferred subjects was to be done by Governor General on advice of the Council of Ministers whose number could not exceed 10. The council of ministers had to command the confidence of legislature. However, the Governor General could act on contrary to the advice of the Council of Ministers if any of his 'special responsibilities' was involved in such act. However, in that case {when an act involved special responsibilities}, the Governor General would work under the control and direction of the Secretary of State.

Further, the Governor General was also responsible for the coordination of work between the two wings and for encouraging joint deliberations between the counsellors and the ministers.

Federal Legislature

The bicameral federal legislature would be consisted of two houses viz. Council of states and Federal Assembly.

Council of States

The Council of States was to be upper house and a permanent body with one third of its membership retiring every 3rd year. It was to be composed of 260 members of which 156 were to be representatives of British India while 101 of the Indian states.

Representatives of British India

The 150 out of 156 representatives of British India were to be elected on communal basis while six were to be nominated by Governor General from amongst women, minorities and depressed classes. Further, the seats which were reserved for Hindus, Muslims and Sikhs had to be filled via direct election while those reserved for Europeans, Anglo-Indians, Indian Christians and Depressed Classes were to be filled by Indirect election.

Representatives of Princely states

The distribution of the seats among states was on their relative importance and not population. The representatives of the princely states would be nominated by rulers.

Federal Assembly

The Federal Assembly was the lower house with a tenure of five years. It was to be made of 375 members who which 250 representatives of British India and not more than 125 members from princely states. While the seats reserved for princely states were to be filled by nominated members, the provinces were given different numbers of seats. Election to the Federal assembly was to be indirect. The term of the assembly was five years but it could be dissolved earlier also.

Provincial Autonomy

The most remarkable feature of the Act was the provincial autonomy. With the abolition of Dyarchy at provinces, the entire provincial administration was instructed to the responsible ministers who were controlled and removed by the provincial legislatures.

The provincial autonomy means two things. First, the Provincial Governments were wholly, responsible to the provincial legislatures and secondly, provinces, were free from outside control and interference in a large number of matters. Thus, in the provincial sphere, the Act of 1935 made a fundamental departure from the act of 1919.

The act divided the powers between the Centre and provinces in terms of three list-Federal List (for Centre, with 59 items), Provincial List (for Provinces, with 54 items), and Concurrent list (for both, with 36 items). Residuary powers were given to the Viceroy.

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

Safeguards and Reservations

A controversial feature of the Government of India Act, 1935 was the safeguards and reservations provided in the Act, would serve as checks and limitations on such undesirable tendencies which might lead to the failure of the responsible government in India. A plea was given that those safeguards and reservations were necessary for the interests of the country. They were imposed

either on the exercise of powers by the Government of India on of the states.

Establishment of Federal Court

The Government of India Act, 1935 provided for the establishment of Federal Court to interpret the Act and adjudicate disputes relating to the federal matters. It provided that the Federal Courts should consist of one Chief justice and not more than six judges.

The Federal Court was given exclusive original jurisdiction to decide disputes between the Centre and constituent Units. The provision was made for filing of appeals from High Courts to the Federal Court and from Federal Court to the Privy Council. The Federal Court also had jurisdiction to grant Special Leave to Appeal and for such appeals a certificate of the High Court was essential.

Factbox: Abolition of Privy Council

We note here that India retained the right of appeal from the Federal Court to the Privy Council even after the establishment of the Dominion of India. Then, the Federal Court Enlargement of Jurisdiction Act, 1948 was passed. This Act enlarged the appellate jurisdiction of Federal Court and also abolished the old system of filing direct appeals from the High Court to the Privy Council. Finally in 1949, the Abolition of Privy Council Jurisdiction Act was passed by the Indian Government. This Act accordingly abolished the jurisdiction of Privy Council to entertain new appeals and petitions as well as to dispose of any pending appeals and petitions. It also provided for transfer of all cases filed before Privy Council to the Federal Court in India. All powers of the Privy Council regarding appeals from the High Court were conferred to the Federal Court. Thereafter with the commencement of the Constitution of India in 1950, the Supreme Court has been established and is serving as the Apex Court for all purposes in India. It hears appeals from all the High Courts and Subordinate Courts. With this the appellate jurisdiction of the Privy Council finally came to an end.

Abolition of Indian Council

It abolished the council of India, established by the Government of India Act of 1858. The secretary of state for India was provided with a team of advisors in its place.

Extension of Franchise

The act extended the franchise. This act introduced for the first time the direct elections. About 10% of the total population got the voting rights.

Federal Railway Authority

The GOI act 1935 vested the control of Railway in a new authority called Federal Railway Authority, which had seven members and was free from control of ministers and councillors. The members of this authority reported directly to Governor General. The idea was to assure the British Stakeholders

of the railways that their investment was safe.

Reorganization of the provinces

The partial reorganization of the provinces included separation of Sind from Bombay, Splitting Bihar and Orissa into separate provinces, Complete separation of Burma from India, detachment of Aden from India and establishing as a separate colony.

Separation of Burma

The Government of India Act 1935 contemplated the Federation of the British Indian Provinces and Indian States. But for Burma, there was a separate set of Events. Burma was proposed to be separated in pursuance of the recommendation of the Indian Statutory (Simon Commission) whose proposal was accepted in principle by the Government. Consequently a Burma Round Table Conference was held in London in 1932. In 1935, Burma Act was passed and separation of Burma actually took place in 1937. The Government of India Act 1935 also provided a new Burma Office, in preparation for the establishment of Burma as a separate colony, but the same Secretary of State headed both Departments and was styled the Secretary of State for India and Burma. The first secretary of state for India and Burma was Lord Dundas.

Implications of the GOI Act 1935

The proposal for setting up of the Federation of India did not materialize because the act proposed that federation could come into existence only if as many princely states (which had been given option to join or not to join) were entitled to one half of the states seats in the upper house of the federal legislature. Due to this, Central Government in India continued to be governed by the provision of the Act of 1919. However, some parts of the GOI Act 1935 came into force for example : the Federal Bank (The Reserve Bank of India) and the Federal Court were established in 1935 and 1937 respectively. The other parts of the Act, particularly provincial Autonomy, came into force on 1st April 1937. The first elections under the Act were also held in 1937.

What happened to Dominion status?

The Simon commission had promised 'Dominion Status' for India in 1929 , but the Government of India Act did not confer it. This act by providing separate electorates for Hindus, Muslims, Sikhs, Europeans, Anglo Indians, Indian Christians etc. proved to be further an instrument of disintegrating India. It was over obstructing and Nehru called it "all breaks, no engine".

Analysis: The Policy of Equal Federation

The Government of India Act of 1935 provided a scheme of federation in which the princely states were to be brought into a direct constitutional relationship with British India. Under the Act, States were to send representatives to the Federal Legislative. They would be nominees of the rulers of these states and not democratically elected representatives of the people. These representatives were

one third of total number of Federal Legislatures. The Federation of India was to come into existence only when rulers of states representing not less than one-half of the total population of the state and entitled to not less than half of seat allotted to the states in the upper house of the Federal Legislature agreed to join the Federation.

The question is – *what were motive behind the policy of equal federation? Was it the last attempt to use the Princely states as the 'Breakwaters in the Storm'?*

The purpose of the policy of equal Federation towards Indian states was to have the help of Princely States to reduce the influence of National movement. The rulers of the Native States were bound to be very loyal to their British connection. It was why in the scheme of federation, these rulers were to select the representatives of the states. It was considered that it would be difficult for a general rebellion against the British to sweep India because of this network of powerful loyal native states. In this phase, the people of the Princely States had awaken for civil liberties and responsible government. But the British wanted the help of Princely States to maintain their power.

In this way, the presence of the rulers in the Central Legislature was matter of vital interest for British rulers in India as they mostly relied upon this reactionary element to keep down, at least moderate, the democratic element in British India. The British Government undoubtedly devised the federation in the hope that the mutual jealousies and rivalries between the Congress, the Muslim League, and the Rulers of States would enable them to retain the real authority by playing off one against the other. They could therefore never think of introducing Responsible Government in the centre, even in a modified or diluted form, without roping in the rulers within the Federation. The Rulers feared that their own subjects would demand similar reforms, and such demands would be hard to resist once the States formed a part of the Federation of India. The Rulers of the States felt that with the introduction of new Constitution in the Provinces, the contrast between the forms of Government in British India and those in States would be more and more glaring.

Indian Independence Act 1947

On the basis of Mountbatten Plan, the British government was anxious to transfer power. The Indian Independence Bill was introduced in British Parliament on July 4 1947. The Act did not provide for any new Constitution of India. The Act provided for partition of India and the establishment of the two Dominion (India and Pakistan).

The formal transfer of power into Indian hands was affected by the Indian independence Act. The Bill was introduced on the House of Commons and within a short span of a fortnight it was passed by both the Houses of the British Parliament. Lord Mountbatten, the viceroy of India, put forth the partition plan, known as the Mountbatten Plan. The plan was accepted by the Congress and Muslim

League. Immediate effect was given to the plan by enacting the Indian Independence Act.

Provisions of the Act

The main provisions of the Act were as follows –

- The act provided for the end of the British Rule in India on 15 August 1947 and the establishment of two Dominions of India and Pakistan. The two Dominions were given the right to secede from the British Commonwealth.
- The Act abolished the office of the secretary of State for India and transferred his functions to the secretary of state for commonwealth Affairs.
- It provided for the appointment of the Governor-General in each of the Dominions. The Governor-General was to be appointed by the British King on the advice of the cabinet of the concerned Dominion.
- Governor-General and the Governors of the provinces were expected to Act on the advice of the ministers in all matters, including those matters where they could exercise their special and discretionary powers. Thus they were reduced to the position of constitutional heads.
- The Act deprived the Monarch of the right to Veto laws or to ask for reservation of certain laws for his approval. However, this right was reserved for the Governor-General.
- The British king was to drop the title of the Emperor of India.
- With the creation of the Dominions of India and Pakistan the appointment of civil services and reservations of seats by the secretary of state was discontinued.
- The British Government was to transfer all the powers to the Constituent Assemblies of the two Dominions. No Act of the British parliament could be extended to any Dominion unless it was adopted by the Legislature of the respective Country as part of its laws.
- Till a new constitution was framed by each Dominion, all the provinces were to be administered in accordance with the provisions of the Government of India Act 1935.
- The severity of the crown over the Indian states as well as regard to the tribal areas came to an end with effect from 15 August 1947.

Significance

The enactment of the Indian independence Act 1947 was an event of great constitutional significance. As Attlee put it was “the fulfilment of the British mission” in India, the “Culminating point in a long course of events”. Similarly Lord Samuel described the Act, in the House of Lords, as “a treaty of peace without war”. Even the Indian leaders hailed the enactment of this Act. For example Dr. Rajendra Prasad said the period of domination of British over India ends today and our own relationship with Britain is henceforth going to rest on a basis of equality, or mutual good will and mutual profit.

The Act market the beginning of a new era of free India but a sizeable population of people and leaders were unhappy with this. As Maulana Abul Kalam Azad had observed 'the 14th August was for the Muslims of Pakistan a day of rejoicing. For the Hindus and Sikhs it was a day of mourning. Again the termination of the British Paramouncy over the Indian States and the conceding of right to accede to their Dominion or remain independent, posed a serious threat to the unity of the Country.

Despite these defects, it cannot be denied that the Indian Independence Act of 1947 closed the chapter of British rule In India and ushered the dawn of a free India.

Evolution of Central Legislature in Numbers

The early charters of the British East India Company have now lost. For the first time, the charter of 1726 empowered the government in Council and three Presidencies to make laws, ordinance and regulations in their jurisdictions. Each presidency was virtually independent of each other and only responsible to court of directors in England. Regulating Act 1773 marked *beginning of Parliamentary control over East India Company*. This act made it clear that the administration of Indian territories was not a personal affair of the company and that the British Parliament had every right to pass laws and instructions in that regard. This act started the process of territorial integration and administrative centralization in East India Company. The act provided for four members of the Governor General's Council to do all functions i.e. executive, legislative and judicial. There was inadequate coordination between the legislative policies of all the presidencies and the legislative power of presidency government was inadequate. Various Acts that followed increased the number of the members. The below list shows how the Central legislature in India grew in numbers from a 4 member Governor General's Council to a current parliament with maximum strength of 802 members.

- Regulating Act 1773 → 4 members in Governor General's Council
- Pitts India Act 1784 → 3 members in Governor General's Council
- Charter Act 1833 → Total 4 Members
    - 3 members in Governor General's Council
    - 1 Law member
- Charter Act of 1853 → Total 10 members
    - 4 members in Governor General's Council
    - 1 Chief Justice
    - 1 Judge of Supreme Court
    - 4 representatives of Bengal, Madras, Bombay and North West Provinces
- Indian Councils Act 1861 → Max 17 Members

- 5 members in Governor General's Council
- 12 additional members (max-12, minimum-6)

- Indian Councils Act 1892 → Max 22 members
  - 6 members in Governor General's Council
  - max 16 additional members
- Indian Councils Act 1909 → Max 69 Members
  - 9 members in Governor's Council
  - 60 Additional Members
- Government of India Act 1919 → Bicameral Legislature with 205 members
  - 60 members in Council of State
  - 145 Members in Central Legislative Assembly
- Government of India Act 1935 → Total 635 members
  - 260 members in Council of State
  - 375 Members in Federal Assembly
- Constitution of India Act (Current strength) → Total 802 MPs
  - 250 members (maximum sanctioned strength) in Rajya Sabha
  - 552 members (maximum sanctioned strength) in Lok Sabha

Evolution of Judiciary in India

India has a single unified and integrated judicial system and Supreme Court of India is at the apex court of the Indian judicial system. Judiciary plays an important role as an organ of the government. It settles disputes, interprets laws, protects fundamental rights and acts as guardian of the Constitution.

During ancient times, the concept of justice was inextricably linked with religion and was embedded in the ascriptive norms of socially stratified caste groups. Most of the Kings' courts dispensed justice according to 'dharma', a set of eternal laws rested upon the individual duty to be performed in four stages of life (ashrama) and status of the individual according to his status (varna). In medieval times, the dictum *'King can do no wrong'* was applied and the King arrogated to himself an important role in administering justice. He became the apostle of justice and so the highest judge in the kingdom. With the advent of the British colonial administration, India witnessed a judicial system introduced on the basis of Anglo-Saxon jurisprudence.

Mayor's Courts

The story of India's modern judiciary begins with the Mayor's courts. Under the Royal Charter of 1661, the Governor-in-Council of each Presidency {That time they had two presidencies viz. Madras

and Surat} were empowered *'to judge all persons belonging to the said presidency or that shall live under them in all causes, whether civil or criminal, according to the laws of this Kingdom and to execute judgement accordingly'*. This power was not exercised for at least two decades at Madras. In 1678, the Governor-in-Council decided that they should have two sittings per week to hear and judge all cases concerning Europeans and Indians as per the according to English Law. Meanwhile in 1687, another charter authorized the company to establish municipality at Madras to mark the beginning of territorial character of Company's rule in Madras.

In exercise of this power, the company established a municipality. The Mayor and Aldermen were recognized as a "Court of Record" with power to try the civil and criminal cases in their territories. The Mayor and three of the twelve Aldermen were so called to be the "Justices of the Peace". Similar courts were established in successive presidencies at Bombay and Calcutta.

Under the Charter of 1726, a Mayor's court was established at each presidency town viz. Madras, Bombay and Calcutta. The difference between the old courts and this new court was that the earlier Mayor's courts were of the Company but the newer courts were of the King of England. The terms in the charter made is implicit that English Law had to be applied in the Mayor's Courts in India.

However, meanwhile French occupied Madras and this system remained suspended till 1749 when French surrendered Madras back. The Charter of 1753 was passed later to remove the difficulties of previous charter including the courts. Under the new charter, the Mayor's courts were put under the Governor-in-council to avoid disputes between the two. However, still judiciary suffered from lack of legal knowledge, overburdened executive, failure of impartial judgment, lack of local judges etc.

Supreme Court at Calcutta

Regulating Act of 1773 established for the first time the Supreme Court of Fort Williams in Calcutta in 1774, consisting of the Chief Justice and three judges (later reduced to two) appointed by the Crown acting as King's court. Thus, establishment of this Supreme Court was *'an act of reformation rather than of innovation'*, for it was intended 'in fact to occupy the position of the Mayor's Court founded in 1727 (under the Charter of 1726). This court was adorned with powers such as power to punish for its contempt, power to try civil & criminal cases, ecclesiastical and admiralty jurisdiction etc. Appeals against this court could be taken to King-in-Council.

Sir Elijah Imphey was appointed as chief justice of this court.

Conflict between legislative and executive

The ambiguities of the Regulating Act 1773 led to frequent spats between the Supreme Court and the Governor General in Council. In 1781, this was remedied by substantially curtailing the powers of the Supreme Court in favour of the Governor-in-council. However, an attempt was made to

separate the judicial meetings of the council with its executive meetings.

Recorder's Courts

Due to increased activities of the Company, the need was felt to establish new courts. On February 1, 1798, the King issued another charter to establish two Recorder's Courts at Madras and Bombay. Each Recorder's court was made of one Recorder, one Mayor and three Aldermen of the Corporation. The Recorder's court was same as that of Supreme Court of Calcutta in terms of powers, functions and limitations *except in composition.* In 1801 and 1824 Supreme Courts were established in Madras and Bombay respectively. The Constitutional powers, functions, limitations and jurisdiction of these courts were the same as that of the Supreme Court at Calcutta. These Supreme Courts functioned until 1862 when they were replaced by the High Courts at all the three places.

Mofussil Adalats

Mofussil means rural i.e. the places away from Company's Presidency towns. The Company had attained the Diwani of Bengal, Bihar and Orissa in 1765. Warren Hastings established the *Mofussil Faujdari Adalat* as court of criminal jurisdiction and *Mofussil Diwani Adalat* as court of civil jurisdiction and Small Cause *Adalat.* The appeals from these courts could be taken to *Sadar Nizami Adalat* {criminal court of appeals} *Sadar Diwani Adalat* {civil court of appeals}. By that time Zamindars were also doing some kind of Judicial functions which Warren Hastings abolished. Warren Hasings is also known to have brought the judicial proceedings in writing and appointment of Indian judges in Faujdari adalats.

The system of judiciary had undergone change under Lord Cornwallis in 1787, 1790, and 1793. He thoroughly reorganized the civil and criminal judicial system in Bengal, Bihar, and Orissa and introduced the principle of administration according to law. The system under Cornwallis was of a three tier judiciary as follows:

Civil Judiciary

Lowest Court was the *Amin Court* or *Munsif Court* for cases involving value less than Rs. 50. Higher was Diwani Adalat or District court headed by a Session Judge. Higher than Diwani Adalat was the Provincial Court of Appeal. Four provincial Courts of appeal were set up at Dhaka, Calcutta, Murshidabad and Patna. After provincial court, the Highest Court of Appeal was set up which was called "Sadar Diwani Adalat". The headquarters of Sadar Diwani Adalat was at Calcutta and it was the Highest Court of Appeal. Its judge was supported by a Head Qazi, two Muftis and Two Pandits. The appeals from "Sadar Diwani Adalat" could be submitted to the King in England. The King of England only entertained those cases whose value was more than 5000 rupees.

Criminal Judiciary

At Taluka / Tahsil level, there was a Darogh-i-Adalat. Its judge was Darogha, who was an Indian judge. Appeals from Darogha could be taken to "District Criminal Courts". The judge of this court was a Session Judge. To hear the criminal appeals from District courts, four circuit Courts at Murshidabad, Dhaka, Calcutta and Patna were established. The **Highest court of Criminal appeal was in "Sadar Diwani Adalat" at** Calcutta which used to sit once in a week. It was supervised by Governor General in council.

Lord Cornwallis also abolished the Court fee and asked the lawyers to prescribe their fee. He also abolished inhuman punishments of Mughal / sultanate era such as cutting limbs, cutting nose and ears etc.

Establishment of High Courts

The year 1861 also constituted a conspicuous landmark in the process of development of legal and judicial institutions in India. It was during this year that the steps were taken to establish High Courts at Calcutta, Madras and Bombay. These High Courts were not only better instruments of justice than the preceding courts, but also represented the amalgamation of the hitherto existing two disparate and distinct judicial systems, the Company's Courts in the Provinces of Bengal, Bombay Madras, and the three Supreme Courts(established by the Royal Charter) in the Presidency town.

Indian High Courts Act 1861

The Indian High Courts Act of 1861 was passed by British Parliament to authorize British monarch to create high Courts in India. Objective of this act was to effect a fusion of the Supreme Courts and the Sadar Adalats in the three Presidencies. The High Courts of Calcutta, Madras and Bombay were established in their place. Each high court was to consist of a Chief Justice and not more than 15 regular judges.

The High Courts enjoyed the same power over all persons and estates and had original, appellate and extraordinary original jurisdiction in civil cases whereas extraordinary and appellant jurisdiction in criminal cases. Later, more high courts were established at Allahabad (1875), Patna (1912), Lahore (1865) etc. Appeals from the High Courts would be now taken to Privy Council.

Federal Court and Supreme Court of India

A Federal Court at Delhi was established under the Government of India Act 1935. This court served as immediate precursor to current Supreme Court of India. It was composed of a Chief Justice and not more than six judges. It had original, appellate, and advisory jurisdiction. Its exclusive original jurisdiction was in all disputes between the federation and the units or between the units of the proposed federation. Appeal from the federal court could go to Privy Council without leave in case of original jurisdiction and with leave for any other matter. The Constituent Assembly passed the

Abolition of Privy Council Jurisdiction Act in 1949 to abolish the jurisdiction of the Privy Council in respect of appeals from India and also to provide for pending appeals. With this, India's supreme Court was established at top of the unitary judicial system in India.

Judiciary debates in Constituent Assembly

The members of the Constituent Assembly envisaged the judiciary as the bastion of rights and justice. They wanted to insulate the courts from attempted coercion from forces within and outside the government. Sapru Committee Report on judiciary and the Constituent Assembly's ad hoc committee on the Supreme Court report formed the bulk of the guidelines for judiciary. A.K.Ayyar, K.Santhanam, M.A.Ayyangar, Tej Bahadur Sapru, B.N.Rau, K.M. Munshi, Saadulla and B.R. Ambedkar played important roles in shaping the judicial system of India.

The unitary judicial system seems to have been accepted with the least questioning. The Supreme Court was to have a special, countrywide responsibility for the protection of individual rights. Ambedkar was perhaps the greatest apostle in the Assembly of what he described as 'one single integrated judiciary having jurisdiction and providing remedies in all cases arising under the Constitutional law, the Civil, or the criminal law, essential to maintain the unity of the country'.

Evolution of Panchayati Raj System

A strong, vibrant local government is a means of political decentralization. There are several advantages of the Decentralization. Decision-making being closer to the people, decentralization ensures decision-makers more effective accountability to the governed. This also ensures more realistic programming, for local problems are apt to receive urgent attention. Local vigilance also increases; thereby reducing the room for corruption. This certainly goes a long way towards maximising returns on every rupee spent on development. These are some of the tangible advantages of decentralization.

The Community Development Programme

On 15 August 1947, India got an opportunity of redeeming the pledges made to the people during the long-drawn freedom movement. Among the first tasks that India had to assume was the formulation and execution of the first five year plan in the fifties.

Post Independence, the first major development programme launched in India was Community Development Programme in 1952. Core philosophy was **overall development of rural areas** and people's participation.

This programme was formulated to provide an administrative framework through which the government might reach to the district, tehsil / taluka and village level.

All the districts of the country were divided into "Development Blocks" and a "Block Development

Officer (BDO)" was made in charge of each block.

Below the BDO were appointed the workers called Village Level Workers (VLW) who were responsible to keep in touch with 10-12 villages. So, a nationwide structure was started to be created. Thousands of BDOs and VLW's were trained for the job of carrying out array of government programmes and make it possible to reach the government to villages. Top authority was "Community Development Organization" and a Community Development Research Center was created with best academic brains of the country at that time.

This programme was not successful. It's failure was directly attributed to inadequacy of avenues of popular participation in local level programmes of rural development. This was the finding of the team for the study of community projects and national extension service under the chairmanship of Balwant Rai Mehta, reporting in 1959.

Balwant Rai Mehta Committee Report

As we read above, the **Community Development Programme** was formulated to provide an administrative framework through which the government might reach to the district, tehsil / taluka and village level. All the districts of the country were divided into "Development Blocks" and a "Block Development Officer (BDO)" was made in charge of each block. Below the BDO were appointed the workers called Village Level Workers (VLW) who were responsible to keep in touch with 10-12 villages. So, a nationwide structure was started to be created. Thousands of BDOs and VLW's were trained for the job of carrying out array of government programmes and make it possible to reach the government to villages. Top authority was "Community Development Organization" and a Community Development Research Center was created with best academic brains of the country at that time.

But this programme could not deliver the results. The programme became an overburden on the Government.

Further, in 1953, the National Extension Services were started under which the entire country was divided into Blocks. These Blocks were envisaged as smallest division for development work.

In 1957, the **Balvant Rai Mehta Committee** was appointed to study the **Community Development Programmes** and **National Extension Services Programme** especially from the point of view of assessing the extent of people's participation and to recommend the **creation of the institutions** through which such participation can be achieved.

Balwant Rai Mehta

Balwant Rai Mehta was one of the legendry freedom fighters of the country who participated in the Bardoli Satyagraha. He is best known **as second Chief Minister of**

Gujarat. Balwant Rai Mehta was a parliamentarian when the committee was established. He is credited for pioneering the concept the Panchayati Raj in India and also known as Father of Panchayati Raj in India.

Following were the landmark recommendations of the Balwant Rai Mehta Committee:
Panchayati Raj Institutions should be composed of elected representatives and should enjoy enough autonomy and freedom.
The Balwant Rai Mehta committee recommended a 3-tier Panchayati Raj System which includes

- **Zila Parishad** at the District Level
- **Panchayat Samiti** at the Block/ Tehsil/ Taluka Level
- **Gram Panchayat** at the Village Level

But the committee **did not insisted on a rigid pattern**. It recommended that the states should be given freedom to choose and develop their own patterns as per the local conditions. The committee recommended that the above 3 tiers should be organically linked together through an instrument of indirect election.
The committee recommended that the Gram Panchayats should be constituted with directly elected representatives, whereas the Panchayat Samiti and Zila Parishad should be the constituted with indirectly elected members.

- The status of the Panchayat samiti should be of that of an executive body, while the status of the Zila Parishad should be that of an advisory body.
- The Zila Parishad should be chaired by the District Collector.
- These democratic bodies must be given genuine powers.
- These bodies should be given adequate resources to carry out the functions and fulfill the responsibilities.

Thus we see, that most of the recommendations of the Balwant Rai Mehta committee reflect in the Panchayati Raj institutions, as we see them today.

Launching of Panchayati Raj in India

The Balwant Rai Mehta report was greeted very warmly, and Panchayati raj was introduced with great fanfare all over the country. The committee recommended a three-tier system of rural local government, which is called panchayat raj. The principal thrust of the Mehta report was on the decentralization of democratic institutions in an effort to shirt decision centres closer to the people to ensure their participation, and to put the bureaucracy under local popular control.
The recommendations of the Balwant Rai Mehta committee were accepted by the **National Development Council** in 1958 and subsequently Rajasthan in 1959 became the first state in India

to launch the Panchayati Raj.

The institution of Panchayati Raj was inaugurated by Jawahar lal Nehru on October 2, 1959 in **Nagaur District of Rajasthan**. Nine days later, Andhra Pradesh became the second state to launch Panchayati Raj at **Shadnagar** near Hyderabad

The launch of the Panchayati Raj institutions was a thumping success and soon the states started adopting the institutions. This continued for 5-6 years and after that the institutions started crippling due to lack of resources, political will, and bureaucratic apathy and change the government priorities. *The rural elites dominated the system and the benefit of the development schemes was not able to reach to the last corner of the country.* The legitimacy of the Panchayati Raj institutions came under questions. There was not much development in this site until the Congress was thrown out of center and Janta Government came in 1977. However, before that there are some efforts in the form of committees were done to make the system more efficient.

Santhanam Committee: 1963

The Balwant Rai Mehta Committee was followed by the Santhanam Committee. This committee was formed by the Government of India to solve the following important practical questions.

- How and in what ratio, the revenues should be handed over to PRIs?
- What should be the criteria of sanction of grants to them by State Government
- What should be the status of the Financial Relations between the different levels of PRIs?

So, in a nutshell, the Santhanam Committee's scope of study **was the financial matters of the PRIs**. The important recommendations this committee made are as follows:

- The Panchayati Raj Finance Corporations should be established.
- All the grants at the state level should be sent in a consolidated form to various PRIs
- Panchayats should have power to levy special tax which should be based upon the land revenue and house tax etc.

We see that Santhanam Committee gave some practical recommendations to matters of financial relevance. There was one more major issue of implementation of PRIs. This was – what should be the point of decentralization? Should it be a Tehsil / Taluka/ block or a District? If it is a district, then what would be the relevancy of the middle tier of Panchayat Samitees? If it is to be a tehsil / Taluka/ block, then how the effective decentralization can take place looking at vastness of the country?

Two more committees viz. the **Ashok Mehta committee on Panchayati Raj institutions** and the **G.V.K. Rao committee** on administrative arrangements for rural development and poverty alleviation programmes supported that "district" is the most appropriate point for effective point of

decentralization.

Ashok Mehta Committee: 1977

One of the major issues in context with the PRIs was that it got dominated by the privileged section of the village society. In December 1977, the Janta Government appointed a 13 member committee which was headed by Mr. Ashok Mehta. The committee was appointed for following:

- What are the causes responsible for poor performance of the PRIs?
- What measures should be taken to improve performance of the PRIs?

The Ashok Mehta committee submitted its report in 1978 and made more than 130 recommendations. The essence of Ashok Mehta Committee recommendations is as follows:

3-tier should be replaced by the 2-tier system. The upper tier would be the Zila Parishad at the district level and lower tier should be the **Mandal Panchayat**, which should be a Panchayat of group of villages covering a population of 15000 to 20000.

The committee recommended that the base of the Panchayati Raj system should be a Mandal Panchayats. Each Mandal panchayat should contain 15 members directly elected by the people. The head of the Mandal Panchayat should be elected among the members themselves.

Zila Parishad should be the executive body and made responsible for planning at the district level. The Zila Parishad members should be elected as well as nominated. The MLA and MPs of the area should have the status of Ex-officio chairmen of the Zila Parishads. Development functions should be transferred to the Zila Parishad and all development staff should work under its control and supervision.

Thus, we see that the Ashok Mehta Committee **recommended abolishing the middle trier i.e. Blocks** as unit of administration. It recommended that the **district should be the first point** for decentralization under **popular supervision** below the state level.

In the matters of Finance, the committee said that compulsory items of taxation should be put under the jurisdictions of the Zila Parishads so that they are able to mobilize their own financial resources.

The committee recommended that there should be regular audit at the district level and a committee of legislatures should check whether the funds allotted for the vulnerable social and economic groups are actually spent on them.

One more important recommendation of this committee was that there should be **Nyaya Panchayats** as separate bodies from that of **development Panchayats**. The Nyaya Panchayats should be presided over by a qualified judge.

It was the Ashok Mehta Committee that recommended that there should be a **minister for Panchayati Raj** in the state council of ministers to look after the affairs of the Panchayati Raj

institutions.

In summary, the democratic decentralization initiated by the Balwant Rai Mehta Committee were taken forward by the Ashok Mehta Committee. But before any action could be taken on the recommendations of this committee, the Janta Government collapsed. So, the zeal to implement the recommendations got wiped out. However, **West Bengal and Karnataka** were two states that took initiatives on the basis of recommendations of the Ashok Mehta Committee.

As per the recommendations the Karnataka Government passed the Karnataka Zilla Parishads, Taluk Panchayat Samitis, Mandal Panchayats and Nyaya Panchayats Act, 1983 (Karnataka Act 20 of 1985)

The Ashok Mehta committee noted that except the states of Maharastra and Gujarat, the PRIs were not given an opportunity to take up implementation at a satisfactory level. The Zila Parishads were not relevant in the implantation of several Government programmes which ought to implement at the grass root level. Committee noted that the bureaucracy was also responsible for the decline for particularly two reasons:

- The officers felt that they are primarily accountable to the State Governments.
- They were not able to adjust to the working under the supervision of the elected representatives.

G V K Rao Committee: 1985

The Ashok Mehta Committee was followed by GVK Rao Committee in 1985. This committee was appointed prior to the 7th Five Year Plan, to recommend on an integrated concept for growth and poverty alleviation. The committee had the following tasks:

- Examine the existing administration structure for rural development and detail out the functions and revenue resources of the PRIs
- Recommend the administrative arrangements for rural development and poverty alleviation programmes.
- Recommend on revitalizing the PRI.

The essence of the recommendations of the GVK Rao Committee is as follows:

- The **district level Zila Parishad should be the basic unit** for policy planning and programme implementation. The Zila Parishad should be the pivotal body for the scheme of the democratic decentralization.
- The State level planning functions should be transferred to the Zila Parishad for effective decentralized planning.

So, in a nutshell, the GVK Rao committee was of the view of **making the district as the pole of democratic centralization**. The committee also recommended that **a post of District**

Development Commissioner should be created, who would work as the CEO of the Zila Parishad.

The District Development Commissioner should be the in charge of all the developmental departments at the district level.

This was a big deviation from the previous committees which recommended the lower bodies as bases and assigned the major role to the Panchayats and Mandal Panchayats in the development.

Next year, report of one more important committee came out.

L M Singhvi Committee: 1986

A year after the GVK Rao committee, the Government of India set up Dr. L M Singhvi Committee. The prime minister was Rajiv Gandhi. The LM Singhvi Committee was of the view that the Panchayati Raj Institutions declined in the country because of –

- Absence of a clear concept
- Absence of political will
- Lack of Research, evaluation and monitoring.

The committee was in favour of making ways for the PRIs to ensure the availability of the enough financial resources.

The LM Singhvi Committee is best known for recommending the constitutional status for Panchayats.

This was virtually the first committee after decades of India's experiments with the decentralization which found **the "Gram Sabhas" as the "incarnation of the direct democracy".**

Here are the notes from its recommendations:

- The PRIs should be recognized, protected and preserved constitutionally. A new chapter should be added in the Constitution of India which should enshrine the provisions to ensure free, regular and fair elections in the PRIs.
- For revenue procedures, the Singhvi Committee was of the view that there should be optional and compulsory levies which should be entrusted to the PRIs. For initial years, the state government may levy on behalf of the PRIs and disburse money to them. This disbursement should be based upon the recommendations of the State Finance Commissions.
- For Jurisdiction of the PRI's, Nyaya Panchayats should be established for a cluster of villages.
- Gram Sabha is the embodiment of the direct democracy and the village Panchayats should be more organized. Gram Sabha should be given importance.
- The Singhvi Committee also recommended establishment of the Judicial Tribunals in the states which would tackle the controversies regarding the elections to the Panchayati Raj

institutions.

Singhvi Committee versus Sarkaria Commission

The above recommendations of the Singhvi Committee, though revolutionary, were opposed by the Sarkaria Commission on Centre-State Relations, which submitted its report in 1988. This commission was of the view that enacting any law on the Panchayats is exclusive power vested in the states and rather than adding a new chapter in the Constitution, there should be a uniform law, applicable throughout India. A model bill can be drafted on the basis of consensus among all the state at the level of Interstate Council.

64th Amendment Bill

Despite the contradictory view of the Sarkaria Commission, the government had zeroed in on giving constitutional protection to the PRIs. In this regard, the 64th amendment bill was introduced in the parliament by Rajiv Gandhi Government on 15 May 1989. The bill got lapsed because it could not pass in **Rajya Sabha**. This was on 15 October 1989. On 27 November 1989, the tenure of the Rajiv Gandhi government ended and elections were held. Rajiv Gandhi lost the elections, and the result was a minority government under V.P. Singh and the National Front. This was the **first minority government, since 1947**, with the help of the Left Parties and Bharatiya Janta Party, who supported the government from outside.

74th amendment Bill

The VP Singh Government introduced the 74th Constitutional Amendment Bill on September 7, 1990. This bill also got lapsed because the minority Government of VP Singh collapsed leading to dissolution of the Lok Sabha.

72nd Amendment Bill and 73rd Amendment Act

The 72nd amendment Bill was enshrining a comprehensive amendment of the Constitution and was introduced on 10th September, 1991 by G. Venkat Swamy. The bill was passed in the Lok Sabha on December 22, 1992 and the Rajya Sabha on December 23, 1992. After having been ratified by 17 state assemblies this bill came into effect as **Constitution 73rd Amendment Act 1993** w.e.f April 24, 1993.

Thus, April 24, 1993 became the landmark day in the history of Panchayati Raj in India. By this amendment act, a new Part IX was inserted in the Constitution of India enshrining the provisions for the Panchayats. Here please note that Original part IX was repealed by one the amendments of the constitution. Constitution (Seventy Forth Amendment) Act, 1992 has introduced a new part Part IXA in the Constitution, which deals with Municipalities.

General Knowledge Today

GS-II-2: Analysis of Salient Features of Constitution

Integrated IAS General Studies:2016-17
Last Updated: September 5, 2016
Published by: GKTODAY.IN

Contents

Model Questions

1. United States is thrice in size in area in comparison to India and has 50 states in comparison to 29 states in India. Still, US has a small constitution. Justify the reasons keeping both the countries in focus.
2. To what extent India's demography and social diversity is responsible for mammoth size Constitution? Examine.
3. Many call Indian constitution a copy-paste work and a glaring example of plagiarism. To what extent it is justified? Argue.
4. Many say that constitution of India is mostly a replica of Government of India Act 1935. Do you agree with this? Explain.
5. What do you understand by flexibility and rigidity of a constitution? In your view, Indian constitution tilts towards "more flexible and less rigid" or "less flexible and more rigid"? Explain.
6. Discuss how Basic structure doctrine (1) adds flexibility or rigidity to the Constitution (2) upholds judicial or parliamentary supremacy.
7. Is there any flexibility / rigidity angle when Indian constitution includes both the fundamental law of the US constitution and the theory of Parliamentary sovereignty in UK? Discuss.
8. What are the principles of Constitutional Supremacy doctrine? How Constitutional Supremacy is related to Judicial Supremacy and Parliamentary Sovereignty? Discuss.
9. India has often witnessed a conflict between parliamentary supremacy and judicial supremacy; and often Judiciary has won. Isn't it tyranny of the unelected by undermining the elected? Give arguments.
10. Often a question has been publicly debated that should India opt for a Presidential form of Government like United States. While keeping in focus that country, discuss if presidential system is practical in India?
11. "Westminster model of democracy is unsuitable for a stable government in India". Discuss with arguments for/ against this statement?
12. "Constitutionally India is secular, but social it is not." Justify.
13. Constitution does not define what is secular. Has Judiciary played any role in defining secularism? Discuss citing relevant cases.
14. Secularism was not found in the preamble of Constitution; and it was included by 42nd Constitution Amendment Act, 1976. Did the framers of constitution obviate the communal

violence at the time of framing the constitution? Discuss.

15. Many say that secularism' in preamble has divided country into pigeon-holes of different 'isms'. Do you agree with this view? Justify.
16. What measures can you suggest towards making India a truly secular society?

The salient features of the Constituent of India can be analyzed under the below heads.

Longest Written Constitution

Constitution of India is the longest written constitution of any sovereign state in the world, and has continued to grow till date. Originally, it had 395 articles divided into 22 parts and eight schedules. The numbering still remains the same but with amendments; either old articles or their parts are repealed or additional articles with suffix A, B, C etc. are added. For example, Right to Education added Article 21-A in the constitution. Currently, it has 25 parts, 12 Schedules, around 450 articles including sub-articles. It has been amended for 101 times till date.

Questions to Analyze

- *What were the various reasons that India settled for a mammoth size constitution?*
- *United States is thrice in size in area in comparison to India and has 50 states in comparison to 29 states in India. Still, US has a small constitution. How can we justify this by keeping both the countries in focus?*
- *To what extent India's demography and social diversity is responsible for mammoth size Constitution?*

What were the various reasons that India settled for a mammoth size constitution?

There are various factors responsible for the long size of the constitution. *Firstly,* the main input was Government of India Act 1935; and it was reproduced almost in entirety to provide administrative detail. *Secondly,* it was necessary to make provisions for peculiar problems of India like scheduled castes, Scheduled Tribes and backward regions. *Thirdly,* provisions were made for elaborate centre-state relations in all aspects of their administrative and other activities. This was very much necessary because these provisions were reverse of what were provided in GOI Act 1935 {GOI Act had provided for a federation with weak centre}. *Fourthly,* the size of the constitution became bulky, as provisions regarding the state administration were also included. Further, a detail list of individual rights, directive principles of state policy and the details of administration procedure were laid down to make the Constitution clear and unambiguous for the ordinary citizen. Thus, the Constitution of India became an exhaustive and lengthy one.

