Directorate of Distance Education

KURUKSHETRA UNIVERSITY, KURUKSHETRA

(Established by the State Legislature Act XII of 1956)

('A+' Grade, NAAC Accredited)

Indian Constitutional Law And The New Challenges

Paper : II (102)

Volume : I

Lesson No. : 1-11

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DIRECTORATE OF DISTANCE EDUCATION
KURUKSHETRA UNIVERSITY
KURUKSHETRA – 136 119

LL.M – I

INDIAN CONSTITUTIONAL LAW AND THE NEW CHALLENGES

Paper : II	**Maximum Marks : 100**
Code : (102) DE	**Time : 3 Hours**

SYLLABUS

***Note* : (i) Eight questions shall be set with two questions from each unit. The candidates shall be required to attempt FOUR questions in all, selecting ONE question from each unit.**

(ii) All questions shall carry equal marks.

UNIT – I

1. The Executive – Union & State.

1.1 Parliamentary / Presidential Form of Governments – Suitability.

1.2 President / Governor & Council of Ministers – Relationship.

1.3 Coalition Government, Power Politics.

2. Parliament & State Legislature.

2.1 Composition of Legislature, Elections, Corrupt Practices.

2.2 Role of the Legislature, Elections, Corrupt Practices.

2.3 Coalition Government, Power Politics.

3. Judiciary in India.

3.1 Independence of Judiciary, Appointment, Removal of the Judges, Code of Conduct for Judges.

3.2 Power of Judicial Review, Writ Jurisdiction & other Powers of the Court, Judicial Activism.

3.3 Separation of Powers, Relationship of Executive, Legislature & Courts.

UNIT – II

1. Fundamental Rights, Definitions of State and Law.

2. Right to Equality, Reverse Discrimination.

3. Political Freedom of the Citizen, Reasonableness of Restrictions.

4. Contingent Contract – Meaning and Scope, Reciprocal Promises.

5. Right to Life & Personal Liberty, Various Dimensions of the Right to Life and Personal Liberty.

UNIT – III

1. Secularism, Right of the Minorities.

2. Socio – economic Rights, Directive Principles of State Policy – Enforcement by the State Relationship between Directive Principles & Fundamental Rights.

3. Doctrine of Eminent Domain, Right to Property.

4. Parliamentary Privileges & Fundamental Rights.

5. Fundamental Duties of the Citizen.

UNIT – IV

1. Federalism, Co-operative Federalism.

2. Legislative and Administrative Relations.

3. Distribution of Financial Resources, Inter-State Trade and Commerce.

4. Amendment of the Constitution, Basic Structure Theory.

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INDIAN CONSTITUTIONAL LAW AND THE NEW CHALLENGES

LL.M – Previous

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(DDE – 2018) **LL.M – I**

INDIAN CONSTITUTIONAL LAW AND THE NEW CHALLENGES

Paper : II (102) DE

Lesson No. : 1

Writer: Prof. Sunil Deshta [*]

Updated by: Dr. Sudhir Kumar Vats[**]

PARLIAMENTARY OR PRESIDENTIAL FORM OF GOVERNMENT SUITABILITY

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- **3.1 Parliamentary Democracy with Monarchy**
- **3.2 Parliamentary System without Monarchy**
- **3.3 The System of Government under the Constitution of India**
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- **3.6 Merits of Presidential System**
- **3.7 Drawbacks of the Presidential System**
- **3.8 Parliamentary/Presidential Forms of Government**

4. SUMMARY

[*] **Professor, Dept. of Law, Himachal Pradesh University, Shimla.**

[**] **Assistant Professor of Law, Directorate of Distance Education, Kurukshetra University, Kurukshetra.**

5. **SUGGESTED READINGS**
6. **SELF – ASSESSMENT QUESTIONS**

1. INTRODUCTION

Traditionally and persistently, typology of governmental form has been argued to rest on the location of real power in the Fifth century B.C. ***Herodotus*** classified all governments as monarchies, aristocracies or democracies.[1] '*Every political system operates*', says ***Austin Ranney***, '*in an environment, and certain characteristics of its particular environment contribute materially towards determining both its form of government and its policy outputs*'.[2]

This observation bears truth as the different countries have adopted different forms of the government. In some countries one form of government is functioning well, whereas in others not. The suitability of one form of government or the other depends on different factors like population, economy, social structure, social tensions and consensus and political culture etc. In broader terms the government may be categorized either as democracy, oligarchy, dictatorship, pluralism or eliticism.

It is notable that democracy is preferred over other forms of government as in its decisions are ultimately controlled by all the adult members of the society rather than by some specially privileged sub-group or one alt powerful member. Democracy is a government of the people, for the people and by the people.

Similarly, ***Daniel Webster*** has rightly stated that '*the people's*' *government made for the people, made by the people, and answerable to the people*.'

Modern democracies follow either parliamentary or presidential form of government. It is crystal clear that the principles, on which any democratic form of government is organized, are aimed primarily to establish a direct link between the government and the governed. Both the Parliamentary and the Presidential form of government are the names of the means through which this final democratic goal is to be achieved.

Hence, in order to understand the dynamics of these two forms of government, it is important to encompass both the procedural and the substantive issues. The difference between the two hinges upon the principles governing the relations between the executive and legislative wings of the government. If the executive and legislative branches are unified

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[1] Quoted in Muhamraadmosiniqbal's Blog, Parliamentary Versus Presidential Government, American Chronicle, August 2, 2010.

[2] Austin Ranney, The Governing of Men 288 (1985).

and coordinated under the control of the same persons so that they work in harmony, such a system is called parliamentary.

On the other hand, if the executive and legislative branches are largely independent of one another, but each possessing checks on the powers of the other in order to make power limited, controlled and diffused, the system is known as Presidential. The independence of the legislative and executive powers is the characteristic feature of the Presidential form of government, whereas in parliamentary form of government, it is founded on their fusion and combination.

In parliamentary form, the government is carried on in the name of the King or President by ministers who are members of the majority party in Parliament and who are responsible to it for their public acts both individually and collectively. It makes a distinction between the nominal and the real executive. The King or the President is only a titular executive head of the state, possessing all powers and privileges which the Constitution and the law may confer upon him, but his authority is *de jure*. He is often called the Chief Executive, but he is not the executive. He is not the directing and deciding factor responsible to the nation for the measures taken by the government.

Theoretically, the administration is vested in the head of the State, the officers of the state including ministers being appointed and dismissed by him. He summons, dissolves and prorogues Parliament. Laws made by the Parliament become enforceable only with his assent; if he so likes, he may withhold his assent thereto. But all these remain only in theory; in practice, he is a figurehead who is simply to sign on a '*dotted line*'.

According to Bagehot, the King in England has three rights, *the right to be consulted*, *the right to encourage* and *the right to warn*.[3] The executive and legislative functions in a parliamentary democracy are '*inextricably co-mingled*' and the cabinet is a hyphen that joins, the buckle that binds the executive and legislative departments together. Its growth in any land was extra-constitutional. It consists of about twenty or less ministers. They are the real functionaries who '*head-up*' the government. Thus, the cabinet[4] is the supreme directing

[3] Bagehot, The English Constitution, 1961, pp.30-78.

[4] Bagehot defines it as a committee- of legislative body selected to be the executive body. Id., at 9.
At another place he defines it as a board of control chosen by legislature, out of persons whom it trusts and knows, to rule the nation. *Id*. at 11.

authority and the '*motive power*' of all political action in a parliamentary or cabinet form of government because it is the '*pivot around which the whole political machinery revolves*'.

On the other hand, the term '*Presidential*' is chosen to indicate a system wherein the offices of the head of the government and head of State are combined in a single man, that is, the President. The entire executive power is vested in the President and all government actions are his responsibility. The President has to see that the laws are faithfully executed. He is assisted by a cabinet, an informal group without legal sanction. Its personnel are determined by the President and exercise such powers as he chooses to vest in it. It may be dissolved when the President wishes.

The President unlike Parliamentary government, is not responsible to the Parliament, but to the Constitution. No vote is taken unless President asks for it. As Lincoln once said, the only vote that counts, is the President's own. It is the notable feature of Presidential government that both Executive and Assembly are selected by the electorate. It is the Assembly which holds the President ultimately responsible to the Constitution by impeachment process.[5]

2. OBJECTIVE

Every Political system is at once unique and different from all others and is in flux. The Indian political system is no exception. Two of the most popular types of democratic governments are the Presidential and Parliamentary system. Parliamentary system is the most widely adopted system of government. It seems appropriate to refer to British Parliamentary experience in particular because it is the British System which has proved an example for a great many other countries. Great Britain is regarded as mother country of the Parliamentary executive. Contrary to this Presidential system is chosen to indicate a system wherein the office of the head of the government and head of the state are combined in a single man i.e. the President. The entire executive power is vested in the President and all government action is his responsibility.

The pertinent question emerges in the present scenario is, it should parliamentary system. No doubt this is debatable question. Considering the present state of affair, this lesson examines the merits and demerits of both presidential system and parliamentary system of government.

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[5] *Douglas v. Verney*, The Analysis of Political System, 48 (1959).

The basic objective is to find out the suitability of government i.e. whether it is possible to substitute parliamentary system by Presidential System in the existing circumstances in India or not.

3. PRESENTATION OF CONTENTS

3.1 Parliamentary Democracy with Monarchy

Great Britain is regarded as mother country of parliamentary executive. The British experience point out how power was shifted from crown to the Parliament. Originally King was amalgam of all the powers - legislative, executive and judicial. The Government was known as Crown's Government. '*The foundation of the English Parliament's strength*', says ***Douglas v. Verney***, '*were maintained and strengthened in the Tudor period and it required considerable fitness on the part of the Monarch to manage the two Houses*'.[6]

But there was yet no question of challenging the supreme position of the Monarch as Executive. It is during the second phase of struggle power, legislative power was given to Assemblies to distinguish them from executive power of the King. '*The English Civil War and the 1688 Revolution*' says Verney '*did not establish pariiamentarianism in England but made explicit this division of executive and legislative power between the King and the two Houses*.'[7]

The Revolution of 1688 finally settled that in the last resort the King must give way to Parliament. The King started losing his executive power to Ministers who came to regard the Legislature, not the Monarch, as the sovereign to whom they were really responsible. Ministers were chosen from among members of the Legislature and resigned when the Assembly withdraws support from them. The Parliament became the real centre of the powers and the real executive power shifted from Crown to the cabinet, which became '*the sole supreme consultative council and executive authority in the state*'.

In Parliamentary constitutional monarchies, the legitimacy of the unelected head of state typically derives from the tacit approval of the people via the elected representatives. Accordingly, at the time of the Glorious Revolution, the English Parliament acted of its own authority to name a new King and queen (joint monarchs Mary II and William III); likewise, Edward VIII's abdication required the approval of the Parliament in each of Edward's six independent realms. In monarchies with a written Constitution, the position of Monarch is a creature of the Constitution and could quite properly be abolished through a democratic

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[6] *Douglas v. Verney*, *op.cit*., at 19.

[7] *Id*., at 30.

procedure of constitutional amendment, although there are often significant procedural hurdles imposed on such a procedure as in the Constitution of Spain.

The strength of British Parliamentary system lies in the fact that it derives its power from the public opinion and is accountable to it. The successful functioning of the Parliamentary Democracy in England is dependent on the historical fact that it has been evolved there and not imposed on the British people. Great Britain, no doubt has no written Constitution in strict sense, but the Parliamentary Democracy is so entrenchedly rooted in the soil that it is functioning without the much ifs and buts. It has no Constitution but a developed Constitutional Law-mainly based on conventions and practices.

Practices turn into conventions and precedents create rules because they are consistent with and are implied in the principles of the Constitution. Of these, there are four major importance. The British Constitution is democratic; it is a parliamentary; it is monarchial; and it is a cabinet system.[8]

It is democratic because it is carried on the name of the people according to doctrines freely accepted by or acceptable to the people at a general election. It is parliamentary because the people are for the time being represented by the House of Commons, subject always to an appeal to the electorate; because in consequence, the approval of the House of Commons is necessary for the general policy and, frequently, the specific proposals of the Government; and because all other authorities in the State, including the sovereign and the House of Lords, must give way to a House of Commons that clearly represents the people. It is monarchial because the titular head of the State is a sovereign who is the representative for the time being of a dynasty established by law. It is a Cabinet system because responsibility rests, subject to the House of Commons and the people, not in a single individual but on a committee of politicians sitting in cabinet. The power centers round the cabinet.