United States is thrice in size in area in comparison to India and has 50 states in comparison to 29 states in India. Still, US has a small constitution. How can we justify this by keeping both the countries in focus?

There are several reasons for this. *Firstly,* both constitutions were created in different era. The US

constitution dates 1787 and at that time, this was first written constitution of the world. This implies that there was a *lack of historical precedents and so the framers kept it bare minimum.* Thus, US came up with a short and simple constitution. *Secondly,* United States has a different federal structure. They had a Federal Constitution with just 7 articles. However, every state in US has its own constitution and these state constitutions are much elaborative indeed. For example, the *Constitution of Alabama is around three times longer than India's*. *Thirdly*, United States has a largely homogenous population, so large fraction of population could be satisfied with a small constitution on federal level. Any small variance had to be dealt by the federal units.

Now, we focus on India. *Firstly,* Indian constitution was framed in a time when there were so many sources available from around the world, and our founding fathers did not hesitate to include the best practices from them. *Secondly,* India has a single constitution for both states and centre and it has tried its best to accommodate the huge diversity, social, economic and geographical inequalities. *Thirdly,* there was a need to draft a flexible constitution, not a rigid one. It was the flexibility of our constitution which has *kept us united for last seven decades and helped India to become a mature democracy*. *Lastly*, the major source document was GOI Act 1935, which itself was very bulky. In order to avoid conflicts between the Union and States and among the States and to maintain federal equilibrium with a unitary bias, the framers inculcated exhaustive legislative, administrative provisions in the Constitution.

To what extent India's demography and social diversity is responsible for mammoth size Constitution?

India's demography and social diversity has a big role for such a lengthy constitution. India is country with second largest population {4 times of US}. More is the population, more difficult is to govern it. Second, extra-ordinary diversity does not allow for similar rules applicable for all sections of society. Due to this, separate provisions had to be made for socially deprived people, regionally undeveloped regions, tribal areas etc. Some historical reasons led to inclusion of temporary, transient provisions such as separate special articles for J&K. To meet the typical regional problems and demands in certain States like Nagaland, Assam, Manipur, Andhra Pradesh, Maharashtra, Gujarat, Sikkim, Mizoram etc. special provisions have been inserted in the Constitution.

The country was left to deal on its own in the war torn world and had to deal with a lots of problems such as caste system, untouchability, sati, dowry, child marriage, bonded labour, Zamindari system etc. Further, there was a need to accommodate various beliefs and rituals. This was the reason that abolition of untouchability, criminalization of bonded/ child labour, potable alcohol, cow slaughter etc. got place in constitution.

Drawn From Various Sources

The Constitution of India is a salubrious integration of useful and progressive features drawn from different Constitutions of the world. Although most of the Constitution is almost a reproduction of the Government of India Act, 1935, certain features were also included in it during the making of the Constitution.

- Features like parliamentary government and bicameralism, cabinet system, single citizenship etc. from the British Constitution;
- Fundamental Rights, Impeachment of President, Removal of Judges, Judicial Review, office of the Vice Presidents etc. from the US Constitution;
- Federation with a strong centre, Vesting residuary powers with the centre, Appointment of Governor of states by the centre, Advisory jurisdiction of Supreme Court, Single Citizenship from Canadian Constitution;
- Directive Principles of State Policy (DPSP), Methods of election of President, Nomination of members to Rajya Sabha from Irish Constitution;
- Concurrent list (Seventh Schedule), Joint sitting of Parliament, freedom of trade, commerce and intercourse etc. from Australian Constitution;
- Suspension of Fundamental during emergency from Weimar Constitution of Germany; Fundamental duties and the ideal of justice (social, economic and political) in the Preamble etc. from Russian Constitution;
- Republic and the ideals of liberty, equality and fraternity in the Preamble etc. from French Constitution; Procedure of amendment of the Constitution and election of members of Rajya Sabha from South African Constitution; and
- Procedure established by law from Japanese Constitution.

The above features were made accommodative and acclimatizing to the socio-political environment of the country by correcting faults and removing incongruences in them.

Questions to Analyze

- *Many call Indian constitution a copy-paste work and a glaring example of plagiarism. What are the arguments against such unfair criticism?*
- *Many say that constitution of India is mostly a replica of Government of India Act 1935. Is it true? How?*

Many call Indian constitution a copy-paste work and a glaring example of plagiarism. What are the arguments against such unfair criticism?

This is one of the most unfair criticisms. The framers of constitution included the best minds and many of them were eminent lawyers. World's first written constitution had come up in 1787 and

after that many new constitutions evolved in various countries in response to the events that occurred within them or elsewhere in world. Each country inspired from other existing constitutions, and each had included its own flavour as per its social, economical and political needs. As Dr. Ambedkar had responded to this criticism himself and said: "There is nothing to be ashamed of in borrowing. It involves no plagiarism. Nobody holds any patent rights in the fundamental ideas of a Constitution." Thus, there was no need to reinvent the wheel.

Many say that constitution of India is mostly a replica of Government of India Act 1935. Is it true? How?

The Government of India Act, 1935 is considered a milestone in the constitutional history of India during British Raj. The framers of Indian Constitution chose to replicate most of the provisions of the said Act as the people of India were accustomed to the provision therein in letter and spirit.

The features, enumerated in the present Constitution, like all Indian federation, division of power in the Seventh Schedule, bicameral legislature at the Centre and states; Union Public Service Commission and State Public Service Commission and Joint Public Service Commission for two or more states; setting up of Reserve Bank of India to control the currency and credit policy of the country; establishment of Supreme Court etc. have been derived from the Government of India Act, 1935. Such a bulk of provisions from the Act present in the Constitution makes one conclude that the Constitution of India is a replica of the said Act.

However, the Constitution is not the exact replica of the Act. The framers brought required modifications and changes in the said Act with a view to avoiding the faults that have been brought to the fore in their working for over a decade and to adapting them to the existing conditions and needs of the country. Unlike the provision of resting residuary power in the Viceroy as the Act stipulated, the framers put the onus of residuary power upon the Parliament of India. The provision of communal representation found in the Act was totally discarded from the original Constitution of India. The framers not only relied upon the Act but also sought best democratic and constitutional features from other successful constitutions of the world while making the Constitution of India. So, the Constitution is not the exact replica of the Government of India Act, 1935; rather the Act was banked on as one of its many sources.

Partly Flexible and Partly Rigid

Based upon the provisions made for its amendment, a constitution can be flexible or rigid or a mixture of both. A flexible constitution can be amended by ordinary law making exercise while a rigid constitution can be amended by a very difficult and special procedure. As regards to Indian Constitution, it *strikes a balance between the rigidity and flexibility*. The Constitution can be

amended in three ways such as:

- The Parliament can alter or modify many of the laws of the Constitution by a simple majority as is required for ordinary legislations. For instance the Parliament can deal with the abolition or creation of Legislative Councils (Article 169). Further, the Parliament can change the name of boundaries, areas etc. of States through simple majority; and these changes don't even need to done via a Constitutional Amendment Bill. These are examples of most flexible provisions of the constitution.
- Parliament can amend other major parts of the Constitution with special majority (a majority of not less than 2/3 of the members of each House present and majority of them voting) as mentioned in Article 368. This process can be semi-rigid and examples include those amendments needed for inclusion / exclusion of fundamental special right, special provisions for SC/ST, special provisions for some regions etc.
- The amendments to certain features affecting the federal structure of Indian State requires special majority with ratification by half of the States. Provisions related to election to the President and its manner; extent of the executive power of the Union and the states; Supreme Court and high courts etc. fall under this. These are examples of a rigid constitution.

The Parliament can also modify the constitutional provisions by supplementing them with its own laws. For instance, the addition of Citizenship Act, 1955 to Part II (Citizenship) in order to have detailed view of the citizenship laws in India is a case in point. Likewise, Article 22 (Preventive Detention) empowers the Parliament to make subsidiary provisions and upon the basis of Article 17, Protection of Civil Rights Act, 1955 was enacted by the Parliament. In fine, the supplementing aspect of Union Legislations brings modifications and alterations by means of addition and deletion to meet the exigencies of time without having resorted to a constitutional amendment.

Questions to Analyze

- *Indian constitution tilts towards "more flexible and less rigid" or "less flexible and more rigid"?*
- *The Basic structure doctrine adds flexibility or rigidity to the Constitution?*
- *Is there any flexibility / rigidity angle when Indian constitution includes both the fundamental law of the US constitution and the theory of Parliamentary sovereignty in UK?*

Indian constitution tilts towards "more flexible and less rigid" or "less flexible and more rigid"?

The above study of various types of amendments makes it clear that Indian constitution is *certainly more flexible than rigid*. This is also evident from the fact that we have so far amended the constitution for 101 times since its enactment. Had it been rigid, it was not possible to amend it almost twice a year. The US constitution is rigid and that is why it has been amended only 33 times

so far. Rigidity in constitution comes only in picture when the proposed amendment makes changes into the federal structure of the constitution. Wherever the interests of *states are involved*, the constitution becomes rigid.

The Basic structure doctrine adds flexibility or rigidity to the Constitution?

The Basic Structure doctrine propounded in the Kesavananda Bharati case has certainly introduced more rigidity in the constitution. In fact, wherever the question of Basic Structure comes, the constitution of India, added by its Guardian Supreme Court is "absolutely rigid" and makes it clear that Parliament cannot use its power to amend the Constitution to alter, distort or damage in anyway the basic characteristics and principles of Constitution. The list of these characteristics itself is evolving with time, and includes democracy, secularism, republic nature, independence of judiciary etc.

Is there any flexibility / rigidity angle when Indian constitution includes both the fundamental law of the US constitution and the theory of Parliamentary sovereignty in UK?

Yes. Indian Constitution is a unique agreement of both the theory of fundamental law of the US constitution and the theory of Parliamentary sovereignty of the unwritten constitution of the UK. In other words, the Constitution is not so rigid that it cannot be amended by the supreme law making body i.e. the Parliament. India chose the middle path between rigidity of the US Constitution and flexibility of the unwritten conventions of the UK in order to allow the new nation grow smoothly by accommodating changes.

The flexibility of the Indian Constitution as proven feature is established by the fact that within seven decades of functioning of the Constitution has been amended more than hundred times. The Constitutional Amendment Acts like the First, Fourth, Twenty Fourth, Twenty Fifth, Thirty Ninth, Forty-second, Forty-fourth, Seventy-third, Seventy-fourth and Ninety-seventh are vital changes so far included in the original Constitution.

Unique Blend of Federal and Unitary Features

Indian Constitution is a unique blending of both federal and unitary features. Federal features present in the Constitutions are:

1. Two governments
2. Division of powers between the union and its constituents
3. Written constitution
4. Supremacy of the Constitution
5. Partial Rigidity of the Constitution
6. Independent judiciary
7. Bicameralism

However, the Constitution enables the federal structure to transform into a unitary one during emergencies as mentioned in Part XVIII of the Constitution. The Constitution of India also contains various unitary features such as:

1. A strong centre
2. Single constitution
3. Single citizenship
4. Flexibility of Constitution
5. Integrated judiciary
6. Appointment of State governor by the Centre
7. All India Services
8. Emergency provisions

Questions to Analyze

- *Is India not a true federation? Why?*
- *The Supreme Court has described India as a federal structure with strong bias towards centre. Explain this.*

Is India not a true federation? Why?

India is not a true federation. It can be called a quasi-federation. *Firstly*, Constitution of India does not describe India as a "Federation of States". Instead, Article 1 describes India as a Union of States. This implies that Union is non-destructible and states are destructible parts of an indestructible Union. The states cannot break way from Union and have no right to secede from Union. In a true federation, the constituent units would have more flexibility or freedom to move out of it. *Secondly,* India combines features of federal as well as unitary government, as discussed above.

The Supreme Court has described India as a federal structure with strong bias towards centre. Explain this.

In India, there is a strong bias towards centre. *Firstly*, as discussed above, states have no freedom to seceded from Union; they are destructible units of an indestructible Union, Centre can change name, boundary etc. of states with minimum efforts. The states need to respect the laws made by parliament and cannot make any law on matters on which there is already a central law. Thus, mere existence of states depends on authority of centre. *Secondly,* in a true federation, the powers of upper house have equal representations from the constituent units. However, in India, the Rajya Sabha has unequal representations {more population, more MPs}. This implies that Rajya Sabha is not properly representative of the states. *Thirdly,* in true federation states, citizens have dual citizenships {states and federation}. Indian citizens have single citizenship. *Fourthly*, an independent Judiciary has been provided to interpret the Constitution and safeguard the rights of both the Centre and the States.

Fifthly, in financial matters also, the central government is more powerful than the States. President has been vested with power to make alterations in the distribution of revenues between centre and the States. Further, CAG and Finance Commission, which have lots of say in financial matters of states are also central agencies. *Sixthly,* Governors are appointed by the president (article 155 and 156) and there have been many instances when centre has redundantly toppled the elected state governments using the powers of article 356 on report of Governors. Seventhly, Governor can keep some of the state laws for perusal of President, who can block them in becoming the law.

These are some of the reasons that make India federal in structure but unitary in spirit. The unitary features enable the Union Government to deal with emergencies like war or external aggression, armed rebellion inside the country, constitutional breakdown in the states etc. By these provisions, the unity and integrity of the country is maintained by checking subversive and anti-national forces. In fine, though the Constitution wears a look of a federation, in fact, it behaves like a unitary structure in many circumstances.

Constitutional Supremacy & Judicial Supremacy

The first and foremost feature of Indian Sovereignty is that Constitution is the *supreme law of the land*; and *all state organs including parliament, judiciary, states etc. are bound by it*. They must act within the limits laid down by the Constitution. This is called Doctrine of Constitutional Supremacy.

There are several preconditions of doctrine of Constitutional Supremacy. *Firstly,* the constitution *must be written and somewhat rigid*. If there is no rigidity in the constitutional, the parliament would amend it easily and may dissolve its ideals. *Secondly, Constitutional law must be different from the ordinary law*. This implies that there can be different types of laws such as Civil Law, Penal Law, Family Law, Business Law, Contract Law, Labor Law, Administrative Law, Environmental Law etc. but the Constitutional Law serves as a "common trunk" of all these branches. Every other law, rule, order, bylaw, ordinance etc. have to be in line with the constitution. *Thirdly,* since the constitutional law is supreme, it cannot be challenged in a court of law. *Fourthly,* if there is any contradiction between the constitutional law and ordinary law; the constitutional law will prevail and get priority.

Questions for Analysis

- *Is Constitutional Supremacy applicable to India? If yes, what are the principles of this doctrine?*
- How Constitutional Supremacy is related to Judicial Supremacy and Parliamentary Sovereignty?
- India has often witnessed a conflict between parliamentary supremacy and judicial

supremacy; and often Judiciary has won. Isn't it tyranny of the unelected by undermining the elected?

Is Constitutional Supremacy applicable to India? If yes, what are the principles of this doctrine?

In India, the constitutional supremacy was explicitly echoed in the Minerva Mills case whereby the Supreme Court held that *"government, legislature, executive and judiciary are all bound by the Constitution, and nobody is above or beyond the Constitution."* Every law made by the parliament is subject to interpretation by supreme court in the light of ideals and objectives of the constitution and if they go beyond or above that, they can be held null and void. The Constitutional Supremacy is founded on the below principles in India:

- The Constitution draws its authority from the people and has been promulgated in the name of the people. This is evident from the Preamble which states "*We the people of India .... do hereby adopt, enact and give to ourselves this Constitution.*" This implies that the direct authority of the people cannot be claimed or usurped by the legislature. Under the constitution, legislature is a representative body but people constitute the ultimate sovereign.
- The constitution is the source of authority of all organs of the state including legislature. This implies that they cannot exercise any power which is not conferred upon them by the Constitution.

The constitutional supremacy has further strengthened by the *Basic Structure Doctrine*. The constitutional has provided the weapon of judicial review to the Supreme Court to upheld Constitutional Supremacy.

How Constitutional Supremacy is related to Judicial Supremacy and Parliamentary Sovereignty?

The Constitution of India was honestly adapted through a middle path between Judicial Supremacy {of United States} and Parliamentary Supremacy {of UK}. In fact, both parliament and the judiciary should not exceed their limits as defined by the constitution of India, so that harmony can be maintained between the legislature and judiciary. At the same time, Judiciary was given the power of declaring a law unconstitutional if it is perceived to be going beyond the competence of the legislature as per distribution of powers enshrined in the constitution.

Though Indian Constitution does not have express provision of separation of judicial and parliamentary supremacy but it's not quite unclear also. While it is the prerogative of the parliament to amend the constitution and make the laws; it is the duty of the judiciary to decide if basic ideals and structure of the constitution are transgressed by such laws. One the parliament has done its job, its Supreme Court which decides its constitutionality through judicial review.

India has often witnessed a conflict between parliamentary supremacy and judicial supremacy; and

often Judiciary has won. Isn't it tyranny of the unelected by undermining the elected?

Yes, indeed there have been conflicts between parliamentary supremacy and judicial supremacy. The best example is of National Judicial Appointment Commission when Supreme Court pronounced its verdict on the 99th Constitution Amendment Act and the National Judicial Appointments Commission (NJAC), declaring them to be *ultra vires* the Constitution. Two days after this judgement, the Finance Minister said: "*Indian democracy cannot be a tyranny of the unelected and if elected are undermined, democracy itself would be in danger.*"

Though it is true that constitution has given superior powers of review to judiciary {which is unelected} to decide the constitutionality of the acts passed by legislature {whose members are elected}. However, since *it is the Constitutional Supremacy which matters in the end, the power to strike down any offending amendments should be in hands of judiciary, so that Indian democracy does not become tyranny of elected too*! This is because discharge of the judicial functions should not be seen as against the will of the people for; constitution derives its authority to give this power to unelected from the people.

Parliamentary System

India has a parliamentary form of Government. The parliamentary system means that the **ministers get their legitimacy from Parliament**. Part V of the Constitution trifurcates the State into three equal constituents' viz. Executive, Legislature and Judiciary. Legislature is made of President, Lok Sabha and Rajya Sabha. Lok Sabha seats are divided into territorial constituencies and each elected member becomes the representative of all the people residing in his constituency and registered in the electoral roll of that constituency. Each Member of Parliament then acts in the House on behalf of all his constituents and that is why India is a representative democracy. Rajya Sabha members are indirectly elected.

This is in contrast with the United States of America, which is a **presidential form of democracy**. The presidential system operates under a stricter separation of powers whereby the *executive does not form part of, nor is appointed by, the parliamentary or legislative body*. In such a system, congresses do not select or dismiss heads of governments, and governments cannot request an early dissolution as may be the case for parliaments.

In India, the government power is exercised by the Prime Minister and the Council of Ministers who collectively enjoy the confidence of the House and who advise the President on how the executive powers of the Union will be exercised. The moment the House loses confidence in government the Prime Minister and the Council of Ministers must resign and the government would fall.

However, in the presidential form of democracy *the President is directly elected by the people* and neither he nor his cabinet is responsible to the House of Representatives, the lower house in the American Congress or Parliament. In fact in the United States a cabinet member cannot be a member of either House of Congress. In US, the balance of power is established by the Legislature through its functions of legislation and approving the budget, but by itself Congress can neither dismiss the cabinet nor remove the President except through the process of impeachment. In India, which follows the **Westminster model**, legislation itself is initiated by government and because the Council of Ministers is collectively responsible to Parliament, the Executive and the Legislature are intertwined in the matter of legislative business. Because government enjoys a majority in the House the Prime Minister can and does influence what goes on in Parliament, whether in the mater of the budget, legislation or debate. To that extent the Executive embodied by the Prime Minister can override the checks and balances between the Legislature and Executive, which are a feature of the American Constitution.

The above discussion makes it clear that the council of ministers is responsible to the lower of parliament i.e. Lok Sabha here in India. This means that if the government loses the confidence in Lok Sabha it has to go.

Confidence of the House is reflected in existence/continuance of majority support – whether it be of a single party or of a coalition of parties. If it's a coalition, it many a times becomes a cause for political instability.

Key differences between Presidential and Parliamentary System

The key differences between Presidential and Parliamentary system are as follows:

Parliamentary System	Presidential System
Features 1. Dual Executive 2. Majority Party Rule 3. Collective Responsibility 4. Political homogeneity 5. Double membership 6. Leadership of Prime Minister 7. Dissolution of lower house 8. Fusion of Powers **Merits** 1. Harmony between legislature and executive 2. Responsible government 3. Prevents despotism 4. Wide representation	**Features** 1. Single executive 2. President and legislators are elected separately 3. Non-responsibility 4. Political homogeneity may or may not be there 5. Single membership 6. Domination of President 7. No dissolution of lower house 8. Separation of powers **Merits** 1. Conflict between legislature and executive 2. Non-responsible Government 3. May lead to autocracy 4. Narrow representation

Questions for Analysis

- *Often a question has been publicly debated that should India opt for a Presidential form of Government like United States. Will it be worth?*
- *How is the system in other governments?*
- *"Westminster model of democracy is unsuitable for a stable government in India". What are arguments for/ against this statement?*

We can analyze all the above three questions together as follows. As we have read that in presidential democracies, the head of Government {President} is directly elected by the people and cannot be removed from office except in circumstances of high crimes and misdemeanour established through impeachment process. Hence, Presidential democracies provide stable governance. That is the reason that, a question has been publicly debated often that **should India opt for a Presidential form of Government.**

This debate is more important in current times because of the traditions of declaring a PM / CM candidate even before the MPs / MLAs have been elected. Further, election of Prime Minister Narendra Modi in 2014 was presidential style in spirit. When NDA won election in 2014, in many opinion polls people chose the presidential system as an alternative to the parliamentary system in India.

Before we come to the conclusion, we may look into various other constituons first.

American System

American Presidential system encompasses an independent executive and a bicameral legislature consisting of the Senate and the House of Representatives. All the three components are elected by the public and especially the President is elected by direct election. It means that the people poll for a particular candidate and *not for a particular party as opposed to the election of the Prime Minister in India where the party chief decides the Prime Ministerial candidate who later has to win the approval of the parliament. What stands as the most attractive part of the Presidential system is the stability of the tenure of the President which allows him/her to take steadfast and quick decisions*. The Indian experiment of direct elections has been implemented at the Panchayat level where the village Sarpanch (headman) is elected directly by the people and not indirectly by the elected panches (elected councillors). So far, **this system has worked as an effectively** in village republics.

System in Germany

Another alternative to the Westminster model can be the **German federal parliamentary republic system**. Here, a vote of no confidence can be passed only when an alternative successor government can form a majority. If the condition is satisfied, the incumbent government can continue as a minority government in the parliament. If a successor government is not ready, the President then dissolves the entire Parliament and fresh elections take place. The advantage of such a system is that

- firstly, it checks the power of the President with respect to dissolving the house in the event of a no confidence motion.
- Secondly, the systems ensures stability and continuity in the legislative process as an alternative government can take over in a short period of time without stalling legislation by avoiding the cumbersome process of re-election.

The minority government continue to work along with the successor government and thus continue to have an effect over legislation.

System in Sri Lanka

An advantage of the German system is the electoral system where half of the seats are directly elected and the other half are indirectly elected. To be eligible to get indirect votes, the party must have garnered at-least 5% of the total votes polled and this prevents smaller parties from becoming a part of the parliament and eliminates the question of multi-party alliances. Such a system has also adopted by Sri Lanka who switched from the Westminster system to the *French-style semi-presidential system*. Instead of the system of first-past-the-post in India, Sri Lanka has adopted the system of proportional representation and made it mandatory for political parties to secure a minimum of 5% votes of the total to ensure stability in the parliament by allowing only major parties into the

parliament.

Both the President as well as the Prime Minister in the Sri Lankan government are elected and equally strong institutions and hence in case of political logjam in the parliament, the President can continue to carry on the governance.

System in South Korea

The South Korean system has enabled a check on the possibility of autocratic tendencies in the President by limiting the term of the President to 5 years after which a new candidate is elected by the people.

Coming to Conclusion

In India, Prime Ministerial candidates should be fixed like the American Presidential system and they should be allowed express their views and agendas as potential heads of Government to help the public take a well thought decision and also to insulate the candidate from inter-party politics. The German system of indirectly elected seats in the Parliament stands as a solution to criminalisation of politics in India as the elected parties project their best candidates in the indirect elections so as to secure more seats in the Parliament. The Indian parliamentary form of government is losing its democratic character and the control on the representatives is slipping from the hands of the republic to party politics and whimsical allied powers. Thus, a change is need of the hour. However, theoretically, adapting to presidential system is not possible because *Parliamentary form is a basic* ***feature of the Constitution****, as held by the Supreme Court,* legal problems might arise in switch over to any other form. Then, the merits of Parliamentary system are what make it suitable for India. In our country, the *Parliament is in a position to keep the Prime Minister and his Ministers under constant vigil through its oversight mechanisms and many other tools* such as – Question Hour, Adjournment Motions, Calling Attention Notices, debates, Confidence and No Confidence Motions, Scrutiny of budget and its implementation, public accounts audit etc. These are some of the unique features of Indian parliamentary system which must be preserved and protected.

Secularism

India is a multi-religious, multi-lingual, multi-racial, and multi-cultural society. Religious minorities constitute roughly 20% of India's population, out of which Muslims account for 14.2%. No society can prosper or be at peace if its 20% of the population feels threatened, deprived, neglected and unwanted. Some of the recent incidents have made some to question India's credentials as a secular nation. Secularism, instead of being a cementing force as envisaged in the constitution has brought forth the opposite results.

Important Facts

Relevant constitutional provisions pertaining to secularism

Fundamental Rights

- Article 14: Equality before law.
- Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
- Article 16: Equality of opportunity in matters of public employment.
- Article 19: Protection of certain rights regarding freedom of speech, etc.
- Article 21: Protection of life and personal property.
- Article 25: Freedom of conscience and free profession, practice and propagation of religion.
- Article 26: Freedom to manage religious affairs.
- Article 27: Freedom as to payment of taxes for promotion of any particular religion.
- Article 28: Freedom as to attendance at religious instruction or religious worship in certain educational institutions.
- Article 29: Protection of interests of minorities.
- Article 30: Right of minorities to establish and administer educational institutions.

Directive Principles of State Policy

- Article 44: Uniform civil code for the citizens.
- Article 48: Organization of agriculture and animal husbandry.
- Article 51A: Fundamental duties
    - Clause (e): to promote harmony and the spirit of common brotherhood amongst all people of India transcending religious, linguistic and regional or sectional diversities; and to renounce practices derogatory to the dignity of women.
    - Clause (f): to value and preserve the rich heritage of our composite culture.

Preamble:

- 42nd Constitutional Amendment Act, 1976 inserted the word 'secular' in the Preamble of the Constitution.

Questions for analysis

- *"Constitutionally India is secular, but social it is not." Justify this.*
- *Constitution does not define what is secular. Has Judiciary played any role in defining secularism?*
- *Secularism was not found in the preamble of Constitution; and it was included by 42nd Constitution Amendment Act, 1976. Did the framers of constitution obviate the communal violence at the time of framing the constitution?*
- *Many say that secularism' in preamble has divided country into pigeon-holes of different 'isms'. Is it*

correct to say so? What is justification for the same?

- *What measures can we suggest towards making India a truly secular society?*

"Constitutionally India is secular, but social it is not." Justify this?

For a state to be secular, it is expected that religion should be purely personal and private matter and is not supposed to have anything to do with the governance of the state. Non-separation of religion from politics and the few incidents in the past like the demolition of the Babri Masjid, anti-Sikh riots in 1984, Mumbai riots in December 1992 and January 1993, Godhra riots in 2002 have showed the deep seated problem of communalism rising its head now and then. Also, banning of cow slaughter and instructing people what to eat have led people to question the credentials of India as a secular nation.

Thus, *reality is totally different from what we have enshrined in the constitution.* In fact, most of the people are confused about working of secularism, and this concept is still vague. There are several political failures that led to this. For example, implementation of Uniform Civil Code could never be realized and personal laws have dominated the life of most communities. Similarly, the Muslim Women (Protection of Rights on Divorce) Act 1986 overturning the supreme court's decision on "The Shah Bano Case" was an attempt to appease the radical and conservative Muslim element.

These examples show that where government was supposed to be neutral was found biased towards a certain religion. Similarly, events such as demolition of Babri mosque, anti-Sikh riots. Hindu-Muslim riots etc. have been politically motivated. In most parts of the country, even today elections are fought and won directly or indirectly in the name of religion.

Thus, the major issues that plague secularism are:

- Grievance of the majority Hindus that rules, regulations and restrictions are applicable only to their religious institutions.
- Non implementation of the uniform civil code.
- Appeasement of radical and orthodox Muslim elements by the passage of Muslim Women's Divorce Act.
- Propagation of religion and large scale religious conversions by Muslims and Christians especially in the tribal belts and among poor people.
- Provision of unjustified protection to minority educational institutions.

Thus, we can conclude that India is totally secular constitutionally but socially it is still not.

Constitution does not define what is secular. Has Judiciary played any role in defining secularism?

Constitution does not define what secularism is and who is secular. In fact, till date even judiciary has not been able to define secularism. Thus there is a need to initiate a national debate to ascertain what should constitute the term 'secular' and a political and social consensus has to be achieved.

However, despite its being very subjective and vague, secularism is a part of the basic structure of the Constitution, thanks to Supreme Court. In multiple constitutional cases especially the S.R.Bommai case, Supreme Court has ruled that secularism forms the *basic structure of the Indian Constitution.* In the Ayodhya case also, the Court opined that the *secular nature of India would form the basic structure of our Constitution, even if it hadn't been specifically mentioned in the Constitution.* However, despite all this, there is a need to define what secularism means to India and Indians, and how it translates in implementation.

At the same time, Constitution does not define who is minority. As a result, the Supreme Court and other state institutions have adopted numerical strength as the criteria for determining whether a community falls under minority bracket or not.

Secularism was not found in the preamble of Constitution; and it was included by 42nd Constitution Amendment Act, 1976. Did the framers of constitution obviate the communal violence at the time of framing the constitution?

It wouldn't be correct to say that our founding fathers obviated communal violence while framing the constitution. Communal violence in India had already raised its ugly head in 1946 before the Constituent Assembly began its work. So the constitution makers were aware of the need to contain it by providing enabling constitutional provisions. Thus, "public order" and "police" were listed in the State List in Schedule 7 of the Constitution, which gives state governments the exclusive right to legislate on these subjects. The State governments also exercise administrative control over the police force. Public order and police are state subjects because states are in a better position to legislate over them considering the widespread diversity in the country and the resultant difference in causes of public disorders in various states. For example, a state such as UP might face public disorder due to communal tensions while a northeast state may experience disruption of law and order due to insurgency. Also, the Union government would find it extremely difficult to manage the police force for entire country because of purely administrative reasons. Dividing the management of police forces between all states makes it administratively convenient and efficient. In addition, the founding fathers could also foresee situations when state government would be unable to maintain public order and protect people from harm. Thus, Article 355 was provided under "Emergency Provisions" of the Constitution. It imposes a duty on the Union government to protect every state from external aggression and internal disturbance and make sure that the state government is carried on in accordance with provisions of the constitution. Communal violence was very much in their mind when they used the words "internal disturbance" in this Article. Under this article, during incidents of communal violence when the state government has been unable to stop the killing of minorities, the centre has deployed armed forces and paramilitary forces to quickly bring about

public order and save citizens, especially the vulnerable minorities. In fact, these powers of the centre were made explicit when entry 2A was added in the Union List through 42nd Amendment in 1976. It reads as follows: "deployment of any armed force of the Union….in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deputation." Thus, in addition to the implicit powers granted by Article 355, the union govt can now deploy armed forces in any state to control communal violence under a law made to give effect to entry 2A. Thus, considering all of the above evidences, it would be appropriate to remark that our founding fathers did not obviate the communal violence while framing the constitution.

'Secularism' in Preamble has divided country into pigeon-holes of different 'isms'. To what extent is this correct?

In our constitutional scheme, a citizen of India is only an Indian. No person can claim himself to be a Hindu nationalist, Muslim nationalist, Sikh nationalist, Buddhist nationalist or Christian nationalist. These expressions denote that there is a 'Hindu nation, Muslim nation, Sikh nation, Buddhist nation or Christian nation". These expressions or thoughts are antithesis and abhorrent to the Constitution of India. If India has to survive then only "Indianism" has to be there and all other "isms" have to disappear from the firmament of the country. However, there was *no need to bring in the term "secularism* in the Preamble of Constitution, as this expression had evoked a sharp reaction and "divided the people of India into "pigeonholes" of different "isms". The constitutional provisions, in "loud and clear terms" forbid the use of such expressions. Any person "persisting" with their use had to be dealt with and proceeded against in accordance with the mandate contained in the Constitution and other laws of the land.

If India, which is created by its Constitution, which 'we the people' have given to ourselves, has to survive, then it is only "Indianism" which has to be there and all other "isms" have to disappear from the firmament of the country called India."

What measures can we suggest towards making India a truly secular society?

Following are some of the ground level measures that can help in making India truly secular.

Separation of religion from politics

Suitable legislation has to be immediately passed to separate religion from politics. On April 3, 1948, the Constituent Assembly (Legislative) had already passed an explicit resolution to separate religion form politics. But nothing concrete has been achieved on this subject. In 1993, P.V. Narasimha Rao government attempted to amend the Representation of the People Act and brought the Constitution (Eightieth Amendment) Bill before Parliament. However, the bill was withdrawn as it did not have adequate support.

The suitable amendment will make the political parties to behave in a responsible manner. For

example, in 2007 Turkey's ruling Justice and Development Party (AKP) faced a serious threat for its survival after Turkey's constitutional court reviewed a case to ban the political party for its anti-secular activities in violation of the country's constitution.

Right to propagate religion

There is a considerable controversy over placing Right to propagate religion as a fundamental right. In this area, there have been many verdicts delivered by the Supreme Court and the High Court all of which have stated that the right to propagation is not a right to conversion. This problem has to be addressed by removing the word "propagation" from Article 25.

Withdrawing protection of minority educational institutions

Article 30(1) of the constitution gives right to minority educational institutes the right to establish and administer educational institutions. There was significant opposition to this article in the Constituent assembly. It is the right time to do away with this right as it encourages separate identities and undermines the spread of secular education. With globalization and spread of information technology, there is no justification to continue this right even to linguistic minorities.

Rationalize prohibition of cow slaughter

There is no universal demand for the ban of cow slaughter form all the Hindus and the prohibition cannot only be solely justified only based on the religious sentiments of the Hindus. This demand is unviable especially in drought hit areas in a number of states like Maharashtra.

Restructuring police departments

Weaknesses and inadequacies of police have been attributed for starting or escalating of communal violence. Politicisation and Communalisation of police in various states has to be prohibited.

A Commission on secularism

A commission on secularism has to be set up by amending the constitution to ensure adherence to the constitutional mandate on secularism. The commission should be made to be presided over by a former chief justice of India. The report of the commission has to be submitted to the Parliament and also has to be simultaneously released to media and public.

Other Salient Features

Integrated and Independent Judiciary

The judicial system prevalent under constitutional arrangement in India is integrated and independent. In the integrated system the Supreme Court of India stands at the apex of the judicial system in the country. Below it, there are High Courts at the state level and under a high court there is hierarchy of subordinate courts like district courts and other lower courts. The single integrated judicial system enforces both the central and state laws unlike the USA, where the federal judiciary looks after federal laws and state judiciary looks after their respective state laws.

Being the highest federal court and the highest court of appeal the Supreme Court is the custodian of constitution, the protector and guarantor of the fundamental rights of the citizens of India. This is why the Constitution has made elaborate arrangement to ensure independence of judiciary so that it will solve legal and constitutional conflicts between the Union and its units or among the units without favour and prejudice to any institution.

Provisions like fixed service conditions and fixed tenure of judges, cumbersome removal procedure like impeachment of judges; all the expenses of the Supreme Court judges are charged upon the Consolidated Fund of India, prohibition of discussion on the conduct of judges in the legislature, ban on practice after retirement, power to punish for its contempt vested in the Supreme Court and separation of judiciary from the executive etc. substantiate the independence of judiciary in India.

Judicial Review

One of the noteworthy features of the Constitution is the power of judicial review of the apex judiciary. It is based upon the conception of 'limited government' as found in America. It aims at checking Parliamentary supremacy and executive despotism and keeps the political settings on track for ever. Judicial review is novel mechanism through which the apex judiciary examines legislations on the scanner of constitutional supremacy. If any time any legislative or executive action violates certain basic features of the Constitution, such action is declared ultra vires or void by the Supreme Court. Unlike the UK, India does not have parliamentary supremacy and the Parliament is to functions within the broad, flexible but limited periphery set by the Constitution.

The tussle between the Union Legislature and Judiciary in India often revolve round the issue of supremacy. Judiciary plays the role of arbiter and interpreter of the Constitution and at many instances it has declared legislative acts invalid on ground of violation of basic structure of the Constituent, which got a formal recognition in 1973 in Keshavananda Bharati Case. However, Parliament enjoys substantial power to amend the Constitution under Article 368.

Indian Constitution, however, is a healthy compromise between Judicial Supremacy of the US Constitution and Parliamentary Sovereignty of UK. The supremacy of the Parliament in India is permissible to the extent it is possible within the bounds of a written constitution.

Provisions for Social Equality and Socialism

Apart from political and legal equality, the Constitution also ensures social equality to the citizens of India. No citizen can be discriminated on the ground of religion, race, caste, sex or place of birth in the matter of employment by the State. The Constitution also includes prohibition of 'untouchability' in any form and clearly states that no citizen can be deprived of access to public places, public amenities and privileges on the aforesaid grounds.

To achieve a socialistic order of society in the country, the 42nd Amendment Act included specifically

the term 'socialist' in the Constitution by amending the Preamble. Part IV contains various socialist objective and enjoins the same upon the State towards achieving

Universal Adult Franchise

The concept of popular sovereignty as found mention in the Preamble and the declaration that the Constitution is adopted, enacted and given by the people of India unto themselveswould have been hollow unless there had been a provision of universal adult franchise in vogue. Adult franchise is the only mechanism of popular sovereignty in modern democracy. The adoption of universal adult franchise under Article 326 with only eligibility of attaining 18 years of age is a unique feature of Indian Constitution. All citizens of India attaining 18 years of age are eligible to vote and take part in political affairs of the country without any discrimination.

It is astounding to note that in 2014 General Election more than 834 million voters were eligible to vote. Such a huge democratic election is an unforeseen phenomenon in the history of democracy and as such it is a grand characteristic of Indian Political system.

There is no communal representation as was seen in pre-independent India. Reservation of seats is only meant for Scheduled Castes and Scheduled Tribes to provide equal representation of the said castes in the legislatures.

System of Independent Bodies

Apart from three integral parts of the government like legislative, executive and judicial organs, the Constitution has also envisaged certain independent bodies which are inbuilt mechanism to act as the bulwarks of the democratic system of Government prevalent in India. Such bodies are:

- **Election Commission** (Article 324) of India to ensure free and fair elections to Parliament, the state legislatures, the office of the President and Vice President of India.
- **Union Public Service Commission**(Article 315) to conduct examinations of recruitment to all-India services (Indian Administrative Services, Indian Police Services, Indian Forest Services etc.) and higher central services and to advise the president on various disciplinary matters.
- **State Public Services Commission**(Article 315) in almost every state (there is provision of Joint public service commission for two or more states) to conduct recruitment examination to higher state services and advise the governor on disciplinary matters.
- **The Comptroller and Auditor General of India** under Article 148 ensure financial prudence and propriety and audit accounts of the Central and state governments. The CAG is the guardian of public purse in India.

Three-tier Government

The system of Government at Centre, government at state level and government at panchayat and

municipality level is a unique constitutional phenomenon in India. The grassroot level of government at the Panchayat and Municipality level was not present in the original Constitution; it was included in the Constitution under 73rd and 74th Constitution Amendment Acts (1992) respectively to widen the base of popular sovereignty in India and realise decentralization of power. The Seventy-third Amendment Act conferred constitutional recognition to the Panchayats (rural local self-government) by adding Part IX and a new 11 Schedule to the Constitution and the Seventy-fourth Amendment Act gave constitutional recognition to municipalities (urban local self-government) by adding Part IXA and 12 Schedule to the Constitution.

Emergency Provisions

Unlike the US, in India the Constitution itself provides for inbuilt mechanism for the Union Government to assume greater powers whenever unified action is essential by reason of emergent internal and external circumstances. Emergency Provisions enshrined in the Constitution of India enable the Central Government to fight with external aggression, armed rebellions, riots of mass scale, constitutional breakdown and improprieties and also to balance economy in case there is financial crisis. There are, hence, three types of emergencies envisaged by the Constitution.

- National Emergency under Article 352 due to war, external aggression and armed rebellion.
- State Emergency or President's Rule due to breakdown of constitutional machinery in a state or states under Article 356.
- Financial Emergency on the ground of threat to financial stability and credit of India under Article 360.

General Knowledge Today

GS-II-3 - Important Amendments of Constitution

Integrated IAS General Studies:2016-17
Last Updated: September 12, 2016
Published by: GKTODAY.IN

Contents

Background: Procedure of amendment of the Constitution

Part XX of the Constitution of India has only one article that is Article 368 that deals with the amendment of the Constitution. As per this article, Parliament may add, amend or repeal any provision of the constitution as per the procedure laid down for this purpose. However, in the Kesavanand Bharati Case 1973, the Supreme Court has ruled that the Parliament cannot amend those provisions which constitute the Basic Structure of the Constitution.

Procedure for Amendment

- A constitution amendment bill *can be introduced in any house* of the parliament. A bill for the purpose of amendment of constitution *can NOT be introduced in any state legislature*.
- The Ordinance making power of the President *can NOT be used to amend the Constitution.*
- A constitution amendment bill *can be introduced both as a government bill or a private member bill.* However, if it's a Private Member, then it has to be examined in the first instance and recommended for introduction by the Committee on Private Members' Bills and Resolutions before it is included for introduction in the List of Business.
- *Prior recommendation of President is NOT needed* in introducing the constitution amendment bills.

- Constitution Amendment Bills are not treated as Money Bills or Financial Bills even if they have some provisions related to them.
- A constitution amendment bill must pass in both the houses separately by absolute + special majority {absolute → more than 50% of strength; special → 2/3 of present and voting}.
- If there is a disagreement between the two houses on a constitution amendment bill, there is NO provision of joint sitting to resolve the deadlock.
- The bills which result in some changes in the constitution but passed by *simple majority* are not deemed to be Constitution Amendments.
- If a bill seeks to amend the federal provisions of the Constitution, it must also be ratified by the legislatures of half of the states by a simple majority.
- Once the bill is passed in both houses, the bill is sent to president for approval. The 24th Amendment Act of 1971 had made it obligatory for the President to give his assent to a constitutional Amendment Bill. Thus, for a Constitution amendment bill, a President can neither withhold his assent not return the bill for reconsideration.

Bills which result in changes but not deemed to be Constitution Amendment Bills

There are several amendments which result into some changes in the constitution but can be passed in the houses by simple majorities. Such bills are NOT considered to be Constitution Amendment

Bills for the purpose of Article 368. These include the following:

- Admission or establishment of new states.
- Formation of new states and alteration of areas, boundaries or names of existing states.
- Abolition or creation of legislative councils in states.
- Changes in the Second Schedule-emoluments, allowances, privileges and so on of the president, the governors, the Speakers, judges, etc.
- Changes in the requirements of quorum in Parliament.
- Salaries and allowances of the members of Parliament.
- Changes in the Rules of procedure in Parliament.
- Changes in the Privileges of the Parliament, its members and its committees.
- Use of English language in Parliament or changes in use of official langauges {Please note that insertion of a language in 8th schedule or removal from it would need an amendment bill to be passed as per article 268}
- Changes that need to redefine number of the judges of Supreme Court.
- Changes that extend the jurisdiction of Supreme Court {Parliament can extend but cannot curtail jurisdiction of Supreme Court}.
- Changes in elections to parliament and state legislatures; delimitation.
- Changes in scheduled areas (5th schedule) and Tribal Areas (6th schedule)

Bills seeking to amend all other provisions can be introduced in either House of Parliament.

Amendments that seek to change federal provisions of the Constitution

A Constitution Amendment Bill which seeks to make any change in articles relating to:—

- the election of the President, or
- the extent of the executive power of the Union and the States, or
- the Supreme Court and the High Courts, or
- distribution of legislative powers between the Union and States, or representation of States in Parliament, or the very procedure for amendment as laid down in article 368 of the Constitution

The above bills will be first passed in the two houses separately by absolute and special majority and then also need to be ratified by legislatures of at least half of the states *by resolutions*. Only after this, the bill will be sent for presidential assent.

Presidential Assent to Constitution Amendment Bills

Constitution Amendment Bills passed by Parliament by the prescribed special majority and, where necessary, ratified by the requisite number of State Legislatures are presented to the President under article 368 of the Constitution under which the President is bound to give his assent to such Bills.

Constitution 1st Amendment, 1951

The First Amendment was passed in 1951 by the Provisional Parliament, which was elected on a limited franchise. The Statement of Reasons (SOR) relating to the First Amendment said: "*Challenges to agrarian laws or laws relating to land reform were pending in courts and were holding up large schemes of land legislation through dilatory and wasteful litigation.*"

Important Facts

- The First Amendment Act amended articles 15, 19, 85, 87, 174, 176, 341, 342, 372 and 376.
- It inserted articles *31A and 31B.*
- It inserted *Ninth Schedule* to the Constitution to protect the land reform and other laws present in it from the judicial review.
- First Amendment Act had set the precedent of amending the Constitution to overcome judicial pronouncements to implement the programmes and policies of the Government.
- It placed reasonable restrictions on fundamental rights and added three more grounds of restrictions on freedom of speech such as public order, friendly relations with foreign states and incitement to an offence.

- *Article 19(1)(g)* of the Constitution confers the right of citizens of India to practice any profession or to carry on any occupation, trade or business. The Amendment expressly provided that State trading and nationalization of any trade or business by the state is not being invalid on the ground of the violation of the right to trade or business.
- In response to the verdict on *State of Madras v. Champakam Dorairajan* case(1951), it made provision for special treatment of educationally and socially backward classes by adding the 9th schedule to the Constitution. It preventedthe acts listed in the 9th Schedule from being subjected to judicial review.

Why the first amendment was enacted?

- The citizen's right to freedom of speech and expression guaranteed by article 19(1)(a) has been held by some courts to be so comprehensive as not to render a person culpable even if he advocates murder and other crimes of violence. In other countries with written constitutions, freedom of speech and of the press is not regarded as debarring the State from punishing or preventing abuse of this freedom. So, the main objective was to amend article 19 for the purposes indicated above and to insert provisions fully securing the constitutional validity of zamindari abolition laws in general and certain specified State Acts in particular.
- It is laid down in article 46 as a directive principle of State policy that the State should

promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. In order that any special provision that the State may make for the educational, economic or social advancement of any backward class of citizens may not be challenged on the ground
of being discriminatory.

- Certain amendments in respect of articles dealing with the convening and proroguing of the sessions of Parliament was found necessary and are also incorporated in this Act. So also a few minor amendments in respect of articles 341, 342, 372 and 376.

What were the implications of the First Amendment Act, 1951?

- Under the provisions of Article 31, laws placed in the Ninth Schedule cannot be challenged in a court of law on the ground that they violated the fundamental rights of citizens.Art.31-B is also retrospective in nature. So, even if a statute which has already been declared unconstitutional by a court of law is included with in the Schedule, it is deemed to be constitutionally valid from the date of its inception. In short, the judicial decision becomes void when the statute is included in the Schedule.
- Article 31(A), has vested enormous power to the State with respect to the acquisition of estates or taking over of management of any property or corporation in public interest. It sought to exclude such acquisitions or from the scope of judicial review under Articles 14 and 19.
- Even though the Supreme Court has held that judicial review, as a basic structure, cannot be taken away after the kesavanandaBharati case, 1973, Articles 31(A), 31(B) and 31(C) saved land reform legislations and gave priority to the implementation of the Directive Principles rather than to the individual liberty.
- Ninth Schedule was widely misused.Ninth Schedule contains more than 250 legislations receiving protection under Ninth Schedule from the judicial scrutiny. With the burgeoning laws which are placed under the Ninth Schedule, it has today become a constitutional dustbin and house for every controversial law passed by the government of the day. Such a situation was not envisaged at the time, the First Amendment was enacted. For instance, former PM Indira Gandhi made amendments to the Representation of Peoples Acts of 1951 and 1974 and placed in the Ninth Schedule along with the Election Laws Amendment Act, 1975 to make her election valid.

Constitution 7th Amendment Act, 1956

The 7th Amendment of Indian Constitution was needed to implement the recommendations of the States Reorganisation Commission regarding the reorganization of the states on a linguistic basis. It paved way for doing away with classification of states in A, B, C and D categories and introduced of Union Territories.

Important Facts

- The areas and boundaries pertaining to the States and Union territories which were present in the first schedule of the Constitution was completely revised to reflect the changes brought in by the reorganization scheme.
- 7th CAA amended articles 1, 3, 49, 80, 81, 82, 131, 153, 158, 168, 170, 171, 216, 217, 220, 222, 224, 230, 231 and 232.
- It inserted articles 258A, 290A, 298, 350A, 350B, 371, 372A and 378A and amended part 8 and schedules 1, 2, 4 and 7.
- Fourth Schedule which lays down the allocation of seats in the Council of States, was completely revised.

- A new article 258A was inserted to provide that the Governor of a State may, with the consent of the Government of India, entrust any State functions to the central Government or its officers.
- Article 81 was revised. It has a provision which made readjustment in the allocation of seats to the states and the divisions of each state into territorial constituencies after each census. It also provided for a maximum of 500 members directly elected from territorial constituencies in the States, and a maximum of 20 members chosen from the Union Territories to the Lok Sabha as Parliament may by law provide.
- The House of the People shall consist of a maximum of 500 members directly elected from territorial constituencies in the States, and a maximum of 20 members chosen from the Union Territories in such manner as Parliament may by law provide.
- A provision making it possible to appoint the same person as Governor for two or more States has been added to article 153.
- Articles 170 and 171 were amended. The maximum strength of the Legislative Council of a State has been raised from one-fourth to one-third of the strength of the Legislative Assembly of that State.
- By amending article 220 relaxes the complete ban on practice by retired judges of the High

Courts and made provisions for the retired judge to practice in the Supreme Court and in any High Court other than the one in which he was a permanent judge.

- Article 230 was revised to enable Parliament to extend the jurisdiction of a High Court to, exclude the jurisdiction of a High Court from, any Union territory.
- Article 231 was amended to enable Parliament to establish a common High Court for two or more States.
- Article 240 was revised to make provisions for the peace, progress and good government of the Union territory of:
- The Andaman and Nicobar Islands; and
- The Laccadive, Minicoy and Amindivi Islands.
- Article 39 was revised to provide for the administration of a Union territory by the President through an administrator to be appointed by him. It also states that the President may appoint the Governor of State as the administrator of an adjoining Union territory. In such a case the Governor appointed shall exercise his functions independently of his Council of Ministers.
- A new article 350A states that every State to provide facilities for instruction in mother Tongue at the Primary stage to children belonging to linguistic minority groups and empowers the President to issue directions to any State for securing such facilities.
- A new article 350B inserted provides for appointment for the President to appoint Special Officers whose duty shall to investigate all matters relating to safeguards provided for linguistic minorities under the Constitution and to report to the President upon those matters. These reports shall be laid before each house of Parliament and sent to the Governments of the States concerned.
- Entries relating to Legislative lists to the acquisition and requisition of property. Entry 33 of the Union List and Entry 36 of the State List have been omitted and Entry 42 of the Concurrent List has been replaced by a more comprehensive entry covering the whole subject.

Implications

It was needed to make amendments to implement the scheme of States Reorganization and also to make some changes in certain provisions of the Constitution relating to High Courts and High Courts Judges, the executive power of the Union and the States, and a few in the legislative lists.

Constitution 10th Amendment Act, 1961

People of free Dadra and Nagar Haveli adopted a resolution on 12 June 1961 for integration of their territories with the Union of India. Subsequently, these areas were made part of specific Union Territory with effect from August 11, 1961.

Important Provisions

- The First Schedule to the Constitution is amended to make Dadra and Nagar Haveli as Seventh Union territory.
- It amended article 240(1) to include union territory of Dadra and Nagar Haveli in order to enable the President to make regulations for the peace, progress and good government of the territory.

Constitution 11th Amendment Act, 1961

Article 66(1) requires the members of the two Houses of Parliament to assemble at a joint sitting for the election of the Vice President. This provision of the article seemed to be unnecessary. So, it was amended. Also, it was possible that the elections to the houses of Parliament may not be completed before the elections of President and Vice President. So it was also necessary to amend article 71 containing the provisions for the election of President or Vice President.

Important provisions

- Article 66 was amended to omit the requirement of joint sitting of the Houses of Parliament.
- Article 71 was amended to make the election of President or Vice President free from being challenged on the ground of existence of any vacancy for whatever reason in the Electoral College.

Constitution 12th Amendment Act, 1962

There was a need to incorporate Goa, Daman and Diu as a Union Territory, consequent to acquisition from Portugal and also to empower President to make regulations for the peace, progress and good government of the territory.

Important provisions

- First Schedule of the Constitution was amended to include Goa, Daman and Diu as a union territory.
- Article 240(1) was amended to enable the President to make regulations for the peace, progress and good government of the territory.

Constitution 13th Amendment Act, 1962

Nagaland was present as a tribal area within the State of Assam. An agreement was made in July 1960 between the Government of India and the leaders of Naga People's Convention to incorporate the state of Nagaland in to the Union of India.

Important provisions

- Part XXI of the Constitution with the heading "Temporary and Transitional Provisions" was substituted by "Temporary Transitional and Special Provisions"
- It inserted a new article 371A to provide special provisions with respect to the State of Nagaland. The Governor of Nagaland will be responsible:
    - For law and order so long as the situation in the State continued to remain disturbed on account of the hostile activities inside the area.
    - For the funds to be made available to the new State by the Government of India
    - For the administration of Tuensang district for a period of ten years.

Constitution 14th Amendment Act, 1962

The French establishments of Pondicherry, Karaikal, Mahe and Yanam became territories of India after the ratification of "Treaty of Cession" by the Governments of India and France. Also to create Legislative Assemblies for Himachal Pradesh, Tripura, Manipur and Goa.

Important provisions

- First Schedule was amended to include the territories of "Pondicherry".
- It amended the article 81(1)(b) of the Constitution to raise the maximum number of seats in LokSabha for members representing the Union territories, from twenty to twenty-five, thus enabling representation being given to Union territory of "Pondicherry".
- Fourth Schedule was amended to allocate one seat in RajyaSabhe to the Union territory of Pondicherry.
- New Article 239A was inserted to create Legislatures and Counil of Ministers for the Union territories of Himachal Pradesh, Manipur, Tripura, Goa, Daman and Diu, and Pondicherry
- Article 240(1) was amended to enable the President to make regulations for the peace, progress and good government for the Union territory of Pondicherry.

Constitution 24th Amendment Act, 1971

The 24th amendment was enacted as a reaction to Golak Nath case, 1967. The Golak Nath ruling led to increased parliamentary authority to amend the Constitution. Through the Amendment,

Parliament restored to itself undisputed authority to amend the Constitution, including its repeal.

Important Facts

- It restored the absolute power of the Parliament to amend any part of the Constitution including Part III (fundamental rights).
- The Act provides that when a Constitution Amendment Bill passed by both Houses of Parliament is presented to the President for his assent, he should give his assent. The president was made duty bound to give assent to a Constitution Amendment Bill when presented to him.
- It amends article 13 of the Constitution to make it inapplicable to any amendment of the Constitution under article 368.
- Article 13(4) and 368(3) were inserted through 24th Amendment. Article 13 (4) says "Nothing in this article shall apply to any amendment of this Constitution made under article 368."

Why it was enacted?

The Supreme Court in the Golak Nath's case (1967) upheld the power of Parliament to amend all parts of the Constitution including Part III relating to fundamental rights. The result of the judgment is that Parliament is considered powerless to take away or curtail any of the fundamental rights guaranteedby Part III of the Constitution even if it becomes necessary to do sofor giving effect to the Directive Principles of State Policy and for the attainment of the objectives set out in the Preamble to the Constitution. It was considered necessary to provide expressly that Parliament has power to amend any provision of the Constitution and to include the provisions of Part III within the scope of the amending power.

Implications

The president's assent to the Constitution amendment bill was made obligatory.

- It substituted a new marginal heading to article 368 in place of the old heading "procedure for amendment of the constitution". The new heading is "power of parliament to amend the constitution and procedure thereof."
- The 24th Amendment was the first of a series of several constitutional amendments designed to weaken the judiciary, and enhance the authority of Parliament and thePrime Minister's office. The most notable among these were the 25th, 38th and 39th Amendments, culminating in the 42nd Amendment in 1976, which brought about the most sweeping changes to the Constitution in history.

- In GolakNath's case, the Supreme Court held that the amendment of the Constitution under article 368 is "law within the meaning of Article 13 of the Constitution so a Constitutional Amendment which takes away or abridges a fundamental right would be void. 24th Amendment Act made clear that provisions in article 13 does not apply to constitutional amendment made under article 368.

Kesavananda Bharati case and constitutional amendments:

In Kesavananda Bharati v. State of Kerala case (1973), the Supreme Court reviewed the validity of 24th,25th, 26th and 29th Constitution Amendments. Accordingly the following observations were made by it:

- GolakNath case verdict was overruled and was held that article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.
- The 24th and 29th Amendment Act was made valid.

The first part of section 3 of the 25th CAA was held valid but the second part namely "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy" is invalid, thus paving way for judicial scrutiny.

Constitution 42nd Amendment Act, 1976

The 42nd Amendment of Indian Constitution is most comprehensive amendment to the Constitution and carried out major changes. It is also known as "mini constitution".

Why it was enacted?

According to the statement of objects and reasons of the 42nd CAA, the following are the reasons for the enactment of 42nd CAA:

- A Constitution to be living must be growing. For removing the difficulties which have arisen in achieving the objective of socio-economic revolution, which would end poverty and ignorance and disease and inequality of opportunity etc., amendment of the Constitution is needed.
- to amend the Constitution to spell out expressly the high ideals of socialism, secularism and the integrity of the nation, to make the directive principles more comprehensive and give them precedence over those fundamental rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing the directive principles.
- to specify the fundamental duties of the citizens and make special provisions fordealing with anti-national activities, whether by individuals orassociations.
- As Parliament and the State Legislatures embody the will of the people so it is essential to

establish the parliamentary supremacy in enacting Constitutional amendments.

- to strengthen the presumption in favour of the constitutionality of legislation enacted by Parliament and State Legislatures by providing for a requirements as to the minimum number of Judges for determining questions as to the constitutionality of laws and for a special majority of not less than two-thirds for declaring any law to be constitutionally invalid.
- to take away the jurisdiction of High Courts with regard to determination of Constitutional validity of Central laws and confer exclusive jurisdiction in this behalf on the Supreme Court so as to avoid multiplicity of proceedings with regard to validity of the same Central law in different High Courts and the consequent possibility of the Central law being valid in one State and invalid in another State.
- To reduce the mounting arrears in High Courts and to secure the speedy disposal of service matters, revenue matters and certain other matters of special importance in the context of the socio-economic

  development and progress, it is considered expedient to provide for administrative and other tribunals for dealing with such matters while preserving the jurisdiction of the Supreme Court in regard to such matters under article 136 of the Constitution. It is also necessary to make certain modifications in the writ jurisdiction of the High Courts under article 226.
- to avail of the present opportunity to make certain other amendments which have become necessary in the light of the working of the Constitution.

Important Provisions

- It amended articles 31, 31C, 39, 55, 74, 77, 81, 82, 83, 100, 102, 103, 105, 118, 145, 150, 166, 170, 172, 189, 191, 192, 194, 208, 217, 225, 226, 227, 228, 311, 312, 330, 352, 353, 356, 357, 358, 359, 366, 368 and 371F.
- It inserted articles 31D, 32A, 39A, 43A, 48A, 131A, 139A, 144A, 226A, 228A and 257A and parts 4A and 14A. It also amended Schedule 7.
- The preamble has been amended to substitute the words "SOVEREIGN DEMOCRATIC REPUBLIC", with the words "SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC" and the words "unity of the Nation" was substituted with "unity and integrity of the Nation."
- The scope of article 31C was widened to cover all the directive principles laid down in the Constitution. Earlier Article 31C saved only laws giving effect to the directive principles of State policy specified in article 39(b) and 39(c).

- New directives was added by new articles 39A, 43A, 48A which, respectively, provide for equal justice and free legal aid to economically backward classes, participation of workers in the management of industries, and protection and improvement of environment and safeguarding of forests and wildlife.
- New article 31D provides for the making of a Parliamentary law to prevent or prohibit anti national activity and anti-national associations. Further it was provided that article 31D will not be deemed to be void on the ground that it takes away or abridges any of the fundamental rights conferred by article 14, article 19 and article 31.
- New article 32A was added to provide that the Supreme Court will have no jurisdiction to decide the constitutional validity of a State law in any writ proceedings under article 32.
- New Part IVA containing article 51A was added to provide lists of fundamental duties of citizens.
- Article 74(1) was amended to make the President to act in accordance with the advice of the Council of Ministers.
- Article 77 and article 166 relating to the Union government and State government have been amended to provide that no court or other authority will be entitled to require the production of any rules framed for the transaction of Government business.
- Article 102(1)(a) was amended to provide that a person will be so disqualified if he holds any such office of profit under the Government of India or the Government of any State as is declared by Parliamentary law to disqualify offices will vest in Parliament instead of in the State Legislature.
- It amended the articles 83 and 172 to increase the duration of the LokSabha and every Legislative Assembly from five to six years during a situation of emergency.
- It provided the Union Government to deploy personnel of armed forces in any state to deal with a 'grave situation of law and order'
- It curtailed the power of the Supreme Court and High Court with regard to the issue of writs and judicial review.
- Supremacy of the Parliament was established by this 42nd CAA with regard to the amendment of the Constitution. Article 368 has been amended to provide that no constitutional amendment will be called in question in any court on any ground.
- It transferred subjects like forests, education, weights and measures except establishments of standards, protection of wild animals and birds from the State List to the Concurrent List. New entry 20A was added in Concurrent List which is "Population control and family

planning".

Article 356 was amended to enlarge the period of operation of proclamation of failure of constitutional machinery in a State which has been approved by Parliament and the period for which the approved Proclamation can be renewed at a time was increased from 6 months to one year.

Constitution 44th Amendment Act, 1978

The 44th amendment of the Indian Constitution was significant as it removed partially the distortions that were introduced into the Constitution by 42nd Amendment. It wanted to provide that certain changes in the Constitution which would have the effect of impairing its secular or democratic character, abridging or taking away fundamental rights prejudicing or impeding free and fair elections on the basis of adult suffrage and compromising the independence of judiciary.

Important Facts

- The fundamental rights, including those of life and liberty, granted to citizens are capable of being taken away by a transient majority. It was, therefore, necessary to provide adequate safeguards against the recurrence of such a contingency in the future and to ensure to the people themselves an effective voice in determining the form of government under which they are to live. This was one of the primary objectives of the Act.
- The Act wanted to take away the right to property from the category of fundamental rights and to provide that no person shall be deprived of his property save in accordance with law.
- A Proclamation of Emergency under article 352 has virtually the effect of amending the Constitution by converting it for the duration into that of a Unitary State and made the rights of the citizen to move the courts for the enforcement of fundamental rights including the right to life and liberty to be suspended. Adequate safeguards were, therefore, necessary to ensure that this power is properly exercised and is not abused.

Important provisions

- The right to property was taken away from the category of fundamental rights and made as a legal right. Article 19(1)(f), which guarantees the citizens the right to acquire, hold and dispose of property and article 31 relating to compulsory acquisition of property have been omitted. It was, however, be ensured that the removal of property from the list of fundamental rights would not affect the right of minorities to establish and administer educational institutions of their choice.

- It amended articles 19, 22, 30, 31A, 31C, 38, 71, 74, 77, 83, 103, 105, 123, 132, 133, 134, 139A, 150, 166, 172, 192, 194, 213, 217, 225, 226, 227, 239B, 329, 352, 356, 358, 359, 360 and 371F and inserted articles 134A and 361A. Further removed articles 31, 257A and 329A. It also amended part 12 and schedule 9.
- A new directive principle has been inserted in article 38, which provides that State shall secure social order for promotion of welfare of the people.
- Article 74(1) was amended to include a provision that President may require the Council of Ministers to reconsider any advice tendered to him but the President has to act in accordance with the advice tendered after such reconsideration. Earlier, the President has to act in accordance with the advice tendered by the Council of Ministers.
- Article 83 and 172 was amended to restore the terms of the House of the People and the State Assemblies to five years. Earlier the 42nd CAA had extended the life of LokSabha and RajyaSabha from 5 to 6 years.
- Article 103 and 192 relating respectively to decisions on questions as to disqualification of members of Parliament and of State Legislatures have been replaced to provide that the decision on the question as to disqualification, by the President in the case of a member of a State Legislature, will be in accordance with the opinion of the Election Commission.

Amendments related to High Courts

- Article 226 was amended to restore to the High Courts their power to issue writs for any other purpose besides the enforcement of fundamental rights.
- Article 227 was amended to restore to the High Courts their power of superintendence over all courts and tribunals within its territorial jurisdiction.
- Article 257A which was related to power of Central government to send its armed forces or other forces of the union to address a grave situation there was omitted.

Amendments related to emergency

Article 352 was amended with the following changes:

- The ground of *"internal disturbance"* was substituted by the ground of *"armed rebellion"*.Proclamation of Emergency can be issued only when the security of India or any part of its territory is threatened by war or external aggression or by armed rebellion. Internal disturbance not amounting to armed rebellion would not be a ground for the issue of a Proclamation.
- A provision was included stating that the President will not issue a Proclamation of Emergency unless the decision of the Union Cabinet that such a Proclamation may be issued

has to be communicated to him in writing.

- Proclamation of Emergency has to be approved within a period of one month (instead of two months) by resolutions of both Houses of Parliament and has to be passed by a majority of the total membership of each house and by a majority of not less than two-thirds of the members present and voting in each House instead of a simple majority.
- For continuance of the Proclamation of Emergency, approval by resolutions of both Houses will be required every six months.
- Proclamation of Emergency will be revoked whenever the House of the People passes a resolution by a simple majority disapproving its continuance.
- Ten per cent or more of the Members of Lok Sabha can request a special meeting for considering a resolution for disapproving the Proclamation.

Article 356 relating to the President's power to issue a proclamation in case of failure of constitutional machinery in a State is amended with the following provisions:

- The provision with regard to the breakdown of the constitutional machinery in the States was amended so as to provide that a Proclamation issued under article 356 would be in force only for a period of six months in the first instance and that it cannot exceed one year ordinarily. However, if a Proclamation of Emergency is in operation and the Election Commission certifies that the extension of the President's rule beyond a period of one year is necessary on account of difficulties in holding elections to the Legislative Assembly of the State concerned, the period of operation of the Proclamation can be extended beyond one year. This is subject to the existing limit of three years. These changes were made to ensure that democratic rule is restored to a State after the minimum period which will be necessary for holding elections.

Article 358 relating to the suspension of Article 19 was amended:

- The provisions of Article 19 will become suspended only in case of a Proclamation of Emergency issued on the ground of war or external aggression and not in the case of a Proclamation of Emergency issued on the ground of armed rebellion.

Article 359 relating to suspension of the enforcement of the rights conferred by Part III of the Constitution during Emergencies was amended:

- Enforcement of rights under Article 20 and 21 cannot be suspended.

Other amendments

- Article 360 clause (5) was omitted which states that the satisfaction of the President as to the arising of a situation whereby the financial stability or credit of the country of any part is

threatened is final and conclusive.

- Article 361A was inserted to provide constitutional protection in respect of publication of a substantially true report of the proceedings of Parliament and of State Legislatures. But the protection will be absent in respect of proceedings of secret sittings.
- Entries such as 87 and 130 were omitted in the ninth schedule of the constitution. Entry 87 dealt with the Representation of People Act, 1951, 1974 and Election Laws (Amendment) Act, 1975 etc. Entry 130 dealt the Prevention of Publication of Objectionable Matter Act, 1976).
- As a further check against the misuse of the Emergency provisions and to put the right to life and liberty on a secure footing, provisions was made such that the power to suspend the right to move the court for the enforcement of a fundamental right cannot be exercised in respect of the fundamental right to life and liberty. The right to liberty was further strengthened by the provision that a law for preventivedetention cannot authorize, in any case, detention for a longer period than two months, unless an Advisory Board has reported that there issufficient cause for such detention. Article 22 has provisions for *preventive detention.*An additional safeguard was provided by the requirement that the Chairman of an Advisory Board shall be a serving Judge of the appropriate High Court and that the Board shall be constituted in accordance with the recommendations of the Chief Justice of that High Court.
- With a view to avoiding delays, articles 132,133 and 134 was amended to insert a new article 134A to provide that a High Court should consider the question of granting a certificate for appeal to Supreme Court immediately after the delivery of the judgment, decree, final order or sentence concerned on the basis of an oral application by a party or, if the High Court deems fit so to do, on its own motion. Cases of special leave to appeal by Supreme Court will be left to be regulated exclusively by article 136.

Implications

It modified the emergency provisions of the Constitution and prevented it from being misused in the future. Supreme Court and High Courts were restored with their jurisdiction and power which they enjoyed before the 42nd amendment act was passed. It restored the secular and democratic ideals present in the Constitution.

Constitution 52nd Amendment Act, 1985

Constitution 52nd Amendment Act, 1985 provided provisions related to anti-defection in India. In this amendment, articles 101, 102, 190 and 191 were changed. It laid down the process by which legislators may be disqualified on grounds of defection and inserted schedule 10.

Key Provisions

It laid down the process by which legislators may be disqualified on grounds of defection. As per this process, a Member of Parliament or state legislature can be disqualified on the following grounds:

Members of a Political Party

- When voluntarily resigned from his party or disobeyed the directives of the party leadership on a vote.
- When does not vote / abstains as per party's whip. However, if the member has taken prior permission, or is condoned by the party within 15 days from such voting or abstention, the member shall not be disqualified.

Independent Members

If a member has been elected as "Independent", he / she would be disqualified if joined a political party.

Nominated Members

Nominated members who were not members of a party could choose to join a party within six months; after that period, they were treated as a party member or independent member.

Exceptions

- If a person is elected as speaker or chairman then he could resign from his party, and rejoin the party if he demitted that post. No disqualification in this case.
- A party could be merged into another if*at least one-thirds of its party legislators voted for the merger*. The law initially permitted splitting of parties, but that has now been made two-third.

10th schedule

- The amendment added the Tenth Schedule to the Constitution which contains provisions as to disqualification on the ground of defection.
- *Bar of jurisdiction of courts*: no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under tenth Schedule.

Article 102 of the Constitution was amended to provide that a person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule. Similarly Article 191 was amended to provide that a person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth

Schedule.

Implications

When this law was passed, it was met with severe oppositions on logic that it impinged on right to free speech of legislators. A PIL was filed in the Supreme Court in the form of famous *Kihoto Hollohon vs Zachillhu and Others (1992)*. This PIL had challenged the constitutional validity of the law. But SC upheld the constitutional validity of 10th schedule. Court also decided that the law does not violate any rights of free speech or basic structure of the parliamentary democracy.

However, Supreme Court also made some observations on Section 2(1) (b) of the Tenth schedule. Section 2(1) (b) reads that a member shall be disqualified if he votes or abstains from voting contrary to any direction issued by the political party. The judgement highlighted the need to limit disqualifications to votes *crucial to the existence of the government* and to matters *integral to the electoral programme of the party*, so as not to 'unduly impinge' on the freedom of speech of members. This further resulted in 91st Amendment Act, 2003. {Anti-defection law has been discussed in detail here}

Constitution 61st Amendment Act, 1988

Constitution 61st Amendment Act, 1988 was enacted to reduce the voting age from 21 years to 18 years. Article 326 of the Constitution provides that the elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage and the voters should not be less than 21 years of age. Keeping in view of the literacy, enlightenment and politically awareness among the youth, the lowering of the voting age was carried out by the amendment.

Important provisions

Article 326 was amended to give effect to reduced voting age of 18 years. The act was also ratified by the legislatures of not less than one-half of the States by resolution.

Constitution 65th Amendment Act, 1990

Article 338 of the Constitution provides for a Special Officer for the Scheduled Castes and Scheduled Tribes to investigate all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under the Constitution and to report to the President on their working. It was felt that a high level five-member Commission under article 338 will be a more effective arrangement in respect of the constitutional safeguards for Scheduled Castes and Scheduled Tribes than a single Special Officer. It was also felt that it is necessary to elaborate the functions of the said Commission so as to cover measures that should be taken by the Union or any State for the effective implementation of those safeguards and other measures for the

protection, welfare and socio-economic development of the Scheduled Castes and Scheduled Tribes and to entrust to the Commission such other functions in relation to the protection, welfare and development and advancement of the Scheduled Castes and Scheduled Tribes as the President may, subject to any law made by Parliament, by rule specify. It was also felt that the reports of the said Commission shall be laid before Parliament and the Legislatures of the States

Important provisions

Amendment of article 338:

In article 338 of the Constitution,-

- The following marginal heading was substituted, namely"National Commission for Scheduled Castes and Scheduled Tribes"
- Clauses (1) and (2) were substituted with the following provisions:
    - There shall be a Commission for the Scheduled Castes and Scheduled Tribes to be known as the National Commission for the Scheduled Castes and Scheduled Tribes.
    - (2) The Commission was made to consist of a Chairperson, Vice-Chairperson and five other Members and the conditions of service

and tenure of office of the Chairperson, Vice-Chairperson and other Members so appointed shall be such as the President may by rule determine.
- The Chairperson, Vice-Chairperson and other Members of the Commission shall be appointed by the President by warrant under his hand and seal.
- The Commission shall have the power to regulate its own procedure.
- It shall be the duty of the Commission:
    - to investigate and monitor all matters relating the safeguards provided for the Scheduled Castes and Scheduled Tribes under the Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards.
    - to inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled Castes and Scheduled Tribes.
    - to participate and advise on the planning process of socio-economic development of the Scheduled Castes and Scheduled Tribes and to evaluate the progress of their development under the Union and any State.
    - to present to the President, annually and at such other times as

the Commission may deem fit, reports upon the working of those safeguards.

- to make in such reports recommendations as to the measures that should be taken by the Union or any State for the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of the Scheduled Castes and Scheduled Tribes.
- to discharge such other functions in relation to the protection, welfare and development and advancement of the Scheduled Castes and Scheduled Tribes as the President may, subject to the provisions of any law made by Parliament, by rule specify.
- The President shall cause all such reports to be laid before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non-acceptance, if any, of any of such recommendations.
- Where any such report, or any part thereof, relates to any matter with which any State Government is concerned, a copy of such report shall be forwarded to the Governor of the State who shall cause it to be laid before the Legislature of the State along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the State and the reasons for the non-acceptance, if any, of any such recommendations.
- The Commission shall, while investigating any matter referred to have all the powers of a civil court trying a suit and in particular in respect of the following matters:
    - summoning and enforcing the attendance of any person from any part of India and examining him on oath;
    - requiring the discovery and production of any document;
    - receiving evidence on affidavits;
    - requisitioning any public record or copy thereof from any court or office;
    - issuing commissions for the examination of witnesses and documents;
    - any other matter which the President may, by rule, determine.
- The Union and every State Government shall consult the Commission on all major policy matters affecting Scheduled Castes and Scheduled

Constitution 73rd Amendment Act, 1992

The 73rd Amendment 1992 added a new Part IX to the constitution titled "The Panchayats" covering provisions from Article 243 to 243(O); and a new Eleventh Schedule covering 29 subjects within the functions of the Panchayats.

Significance of the amendment

This amendment implements the article 40 of the DPSP which says that "State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government" and have upgraded them from non-justifiable to justifiable part of the constitution and has put constitutional obligation upon states to enact the Panchayati Raj Acts as per provisions of the Part IX. However, states have been given enough freedom to take their geographical, politico-administrative and others conditions into account while adopting the Panchayati Raj System.

Salient Features

Gram Sabha

Gram Sabha is a body consisting of *all the persons registered in the electoral rolls* relating to a village comprised within the area of Panchayat at the village level. Since all the persons registered in electoral rolls are members of Gram Sabha, *there are no elected representatives*. Further, Gram Sabha is the only permanent unit in Panchayati Raj system and not constituted for a particular period. Although it serves as foundation of the Panchayati Raj, yet it is **not** among the three tiers of the same. The powers and functions of Gram Sabha are fixed by state legislature by law.

Three Tiers of Panchayati Raj

Part IX provides for a 3 tier Panchayat system, which would be constituted in every state at the village level, intermediate level and district level. This provision brought the uniformity in the Panchayati Raj structure in India. However, the states which were having population below 20 Lakh were given an option to not to have the intermediate level.

All the members of these three level are elected. Further, the chairperson of panchayats at the intermediate and district levels are indirectly elected from amongst the elected members. But at the village level, the election of chairperson of Panchayat (Sarpanch) may be direct or indirect as provided by the state in its own Panchayati Raj Act.

Reservation in Panchayats

There is a provision of reservation of seats for SCs and STs at every level of Panchayat. The seats are to be reserved for SCs and STs in proportion to their population at each level. Out of the Reserved Seats, 1/3rd have to be reserved for the women of the SC and ST. Out of the total number of seats to

be filled by the direct elections, 1/3rd have to be reserved for women. There has been an amendment bill pending that seeks to increase reservation for women to 50%. The reserved seats may be allotted by rotation to different constituencies in the Panchayat. The State by law may also provide for reservations for the offices of the Chairpersons.

Duration of Panchayats

A clear term for 5 years has been provided for the Panchayats and elections must take place before the expiry of the terms. However, the Panchayat may be dissolved earlier on specific grounds in accordance with the state legislations. In that case the elections must take place before expiry of 6 months of the dissolution.

Disqualification of Members

Article 243F makes provisions for disqualifications from the membership. As per this article, any person who is qualified to become an MLA is qualified to become a member of the Panchayat, but for Panchayat the minimum age prescribed is 21 years. Further, the disqualification criteria are to be decided by the state legislature by law.

Finance Commission

State Government needs to appoint a finance commission every five years, which shall review the financial position of the Panchayats and to make recommendation on the following:

- The Distribution of the taxes, duties, tolls, fees etc. levied by the state which is to be divided between the Panchayats.
- Allocation of proceeds between various tiers.
- Taxes, tolls, fees assigned to Panchayats
- Grant in aids.

This report of the Finance Commission would be laid on the *table in the State legislature*. Further, the Union Finance Commission also suggests the measures needed to augment the Consolidated Funds of States to supplement the resources of the panchayats in the states.

Powers and Functions: 11th Schedule

The state legislatures are needed to enact laws to endow powers and authority to the Panchayats to enable them functions of local government. The 11th schedule enshrines the distribution of powers between the State legislature and the Panchayats. These 29 subjects are listed below:

11th Schedule of the Constitution	
1. Agriculture, including agricultural extension.	16. Poverty alleviation programme.
2. Land improvement, implementation of land reforms, land consolidation and soil conservation.	17. Education, including primary and secondary schools.

11th Schedule of the Constitution	
3. Minor irrigation, water management and watershed development.	18. Technical training and vocational education.
4. Animal husbandry, dairying and poultry.	19. Adult and non-formal education.
5. Fisheries.	20. Libraries.
6. Social forestry and farm forestry.	21. Cultural activities.
7. Minor forest produce.	22. Markets and fairs.
8. Small scale industries, including food processing industries.	23. Health and sanitation, including hospitals, primary health centers and dispensaries.
9. Khadi, village and cottage industries.	24. Family welfare.
10. Rural housing.	25. Women and child development.
11. Drinking water.	26. Social welfare, including welfare of the handicapped and mentally retarded.
12. Fuel and fodder.	27. Welfare of the weaker sections, and in particular, of the Scheduled Castes and the Scheduled Tribes.
13. Roads, culverts, bridges, ferries, waterways and other means of communication.	28. Public distribution system.
14. Rural electrification, including distribution of electricity.	29. Maintenance of community assets.
15. Non-conventional energy sources.	

Further, the state legislature can authorize the Panchayats to collect and appropriate suitable local taxes and provide grant in aids to the Panchayats from the Consolidated Funds of the states.

Audit of Accounts

State Government can make provisions for audit of accounts of the Panchayats.

Elections

Article 243K enshrines the provisions with respect to elections of the Panchayats. This article provides for constitution of a State Election Commission in respect of the Panchayats. This State Election Commission would have the power to supervise, direct and control the elections to the Panchayats and also prepare the electoral rolls.

The article maintains the independence of the election commission by making provisions that the election commissioner of this commissioner would be removed only by manner and on same grounds as a Judge of the High Court.

If there is a dispute in the Panchayat elections, the *Courts have NO jurisdiction over them*. This means that the Panchayat election can be questioned only in the form of an election petition presented to an authority which the State legislature by law can prescribe. (Important) The election commissioner for this reason is to be appointed by the Governor. The terms and conditions of the office of the Election commissioners have also to be decided by the Governor.

Applications to Union Territories

Provisions of Panchayats shall be applicable to the UTs in same way as in case of the states but the President by a public notification may make any modifications in the applications of any part.

Exempted areas and states

The provisions of part IX are not applicable to the following:

- Entire states of Nagaland, Meghalaya and Mizoram
- Hill areas in the State of Manipur for which District Councils
- Further, the district level provisions shall not apply to the hill areas of the District of Darjeeling in the State of West Bengal which affect the Darjeeling Gorkha Hill Council.
- The reservation provisions are not applicable to Arunachal Pradesh.