One of the established conventions is that the Queen exercises her formal legal powers only upon and in accordance with the advice of her ministers. The doctrine of 'aid and advice' has mandatory significance. The Queen has. '*the right to be consulted, the right to encourage and the right to warn*'. She also has right to offer, on her own initiative, suggestions and advice to her ministers even where she is obliged in the last resort to accept the formal advice tendered to her. The decisions are taken by the Ministry. There is countersignature of the Minister and thereafter the Queen assents. Conventionally Queen does nothing but to sign. In one extreme case it was argued that Queen cannot refuse to sign even her death warrant, if it is duly presented before her by a Minister. The old is duly

[8] Sir Ivor Jennings, *Cabinet Government*, 13 (1969).

presented before her by a Minister. The old maxim, the King can do no wrong, is justified in present context.

In England, no doubt, there is parliamentary supremacy. It can make and unmake any law. It controls the executive. But cannot act tyrannically. There are in-built control mechanisms. Parliament in focus of nation's aspirations.

In most of European monarchies there was transfer of powers from Monarch to the Ministry in a way similar to the British system, but there has been no restatement of their respective functions. The British Parliamentary system has been fully applied by Dominion of Canada, Commonwealth of Australia and Sri Lanka.

3.2 Parliamentary System without Monarchy

Parliamentary democracy in countries having elected Presidency marks other face of British system. Such countries adopt the idea of responsible government but not the monarchy. There is a division between the Head of the State - the President and head of the Executive - the Prime Minister, but the head of the state is not hereditary but elected by the legislature. One of the major differences between the parliamentary system with monarchy and parliamentary system with Presidency is that in the former the King cannot be held personally responsible and so his ministers must bear responsibility for him, no such inhibition seems to affect republics, where the President is elected. As a result when the president oversteps his position he may be impeached, for high treason in France, for unconstitutional activity in the Federal German Republic and for both in Italy.

Parliamentary system of the Government has placed more and more emphasis on the power of Parliament. The main emphasis is on the centre of the power. Parliament becomes the main focus and the institution of Prime Minister has been getting more and more importance. In both parliamentary democracies with monarchy and cabinet system with republics the head of the state is titular or nominal.

The difference being that the monarch like British Crown Is hereditary and President is an elected official. Presidents of most of republics are chosen by the both Houses of the Parliament and in federo-parliamentary-democratlc countries both the National legislature and legislatures of the component states participate in Presidential election. In Monarchist democracies crown is permanent whereas in republican democracies Presidents have time tenure of five to seven years, having chances of being re-elected once more.

3.3 The System of Government under the Constitution of India

It is accepted by all that India has adopted the parliamentary system of Government as prevalent in the United Kingdom. The system of government under the Constitution of India is based on parliamentary democracy modeled on British system popularly terms at '*Westminster model*' of course with some modifications to suit the federo-parliamentary set up of a Constitution. Following the British pattern, the Constitution of India has basically adopted, both at the Union and State levels the parliamentary system of government with ministerial responsibility to the popular House as against the U.S. system of Presidential Government with separation of powers and a nearly irremovable President as the Chief Executive for a fixed term. The framers of the Indian Constitution had the experience of both the successful functioning of parliamentary system in England and presidential system in United States of America. There was serious discussion in Constituent Assembly as to the adoption of the form of the government.

Dr. B.R. Ambedkar pointed out that '*a student of constitutional law, if a copy of a Constitution is placed in his hands, is sure to ask two questions. Firstly, what is the form of government that is envisaged in the Constitution; and secondly, what is the form of Constitution*'.[9]

The choice of the form of the Government was considerably influenced by the political background and practices evolved during the British rule. Though some of the members like Kazi Syed Karimuddin pleaded for 'non-parliamentary' executive and Hussatn suggested for adoption of the system of the united States of America which was more democratic and based on better and sounder principles than the British model, but preponderance of the opinion of members was in favour of Parliamentary system. It would, however, be wrong to assert that we have adopted the British Parliamentary system *in toto*.

There are several fundamental differences and departures. To name a few; the U.K. Constitution is unitary, while ours is largely federal. They are a, monarchy with a hereditary King while we are republic with an elected President, unlike the British we have a written Constitution and our Parliament, therefore, is not sovereign and legislation passed by it is subject to judicial review.

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[9] Constituent Assembly Debates, Vol, VII, pp.31-32.

3.3.1 Basic Tenets of Parliamentary System in India

The following are the basic tenets of parliamentary system In India:-

- *(i)* Executive divided in two parts i.e. the President is the head of the State and the Prime Minister is the head of the Government. All actions are taken in the name of the head of the state, but responsibility is that of the Council of Ministers.

- *(ii)* Head of the State appoints the Head of Government who chooses his team. The president of India appoints the Prime Minister. Like British crown, Indian President has power to appoint the Prime Minister, but in practice choice is marginal. Where there is a clear majority, he has no option but to appoint the leader of the majority party. In cases of fluid political situations where no party has clear majority he may exercise his discretion.

- *(iii)* It is hallmark of the parliamentary system that the Government acts collectively. For every decision taken by the cabinet all ministers are responsible. They may agree or disagree with the decision they might have expressed their dissent in decision making process, but once decision is arrived at all are bound to obey the decisions. Collective nature of parliamentary executive indicate two things, *viz.* (a) it is not one man show, the decision has to be arrived at by the Council of Ministers (or at least cabinet); (b) governmental solidarity is maintained by collective effort and obligation to uphold the governmental decisions.

- *(iv)* The Council of Ministers is collectively responsible to the House of people. For all the actions of the Government it is responsible to the popular House.

- *(v)* The Government can remain in office, so long as the House of the People survives. As soon as Lok Sabha is dissolved the life of government automatically comes to an end. The Government lives and dies with the Parliament.

- *(vi)* The President of India my dissolve the House of the People.

- *(vii)* President of India, like the British monarch is merely a nominal or titular executive head, the real power is vested in the ministry. President to be always bound by ministerial advice.

- *(viii)* There is peculiar fusion of powers between the two organs - executive and legislative, of the government. There is no separation of personnel between these two organs. The Ministers are to be the members of the Parliament.

3.3.2 Merits of Parliamentary System

One of the commonly attributed advantages to parliamentary systems is that it's faster and easier to pass legislation. This is because the executive branch is dependent upon the direct or indirect support of the legislative branch and often includes members of the legislature. The Parliamentary system is more sensitive to public opinion, as there is constant feedback through the legislature. The Indian Constitution-makers adopted the Parliamentary form of government because of the diversity of population, historical legacy and to avoid rift between the executive and the legislature.

The Parliamentary system has fortified the democratic credentials in India. The merit of it is the flexibility and elasticity. Parliamentary system has succeeded in democratizing governmental machinery in all civilized countries particularly where the institution of hereditary monarchy exists. The parliamentary form of government offers the following benefits owing to its features[10]:-

3.3.2.1 *Smooth Functioning*

The close link between the executive and the legislature avoids any kind of conflict between the two organs of the government. This also ensures as working of both of them in a complementary way to each other. In India, there is a concept of partial separation of powers which accounts for freedom accompanied with responsibility and accountability. Therefore, the two organs can function without any interference if they work as per the interest of the masses.

3.3.2.2 *Quick Decision Making*

If the ruling party enjoys majority in the legislature, then the executive can take decisions quickly and implement them without any hindrance and fear of being let down on the floor of the House. This can be very helpful in case of constructive decision making and overcoming the problems of procedural delays.

3.3.2.3 *Flexible System*

This form of government is highly adaptive in nature to the changing situations. An example of benefit of a flexible system can be seen in case of grave emergency, wherein the leadership can be changed without any harassment and objections. This will enable the government to tackle the situation efficiently as was seen in as it happened during World War

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[10] Shri P.A. Sangma ,"*Functioning of Parliamentary Democracy in India*", 01/2008. Also see https://www.lawctopus.com/academike/is-parliamentary-form-of-government-good-enough-for-india-need-for-a-change/

II in England when Mr. Chamberlain made way for Mr. Winston Churchill to handle the War.[11] Even the elections can be delayed till normality is restored in the country.

3.3.2.4 ***Open Administration***

The executive remains vigilant and always tries to administer properly and effectively in order to secure its electoral prospects and confidence of the Parliament. The Parliament controls the executive, particularly the Cabinet in two ways:-

(i) ***Need of Confidence by the Government***

Since by a motion of "*No Confidence*" against the government would make the Prime Minister resign from his office, leading to the dissolution of the Council of Ministers as a whole.

(ii) Financial Powers of the Parliament

The Government has to seek for financial grants by the Parliament to implement its policies and for the purpose of administration. The Parliament has the power to grant or refuse to grant the requested funds, thereby controlling the executive. The House also has to control the expenditure made out of granted funds.

This control over the executive keeps it on its toes and ensures that there is no misuse of powers and funds. The more mistake the executive commits, the less popular it gets and more confrontation by the opposition and hence it becomes vulnerable to the restraint of funds and collapse of the government.

3.3.3 Drawbacks of Parliamentary System

Inspite of the many practical merits of the system, it has been argued that Parliamentary system violates the theory of separation of powers. Combination of executive and legislative functions in the same set of individuals leads to tyranny. It is also pointed out that the Parliamentary system is unstable. The government has no fixed life. It remains in office only as long as it can retain parliamentary majority which is subject to the vagaries of the representatives. There is no system which can be completely foolproof. Irrespective to the soundness of this system, there are certain flaws of this system which are as follows[12]:-

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[11] S.A. Aiyar, Obama shows why India must not seek a presidential system, The Times of India Blogs as on 13th October, 2013, visited on 22/02/2018.

[12] https://www.lawctopus.com/academike/is-parliamentary-form-of-government-good-enough-for-india-need-for-a-change/

3.3.3.1 ***Absolute Majority***

In case there is absolute majority enjoyed by the government in the legislature, then the executive may become “virtually dictatorial”[13]. It may become whimsical and corrupt in using its powers without caring about the liberty and rights of the people.

3.3.3.2 ***Politicization of Administration***

The executive is bound to take political considerations into account before implementing any policy and decision. This can be said for the opposition too as it may oppose the government merely for the sake of politics rather than offering constructive criticism after looking into the working of the government and interest of the people. This may simply fail the purpose of democracy as people suffer at the cost of political considerations and actions.

3.3.3.3 ***Unsuitable for Multi-party system***

In a country like India where there are multiple parties contesting elections, there is no absolute majority to one party and this leads to the formation of a coalition government which is highly unstable and chaotic. The leader is also chosen after political considerations and there is no autonomy and efficiency in the government. Dual party system is the essence of parliamentary system as in Great Britain. India has witnessed a high level of political instability due to the presence of numerous parties and this makes the system flawed, chaotic and confused.

3.3.3.4 ***Emergencies***

Professor Dicey has pointed out that the Parliamentary system fails to respond properly to the critical situations since the Prime Minister has to consider the party and every political outcome before coming to a decision. Also, the members of the Parliament are not always unanimous to a particular decision. This may make the situation even worse and uncontrollable.

3.3.3.5 ***Mal-administration***

Since the government is elected from the social field, having no administrative training, background or skill, the efficiency of the system depends largely on the civil servants for proper formulation and implementation of the policies. Thus the bureaucrats

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[13] Rohini Dasgupta, “*Notes on Parliamentary Form of Government in India*”, As on 28/02/2014, available at http;//www.indiaBIX.com, visited on 05/02/2018.

assume huge importance in the system and they often misuse their position leading to maladministration.

Therefore we see that within the enlisted benefits of the parliamentary system, there are flaws and lacuna too. This makes the system questionable and calls for a consideration over another form of democracy in India, i.e., Presidential System of Government.

3.4 Presidential System of Government

Some Constitutions or fundamental Jaws provide for a head of state who is not just in theory but in practice Chief executive, operating separately from, and independent from the legislature. This system is known as '*presidential system*' and sometimes called the '*imperial model*', because the executive officials of the government are answerable solely and exclusively to a presiding, acting head of state, and is selected by and on occasion dismissed by the head of the State without reference to the legislature.

It is notable that some presidential systems, while not providing for collective executive answerability to the legislature, may require legislative approval for individuals prior to their assumption of cabinet office and empower legislature to remove a President from office (for example, in the United States of America). In this case the debate centers on the suitability of the individual for office, not a judgment on them when appointed, and does not involve the power to reject or approve proposed cabinet members en bloc, so it is not answerability in the sense understood in a parliamentary system.