Continuance of Existing Laws

Any provision of any law relating to Panchayats in force in a State immediately before the commencement of the Constitution (Seventy-third Amendment) Act, 1992, which is inconsistent with the provisions of this Part, shall continue to be in force until amended or repealed by a competent Legislature or competent authority.

Bar on Interference by Courts

Article 243 O bars the courts to interfere in the Panchayat Matters. The validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies cannot be questioned in a court. No election to any Panchayat is to be questioned except by an election petition presented to such authority and in such manner as provided by the state legislature.

Comment

The positive impact of the 73rd Amendment in rural India is clearly visible as it has changed power equations significantly. Elections to the Panchayats in most states are being held regularly. Through over 600 District Panchayats, around 6000 Intermediate Panchayats and 2.3 lakh Gram Panchayats, more than 28 lakh persons now have a formal position in our representative democracy.

Still, this bill lacks the proper definition of the role of the bureaucracy. It does not clearly define the role of the state government. On practical level, people are illiterate in India and they are actually not

aware of these novel features. The Panchayats are dominated by effluents in some parts of the country. The 3 tiers of the Panchayati Raj have still very limited financial powers and their viability is entirely dependent upon the political will of the states.

Constituting 74th Amendment Act, 1992

Constitution (Seventy Forth Amendment) Act, 1992 has introduced a new **Part IXA** in the Constitution, which deals with Municipalities in an article 243 P to 243 ZG. This amendment, also known as **Nagarpalika Act**, came into force on 1st June 1993. It has given constitutional status to the municipalities and brought them under the justifiable part of the constitution. States were put under constitutional obligation to adopt municipalities as per system enshrined in the constitution.

Definition of Metropolitan area

Metropolitan area in the country is an area where population is above 10 Lakh. (Article 243P)

Three Kinds of Municipalities

Article 243Q provides for establishment of 3 kinds of Municipalities of every state.

- **Nagar Panchayat:** A Nagar Panchayat is for those areas which are transitional areas i.e. transiting from Rural Area to Urban areas. *"Governor" will by public notice, will define these three areas based upon the population, density of population, revenue generated for local administration, % of employment in Non-agricultural activities and other factors. Further, a Governor may also if, he fits it necessary, based upon the industrial establishments, can specify the Industrial Townships by public notice.*

- **Municipal Council:** A Municipal council is for smaller urban area
- **Municipal Corporation:** A municipal Corporation for Larger urban Areas

Composition of Municipalities

All the members of a Municipality are to be directly elected by the people of the Municipal area and for the purpose of making the electorate; the municipal area will be divided into territorial constituencies known as **Wards**.

- Besides the seats filled by direct elections, some seats may be filled by nomination of persons having special knowledge and experience in municipal administration.
- Persons so nominated shall not have the right to vote in the meetings of the municipality.
- The Legislature of a State may, by law, also provide for the representation in a municipality of members of the House of the People and the members of the Legislative Assembly of the State representing constituencies which comprise wholly or partly the Municipal area and also the Members of the Council of States and the members of the Legislative Council of the

State registered as electors within the municipal area.

The manner of election of Chairpersons of municipalities has been left to be specified by the **State Legislature. {**Article 243R}

Ward Committees

There shall be constituted the ward committees consisting of one or more wards within the territorial area of all the municipalities with a population of 3 Lakhs or more. { Article 243S}

Reservation of Seats:

Rreservation of the seats for the Scheduled castes and scheduled tribes in every municipality corporation has to be provided in proportion to their population to the total population in the municipal area.

- The proportion of seats to be reserved for SC/ST to the total number of seats has to be same as the proportion of the population of SC/ST in the municipal area.
- The reservation has to be made for only those seats that are to be filled by the direct elections. (This means no reservation for nominated seats)
- This article also provides that not less than one-third of the total number of seats reserved for SC/ST shall be reserved for women belonging to SC/ST. (**Mandatory provision**)

- In respect of women, the seats shall be reserved to the extent of not less than one-third of the total number of seats. This includes seats reserved for women belonging to SC/ST. These reservations will apply for direct elections only. (**Mandatory provision**)
- There are no bar on State Legislatures from making provisions for reservation of seats in any municipality or office of Chairperson in the municipalities in favor of backward class of citizens. (**Optional Provision**). {Article 243S}

Duration of Municipalities

Duration of the municipality has been fixed at 5 years from the date appointed for its first meeting. Elections to constitute a municipality are required to be completed before the expiration of the duration of the municipality. If the municipality is dissolved before the expiry of 5 years, the elections for constituting a new municipality are required to be completed within a period of 6 months from the date of its dissolution. {Article 243U}

Disqualifications of the members

A member is disqualified to be chosen as a member of municipality if he / she is disqualified under any law to be elected as MLA. The minimum age to be qualified as a **member is 21 years.**

Powers, authorities and responsibilities

As per Article 243 W, all municipalities would be empowered with such powers and responsibilities as may be necessary to enable them to function as effective institutions of self-government.

- The State Legislature may, by law, specify what powers and responsibilities would be given to the municipalities in respect of preparation of plans for economic development and social justice and for implementation of schemes as may be entrusted to them.

An illustrative list of functions that may be entrusted to the municipalities has been incorporated as the Twelfth Schedule of the Constitution. This schedule defines 18 new tasks in the functional domain of the Urban Local Bodies, as follows:

12th Schedule of the Constitution	
1. Urban planning including town planning.	10. Slum improvement and upgradation.
2. Regulation of land-use and construction of buildings.	11. Urban poverty alleviation.
3. Planning for economic and social development.	12. Provision of urban amenities and facilities such as parks, gardens, playgrounds.
4. Roads and bridges.	13. Promotion of cultural, educational and aesthetic aspects.
5. Water supply for domestic, industrial and commercial purposes.	14. Burials and burial grounds; cremations, cremation grounds; and electric crematoriums.
6. Public health, sanitation conservancy and solid waste management.	15. Cattle pounds; prevention of cruelty to animals.
7. Fire services.	16. Vital statistics including registration of births and deaths.
8. Urban forestry, protection of the environment and promotion of ecological aspects.	17. Public amenities including street lighting, parking lots, bus stops and public conveniences.
9. Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded.	18. Regulation of slaughter houses and tanneries.

Financial Powers

Via Article 243X, the constitution has left it open to the Legislature of a State to specify by law matters relating to imposition of taxes. Such law may specify:

- Taxes, duties, fees, etc. which could be levied and collected by the Municipalities, as per the procedure to be laid down in the State law
- Taxes, duties, fees, etc. which would be levied and collected by the State Government and a share passed on to the Municipalities

- Grant-in-aid that would be given to the Municipalities from the State
- Constitution of funds for crediting and withdrawal of moneys by the Municipality.

Finance Commission

Article 243Y makes provision that the Finance Commission constituted under Part IX for Panchayats shall also review the financial position of the municipalities and will make recommendations to the Governor.

- The recommendations of the Finance Commission will cover the following:
- Distribution between the State Government and Municipalities of the net proceeds of the taxes, duties, tolls and fees to be levied by the State
- Allocation of share of such proceeds between the Municipalities at all levels in the State
- Determination of taxes, duties, tolls and fees to be assigned or appropriated by the Municipalities
- Grants-in-aid to Municipalities from the Consolidated Fund of the State
- Measures needed to improve the financial position of the Municipalities.

Union Finance Commission also suggests the measures needed to augment the Consolidated Funds of States to supplement the resources of the panchayats in the states.

Audit and Accounts

As per article 243Z, the maintenance of the accounts of the municipalities and other audit shall be done in accordance with the *provisions in the State law*. The State Legislatures will be free to make appropriate provisions in this regard depending upon the local needs and institutional framework available for this purpose.

Elections Commission

Article 243ZA makes the provisions that the superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to the Panchayats and municipalities shall be vested in the **State Election Commissions**.

Application to Union Territories:

Article 243ZB makes provisions for applications of these provisions to the Union Territories. This article says that the provisions of Municipalities shall be applicable to the UTs in same way as in case of the states but the President by a public notification may make any modifications in the applications of any part.

Not applicability in some areas

Article 243 ZC says that provisions of part IXA are not applicable to

- Scheduled Areas referred in article 244. These include Assam, Meghalaya, Tripura and Mizoram.

- This part is also not applicable to the area covered under Darjeeling Gorkha Hill Council.

If the parliament makes any modifications in the scheduled areas , then the same restrictions would apply to those areas also.

Committee for District Planning

We have studied in the part IX that Planning and allocation of resources at the district level for the Panchayati Raj institutions are normally to be done by the Zila Parishad. As per the provisions of the Part IX-A, for urban areas, municipal bodies discharge these functions within their respective jurisdictions.

However, this gives rise to an important question that at the how the allocation of the funds has to be made. The Constitution has made provisions of creating **two Planning Committees in the state**.

- One is District Planning Committee at the district level with a view to consolidating the plans prepared by the Panchayats and the Municipalities and preparing a development plan for the district as a whole and the other is a Metropolitan Planning Committee.
- As per Article 243 ZD, there shall be constituted in every State at the district level a District Planning Committee to **consolidate the plans prepared by the Panchayats and the Municipalities** in the district and to prepare a draft development plan for the district as a whole.
- The option of composition and filling the seats has been left open to the states.
- District Planning Committee in preparing the Draft Development Plan shall have regard to:
- Matter of common interest between the Panchayats and the Municipalities including spatial planning
- Sharing of water and other physical and natural resources
- Integrated development of infrastructure and environment conservation
- Extent and type of available resources, whether financial or otherwise.

The Draft District Development Plan so prepared and recommended by the District Planning Committee shall be forwarded by the Chairperson of the Committee to the State Government.

Metropolitan Planning Committee:

Article 243 ZE says that there shall be constituted in every Metropolitan area a **Metropolitan Planning Committee** to prepare a draft development plan for the Metropolitan area as a whole. So for the areas with a population of 10 lakhs or more, a Metropolitan Planning Committee shall be constituted for preparing a draft development plan for the metropolitan area as a whole.

- The composition and filling of seats is open to the State legislatures.

- The Metropolitan Planning Committee shall take into account the following for preparation of the Draft Development Plan:
- Plan prepared by the Municipalities and the Panchayats in the metropolitan area
- Matter of common interest between the Municipalities and Panchayats including coordinated spatial plans of the area
- Sharing of water and other physical and natural resources
- Integrated development of infrastructure and environmental conservation
- Overall objectives and priorities set by the Government of India and the State Government
- Extent and nature of investments likely to be made in the metropolitan area by agencies of the Government
- Other available resources, financial and otherwise.

Comment

When we look at the provisions of the Part IXA of our constitution, we can say with confidence that 74th amendment act 1992 is one of the most important and vital amendments carried out so far in with regard to the urban development. The act has attempted to make the local bodies stronger, transparent. Here are some notable implications with regard to this Constitution amendment act:

- Local Government including self- government institutions in both urban and rural areas being exclusively a State subject under the legislative Entry 5 of the State List of the Seventh Schedule, the Union Government cannot enact any law relating to these subjects. However, what the part IX-A (and also IX) has done is to outline the Scheme which would be implemented by the States by making laws or amending their own existing laws to bring them in conformity with the provisions of the Constitution (74th Amendment) Act. Union Government's role is catalytic within the meaning of "economic and social planning" under concurrent list.
- Due to this amendment, a uniform pattern has emerged all over the country except any tribal areas which exist only in the north-eastem region, unless the Parliament by law extends the same to the tribal areas.
- The discretion of the state Governments has been drastically curtailed in the sense that they have now constitutional obligations to set up the Municipalities as per article 243Q.
- The criteria to set up the municipalities have been fixed and now it is more rational and scientific.
- With this act, the district planning has been given the Constitutional Status. Due to this the planning process itself has changed.

Various issues with 74th Amendment

The 74th Constitutional Amendment Act came into effect on June 1, 1993. It is related to Urban Local Bodies or Nagarpalikas. It had been enacted to accord constitutional recognition to the Urban Local Bodies as the third tier of the Government in urban areas. In many aspects it is similar to the 73rd Amendment Act, which relates to Panchayati Raj institutions, except that it applies to urban areas. For instance, provisions relating to direct elections, reservations, transfer of subjects, State Election Commission and State Finance Commission have been incorporated in the 74th Amendment Act also and thus apply to Nagarpalikas as well. The Constitution also mandated the transfer of a list of functions from the State government to the urban local bodies, which have been listed in the Eleventh Schedule of the Constitution.

The 74th Amendment Act has created uniformity in the structure of Nagarpalika institutions across the country. The provision for reservations for women, SC's, ST's and BC's (in some states) has also ensured adequate representation for all sections of the society.

However, despite the successes, there has been lacuna on several fronts too. It has been found that Nagarpalikas enjoy limited autonomy to perform the functions assigned to them. Further, many states have not transferred most of the subjects to the local bodies, which makes the entire exercise of electing so many representatives somewhat symbolic. They are also criticized on the ground that the formation of local bodies has not changed the way decisions are taken at the central and the state level. Thus there has been little effective decentralization. The financial dependence of Nagarpalikas, on the State and Central Governments, has also eroded their capacity to operate effectively. People at the local level still do not enjoy much power of choosing welfare programmes or allocation of resources.

Other specific weaknesses related to Nagarpalikas include:

- Article 243Q added a proviso which states that a municipality may not be constituted in those urban areas which are specified as industrial townships. This provision sidetracks the most important purpose of the 74th amendment, viz. creating constitutionally mandated municipal bodies of self-governance for all urban areas.
- Of the 18 tasks that are listed under the 12th Schedule, only a few have been entrusted to the municipalities.
- Though the 74th Amendment contains a stipulation for ward committees, they exists only in a few states.
- Article 243ZE mandates a Committee for Metropolitan Planning. However it has been set up only in Kolkata and Mumbai.

The 74th Amendment had a noble aim of imparting decentralization in urban areas. However, in light of the shortcomings that still persist, it would not be wrong to say that there is an urgent need to revisit the 74th Amendment.

Constitution 86th Amendment Act, 2002

The Constitution 86th Amendment Act, 2002 enshrined right to education as a fundamental right in part-III of the constitution. It came up with the below features:

Change in Fundamental Rights

A new article 21A was inserted below the Article 21 which made Right to Education a Fundamental Right for children in the range of 6-14 years. This article reads:

"The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine"

Change in DPSP

Article 45 which originally stated:

"The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

Was substituted as

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

Change in Fundamental Duties

- Article 51A was also amended and after clause (J), the clause (k) was added which says:
- "who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."

As per the above amendments, the 86th Amendment Act came up with the following:

- It made Right to Education a Fundamental Right for Children from Age 6-14.
- It made education for all children below 6 years a Directive Principle for State Policy (DPSP).
- It made the opportunities for education to child a Fundamental duty of the parents of the children.

No child is liable to pay any kind of fee/ capitation fee/ charges. A collection of capitation fee invites a fine up to 10 times the amount collected.

Children from Disadvantaged Group:

This right provides that "child belonging to disadvantage group" means a child who

- Belongs to SC & ST
- Socially backward class
- Geographical, Linguistic
- Gender or such other matters

- Is differentially abled

The Right to Education Act 2009 did not initially talk about "Physically disabled" children. To enable such provisions, the Right of Children to Free & Compulsory Education (Amendment) Bill 2010 was introduced in the RajyaSabha on April 16, 2010. This bill was later referred to a standing committee on Human Resource Development. The bill was passed in both the houses of the parliament by May 2012 thus expanding the definition of "Child belonging to disadvantaged group". Now this group shall also include the children with disability. Disability means blind, leprosy cured, hearing impaired, locomotor disabled and mentally ill. It also includes autism, cerebral palsy, mental retardation & multiple disabilities. These children have the same right as of other children. Please note that Right to Education of persons with disabilities until 18 years of age is laid down under a separate legislation- the Persons with Disabilities Act. A number of other provisions regarding improvement of school infrastructure, teacher-student ratio and faculty are made in the Act.

- *Teachers:* This act provides that the states will ensure that no non-teaching work is given to the teachers. The act recommends quality teachers and mandates that untrained teachers will have to *upgrade themselves in 5 years.*
- *Schools:* The act has listed minimum infrastructure requirements as a part of the schools and mandates the states to ensure that schools have these requirements. The schools which don't conform to the quality standards as mentioned in the act, will *upgrade themselves in 3 years or face derecognition.*
- *Reservation:* The act mandates 25% reservation for disadvantage sections of the society as defined by the act.
- *Management Committees:* The act mandates that parents are to constitute the 75% members in the management committees. The School management committees are to have 50% women members.
- *Screening:* This act makes the screening of students / parents unlawful. It invites fine up to ` 25000 in the first instance and double in every successive violations.
- *Examinations:* No child can be put through any exam, not even class V & Class VIII board examinations.
- *Number of Teachers:* The act mandates number of teachers as follows: (please note that in newspapers, different news have written different ratios. The following list is reproduced from the official document)
- Class I to Class V
    - Up to 60 children : 2 teachers (Pupil Teacher Ratio: 30:1)

- 61 to 90 children : 3 teachers (Pupil Teacher Ratio: 30:1)
- 90 to 120 : 4 teachers (Pupil Teacher Ratio: 30:1)
- 121-200 : 5 teachers (minimum Pupil Teacher Ratio: 40:1)

- Class VI to Class VIII
  - One teacher per class each for 1. Science and math 2. Social Studies 3. Languages.
  - One teacher for 35 children
  - If there are more than 100 children then 1. A full time teacher 2. Part time instructors for Art, Health and Physical Education, Work Education.
- *Corporal punishment:* The Right to Education Act 2009 makes corporal punishment unlawful.
- *Private Teaching / Tuitions:* Clause 28, Chapter 28 of the act mandates that no teacher shall engage himself / herself in private teaching.
- *Monitoring:* The act states that National & State Commissions for protection of Child rights would monitor the effective implementation of measures in this act and inquire into complaints.
- *National Advisory Council:* The act provides that the central Government shall constitute a National Advisory Council of maximum 15 members which shall advise the central government on implementation of the various provisions of the act.

Constitution 93rd Amendment Act, 2006

The Supreme Court delivered a judgement August 12, 2005 in the case of *P.A. Inamdar & Ors. vs. State of Maharashtra & Ors*, declaring that the State can't impose its reservation policy on minority and non-minority unaided private colleges, including professional colleges. So, to impose the State's reservation policies on the private unaided colleges, this amendment was enacted.

Further, the act aims to provide greater access to higher education including professional education to a larger number of students belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. The number of seats available in aided or State maintained institutions, particularly in respect of professional education, was limited in comparison to those in private unaided institutions.

It is laid down in article 46, as a directive principle of State policy, that the State shall promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. To promote the educational advancement of the socially and educationally backward classes of citizens or of the Scheduled Castes and Scheduled Tribes in matters

of admission of students belonging to these categories in unaided educational institutions, other than the minority educational institutions referred to in clause (1) of article 30 of the Constitution, it was enacted to amplify article 15.

Important provisions

- It inserted clause (5) in Article 15 of the Constitution with a aim to promote the educational advancement of the socially and educationally backward classes of citizens, the Scheduled Castes and the Scheduled Tribes through special provisions relating to admission of students belonging to these categories in all educational institutions, including private educational institutions, whether aided or unaided by the State.
- In article 15 of the Constitution, after clause (5), was inserted, namely:-
  "(5) Nothing in this article 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 Castes or the Scheduled Tribes in so far as such special provisions relate to their **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."
- Reservation of seats in Central Educational Institutions: out of the annual permitted strength in each branch of study or faculty:
- 15% seats shall be reserved for the Scheduled Castes;
- Seven and one-half percent seats shall be reserved for the Scheduled tribes;
- 27% seats shall be reserved for the Other Backward Classes.
- Act not to apply to:
- a central educational institution established in the tribal areas referred to in the 6th Schedule of the Constitution;
- a minority educational institution.

Implications

- This act was enacted to fulfil the Constitutional obligation of uplifting the backward classes.
- According to the critics, *it* "unequivocally destroys the essence of equality embedded in the Constitution by excluding educational institutions established by minorities and subjecting non-minority established institutions alone to bear the burden of weaker sections that are less meritorious."
- Article 15 (5) excluding minority institutions inconsistent with Article 15 (4)
- There is no provision to remove educational disparities among BCs

- Former Minister of HRD, Arjun Singh had termed this Act as an "enabling legislation, which means it is insidious and allows the government to enforce reservations not just in higher education institutions but in all educational institutions starting from the nursery upwards.
- The Amendment widening its scope of implementation by specifically including the term "admission to educational institutions". While Article 15 was first amended by thethe Constitution (First Amendment) Act, 1951 enacted on June 18, 1951. This particular amendment mentions "educational advancement", it does not use the term "admission to educational institutions". So, by this scope of the amendment act has been widely increased.

Supreme Court's observation on 93rd Amendment Act

The Supreme Court upheld the law providing a quota of 27 per cent for candidates belonging to the Other Backward Classes in Central higher educational institutions. But it directed the government to exclude the 'creamy layer' among the OBCs while implementing the law. The institutions will also include the Indian Institutes of Technology and the Indian Institutes of Management. It thus paved the way to giving effect to the Central Educational Institutions (Reservation in Admission) Act, 2006, from the academic year 2008-2009. It excludes the minority institutions from Article 15(5), by reasoning: "It does not violate Article 14 as minority educational institutions are a separate class and their rights are protected by other constitutional provisions."

According to the CJI, "The 93rd Amendment Act does not violate the basic structure of the Constitution so far as it relates to State maintained institutions and aided educational institutions. Article 15(5) of the Constitution is constitutionally valid and Articles 15(4) and 15(5) are not mutually contradictory."

He agreed with the decision to The CJI said: "Reservation is one of the many tools that are used to preserve and promote the essence of equality, so that disadvantaged groups can be brought to the forefront of civil life. It is also the duty of the State to promote positive measures to remove barriers of inequality and enable diverse communities to enjoy the freedoms and share the benefits guaranteed by the Constitution."

But it was made clear that the creamy layer should be excluded from the socially and educationally backward classes. Further, the creamy layer principle would not apply as far as the Scheduled Castes/Scheduled Tribes are concerned.

Constitution 96th Amendment Act, 2011

Constitution 96th Amendment Act, 2011 pertains to change of the entry of Oriya Language to Odiya in the 8th Schedule of Constitution of India.

Why it was enacted?

Orissa Assembly had passed a resolution unanimously on August 28, 2008 urging the Union government to correct the spelling of the name and language of the state mis-spelt in the first and eighth schedule of the Constitution.

Important provision

With this amendment, the spelling of the name of Orissa was changed to Odisha as an statutory act and its language from Oriya to Odiya in the 8th schedule of Constitution of India as a Constitutional amendment act.

Implications:

The Schedule 1 was changed. For example if Orissa becomes Odisha, the entry 10 in schedule 1 was changed from Orissa to Odisha. Wherever the term "Orissa" has been used in the constitution, it was subjected to change (for example Article 164). Entry in the Fourth Schedule was changed.

Constitution 97th Amendment Act, 2011

The Constitution (Ninety Seventh Amendment) Act 2011 relating to the co-operatives is aimed to encourage economic activities of cooperatives which in turn help progress of rural India. It is expected to not only ensure autonomous and democratic functioning of cooperatives, but also the accountability of the management to the members and other stakeholders.

Reasons of Failure of Cooperative Sector

The cooperative sector has been playing a distinct and significant role in the country's process of socio-economic development. The failure of cooperatives in the country is mainly attributable to:

- Dormant membership and lack of active participation of members in the management of cooperatives.
- Mounting overdue in cooperative credit institution
- Lack of mobilisation of internal resources and over-dependence on Government assistance,
- Lack of professional management.
- Bureaucratic control and interference in the management, political interference and over-polarisation have proved harmful to their growth.
- Predominance of vested interests resulting in non-percolation of benefits to a common member, particularly to the class of persons for whom such cooperatives were basically formed, has also retarded the development of cooperatives.

These are the areas which needed to be attended to by evolving suitable legislative and policy support with proper political will and financial support.

97th Amendment Act, 2011

As per the amendment the changes done to constitution are:-

- **In Part III**of the constitution, after words "or unions" the words "Cooperative Societies" was added.
- In **Part IV**a new **Article 43B** was inserted, which says: *The state shall endeavour to promote voluntary formation, autonomous functioning, democratic control and professional management of the co-operative societies".*
- After **Part IXA**of the constitution, a **Part IXB** was inserted to accommodate state vs centre roles.

Salient features Part IXB

- It makes Right to form cooperatives is a **fundamental right**.
- Reservation of one seat for SC/ST and two seats for women on the board of every co-operative society.
- Cooperatives **could set up agency**which would oversee election.
- **Uniformity in the tenure**of Cooperative Board of Directors.
- **Provisions for incorporation, regulation**and winding up of co-operative societies based on the principles of democratic process and specifying the maximum number of directors as twenty-one.
- **Providing for a fixed term**of five years from the date of election in respect of the elected members of the board and its office bearers;
- Providing for a **maximum time limit of six months**during which a board of directors of co-operative society could be kept under suspension;
- Providing for **independent professional audit**;
- Providing for **right of information to the members**of the co-operative societies;
- **Empowering the State Governments**to obtain periodic reports of activities and accounts of co-operative societies; which have individuals as members from such categories;
- Providing for offences relating to co-operative societies and **penalties**in respect of such offences.

Implications

The amendment of the Constitution to make it obligatory for the states to ensure autonomy of **cooperatives** makes it binding for the state governments to facilitate voluntary formation, independent decision-making and democratic control and functioning of the cooperatives.

It also ensures **holding regular elections under the supervision of autonomous authorities**, five-year term for functionaries and independent audit. Significantly, it also mandates that in case the

board is dissolved, the new one is constituted within six months. Such a constitutional provision was urgently required as the woes of the cooperative sector are far too many, long-lasting and deep-rooted to be addressed under the present lax legal framework

However, it ***fails to establish what constitutional amendments can't do in reviving institutions*** and may be victim of rival political institutions at the state level as happened in case of 73rd amendments. It is feared that state-level politicians will do to this amendment on cooperatives what they did to the one on panchayats. Barring exceptions in a few sectors and states, the cooperative sector, particularly cooperative credit societies numbering over 120 million, has for a long time been in a shambles with all kinds of vested interests using them as personal fiefdoms and ladders to political power and means of personal aggrandisement.

Constituent 100th Amendment Act, 2015

Constitution (100th Amendment) Act 2015 ratified the land boundary agreement between India and Bangladesh. The act amended the 1st schedule of the constitution to exchange the disputed territories occupied by both the nations in accordance with the 1974 bilateral LBA. India received 51 Bangladeshi enclaves (covering 7,110 acres) in the Indian mainland, while Bangladesh received 111 Indian enclaves (covering 17,160 acres) in the Bangladeshi mainland.

Why it was enacted?

The India-Bangladesh Agreement was signed in 1974, but was not ratified as it involved transfer of territory which required a Constitutional Amendment. Hence, the amendment was enacted.

India and Bangladesh share a 4,096 km land boundary covering West Bengal, Assam, Tripura, Meghalaya and Mizoram. This is largest among the international boundaries that India shares with its neighbours. On this boundary, some 50,000-100,000 people reside in so called Chitmahals or Indo-Bangladeshi enclaves. There are 102 Indian enclaves inside Bangladesh and 71 Bangladeshi ones inside India. Inside those enclaves are also 28 counter-enclaves and one counter-counter-enclave, called Dahala Khagrabari. This ambiguity has led the life of the residents of these enclaves to misery. They are unable to get the basic government services because they are isolated from their own country by strips of foreign land. This issue was pending ever since Bangladesh got birth. For the first time, a vision to solve this issue had been enshrined in the Indira-Mujib pact of 1972. Accordingly, the India Bangladesh Land Boundary Agreement was signed between the two countries in 1974. However, this agreement need ratification from the parliaments of the both countries as it involved exchange of the territories. While Bangladesh had ratified it as back as 1974 only, it was not ratified by Indian parliament till now.

Important provisions

The LBA envisages a notional transfer of 111 Indian enclaves to Bangladesh in return of 51 enclaves to India.

Amendment to the First Schedule of the Constitution:

- The Bill amends the First Schedule of the Constitution to give effect to an agreement entered into by India and Bangladesh on the acquiring and transfer of territories between the two countries on May 16, 1974. The First Schedule of the Constitution defines the area of each state and union territory which together constitute India.
- The territories involved are in the states of Assam, West Bengal, Meghalaya and Tripura. Many of these are enclaves (i.e., territory belonging to one country that is entirely surrounded by the other country), and there are even enclaves-within-enclaves.
- The enclave residents are to be allowed to either reside at their present location or move to the country of their choice.
- The enclaves stand exchanged on the midnight of 31 July 2015.
- The physical exchange of enclaves will be implemented in phases between 31 July 2015 and 30 June 2016.

Implications

- The area transferred to India is less than that transferred by India to Bangladesh. In totality India incurs a net loss in terms of area occupancy. India lost around 40 km² (10,000 acres) to Bangladesh. This remained a major concern of opposition from the north-eastern affected states and west Bengal.
- Also, most of the area concerned is occupied by the tribals of the NE states and hence the swapping takes away their land rights leaving them more vulnerable.
- It represents a permanent solution to a decades old issue;
- The newly demarcated boundaries are a fixed boundary, thereby adding to certainty regarding the future;
- It will secure the long stranded boundary and enable to curb the illegal migration, smuggling and criminal acts cross the border.
- It would help those stateless citizens by granting the citizenship from their respective countries.
- It would help settle the boundary dispute at several points in Meghalaya, Tripura, Assam, and west Bengal.
- It would improve the access to the underdeveloped north-eastern state and would further enhance the developmental works in the region.

- It would help to increase the connectivity with the south-east Asia as part of India's North-eastern policy. All these could be achieved with the active support from Bangladesh.
- This also helps on issues of strategic concern, including security cooperation and denial of sanctuary to elements inimical to India.
- It takes into consideration the situation on the ground and the wishes of the people.

Constitution 101st Amendment Act, 2016

The Constitution 101st Amendment Act has received presidential assent on 8th September 2016. This act paves the way for introduction of Goods & Services Tax (GST) by making Special provision with respect to goods and services tax.

Important Provisions

Article 264 & 293 are related to the financial relations between the Union and the State Governments. Since, the state Governments have their interests in GST, the implementation of GST cannot take place without amendment of the Indian Constitution. For this purpose, Constitution (101st Amendment) Bill, 2016 has been passed. This amendment has made the following changes:

Introduced new Article 246A

This articles provides that both parliament and state legislatures shall have concurrent powers to make laws with respect to goods and services tax (GST). The Parliament will retain exclusive power to legislate on inter-state trade or commerce.

Introduced Article 269A

In case of the inter-state trade, the tax will be levied and collected by the Government of India and shared between the Union and States as per recommendation of the GST Council.

Introduced Article 279A

This article provides for constitution of a GST council by president within sixty days from this act coming into force.

Other Important amendments in existing articles

- The residuary power of legislation of Parliament vi article 248 is now subject to article 246A.
- Article 249 has been changed so that if 2/3rd majority resolution is passed by Rajya Sabha, the Parliament will have powers to make necessary laws with respect to GST in national interest.
- Article 250 has been amended so that parliament will have powers to make laws related to GST during emergency period.
- Article 268 has been amended so that excise duty on medicinal and toilet preparation will be omitted from the state list and will be subsumed in GST.
- Article 268A has been repealed so now service tax is subsumed in GST.

- Article 269 would empower the parliament to make GST related laws for inter-state trade / commerce.

General Knowledge Today

GS-II-4: The Basic Structure Doctrine

Integrated IAS General Studies:2016-17
Last Updated: September 3, 2016
Published by: GKTODAY.IN

Contents

Model Questions

1. Describe the emergence of Basic Structure concept in the Indian Constitution. (1994)
2. Explain the importance of Basic Structure doctrine in amending the constitution.
3. "April 24, 1973 is very important in the history of India". Explain the significance of Kesavananda Bharati case and also state its implications.
4. "The attempt by a constitutional court to review the substance of the constitutional amendments would be dangerous for a democratic system in which the amending power belongs to the people or its representatives, not to judges". Is this view justified?
5. "In a long tussle between the Judiciary and Parliament, Judiciary wins". Explain this statement in light of the emergence of the Basic Structure doctrine.
6. It is said that Basic Structure doctrine saved Indian democracy. What were the challenges the Indian democracy faced and how it was checked by the Basic Structure doctrine.
7. Basic Structure doctrine by the Supreme Court has been branded as an act of Judicial overreach. Discuss critically giving your view.
8. What is Basic Structure doctrine? What constitutes Basic Structure according to various Judicial pronouncements?
9. "Supreme Court is the final arbiter and interpreter of the law". Explain this statement giving examples.
10. Right to property was made as a legal right (Article 300A) by the 44th CAA,1978. What are its implications? What was its position in the original Constitution?

The basic structure doctrine says that Constitution has certain basic features that *cannot be altered or destroyed* through bringing amendments by the Parliament. The doctrine, first propounded in the Kesavananda Bharati vs. The State of Kerala (1973) case, forms the basis of power of the Supreme Court to review and strike down constitutional amendments enacted the parliament which are in conflict with or seek to alter this "basic structure" of the Constitution.

Emergence of the Basic Structure Concept

The constitution empowers the legislative bodies {Parliament / state legislative assemblies} in the country to make laws in their respective jurisdictions. However, this power is not absolute but is subject to *judicial review*. Power of judicial review makes Supreme Court guardian of not only fundamental rights but the constitution itself. However, at the time of enactment of the constitution, the Supreme Court derived its power to review the acts via article 13, article 226 and article 245 mainly. Article 13 declares that any law which contravenes any of the provisions of part –III {Fundamental Rights} shall be null and void. Articles 32 and 226 entrust Supreme Court and High

Courts with roles of the protector and guarantor of fundamental rights Article 245 states that the powers of both Parliament and State legislatures are subject to the provisions of the constitution.

Once the constitution was in force and Supreme Court was established, a long struggle started between Judiciary and Parliament, which ultimately culminated in what is known as Basic Structure Doctrine. The gist of this long struggle is that *while parliament went on an amendment spree to achieve its socio-economic and political goals, Supreme Court kept reviewing these amendments and striking down those which were not consistent with explicit provisions of the constitution {mainly article 13, 32, 226 and 245}.*

Beginning of Tussle – The Right to Property

After independence, the Government of India started to implement agrarian reforms with the aim of reforming land ownership and tenancy structures and to implement the socialistic goals of the Constitution contained in Article 39 (b) and (c) of DPSP which required equitable distribution of resources of production among all citizens and prevention of concentration of wealth in the hands of a few.

However, initially, right to property was enshrined as fundamental right under article 19 and 31. When the provinces started passing the Zamindari abolition acts, property owners approached courts because these acts were violating their fundamental right to property. When the supreme court reviewed these laws, it followed the constitution religiously and *upheld the fundamental right to property of Zamindars* and struck down the Zamindari abolition laws.

Thus, parliament needed to *secure the constitutional validity of these laws*. This led to the first amendment of the constitution in 1951. Via this amendment, Article 31B and a Ninth Schedule were inserted in the Constitution.

To immunize the law and to prevent it from the scope of judicial review, *Art. 31B and the Ninth Schedule* were introduced in the Constitution by the Constitution *First Amendment Act 1951* by the Parliament and it effectively placed these laws in *the ninth Schedule* of the Constitution.

What the government exactly did was that *it placed 13 laws passed by the states* {i.e. the laws which were passed to abolish Zamindari etc.} into the 9th schedule and then put Article 31-B which said that any law placed in 9th schedule shall not be deemed to be void only on the ground that it takes away some fundamental rights. This ensured that laws placed in 9th schedule are not challenged in Supreme Court and government can continue with its social engineering and land reforms.

The net result of this enactment was that government found a way to curtail down the power of judicial review. This 9th schedule was such a powerful instrument that starting from 13 acts in 1951, *it has now 284 acts*; and none of these acts can be challenged on the ground that they violate the fundamental rights. The 9th schedule was initially for laws against property rights, but then it was

also used to put in laws that were not even distantly related to property rights. This implies that there was indeed a misuse of the 9th schedule which we would discuss sometimes later in our modules.

However, the 1st amendment itself was now challenged because it would violate article 13(2) and Article 14 {Right to Equality}. The challenge came mainly in two cases viz. *Sankari Prasad Singh Deo v. Union of India (1952)* and *Sajjan Singh v. State of Rajasthan (1955).* But those were the times when a free India was just born and there was dire need of radical agrarian reforms to curb poverty and change the system of unequal distribution of land. Further, Supreme Court did not see any threat in 9th schedule because it supported the statecraft of the leaders such as Nehru and Shastri. Obviously, Supreme Court supported the Legislature, and rejected the challenges to the 1st amendment.

In the *Sankari Prasad Singh Deo* and *Sajjan Singh* cases Supreme Court not only upheld the power of Parliament to amend any part of the Constitution including fundamental rights but also brought out the distinction between legislative power and constituent power and held that "law" in Art.13 did not include an amendment of the Constitution made in the exercise of constituent power and Fundamental Rights were not outside the scope of amending power.

^^You must cite this example if you are asked about cooperation between Judiciary and legislature.^^

But this bonhomie between judiciary and legislature did not last long. During Indira Gandhi's tenure, power under Article 31-B was aggressively used {and mis-used too} which provoked the judiciary to clip the wings of the legislature.

Reversal of the verdict: Golak Nath Case

Golak Nath case is related to property of two brothers {Henry and William Golaknath}. They had some 500 acres of land in Jalandhar. Under the Punjab Security and Land Tenure Act, the state government held that they could keep some 20 acres and rest was declared surplus land.

The Golak Nath family challenged the case courts on the ground that it denied them constitutional right to acquire and hold property; and practice any profession; and equality before the law / equal protection of law. Since the Punjab act was placed in Ninth Schedule via 17th amendment, the Golak Nath family also sought to declare it ultra vires.

An eleven judge bench of the Supreme Court with a 6-5 majority reversed its earlier held position. Supreme Court ruled that the Parliament *had no power to amend Part III of the Constitution* and *overruled* its earlier decision in *Shankari Prasad and Sajjan Singh case*. Further, the majority judgement invoked the *concept of implied limitations* on Parliament's power to amend the Constitution. The bench observed the following:

- Article 368 merely laid down the amending procedure.

- Article 368 did not confer upon Parliament the power to amend the Constitution.
- The amending power of Parliament arose from other provisions contained in the Constitution such as Articles 245, 246, 248 all of which gave it the power to make laws (plenary legislative power).
- The amending power and legislative powers of Parliament were essentially the same. Hence, law under Art.13 includes the amendment laws also.
- Constitution gives a place of permanence to the fundamental freedoms of the citizen. In giving the Constitution to themselves, the people had reserved the fundamental rights for themselves.
- Parliament could not modify, restrict or impair fundamental freedoms due to this very scheme of the Constitution and the nature of the freedoms granted under it.
- The fundamental rights were so sacrosanct and transcendental in importance that they could not be restricted even if such a move were to receive unanimous approval of both houses of Parliament.
- They observed that a Constituent Assembly might be summoned by Parliament for the purpose of amending the fundamental rights if necessary.

In light of the above points, it was held that any amendment of the Constitution must be deemed law as understood in Article 13 (2).

Nationalisation of Banks and Abolition of Privy purses

The Golak Nath verdict came at a time when the Indira Gandhi Government was on a social engineering spree. Meanwhile, two major events happened and both were challenged in court. These were Nationalization of Banks and abolition of Privy Purse.

Nationalization of Banks

In 1969, the government nationalized 14 major banks and the paltry compensation was to be made payable in bonds that matured after 10 years. The government decision was challenged in *Rustom Cavasjee Cooper vs Union of India, 1970* case which is also known as Bank Nationalization case. In this case, the Supreme Court though upheld the right of parliament to nationalize the banks and other industries but it said that:

- Constitution guarantees the right to compensation, that is, the equivalent money of the property compulsorily acquired.
- A law which seeks to acquire or requisition property for public purposes must satisfy the requirement of Article19(1)(f) {Right to Property}.

The net outcome of this judgement was that compensation was increased.

Privy Purse Case

When Sardar Patel was pursuing the princes for signing the instrument of accession, they were assured of a privy purse, which was a sort of annual pension or grant. They were also allowed to hold their honorary titles, other symbols of their order such as flying their own flags etc. as a part of this privy purse package. We note here that originally, the constitution had made the arrangement of privy purse as a "permanent feature". It was also decided that the Privy Purse *could not at any time be "increased, or decreased" for reason or whatsoever.*

Though the amount paid as a part of the privy purse was insignificant, yet people started opposing it. Why? Firstly, hereditary privileges were not in consonance with the principle of equality. Secondly, it became an election issue. In 1967 elections, Indira Gandhi had supported the demand to abolish Privy Purses. Her government tried to amend the constitution but this amendment was not passed in Rajya Sabha. Then, an ordinance was issued.