Presidential systems are a notable feature of Constitutions in the American Continent; including those of the United States, Brazil, Columbia and Mexico; this is generally attributed to the influence of the United States Constitution, as the United States served as an inspiration and model for the Latin American wars of independence of the early 19th century. Most of the Presidents are selected by democratic means (*popular direct or indirect election*); however, like all other systems, the presidential model also encompasses people who become head of the State by other means, notably through military dictatorship or *coup d'etat*[14] as often seen in Latin American, Middle Eastern and other presidential regimes.

Some of the characteristics of a presidential system (i.e, a strong dominant political figure with an executive answerable to them, not the legislature) can also be found among absolute monarchies, parliamentary monarchies and single party (e.g. *Communist*) regimes,

[14] '*coup d'etat*' is a French word and known simply as a *Coup* means '*A sudden decisive exercise of force in politics; especially the violent overthrow or alteration of an existing government by a small group'*.

but in most cases of dictatorship apply their stated constitutional model in name only and not in political theory or practice.

The office of the President characterizes the presidential system. The President is both the Chief Executive and Head of State. The President is unique in that he or she is elected independently of the legislature. The powers invested in the President are usually balanced against those vested in the legislature.

In American presidential system, the legislature must debate and pass various bills. The President has the power to veto the bill, preventing its adoption. However, the legislature may override the President's veto if they can muster enough votes. The American President's broadest powers rest in foreign affairs. The President has the right to deploy the military in most situations, but does not have the right to officially declare war.

3.4.1 Presidential Democracy with Checks and Balances

The framers of American Constitution had witnessed the struggle in Great Britain between the Crown and Parliament. They were also benefited by the writings of ***Montesquieu*** (*was a French lawyer, man of letters, and political philosopher*) and ***John Locke*** (*was an English philosopher and physician*) on the virtues of separation of powers. They framed the Constitution incorporating Presidential democracy - a government organized according to the classical doctrine of Separation of Powers. American Presidential system bears certain distinguishing features. These are as follows :-

(i) Unlike the Parliamentary democracy where the government and Assembly are fused in the Parliament, the Assembly under Presidential system remains a distinct legislative body. In United States of America the Congress is a legislative body; it does not control the executive of the day.

(ii) The role of the head of government is performed by Chief Executive officially known as President in United States of America. All states use popular election on statewide basis. The electors meet in their own states and cast ballots, for Presidential and Vice-Presidential candidates. The results sent to the national capital, are opened in the presence of the Congress.

(iii) The root of American Presidential system rests on separation of powers which is absolutely essential for the protection of liberty. The separation of powers makes the Executive under the Presidential system independent of legislature and thereby it guarantees a stable executive.

(iv) Corollary to the doctrine of separation of powers, the doctrine of checks and balances represents the other feature of American Presidential System. The three branches are not isolated from one another; rather each is given a number of '*checks*' with which It can keep the others in proper '*balance*'. The checks and balances work as under:-

- Congressional checks over Presidency.
- Congressional checks over the Supreme Court.
- Presidential check over Congress and the Supreme Court.
- Supreme Court's check over the Congress and President.

(v) The Head of the Government is the Head of the State.

(vi) President is the Real Executive Head in U.S.

(vii) The President is responsible to the Constitution.

(viii) The President cannot dissolve the House of Representatives.

(ix) President directly responsible to the Electorate.

In American system, the executive cannot interfere in the proceedings of the legislature, still less dissolve it, and the Legislature for its part cannot evade province of the executive. In practice President is responsible for preparation of legislation and getting congressional approval. The Congress has the control over the funds and if it refuses to grant the same to the President, he would have to go without it. Meaning thereby, he has to depend on Congressional appropriations. If the President acts unconstitutionally he may be impeached. The Congress has the power to amend the Constitution without regard to President, as Congress has limited the tenure-of office to two terms.

In the end, it may be stated that the American system is marked not only for its separation of powers between the three branches of government; it also presents division of power between the national and state governments which provides safeguards to liberty. Hence, the United States system may be termed as federo-presidential democratic.

3.4.2 Presidential Democracy without Checks and Balances

The traditional presidential system as operating in the United States of America is based on the well founded idea of checks and balances and that is the reason why Presidential system without checks and balances presents a peculiar system. The Fifth French Republic of 1958 shows a peculiar switch over from weak Presidency to strong Presidency - from parliamentary democracy to Presidential democracy. It proves a form of government which does not fit easily into either '*Presidential or Parliamentary*' categories; it may be treated as

hybrid or a parliamentary-presidential type. In France, there is combined form of government to meet the requirements.

In France, the President is elected for seven years by direct universal suffrage. He is elected by an absolute majority of valid votes cast. If the candidate fails to obtain absolute majority at the first ballot, a second ballot li held on the second Sunday following the first ballot and only two candidates may stand - the two at the top of the poll, or who have been left in that position by withdrawal after the first ballot of candidates who polled more votes. The election of the President takes place not less than twenty and not more than thirty five days before the expiry of the existing president's term of office.

3.5 Presidential and Parliamentary Characteristics of the Fifth Republic

The presidential and republican peculiarities of the Fifth French Republic are given as under : -

3.5.1 *Presidential Characteristics*

- *(i)* The President is elected by the people on the principle of universal suffrage.

- *(ii)* He has tenure of seven years, having no limitation on his re - election.

- *(iii)* He has wide power under Article 16 to declare emergency, like the war powers of the American President.

- *(iv)* There is separation as regards personnel - the membership of Council of Ministers Is incompatible with membership of Parliament and the functions of I member of the Constitutional Council are Incompatible with those of a Minister or a Member of Parliament.[15]

- *(v)* The President is the focal point as the ***Charles de Gaulle*** (*was a French general and statesman and was elected as the President of France*) affirmed m the beginning of 1964:-

> "*The President is obviously the only one to hold and delegate the authority of the State*", and that "*it should obviously be understood the indivisible authority of the state is entrusted completely to the President by the people who elected him, that there is no authority either ministerial, civilian, military or judicial - which is not entrusted and maintained by him*".

[15] Article 76 (4).

In 1965 he declared that the President, "*is alone the representative and the mandatory of the nation as a whole*".[16]

- *(vi)* In practice Prime Minister and his team depend upon the sweet-will of the President.

President ***Charles de Gaulle*** claimed in his press conference of 31st January, 1964, the right to dismiss the Prime Minister and M. Pompidou, the then Prime Minister, implicitly accepted the view when he said on April 24, 1964 that it was inconceivable that a Prime Minister should remain in office if he had lost the confidence of the President.[17]

3.5.2 *Parliamentary Characteristics of French Fifth Republic*

- *(i)* Like British system the Head of the state the President and the head of the Government remain in theory distinct.

- *(ii)* The Head of the State appoints the head of the Government.

- *(iii)* The Prime Minister (head of the government) is responsible for appointment and dismissal of his colleagues.

- *(iv)* The Prime Minister is responsible to the National Assembly.

- *(v)* The two houses of the Parliament are democratically elected and judiciary is independent.

- *(vi)* The Head of the State may dissolve the National Legislative Assembly.

But there are certain features which are peculiar only to the French system. There is separation of legislative and executive powers. In 1964 ***Charles de Gaulle*** had expressed and had argued later on persistently that:-

> "*It goes without saying that executive power should not emanate from Parliament - a Parliament which should be bi-cameral and should exercise legislative power - or the result will be a confusion of powers which will reduce the Government to a mere conglomeration of delegated powers... The unity, cohesion and internal discipline of the French Government must be held sacred, if the national leadership is not to degerate rapidly into incompetence and importance.*"[18]

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[16] Article 143.

[17] Article 103.

[18] Article 124 (2) read, "*Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and the High Courts in the States as the President may deem for the purpose and shall hold office until he attains the age of sixty five years: Provided that in the case of appointment of Judge other than the Chief Justice of India shall always be consulted*".

It is to be submitted that the separation between the executive and the legislature ensures stability but the grand contradiction of French system at present is that the poor Prime Minister has to serve between two masters - the President and the Assembly. Partial duality of the executive has caused both confusion and uncertainty. Prime-Ministerial responsibility to the National Legislature may give the impression that a President may remain in backgrounds by using his new powers - the right to negotiate treaties, to dissolve the Assembly, to send messages to Parliament - on advice of the Prime Ministers, but in actuality as ***Charles de Gaulle*** has exercised and interpreted the Presidential power, it leads him to govern instead of reigning. The Government and Parliament have proved mere agents of the President and the increase in power of Presidency has been such that France has developed what is known as '*Gaullian style*' - ministers at times, are communicated the decisions of the President.

The Philippines is one of the countries with a presidential form of government together with South Korea, Indonesia, Nigeria, most South American nations and the United States which is the pioneer under this political system, the President is both head of the State and head of Government. The incumbent for the position is elected nationwide on timing that has been predetermined in the Constitution.

Thus, in the presidential system, the President is said to enjoy a direct mandate from the people. There is a fixed term of office for the President, which may be re-elected depending on the country adopting the system.

3.6 Merits of Presidential System

Presidential system of democracy has main virtue of stability. It concentrates powers in strong hands of one President. That is reason, why some people apprehend that it may result into one man's authoritarian rule. But the apprehension is totally misconceived, in view of in-built checks and balances. Even the strongest President of U.S.A., ***Franklin Delano Roosevelt***, was an American statesman and political leader who served as the 32nd President from 1933 until his death in 1945, could not push his '*The Court's Packing Plan*' in 1930s. The fear of conversion of Presidency into dictatorship is not well founded and American experience goes otherwise. There may be possibility of dictatorship in Presidency other than American system, which may be termed as Presidential system without checks and balances - a self-styled system, nearer to monarchy.

The examples of such system may be found in French Fifth Republic and post 1977 Sri Lanka. When one speak of Presidential system of government, he must keep in mind the matured American system and not immatured French or Sri Lanka model.

Democratic system may function very well in a Presidential system with all its liberal tenets. This system may provide the following advantages:-

- *(i)* President being elected by popular vote for a fixed term, need not bother of counting heads of legislators and can take measures on his own initiative.

- *(ii)* In formation of his cabinet, the choice would not be limited to the members of Parliament He may choose persons of outstanding competence and intellectual integrity to help him in administration of the country. The country may have benefit of the persons of integrity who may not be interested in election due to its corruption's nature.

- *(iii)* The country may be benefited by experts above populist pressures. Since the cabinet members, need not face election they may remain statesmen - who may think of next generation, where as a politicians who has to face election only thinks of next election. The elected politicians are motivated to adopt cheap and populist measures which may prove dangerous to the health of country's economy in the long run. The cabinet members free from populist pressure may think and suggest on merit and render good service to the country.

- *(iv)* The Presidential system also offers the cabinet ministers to devote their full time and full energy in the service of nation, instead of wasting their time and energy in endless politicking.

- *(v)* Presidential system will cure the cancer of defection which has now become the property of legislators. The expertise of defection and desertions on the part of legislators motivated by thirst for power and hunger for office will disappear and some sort of cleaning in political life would be obvious as a result.

- *(vi)* The Presidential system of American model, may give the benefit of separation of powers between the three organs of the government and it may encourage mutual checks and balances.

- *(vii)* The independence of executive from the legislature may encourage a healthy move towards two party system strong government and effective opposition. It may be possible that one party may dominate the legislature and the other Presidency, making possible the oppositional checks and balances.

- *(viii)* In context of India, Presidential system may have additional advantage of allocation of responsibility. In India at present actions are done in name of President, but

there is no counter signature of a minister. In most of cases when action of President under *Article 356* have been challenged, the government has taken the plea that action had been taken in Presidential satisfaction and no suit could be maintainable in view of *Article 361* of Constitution of India.

- *(ix)* Presidential system will ensure independence of judiciary which *sine qua non*[19] for democracy. The political move to cow down judges have been done during Mrs. Indira Gandhi's regime have deprived services of senior judges of the Supreme Court.

- *(x)* The principle of separation of power will bring sufficient checks and balances.

3.7 Drawbacks of the Presidential System

Doubts have been raised from quarters of political thinkers and some jurists that in view of experiences of Pakistan and Bangla Desh switch-over of the government may bring anti-democratic and authoritarian regime. The critics of Presidential system urge that it divides government into watertight compartments as it is based on separation of powers.

In actual practice there can be no rigid division between the executive and legislative departments and to divide them into independent and co-ordinate departments is to create friction between them which is highly injurious to good and efficient government. Lack of direct initiative in legislation on the part of the executive is really a very serious defect in the Presidential system. Presidential system is characterized to be autocratic, irresponsible and dangerous.

Once the President has been elected the nation must continue with him whether they like or approve his policy or not. He may become autocratic and even degenerate into dictator, subject to the provision of the Constitution.

3.8 Parliamentary/Presidential Forms of Government

Justice ***V.R. Krishna Iyer*** has rightly stated that '*for forms of government, let fools contest; whatever is best administered is best*'.[20] A meaningful national debate on issues of great moment is vital if participative democracy is to become a reality. A constitutlonal-political-controversy has been ranging in the country on such an issue.

Should India switch from the Parliamentary system of government patterned on the Westminster model to a presidential form of government either of the White house style or of any other variety available in many countries from Argentina to Venezuela?

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[19] '*Sine qua non*' is an indispensable and essential action, condition, or ingredient. It was originally a Latin legal term for '*a condition without which it could not be*' or '*but for*' or '*without which there is nothing*'.

[20] Foreword in Anirudh Prasad, *Presidential Government or Parliamentary Democracy*, 1 (1981).

Justice ***V.R. Krishna Iyer*** has stated that reform of the parliamentary system is an urgent desideratum. Its presidential replacement may prove an ominous potent. He presumes that the presidentialists are thinking of White House versus Whitehall - not Pakistan, Singapore, Sri Lanka or Burma or North Korea! The fault is not in the system but it is handling of the system. India is a multi-ethnic country where about 35 per cent population is illiterate.

The Parliamentary form of government can best represent this heterogeneous population. Bringing about structural reforms can reduce the deficiencies. Structural reforms in the form of electoral reforms, revival of existing public institutions, certain qualification should be made for appointment, no confidence should be used only once a year and it should be backed by an alternative, defectors should be disqualified from holding public office, massive investment in Human Resource Development like education and literacy etc. can go a long way in solving the problems facing the parliamentary system.

Parliamentary system does not rule out the need for radical reforms of the system and the mentality of the actors. Today there is so much bitterness, denunciation and unscrupulous attack among the major parties that good faith is the last thing conceded by one or the other. Power and the hunger to grab it and keep it pollute politics. The need is to give Impetus to values and ethics in the society. The right kind of values should be coupled with the educational system, so as to bring about an awareness and spirit of enquiry.

India should persist with the Parliamentary system as it has the capability to encompass and represent all plurality. The need is not to find fault in the system but to emphasize on a better handling and implementation of the system. The people should realize that is they who are the ultimate beneficiaries of a proper functioning system. It is up to the people to see that the system works and produces optimum results.

4. SUMMARY

The Parliamentary system of government refers to "*a system of government having the real executive power vested in a cabinet composed of members of the legislature who are individually and collectively responsible to the legislature*."[21] That means it is a kind of democracy where the executive and legislature are inter-connected and the former obtains its

[21] Definition according to – http://www.merriam-webster.com

democratic legitimacy[22] from, and is held accountable to, the legislature and therefore, the opposition always keeps it alert for it "always lives in the shadow of a coming defeat."[23]

The emergency regime of Mrs. Indira Gandhi between 1975-1977 called for a serious discussion over the form of government in India. The demand for the change came from the supporters of the emergency regime who argued that the unrest and divisiveness in the country that had preceded the declaration of a national emergency in June 1975 indicated the failure of the parliamentary system.[24] It was suggested that, in order to prevent the recurrence of similar situations, India should adopt a stronger presidential rule in the country.

It is abundantly clear from the foregoing study that India adopted a Parliamentary form of government and the entire executive power is vested in the President and all government action is his responsibility. It is also revealed from the study that Parliamentary system does not rule out the need for radical reforms of the system and the need is to give impetus to values and ethics in the society. India should persist with the Parliamentary system as it has the capability to encompass and represent all plurality.

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6. SELF – ASSESSMENT QUESTIONS

1. What do you mean by Parliamentary form of Government? Explain its merits and demerits on the basis of its functioning in India and United Kingdom.
2. What is meant by Presidential form of Government? Explain its merits and demerits on the basis of its functioning in United States of America.
3. Critically examine Presidential and Parliamentary Systems of Government. Which system is most suitable in the Indian Circumstances and why?
4. The upper house of the Parliament has secondary or nominal role in the passing of bills. Discuss.
5. Explain the suitability of Presidential form of government under Constitution of India.
6. Evaluate the Parliamentary form of government in India. Compare it with Presidential form of government in the U.S.A. Which type of government is now more suited to India in the present-day emerging scenario?
7. The upper house of the Parliament has secondary or nominal role in the passing of bills. Discuss.

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LL.M – I

INDIAN CONSTITUTIONAL LAW AND THE NEW CHALLENGES

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PRESIDENT / GOVERNOR AND COUNCIL OF MINISTERS RELATIONSHIP

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4. SUMMARY
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1. INTRODUCTION

The Present pattern of government established under the Constitution is basically a blended brew of the British Parliamentary system and the *Government of India Act, 1935*. Therefore, it has been considerably influenced by the political background in India as it evolved during the British rule. The founding fathers of the Constitution were desirous of

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establishing a Parliamentary System of Government under the Constitution of India. Therefore, while framing the provisions relating to the office of the President, they heavily relied upon the British conventions, where the King always acts on the aid and advice of the Council of Ministers headed by the Prime Minister. It was this scheme which was finally fitted into the Indian system of Parliamentary democracy with slight modifications.

Though in the Constituent Assembly there were many members who expressed doubt about the intended authority of the President, but *Dr. B.R. Ambedkar* satisfied them with his explanation that there is no occasion contemplated in the Constitution where the President may refuse, to accept the advice tendered by the Council of Ministers. It was highlighted that in some exceptional situations where no political party is able to obtain the required majority to form Government, the President may have some discretion in the appointment of Prime Minister. The same thing was visualized in the dissolution of the House of the People where the Council of Ministers has lost majority support or refused to a trial of strength in the House.

Besides these situations which are practically exceptional, the President would always' be bound to act according to the advice of the Council of Ministers failing which he may be accused of violating the Constitution which may entail impeachment proceedings against him. Thus, under the scheme of the Constitution, as framed by the framers, the President is bound by the advice tendered by the Council of Ministers, so long as the latter enjoys the confidence of the House of People.

On the other hand, the framers of the Constituent Assembly gave to the Governor a status similar to that of the President of India. There is no doubt about the fact that the Governor has to act on the aid and advice of the Council of Ministers. However, there is one material difference regarding the exercise of functions by the President and the Governor, the two constitutional functionaries. The President of India has no voice of his own or cannot go against the wishes of the Council of Ministers, but the Governor of a State has been vested with some discretionary powers wherein he is not guided by the Council of Ministers and is required to act quite independently of the assistance of Cabinet. The vesting of discretionary powers in the Governor may be justified on the ground that the Governor acts is dual capacity. ***First***, he acts as a Constitutional Head of the State and ***second***, he has also to function as a representative of the Union Government. In the latter case, he has to implement the policies of the Union Government in the concerned state. This may sometime be a

difficult task more particularly in situation where there are different political party ruling at the centre and the concerned states.

Thus, to eliminate the possibility of a conflict situation that the Governor has to play a pivotal role while discharging his constitutional responsibilities.

2. OBJECTIVE

There was a time when Governor and President were glorified and their actions immunized by the aura of office. But the old ideas and assumptions which made institutions legitimate and hallowed are being eroded by dangerous experience. They are slipping away in the face of changing reality, of corroding corruption, and are being replaced by different ideas, doubts and interrogations as yet ill-formed and not crystallized. The Parliament, the Cabinet and the President, apart from the Court, appropriately figure in any comprehensive critique and audit of the Indian Constitutional System.

It is now almost agreed on all sides that there is no express provision in the Constitution obliging the President or the Governors to act in accordance with the advice of the Council of Ministers in all cases and under all circumstances. However, the view expressed is that as an incident of the Parliamentary form of Government adopted by the Constitution, the President and the Governors has to act only in accordance with the advice of the Council of Ministers. As a matter of fact, one of the avowed objectives of the makers of the Indian Constitution was to frame a Constitution suitable to the genius, traditions and temperament of the people of this country. Certainly it cannot be said that, in this connection, there is either similarity or identity between England and India.

In India, with its vast illiteracy and ignorance, the traditions of the British Parliamentary democracy will take a long time to acquire effective acceptance or find useful and beneficial adoption. The history of India has been characterized only by benevolent monarchical traditions and not by any completely popular democratic institutions. The temperament and emotions of the Indian people have attuned only to such institutions and they will have to gradually acclimatize themselves to a total democratic tradition. One of the circumstances prevailing in this country which will render the effective application of the British pattern impossible is the absence of two or three well-knit national political parties.

On the other hand, in this country the number of parties is legion and their hues and brands are innumerable. The numerous religious obscurantism, linguistic fanaticism and regional chauvinism constitute insurmountable obstacles to the successful working of the British type of Parliamentary system.

3. PRESENTATION OF CONTENTS

3.1 President and the Council of Ministers

The Constitution of India has provided for a responsible government. This means that the Council of Ministers is accountable to the Lok Sabha for all its actions. This being the case, the President ordinarily should not interfere in matters on which the Council of Ministers would be called upon to explain its action. In other areas, he is entitled to act according to the provisions of the Constitution.

For instance, if the President has to exercise his power of pardon, he should be guided by the advice of the Council of Ministers, for the person pardoned may again commit crimes and create problems for the government. However, in case of dissolution of the House of People, it is submitted that the President need not be bound by the advice of the Council of Ministers.

Truly, admitting that the Council of Ministers is practically a body of party politicians selected from amongst the members of that party or group of parties which have a majority in the Lower House of Parliament. This body is headed by the Prime Minister and formed with his choice-aids and advises to the Head of the nation in running the administration of the country.[1]

This fundamental principle has been specifically incorporated in *Articles 53*, *74* and *75* of the Constitution. *Article 53* provides that the executive powers of the Union shall be vested In the President and shall be exercised by him either directly or through officers subordinates to him in accordance with this Constitution. This clearly means that whatever power belongs to the executive as distinguished from the other two organs of the Government shall be vested in the President and shall be exercised by him. The language of the provision further indicates that the President may not personally in every case and may act through officers subordinate to him. But the same has to be done strictly in accordance with the Constitution.

Articles 74 and *75* which deal with the composition and status of the Council of Ministers are sketchy and very generally worded. The framers of the Constitution left these matters undefined so that these may be regulated by practice and conventions. The conventions operating in England, where a similar pattern of government prevails are most relevant to India and can be adapted suitably to meet the conditions here.

[1] Sir Ivor Jennings, *Cabinet Government*, 20 (1969).

The author proposes to consider the relationship between the President and the Governors on the one hand and the Council of Ministers on the other from three angles. In the *first* place, the author shall refer to the text of the Articles dealing with this question and shall show that there is no provision in the Constitution obliging the President or the Governors to accept the advice of the Council of Ministers and act according to the same In all matters and under all circumstances.

Second, an endeavour is made to refer to the cause of the framing of the Constitution and the framers did not intend that there should be anything in the text of the Constitution which should compel the President or the Governors to accept the advice of the Council of Ministers under all circumstances.

Last, an effort is made to refer to certain provisions in the Constitution, from which it will be clear that a vast reserve power is left in the President and the Governors to act according to their own judgment, even disagreeing with the advice tendered by the Council of Ministers.

3.1.1 Text of the Articles

Taking up the first aspect, the relevant provisions as far as the centre are concerned are *Articles 52*, *53*, *60*, *74*, *75* and *78*. *Article 52* states that there shall be a President of India.

Article 53(1) lays down that the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinates to him in accordance with this Constitution.

Article 60 requires that every President and every person acting as President or discharging functions of the President shall before entering upon his office, make and subscribe in the presence of the Chief Justice of India or, in his absence, the senior-most Judge of the Supreme Court available, an oath or affirmation.

Article 74 provides for the Council of Minister and clause (1) thereof states, "*There shall be a Council of Ministers with the Prime Minister as the head to aid and advise the President to exercise of his functions*", clause (2*)* provides that, "*the question whether any, or if so what, advice was tendered by Ministers to the President, shall not be inquired into in any Court*".

Article 75 of the Constitution reads:-

"(1) The Prime Minister shall be appointed by the President and other Ministers shall be appointed by the President on the advice of the Prime Minister.