Promulgation of ordinance for abolition of Privy Purse was considered a constitutional betrayal of the solemn assurance given by Sardar Patel to all the erstwhile princes. This ordinance was challenged in Supreme Court in *Madhav Rao Scindia v. Union of India, 1970. The Supreme Court for obvious reasons struck down the ordinance, though government had pleaded that it is being done to give effect to directive principles.* This gave a major election issue to Indira Gandhi, and she was able to garner public support against Privy Purse. She got a massive victory in 1971 election. This was followed by a series of amendment of the constitution. With this, what *could never be increased or decreased for reason whatsoever* was ***abolished forever***.

Indira Gandi government was on an amendment spree to fix the issues arising out of these cases. The amendments done during that period are as follows:

24th amendment

The 24th amendment, 1971 restored the parliamentary power to amend any part of the constitution including the part III.

Hitherto, any constitutional amendment bill once passed in both the houses and sent to President was on mercy of president to become a law. This amendment made president duty bound to give assent to a Constitution Amendment Bill when presented to him. Thus, today, any constitution amendment passed in both houses of parliament is sure to become a law because President can not withhold assent or return it back.

25th Amendment

The right to property still was intact and to override the Supreme Court judgement in nationalization case, the government brought in 25th amendment of the constitution. This

amendment brought the following changes:

- Amendment of Article 31A which now meant that: If the government acquires your property for public purpose and pays you a paltry compensation, you cannot question that in court.
- Insertion of Article 31C which meant that: If the government has made some law to realize any of the Directive Principles under article 39 {Certain principles of policy to be followed by the State}, then it will not be reviewed under the lens of Article 13; and it will not be void on ground that it takes way rights conferred by Article 14, 19 or 31. If a law declares that it is for giving effect to such policy, it cannot be questioned in the court on the ground that it does not give effect to such policy.

26th amendment

The 26th Amendment (1971) abolished the Privy Purse.

29th amendment

The 29th Amendment (1972) added two Kerala Land Reforms Amendment Acts (1969 and 1971) to the Ninth Schedule, which is meant for Acts that the State legislatures and Parliament wanted to keep beyond judicial review.

Thus, till 1972, the tussle between legislature and judiciary continued with judiciary losing its powers of striking down the erring acts due to many amendments targeted only at Supreme Court judgements. In such scenario, the Kesavanada Bharti Case was filed in Supreme Court.

Kesavanada Bharti Case, 1973

The *Kesavananda Bharati* case was the culmination of a serious conflict between the judiciary and the government, which was headed by Mrs Indira Gandhi. The case sought to find answers to the following questions: was the power of Parliament to amend the Constitution unlimited? In other words, could Parliament alter, amend, abrogate any part of the Constitution even to the extent of taking away all fundamental rights?

Though, the phrase 'basic structure' was introduced for the first time by M.K. Nambiar and other counsels while arguing for the petitioners in the Golaknath case, it was only in the kesavanada Bharati's case that the concept surfaced in the text of the apex court's verdict. 3In this context, it is also pertinent to note that, actually this doctrine of "basic structure" is introduced into India by a German scholar, Dietrich Conrad.

Background

Kesavananda Bharati, the pontiff of a religious mutt in Kerala,in 1970, took objection to the attempts of the government to acquire, under the Kerala Land Reforms Act, 1963, land belonging to the mutt. The mutt challenged the Act before the Supreme Court by filing a writ petition seeking to protect

the fundamental right of religious institutions to manage their own property without undue restrictions by the state. When this petition was pending, the 24th Amendment to the Constitution (amending Articles 13 and 368) was adopted. It was followed by the 25th, 26th and 29th Amendments.

The 29th Amendment (1972) added two Kerala Land Reforms Amendment Acts (1969 and 1971) to the Ninth Schedule, which is meant for Acts that the State legislatures and Parliament wanted to keep beyond judicial review. Kesavananda subsequently challenged this amendment, but as the challenges to the other amendments raised similar issues, they were heard together. Kesavananda Bharati became the lead petitioner since he had filed the petition first.

The validity of these amendments was challenged before a Constitution Bench comprising five judges, which then referred it to a 13 judge Bench, which heard the case for over six months before delivering its verdict on April 24, 1973.

Verdict

Chief Jusitce Sikri and Justices J.M. Shelat, K.S. Hegde and A.N. Grover were determined to defend the concept of implied limitations on Parliament's amending power, which was the bedrock of the Golaknath judgment. All the four judges were part of the majority judges whose verdicts went against the government's moves to nationalise banks and abolish privy purses. The Supreme Court had decided these cases between the Golaknath and Kesavananda cases.

Justices A.N. Ray, K.K. Mathew, D.G. Palekar, M.H. Beg, and S.N. Dwivedi were pro-government judges on the Kesavananda Bench, and their collective view was that Parliament had unfettered powers to amend the fundamental rights.

Justices H.R. Khanna, A.K. Mukherjea, P. Jaganmohan Reddy and Y.V. Chandrachud were non-committal at the start of the Kesavananda hearing.

In the final outcome, the number of Sikri-led judges went up to six, with two additions. They were Justices Reddy and Mukherjea. Justice Chandrachud joined the remaining five judges who decided that Parliament had the unlimited amending power. Justice Khanna thus became the only judge who could tilt the scales one way or the other. By signing the note circulated by Chief Justice Sikri, Justice Khanna apparently joined the Sikri-led judges, thus giving them the bare majority on the Bench.

Nine judges signed a summary statement which records the most important conclusions reached by them in this case.

In this case the validity of the *Twenty -fifth Amendment Act* was challenged along with the *Twenty-fourth and Twenty-ninth Amendments*. The Court by majority overruled the Golak Nath case which denied the Parliament's power to amend Fundamental Rights of the citizens. The majority held that

Art.368 even before the 24th Amendment contained the power as well as the procedure of amendment. The Supreme Court declared that Art.368 did not enable the Parliament to alter the basic structure or framework of the Constitution and Parliament could not use its amending power under Art.368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution.

Most importantly seven of the thirteen judges in the Kesavananda Bharati case, including Chief Justice Sikri who signed the summary statement, declared that Parliament's constituent power was subject to inherent limitations. *Parliament could not use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution.*

This is how the development of this Basic Structure Doctrine evolved because of some controversial laws included in the Ninth Schedule. This doctrine counts as one of the greatest contribution of Indian judiciary in the field jurisprudence.

Major outcomes of the Kesavananda Bharati's case

- The seminal concept of 'basic structure' of the Constitution gained recognition in the majority verdict
- All judges upheld the validity of the Twenty-fourth amendment saying that Parliament had the power to amend any or all provisions of the Constitution.
- All signatories to the summary held that the Golaknath case had been decided wrongly and that Article 368 contained both the power and the procedure for amending the Constitution.
- An amendment to the Constitution was not the same as a law as understood by Article 13 (2).
- Unlike ordinary laws, amendments to constitutional provisions require a special majority vote in Parliament.

In summary the majority verdict in Kesavananda Bharati recognised the power of Parliament to amend any or all provisions of the Constitution provided such an act did not destroy its basic structure. But there was no unanimity of opinion about what constitutes basic structure. Though the Supreme Court very nearly returned to the position of Sankari Prasad (1952) by restoring the supremacy of Parliament's amending power, in effect it strengthened the power of judicial review much more.

Indira Gandhi v. Raj Narain Case (1975)

This was the first case to apply basic structure doctrine. In this case, Court had to examine the validity of the *Thirty Ninth Amendment* Act by which *Art.329-A* was inserted into the Constitution. 329-A dealt with special provision as to elections to Parliament in the case of Prime Minister and Speaker. Along with this Art.329-A, the Parliament added 38 unrelated laws in the Ninth Schedule. Further some issues were also raised that whether the Representation of the People (Amendment)

Act, 1974 and the Election Laws (Amendment) Act, 1975 are unconstitutional because these Acts destroy or damage basic structure or basic features?

Basic Structure concept reaffirmed in this case. The Supreme Court's five-judge Constitution Bench unanimously applied the basic structure doctrine to invalidate Article 329A as it was beyond the amending power of the Parliament and destroyed the basic feature of the Constitution. But, it upheld the Prime Minister's election on the basis of the retrospective amendment to the electoral law.

Justice Y.V. Chandrachud listed four basic features which he considered unamendable:

- Sovereign democratic republic status.
- Equality of status and opportunity of an individual.
- Secularism and freedom of conscience and religion.
- 'Government of laws and not of men' i.e. the rule of law.

The Kesavananda Bharti verdict case review bench

Immediately after the decision of the Election case, an attempt was made by Chief Justice Ray to review the *Kesavananda Bharati* decision by constituting another Bench of 13 judges. The bench was constituted on the pretext of hearing a number of petitions relating to land ceiling laws which had been languishing in high courts. The petitions contended that the application of land ceiling laws violated the basic structure of the Constitution. In effect, the Review bench was to decide whether or not the basic structure doctrine restricted Parliament's power to amend the Constitution.

In a major embarrassment to Ray, it was revealed that no one had filed a review petition. How this Bench was then constituted? was the question that surfaced in the minds of many. Also the other judges strongly opposed this impropriety and the 13-judge Bench was dissolved after two days of arguments.

Basic Structure concept reaffirmed in Post Kesavananda's Case

After Kesavananda Bharati's case, Supreme Court in many cases invoked this doctrine of basic structure. The doctrine of non-amendability of the basic features of the Constitution implies that there are certain provisions in the Constitution which cannot be amended even by the following prescribed procedure under Article 368.The Basic Structure concept got highlighted in various judgements of Supreme Court such as Indira Nehru Gandhi,Minerva Mills,Waman Rao and I.R.Coelho etc.

List of Basic structure of the Constitution according to different cases:

The following are the basic or essential features of the Constitution according to the observations of Judges of Supreme Court in different cases. There is no exact list of as to what these basic features are.

1. **Kesavananda Bharati case**

- Chief Justice Sikri, C.J:
- Supremacy of the Constitution
- Republican and democratic form of government
- Secular character of the Constitution
- Separation of powers between the legislature, executive and the judiciary
- Federal character of the Constitution
- Justices Shelat, J. and Grover, J.:
    - The mandate to build a welfare state contained in the Directive Principles of State Policy.
    - Unity and integrity of the nation
    - Sovereignty of the country
- Justices Hegde, J. and Mukherjea, J.:
    - Democratic character of the polity
    - Unity of the country
    - Essential features of the individual freedoms secured to the citizens
    - Mandate to build a welfare state Unity and integrity of the nation
- Justice Jaganmohan Reddy, J.:
    - Equality of status and the opportunity
    - Sovereign democratic republic
    - Justice – social, economic and political
    - Liberty of thought, expression, belief, faith and worship

2. ***Indira Nehru Gandhi v. Raj Narain, 1975:***

- Justice H.R. Khanna:
    - Democracy is a basic feature of the Constitution and includes free and fair elections.
- Justice K.K. Thomas :
    - Power of judicial review is an essential feature.
- Justice Y.V. Chandrachud:
    - Sovereign democratic republic status
    - Equality of status and opportunity of an individual
    - Secularism and freedom of conscience and religion
    - Government of laws and not of men i.e. the rule of law

3. ***Nachane, Ashwini Shivram v. State of Maharashtra, 1998:***

- The doctrine of equality enshrined in Art.14 of the Constitution, which is the basis of the

Rule of Law, is the basic feature of the Constitution.

4. ***Raghunath Rao v. Union of India case, 1993:***

- The unity and integrity of the nation and Parliamentary system.

5. ***R. Bommai v. Union of India,1994 and Poudyal v.Union of India, 1994:***

- Secularism and "Democracy and Federalism are essential features of our Constitution and are part of its basic structure."

6. ***P. Sampath Kumar v. Union of India (1987), L.Chandrakumar v. Union of India (1997), Waman Rao v. Union of India(1981), Subhesh Sharma v. Union of India (1991), Minerva Mills v.Union of India(1980):***

- "Judicial review is a part of the basic constitutional structure and one of the basic features of the essential Indian Constitutional Policy." Several Articles in the Constitution, such as Arts.32, 136, 226 and 227, guarantee judicial review of legislation and administrative action.

7. ***Kihoto hollohan Vs. Zachillhu, 1992:***

- Democracy is a part of thebasic structure of our Constitution, and rule of law; and free and fair elections are basic features of democracy.

8. ***Chandra Kumar v. Union of India (1997):***

- Chief Justice Sikri
- The supremacy of the constitution.
- A republican and democratic form of government.
- The secular character of the Constitution.
- Maintenance of the separation of powers.
- The federal character of the Constitution.
- Justices Shelat and Grover
- Maintenance of the unity and integrity of India
- The sovereignty of the country
- The sovereignty of India
- The democratic character of the polity
- The unity of the country
- Essential features of individual freedoms
- The mandate to build a welfare state

9. ***In a plethora of various other cases:***

- Independence of judiciary is a basic feature of the Constitution as it is the *sine qua non* of democracy

Significance of the Basic Structure Doctrine

The doctrine of Basic Structure is one of the greatest contributions of Indian Judiciary to theory of constitutionalism. The doctrine of Basic Structure helped in maintaining the supremacy of the Constitution and to prevent its destruction by a temporary majority in Parliament.

It acts as a limitation upon the constituent power and has helped in arresting the forces which may destabilize the democracy. Parliament does not and should not have an unlimited power to amend the Constitution. This basic structure doctrine, as future events showed, saved Indian democracy.

It helps to retain the basic ideals of the Constitution which was meticulously constituted by the founding fathers our Constitution

It is widely believed that if the Supreme Court had held that Parliament could alter any part of the Constitution, India would most certainly have degenerated into a totalitarian State or had one-party rule. Most importantly, the Constitution would have lost its supremacy. For instance, the amendments that were made during the Emergency would have derailed the democratic set up of our Constitution. If Parliament were indeed supreme, the following amendments would have become part of the Constitution.

- The 39th Amendment prohibited any challenge to the election of the President, Vice-President, Speaker and Prime Minister. This was made to nullify the adverse Allahabad High Court ruling against former Prime Minister Indira Gandhi.
- The 41st Amendment prohibited any case, civil or criminal, being filed against the President, Vice-President, Prime Minister or the Governors, not only during their term of office but forever. Thus, if a person was a governor for just one day, he acquired immunity from any legal proceedings for life.

Criticisms about Kesavanada Bharti case

Many critics have questioned the anti-democratic character and more generally the political legitimacy, of the basic structure doctrine. Granville Austin notes that there are several discrepancies between the points contained in the summary signed by the judges and the opinions expressed by them in their separate judgements. The crucial sentence in the note relating to Article 368 not enabling Parliament to alter the basic structure was in fact lifted from only one (Justice H.R.Khanna) of the 11 judgments in the case. It is said that a single judge's view became the holding of the majority of judges. Also, the verdict was believed to be delivered in haste without even debating the conclusion in the court to create a majority that did not exist.

Criticism of Basic Structure doctrine

The following are the major criticisms advanced by the critics:

- The doctrine does not have a textual basis. There is no provision stipulating that this

Constitution has a basic structure and that this structure is beyond the competence of amending power.

- The concept of the "basic structure of the Constitution" cannot be defined. What constituted the basic structure of the Constitution? Each judge defines the basic structure concept according to his own subjective satisfaction. This leads to the fact that the validity of invalidity of the Constitution Amendment lies on the personal preference of each judge and the judges will acquire the power to amend the Constitution
- The attempt by a constitutional court to review the substance of the constitutional amendments would be dangerous for a democratic system in which the amending power belongs to the people or its representatives, not to judges.
- An amendment to a Constitution may be necessary even to change the original intention of the Constitution framers, which may not augur well for the subsequent generation which is to work with the Constitution. Therefore to hold that an amendment not falling in the line with the original intention of the founding fathers is not valid.

Forty-second Amendment Act, 1976

The parliament reacted to the Basic Structure concept by enacting the 42nd Amendment Act(1976). A committee under the Chairmanship of *Sardar Swaran Singh* to study the question of amending the Constitution.

Based on its recommendations, the government incorporated several changes to the Constitution including the Preamble, through the Forty-second amendment which was passed in 1976 and came into force on January 3, 1977. Article 368 was amended and was made to have no limitation on the constituent power of Parliament and no amendment can be questioned in any court on any ground including the contravention of any of the fundamental rights. The changes made to the Constitution by this amendment was so widespread that it was sometimes called as a *"mini constitution*".

Among other things the amendment:

- gave the Directive Principles of State Policy precedence over the Fundamental Rights contained in Article 14 (right to equality before the law and equal protection of the laws), Article 19 (various freedoms like freedom of speech and expression, right to assemble peacefully, right to form associations and unions, right to move about and reside freely in any part of the country and the right to pursue any trade or profession) and Article 21 (right to life and personal liberty). Article 31C was amended to prohibit any challenge to laws made under any of the Directive Principles of State Policy;
- laid down that amendments to the Constitution made in the past or those likely to be made in

future could not be questioned in any court on any ground;

- removed all amendments to fundamental rights from the scope of judicial review and
- removed all limits on Parliament's power to amend the Constitution under Article 368.

Minerva Mills v. Union of India(1980) and Waman Rao v. Union of India(1981)

The Forty-second amendment was challenged before the Supreme Court by the owners of Minerva Mills, a sick industrial firm which was nationalized by the government in 1974. It was argued that Section 55 of the amendment had placed unlimited amending power in the hands of Parliament. The attempt to immunize constitutional amendments against judicial review violated the doctrine of basic structure which had been recognized by the Supreme Court in the Kesavananda Bharati and Indira Gandhi Election Cases. Also, it was argued that this deprived courts of the ability to question the amendment even if it damaged or destroyed the Constitution's basic structure.

In the *Minerva Mills* case, the Supreme Court struck down *section 4 and 55 of the 42nd Amendment Act 1976*. It also provided key clarifications on the interpretation of the basic structure doctrine. The court ruled that the power of the Parliament to amend the constitution is limited by the constitution. Hence the parliament cannot exercise this limited power to grant itself an unlimited power. Hence the parliament cannot usurp the fundamental rights of individuals, including the right to liberty and equality.

After this case, Supreme Court in Waman Rao v. Union of India once again reiterated and applied the doctrine of basic features of the Constitution. In this case, implications of the basic structure doctrine for Art.31-B were reexamined by a five-judge bench of the Supreme Court. Insofar as Art.31-B was concerned, the Court drew a line of demarcation at April 24th, 1973 i.e. the date of Kesavananda Bharti's decision and held it should not be applied retrospectively to reopen the validity of any amendment to the Constitution which took place prior to 24-04-1973, that means all the amendments which added to the Ninth Schedule before that date were valid. All future amendments were held to be challengeable on the grounds that the Acts and Regulations which they inserted to the Ninth Schedule damaged the basic structure.

Implications of Kesavananda Bharati case on the independence of judiciary

The very next day of the Kesavananda Bharathi case judgement, on April 25, 1973, Indira Gandhi's government struck a blow at the independence of the judiciary. It superseded three most senior Judges of the Supreme Court and appointed Justice A.N. Ray as a successor to Chief justice Sikri. The superseded judges, Justices Shelat, Hegde and Grover, who were on the side of Sikri on the Kesavananda Bench resigned in protest.

Conclusion

The basic structure doctrine, as future events showed, saved Indian democracy to a greater extent.

Kesavananda Bharati case will always occupy a hallowed place in our constitutional history. No wonder this made Bangladesh to adopt the Basic Structure doctrine in 1989, by expressly relying on the reasoning in the Kesavananda case, in its ruling on *Anwar Hossain Chowdhary v. Bangladesh.*

General Knowledge Today

GS-II-5: Functions and Responsibilities of Union and States

Integrated IAS General Studies:2016-17
Last Updated: September 19, 2016
Published by: GKTODAY.IN

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Model Questions

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2. What do you understand by Doctrine of Territorial Nexus? Discuss the importance of this doctrine towards Indian federation.
3. "Power of parliament to make laws for the whole or any part of the territory of India is absolute." Analyze.
4. How Part XI is more tilted towards parliament in law making powers? What are other provisions for control of centre over state legislation? Are these provisions justified? Discuss.
5. While keeping various constitutional provisions in focus, discuss the responsibilities / obligations of states towards centre and vice versa.
6. "Though there is a rigid division of legislative powers, such rigidity cannot be practical in case of the administrative sphere." Discuss explaining the mutual delegation of administrative functions as provided in Indian Constitution.
7. Explain the provisions made in the constitution of India for smooth administrative relationship between the Union and the States. To what extent, the extra-constitutional devices supplement these provisions? Discuss.
8. Critically examine the existing scheme of Union and State relations in India. Comment upon the Sarkaria Commission Report in this connection and examine the propriety of the power of the Union Government to impose President's Rule in the States.
9. Is Article 365 an extension to emergency powers of President? What is importance of this article?
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11. Discuss the scheme of allocation of Taxation Powers and distribution of Tax Revenues in Constitution of India.
12. What provisions have been made in the Constitution for protection of the interest of states in the financial matters? Explain.
13. Discuss the implications of emergencies on Centre-State Financial Relations.
14. Comment on the competence of Interstate Council on Riparian Disputes.

Introduction

On the basis of relations between the central government and the units, the governments are classified as unitary and federal. In a unitary system of government, all powers are vested in

Centre while in a federal system; the powers are divided between the centre and the states by the constitution. The constitution of India provides a federal system even though it describes India as **union** of states. The term union of states implies that states have no freedom to recede from India. Indian Constitution is also called quasi-federal because it has features of both federal and unitary types of governments. It has been called a *unique blend of unitary and federal features* by the Supreme Court. The key federal features are *written constitution*; concept of constitutional supremacy; complex procedure of amendment of constitution in certain matters; an independent judiciary; clear division of powers via 7th schedule; provision of Rajya Sabha {it is a federal feature as states have been given representation in this house} etc.

Unitary features include strong centre; absence of separate constitution of states, right of parliament to amend major portions of constitution, unequal representation in Rajya Sabha, states not given guarantee of territorial integrity, single constitution; single citizenship; flexibility of constitution; integrated judiciary; appointment of state governor by the centre; all India services and emergency provisions, single election machinery for state / centre government elections, CAG office which looks into the accounts of both states and union etc.

Constitution of India has divided the three kinds of functional powers viz. legislative, executive and financial between union and states. However, there is *no division of judicial powers and functions* because India has an integrated, independent judiciary.

Division of Legislative Functions & Powers

The legislative functions of union and states are discussed mainly in article 245 to 255 in Part XI of the constitution. Here is a brief idea of these articles.

Article 245

Article 245 provides for territorial limits on legislation powers of parliament and states. It says that parliament can make laws for whole or part of territory of India {which includes states, UTs and other territories such as enclaves}; while states can make laws for whole or part of territory of the state. A law made by parliament cannot be held invalid on ground that it has an extra-territorial operation.

Article 246

Article 246 makes provision of seventh schedule. It says that Parliament can make laws on List-I {Union List} subjects; states can make laws on List-II {state list} while both union and states can make laws on List-III {Concurrent List}.

Article 247

Article 247 vests the power of establishing additional courts in parliament if needed for matters

related to Union List.

Article 248

Article 248 vests residual power of legislation {making law on a subject that is not listed in 7th schedule} in parliament. This power includes imposition of taxes on subjects not listed in 7th schedule.

Article 249

Article 249 says that If Rajya Sabha declares by Resolution supported by 2/3rd of the members present and voting (special majority), that it is necessary to expedient in the national interest that Parliament should make laws with respect any matter enumerated in the State List then, Parliament is competent to make laws on such matters for whole or part of India. *This is very important feature which makes the importance of Rajya Sabha in keeping the balance of law making powers between Union and States.*

Such a resolution passed by Rajya Sabha is valid for ONLY one Year. But if the circumstances under which the above resolution was passed prevail even after one year, then, the *same kind of resolution with same special majority is needed to be passed again*. In absence of such a resolution, the law passed by the parliament with ceases to remain valid within 6 months after passing of a year.

Article 250

According to Article 250, parliament is empowered to make laws on any item that is included in the State List for the whole or part of India, while a Proclamation of emergency is in operation. Such a law passed by parliament on items of state list shall be in force for the period of emergency and 6 months beyond that period.

Article 251

Article 251 says that if any provision of a law made by the Legislature of a State is inconsistent to any provision of a law made by Parliament, then the law passed by the parliament shall prevail, and the law made by the Legislature of the State be inoperative, to the extent of the inconsistency.

Article 252

As per the above discussions, there are two occasions when the Union, on its own initiative, extends its legislative powers to embrace that of the states.

- When Rajya Sabha passes a resolution by special majority
- When Emergency is in operation

However, there could be a third occasion when the states themselves would want the parliament to make laws on subjects enumerated in the state list. The action on the part of **two or more states** can enable the parliament to make laws on any item included in the state list. This has been enshrined in the article 252. Article 252 says that – *if the legislatures of the two or more states pass resolutions to the*

effect that it is desirable to have a parliamentary law regulating any of the matters included in the state list, then it is lawful for parliament to make laws on regulation of such matter.

Such laws are valid only in the states those took the above mentioned action. However, it can be extended to other states as well, which have not passed such resolution earlier, but passes a resolution thereafter.

Thus, we see that Article 252 makes a very important provision. Here, the parliamentary action is basically a result of the states initiatives where the states have the common interest but are unable to act individually.

Once the purpose of passing such parliamentary legislation over state list subject is over, the states can amend or repeal that act , however to repeal that also they need to follow the same procedure i.e. pass resolution to the effect that it is desirable that parliament repeals / amends that act.

Article 253

Article 253 says that Parliament has power to make any law for the whole or any part of the territory of India *for implementing any international treaty, agreement or convention*.

Article 254

Article 254 says that if there is any inconsistency of a law made by the Legislature of a State with any provision of a law made by Parliament which Parliament is competent to enact, or on a matter of Concurrent List, then, the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail.

Article 255

This article provides that any law made by parliament or state legislature will not be invalid only because some recommendations or prior sanction from Governor, LG, President etc. was not taken.

Doctrine of Territorial Nexus

Clause 1 of article 245 says- *Subject to the provisions of this Constitution*, Parliament may make laws for the whole or any part of the territory of India and the Legislature of a State may make laws for the whole or any part of the State. However, second clause says that a law made by parliament cannot be held invalid on ground that it has an extra-territorial operation.

This implies that state law cannot have extra-territorial operation. The Doctrine of territorial nexus emanates from the Supreme Court interpretation of this provision in context with extra-territorial operation of a law made by state government in India.

This can be understood by an example. We imagine that I live in Rajasthan running a Lottery business in Bangalore using my network and people over there. The people in Bangalore will pay for lottery tickets and from whatever receipts I get, I will pay the prize money and keep rest as profit after paying applicable taxes. Question is – since I

am living in Rajasthan but my business was conducted in Bangalore, should I pay tax to Karnataka Government?
The court has reviewed such cases and established that even I am not living in Bangalore, since business activity was conducted there; I should pay tax to Karnataka Government. The court says that if there is sufficient nexus between state and the object, then the state law can operate outside state also. Here, I am an object and Karnataka government is state; and there is a nexus between object and state because of my business activity in that state despite not living there or physically present there. This is called Doctrine of territorial nexus.

In simple words, Doctrine territorial nexus says that laws made by a state legislature are not applicable outside the state, except when there is a sufficient nexus between the state and the object. Its importance can be judged by the following observations of supreme court:
"Territorial nexus doctrine, thus, plays an important part in assessment of tax. Tax is levied on one transaction where the operations which may give rise to income make take place partly in one territory and partly in another. The question which would fall for consideration is as to whether the income that arises out of the said transaction would be required to be apportioned to each of the territories or not.
Income arising out of operation in more than one jurisdiction would have territorial nexus with each of the jurisdiction on actual basis. If that be so, it may not be correct to contend that the entire income "accrues or arises" in each of the jurisdiction."

Territorial limit on parliament with regard to making laws: Analysis

As per article 245, *subject to this constitution*, parliament can make laws for whole or part of territory of India. Territory of India includes states, UTs and other territories such as enclaves. The question is – Is this power absolute? *Answer is no* because this article puts condition – *subject to this constitution* before conferring this power. These conditions are as follows:

- For four UTs viz. A&N, D&NH, Lakshadweep and D&D, president is empowered to make regulations for peace, progress and good governance. Such a regulation is so powerful that it can repeal or amend a law made by parliament also with respect to these territories.
- In case of fifth schedule *scheduled areas*, the Governor can direct that a particular parliamentary law is or is not applicable to such area. Governor can also direct if such law can be applicable with suitable modifications and exceptions.
- In case of sixth schedule states viz. Assam, Meghalaya, Tripura and Mizoram, the Governor can direct if a parliamentary law is not applicable / applicable after modification / partly applicable to an autonomous district of a tribal area.

Thus, the power of parliament to make laws for the whole or any part of the territory of India is not

absolute and should be read in subject to other provisions of the constitution. Similarly, other provisions like the distribution of powers, fundamental rights and other provisions should also be taken into consideration.

Other Provisions for Control Over State

How Part XI is more tilted towards parliament in law making powers? What are other provisions for control of centre over state legislation? Are these provisions justified?

In terms of law making powers, the constitution has done more favour to parliament than in states. It has kept state laws out of extra-territorial operation (article 245); it has given residuary power of legislation to parliament {article 249}; it has empowered parliament to make laws on all subjects of state list during emergency {article 250}.

Other provisions for control over state legislation

Apart from Parliament's power to legislate directly on the state subjects under the exceptional situations, the Constitution empowers the Centre to exercise control over the state's legislative matters in the following ways:

- Governor can reserve certain types of bills passed by the state legislature for the consideration of the President. For such bills, president has absolute veto power.
- Bills on certain matters {such as those putting restrictions on freedom of trade & commerce} of state list can be introduced in legislature only on prior sanction of president.
- During a financial emergency, the President can direct the states to reserve money and financial bills for his consideration.

The above provisions conclude that constitution has given enough superiority to centre in terms of legislative functions.

Are these provisions justified?

Yes. They are justified because they provide clarity and remove absurdity between centre-state powers. If we exclude this principle of Parliamentary supremacy, there would be a possibility of two equally powerful tiers of power which would indulge in conflict, interference, strife and chaos due to conflicting laws. These provisions make sure that there is an integrated legislative policy and there is uniformity in the basic laws.

Division of Executive / Administrative Functions & Powers

The powers related to administrative functions have been mainly provided in articles 256 to 263 of part XI of the constitution. Here is a brief idea of these articles first:

Article 256

As per article 256, States are **expected to** comply with the laws of parliament and not impede the

exercise of the executive powers of the union. In this regard the union government can issue necessary directives to the states.

Article 257

The constitution goes one step ahead and makes some specific provisions, which give a clear supremacy to centre over states. This article calls upon every state to not to impede or prejudice the executive power of the Union in the state. This power includes:

- Power of giving instructions to states for construction and maintenance of means of communication of national and military importance including national highways, national waterways; power of giving instruction to state to take measures for protection of Railways. In this context, whatever are expenditures of state for carrying out these instructions are to be incurred / reimbursed by the centre.
- If any Union agency is finding it difficult to function within the state, the Union Executive is empowered to issue directions to state to remove those difficulties.

Articles 258 & 259

- To make the Union power work in state, as per this Article 258 and 259, the president can entrust to officers of the states to do certain functions of the union. If the officers of state are asked to do certain functions of the union, the extra costs have to be met by the union government.

- The members of the all-India services who occupy key positions in the state administration and give the centre indirect control over the states. Governor of a State may, with the consent of the Government of India, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the State extends.

Article 260

This article provides for government of India to perform legislative and judicial functions in foreign territories. It says that Government of India may undertake any executive legislative or judicial functions in a foreign territory on the basis of an agreement with the Government of that territory. The provisions of such agreement are governed by the laws relating to the exercise of foreign jurisdiction and as such they will not come within the scope of the provisions dealing with the normal administrative relationship between the state and the Union.

The necessity of this provision is obvious in the context of the territories belonging to foreign powers with the geographical boundaries of the Indian Union.

Article 261

Article 261 says that full faith and credit shall be given throughout the territory of India to public

acts, records and judicial proceedings of the Union and of every State

Article 262

Article 262 provides constitutional provisions regarding riparian states and disputes related to inter-state rivers and sharing of their water. Though water is a state subject, yet, aware of the unending *Inter-state disputes*, the framers of the constitution of India placed this subject under the exclusive powers of the parliament.

As per this article the parliament by law can provide for the adjudication of the any dispute or complaint with respect to the use, distribution or control of the waters of any interstate river or river valley. Parliament may also provide that neither the Supreme Court nor the any other court shall exercise any jurisdiction in respect of the dispute. Thus, all disputes between states regarding the use, distribution or control of water are decided by the centre.

Article 263

As per this article, President can by order establish a council to inquire into and advising upon disputes to states if at any time it appears to the President that public interests would be served by the establishment of such council. This article led to setting up of the inter-state council.

Responsibilities / obligations of states towards centre

Constitution has put important restrictions on states to give ample scope to the centre for exercising its executive authority. *Firstly*, via articles 255 & 256, the executive power of state has to be exercised in such a way that it ensures compliance with the laws of parliament and it does not impede or prejudice the exercise of centre's power in state. *Secondly,* constitution has given some coercive powers to centre via 365 for effective implementation of article 255 & 256. This article says that if a state has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, *it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.* This implies that president's rule can be imposed in the state using article 356. This is a very important extension to emergency powers of President and one of his discretionary powers.

Responsibility / obligations of Centre towards States

Article 355 puts the onus on the centre to protect states against any external aggression and the internal disturbance. It says that it shall be the duty of the Union to protect every State against any external aggression and the internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution. Over the period, this article has gained a different texture, which we would discuss in analysis part of this section.

Distribution of executive powers

Constitution has divided the executive powers between the centre and states on lines of legislative powers. The executive power of centre extends to the whole of India as follows:

- To the matters related to Union List
- To the exercise of rights, authority and jurisdiction conferred on it by any treaty or agreement.

In the same way, the executive power of a state extends to its territory in respect of matters related to State List. On concurrent list matters, the *executive power rests with the states except when a Constitutional provision or a parliamentary law specifically confers it on the Centre.*

Mutual delegation of administrative functions

Though there is a rigid division of legislative powers, such rigidity cannot be practical in case of the executive sphere because it would then cause conflicts more frequently. Towards this end, the constitution provides inter-government delegation of executive powers via two methods as follows:

Delegation by agreement

With the consent of the state government, the President can entrust that state government any of the executive function of the centre. Similarly, with the consent of the Central Government, governor of the state can entrust any of the executive function of a state to centre. This mutual delegation of administrative function is available to both centre and states; and can be either conditional or unconditional.

Delegation by law

We note here that the constitution provides entrustment of executive function of centre to state without even consent of that state but then this delegation comes from *parliament {by law} and not president.* This implies that a law made by the Parliament on Union List subject can confer powers and impose duties on a state, or authorise the conferring of powers and imposition of duties by the Centre upon a state (irrespective of the consent of the state concerned). This power of delegation by law is not available to state.

Other Measures in Constitution for Cooperation between Centre and States

Following are other measures are specifically there for better coordination between centre and states:

- The Parliament can appoint an appropriate authority to carry out the purposes of the constitutional provisions relating to the interstate freedom of trade, commerce and intercourse. However, no such authority has been appointed so far.
- Constitution provides the states the right of forming their own civil services, but then there is an All-India service, recruited on an all-India basis with common qualifications, with uniform scale of pay and members of which alone could be appointed to those strategic posts

throughout the Union.

- Chairman and members of a state public service commission, though appointed by the governor of the state, can be removed only by the President.
- The Parliament can establish a Joint State Public Service Commission for two or more states on the request of the state legislatures concerned. Union Public Service Commission (UPSC) can also serve the needs of a state on the request of the state governor and with the approval of the President.
- The governor of a state is appointed by the president. He holds office during the pleasure of the President. In addition to the Constitutional head of the state, the governor acts as an agent of the Centre in the state. He submits periodical reports to the Centre about the administrative affairs of the state.
- The state election commissioner, though appointed by the governor of the state, can be removed only by the President.

Extra-Constitutional Devices for Centre-State Cooperation

Apart from constitutional measures, following are some of the extra-constitutional devices for centre-state cooperation.

- A number of advisory bodies such as Planning Commission {now replaced by NITI Aayog}, National Integration Council, Zonal Councils, North-Eastern Council, University Grants Commission, recently created GST council etc.
- Several conferences take place frequently such as Governor's conference {presided by President}, Chief Ministers' conference {presided by PM}, Chief Secretaries' conference {presided by Cabinet Secretary} etc.

Conclusion

Adjustment of the administrative functions between the Union and the States is one of the most difficult problems in a federal system. The framers of the Indian Constitution had included detailed provisions so that the clashes between the states and Union are avoided as far as possible. However, in the administrative field akin to the legislative field, the union government occupies a superior position, as its executive authority extends over a larger number of subjects.

Analysis: Article 365 – An extension to emergency powers?

Article 365 is an extension to emergency powers of President? What is importance of this article?

Article 365 is an extension to emergency powers of President. The Constitution of India has provided the President of India the power to impose emergency using article 352 and article 365 on two different accounts, if the state does not follow the Indian constitution and if the state

does not obey the union Government direction. Article 365 says that where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution.

The words "it shall be lawful for the President to hold" occurring in Article 365 do not impose an obligation. They only confer power, the exercise of which is a matter of discretion with the President.

On every non-compliance with the Union direction, irrespective of its extent and significance, the President (in effect the Council of Ministers) is not bound to hold that a situation has arisen in which the Government of the non-complying State cannot be carried on in accordance with the Constitution.

The President should exercise this drastic power in a reasonable manner with due care and circumspection, and not mechanically. He should give due consideration to all relevant circumstances, including the response, if any, of the State Government to the direction. In response to the direction the State Government might satisfy the President that the direction had been issued on wrong facts or misinformation, or that the required correction has been effected.

The President should also keep in mind that every insignificant aberration from the constitutional path or a technical contravention of constitutional provisions by the functionaries of the State Government would not necessarily and reasonably lead one to hold that the Government in the State cannot be carried on in accordance with the Constitution.

Thus Article 365 acts as a screen to prevent any hasty resort to the drastic action under Article 356 in the event of failure on the part of a State Government to comply with or to give effect to any constitutional direction given in the exercise of the executive power of the Union. Therefore, the extraordinary powers under Article 365 are necessary but should be exercised with great caution and in extreme cases.

Analysis: Relation of Article 355, 352 and 356

Why it is alleged that Article 355 merely justifies action under articles 352 and 356? To what extent, it is justified?

Article 355 entrusts the duty upon Union to protect the states against "external aggression" and "internal disturbance" to ensure that the government of every State is carried on in accordance with the provisions of Constitution. Over the period, this article has gained a different texture. There are several angles to the second part of this duty – to ensure that Government of every

State is carried on in accordance with the provisions of Constitution. *First is the law & order angle.* We know that the "public order" and "police" are state subject and states have exclusive power to legislate on these matters. These subjects were entrusted to states because states would be in better position to handle any law and order problem. Management of Police by states was also seen as administratively convenient and efficient. However, there might be some circumstances where states are unable to maintain public order and protect people. In such situation, centre can invoke article 355 and take measures such as taking law and order of state under its own hand, deployment of military etc. This article thus comes handy when there are communal violence incidents.

Second angle is *alleged justification of emergency.* Although this article has been seldom used; it is seen as an instrument to justify imposition of emergency under articles 352 and 356. Here, we need to pay attention to two words viz. "internal disturbance" and "armed rebellion". While article 352 empowers the centre to impose emergency when an armed rebellion occurs, such proclamation cannot be for internal disturbance – thus said SC in SR Bommai Case. So, Supreme Court interpretation was that article 355 itself does not give power to centre to impose emergency because mere internal disturbance short of armed rebellion cannot justify a proclamation of emergency under Art. 352 nor can such disturbance justify issuance of proclamation under Art. 356, unless it disables or prevents carrying on of the Government of the State in accordance with the provisions of the Constitution. *On the basis of this, the constitutional validity of AFSPA was upheld which allows the centre to send armed forces in disturbed area*. Court observed that this law was enacted in order to enable the Union to discharge the obligation imposed on it under Art. 355. Further, Sarkaria Commission also expressed view that article 355 not only imposes duty on the Union but also grants it, by necessary implication, the power of doing all such acts and employing such means as are reasonably necessary for the effective performance of that duty. Thus saying that Article 355 merely justifies action under articles 352 and 356 is not justified. In fact, despite being in Part XVIII {Emergency Provisions}, this article is not seen exactly as an emergency provision. It provides for a broad legal standard which justifies a range of centre's actions in situations that are not so grave as to warrant emergency measures but are yet of immediate and pressing concern enough as should justify the taking of alternative statutory and constitutional measures {not amounting to emergency action}

Financial Functions & Relations

The distribution of financial functions and powers are mainly discussed in articles 264 to 293; and no other federal Constitution has made such elaborate provisions as Constitution of India

with respect to the relationships between the Union and States in the financial field. Among these articles, the important are as follows: Article 265 says that not tax can be imposed except authority of law; Article 266 provides for consolidated fund and public accounts for union and states; Article 266 provides for a contingency fund; Article 268 discusses the duties levied by the Union but collected and appropriated by the States; Article 269 discusses taxes levied and collected by the Union but assigned to the States; Article 270 provides taxes levied and collected by the Union and distributed between the Union and the States; Article 271 provides for surcharges {cess etc.}; Article 273 provides for grants to promote jute and jute products; Article 274 provides for prior recommendation of president for bills which might affect states' interests; Article 275 makes provisions for grants from union to states; Article 280 makes provisions for finance commission; article 281 provides for Recommendations of the Finance Commission; Articles 292 and 293 make provisions for borrowings by centre and state respectively. Apart from these articles, there are some other provisions also which deal in financial relations between union and states. Further, Constitution amendment for GST Bill has also included some articles which would impact these relations.