(2) The Minister shall hold office during the pleasure of the President.

(3) The Council of Minister shall be collectively responsible to the House of the People.

(4) Before a Minister enters upon his office, the President shall administer him the oaths of office of secrecy according to the forms set out for the purpose in the third Schedule."

Article 78 of the Constitution of India imposes a duty on the Prime Minister to communicate to the President all the decisions of the Council of Ministers relating to the administration of the affairs of the Union and the proposals for legislation; to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for; and if the President so requires, to submit for consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

The Constitution gives a *carte blanche* [2] to the centre in the matter of appointment of a State Governor. The Governor has a dual capacity he is the Head of the State as well as the representative of the Centre in the State and he works as a channel of communication and contact between the state and the centre. On lines similar to the centre, each State has a Council of Ministers, with the Chief Minister as its head. The provisions regarding the Council of Ministers are mandatory and the Governor cannot dispense with this body at any time.

Article 163(1) refers to the Council of Ministers to aid and advise the Governor and lays down that there shall be a Council of Ministers with Chief Minister at the head to aid and advise the Governor in the exercise of his functions except in so far as he is by or under this Constitution required to exercise his function or any of them in his discretion. The functions which are specially required by the Constitution to be exercised by a Governor in his discretion are mentioned m paragraph 9 and 18 of the Sixth Schedule and *Article 239 (2).*

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[2] '*Carte blanche'* is a French term means '*unrestricted power to act at one's own discretion; unconditional authority*'.

It is, therefore, crystal clear from the foregoing study that there is no Article in the Constitution expressly requiring the President to act only in accordance with the advice of the Council of Ministers. But the working of the Constitution over the last six decades has demonstrated that the expression '*aid and advice*' has acquired a definite meaning and have continued to be given to the President have been followed uninterruptedly.

It may, however, be pointed out that ***Dr. Rajendra Prasad*** became the first President of the Indian Republic, he has disputed the powers of the Council of Ministers while giving advice to the President. In his speech delivered on November 28, 1960 at the laying down ceremony of the foundation stone of the Indian Law Institute, New Delhi, Dr. Prasad asserted that there is not even a single provision in the Constitution which binds the President to accept the advice tendered by the Council of Ministers. He further stated that it was a proper course to import conventions of the British Constitution of India. This question acquired new dimensions and for settling the issue it took some time.

To settle the issue finally, ***Pandit Jawahar Lai Nehru***, the first Prime Minister of India referred the whole matter to the then Attorney-General for India*,* ***Shri M.C. Setalvad,*** who in turn advised that '*by Article 74(1) the President is required to act in all matter with the aid and advice of his Council of Ministers*'.[3] This principle has consistently been acted upon during the working of the Constitution in the past.

3.1.2 Constituent Assembly Debates

The Constituent Assembly of India was convened and met for the first time on December 9, 1946, under the Cabinet Mission Plan of May 16, 1946, with the idea of working out the terms of that plan. *Pandit Jawahar Lal Nehru* moved his historic Objective Resolution on December 13, 1946. The Resolution declared, *inter alia*, the firm intention of the Constituent Assembly to proclaim India as Independent Sovereign and Democratic Republic, wherein the powers and authority of the sovereign and its constituent parts were to be derived from the people. The Resolution also dealt with the formation of the Indian Union vis-a-vis a constitutional guarantee of rights to the people, including minorities.

Shri B.N. Rau, the Constitutional Advisor to the Assembly in consultation with the President of the Assembly, *Dr. Rajendra Prasad*, circulated a questionnaire to the members of the various legislatures for having their views on the basic framework of the Constitution.

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[3] Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, 141 (1966).

Later this questionnaire was also circulated - among the members of the Union Constitutional Committee and the Provincial Constitution Committee. Subsequently on May 30, 1947, *Shri B.N. Rau* also submitted an independent Memorandum and a detailed draft of many of the proposed provisions which were circulated among the members for eliciting their views. In the Memorandum prepared by the Constitutional Advisor, it was stated that the Head of the Union Executive shall be the President. He would be elected by the two Houses of the Union Parliament at joint session by secret ballot according to the system of proportional representation by single transferable vote.

The memorandum further proposed a Council of Minister to be headed by the Prime Minister to aid and advise the President in the discharge of his functions except those which he was required to act in his discretion. It was stressed that the convention regarding the relationship between the President and the Council of Ministers shall be followed on the same pattern as between the King and his Ministers in England.

Shri S.P. Mookerjee expressed the view that the President was to act on the advice of the Union Cabinet. He had also the powers to appoint the Prime Minister and other Ministers were to be appointed on the advice of the Prime Minister. The power to dismiss a Minister and to summon, prorogue and dissolve the legislature on the advice of the Prime Minister was also contemplated in the reply.

Members of the Constituent Assembly hotly debated the authority the new Constitution should give Governors as they weighed their goal of curbing executive power against the aim of protecting national unity by having a central government appointee at the head of the State Government. The result of their efforts was a governor appointed by the President and serving at his '*pleasure*'. He was to act like the President, as a constitutional sovereign, reigning but not ruling with advice of the Chief Minister and the Council of Ministers. The Governor also was given authority to act in his '*discretion*', but these occasions largely were unspecified in the Constitution. In theory discretionary authority was subject to constitutional conventions; yet continuing controversies showed these still to be information.

3.1.3 Discretion of the President and Governor

The third and the fast viewpoint to consider the question with reference to certain specific provisions and situations. There are two matters in which the President or the Governors obviously have to act in their discretion. The first is in the choice of the Prime Minister or the Chief Minister and the second is the dismissal of the Council of Ministers, a

power which flows from the express constitutional provision that Minister hold office during the pleasure of the President or the Governor as the case may be. As far as the choice of the Prime Minister is concerned, the President has necessarily to act in his discretion, because there would be no Prime Minister then to tender him advice. If a particular party has secured an absolute majority of the total number of seats in the House of the People, there should not be any difficulty in the President choosing the leader of that party as the Prime Minister.

However, it may happen that no party has obtained an absolute majority, but there are two parties who have secured a large number of seats in the House of the People and the difference between their strength is only marginal and the leaders of both the parties claim that they have got the support of other members of the house of the People and therefore they can form a stable Ministry. In such a situation the discretion of the President is practically unlimited.

On the other hand, It is clear that the President has the discretion of deciding whether to grant a dissolution of the House of People or not, when advised to do so by his Council of Ministers. The President will have necessarily to take into account the reason that is urged by the Prime Minister for dissolving the House. In terms of the oath of his office, the President will have to consider whether the national interest requires such dissolution, and if the President is of the opinion that the request for dissolution is an improper one, he will certainly have to refuse the dissolution advised by the Council of Ministers.

Keeping in view all these aspects, the author is of the view that the Constitution has not imposed an obligation either on the President or on the Governors to act in accordance with the advice of the Council of Ministers in all matters and under all circumstances and they have got a certain amount of discretion in the matter of preserving, protecting and defending the Constitution and devoting themselves to the service and well-being of the people of India, overriding the temporary advantages sought to be gained by any particular party in power for the time being. The relationship between the President and the Governors on the one hand and their Council of Ministers on the other was meant to be governed by conventions to be evolved during the course of the working of the Constitution and unfortunately in this, country, ever since the coming into force of the Constitution, there had not been present an atmosphere conducive to such conscious evolution of conventions.

3.2 Relationship between President and Council of Ministers[4]

Until 1976, when the forty-second amendment to the Constitution[5] settled the very controversial and hotly debated issue of the role of the President according to the Constitution of India. At that moment, Dr. Rajendra Prasad gave his contribution to the controversy by saying that '*there is no provision in the Constitution in which so many words lays down that the President shall be bound to act in accordance with the advice of his Council of Ministers*'.[6]

There were different views regarding the role of the President according to the Constitution of India. Thinkers of one view believed that the post of the President cannot be that of a '*real*' executive if the President follows the provisions of the Constitution of India. But there was another view which said that the President has some '*real'* powers in the constitution which can be used in exceptional circumstances. Another school of thought believed that the President is the Constitutional head of the State who is supposed to act on the advice of the Ministers but can execute some real powers at his discretion.

This confusion arose because the intention of the founding fathers of the Constitution is not clear. *Dr. Ambedkar,* one of the founding fathers, tried to explain the role of the President by saying that the President "*occupies the same position as the king in the British Constitution. He can do nothing contrary to the Minister's advice. He is the head of the State, but not of the Executive*".

But on the other hand some people like Jawaharlal Nehru believed that the President's post is not of that of a rubber stamp like the President of France. Though the Constitution does not explicitly provides the President with '*real*' powers but this position is of that of dignity and authority.

3.2.1 *Provisions in the Constitution related to Relationship*

Central executive is dealt with from *Article 52*[7] to *78* in the Constitution of India. India follows a Parliamentary type of government as the Council of Ministers is responsible to the Lok Sabha. The President and the Council of Ministers, with Prime Minister as its head, form the Central executive.[8] The position of President is that of the head of the state. He is the formal executive as all the decisions taken by the government are taken under his name.

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[4] http://iclrq.in/editions/apr/7.pdf

[5] The 42nd Constitutional Amendment Act, 1976, Act of Parliament, 1976 (India).

[6] Negi Mohita, President's Relation to his Council, YOUR ARTICLE LIBRARY, (June 10, 2016, 11:59 PM), http://www.yourarticlelibrary.com/indian-constitution/presidents-relation-to-his-council-of-ministers-india/24885/.

[7] Article 52 of the Constitution of India.

[8] *Id.*, Article 78.

According to ***Article 53(1)***, "*The executive power of the Union shall be vested in the President and shall be exercised by him directly or through officers subordinate to him in accordance with this Constitution*".

According to ***Article 74(1),*** "*there shall be a Council of Ministers with the Prime Minister at its head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice*".[9]

The provision clearly denotes that the Council of Ministers should be there all the time. The President does not have the power to dispense the Council of Ministers. Even when the Lok Sabha is dissolved; the Council of Ministers should keep working.

In ***U.N.R. Rao v. Smt. Indira Gandhi***,[10] the Supreme Court clearly ruled out the possibility of the President ruling with the help of his advisers in case of absence of the Council of Ministers. The SC rejected the argument that the '*shall*' in *Article 74(1)* can be read as '*may*'.[11] SC said that as the position of President is compulsory according to *Article 52*, the position of Council of Ministers is also necessary and rejected the argument that when there is no Lok Sabha, Council of Ministers are not responsible to anyone and the position can be done away with.[12]

The rationale behind this order is very clear. Had the SC accepted the above argument then the whole concept would have changed. It would meant that the position of President has the power to rule the country without the Council of Ministers till he is impeached for the same. Therefore, the court prudently interpreted the word '*shall*' strictly to make sure that the President does not function without the Council of Ministers at any point of time. This shows how the Supreme Court had a supreme role to play in promoting and strengthening the parliamentary system of government that the founding fathers of the Constitution envisaged in India.

On the face of it, the provision might seem as mandatory because of the word '*shall*' used in it but it cannot be channelled in any court and is of merely directory nature.[13] *Article 361* protects the President from any action by the court for any ban that he places on the legal actions.[14]

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[9] *Id*. Article 74, Clause 1.
[10] AIR 1971 SC 1002.
[11] Article 74, Clause 1 of the *Constitution of India*.
[12] *Id*., Article 52.
[13] *Id*., Article 361.
[14] G. Austin, *The Indian Constitution*, 1972, pp. 59-61.

According to ***Article 74(2),*** the Courts are barred from enquiring or investigating about the advice given by the Council of Ministers to the President. Therefore, the courts are helpless in this particular case and no remedy can be pursued from the court in case the President does not take cognisance of the advice given by the Council of Ministers.