The financial functions & powers can be studied in different sub-headings as follows:

- *Allocation of Taxation Powers*
- *Distribution of Tax Revenue*
- *Grants-in-aid*
- *Finance Commission*
- *Protection of states' interest in financial matters*
- *Borrowings by states and centre*
- *Inter-Governmental Tax Immunities*
- *Implications of Emergency on Centre-State Financial Relations*

Allocation of Taxation Powers

Indian constitution has divided the taxing powers as well as the spending powers (and responsibilities) between the Union and the state governments. The subjects on which Union or State or both can levy taxes are defined in the 7th schedule of the constitution. Further, limited financial powers have been given to the local governments also as per 73rd and 74th amendments of the constitution and enshrined in Part IX and IX-A of the constitution.

Since the taxing abilities of the states are not necessarily commensurate with their spending responsibilities, some of the centre's revenues need to be assigned to the state governments. On

what basis this assignment should be made and on what guidelines the government should act – the Constitution provides for the formation of a Finance Commission (FC) by President of India, every five years, or any such earlier period which the President deems necessary via Article 280. Based on the report of the Finance Commission, the central taxes are devolved to the state governments.

Separation of Powers

The Union government is responsible for issues that usually concern the country as a whole, for example national defence, foreign policy, railways, national highways, shipping, airways, post and telegraphs, foreign trade and banking. The state governments are responsible for other items including, law and order, agriculture, fisheries, water supply and irrigation, and public health.

Some items for which responsibility vests in both the Centre and the states include forests, economic and social planning, education, trade unions and industrial disputes, price control and electricity. Then, there is devolution of some powers to local governments at the city, town and village levels.

The taxing powers of the central government encompass taxes on income (except agricultural income), excise on goods produced (other than alcohol), customs duties, and inter-state sale of goods. The state governments are vested with the power to tax agricultural income, land and buildings, sale of goods (other than inter-state), and excise on alcohol. Local authorities such as Panchayat and Municipality also have power to levy some **minor** taxes.

The authority to levy a tax is comes from the Constitution which allocates the power to levy various taxes between the Centre and the State. An important restriction on this power is Article 265 of the Constitution which states that "*No tax shall be levied or collected except by the authority of law.*" This means that no tax can be levied if it is not backed by a legislation passed by either Parliament or the State Legislature.

Sources of Revenue for Union Government

The sources of Revenue of the Union Government are as follows:

- Income (except tax on agricultural income), Corporation Tax & Service Tax
- Currency, Coinage, legal tender, Foreign Exchange
- Custom duties (except export duties)
- Excise on tobacco and other goods.
- Estate Duty (except on agricultural goods) (Kindly note that its mentioned in the constitution but Estate duty was abolished in India in 1985 by Rajiv Gandhi Government)
- Fees related to any matter in Union list except Court Fee
- Foreign Loans
- Lotteries by Union as well as State Governments.

- Post Office Savings bank, Posts, Telegraphs, Telephones, Wireless Broadcasting, other forms of communication
- Property of the Union
- Public Debt of the Union
- Railways
- Stamp duty on negotiable instruments such as Bills of Exchange, Cheques, Promissory notes etc.
- Reserve Bank of India
- Capital gains taxes, Taxes on capital value of assets except farm land
- Taxes other than stamp duties on transactions in stock exchanges and future markets
- Taxes on the sale and purchase of newspapers and advertisements published therein.
- Terminal Taxes on Goods and passengers, carried by Railways and sea or air.

Sources of revenue for State Governments

The following are sources of revenue for State Governments.

- Taxes and duties related to agricultural lands
- Capitation Taxes

- Excise on liquors, opium etc.
- Fees on matters related to state list except court fee
- Land Revenue, Land and buildings related taxes
- Rates of Stamp duties in respect of documents other than those specified in the Union List
- Taxes on mineral rights subject to limitations imposed by the parliament related to mineral development
- Taxes on the consumption or sale of electricity
- Sales tax on goods (other than newspapers) for consumption and use within state.
- Taxes on advertisements except newspaper ads.
- Taxes on goods and passengers carried by road or on inland waterways
- Taxes on vehicles, animals and boats, professions, trades, callings, employments, luxuries, including the taxes on entertainments, amusements, betting and gambling.
- Toll Taxes.

Certain Taxes levied as Concurrent Powers

Please note that the Union and the State Governments have the concurrent powers to fix the principles on which taxes on motor vehicles shall be levied and to impose stamp duties on non-judicial stamps. The property of the Union is exempted from State Taxation; and the property of the states is exempted from the Union Taxation. But the parliament of India can pass legislation for

taxation by Union Government of any business activities / trade of the state which are not the ordinary functions of the state.

Residuary Power of Taxation

Union Government has exclusive powers to impose taxes which are not specifically mentioned in the state or concurrent lists. Some taxes imposed using these powers include Gift tax, wealth tax and expenditure tax.

State's power Regarding Sales Tax

The sales tax on consumer goods such as toothpastes, soaps, daily use items, electronic items etc. are *imposed, collected and appropriated by state governments.* However, newspapers and newspaper ads are exception to this. Further, there are four restrictions to this power of the state. These include:

- A state cannot impose sales tax if a good is produced there but is sold outside the state.
- A state cannot impose sales tax if the sale and purchase is taking place for items due for export.
- A state cannot impose tax on interstate trade and commerce of goods
- State cannot impose a tax on a good that has been declared of special importance by parliament.

Other facts about levying and appropriation of Taxes

- Sales tax is imposed, levied, collected, appropriated by states as mentioned above
- Income tax, Corporation Tax, Service tax are levied and collected by Centre but are appropriated by both states and centres as per distribution formula recommended by Finance Commission. This formula is NOT binding upon the parliament.
- However states have no share in surcharges, cesses on these taxes.
- Stamp duties on negotiable instruments and excise duties on medicinal and toilet preparations that have use of alcohol and narcotics are levied by Centre. But these taxes don't make a part of consolidated fund of India. They are assigned to respective states only, which appropriate these taxes.
- Sales tax in case of Inter-state trade of goods (except newspapers) is levied and collected by the centre but such proceeds are assigned to states. (This is known as Central Sales Tax)

Distribution of Tax Revenues

Article 268 to 281 in the constitution of India deal with the distribution of tax revenues. These articles have been amended from time to time, for example 88th amendment provided for service tax via article 268-A. Some articles have been amended as per recommendations of finance commission also. The current position is as follows:

Article 268: Taxes Levied by the Centre but Collected and Appropriated by the States

This includes stamp duties on bills of exchange, cheques, promissory notes, policies of insurance, transfer of shares; excise duties on medicinal and toilet preparations containing alcohol and narcotics. The proceeds of these duties levied within any state do not form a part of the Consolidated Fund of India, but are assigned to that state.

Article 268-A: Service Tax Levied by the Centre but Collected and Appropriated by the Centre and the States

Service tax is levied by the centre but makes part of divisible pool of proceeds. The principles of their collection and appropriation are formulated by the Parliament on the basis of recommendations of finance commission, but such recommendations are not binding upon the parliament.

Article 269: Taxes Levied and Collected by the Centre but Assigned to the States

This includes taxes on the sale or purchase of goods (other than newspapers) in the course of inter-state trade or commerce; taxes on the consignment of goods in the course of inter-state trade or commerce. The net proceeds of these taxes do not form a part of the Consolidated Fund of India. They are assigned to the concerned states in accordance with the principles laid down by the Parliament.

Article 270: Taxes Levied and Collected by the Centre but Distributed between the Centre and the States

This includes all taxes and duties referred to in the Union List except the following:

- Duties and taxes referred to in Articles 268, 268-A and 269 (mentioned above);
- Surcharge on taxes and duties referred to in Article 271 (mentioned below); and
- Any cess levied for specific purposes.

The manner of distribution of the net proceeds of these taxes and duties is prescribed by the President on the recommendation of the Finance Commission.

Article 271: Surcharges

Parliament can at any time levy the surcharges on taxes and duties referred to in Articles 269 and 270. This includes cesses of different kinds such as Swachh Bharat Cess, Krishi Kalyan Cess etc. The proceeds of such surcharges go to the Centre exclusively and states have no share in them.

Taxes Levied and Collected and Retained by the States

These include land revenue; taxes on agricultural income, succession and estate duties in respect of agricultural land; taxes on lands and buildings, on mineral rights, on animals and boats, on road vehicles, on luxuries, on entertainments, and on gambling; excise duties on alcoholic liquors for human consumption and narcotics; taxes on the entry of goods into a local area, on advertisements (except newspapers), on consumption or sale of electricity, and on goods and passengers carried by road or on inland waterways; taxes on professions, trades, callings and employments not exceeding

Rs. 2,500 per annum; capitation taxes; tolls; stamp duty on documents (except those specified in the Union List); sales tax (other than newspaper); and fees on the matters enumerated in the State List (except court fees).

Grants-in-Aid to the States

Apart from distribution of taxes between centre and states, the constitution provides for mainly two types of grants-in-aid viz. statutory grants and discretionary grants:

Statutory Grants

Article 275 makes provisions for statutory grants to *needy states* {not every state}. These are charged on Consolidated Fund of India. Such grants also include specific grants for promoting the welfare of the scheduled tribes in a state or for raising the level of administration of the scheduled areas in a state including the State of Assam. The bases of these grants are recommendations of finance commission.

Discretionary Grants

Under article 282, both centre and states are able to make any grants for public purpose even if they are not within their legislative competence. Since such grants are discretionary, there are no obligations to make such grants. During the planning commission era, these discretionary grants were in fact bigger than statutory grants and that is why planning commission had assumed very important role.

Other Grants

For initial 10 years, constitution had made special grants for Assam, Bihar, Odisha and West Bengal for promotion and protection of jute industry.

Finance Commission

Finance Commission of India is established by President of India as per Article 280 of the constitution. The first finance commission was established in 1951. The Constitutional requirement for setting up a Finance Commission in India was an original idea, not borrowed from anywhere. That is why it is called the original contribution.

Article 280

Article 280 reads: President should, within two years of commencement of the Constitution and thereafter on expiry of **every 5th year**, **or at such intervals as he/ she thinks necessary**, would constitute a Finance Commission.

Members

A Finance Commission would consist of a Chairman and 4 other members who are all will be appointed by the President.

Functions

Since the commission has to be constituted at regular intervals, a certain measure of continuity in the work of these commissions is ensured. Each commission benefits by the work of previous commission.

Finance commission has to make recommendations to the President on two specific matters and on any other mater referred to the commission by the president in the interest of Sound Finance. The two specific matters are as follows:

- How the net proceeds of taxes should be distributed between the Union and States?
- On what principles, the grants-in-aid of the revenues of the State out of the Consolidated Fund of India should be give to needy states?

The President, after considering the recommendations of the Finance Commission with regard to income tax, prescribes by order the percentages and the manner of distribution. So, parliament is not directly concerned with the assignment and distribution of the income tax.

Relevance of Finance Commission

The importance of the Finance Commission as a Constitutional instrument is capable of settling many complicated financial problems that affect the relations of the Union and States. This is evident from the recommendations of the last 14 finance Commissions appointed so far.

Report of Finance Commission in Parliament

Article 281 says that President shall cause every recommendation made by the Finance Commission under the provisions of this Constitution together with an explanatory memorandum as to the action taken thereon to be laid before each House of Parliament.

Recommendations

Finance Commission does not tell the Union Government on how to increase its funds. Its work is to make recommendations on distribution between the Union and the States of the net proceeds of taxes and the principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India and the sums to be paid to the States which are in need of assistance by way of grants-in-aid of their revenues.

Regarding States

Finance Commission suggests the measures needed to augment the Consolidated Fund of a State to supplement the resources of the Panchayat and Municipalities in the State on the basis of the recommendations made by the Finance Commission of the State.

On Panchayat and Municipalities

The role of the Finance Commission has widened after the 73rd and 74th Constitutional amendments to recognise the rural and urban local bodies as the third tier of government. Article

280 (3) (bb) and Article 280 (3) (c) of the Constitution mandate the Commission to recommend measures to augment the Consolidated Fund of a State to supplement the resources of Panchayats and Municipalities based on the recommendations of the respective State Finance Commissions (SFCs). This also includes augmenting the resources of Panchayat and municipalities.

Protection of the States' Interest in Financial Matters

To protect the interest of states in the financial matters, the following bills can be introduced only on recommendation of president:

- A bill which imposes or varies any tax or duty in which states are interested;
- A bill which varies the meaning of the expression 'agricultural income' as defined for the purposes of the enactments relating to Indian income tax;
- A bill which affects the principles on which moneys are or may be distributable to states; and
- A bill which imposes any surcharge on any specified tax or duty for the purpose of the Centre.

Here, the expression "*tax or duty in which states are interested*" means: (a) a tax or duty the whole or part of the net proceeds whereof are assigned to any state; or (b) a tax or duty by reference to the net proceeds whereof sums are for the time being payable, out of the Consolidated Fund of India to any state.

Borrowing by the Centre and the States

Regarding borrowings by states and centre; the following are specific provisions in the constitution.

- The Central government can borrow either *within India or outside India* upon the security of the Consolidated Fund of India or can give guarantees, but both within the limits fixed by the Parliament. We note here that no such law has been passed by parliament to fix such limit.
- A state government can borrow within India (not abroad) upon the security of the Consolidated Fund of the State or can give guarantees, but both within the limits fixed by the legislature of that state.
- Central government can make loans to any state or give guarantees in respect of loans raised by any state. Any sums required for the purpose of making such loans are to be charged on the Consolidated Fund of India.
- A state cannot raise any loan without the consent of the Centre, if there is still outstanding any part of a loan made to the state by the Centre or in respect of which a guarantee has been given by the Centre.

Inter-Governmental Tax Immunities

There are certain provisions in the constitution on 'immunity from mutual taxation'. These are as follows:

Exemption of Central Property from State Taxation

The property of Centre is exempted from all taxes imposed by a state or any authority within a state like municipalities, district boards, panchayats and so on. But, the Parliament is empowered to remove this ban. The word 'property' includes lands, buildings, chattels, shares, debts, everything that has a money value, and every kind of property movable or immovable and tangible or intangible. Further, the property may be used for sovereign (like armed forces) or commercial purposes.

The corporations or the companies created by the Central government are not immune from state taxation or local taxation. The reason is that a corporation or a company is a separate legal entity.

Exemption of State Property or Income from Central Taxation

The property and income of a state is exempted from Central taxation. Such income may be derived from sovereign functions or commercial functions. But the Centre can tax the commercial operations of a state if Parliament so provides. However, the Parliament can declare any particular trade or business as incidental to the ordinary functions of the government and it would then not be taxable.

We note here that the property and income of local authorities situated within a state are not exempted from the Central taxation. Similarly, the property or income of corporations and companies owned by a state can be taxed by the Centre.

The Supreme Court, in an advisory opinion24 (1963), held that the immunity granted to a state in respect of Central taxation does not extend to the duties of customs or duties of excise. In other words, the Centre can impose customs duty on goods imported or exported by a state, or an excise duty on goods produced or manufactured by a state.

Effects of Emergencies on Centre-State Financial Relations

The implications of emergencies on centre-state financial relations are as follows:

During National Emergency

During national emergency under article 352, the President can modify the distribution of revenues between the Centre and the states. This implies that transfer of finances {including tax sharing, grants etc.} can be modified or even cancelled. Such modification continues till the end of the financial year in which the emergency ceases to operate.

Financial Emergency

During Financial emergency under article 360, centre can give directions to the states: (i) to observe the specified canons of financial propriety; (ii) to reduce the salaries and allowances of all class of persons serving in the state (including the high court judges); and (iii) to reserve all money bills and other financial bills for the consideration of the President.

Trends in Centre-State Relations: Various Committees

Till 1967, the relations between centre and states continued to be quite smooth because congress was in power both at the centre and most of the states. *After that strains appeared because Congress lost power in many states and many coalition Governments were formed in India by the opposition parties.* In 1977, the congress lost power at centre and the Janata party formed a government. Soon after assumption of power the Janata government dismissed congress ministries in nine states. But in 1980 congress again returned to power at the centre and dismissed Janata ministries in nine states. A vociferous demand for reforms in centre-state relations was made by West Bengal, Jammu and Kashmir , Punjab, Maharashtra, Kerala, Tamil nadu, Andhra Pradesh etc. states of India.

A number of committee were appointed to examine the following:

- *How far the centre had encroached upon the field of the states ?*
- *Suggest how the states could be granted genuine autonomy?*

These committees made several recommendations. Similarly the administrative reforms commission also recommended withdrawal of centre from the areas reserved for the states. It also recommended formulation of certain guidelines for the exercise of discretionary powers by the governor.

Rajamannar Committee

This committee was set up by DMK government in Tamil Nadu in 1969. Apart from making a call for immediate constitution of Inter-state Council, this committee made following recommendations:

- Union government should not take any decision without consulting the inter-state council when such decision can affect the interests of one or more states.
- Every bill which affects interests of the states should be first referred to inter-state council before it is introduced in parliament.
- Article 356 should be used only in rare cases of complete breakdown of law and order in state.
- Residuary power of taxation should be vested with states.

These recommendations were completely ignored by the union government.

Anandpur Sahib Resolution

This resolution was passed by Akali Dal in 1973 and it called for making Indian constitution a federal one in real sense. It said that centre's jurisdiction should be restricted only in defence, foreign affairs,

communications and currency. All the remaining and residuary powers should be vested in states. All states should have equal authority at centre.

West Beneal Memorandum

The communist government in West Bengal published a memorandum in 1977 and sent it to central government. It made the following demands:

- Replace the word Union in the constitution with federation.
- Confine the jurisdiction of centre in matters of only defence, foreign affairs, currency, communications and economic coordination
- All other subjects including the residuary should be vested in the states·
- Repeal articles 356, 357 and 360.
- State's consent should be made obligatory for formation of new states or reorganisation of existing states
- Of the total revenue raised by the Centre from all sources 75 per cent should be allocated to the states.
- Rajya Sabha should have equal power with that of the Lok Sabha;
- There should be only Central and state services and the all-India services should be abolished.

Obviously, these were radical demands, and thus this memorandum went to great dustbin of central government.

Sarkaria commission

Justice R. S. Sarkaria Commission was appointed in June 1983 and it had presented its report to Rajiv Gandhi Government in 1987. This commission *did not favour any structural changes*; and *regarded the existing constitutional arrangement sound*. It stressed on *cooperative federalism* and noted that the federalism is more a functional arrangement for cooperative action than a static institutional concept. It stated that a strong centre is essential to safeguard the national unity and integrity and rejected the demand for curtailing powers of centre. At the same time, it did not equate strong centre with centralization of powers because *over-centralisation leads to blood pressure at the centre and anaemia at the periphery.*

The other key recommendations are as follows:

- Set up a permanent inter-state council called as "*Inter-Governmental Council" under article 263 of the constitution.*
- *Use of article 356 in extreme cases and only as a last resort.*
- Further strengthen the All India Services and add more services to them.
- Residuary powers of taxation should be continued to be with centre while other residuary

powers should be placed in concurrent list.

- President should communicate reasons to state governments when he withholds assent to bills of state legislature.
- Rename National Development Council as National Economic and Development Council (NEDC).
- Fresh constitution of Zonal Councils to promote spirit of federalism.
- Centre should continue to have powers to deploy armed forces without even consent of states. However, there should be a mechanism to consult the states.
- Centre should consult the states before making a law on concurrent list.
- The constitution should be amended to provide for consultation with Chief Minister in the appointment of the state governor.
- Corporation Tax should be included in sharable pool {it was not there at that time}.
- Governor should not be able to dismiss the council of ministers as long as it commands majority in state assembly.
- Governor's term should be fixed to five years; and it should be disturbed except for some extremely compelling reasons.
- No commission of inquiry should be set up against a minister in state unless demand is made by
- Centre should levy surcharge only for specific purpose and for strictly a limited period.
- The commission found division of functions between finance commission and planning commission reasonable and recommended their continuation.
- Steps should be taken to implement three language formula.
- No autonomy for radio and television but decentralisation in their operations.
- No change in the role of Rajya Sabha and Centre's power to reorganise the states.
- The commissioner for linguistic minorities should be activated.

In summary, Sarkaria commission did not suggest any drastic changes in federal scheme but favoured several changes to remove irritants in centre-state relations.

MM Punchhi Commission

This commission was set up by UPA Government in 2007 and it gave its recommendations in 2010. The key recommendations are as follows:

- There should be a consultation process between union and states via Interstate Council for legislation on concurrent subjects.
- Regarding state bills, the President's pocket veto is baffling because no communication is

given to the state when president decides to withhold assent. This should end and there should be a reasonable time (6 months) in which president communicates his decision.

- The treaty making powers of union should be regulated and states should get greater participation in treaties where interests of states are involved.
- Governor should get clear guidelines for appointment of Chief Ministers so that he does not mis-uses his discretionary powers in this context.
- There should be a two years cool off period from active politics before a person is made governor. State chief minister should have a say in the appointment of governor. Governor's appointment should be done by a committee comprising the Prime Minister, Home Minister, Speaker of the Lok Sabha and chief minister of the concerned state.
- For removal of Governor, the *doctrine of pleasure should end* and governor should not be removed at whim of central government. Governor should be removed either by impeachment or by resolution in state assembly.
- Convention of making the Governors as chancellors of universities should end.
- Article 355 and 356 should be amended. Via these amendments, the Centre should be enabled to bring specific troubled areas under its rule for a limited period, thus there should be localized emergency provisions instead of entire state.
- National Integration Council should be provided teeth so that it can take some actions in event of communal violence. However, it rejected constitutional status to NIC.
- For a short period, Centre should have sweeping powers to deploy army without state's content in the communal violence bill {which it was given to study}.

Related Articles & Backgrounders

Inter-state Council

Inter State council is a constitutional body set up on the basis of provisions in Article 263 of the Constitution of India by a Presidential Order dated 28th May, 1990 on recommendation of Sarkaria Commission. Article 263 of the Constitution envisages establishment of an institutional mechanism to facilitate coordination of policies and their implementation between the Union and the State Governments.

Article 263

Article 263 says that "if at any time it appears to the President that the public interest would be served by the establishment of a Council charged with the duty of –

- inquiring into and advising upon disputes which may have arisen between States;
- investigating and discussing subjects in which some or all of the States, or the Union and one

or more of the States, have a common interest; or

- making recommendations upon any such subject and in particular, recommendations for the better co-ordination of policy and action with respect to that subject,

it shall be lawful for the President by order to establish such a Council, and to define the nature of the duties to be performed by it and its organization and procedure."

Functions and Duties

Inter-State Council is a recommendatory body and it investigates and discusses such subjects, in which some or all of the States or the Union and one or more of the States have a common interest, for better coordination of policy and action with respect to that subject. It also deliberates upon such other matters of general interests to the States as may be referred by the Chairman to the Council. Its duties include:

- Inquiring into and advising upon disputes which may have arisen between/among States
- Investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States have a common interest
- Making recommendations upon any such subject for the better coordination of policy and action with respect to that subject

Composition of Inter-state Council

Prime Minister is the Chairman of the Inter-state Council. Chief Ministers of all the States and Union Territories having Legislative Assemblies, Administrators of Union Territories not having Legislative Assemblies, Governors of States under President's rule and six Ministers of Cabinet rank in the Union Council of Ministers, nominated by the Chairman of the Council, are members of the Council. Five Ministers of Cabinet rank nominated by the Chairman of the Council are permanent invitees to the Council.

Secretariat

The Inter-State Council is assisted by Secretariat, which is headed by a Secretary to the Government of India. The Inter-State Council Secretariat closely monitors the implementation of the recommendations made by the Inter-State Council, and places the Action Taken Report before the Standing Committee/Council for consideration. *Inter-State Council Secretariat also works as Secretariat of the Zonal Councils.*

Competence of Interstate Council on Riparian Disputes

Although this Council has several functions, it is also competent to tender advice regarding the resolution of inter-State disputes including the River Dispute. The above mentioned Article 263 contemplates inquiry into, and advice upon, disputes between States, it does not bring within the scope of the article disputes between the Union and a State. Further, though it does authorize

investigation and discussion of subjects of common interest and the making of recommendations upon such subjects, the body itself remains advisory and recommendatory only.

Inter-state Council – An underutilised and ignored constitutional body

Till 1967, most states in India were under rule of a common party {Congress} and it was easier to resolve inter-state disputes. After 1967, other parties or coalitions than the one running at centre or neighbouring states started ruling. These governments with different opinions and political visions were unable to solve the disputes in inter-state problems. Setting up of this council was based on Sarkaria Commission recommendations. It was set up in 1990 but not a single meeting was held for long time. It was only during Atal Bihari Vajpayee government tenure when the council was revived and meetings happened almost every year. However, even today, the Inter-state Council has been largely under-utilized and ignored.

Zonal Councils

The idea of creation of Zonal Councils was first of all mooted by the first Prime Minister of India, Pandit Jawahar Lal Nehru in 1956. The zonal councils have been established by the state reorganization act 1956 to advise on matters of common interest to each of the five zones, into which the territory of India has been divided.

> Zonal Councils are not Constitutional bodies unlike Interstate Council, which is a statutory body established under article 263. However, since Zonal Councils have been established via the **part III of the States Reorganization Act of 1956**, they are statutory bodies.

In India, at present, there are 6 Zonal Council. Originally five councils were created as per the States Reorganization Act 1956 as follows:

- **Northern Zonal Council:** Haryana, Himachal Pradesh, Jammu & Kashmir, Punjab, Rajasthan, National Capital Territory of Delhi and Union Territory of Chandigarh
- **Central Zonal Council:** Chhattisgarh, Uttarakhand, Uttar Pradesh and Madhya Pradesh
- **Eastern Zonal Council:** Bihar, Jharkhand, Orissa, Sikkim and West Bengal;
- **Western Zonal Council:** Goa, Gujarat, Maharashtra and the Union Territories of Daman & Diu and Dadra & Nagar Haveli
- **Southern Zonal Council:** Andhra Pradesh, Karnataka, Kerala, Tamil Nadu and the Union Territory of Puducherry.

North Eastern Council

The North eastern council was set up in 1971 to deal with the problems of seven north east states of

India. It was set up under the legislation called North Eastern Council Act, 1972. The State of Sikkim has also been included in the North Eastern Council vide North Eastern Council (Amendment) Act, 2002 notified on 23rd December, 2002.Consequently, action for exclusion of Sikkim as member of Eastern Zonal Council has been initiated by Ministry of Home Affairs. The chairman of the Zonal council is Union Home Minister and Chief Ministers of the States included in each zone act as Vice-Chairman of the Zonal Council for that zone by rotation, each holding office for a period of one year at a time.

Arbitrary Removal of Governors: Recommendations of Various Panels

As per Article 155 and Article 156 of the Constitution, a Governor of a state is appointed by the President, and he or she holds office "during the pleasure of the President" for a term of five years. As President is bound to act on the aid and advice of the Council of Ministers under Article 74 of the Constitution, in effect it is the central government that appoints and removes the Governors. "Pleasure of the President" merely refers to this will and wish of the central government.

The Supreme Court's interpretation

- In 2010, in *P. Singhal v. Union of India*, a constitutional bench of the Supreme Court had interpreted these provisions and laid down some binding principles:
- The President, in effect the central government, has the power to remove a Governor at any time without giving him or her any reason, and without granting an opportunity to be heard.
- However, this *power cannot be exercised in an arbitrary, capricious or unreasonable manner.* The power of removing Governors should only be exercised in rare and exceptional circumstances for valid and compelling reasons.
- The mere reason that a Governor is at variance with the policies and ideologies of the central government, or that the central government has lost confidence in him or her, is not sufficient to remove a Governor. Thus, a change in central government cannot be a ground for removal of Governors, or to appoint more favourable persons to this post.
- A decision to remove a Governor can be challenged in a court of law. In such cases, first the petitioner will have to make a prima facie case of arbitrariness or bad faith on part of the central government. If a prima facie case is established, the court can require the central government to produce the materials on the basis of which the decision was made in order to verify the presence of compelling reasons.
- In summary, this means that the central government enjoys the power to remove Governors of the different states, as long as it does not act arbitrarily, without reason, or in bad faith.

Recommendations of Various Commissions on removal of Governor

Three important commissions have examined this issue.

Sarkaria Commission (1988)

The Sarkaria Commission (1988) recommended that Governors must not be removed before completion of their five year tenure, except in rare and compelling circumstances. This was meant to provide Governors with a measure of security of tenure, so that they could carry out their duties without fear or favour. If such rare and compelling circumstances did exist, the Commission said that the procedure of removal must allow the Governors an opportunity to explain their conduct, and the central government must give fair consideration to such explanation. It was further recommended that Governors should be informed of the grounds of their removal.

Venkatachaliah Commission (2002)

The Venkatachaliah Commission (2002) similarly recommended that ordinarily Governors should be allowed to complete their five year term. If they have to be removed before completion of their term, the central government should do so only after consultation with the Chief Minister.

Punchhi Commission (2010)

The Punchhi Commission (2010) suggested that the phrase "during the pleasure of the President" should be deleted from the Constitution, because a Governor should not be removed at the will of the central government; instead he or she should be removed only by a resolution of the state legislature.

The above recommendations however were never made into law by Parliament. Therefore, they are not binding on the central government.

Proposed Centre-State Investment Agreement

As proposed in this year's union budget, the finance ministry has started to prepare a *model Centre-State Investment Agreement* (CSIA). This agreement will be signed between the Centre and various states for the effective implementation of Bilateral Investment Treaties (BIT), signed by India with other countries.

What is a bilateral investment treaty (BIT)?

A bilateral investment treaty (BIT) is an agreement entered by two countries regarding promotion and protection of investments made by investors of these two countries in each other's territory. By regulating the host nation's treatment of investment, it tends to protect the investments made by an investor belonging to one country in the other.

Why the government has come up with this proposal?

The motivating factor behind the proposal is to facilitate ease of doing business for foreign investors and their domestic recipients. There can be a few instances where a problem with a foreign investor

is due to a particular state. CSIA will address this by ensuring commitment and fulfillment of obligations by the State governments. It is provided that the government will not make it mandatory for the states to sign CSIA, but the information of those states which did not sign CSIA will be given to India's BIT partner. So, the states which opt to sign this agreement will be a more attractive destination for foreign investors than the one which does not. Some of the features of the agreement may include an enterprise-based definition of investment, non-discriminatory treatment, protection against expropriation, an Investor State Dispute Settlement (ISDS) provision requiring the investors to first exhaust local remedies before seeking international arbitration etc.

The finance ministry came up with a new Model BIT Text in December last year. This basic template will be used during treaty negotiations with other countries. In the past with several instances of investors suing governments and claiming huge compensation for their 'losses,' the government has come up with these initiatives to protect the government's interests. BIT is expected to replace the existing Bilateral Investment Protection and Promotion Agreements (BIPPA). The BIT language cleared by the Union Cabinet in December keeps taxation out of its ambit. Unlike BIPAs, BITs will not allow foreign companies finding themselves in a tax row with the government to invoke the investment treaty their parent country has signed with India, as is the case at present. Vodafone had invoked the India-Netherlands BIPPA after the cancellation of conciliation talks and sought international arbitration in its Rs 20,000-crore tax dispute. Recently, Cairn Energy invoked India-UK BIPPA and demanded compensation for the Rs 10,200-crore tax notice served on Cairn India.

What are the issues/criticisms?

Obligations under international law

Critics argue that irrespective of a foreign company running into trouble with the state, the onus and the liability will be on the central government. Whether a state government enters into agreement or not, the actions of the state government will bind the Indian state. Further, if the state government infringes upon the rights enjoyed by a foreign investor under the BIT, the foreign company may challenge this as a violation under international law. In this case the Central government cannot justify its non-compliance with BIT obligations by invoking "provisions of its municipal law, or because of any special features of its government organization or its constitutional system".

The judgment of *Azadi Bachao Andolan Vs Union of India (2004)* case and a combined reading of Entry 14 of the union list (Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries) and Article 73, provides that the Central government, on behalf of the Indian republic has the power to enter into treaties. Once the

Central government accedes to a treaty on behalf of the republic, the international obligations will bind the entire country, including its constituent states, at least externally. It does not matter whether the Central government has entered into an agreement with the State governments regarding the implementation of treaty or not. Under international law, distribution of sovereign powers among constituent states is deemed to be an internal matter. Hence, irrespective of whether the Centre warns India's BIT partners about non-compliant States before they make their investment in the State, the proposal does not has much legal significance unless framed as a reservation to the BITs.

Cooperative federalism

India has a quasi-federal structure with Union and State governments often politically non-aligned. In this context, a proposal by the Centre to enter into investment agreements with States as an optional arrangement will become a challenge to the cooperative federalism and will further sour fragile Centre-State relations. The reasons being:

- The state governments may not like themselves to be blamed for the violation of a BIT.
- They may not like the idea of Central government informing the BIT partner countries about their non-compliance in case they are not willing to sign the agreement and downgrading its image to a non-safe destination for foreign investments.

What is the way forward?

- Given the direct impact that many regulations of State governments has on foreign investors, the central government can include sensitizing State governments as one of the objectives of the proposal.
- Institutionalizing the involvement of State governments in the treaty-making process can be thought of. Forums like NITI Aayog, can be used as a platform for Centre-State consultative process on treaty making.
- Apart from BITs, the sensitization of state governments should be extended to other international agreements like Free Trade Agreements (FTAs), Double Taxation Avoidance Agreements (DTAAs) and agreements concluded under the aegis of WTO.

Conclusion

The trade treaties assume significance because it covers many issues that fall in the State list like agriculture. Thus, with the spirit of cooperative federalism, the Centre and the States should work harmoniously for the benefit of the country and for the better implementation of international treaties.

General Knowledge Today

GS-II-6: Indian Federalism- Issues and Challenges

Integrated IAS General Studies:2016-17
Last Updated: September 25, 2016
Published by: GKTODAY.IN

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7. "Globalisation provides challenges as well as opportunities to federal systems such as India's" Discuss.
8. One of the basic premises of establishing NITI Aayog was that it would promote fiscal federalism. Two years down the line, to what extent it has been successful towards that end? Discuss critically.

9. What are key recommendations of 14th Finance Commission and what is their implication for Fiscal Federalism in India? Explain.
10. Indian Constitution is federal in structure but unitary in spirit'. Explain.
11. "Strong Centre is a robust constitutional mechanism against divisive forces in India". Justify.
12. Is regionalism a threat to unity and integrity of India? Substantiate your answer with recent examples.
13. Limited sovereignty of units at the periphery can be best ensured to the survival of federalism in India. Discuss.

Indian Federalism and Regionalism

The term regionalism has both negative and positive connotations. In negative sense, it denotes excessive preference to one's region over nation. In positive sense, it denotes one's love for his / her region, culture, language, etc. Regionalism in positive sense helps to develop a sense of belonging, brotherhood and commonness. In negative sense, it is a threat to unity and integrity of the nation.

Analysis

In Indian context, regionalism has *generally a negative connotation* and is seen a divisive force {which it is to a great extent} and a threat to India's unity.

The relation of Indian Federalism and Regionalism must be analyzed in the light of following questions:

- *To what extent, Indian federalism is responsible for regionalism in India?*
- *To what extent, regionalism is responsible for the type of federalism we have?*

To what extent, Indian federalism is responsible for regionalism in India?

To answer this question, we may have a look upon various reasons which lead to regionalism. There are two major reasons which lead to rise of regionalism {in negative context}. *Firstly*, it is the consistent neglect of a particular area or region by ruling authorities, leading to uneven distribution of resources. *Secondly,* it may also be because of the encouragement given by local leaders to maintain their hold in particular region.

Though the constitution has tried to make provisions for equal distribution of resources and equal development of the country, yet the disparity is so wide that centre's apathy towards some of the areas has led to strong feeling of regionalism in the country. This led to several movements for demand of separate states; demand of freedom from Indian union; demand of certain UTs for full statehood; demand of favour in inter-state disputes by particular region. These have kept our country on toe for many decades and are expected to keep same for long. It has resulted in rise of so many regional political parties and secessionist movements. The nature of Indian federalism is held responsible for regionalism mainly because provision of strong centre / weak states has led to too much interference from centre in the matters of states.

There are several fallouts of structure with strong centre and independent state government. *Firstly*, the state governments are not fully accountable. They depend on centre for funds and for support in any adverse situation. Most parts of India are left with virtual absence of local governments. *Thus, our federalism has ensured that it hurts most where it touches people most.* Our strong centre is too far to provide any real representation or participation with the common people. *Secondly,* the subject classification in seventh schedule has not been fair, particularly with respect to 11th and 12th schedules (local governments). The third tier of governance is totally dependent on second tier which itself is totally dependent on first tier. Thus closest tier of governance to people is also the weakest tier. This has its own manifestation in fiscal federalism also. The devolution of power has not been just in case of second and third tiers. There have been growing demands for decentralization of power and finance both for the states and to grass root levels under the backdrop of gross inability of the Centre to deliver public services in an efficient manner all through this vast country.

In summary, federal structure has not been able to address the regional disparity and led to development of only certain areas.

The suggested reforms are as follows: firstly, there is a need of proper fiscal federalism in real sense up to grass root level. *Secondly,* centre-state relations should be such that centre interferes in matters of states only in unavoidable national interests. *Thirdly,* there should be a system of national education that helps to overcome regional feelings and develop an attachment towards the nation. Obviously, each has its own issues and challenges.

To what extent, regionalism is responsible for the type of federalism we have?

Geographically, socially as well as economically, India is one of the most diverse countries of the world. The Indian federalism has been a proven method to accommodate aspirations of various regions. In words of Granville Austin, Indian federalism is pragmatic and *its own type of "cooperative federalism". He argued that Indian federalism has given out a strong centre but not yet the weak states.* Further, the decentralization was not seen by our founding fathers as only an administrative tool to a complex nation with huge ethnic, cultural, religious and linguistic diversities. They tried to create a living social space around constitutional protection blending together the price of citizenship with richness of multicultural diversities. Thus, they tried to accommodate regional aspirations in constitution by providing for special provisions, rights of minorities, separate personal laws and special protections and affirmative action to ensure equity and justice for all.

However, mere constitutional provisions did not and could not address the sudden upsurge of ethnic identities, and their constant struggle for more autonomous spaces as reflected in the demand for separate statehood for themselves, within the federal set-up complicated the task of a centralized governance from any level.

The voice for demand of more states has become more prominent in recent times, especially after the formation of Telangana in 2014. Recent demands like four fold-division of Uttar Pradesh and creation of Gorkhaland from West Bengal are instances of aggressive regionalism that pose a threat to federal structure of India. The agitations for Gorkhaland, Bodoland and Karbi Anglong have been revived. This is apart from the new demands for a separate Vidharbha State in Maharashtra, and Harit Pradesh and Poorvanchal in Uttar Pradesh. The more the number of states the more the centre will be held hostage to state parties on matters of national importance.

For instance, West Bengal threatened India's Teesta river waters treaty with Bangladesh because of its possible potential costs for West Bengal. Even growing regional powers may affect effective foreign policy as the federal government may bow to the will of an individual state.India had to vote in favour of UNHRC resolution for Sri Lanka in 2012 for a backlash from Tamil Nadu.

Conclusion

Regionalism is one of the significant challenges to federalism in India. Federalism best thrives as a democratic system when it mitigates the centralization of power sharing between the centre and the

states. The pluralist character of India gives rise to many factors including regionalism. People from far north east sometimes feel themselves at a formidable distance from New Delhi and people in southern part of the country with bigger states feel neglected having been within larger states. Regionalism or love for one's region, despite India's tradition of successful federal rule over the years since independence, still raises its head in different parts of the country.

Federal Structure, Diversity and Insurgency in India

Our country has been hailed as a triumph of democracy. India is known as largest functioning democracy in the world and also a beacon of democracy to the world. The cornerstone of success of democracy is *the way the **power** has been distributed by the constitution.* Further, the success of democracy also must be qualified the various armed challenges that we have seen in last seven decades.

India is a Union of States. Our constitution provides for a parliamentary form of government, which is *federal in structure but with certain unitary features.* The Constitution distributes legislative powers between parliament and states legislative assemblies. We also have centrally administered Union Territories.