The only fear that the President has in case he ignores the advice given by the Council of Ministers is that the Lok Sabha can start impeachment proceedings against him for '*violation of constitution*' under *Article 56(b)* of the Constitution. But the process of impeachment is very complex and requires a very strong government enjoying majority in one house with support of two-third of total membership in other house as it is requisite to pass a motion with no less than two-third majority of the total membership of the House.[15]

To conclude, we can say despite the attempt to codify the convention, the provision in *Article 74(1)* of the Constitution is merely directory in nature and is not a legally enforceable injunction.[16]

3.2.2 *Who is the Actual Head of the State?*

The executive power that is vested in the President by the Constitution should be exercised in accordance to the constitution. In a parliamentary form of government, it is necessary that the effective power rests with the Council of Ministers and not with the President. Therefore, though prima facie the power seems to be vested in the President, the Council of Ministers takes all the decisions.[17]

The Constitution gives the President to exercise the executive power vested in him either directly or through the officers subordinate to him.[18] In this case, the Council of Ministers is regarded as the officers working under the President and therefore, the President exercises his powers through them.[19] As the real power vests with the Council of Ministers, the personal satisfaction of the President is not prerequisite to every decision taken by the Council of Ministers.[20]

The Supreme Court had, in a number of decisions, expressly accepted this constitutional position of the President. In ***Ram Jawaya v. State of Punjab***,[21] *Mukherjea, C.J.*, speaking on behalf of the Supreme Court said "*Our Constitution has adopted the British*

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[15] Article 56, Clause b of the Constitution of India.

[16] *Id.*, Article 74, Clause 1..

[17] M. Ramaswamy, The Constitutional Position of the President of the Indian Republic, 1950, pp. 640-648.

[18] *U.N.R. Rao v. Smt. Indira Gandhi*, AIR 1971 SC 1002.

[19] *Bejoy Lakshmi Cotton Mills Limited v. State of West Bengal,* AIR 1967 SC 1145.

[20] *Samsher Singh v. State of Punjab*, AIR 1974 SC 2192.

[21] AIR 1955 SC 549.

system of a parliamentary executive. The President is only a formal or constitutional head of the executive and the real executive power are vested in the Ministers or the Cabinet."

In ***U.N.R. Rao v. Indira Gandhi***,[22] the Supreme Court emphasized that "*the conventions operating in Britain governing the relationship between the Crown and the Ministers are very pertinent to the Indian Constitution as well, and the formal provisions of the Indian Constitution should be read in the light of those conventions*." The Court observed that the Constituent Assembly did not choose the Presidential system of Government.

In ***R.C. Cooper v. Union of India***,[23] the Supreme Court said "*Under the Constitution, the President being the constitutional head, normally acts in all matters including the promulgation of an ordinance on the advice of his Council of Ministers*."

In ***Samsher Singh v. State of Punjab***,[24] the Supreme Court stated "*it was not correct to say that the President is to be satisfied personally in exercising the executive power. The President is only a formal or constitutional head who exercises the power and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers. Whenever the Constitution requires the 'satisfaction' of the President for the exercise by him of any power or function, it is not his 'personal satisfaction', but, in the constitutional sense, the 'satisfaction of the Council of Ministers'*."

When the President uses his powers to proclaim emergency in the country under *Article 352* of the Constitution, the Fundamental rights under *Article 14, 21* and *22* can be suspended using *Article 359(1)*.[25] But these orders are always signed by the Additional Secretary to the Government of India. The SC held in ***K. Anada Nambiar v. Government of Madras***,[26] that the personal satisfaction of the President of India is not necessary to issue such an order. If the Additional Secretary to the Government of India issued a properly authenticated order under *Article 359(1)*, then that order cannot be challenged in any court on the grounds that the President was not satisfied with the same. These provisions show that in cases of exercising executive power, whether they are executive or legislative in nature, the President does not act independently and merely acts on the aid and advice of the Council of Ministers.

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[22] AIR 1971 SC 1002.

[23] AIR 1970 SC 564.

[24] AIR 1974 SC 2192.

[25] Article 359, Clause 1 of the *Constitution of India*.

[26] *K.Anada Nambiar v. Government of Madras*, AIR 1966 SC 657.

From the provisions of the Constitution, it is very clear that the founding fathers of the Constitution did not want the President to take all the decisions of central executive independently. They envisaged that the President will only act on aid and advice of the Council of Ministers. To ensure the same, the Constitutional framers wove various safeguards to make sure that the President does not even ignore the advice given by the Council of Ministers. The Constitutional framers wanted the effective power of the decisions of the Central executive in the hands of the Council of Ministers instead of the President because the Council of Ministers is responsible to the Lok Sabha and they believed that this would keep a check and ensure better transparency in the functioning of the government.[27]

The Ministry may take the extreme step of resigning collectively in case the President overrides its decision. This will create a constitutional crisis and havoc across the country. Now, the President needs the Council of Ministers to administer the country and take decisions. Therefore, he will have to search for alternative Ministry which enjoys the majority support of Lok Sabha and justify the action of refusing the advice given by the Council of Ministers. President would thus be in a fiasco as the previous Ministry enjoyed the support of the majority of Members and the members would not be amicable to appointing a new Council of Minister just because of the conduct of the President.

Even the power of issuing an ordinance of the president is restricted. The President can only issue an ordinance for six months and the same has to be ratified by the Parliament when it comes in session.[28] This shows how the President cannot carry on the administration of the country and take decisions independently without the co-operation of Council of Ministers.[29] Moreover, the President can declare emergency only after approval of the two houses of Parliament.

From the above provisions of the Constitution, it is very clear that the office of a Ministry which enjoys the confidence of the Lok Sabha to ensure that the there is Parliamentary approval in all the decisions taken by the government. If the Council of Ministers does not have the confidence of the LokSabha then it would be difficult to carry on the operations of the government as there would be no cooperation and the Parliament may turn hostile.

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[27] G.Austin, *The Constitution of India*, 1972, pp.132-133.

[28] M. Ramaswamy, *The Constitutional Position of the President of the Indian Republic*, 1950, pp. 645-647.

[29] M.P.Jain, *Indian Constitutional Law*, 2014, pp. 545-550.

The working of the Constitution since 1950 has clearly established that the president is just a titular head of the state and the real power vested with the Council of Ministers. Nehru, the first Prime Minister of India, had made it clear that the President is not responsible for the decisions taken by the government. The Council of Ministers are answerable to the Parliament for every aid or advice given to the President as the President does not exercise discretion in this regard.[30]

3.2.3 *Present Status*

The President in the present paradigm, has no option but to follow the Council of Ministers in the advice rendered to him on matter pertinent. *Article 74(1)* keeps the president bound in all situations and this was what prevented a major standoff during the 2006 office of profit controversy.[31]

But the one safeguard that can assuredly be used by the president in order that his decision might hold water, is the use of the '*reconsideration*' clause, this is a clause that will enable the decision of the council to be sent back from the president and shall be reconsidered. This was handy in avoiding president's rule in UP when the Center insisted. Yet the situation was avoided because the president sent the decision of the council back, Again in 2002, when president's rule was intended to be imposed in Bihar, here again the power of '*reconsideration*' was used effectively to avoid a situation.[32]

What has been changing recently is that the court has declared that such advise given by the council of ministers can be struck down if it were ultra vires. Also, reference must be made to the responsibility and privilege of the president in keeping up with the happenings of the council of ministers. This is again the responsibility of the council of ministers under *Article 78(b).* This is a privilege and power in the purest forms of the words, also the president has the right to demand the happenings of the council and also put before the council any bill that is introduced by an individual minister, this is done to include a sense of collective responsibility among the ministers.

What is surprising from the phraseology of *Article 78* is that it is not governed by *Article 74*, they are standalone from each other, this would mean that the president need not

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[30] Durga Das Basu, *Introduction to the Constitution of India*, 1960, pp. 279-283.

[31] M.P.Jain, *Indian Constitutional Law*, 2014, pp. 545-550.

[32] Durga Das Basu, *Introduction to the Constitution of India*, 1960, pp. 283-285.

await advice from the council in calling for information and at the same time, the denial of advice to the president is a constitutional violation.[33]

It must be remembered that the president in the current instance is not a mere figurehead, and that the PM is tasked with communicating the proceedings of the parliament to the president, along with any other information that the president calls for, and to top it all the president can request the reconsideration of a member's bill if he thinks it needs to be considered. In addition
to all the above provisions, the president as in the British monarch, hold a persuasive value in the parliament.

This predicament of the president has befallen him as a direct consequence of the 42ndAmendment act, where there are provisions in the act that bound the president to the advice given by the council of ministers. He has since been reduced to following the council's lead on matter s and has been unable to make a individual decision since, and the reconsideration can only be exercised limited, any breach, or deviation by the presidential candidate from this accept paradigm of operations, and he risks being impeached by the house. All this points to the impoverishment of presidential powers.[34]

3.3 The Relationship between Governor and the Council of Ministers

The constitutional position of the Governor of a State resembles with those of the President at the Centre. The executive power of the State is vested in him and such powers Eire exercised by him directly or through officers subordinate to him in accordance with the Constitution (*Article 164*).

There is a Council of Ministers with the Chief Minister at the head to aid and advise the Governor. The Governor appoints the Chief Minister and other Ministers are appointed by him on the advice of the Chief Minister.

All ministers hold office during the pleasure of the Governor. The Council of Ministers is collectively responsible to the legislative Assembly of the State and may be removed from office by adverse voting therein.

The Governor is bound to appoint a person who is the leader of the majority party as Chief Minister. But where there is no party which commands majority in the legislative Assembly, the Governor can exercise his discretion in the selection of the Chief Minister.

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[33] B.N.Rau, *Indian Constitution in the Making*, 1960, p. 67.
[34] G.Austin, *The Constitution of India*, 1972, pp.59-61.

The Council of Ministers is responsible to the Legislative Assembly but not to the Governor. All the decisions taken by the Council of Ministers are conveyed to the Governor by the Chief Minister.

These provisions make it clear that Governor is a constitutional head of the State and acts through Council of Ministers responsible to the State Assembly. Normally, the Governor is bound to act with the advice of his Council of Ministers in all matters except where he is required to act in his discretion. In following situations the Governor may be called to exercise his discretion:-

(1) Appointment of the Chief Minister

Normally, the Governor has no discretion in the matter of appointment of the Chief Minister. He is bound to appoint the person who commands majority In the Legislative Assembly. But where no party secures majority in the Legislative Assembly, the Governor may exercise his discretion in the matter of appointment of the Chief Minister.

(2) Dismissal of the Ministry

In the matter of dismissal of a Ministry, the discretion of Governor is quite remote. The Ministers hold office during the pleasure of the Governor. But this concept of pleasure does not mean that the Governor may dismiss the ministry at his will.

So long the Ministry enjoys the confidence of the legislature; the Governor cannot dismiss the Ministry. However, if the Ministry loses the majority support of the legislature, the Governor may dismiss the Ministry immediately.

(3) Dissolution of Legislative Assembly

Normally the State Assembly is dissolved by the Governor on the advice of the Cabinet. But where the Chief Minister advises the Governor to dissolve the Assembly, the Governor is not bound to do so. He may take decision on his own in such a situation.

(4) Power to Governor under Para 16 (2) of the 6th Schedule in respect of tribal Areas of Assam

The Governor of Assam has been provided discretionary powers in respect of administration of tribal Areas of Assam. Here, the powers conferred on the Governor are independent of his Council of Ministers and he can act in his discretion as the situation warrants him to do.

(5) Advising the President to impose President Rule in the State

In this respect Governor is not bound to consult his Council of Ministers. He takes his own decision when the circumstances of the State, are such that the administration cannot be carried on in accordance with the provisions of the Constitution. He may advise the President to take appropriate action to restore constitutional machinery.

3.2 Views of the Supreme Court

The Supreme Court of India has consistently taken the view that the President is bound to accept the advice tendered by the Council of Ministers. This view has been taken because in the scheme of the Constitution as framed by the framers, it has been emphasized that the President of India is only a constitutional head of the nation. Though every function or action is taken in the name of the President, but should not be taken to mean that he possess all the powers. All this has to be read Keeping in view the system of responsible Government established under the Constitution, where the Cabinet, so long as it enjoys the majority support, exercises all the executive functions in the name of the President and the advice, if any, given by the Cabinet to the President - is binding on him.

The first occasion, where the Supreme Court got an opportunity to lay down this principle has been in the case of ***Ram Jawaya Kapur v. State of Punjab***,[35] The Supreme Court speaking through Chief *Justice Mukherjee* observed that the Indian Constitution, though federal in character is modeled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy, and its implementation which practically includes initiation of legislation, the maintenance of orders, the promotion of social and economic welfare and supervision of State administration.

Regarding the relationship between the Present and the Council of Ministers, His Lordship observed:

> "*In India, as in England, the executive has to act subject to the control of the legislature, but in what way in this control exercised by the legislature? Under Article 53(1) of the Constitution the executive powers of the Union is vested in the President but under Article 75, there is to a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet*."

[35] AIR 1955 SC 549.