The framers of our constitution adopted the federal system with many objectives. One of them was that such system *will emerge as a means of managing ethnic and linguistic diversity.* The rationale behind such idea was that the *demand for autonomy can be more easily accommodated in a federal structure* in comparison to unitary structure. The federal system of our country has been broadly a success, defying many prevailing theories that stipulate preconditions. In 1950s and 1960s, the mitigation of the linguistic conflicts in southern parts of India can be attributed to the federal system to a large extent.

However under the federal system, the states have to rely upon the centre for largest chunk of its financial resources. Indian states vary dramatically in their languages, social structures, economies, and politics. The federal system has institutionalized these differences but has largely failed in homogenizing them. Any diversity and heterogeneity is not conflict-producing by itself but it carries the hazards of conflict. While on the one hand, we are bound together by strong bonds of culture, common objectives, friendship and affection, on the other hand, unfortunately, there are inherent in India, separatist and disruptive tendencies.

The basic premise of India being a "**Union" of states** is that states can not by themselves separate themselves from the Union. They States have to retain loyalty to India while acting with significant autonomy within them.

But the federal system demands a careful balance between the local autonomy and central authority. In most circumstances, this balance has been manageable but is threatened while dealing with the ethnic and linguistic groups which have access to the support of the external elements that see themselves distinct from India. In some cases, the local actors, with significant external and internal support engage in separatist sentiments. Their goal is either to create a new autonomous unit in the Indian Union or outright formal independence. In several parts of our vast country, this has resulted in **armed** rebellion against the authority leading to **Insurgency**.

The emergence of insurgencies in India is closely linked to *various problems at home*; the *problems of centre-state relations* and *of relations among the states*. India's geopolitical location is such that most of her neighbours have been willing to provide guns, money, sanctuary, and training to insurgent groups.

Indian Federalism and Division of Powers

The constitution has divided the legislative authority via 7th schedule {Union, State, and Concurrent Lists}. The residuary powers are vested in the Central government.

Analysis

The discussion on Indian Federalism and Division of powers must be analyzed in the light of following questions:

- *What is the general principle underlying the division of powers in the country?*
- *What are the contentious issues related to division of power?*
- *What were some of the major views of Dr. Ambedkar regarding criticism of over-centralisation in the federal structure?*

What is the general principle underlying the division of powers in the country?

The general principle underlying the division of powers is that all matters of national importance, e.g. defence, foreign affairs, railways, currency are allotted to the Central government while matters that are primarily of local or regional importance e.g. education, public health, police, local administration are assigned to regional governments. Some matters which require the involvement of both the centre and states like criminal law, forest, economic and social planning are assigned in the Concurrent List. However, in case of conflict over the legislation on any of the subjects mentioned in the Concurrent List, the Centre supersedes the States.

What are the contentious issues related to division of power?

Some of the major contentious issues include Article 200 (reservation of State Bills by the Governor for consideration of the President), emergency provisions under Article 352, 356 and 360 and compulsory compliance by the States with the executive power of the Centre under Article 256 and

257 etc. These provisions amount to centralisation of power which has been the major concern among the states; and they consider it threat to federalism.

What were some of the major views of Dr. Ambedkar regarding criticism of over-centralisation in the federal structure?

While moving resolution for draft constitution, Dr. Ambedkar said that the form of the Constitution was federal. *"It establishes a dual polity with the Union at the Centre and the States at the periphery, each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution."*

Regarding concerns of over-centralization, Dr. Ambedkar said that:

- Union is not a League of States, united in a loose relationship, nor is the States the agencies of the Union, deriving powers from it. Both the Union and the States *are created by the Constitution; both derive their respective authority from the Constitution. The one is not subordinate to the other in its own field; the authority of one is coordinate with that of the other.*
- The allegation that there is too much centralization and states have been reduced to municipalities – is only exaggeration and founded on misgivings about the constitution.
- As to the relations between the Centre and States it is necessary to bear in mind the fundamental principle on which it rests. The basic principle of federalism is that the Legislative and Executive authority is partitioned between the Centre and the States not by any law to be made by the Centre but by the Constitution itself.
- This is what the Constitution does. The States are in no way dependent upon the Centre for their legislative or executive authority. The States and the Centre is co-equal in this matter.
- The alleged centralism may be because Constitution has assigned large field for operation of legislative and executive authority to centre than states; and residuary power of legislation to state. But these features don't form essence of federalism.
- The chief mark of federalism lies in the partition of the legislative and executive authority between the Centre and Units by the Constitution. This is the principle embodied in our Constitution. There can be no mistake about it. It is therefore wrong to say that the States have been placed under the Centre.
- Centre cannot by its own will alter the boundary of this partition. Nor can the judiciary. For as has been well said: *'Courts may modify, they cannot replace. They can revise earlier interpretations as new arguments, new points of view are presented, and they can shift the dividing line in marginal cases.*
- But there are barriers they cannot pass, definite assignments of power they cannot re-allocate. They can give a broadening construction of existing powers, but they cannot assign to one authority the powers explicitly granted to another'."

- Ambedkar was supported in these views by his colleagues on the Drafting Committee and by others whose opinions carried weight and authority in the deliberations of the Assembly. Yet, the controversy continued.
- A large number of members still thought that the Centre was invested with excessive power and, in the process, the federal principle which was to form the very foundation of the States system under the Constitution was almost destroyed.
- The controversy did not end even with the adoption of the Constitution. From the floor of the Assembly it migrated to a wider arena, among political scientists and constitutional lawyers both within and outside the country.

Asymmetries in the Indian Federation

One of the major concerns about the Indian federalism that it is asymmetric. By "Asymmetric" we mean that Indian federalism is based on unequal distribution of powers in political, administrative and fiscal spheres. Further, this asymmetry is both vertical {between centre and states} and horizontal {among states}. This issue can be analysed in the light of following questions:

- *Indian federation is not founded on the principle of equality between the union and states. Is this justified?*
- *What are different kinds of asymmetries found in Indian federation?*
- *What are the historical reasons for this symmetry in Indian federation?*

Indian federation is not founded on the principle of equality between the union and states. Is this justified?

Yes. This is totally justified. There are several arguments to support this.

Firstly, generally, the federations are seen as "indestructible units" of "indestructible states"; and neither of the constituent unit has power to make inroads into the defined territory of other. In India, this is different. Here, India is considered to be an *indestructible union of destructible states."* Only the union is indestructible and the states are not. Towards this end, there is considerable domination of the union over states, and the later have no territorial integrity defined. The reorganization of the states is one of the easiest task parliament of India can do {by passing an ordinary law}. The bill for this purpose has to be placed in parliament on commendation of the President and after it has been referred to the relevant state legislature for ascertaining their views. Their approval is not necessary.

Secondly, with a view to prevent the evil of predominant influence of larger units over smaller units in a federation, most federations in the world have resorted to some constitutional mechanism like equal representation of units or states in the Second Chamber and ratification of all amendments to

the Constitution by states. We don't find such provision of equal representation of states in the Rajya Sabha nor do the states have any substantial say over the amendments done to the Constitution from time to time. They are asked to ratify the laws only when their interest are involved.

Thirdly, asymmetry is found among states also. For example, Article 370 makes special provisions for the state of Jammu and Kashmir as per its Instrument of Accession. Article 371 makes special provisions for several states such as Andhra Pradesh, Arunachal Pradesh, Assam, Goa, Mizoram, Manipur, Nagaland and Sikkim as per various accession or statehood deals.

What are different kinds of asymmetries found in Indian federation?

There are four different kinds of asymmetries in the Indian federation. *Firstly*, there is a universal asymmetry affecting all units. For instance, States in India are represented by Rajya Sabha not on the basis of formal equality between states {as in United States} but has on the basis of their population. Due to this while UP has 31 seats in Rajya Sabha, States like Meghalaya, Mizoram, Manipur and Goa, and UTs like Pondicherry have just one seat each. Some UTs have no representation in Rajya Sabha. *Secondly,* there are specific asymmetries with regard to the administration of tribal areas, intra-state regional disparities, law and order situation and fixation of number of seats in legislative assemblies in relation to states of Maharashtra, Gujarat, Assam, Manipur, Andhra Pradesh, Telangana, Sikkim, Arunachal Pradesh, Goa under article 371. *Thirdly,* the Union Territories also represent a kind of asymmetry. They were created on varied reasons. They were either too small to be full states or too diverse and difficult to merge into the nearby states. *Fourthly,* the greatest of all asymmetries is because of article 370. Article 370 provides different constitution for Jammu & Kashmir; and part-VI is not at all applicable to that state. The most notable feature that marks the relationship of Jammu and Kashmir with the Union of India is that an Act of the Parliament does not automatically apply to this State unless and until it is endorsed by the State legislature. Similar asymmatries are due to article 371-A {special provisions for Nagaland} and 371-G {Special provisions for Mizoram}. However, the safeguards provided to these states through these special provisions include respect for customary laws, religious and restrictions on the migration of non-residents to the state.

What are the historical reasons for this symmetry in Indian federation?

There are several historical reasons for this asymmetry and go back to British Era when they unified the country under their rule and later the way in which the territories under the direct control of the British and various principalities were integrated in the Indian Union. While the territories ruled directly by the British were easily integrated into the Union, the treaties of accession signed by individual rulers covered the integration of different principalities. The provinces ruled directly by the British had autonomy and rudimentary form of parliamentary government as the British

loosened the grip gradually from 1919 onwards. The original constitution classified the states into four categories. The provinces directly ruled by the British were classified as Part `A' states. The princely states which had a relationship with the Government of India based on individual treaties signed were classified as Part `B' states. These included the states of Hyderabad, Mysore, Jammu and Kashmir and newly joined unions of princely states. In the case of Jammu and Kashmir, the powers special powers were given in the terms of accession. The remaining princely states acceding to the union were grouped under Part `C' states. Finally, the territories ruled by other foreign powers gaining independence (French and Portuguese) and areas not covered in the above three categories were brought under the direct control of the union to form Part `D' states or Union Territories. Thus, the Union of India in 1947 began with a major asymmetry between British India and the princely states and even among the latter, the terms of accession differed depending on the bargaining strength. In almost all cases, the princely states surrendered whatever notional sovereignty they had to the new country of India, in exchange for guaranteed privy purses. The nature of this bargain was clear – security and money in exchange for giving up authority or residual control rights. This is close to the standard view of federation as a political bargain, with the difference that the successors of the British in India, the Indian National Congress, were in an extremely strong bargaining position, even relative to the coalition of the princes. This was illustrated in the case of the exceptions to voluntary accession, such as Hyderabad, where military force (the authority over which was also inherited from the British) ensured integration into the new union.

- Suggested Reading: Asymmetric Federalism in India

Other Issues and Challenges with Regard to Indian Federalism

We have so far discussed regionalism, diversity, division of powers and asymmetries of Indian constitution. Here are some of the other issues and challenges summarized for quick overview.

Centralised Planning

Although economic and social planning is found in the Concurrent List of the Seventh Schedule to the Constitution, the Union Government enjoys unbridled authority over national and regional planning in India. Centralised planning, through the Planning Commission, now NITI Aayog appointed by the Centre, considerable preponderance in legislative power for the Union, the financial dependency of the states on the Centre's mercy, the administrative inferiority of the states make the states meek and weak. The States only fill the blank spaces meant for in the text for planning. There is no special planning commission for the states in India. It also adds to misery of states and pose smooth functioning of federal spirit across the country.

Language Conflicts

Diversity in languages in India sometimes causes a blow the federal sprit of the Constitution. There are 22 languages constitutionally approved in India. Besides, there hundreds of dialects are spoken across the country. Trouble arises when the strongest unit of the federation attempts to force a particular language on others. The tussle for official language in India is still a burning issue. The southern states' opposition to Hindi as the official language of India has led to deep-seated language crisis in India. It throws dirt on the federal character of the Union of India.

Issue of Religion

India is a fine example of religious heterogeneity that sometimes gives rise to turmoil to weaken the federation. But the religious process need not be always divisive. So long as there is a reasonable tolerance on the part of the people and a genuine secular policy on the part of the government, religion may not cause imbalances in a federation.

Relative Economic and Fiscal Incompatibilities among the Units

Differences economic standards and relative economic and fiscal incompatibilities among the constituent states also pose a threat to a federation. The forces of imbalances in the field are demands for economic planning and development and for regional economic equality and financial autonomy of states. Demand for a financial equality of a region creates problems in a federation.

In India some states are declared as poor and on the principle of equalization, are getting grants-in-aid. But the dilemma in a federation emerges that if the principle of equalization is adhered to, the national income and the total income growth will suffer. Again, if much attention is paid to economic development, equalization of all units cannot be attained.

Physical Environment

Physical environment may also create hurdles for a federation by affecting communication. A federation in which the lines of communication are long and difficult has to face the difficulty of keeping in touch with all the units. It is easy for creating misunderstanding and conflict and perhaps this was one of the important causes for the separation of the east wing from Pakistan. Moreover, in the absence of good communication, the poorer units tend to develop a complex of neglect and feel that they are receiving less than their fair share of resources for development. In India, the North-Eastern states are having similar feelings and creating problems for the federation.

External Forces

External forces also create hindrances for a federation. The tension in North Eastern States in India is due to interference of neighbouring countries. China's claim on some portion of the territory of Arunachal Pradesh on LAC threats the territorial integrity of India. The Tamil issue in Sri Lanka creates disruptive forces in India. The alleged Pak hand in Khalistan movement in the past also has a

say in weakening the Indian federation.

Challenges from Globalisation

Globalisation provides challenges as well as opportunities to federal systems such as India's. Federalism faces difficult challenges in the era of globalisation, since the latter has created pressures for reforms in economic and political organisation.

Due to liberalisation of economy in the wake of globalisation, the states also desire economic development by allowing foreign direct investment and SEZ model of economic havens within their territories. It has given rise to multiple readjustments and structural changes in the economy of India.

Market-driven economy has largely redefined the erstwhile centre-state relations especially in economic spheres. Gradual deregulation of the Indian economy, has given rise to competition between the Indian states to secure investment, especially from foreign sources. It has had an adverse impact in accentuating regional imbalances, increasing the gap between have and have-not states.

On one hand forward and developed states enhance their pace of economic development through FDIs, on the other the backward states remain underdeveloped due lack of feasible socio-political economic environment. The latter needs assistance and cooperation in this regard by the Union Government. It will promote cooperative federalism in India.

Also at the grassroot level the relationship between the state and panchayats is passing through changes due to all-penetrating effect of globalisation. There is a need for more decentralisation at each level for federalism to thrive. Globalisation has resulted in emergence of new concepts like 'New localism, people's empowerment etc.

Globalisation has made both the centre and states active partners in establishing political stability and peace and harmony. The use of Article 356 has been drastically reduced since the onset of liberalisation in 1990.

Conclusion

In fine, federalism or federal form of government is the most suitable form for a vast and pluralistic country like India. It tries to facilitate the socio-political cooperation between two sets of identities through various structural mechanisms of 'shared rule'. However, the because of above factors centre-state relations and the state autonomy have become the cardinal issues of the Indian federalism. The Sarkaria Commission in 1983 appointed by the Government of India to examine and review the working of the Indian Federalism, did not make any useful recommendations for structuring the Indian federalism in a proper manner. This reveals the fact that even though our constitution is said to be a federal, but this overemphasis on the power of the federal government makes unable to dealeffectively with socioeconomic challenges and strengthening national unity.

There is need for restructuring Indian Federalism to make it more viable and resilient in paving the way for promoting effective centre-state relation and perpetuating a federal tradition across the country.

Fiscal Federalism

Apart from separation of powers of taxation, constitution of India has provided for an institutional mechanism viz. Finance Commission for making recommendations to parliament on how the tax revenues between centre and states should be shared and how the imbalance can be corrected. Following are the related questions for analysis for this monograph on fiscal federalism.

What was the mandate of Planning Commission with respect to Fiscal Federalism? What were issues?

Planning Commission was set up in 1950 as an advisory and specialized institution charged with three major functions:

- Finalising the State plans and additional central assistance plans
- Act as a link between the centre and states
- Be an overarching guide to the states and the centre in respect of allocation of resources to different ministries for approved plan schemes

Establishment of planning commission as extra-constitutional body was based upon the premise that planning in India is a concurrent subject and creation of such body will strengthen the roots of Centre-State Cooperation and Indian federalism. Later in 1952, the National Development Council was established as an advisory body to the Planning Commission.

The role of Planning Commission in fiscal federalism can be discussed only for academic exercise in the light of following questions:

In context with fiscal federalism, the planning commission had the mandate of coordinating the development plans of the centre and the states in such a way that they conform to national objectives.

Further, planning commission was responsible for plan transfers or Central Planned Assistance (CPA) to the states. Under this, each state was allocated a portion of the total plan transfers which was tied to its development plan budget (part of the state budget; prepared by state governments) and was negotiable on a bilateral basis. These transfers were in addition to the funds available to states through the Finance Commission and Union Ministries (which were called non-plan transfers).

This worked for a while but gradually, started complaining of overarching powers of the Planning

Commission for a long time. PM Narendra Modi himself was biggest critic of this commission. The major issues that were created were as follows:

- It was not acceptable for the chief ministers of the states being told by unelected officers in the Planning Commission where they should spend their money.
- The functions of planning commission collided with Finance Commission as well as Finance Ministry. For example, its role of serving as an intermediate between the centre and state collided with Finance Commission, which recommended on statutory transfers. Similarly, its role on non-discretionary transfers was almost nothing as there was a Gadgil Formula in place. Further, its role on residual discretionary allocation of resources to states was in effect nothing, because this is being done by the finance ministry.

However, despite this, the bilateral bargaining for plan approval continued year to year. With the advent of LPG era, the days of command economy were over and now it was time to replace planning commission with a new structure. {for details, read Rise and Fall of Planning Commission}.

One of the basic premises of establishing NITI Aayog was that it would promote fiscal federalism. Two years down the line, to what extent it has been successful towards that end?

The abolition of planning commission and doing away with the patronage system were two biggest reforms done by Modi Government in initial days of its current tenure. It put an end to the ritual pilgrimage of chief ministers to Yojana Bhawan to get their plan approved. Since centralized planning was a negation of the federalism, and there should be no reason why centre should approve state's plans.

However, this reform was short of what was needed for the country. NITI Aayog has been established on the same premise on which planning commission was minus the annual ritual of plan approval. How this institution will evolve is yet to be seen. Some of its initiatives are as follows:

- The basic / core effort of NITI Aayog has been the creation of two hubs viz. *Team India* and *Knowledge and Innovation Hub*. While the Team India leads the engagement with states, the Knowledge and Innovation Hub is for building NITI Aayog's think-tank capabilities. Overall, its a leaner than planning commission body. Under Team India, regular meetings of the CMs are held whereby cooperative federalism is emphasized.
- Unlike planning commission which looked economy from a national level approach, NITI Aayog targets sector wise implementation. It has tried to interlink the programmes with goal set by the government and works on major schemes on Agriculture, Digital India, Swachh Bharat, Skill Development etc.
- It has created task forces on elimination of poverty and farm development and an expert panel under Bibek Debroy gave a report to the centre on revamping the Indian Railways and

merging the Railway Budget with Union Budget, this ending the British legacy.

- It is also trying to create a repository of best practices and data across the country.

Thus, within its capacity, the organization has tried to raise the hope to the idea of a developed India perhaps it would have been better if NITI Aayog was given a constitutional status. *Two years down the line, we still lack a much needed institution for intergovernmental bargaining and conflict resolution and help the cause of cooperative federalism better.*

What are key recommendations of 14th Finance Commission and what is their implication for Fiscal Federalism?

The key recommendations of 14th FC are as follows:

- Share of 42% of the divisible pool of tax to the states which is 10% more than the present share.
- Doing away with the distinction between unconditional and conditional transfers. Previously the transfers were a mix of conditional and unconditional funds, where the conditional transfers is given for serving some specific purpose. Here the state having the flexibility to utilize the conditional transfers as per the needs.
- Doing away with component of previous commission called fiscal discipline. Instead it introduced two new components that are changes in population between 1971 and 2011 and giving credit to the success in retaining forest cover. The other components to decide upon the share of state are – per capita income, traditional population and the areal considerations.
- Implementation of Goods and Services Tax and laid out a fiscal road map for the economy. A compensation mechanism to states for GST.
- Tax devolution should be the primary route for transfer of resources to the States.
- It has ignored the Plan and non-Plan distinctions
- Grants to States are divided into two (1) grant to duly constituted gram panchayats (2) grant to duly constituted municipal bodies.
- It has also divided grants into two parts (1) a basic grant, and a performance one for gram panchayats and municipal bodies. The ration of basic to performance grant is 90:10 for panchayats; and 80:20 for municipalities

Further, the 14th FC had significantly departed from previous commission vis-à-vis recommendation of the principles governing grants-in-aid to the States by the Centre. It chose to take the entire revenue expenditure for this purpose. Hence, it has decided to take into account a state's entire revenue expenditure needs without making a distinction between plan and non-plan expenditure. The Commission is of the view that sharing pattern in respect to various Centrally-sponsored

schemes need to change. It wants the States to share a greater fiscal responsibility for the implementation of such schemes.

Other Questions & Answers

1. 'Indian Constitution is federal in structure but unitary in spirit'. Explain.

Federalism was introduced in India by the Government of India Act, 1935. While drafting the Constitution of Indian, the framers wanted to give a federal look to it considering the pluralistic characteristics of India. The Constitution contains certain integral federal features such as two governments; division of powers between the union and its constituents; supremacy of the Constitution; rigidity of the Constitution; independent Judiciary; bicameralism. Unlike the true federal states like the USA, Indian federation was not a result of a compact between several sovereign-units but a product of conversion of a unitary system into a federal system.

It is a compromise between two conflicting considerations such as autonomy enjoyed by states within the constitutionally prescribed limit (State List) and the need for a strong centre in view of the unity and integrity and sovereignty of the country. Unitary features of the Constitution like single Constitution; single citizenship; flexibility of Constitution; integrated judiciary; appointment of the Centre; all India Services and emergency provisions. During national and state emergencies the Union Government assumes undisputed power over the whole or any part(s) of India. The Parliament has power to make laws even on the subjects of the State List in the national interest (Article 249), under Article 252 and in implementation of international treaties. Besides, it also retains the ultimate authority on policy decisions and governance. Last but not the least, indestructability of the Union and destructibility of the units by the Union substantiate the given view.

2. Strong Centre is a robust constitutional mechanism against divisive forces in India. Comment.

The very birth of India as an independent nation-state signifies the fact that the Union of India was a necessary corollary and it was not a creation of agreement among its constituents. The framers intended to provide a sturdy centre keeping the sovereignty and unity and integrity in mind considering wide diversity and pluralism in India. Their intention has found meaning. But for a constitutionally strong Union, India would have already been fragmented into pieces since long back. The Parliament of India enjoys sole power for formation, reformation, alteration of boundaries of states in India. Time and again divisive forces raise their ugly heads to secede from the Union. In the past demand for Pakistan-backed Khalistan and clamour for Dravida Nadu created instability in the proposed regions and posed a threat to unity of the country. However, lack of power of secession from the Union of India by the states and constitutionally-approved indestructability of the Union

saved India from disintegration. The simmering flames of separatist movements still haunt India. The issue of Kashmir in the far north, demand for a separate country for Assamese people; Nagalim in not so distant past were brought under control by various stringent measures like Armed Forces Special Powers Acts (AFSPA). Such acts are in vogue to put down separatist movements in certain parts of the country.

Strong Centre is necessary in India in the interest of its unity and integrity. No substitute to such constitutional arrangement is in sight in the context of the country.

3. Is regionalism a threat to unity and integrity of India? Substantiate your answer with recent examples.

Regionalism is excessive love for one's own region which entails invariably regional rather than central systems of administration or economic, cultural, or political affiliation. India is a plural society. Wide diversity is found in religious, linguistic, cultural, social and economic spheres. It gives rise to regional feelings which sometimes pose great threat to the unity and integrity of the country. Immediately after independence language played its role in demarcating states in India. In recent times the clamour for more states became prominent after the creation of three states in 2000. In this case the issue of backwardness and economic development was the ground for division which led to creation of Telangana in 2014. Demand for more states, at present, has been manifold and more vocal. Also divisive forces in northern part and north-eastern states in alliance with immediate alien powers demand for secession from India.

Apart from a great number of states, regional feelings give rise to a number of parties. Multiple states and multiplicity in political party culture are likely to create confusing and hazy governance hindering the progress of the nation. Regionalism is also an anathema to growth of national consciousness and cohesion much to the detriment of unity and integrity of the country.

Even though regionalism is attributive of uneven economic development and underrepresentation of some regions in governance of the country, it is flamed by narrow-minded and antinational forces to gain their nefarious goals. These need to be contained with an iron-hand by stringent measures along with strategy for equitable distribution of national development across the country.

4. Limited sovereignty of units at the periphery can be best ensured to the survival of federalism in India. Discuss.

Article 1 of the Constitution of India states India as Union of India. The states in India were an integral part of British India and its periphery and as such became an indivisible part of the said Union. There is 'one nation and one citizenship' adopted in independent India and the nation's integration has been made paramount. The Constitution, however, provides states with limited sovereignty to establish a quasi-federal structure for the country. It did not intend to make India a

unitary country with states functioning as municipalities and their survival dependent on the whims and fancies of the Union Government. The functioning of the Indian Constitution over the past 66 years doesn't establish a de facto unitary state. It is a fact that federalism has been going deep in India in tandem with global trends. The provisions like a separate state list in the constitution, second chamber for representation of units at the centre, NITI Aayog, inter-state councils, zonally councils and substantial devolution of funds for the states through various ways ensure required sovereignty to states to function as independent entity within a federal set-up.

Demand for more autonomy by states should be gauged on the scale of federal characteristics of Indian polity.

General Knowledge Today

GS-II-7: Separation of Powers / Dispute Redressal Mechanisms

Integrated IAS General Studies:2016-17
Last Updated: September 27, 2016
Published by: GKTODAY.IN

Contents

Model Questions

1. "In Indian Constitution, separation of functions is followed and not of powers." Explain while throwing light upon various provisions in the constitution.
2. Critically examine the scope of Article 131 of the constitution towards Redressal of inter-state dispute. Why the Supreme Court provided that a dispute under this article must be a "federal dispute"?
3. While explaining the scope of article 263, explain the competency of Inter-state Council towards resolution of Inter-state disputes. Why this body is largely ignored and under-utilized?
4. What do you understand by the inherent "contempt power" or "contempt jurisdiction" of the CAT (Central Administrative Tribunal)? What is its relevance?
5. While Central Administrative Tribunal has worked well, state administrative tribunals became redundant. What are the reasons for the same? Why some states have shut down the administrative tribunals? Explain.
6. Make an assessment of four years of NGT performance putting major decisions and cases in light. What role has NGT played in environment jurisprudence and democracy?
7. What are the roles and functions assigned to Competition Commission of India? While making an assessment of functioning of CCI, discuss the present challenges it faces in carrying out its statutory mandate.
8. What are the concerns and key issues around overtribunalisation of dispensation of justice in the country? While keeping Legatt Committee of UK in reference, suggest what should be done to overcome these concerns.
9. Discuss the rationale, proposed mandate and functions of the Central Consumer Protection Authority (CCPA).
10. The Legal Services Authorities Act, 1987 brought about the establishment of Lok Adalat System for settlement of disputes cheaply and expeditiously and also in the spirit of compromise by give and take formula. Discuss their functions and award mechanism.
11. In recent times, arbitration has emerged as a preferred option to settle commercial disputes in India. What efforts have been made to make this option more "user friendly" in addition to reduction of cost? Discuss.

Separation of Powers

Doctrine of Separation of Powers – Historical Overview

The separation of powers, also known as *trias politica*, was first developed in ancient Greece and was widely used by the Roman Republic. The concept was the result of centuries of political and philosophical development. This model divides the state into branches or estates with independent powers and responsibilities. The usual consists of division into an executive, a legislature, and a judiciary. After the fall of the Roman Empire, until the 18th century, the dominant form of governmental structure in Europe was concentrated power resting on the hereditary ruler. The single exception to this was the development of Parliament in England in the 17th century.

Aristotle

Aristotle was the first person to write about separation of powers. In his book entitled *Politics,* he has described three agencies of government three agencies of government – the General Assembly, the Public Officials, and the Judiciary.

John Locke

The theory of three branches of government re-emerged with John Locke's *Two Treatise of Government (1689).* He defined them as 'legislative', 'executive' and 'federative'. He however did not consider them as co-equals. According to him, legislative branch is supreme than the other two. The other two namely the executive and federative functions were to be exercised by the monarch. His model corresponded with the dual form of government existing in England at that time – The Parliament and the Monarchy.

Montesquieu's theory of separation of powers

Montesquieu was a French philosopher who is known for the theorization of the concept of separation of powers in his book *De L' Espirit des Lois (The Spirit of Laws),* in 1748. Montesquieu laid sown his theory largely based on the English system. He laid greater emphasis on the political and natural liberty of a citizen. He explained the union of executive and legislative power would lead to despotism of the executive. Similarly, he also explained that the union of legislative power and the judiciary would not safeguard individuals against the state. Hence, he explained that the human liberty can be safeguarded only if the concentration of powers in a person or a group of persons could be avoided.

Montesquieu divided the government into legislative, executive and judicial functions. He understood legislative power as an activity of declaring the general will of the state. He apprehended the executive power as that of executing the public resolutions embodying the general will of State. Similarly, he understood judicial power as the power of deciding civil and criminal cases. Out of all,

Montesquieu considered judicial power to be frightening as it has the power to harm a subject's life, liberty or property.

Though, Montesquieu is credited for the theory of separation of powers, he is criticized by some that he completely misconstrued what he saw in England.

Separation of power in Ancient India

The roots of separation of power are also found in Vedas. *Narad Smiriti* has the very principle of separation of power. In those days, *Deewan* was head of the Executive wing. *Senapati* maintained law and order and *Kaji* was the judicial head. However, their positions were all subordinate to a king, who was the supreme authority. King was the one who made laws and can be compared to the present form of legislature. Hence, in ancient times also, one can find a separation of powers and functions.

Meaning of Separation of Powers

The basic premise behind the doctrine of separation of powers is that when power gets concentrated in a single person or a group of persons, they can be dangerous to the citizens. Hence, the principle of separation of powers aims at removing the concentrated power and preventing abuse. Generally, all the powers of the government can be categorized into three classes:

- Enactment of making laws
- Interpretation of that enacted laws
- Enforcement of the enacted law

These are simply put as Legislative, Executive and Judicial powers of the government. The executive makes policy decisions and implement laws. Legislature issue enactments and the judiciary adjudicate disputes. The doctrine of separation of powers implies independent functioning of each pillars of the democracy.

Hence, the principle of separation of powers deals with the mutual relations among the three organs of the government – legislature, executive, and judiciary. It states that the three main categories of government functions – Legislative, Executive and Judicial and three powers in a democracy must be maintained separately and exercised by separate organs of the government. It also tries to bring exclusiveness in the functioning of the three organs of the government and strict demarcation of power among them. It simply implies that three organs of the government to be independent of the other and none should perform functions belonging to the other.

According to *Wade and Philips*, the concept of Separation of power means three different things:

- Same person should not form part of more than one of the three organs of the government. Example: Ministers should not be made to sit in the Parliament.

- One organ of the government should not control or interfere with the exercise of its functions by another organ. Example: judiciary should be independent or the Ministers should not be made responsible to the Parliament.
- One organ of the government should not exercise the functions of another. Example: Ministers not to have legislative powers.

Constitution of India and Separation of powers

In India, *separation of functions is followed and not of powers* and hence, the principle is not abided in its rigidity. In India, strict separation of powers is not followed as it is followed in the U.S. But a system of checks and balance has been embedded so much so that the courts are competent to strike down the unconstitutional amendments made by the legislature. The constitution makers have also meticulously defined the functions of various organs of the state. Legislative and executive, which acts the two facets of people's will have all the powers including that of finance. There exists clear division between the head of the state and the head of the government. The executive is president; the legislature is Parliament (Lok Sabha and Rajya Sabha) and the judiciary contains Supreme Court, High Courts and other lower courts. Similarly at the level of states, the Governor acts as executive and there exists legislative body at each state.

Relevant Articles

Some of the articles in the Indian constitution which emphasizes the separation of powers are the following:

Article 50

Article 50 puts an obligation over the state to separate the judiciary from the executive. However, Article 50 falls under the Directive Principles of State policy (DPSP) and hence is not enforceable.

Articles 121 and 211

The legislatures cannot discuss the conduct of a judge of the High Court or Supreme Court. They can do so only in matters of impeachment.

Articles 122 and 212

The courts cannot inquire the validity of the proceedings of the legislatures.

Article 361

The President and Governors enjoy immunity from court proceedings.

Checks and balances

The doctrine of separation of powers is a part of the basic structure of the Indian Constitution even though it is not specifically mentioned in it. Hence, no law and amendment can be passed violating it. The system of checks and balances is essential for the proper functioning of three organs of the government. Different organs of the state impose checks and balances on the other. The following

examples illustrate the checks and balances:

- Judiciary exercises judicial review over legislative and executive actions. Judiciary has the power to void laws passed by the Parliament. Similarly, it can declare the unconstitutional executive actions as void.
- Legislatures review the functioning of the executive.
- Executive appoints the judges.
- Legislative branch removes the judges. It can also alter the basis of the judgment while adhering to the constitutional limitation.

Checks and balances acts in such a way that no organ of the state becomes too powerful. The constitution of India makes sure that the discretionary power bestowed upon any organ of the state does not breach the principles of democracy. For instance, the legislature can impeach judges but as per the condition i.e. two third majority.

Judicial Pronouncements

In *Keshavanand Bharti case (1973)*, the Supreme Court held that the amending power of the Parliament is subject to the basic features of the constitution. So, any amendment violating the basic features will be held unconstitutional. This scheme cannot be altered by even resorting to Art.368 of the constitution.

In *Ram Jawaya v. Punjab (1955)* case, the Supreme Court held up the observation that the executive is derived from the legislature and is dependent on it for its legitimacy. Cabinet ministers in India both executive and legislative functions. Art. 74(1) gives the upper hand to the cabinet ministers over the executive by making their aid and advice mandatory for the President, who is the formal head of the State.

In *Indira Nehri Gandhi v. Raj Narain* (1975) case, the Supreme Court held that adjudication of a dispute is a judicial function and parliament cannot even under constitutional amending power is competent to exercise this function.

In *Swaran Singh case (1998)* the Supreme Court declared the Governor's pardon of a convict unconstitutional.

In subsequent judgments, the Supreme Court upheld the rulings of the *Keshavananda Bharti* case regarding the non-amend ability of the basic features of the Constitution and strict adherence to the doctrine of separation of powers.

Constituent assembly and the separation of powers

There were primarily two reasons for non insertion of separation of powers in the constitution:

- It was felt that it was too late to make amends as the constitution was already drafted and

bringing the amendment inserting the principle of separation of powers would bring in change to the structure of the constitution.

- Since, British system of parliamentary form of government was adopted, it was thought it would be better to avoid adopting complete separation of powers as in the American system.

Independence of Judiciary and separation of powers

Independence of Judiciary guarantees fair and neutral judicial system without the interference or influence by the executive and legislative branches of the government. The concept of independence of judiciary was derived from the England. The *Hampden's case (1637)* and *Coke's (1616) case* helped to secure judicial independence.

In India, during pre-independence times, the criminal magistracy was placed under the direct control of the executive. Executive control of judiciary will breach the rule of law and result may be that the rights of the citizens may be compromised. Article 50 of the constitution puts an obligation over the state to separate the judiciary from the executive. In India, independence of judiciary basically limited to delivering justice. Other things pertaining to the judiciary like salary, allowances, privileges, jurisdiction, appointment and impeachment of jufges are left with Parliament and the executive. Independence of judiciary has been made as a *basic structure* of the constitution. This was observed in the *S.K. Gupta v. President of India (1981)* case.

Legislature Versus Judiciary

In India, there exists tug of war between the Judiciary and Legislature on certain issues. Judiciary has striked down certain laws passed by the Legislature terming them *ultra vires.* The Legislature, for its part has objected to the concept of Judicial Activism and sometimes frames fresh piece of legislation to circumvent the objection raised by the judiciary. It is generally held that the concept of judicial activism outs the doctrine of separation of powers.

In many instances in the past, the courts have issued laws and policies through their judgments. Some of the prominent examples are:

- Vishakha case where the Supreme Court issued guidelines on sexual harassment.
- In 2010, it directed the government to distribute food grains.
- Recently, it also appointed a Special investigation Team (SIT) to replace the High Level Committee constituted by the government for investigating the issue of black money deposits in Swiss Banks.

However, it is often alleged that the judiciary crosses its territory pertaining to the Legislature or executive and is termed *as judicial overreach or judicial adventurism.*

At the same time, there are also instances of the legislature reversing the outcome of some of the

judgments. For instance, in the *Commissioner of Customs vs. Sayed Ali in 2011 case,* imposition of some duties retrospectively by the *Customs Amendment and Validation Bill, 2011* was challenged in the Supreme Court. The Supreme Court struck down the levy of duties. In order to circumvent that judgment, the Parliament passed *Customs Bill, 2011* and amended the provisions to levy duties retrospectively even in those which was earlier struck down by the Supreme Court. Similarly, *Essential Commodities (Amendment) Ordinance, 2009* was passed by the Parliament to overrule the Supreme Courts judgment regarding the purchase of sugar by the government from the mill.

As the doctrine of separation of powers is not codified in the constitution, there is a necessity that each pillar of the State to evolve a healthy trend that respects the powers and responsibilities of other organs of the government.

Dispute Redressal Mechanisms

The Dispute Redressal Mechanisms is broad / dynamic topic and also includes alternative dispute resolution mechanisms. The major topics are discussed as follows.

Inter-state Disputes and their Redressal

In a federal constitution, the sovereignty is divided between the federation and its units. When sovereignty is divided, it is bound to raise disputes. There is a variety of mechanisms under the constitution and outside of it for settlement of inter-state disputes. For your examination, we can discuss the major topics under broad titles as follows:

- *Scope of Article 131{original jurisdiction of Supreme Court} in Inter-state disputes settlements*
- *Scope of Article 262 in Inter-state river disputes*
- *Scope of Article 136{Special Leave Petition}*
- *Scope of article 263{Inter-state Council} in Inter-state disputes.*

We discuss each of them here one by one.

Scope of Article 131

Article 131 is the main provision in the constitution regarding centre-state / inter-state disputes. This article confers upon Supreme Court of India exclusive jurisdiction to deal with a dispute involving legal rights; and also disputes:

- between the Government of India and one or more States; or
- between the Government of India and any State or States on one side and one or more other States on the other; or
- between two or more States.

However, there is a proviso to this article which says that such jurisdiction does not extend to a

dispute that arises out of any treaty, agreement, covenant, engagement, *sanad* or similar instrument entered into by the Government before enactment of the constitution.

We note here that via various judicial pronouncements, the court has established that:

- This article cannot be invoked if one party is a private individual.
- This article cannot be invoked if one party is a public sector corporation.
- This article is not applicable if dispute is purely political and does not involve any question of legal right.
- The element of public law should be component of the dispute.

At the same time, Supreme Court has provided that such a dispute between two governments must be a "federal dispute". *Recently, the AAP government had filed a petition in court regarding statehood of Delhi under article 131 but court even did not hear that petition because as per court, it was not a federal dispute.* Despite these, this article has a wide jurisdiction.

Further, we also note that via the 42nd amendment, 1976, an article 131-A was inserted which conferred the Supreme Court exclusive jurisdiction in regard to constitutional validity of the central laws. But this article was later repealed by 43rd amendment 1977.

Scope of Article 262 in Inter-state river disputes

Water {*including water supplies, irrigation and canals, drainage and embankments, water storage and water power*} was put in the state list {entry-17} but the regulation and development of inter-state river valleys was put in entry 56 of the Union List. Under article 262, *neither the Supreme Court nor any other court can exercise jurisdiction in respect of inter-state water disputes.* Thus, this article gave weapon to parliament to enact a law and ban Supreme Court and high courts to adjudicate the inter-state river disputes.

Using powers of this article, Parliament enacted the Interstate River Water Disputes Act, 1956 (IRWD Act) to resolve the water disputes that would arise in the use, control and distribution of an interstate river or river valley. This act is applicable to only inter-state rivers and river valleys and only when activities of an upstream state affect the interest or downstream state or vice versa. Further, when the riparian states are not able to reach to an amicable agreement, section 4 of this act provides for creation of a Tribunal. The tribunal created this way has power of a Civil Court but its verdict is equivalent to the Supreme Court verdict when pronounced in the ambit of IRWD Act. The final verdict of such tribunal when accepted by Central Government is notified in official gazette and becomes a law, binding upon the states for implementation.