The other important case which came before the Supreme Court was ***R.C. Cooper v. Union of India***,[36] clearly indicates the fact that the ministerial advice is binding on the President. ***U.N. Rao v. Indira Gandhi***,[37] was another case which came before the Supreme Court and demonstrated that the Council of Minister is a body which cannot be dispensed with under any circumstances, because that would make the Constitution lifeless or meaningless. This also means that the Council of Ministers plays a decisive role in rendering advice to the President. The President cannot exercise his function without the aid and advice of this body which in all cases carries a binding force.

In ***Shamsher Singh v. State of Punjab***,[38] the important question which was examined by the Court related to the fact whether the Governor acts in such matters personally or on the aid arid advice of Ministers. Chief Justice *A.N. Ray* who delivered the majority opinion of the Court observed:-

> "*The President as well as the Governor acts on the aid and advice of the Council of Ministers in executive action and is not required by the Constitution to act personally without the aid and advice of the Council of Ministers. Where the Governor has any discretion, the Governor acts on his own judgment. The Governor exercises his discretion in harmony with his Council of Ministers. The appointment as well as removal of members of the subordinate judicial service is an executive action of the Governor to be exercised on the aid and advice of the Council of Ministers in accordance with the provisions of the Constitution. Appointment and removal of persons are made by the President and the Governor as the Constitutional head of the executive on the aid and advice of the Council of Ministers. That is why any action by any servant of the Union or the state in regard to appointment or dismissal is brought against the Union or the State and not against the President or Governor".*

3.3 Views of Constitutional Experts:

Before the enactment of the *Constitution (42nd Amendment) Act, 1976*, there was divergence opinions amongst the leading authorities on the Constitutional Law regarding the binding nature of the ministerial advice. Some of the constitutional experts were of the view that the President was bound in all matters to accept the advice of his Council of Ministers.

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[36] AIR 1970 SC 564.
[37] AIR 1971 SC 1002.
[38] AIR 1974 SC 2192.

The second view was that the Constitution vests the real power in the President and there is no provision which binds him to accept the advice. The third view is in between the two views. According to it, the President normally bound to accept the advice of his Council of Ministers barring certain exceptional situations.

The first view has been supported by *Granville Austin, Alladi Krishnaswami Ayyar, K.C. Markandan, Dr. B.R. Ambedkar and Dr. V.N. Shukla*.

The Second view has been supported by *Dr. K.M. Munshi, B.N. Rau, K. Santhanam, D.D. Basu, M.M. Ismail, Allen Glendhill, N.A. Palkhivala* and some other notable constitutional experts. They hold the view that the advice of the Council of Ministers is not binding on the President.

The third view is more plausible and comprehensive. It has been supported by *V.S. Deshpande, H.M. Seervai, Professor M.P. Jain and Justice H.R. Khanna*. These experts are of the view that the President does not appear to have any personal capacity as *persona* designate as distinguished from his sole capacity as head of the Union executive. He is invariably advised by the Council of Ministers in all his functions. In certain matters he has to apply his mind personally to a case. This implies that in matter of dissolution of the House and the appointment of the Prime Minister, the President has a certain reserve powers.

4. SUMMARY

The above provision makes it abundantly clear that the Prime Minister communicates the decision and not merely gives advice to the President. Constitutionally speaking, the decisions taken by the Council of Ministers are binding on the President, because it is only the Prime Minister and his Council which is responsible to the House of People. Presidential responsibility to Parliament was never contemplated by the founding fathers. The need of the hour is to maintain a harmonious relation between the President on one hand and the Prime Minister and his Council of Ministers on the other hand cannot be over emphasized. It is also equally essential that both these highest offices of the nation have to maintain a good rapport with each other so as to keep the spirit of our constitutional democracy alive.

It can be rightly deduced who holds all the cards in the deal, the council of ministers, and they exercise absolute power over the presidential powers that may/ may not be of any consequence in the long run. Ultimately, it is the intention of the constitution that the President should be an influence and not a power-centre, thus the persuasive powers.

Whereas the new provisions spoke everyone's mind, there is a new kind of difficulty created. Because of the non-explicit nature of the president's powers, he could in some cases exercise some discretion in matter that may need expert judgment, but in the aftermath of an explicit delineation of presidential weakness, the room for discretion has all but been obliterated.

Yet the president has a responsibility that cannot be alienated, he still needs to select the Prime Minister, and the Chief justice, and the like, here the exercise of proper judgment is required. Similarly a situation where the house has been dissolved and there is no council of ministers is also one which the president can exercise his (now) minimal discretion at. This will bring us to the inevitable conclusion that *Articles 74(1)* and *75(3)* must be read together. Meaning that the advice of the council of ministers need be followed by the president as long as parliamentary support is available, and in the event the parliament is being dissolved, the president needn't wait for advice from the PM he may use his own discretion at will.

This said, one must come to terms with the fact that no matter how one amends the constitution to remove discretion from presidency, there will ultimately be some area where the same discretion would be inalienable and absolutely necessary. For this reason, even though there is *Article 74(1)*, the presidential discretion with respect to the major appointments and decisions hasn't been affected.

Parliamentary Government has been established in India sates. The head of the State is the State is the Governor. The administration of the state is run in the name of the Governor. In fact, he exercises his power on the advice of the Council of Ministers. The administration of the state is actually controlled and run by Council of Ministers. Besides the close relationship with the Governor, the Council of Ministers has also close relationship with the Legislature. The Council of Ministers exercises its function according to the wishes of the Legislature.

The Council of Ministers has a close relationship with the Governor. According to the constitution there will be a Council of Ministers headed by the Chief Minister to aid and advise the Governor. The Governor appoints the Chief Minister and other ministers are also appointed by him on the recommendation of the Chief Minister. It is also written in the constitution that the ministers will remain in office during the pleasure of the Governor. It gives an impression that the Governor can appoint anybody as the Chief Minister and minister. The Governor is not bound by the advice of the Chief Minister and his Cabinet and the Cabinet is completely under his control.

The Governor is not free to appoint anybody as the Chief Minister and minister. The Governor appoints only that person as the Chief Minister who is the leader of the majority party in the Legislature. The other ministers are appointed by the Governor on the recommendation of the Chief Minister. It is the Chief Minister who distributes departments among the ministers and not Governor. The Chief Minister Guides and supervisor the work of different ministers.

The Governor cannot remove the Council of Ministers from the office. The Council of Ministers continues to remain in office even if the Governor is not happy with its work. The Council of Ministers can be removed from office only if the majority of the members of the Legislature go against it. The Governor makes all the important appointments on the advice of his Council of Ministers. He exercises his judicial powers on the advice of the Council of Ministers.

The Governor can also act independently in certain matters. The Governor acts in the state as the agent of the Central Government. It is his duty to see that the law and order of the Central Government is fully carried out in the state. When no party gains absolute majority in the State Legislative Assembly or the majority party fails to elect its leader, the Governor can appoint the Chief Minister of his own choice. If the Constitutional machinery fails in the state or there is a possibility of the failure of the state constitutional machinery, the Governor sends his report independently to the President. He does not consult the Council of Ministers under such circumstances. When the President proclaims emergency in the state the Governor acts in the capacity as the agent of the President and he is not bound to act on the advice of the Council of Ministers. During emergency the Council of Ministers is dissolved.

The Chief Minister is the Leader of the majority party in the Legislative Assembly. All other ministers are also taken from the Legislature. If any outsider is appointed as minister he must become the member of the Legislature within a period of six months of his appointments otherwise he will have to leave the office. The ministers participate in the meetings of the Legislature. They introduce Bills, participate in the debates and exercise their vote. Most of the Bills are introduced by the ministers and all these can be passed in the Legislature to which the Council of Ministers is opposed.

The meetings of the Legislature are summoned accordingly to the will of the Council of Ministers and the duration of the sessions can be increased or decreased according to the wishes of the ministry. The programme of the Legislature also planned by the Council of Ministers. The Council of Ministers remains in office during the pleasure of the Legislature.

If the majority in the Legislative Assembly goes against the Council of Ministers, it is to resign office. But normally the Council of Ministers does not work under the control of the Legislature rather the Legislature remains under the control of cabinet.

The Council of Ministers can seeks the dissolution of the Legislative assembly by advising the Government and fresh elections are held. Hence, the Legislature is always afraid of its dissolution and hence it always acts according to the wishes of the Council of Ministers.

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6. SELF – ASSESSMENT QUESTIONS

1. Write a comprehensive note on the collective responsibility of the Council Of Ministers,
2. Constitution mandates that President must act on the aid and advice of Council of Ministers. Are there some expectations to this rule? Explain.
3. What is the relationship between Governor and Council of Ministers?
4. What are discretionary powers of the Governor where he can act without the aid and advice of the Council of Ministers? Discuss. Cite concrete examples to support your answer.
5. "The President of India heads the State whereas the Prime Minister of India heads the government". Comment. Discuss also the mutual relationship between these two constitutional functionaries.
6. "President act on the aid and advice of the Council of Ministers". Explain exceptions, if any to this rule.
7. Discuss the Constitutional position of Governor under the Indian Constitution. Critically examine his role in Union-State relations. Give concrete examples in support of your answer.
8. The President of India seems to be a rubber-stamp under the Constitution but sometimes he may become very powerful. Has he certain discretions under the Constitution when he can act of his own? Elucidate.
9. Explain the Pardoning powers of the President of India under the Constitution. Whether these powers of President are subject to judicial review? Whether the Executive can exercise the pardoning powers at any time after commission of an offence, either before legal proceedings are taken or during their pendency or after conviction? Discuss with Case Law.

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(DDE – 2018) **LL.M – I**

INDIAN CONSTITUTIONAL LAW AND THE NEW CHALLENGES

Paper : II (102) DE **Writer: Prof. Sunil Deshta** *

Lesson No. : 3 **Updated by: Dr. Sudhir Kumar Vats****

COALITION GOVERNMENT, POWER POLITICS

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** **Assistant Professor of Law, Directorate of Distance Education, Kurukshetra University, Kurukshetra.**

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4. SUMMARY

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6. SELF – ASSESSMENT QUESTIONS

1. INTRODUCTION

Parliamentary system in our country has stood the test of time. In early years, Parliament had a large number of members who had been in freedom struggle and many of them were lawyers. They had brought a vision to Parliament based on their experience during the freedom struggle as well as those of them who had been in the Constituent Assembly were fully aware of various opinions in the country before arriving at a consensus.

Time changed, situation changed, problems changed and responses of the elected members also changed with the change. The composition of Parliament has undergone a shift, there are not so many lawyers now, and most people have come from agricultural background and others from different background. The other aspect is that there was far more discipline in Parliament. There was a kind of decorum. Now lot of time is wasted in calling the members to order. There was a time when Lok Sabha used to have one party majority, simple or absolute. Most of the members used to be seasoned politicians with value-orientation and self-discipline. Slogan raising was an exception.

Over the years, the complexion and composition of Lok Sabha has drastically changed. There is no single party majority in the House; there is a coalition of several parties that form the majority group in the House and form the Government. The Twelfth Lok Sabha had a group of thirteen parties, whereas the Thirteen Lok Sabha had about two dozen parties forming the majority group which had formed the Government at the Centre.

2. OBJECTIVE

India has had the experience of coalition government in the States as well as at the centre in the recent time. Mechanism of single party's dominance has suffered erosion and multi-party system that has come in vogue is characterized by a mashroom growth of regional parties. The national political parties have become heavily dependent on regional parties for their national political survival thereby paving way for coalitions both at the Centre and in many States. The current developments indicate that no national party can boast of staging a comeback to the centre stage of its own.

In other words, an era of coalition parties has come to rule the roost. The growth and augmented influence of state-based or regional parties envisaged a new element in the working of the federal system in India. It generated new conventions and aimed at intensifying the participation of the States in national policy making. It is in this context that the prevailing party system in India needs to be appraised afresh. The objective is to examine the paradigm shift in the party system from one-party-dominance to fragmentation and recent endeavours for reconsolidation.

3. PRESENTATION OF CONTENTS

3.1 Meaning of the term '*Coalition*'

The term '*coalition*' has been derived from the Latin word '*coalitio*' meaning '*to go*' or '*to grow together*'. It is the verbal substance of *coalescere*, *cotogether* and *desire-to grow up*, which means to go and grow together.

Oxford dictionary defines coalition as an act of coalescing, or uniting in to one body: a union of persons, states alliance. In strict political sense, the word coalition is used for an alliance or temporary union for joint action of various powers or states and also of the union into a single government of distinct parties or members of distinct parties.