However, verdict of the tribunal can be challenged in Supreme Court via civil suits. The IRWD act was amended in 2002 to provide that:

- If there is any Tribunal award which predates 2002, it **can not be altered by new tribunals**
- If there is any tribunal award which post dates 2002, **can be altered by new tribunals.** The idea is to resolve fresh water disputes which were not addressed by earlier tribunals/ agreements as and when they surface.

So far, the awards of four Inter-State Water Tribunals have been notified viz. Godavari Water Disputes Tribunal (April 1969), Krishna Water Disputes Tribunal (April 1969), Narmada Water Disputes Tribunal (October 1969) and Cauvery Water Disputes Tribunal (June 1990)

Out of them, the first three tribunal awards were issued before the year 2002 which cannot be altered by the new tribunals. The tribunals formed on sharing water of Ravi & Beas rivers, Vamsadhara River, Mahadayi / Mandovi River and Krishna River-2 are either yet to pronounce the verdicts or the issued verdicts are to be accepted by the Government of India. Cauvery Water Disputes Tribunal announced its final verdict on 5 February 2007; and it has mired into controversy, which we would discuss in upcoming documents.

River Boards Act

In 1956, the parliament had also enacted a River Boards Act to entrust the regulation and development of inter-state rivers and river valleys to River Boards. A river board was to advise the central government on development opportunities; coordinate activities and resolve disputes. However, no river board has been created so far.

Scope of Article 136 {Special Leave Petition}

Article 136 says that Supreme Court, in its discretion, may grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by *any court or tribunal* in the territory of India. Since article 262 bars the court to adjudicate the matters related to inter-state river disputes, this article has been used frequently to obviate this bar.

Scope of article 263 {Inter-state Council} in Inter-state disputes

Via article 263, the Constitution entrusts the President to create an inter-state council, which along with other functions, is competent tender advice regarding the resolution of inter-State dispute.

However, it took four decades to get such council established. Why? This was because initially {till 1967}, most states in India were under rule of a common party {Congress} and it was easier to resolve disputes. After 1967, other parties or coalitions than the one running at centre or neighbouring states started ruling. These governments with different opinions and political visions were unable to solve the disputes in inter-state problems. Setting up of this council was based on Sarkaria Commission recommendations. It was set up in 1990 but not a single meeting was held for long time. It was only during Atal Bihari Vajpayee government tenure when the council was revived and meetings happened almost every year. However, even today, the Inter-state Council has been

largely under-utilized and ignored.

Administrative Tribunals and Their Role in Dispute Redressal

There are times when the disputes between the employer (Government) and employees over service matters can arise. This may also lead to litigation between the employees and the government. An employee can though approach the court for redressal of grievances for, the protection of the law is guaranteed to every citizen including government servants. But the judiciary is already overburdened with cases. Then, the court procedure is extremely cumbersome, costly and time-consuming. Due to the huge number of employees, the judicial remedy stands practically ruled out and there was a need for some alternative forum. The basic objective of the administrative tribunals is to take out certain matters of disputes between the citizen and government agencies of purview of the regular courts of law and make the dispute Redressal process quick and less expensive. The topic of administrative tribunals can be studies in the light of following:

- *Constitutional Provisions Regarding Tribunals*
- *Various Issues and Analysis*

Constitutional Provisions Regarding Tribunals

Tribunals were added in the Constitution by Constitution (Forty-second Amendment) Act, 1976 as Part XIV-A, which has only two articles viz. 323-A and 323-B. While article *323-A deals with Administrative Tribunals*; article *323-B deals with tribunals for other matters*. In general sense, the 'tribunals' are *not courts of normal jurisdiction,* but they have very specific and predefined work area. The administrative tribunals **are not original invention** of the Indian Political System. They are well established in all democratic countries of Europe as well as United States of America.

Definition of Administrative Tribunal

An administrative Tribunal is a multimember body to hear on cases filed by the staff members alleging non-observation of their terms of service or any other related matters and to pass judgments on those cases.

Need for Administrative Tribunals

We all know that the government employs a large work force to carry out its diverse activities. Managing such a large number of personnel is a herculean task. Most of the government employees are better educated and enough aware to be insistent on their rights.

There are times when the disputes between the employer (Government) and employees over service matters can arise. This may also lead to litigation between the employees and the government. An

employee can though approach the court for redressal of grievances for, the protection of the law is guaranteed to every citizen including government servants. But the judiciary is already overburdened with cases. Then, the court procedure is extremely cumbersome, costly and time-consuming. Due to the huge number of employees, the judicial remedy stands practically ruled out and there was a need for some alternative forum.

Thus, the basic objective of the administrative tribunals is to take out certain matters of disputes between the citizen and government agencies of purview of the regular courts of law and make the dispute redressal process quick and less expensive.

The Administrative Reforms Commission (1966-70) had recommended the setting up of 'Civil Service Tribunals' to function as final appellate authorities in respect of orders inflicting the major punishments of dismissal, removal from service and reduction in rank. At around same time, **J.C. Shah Committee** had also recommended the establishment of an administrative tribunal to adjudicate on service matters.

In one of the judgments, the Supreme Court of India observed that civil servants need not waste their time in fighting battles in the regular law courts and suggested the establishment of such tribunals.

Jurisdiction of tribunals in service matters

According to Article 323A, administrative tribunals can adjudicate the disputes and complaints with respect to the recruitment and conditions of service of persons appointed to public services and posts at

- Union Level
- State Level as well as
- Any local or other authority within the territory of India.

Establishment of Tribunals

Article 323A provides that a law made by the parliament may provide for establishment of an Administrative Tribunal for the Union and a separate Administrative Tribunal for each state or two or more states. *These tribunals exclude the jurisdiction of all courts except the special jurisdiction of the Supreme Court in Article 136*. The matters for these tribunals are as follows:

- Recruitment and conditions of service of persons appointed to public services in *Union as well as States as well as Local authorities*
- Recruitment and conditions of service of persons appointed to any corporation ***owned or controlled by the Government.***

Tribunals by State Legislatures

Article 323 B empowers the **parliament or state legislatures** to set up tribunals for matters other

than those mentioned above. The matters to be covered by such tribunals are as follows:

- Levy, assessment, collection and enforcement of any tax
- Foreign exchange, import and export across customs frontiers;
- Industrial and labour disputes;
- Matters connected with Land reforms covered by Article 31A
- Ceiling on urban property;
- Elections to either House of Parliament or the House or either House of the Legislature of a State, but excluding the matters which include
- Delimitation of constituencies
- Matters which can be only questions via election petition. This means that some election matters where courts have been barred cannot be questions in tribunals also.
- Production, procurement, supply and distribution of food-stuffs (including edible oilseeds and oils) and such other goods as the President may, by public notification, declare to be essential goods

Administrative Tribunals Act 1985

Using the powers conferred by the Article 323A of the Constitution, Parliament passed a law to establish the Administrative tribunals in India. The **Administrative Tribunals Act 1985** provides for adjudication or trial of disputes and complaints with respect to recruitment and conditions of service of public servants.

- The act has made provisions for the **Central Administrative Tribunal** for the Centre and a **State Administrative Tribunal** for a particular State.
- In addition, the Act also provides for the establishment of **Joint Administrative Tribunals** to hear cases from more than one State.
- The Act was amended shortly thereafter to constitute a Common administrative Tribunal between the Centre and the State.
- The Administrative Tribunals were thus, established in November, 1985 at Delhi, Mumbai, Calcutta and Allahabad.
- Today, there are 17 Benches of the Tribunal located throughout the country wherever the seat of a High Court is located, with 33 Division Benches.
- In addition, circuit sittings are held at Nagpur, Goa, Aurangabad, Jammu, Shimla, Indore, Gwalior, Bilaspur, Ranchi, Pondicherry, Gangtok, Port Blair, Shillong, Agartala, Kohima, Imphal, Itanagar, Aizwal and Nainital.

Central Administrative Tribunal: Important Notes

Its function is to adjudicate the disputes with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or state or other local authorities within the territory of India or under the control of Government of India. In addition to Central Government employees, the Government of India has notified 45 other organizations to bring them within the jurisdiction of the Central Administrative Tribunal. The provisions of the Administrative Tribunals Act, 1985 do not apply to the following:

- Members of paramilitary forces
- Armed forces of the Union
- Officers or employees of the Supreme Court
- Persons appointed to the Secretariat Staff of either House of Parliament or the Secretariat staff of State/Union Territory Legislatures.
- The CAT is headed by a chairman who must be either a sitting or a retired Judge of a High Court.
- Other than Chairman, there are 16 Vice-Chairmen and 49 Members.
- The principle bench is located at New Delhi

Please note that Central Administrative Tribunal enjoys the status and powers of a High Court. However, Government employees not satisfied with CAT orders on their service matters can appeal in High Courts, followed by appeal in Supreme Court. We note here that the law commission had recommended that the appeals should go straight to the Supreme Court; however, this remains just a proposal as of now. In disposing of its cases, the Tribunal observes the canons, principles and norms of 'natural justice'.

Tribunals in various States

Many states in India have established the Tribunals. In some states, the decisions and judgments are binding upon the state Government. In some states such as Andhra Pradesh, the judgments of Tribunals are binding on the State Government unless nullified by the latter within a period of two months. In some states the Tribunals have taken away the jurisdiction of the respective high courts in service matters, while in some other states, they do not abridge or ban the jurisdiction of the High Court concerned.

Issues & Analysis around Administrative Tribunals

The major analytical topics around administrative tribunals are as follows:

- *What do we understand by the inherent "contempt power" or "contempt jurisdiction" of the CAT (Central Administrative Tribunal)? What is its relevance?*
- *While CAT has worked well, state administrative tribunals became redundant. What are the reasons*

for the same? Why some states have shut down the administrative tribunals?

Contempt Power / Contempt Jurisdiction of CAT

The constitutional provisions regarding administrative tribunals are only enabling provisions to set up tribunals. The CAT was established under Administrative Tribunals Act, 1985. Under section 17 of this act, CAT has been empowered to take action against anyone for not implementing its decisions. This is called contempt power or contempt jurisdiction and is analogous to the powers of courts under Contempt of Courts Act 1971.

The people who approach these panels are salaried employees of the government, and they need time bound effective action in matters of payment of salary, fixation of seniority, promotion, pension, medical expenses etc. which are of urgent nature for then. If the relief granted by tribunal is not implemented in time, it would become meaningless.

In service matters, there has to be time bound action — be it a promotion, payment of salary, fixation of seniority, or payment of pension or medical expenses. If the relief granted by the Tribunal is not effected in time, it may become meaningless. Here, the power of contempt works as *teeth of the CAT has this is one of the reasons that CAT has performed well.*

In past, there were efforts to strip the CAT of its power of contempt. However, such efforts remained fruitless. Currently CAT enjoys this power. A power of contempt keeps the decision implementation possible and thus helps employees get cheaper legal remedy within a reasonable time. The High Courts are also happy because CAT and other tribunals bring down their work load.

Losing relevance of State Administrative Tribunals

Article 323 B empowers the parliament or state legislatures to set up tribunals for matters other than those mentioned above. Many states in India have established the Tribunals. In some states, the decisions and judgments are binding upon the state Government. In some states such as Andhra Pradesh, the judgments of Tribunals are binding on the State Government unless nullified by the latter within a period of two months. In some states the Tribunals have taken away the jurisdiction of the respective high courts in service matters, while in some other states, they do not abridge or ban the jurisdiction of the High Court concerned.

As of now most state tribunals are losing relevance and some state governments are closing them down. The reason can be understood as follows:

CAT was established in 1985 and today it has 17 regular branches of which 15 operate at the principal seats of High Courts while two others at Jaipur and Lucknow. Initially the design was such that CAT was treated at par with High Courts and appeals against its decision were to be taken to only Supreme Court. However, in 1997, in L Chandrakumar case, the Supreme Court made it clear

that such appeals need to be sent to High Courts only. This had far reaching implications. *Firstly*, it did not help to reduce the service matter burden as far as appeals in these matters are concerned. *Secondly*, since tribunals now served as lower than high courts, many states considered it better to abolish them because now they would be redundant. The cases also piled up (there were 32000 cases in Odisha State Tribunal before the state government closed it). Thus, the key reason was redundancy.

Issues & Analysis: National Green Tribunal

India became third country in the world to start a National Green Tribunal (NGT) which is a judicial body exclusively meant to judge environmental cases. The National Green Tribunal has been established under the National Green Tribunal Act, 2010 for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources. The Tribunal is mandated to make and endeavour for disposal of applications or appeals finally within 6 months of filing of the same. The predecessor to the NGT, the erstwhile National Environment Appellate Authority has been superseded by the NGT. {for basic information on NGT, refer to this}

Issues and Analysis

The issues around NGT can be discussed in the light of following questions.

- *What is jurisdiction of NGT?*
- *Make an assessment of four years of NGT performance putting major decisions and cases in light?*
- *What role has NGT played in environment jurisprudence and democracy?*

Jurisdiction of NGT

The National Green Tribunal has jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment), is involved and such question arises out of the implementation of the enactments specified in Schedule I of the National Green Tribunal Act 2010. The acts listed in Schedule 1 are:

- The Water (Prevention and Control of Pollution) Act, 1974;
- The Water (Prevention and Control of Pollution) Cess Act, 1977;
- The Forest (Conservation) Act,
- The Air (Prevention and Control of Pollution) Act, 1981;
- The Environment (Protection) Act, 1986;
- The Public Liability Insurance Act, 1991;
- The Biological Diversity Act, 2002.

It would deal with all environmental laws on air and water pollution, the Environment Protection

Act, the Forest Conservation Act and the Biodiversity Act.

Important cases and decisions of NGT

POSCO Case

So far, POSCO case has been the most important in NGT history. Its order to suspend the establishment of 12MTPA capacity steel plant in Odisha came as a radical step in favour of the local tribals and forest dwellers. The NGT remained firm on its ground to support the sustainable development and valued the profit for local communities from the project.

Sterlite Industries Case

In Tamil Nadu's Tuticorin, a UK-based Vedanta Group company, Sterlite Industries Ltd was running a copper smelter plant since 1995-96 producing around 4 Lakh tonnes of copper per year. This plant is located in Sipkot Industrial Complex which is near to residential area. In March 2013, the residents complained of a gas leak, pollution and the protest was such that it persuaded the Tamil Nadu Pollution Control Board to shut the plant on 29 March. Since then, this company is entangled into the legal matters including its petition in Supreme Court as well as NGT. Earlier NGT has passed order in favour of the industries while stating that no action should be suspicion based.

Goa Foundation Case

This case was a landmark case which established NGTs jurisdiction in all civil cases demanding a substantial question of Environment. Goa Foundation is one of the environment action groups of Goa known for filing around 80 PILs towards environment related matters. It has filed a petition in NGT and sought protection of the Western Ghats and prayed for directions to the respondents to exercise the powers conferred upon them under the enactments stated in Schedule I to the NGT Act, 2010 for preservation and protection of Western Ghats within the framework, as enunciated by the Western Ghats Ecology Expert Panel. The Tribunal directed the MoEF to file its reply on the report within 4 weeks. The tribunal put ban on all forms of illegal river and ocean bed sand mining.

No Construction around rajakaluves and lakes in Bangalore

The NGT had imposed a no-construction zone of 75 metres around lakes and rajakaluves (stormwater drains) in Bengaluru.

Banning of Diesel Vehicles in Kerala & Delhi

In May 2016, the Kochi circuit bench of NGT banned all diesel vehicles more than 10 years old from operating in six cities of Kerala. It was stayed by High Court later. A similar interim decision was earlier taken for Delhi also and invited widespread controversy and criticism of NGT. Unaffected by this, NGT plans to put such a ban in 15 major Indian cities with the worst air quality levels soon.

Art of Living Foundation Issue

NGT fined Sri Sri Ravi Shankar's Art of Living Foundation for damage to Yamuna floodplains while making preparations for World Culture Festival from March 11 to 13, 2016 on the banks of the

river.

Role played by NGT

NGT is counted among India's relatively few institutions that hold the public trust. In the last four years, the NGT judgements have been hailed for setting revolutionary precedents to demonstrate the importance and need for change in the environmental jurisprudence. Over this period, its judgements have become stricter in their approach. The Tribunal has not been lenient to either Governments or Ministry of Environment. It has not only issued warrants against high profile government authorities, but has also pulled ministry of environment for not filing its report on Gadgil Report on Western Ghats.

Competition Appellate Tribunal

The Competition Commission of India (CCI) was set up to replace the anachronistic Monopolies and Restrictive Trade Practices Commission (MRTPC). It was established to eliminate practices that adversely affect competition in different industries/areas and protect interests of consumers and ensure freedom of trade. The Competition Act of 2002 called for the creation of CCI. However, it was established in 2003 and became fully functional only by 2009. The CCI is a quasi-judicial body which gives opinions to statutory authorities and also deals with other cases. It has one chairman and six members. It is the youngest and the only cross-sector regulator in India.

Functions and roles of CCI

The functions performed by the CCI include:

1. Playing the role of a market regulator for all sectors with focus on anti-competitive behaviour of companies that may distort competition.
2. To prohibit abuse of dominant position by enterprise or group.
3. To regulate the combinations (acquisition, acquiring of control and Merger and acquisition) that may cause or likely to cause adverse effect on competition within India.
4. To create awareness and impart training on competition issues through advocacy.

Review of functioning of CCI

In seven years of its functioning, the CCI has ordered penalties totalling Rs. 13,900 crore, though only Rs.82 crore has been actually paid and remaining being under litigation. In the last 7 years, the CCI has made its presence felt in various industries as diverse as cement, automobiles, pharmaceuticals, real estate, and information technology-enabled services. Some of the major orders issued by CCI include:

1. In 2011, the National Stock Exchanged Ltd was fined for abusing its dominant position in

currency derivative market.

2. DLF was fined in 2011 for abusing dominant market position. The order against DLF has set a new template between real estate companies and consumers.
3. 11 cement companies were fined in 2012 for alleged cartelisation in price fixing.
4. In 2014, the BCCI was fined for anti-competitive practices in IPL.
5. In 2014, Coal India was fined for abusing dominant position in fuel supplies.
6. In 2015, Jet Airways, IndiGo and SpaceJet were fined for cartelisation in fixing fuel surcharge for cargo.

Government of India must also be given credit for not interfering in functioning of the CCI given the high stakes involved in mergers and acquisitions. However, in several cases the legal integrity of CCI orders has been questioned. It has led to a serious debate about the exact nature and objective of the quasi-judicial regulator. The Competition Appellate Tribunal (COMPAT) has struck down several CCI orders mainly for violation of the principle of natural justice that provides everyone a fair hearing before law. Currently, few orders issued by CCI are still pending before SC for final test. There are also concerns regarding validity of CCI as it may infringe upon the functional domain of other sector specific regulators like the RBI and SEBI.

Future challenges before CCI

The CCI has to streamline it processes to reduce the time taken to clear merger filings. Initially, it took less than 30 days, but because of the raising number of applications, the time period rose up to 60 days. While giving speedy decisions, quality also must be maintained. The CCI has to align its regulatory procedures more closely with the legal architecture of the Indian judicial system. The CCI as a regulator has to move away from applying "19th- and 20th century tools" and should change with need of the hour. The CCI is being seen as a hurdle in doing business in India. The CCI has to prove that its role is to promote fair competition in the market. The CCI may take another five-six years to become fully mature.

COMPAT (Competition Appellate Tribunal)

COMPAT has been set up the Centre in 2009 under Competition Act of 2002. It hears an appeal from a decision of the CCI. COMPAT can have one Chairperson and a maximum of two other members, all of whom serve for 5 years. They are all eligible for re-appointment unless they reach the age of 68 in case of Chairperson and 65 in case of members. Only a former SC Judge or CJ of HC can be appointed as Chairperson of COMPAT.

Securities Appellate Tribunal

The Securities and Exchange Board of India (SEBI) is responsible for protecting the interests of

investors in securities and to promote the development of, and to regulate the securities market and for all other connected matters. To protect and be responsive to the needs of three groups of people (issuer of securities, investors and market intermediaries), SEBI has been invested with three necessary functions rolled-in to enable it to carry out its mandate:

- Quasi-legislative function = drafts regulations
- Quasi-judicial = passes rulings and judgments; prosecute and judge directly certain violations
- Quasi-executive = investigation and enforcement actions.

Since these powers make SEBI a very powerful body, an appeal process has been created to ensure accountability. For the quasi judicial functions, there is a **Securities Appellate Tribunal**, which is a **three-member tribunal**. A second appeal lies directly to the Supreme Court.

The first SAT was formed in 1995, through a notification issued by the Central Government and therefore, is a statutory body established under the provisions of Section 15K of the Securities and Exchange Board of India Act, 1992 to:

- Hear and dispose of appeals against orders passed by the Securities and Exchange Board of India or by an adjudicating officer under the Act and,
  Exercise jurisdiction, powers and authority conferred on the Tribunal by or under this Act or any other law for the time being in force.

The Tribunal is a three-member body composed of a Presiding Officer and two other members who are to be nominated via a notification by the Central Government. The Union Government also reserves the right to notify as many SAT's as is needed.

- The Securities Appellate Tribunal has only one bench that sits at Mumbai and has jurisdiction over all of India.
- The Securities Appellate Tribunal is not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but is be guided by the principles of natural justice and, subject to the other provisions of Depositories Act, 1996.
- The Securities Appellate Tribunal has powers to regulate its own procedure including the places at which it shall have its sittings.

Every proceeding before the Securities Appellate Tribunal is deemed to be a judicial proceeding and the tribunal has all the powers of a Civil Court.

Notable cases

Sahara-SEBI case

In early February this year, SAT disposed off an appeal by the Sahara group saying that the matter was already pending before the Supreme Court. Two Sahara Group firms have been accused of

raising money without regulatory approvals by the SEBI. The appeal related to the case involving two Sahara group firms raising money without regulatory approvals. The legal battle with market regulator SEBI is continuing in the Supreme Court over the refund of over Rs 20,000 crore to investors.

Reliance Industries-SEBI

An insider trading case is being heard by the SAT for the past seven years.

The Spice Telecom IPO case

The Tribunal barred one Dipti Kirit Parekh from accessing the capital market for two years for cornering shares issued in the initial public offer (IPO) of Spice Communications back in 2007.

Over- tribunalisation and Tribunal Reforms

At present, there are a large number of central tribunals (36 in number) leading to over-tribunalisation of dispensation of justice in the country. In a recent report, the law ministry stated that many of these 36 central tribunals are not working properly and to their optimum capacity. Many of them don't have adequate infrastructure to carry out their mandate smoothly. The other key issues are as follows:

- Though tribunals were originally set up to provide speedy and specialized justice, a huge number of appeals from the tribunals have managed to enter into the High Courts and Supreme Court thus clogging the justice delivery system. This raises a doubt whether the tribunals are really achieving their mandates.
- Most tribunals face serious problem of adequate workforce. For example, work in many benches of Arms Force Tribunals is stopped because judicial members have not been appointed. Only 5 out of 17 branches are working.
- Over the years, reforms are periodically suggested regarding tribunals, such as changes recommended to the Armed Forces Tribunal Act made by the Standing Committee on Defence in 2012. However, these recommendations rarely see the light of day.
- Also there is a lack of information available on the functioning of tribunals. Websites of most tribunals either don't exist or are not updated.

The issue of over-tribunalisation is under consideration of the Supreme Court also. In August 2016, the Supreme Court in a matter related to Gujarat Urja Vikas Nigam Ltd versus Essar Power Ltd had commented on the inherent difficulties of many litigants as the bench of Appellate Tribunal for Electricity (APTEL) is located in Delhi. The Supreme Court asked the Law Commission to examine various aspects of working of tribunals and what changes are needed in the statutory framework governing them.

What India can learn from United Kingdom's Legatt Committee?

Legatt Committee in United Kingdom was set up to study the working of Tribunals in that country because it had faced similar problem. It's report recommended that tribunals should be brought together into a single system, administered by a *new Tribunals Service*. India can learn from this to at least handle the staffing problem at the tribunals. Also, there is a need to provide adequate infrastructure to tribunals to enable them carry out their statutory mandate.

Government's Response

As a response to this issue, the Central government was mulling over to bring down to less than half the number of 36 existing tribunal and revamp over 680 organisations, including public sector undertaking under its control. The move is based on the recommendations of a Committee of Secretaries which has Foreign Secretary S Jaishankar and Home Secretary Rajiv Mehrishi as its members. The committee has proposed reduction of the number of tribunals from 36 to 17 and has sought reduction or restructuring of as many as 685 autonomous bodies or institutions during this year. There is possibility that government will merge two tribunals.

Other Mechanisms for Dispute Resolution

In order to make public service delivery more efficient, the government built machinery for redress of public grievances in every Ministry/Department, by fixing time for disposal of public grievances. An online computerized *Public Grievances Redressal and Monitoring System (PGRAMS)* has also been established. An independent authority to oversee the action regarding redressal of public grievances is one of the essential instruments in the process of addressing the complaints of the public.

Various Instruments that are established as redressal mechanisms are:

- Fixing time frames for grievance redressal.
- Monitoring of grievance redressal at the Head of the Department, Secretary and minister levels periodically using computerized monitoring system and placing the results before the public.
- Strengthening of Consumer Courts.
- Increased transparency of and the public's access to, information on public finances is essential to supplement legislative scrutiny.
- Establishment of Call Centre and development of a web-enabled grievances disposal monitoring system.
- Involvement of civil society in the processing and tracking disposal of grievances.

Framework around Redressal of Consumer Disputes

According to the Consumer protection Act, consumer dispute is defined as a dispute in which

the person against whom a complaint has been made denies or disputes the allegations cast on him in the complaint.

Consumer redressal practices in ancient India

In ancient India, although there was no organized systematic movement to safeguard interests of consumers, ethical practices were given prime importance. It is astonishing that ancient Indian law makers recognized the need for consumer protection. In *Arthashastra,* numerous references have been made to the concept of consumer protection against adulteration, exploitation, malpractices and so on. Also, punishments for these offences have also been mentioned.

Genesis for the modern consumer disputes

With advent of rapid industrialization and multifaceted development accompanied with flooding of advertisements for goods and services has led to many changes. For one, it has altered the relationship between the consumer and the trader. Secondly, there is a flood of consumer goods and services in the market. Thirdly, lack of awareness, illiteracy and poverty has increased consumer exploitation, especially among the rural population of the country. Fourthly, with economic development the purchasing capacity of the middle class has increased.

Compared to the developed economies, consumer awareness in India is significantly lower. Promoting the welfare of the consumers has become one of the major concerns for the government.

Factors responsible for consumer exploitation

- Low levels of literacy and ignorance
- Lack of awareness among people in safeguarding their rights
- Poverty and economic inequality
- Huge number of middlemen
- Unethical and false advertisements
- Adoption of modern technologies to exploit consumers
- Greed of the consumers. Example: In some cases, people get cheated by the quick rich schemes of some companies.
- Insufficient monitoring and regulation by the government agencies

Laws for safeguarding Consumer Rights

The following are some of the laws enacted by the government for safeguarding the consumer rights:

- Indian Contract Act, 1872
- Sale of Goods Act, 1930
- Dangerous Drugs Act, 1920
- Agricultural Produce (Grading and Marketing) Act, 1937
- Indian Standards Institution (Certification Marks) Act, 1952

- Prevention of Food Adulteration Act, 1954
- Standard of Weights and Measures Act, 1976
- Consumer Protection Act, 1986.

Consumer Protection Act, 1986

The enactment of this Act was considered as a historic milestone in the consumer movement in the country. This Act aims to provide consumers with effective safeguards against different types of exploitation such as defective goods, unsatisfactory services and unfair trade practices. This Act replaced the *Sale of Goods Act, 1930*, which was the main piece of legislation for consumer protection.

The Consumer Protection Act, 1986 protects the interests of consumers by establishing three-tier quasi-judicial consumer dispute redressal machinery at the National, State and District levels for settlement of consumer disputes. These are called Consumer Fora and they are quasi judicial bodies. The legislation is applicable to whole of India except J & K, which has its own Consumer Protection Act.

It provides consumers with speedy and inexpensive redressal grievances mechanism and specific relief or award of compensation. It recognizes six of the eight rights of the consumer as provided in the UN charter. It envisages following rights of consumers:

- Right to Protection.
- Right of Information.
- Right of Choice.
- Right of Hearing.
- Right of Redressal.
- Right of Education.

Consumer Protection Councils

The consumer protection Act, 1986 provides for the establishment of consumer protection councils at the state and district level to advise and assist the consumers in seeking and enforcing their rights.

Central consumer protection council

The council is advisory in nature. Its objective is to promote and protect the rights of consumers as laid down in the consumer protection act. The council is required to meet at least once in a year

State consumer protection council

It has been established in each state by the respective state governments. It has the same objective as the central council. The council will have not less than two meetings every year.

Dispute Redressal Agencies

Section 9 of the Consumer Protection Act advocates three-tier redressal of consumer disputes at the national, state and the district levels.

District Consumer Disputes Redressal Forum (DCDRF)

These are also known as district forums. These forums are established by the state government in every district to deal with cases of complaints valuing up to Rs 5 lakh. It has the power of a civil court.

State Consumer Disputes Redressal Commission (SCDRC)

It is the apex body for consumer redressal in states. It has been established in each state and union territory. State commissions could entertain complaints up to INR 10 million. In rare cases, it has the power to take the cases pending at a District Forum in its own hands.

National Consumer Disputes Redressal Commission (NCDRC)

The national commission has been established by the central government. It is the highest forum for consumer disputes Redressal in the country. It can entertain cases where the value of claims exceeds Rs 20 lakh. It has both appellate and revisional jurisdiction.

Consumer Protection Bill, 2015

Union Cabinet had approved Consumer Protection Bill, 2015 in order to deal with the growing concern over the safety of consumer products and services. The new bill seeks to replace Consumer Protection Act, 1986 in order to deal with consumer protection and safety. It aims at simplifying the consumer dispute resolution process along with enhancing the pecuniary jurisdiction of the consumer grievance redressal agencies. The new bill is currently pending before the Parliament.

Key features of the Bill

- Central Consumer Protection Authority (CCPA): establishment of CCPA as an apex regulatory authority with more powers to protect and enforce the rights of consumers. It will have powers to recall products and initiate action suit against defaulting companies including e-tailers for refunds and return of products.
- Product liability: If product or services causes personal injury, death or damage to property, CCPA will have powers to take action against defaulting manufacturers or service providers.
- Speedy disposal of court cases: In this regard, provision related to 'mediation' has been proposed which will act as an alternative dispute resolution mechanism. However, mediation will be under the aegis of consumer courts.
- Stringent penalty: In certain cases, the Bill adds stringent penalty provisions including life imprisonment.
- Establishment of circuit bench: For speedy disposal of complaints consumers can file complaints electronically circuit bench along with traditional mechanism of filing complaints in consumer courts that have jurisdiction over the place of residence.

Rationality behind introducing new Bill

There is a need to modernize the Consumer Protection Act to address challenges related to consumer protection effectively. In technologically evolved marketing strategies like multi-level marketing, tele-marketing, direct selling and e-tailing are often found to mislead the consumers. It has resulted in new challenges to consumer protection with growing concern over the consumer products and services safety, especially after the Maggi controversy. Also, the Consumer Protection Act (CPA), 1986 which was amended thrice earlier in 1991, 1993 and 2002 was not capable to deal with the changing scenario of consumer protection effectively.

Alternative Dispute Redressal Mechanism

ADR or "Alternative Dispute Resolution" is an attempt to devise machinery which should be capable of providing an alternative to the conventional methods of resolving disputes. ADR offers to resolve matters of litigants, whether in business causes or otherwise, who are not able to start any process of negotiation and reach any settlement. It has started gaining ground as against litigation and arbitration.

ADR and Constitution

- ADR first started as a quest to find solutions to the perplexing problem of the ever increasing burden on the courts. It was an attempt made by the legislators and judiciary alike to achieve the "**Constitutional goal**" of achieving Complete Justice.
- Alternative Dispute Resolution in India was founded on the Constitutional basis of Articles 14 and 21 which deal with *Equality before Law and Right to life and personal liberty respectively.*
- ADR also tries to achieve the Directive Principle of State Policy relating to Equal justice and Free Legal Aid as laid down under Article 39-A of the Constitution.

The acts

- The Acts which deal with Alternative Dispute Resolution are Arbitration and Conciliation Act, 1996 and the Legal Services Authorities Act, 1987.
- Section 89 of the Civil Procedure Code, 1908 makes it possible for Arbitration proceedings to take place in accordance with the Acts stated above.

Advantage of Alternate Dispute Resolution:

- It is less expensive.
- It is less time consuming.
- It is free from technicalities as in the case of conducting cases in law Courts.
- The parties are free to discuss their difference of opinion without any fear of disclosure of this fact before any law Courts.

- The last but not the least is the fact that parties are having the feeling that there is no losing or winning feeling among the parties by at the same time they are having the feeling that their grievance is redressed and the relationship between the parties is restored.

Legislative recognition of Alternative Dispute Redressal

- The Legal Services Authorities Act, 1987 brought about the establishment of **Lok Adalat System** for settlement of disputes cheaply and expeditiously and also in the spirit of compromise by give and take formula.
- Section 30 of the Arbitration and Conciliation Act, 1996 encourages arbitrators, with the agreement of the parties, to use mediation, conciliation or other procedures at any time during the arbitration proceedings to encourage settlement.
- Further still, the Civil Procedure Code (Amendment) Act, 1999 carries Section 89 which is designed to enable the courts to bring about a settlement of dispute outside the Court. As and when the Amendment comes to be enforced, the four methods listed in the section and known as court-ordered or court- annexed ADRs would become statutory alternatives to litigation for settlement of disputes and would be legally enforceable
- It is now made obligatory for the Court to refer the dispute after issues are framed for settlement with the concurrence of the parties either by way of:
    - Arbitration,
    - Conciliation,
    - Judicial settlement including settlement through Lok Adalat, or
    - Mediation

Where the parties fail to get their disputes settled through any of the Alternative Dispute Resolution methods, the suit would come back to proceed further in the Court it was filed.

Justice Malimath Committee Report (1989-90)

The Malimath Committee undertook a comprehensive review of the working of the court system, particularly all aspects of arrears and Law's delay and made various useful recommendations for reducing litigation and making justice readily accessible to the people at the minimum cost o time and money. It underlined the need for alternative dispute resolution mechanism such as mediation, conciliation, arbitration, Lok Adalats etc. as a viable alternative to the conventional court litigation.

Various Kinds of ADR Mechanism

Arbitration:

Arbitration is the process of hearing and determining of a dispute between parties by persons chosen or agreed to by them. The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay and expense.

Conciliation:

Conciliation is the process of facilitating an amicable settlement between the parties. Unlike the Arbitration there is no determination of a dispute. There need not be a prior agreement and it cannot be forced on a party not intending for conciliation. The proceedings relating to Conciliation are dealt under sections 61 to 81 of Arbitration and Conciliation Act, 1996.

Mediation:

Mediation aims to assist two (or more) disputants in reaching an agreement. The parties themselves determine the conditions of any settlements reached— rather than accepting something imposed by a third party. The disputes may involve (as parties) states, organizations, communities, individuals or other representatives with a vested interest in the outcome. Mediators use appropriate techniques and/or skills to open and/or improve dialogue between disputants, aiming to help the parties reach an agreement (with concrete effects) on the disputed matter.

Lok Adalats

Lok Adalats (people's courts) settle dispute through conciliation and compromise. The First Lok Adalat was held in Gujarat in 1982. Lok Adalat accepts the cases pending in the regular courts within their jurisdiction which could be settled by conciliation and compromise.

- The Lok Adalat is presided over by **a sitting or retired judicial officer** as the chairman, with two other members, usually a lawyer and a social worker.
- Main condition of the Lok Adalat is that both parties in dispute should agree for settlement.
- **There is no court fee.** If the case is already filed in the regular court, the fee paid will be refunded if the dispute is settled at the Lok Adalat
- The procedural laws and the Evidence Act are not strictly followed while assessing the merits of the claim by the Lok Adalat.

The decision of the Lok Adalat is binding on the parties to the dispute and its order is capable of execution through legal process. No appeal lies against the order of the Lok Adalat. Lok Adalat is very effective in settlement of money claims. Disputes like partition suits, damages and matrimonial cases can also be easily settled before Lok Adalat, as the scope for compromise through an approach of give and take is high in these cases.

Commentary

Lok Adalats, which settle dispute through conciliation and compromise, are an Indian contribution to the world jurisprudence. The Legal Services Authorities Act, 1987 brought about the establishment of Lok Adalat System for settlement of disputes cheaply and expeditiously and also in the spirit of compromise by give and take formula. The Lok Adalats offer a very cheap and speedy

dispute redressal mechanism between the consenting parties. A sitting or retired judicial officer along with two other members (usually a lawyer and a social worker) presides over the Lok Adalats. Lok Adalat accepts the cases pending in the regular courts within their jurisdiction which could be settled by conciliation and compromise. Main condition of the Lok Adalat is that both parties in dispute should agree for settlement. There is no court fee. If the case is already filed in the regular court, the fee paid will be refunded if the dispute is settled at the Lok Adalat. The procedural laws and the Evidence Act are not strictly followed while assessing the merits of the claim by the Lok Adalat. The decision of the Lok Adalat is binding on the parties to the dispute and its order is capable of execution through legal process. No appeal lies against the order of the Lok Adalat. Lok Adalat is very effective in settlement of money claims. Disputes like partition suits, damages and matrimonial cases can also be easily settled before Lok Adalat, as the scope for compromise through an approach of give and take is high in these cases.

Arbitration and Conciliation (Amendment) Act, 2015

The Arbitration and Conciliation (Amendment) Act, 2015 has come into force on January 1, 2016. The act has amended the Arbitration and Conciliation Act, 1996 based on the recommendation of Law Commission of India (LCI) to make India a hub of international commercial arbitration.

Amendments introduced

For early settlement of disputes under the arbitration mechanism, several changes are introduced in the act.

- Arbitrators have to settle the dispute within 12 months of time period. After 12 months, the case can be extended for another six months but certain restriction will be imposed to settle the case within 18 months.
- If any challenge to an arbitral award is made before a court, the court has to settle the issue within one year.
- The amendments also included a provision for fast track settlement of disputes within six months.

The 'public policy' definition has been narrowed to prevent its abuse. The arbitral award can be challenged on the ground that it is against public policy. But over the years, the scope of the public policy was widened by the apex court and the chances of setting aside the arbitral award were increased. Now an arbitral award can be challenged if it is induced or affected by fraud or corruption, in contravention with the fundamental policy of Indian Law, conflict with the notions of morality or justice and those in violation of confidentiality and admissibility of evidence provisions in the Act.

- A new sub-section is introduced for disposal of an application for appointment of the arbitrator by the High Court or Supreme Court within 60 days.
- Section 9 of the Arbitration Act, which allows 'interim protection' was widely abused. This has been amended. Nowif the Court passes such an interim order before the commencement of arbitral proceedings, the proceedings must commence within the90 days from the making of the order, or within a time specified by the Court.
- It also amended that in case of international arbitration, the relevant court would be the relevant high court.
- A new section is added for providing comprehensive provisions for costs regime applicable both to arbitrators as well as courts.

While the amendments are welcomed, there is one problem for investors, especially from abroad, is that the tax issues are kept out of the purview of the arbitration process. For example in the Cairn case, the government is not ready for arbitration by saying that the tax issues does not fall under the bilateral investment treaty. Even in non-tax issues like the gas price fixing, the government is not ready for arbitration by citing the argument that price fixing is a policy prerogative.

Summary: Changes brought in the Arbitration and Conciliation Act, 1996

Various changes brought by the amendment include:

- Now the arbitration agreement contained in form of communication through electronic means shall also be treated as an arbitration agreement in writing.
- Appointment of arbitrators shall be made by the Supreme Court or High Courts, as the case may be instead of the Chief Justice of India or Chief Justice of High Court.
- In case of international arbitration, the relevant court would only be the High Court having original ordinary jurisdiction
- To ensure neutrality of arbitrators, when a person is approached in connection with possible appointment as arbitrator, he is required to disclose in writing, the existence of any relationship or interest of any kind.
- Now the arbitration tribunal shall have power to grant all kinds of interim measures which the court is empowered to grant.
- The amendment introduces a provision that requires an arbitration tribunal to make its award within 12 months. This may be extended by a 6 months period.
- The amendment further permits parties to choose to conduct arbitration proceedings in a fast track manner. The award would be granted within 6 months.

In recent times, arbitration has emerged as a preferred option to settle commercial disputes in India.

The amendment act has brought clarity on many aspects, which were previously part of judicial interpretation. With judiciary already overloaded with high pendency of cases, the amendment shall help emerge arbitration as an effective alternative mechanism. Changes will also make arbitration user friendly and cost effective. It will also be helpful for private companies and will help improve ease of doing business in India. Overall it will help conclude the arbitration process expediently and in transparent manner.

Each amendment made to the act will make arbitration more "user friendly" in addition to reduction of cost. By providing speedy resolution of the disputes, the act will improve the "ease of doing business" in India and promote 'Make in India' campaign.