Professor Ogg defines coalitions in the Encyclopedia of Social Science as, "*a co-operative arrangement under which distinct political parties, or at all events numbers of such parties unite to form a government or ministry*".

William A. Gamson defines it as, "*the Joint use of resources to determine the outcome of a decision in a mixed-motive situation involving more than two units*."

3.2 Basic Issues

The subject of Coalition Governments is one which is of great interest and importance to the contemporary world. In India, the subject has a special significance and relevance in the context of current political trends and developments. The coalition government is a

familiar form of government in democratic systems. Such a government is the result of a co-operative arrangement between distinct political parties. Such arrangement become necessary in a multi-party system when single party cannot command majority in a bi-party system where one party allies itself with a minor group or party in order to keep itself in power and also when in a national crisis, like war, party stripe is suspended and the demands of national security requires concentration of all forces.

In multi-party countries coalition governments often serve as stop-gaps. Sometimes such arrangement takes place between parties owing allegiance to similar ideologies. But that is not a necessary condition. When parties follow different ideologies, there may be political compromises and mutual concessions. Although, these do not conduce to stability, such arrangements have been observed to "*tend to curb radicalism and likewise to liberalise conservatism*."

In a vast country with diversities as ours, coalitions may be a necessary stage in the evolution of democracy. Sometimes, they may constitute a natural step in the process of change from a multi-party system to a bi-party system. It is obvious that coalitions have both advantages and disadvantages.

Professor Ivor Jennings in his book on '*Cabinet Government*' has observed: "*Curiously enough, the coalition which saved civilization between 1940 and 1945 seems to have been at least as united as the ordinary party government*."

It is minority parties who generally enter into coalitions with others. It is well-known, however, that even minority governments can be stable. ***Professor Ivor Jennings*** remarks that where no party obtains a majority at a general election there are two possibilities only, the formation of a coalition Governments or the formation of a minority governments with opposition support, for another dissolution is not practicable. He notes that in England there were minority governments from 1839 to 1841, from 1846 to 1852, from 1858 to 1859, from 1866 to 1868, from 1885 to 1886, from 1886-1892, from 1910 to 1915, in 1924, and from 1929 to 1931.

Thus, it appears that a minority government is not quite an abnormal feature of democracy and must have been within the contemplation of our Constitution-makers. It is worth to point out that in England there were coalition governments from 1852 to 1855, from 1895 to 1905, from 1915 to 1922 and from 1931 to 1945.

Professor Ivor Jennings remarks that the exact point at which a coalition becomes a unified party government is not always clear. There is a tendency for coalitions to lose their party differences. Speaking about coalition governments *Professor Jennings* said, "*Here there may be a little personal and no party loyalty. The cabinet has a plethora of eminence. There are rival policies as well as rival ambitious*". '*England*', said **Benjamin Disraeli** (*was a British statesman of the Conservative Party who twice served as Prime Minister of the United Kingdom*), "*does not love coalitions*". The truth is that the parties in the coalitions do not love each other.

It is truism that excessive political strife and repeated unstable governments would naturally, in ordinary cases, affect good administration and the welfare of the people and even the security of the country may suffer if attention is diverted too long, even though partially, from the real objects for which the democratic system exists. In such cases, the problem must be how to make the administrative machinery so strong that even without superior direction and vigilance for a short period it can carry on its functions without detriment to public interests.

In India, it is unfortunate that floor-crossing and defections continue to vitiate public life in spite of the universal realization of their pernicious effects. They feed the causes that lead to uncertainties in our political life.

Another basic issue related to coalition governments is the power of the Governor in matter of formation of governments. It is acknowledged that in the performance of his functions in normal times he is neither the agent nor the servant of the central government. Although appointed by the President, he derives his authority from, and is clothed with functions and obligations by, the Constitution. It may not be denied that except in matters where he is required, expressly or by necessary implication, by the Constitution to exercise his functions according to his discretion, he is bound by the advice of the Council of Ministers.

The other basic issue is that the coalition governments have a bearing on the question of Centre-State relations. The question relating to the relationship between the composite legislative wing and the party organizations may also arise. Such a conflict, however, is not an abnormal feature of the party system, and it may be said that the prevailing view favours

the superiority of the legislative or governmental wing over the party organization. The view is based on the principle that the power and responsibility must go together.

But, in reality, the legislative wing and the party organization are interdependent and such conflicts could perhaps be easily evolved.

3.3 Theories and Concepts associated with the Formation and Working of Coalition Governments

For the sake of convenience, the theories and concepts are divided into three categories :-

- *(1)* Constitutional
- *(2)* Institutional
- *(3)* Political

There is no sanctity behind this categorization and it can be argued that the items included under them may cut across and overlap.

3.3.1 *Constitutional*

Under this head there are three theories which generally describe the impact of coalition government on the constitutional scheme :-

- *(i)* It makes separation of powers more real and effective.
- *(ii)* It superimposes a second separation.
- *(iii)* It weakens the government in a parliamentary regime and strengthens it in a presidential regime

3.3.1.1 *It makes Separation of Powers more Real and Effective*

In a parliamentary regime, coalition of parties always suffer from uneasy solidarity. Behind the facade of solidarity each party in the coalition tries to hatch intrigues to break the alliance and replace it by one where it will have a dominant position or more effective say. This results in anxiety on the part of the coalition government to adhere to a common agreed line of action so as not to alienate any of the constituents and thereby also avoid concentration of power in the hands of a party or a group.

This kind of separation of powers and the element of check and counter check of one over the other is not possible in a two party system where the majority party often having formed the government is certain to get its programme through despite the severest opposition from the minority party unless, of course, there is a split in the ruling party itself resulting in large scale defection.

3.3.1.2 *It Superimposes a Second Separation*

Maurice Duverger (*was a French Jurist, Sociologist and Politician*) has advanced an argument that coalition government tends on occasion to superimpose a second separation of powers upon that resulting from the constitution or nature of institutions. The classical theory of separation of powers divides the function of the government into three organs - *Legislature, Executive* and *Government* - and pleads that all three powers should not be concentrated in one hand. These three spheres of government activity should enjoy a reasonable amount of autonomy so that government may not turn into an absolute autocracy. If one organ of the government tries to be over powerful, the other organ can put a check on it thereby reducing the chances of distortion of constitutional democracy.

3.3.1.3 *Coalition Government weakens the Government in a Parliamentary Regime but tends to strengthen it under a Presidential Regime*

Party solidarity is the strength of the government in a two party system because a party solidly united behind a government makes functioning of the government safe and effective and enables it to run smoothly. In a coalition government, the concept of party solidarity works against government solidarity because each party of the coalition maintains its distinctness by not merely being alert against its political opponents but also against the other allies. Each party attempts not only to score a point against its political opponents but also to see that its allies do not take more advantage of the coalition which may jeopardize its own position. This is, in short, an almost unavoidable element of distrust and rivalry against one another in the alliance.

On the other hand in a presidential regime, a coalition of parties tends to strengthen the authority of the government, its stability and homogeneity. Inter-party conflicts in the legislature provide greater scope for increase in governmental authority and personal character of the Presidential regime. Unlike the parliamentary regimes where the legislature enjoy the power to overthrow the government and thereby making it weak, in Presidential regimes, the executive confronted with a heterogeneous coalition finds scope for dividing and destroying the coalition parties when their internal discipline is poor. It cannot be toppled. The government can create dissension in its ranks of coalition parties in the parliament and striking at their solidarity and forcing them to try new combinations, it also increases the personal character of Presidential regimes because in a multi-party system no party can claim to represent the nation but the President by virtue of his election can claim so. He is the only

continuous authority in the midst of changing coalitions. This of course does not mean that the President can do what he likes.

In fact, his official authority and powers are considerably circumscribed by the fact that he does not have the powerful backing of a single party and has to look to a combination of parties to get his measures through. He cannot function independently of the legislature. But on the whole, the power to overthrow the government which a multiparty character legislature enjoys in a parliamentary regime is absent in a Presidential regime.

3.3.2 Institutional

The impact of coalition governments on certain institutions closely connected with the government may be discussed under the following sub-heads:-

3.3.2.1 Nature of Electoral System

The formation of coalition government is closely associated with a particular system of electoral law. While the single-majority single ballot encourages the two party system, multi-partyism is the natural consequence of second ballot and proportional representation. This is because the existence of a number of different parties does not affect the total number of seats they gain since in this system they can always regroup for the second ballot. The case studies of Imperial Germany, the third Republic in France and that of Holland in the first two decades of previous century etc. lead to the conclusion that in a second ballot system (which is not in vogue these days), the tendency towards multi partyism is obvious. The exception of Belgium during that period was due to internal structure of parties and the nature of political struggle in Belgium. In most of the countries, second ballot has been replaced by proportional representation but both systems have the same effect on the formation and growth of parties.

An analysis of the intimate relationship between proportional representation and multi-party system and coalition would reveal that proportional system of representation does not discourage the emergence of factions and splits. Rather they are amply rewarded by the proportional votes they are able to claim. While in a single ballot system, such tactics would be completely obliterated by the giant parties and there would thus be no incentive to break or split, under proportional representation, factionalism and splits flourish because the ballot gives such, groups a positive place which they can gainfully use in maneuvering coalition governments and tilting the delicate balances between different groups in the coalition.

Proportional Representation decreases the concentration and distinctiveness of opposition; reduces strict competition and increases the need for co-operation, and thereby increases the rewards to be gained from bargaining strategies of various kinds.

Thus, while the operation of proportional representation encourages the growth and multiplication of parties generally, at the same time in a system of multi-party coalition, there is a general tendency to move towards proportional representation because this alone gives them a leverage to survive effectively as small groups.

3.3.2.2 Character of Political Parties

Leon David Epstein (*was political scientist and author of 'Political Parties in the American Mold*') has argued that in a genuine multi-party system coalition there is no alternation actual or potential between one party and another or even between a groups of parties. The nature of this party system is such that no one party is in a position to form the government. The governments are formed by a coalition of different parties and groups each of which has secured a percentage of seats. In such a system even if fresh elections result in changes in the respective strength of the parties, this is hardly followed by a different and alternative coalition.

Basically the same constituents return with modified strength to the coalition. The result of electoral competition may result in a shift of the coalition towards group than the other and there may be marginal adjustments in the strength of the partners to the coalition in the government but there is hardly ever a new and a completely alternative coalition. In this way, coalition governments hardly ever alternate. In most cases, old coalitions continue with minor variations.

Further, in a coalition of multi-party system, the party acts more like an interest group even though at the same time performing the functions of political party. It has also been argued that Coalition governments in a multi-party system do not produce cohesive parties in sharp contrast to a two party system. This is so because in a multi-party system, since no single opposition party is in a position to form the alternative government, the incentive and pressure on unity is greatly reduced. There is an ever growing temptation to break from the mother party and to join the group or faction which may bring the group into power.

3.3.3 Political

Under this head, political ideas and theories associated with the formation and working of coalition governments may be dealt. In this regard following points deserve discussion :-

- *(i)* Line of demarcation between Government and Opposition is not clear.

- *(ii)* Coalition Governments are unstable-instability becomes their characteristic feature.
- *(iii)* Relations between parties to the coalition.

3.3.3.1 ***Line of demarcation between Government and Opposition is not clear***

The position of the government in a coalition is fluid. Despite the final agreement on a common programme, there is an ever continuing threat of defection and some ally falling to support the government. On the other hand ranks of the opposition are equally fluid. If there is an every existing danger of a partner of coalition government voting with the opposition on a particular measure or a bill, there is an equal readiness on the part of certain groups in the opposition to side with government in securing the passage of a bill. In fact the coalition government in the wake of split within its own ranks encourages defection in the ranks of opposition to secure success on a particular issue and save the government from toppling.

On the other hand, there are factions and opposition groups even within individual ruling parties which pose a danger. The dissident groups always threaten to cross over if their point is not being accommodated on a particular issue. It is generally found that in a coalition it would be difficult always to determine clearly where government ends and opposition begins. The opposition of today may be a partner in the coalition government of tomorrow. Alternatively a constituent of the coalition government today may be found voting with the opposition tomorrow. Hence, the line of demarcation between and opposition is not clear.

3.3.3.2 ***Instability of the System***

It is generally stated that coalition governments give rise to political Instability. Despite the clear association of coalition governments with instability, some nations have had fairly stable regimes even with multi - party systems. The question is how instability is reflected, it is when the system is unable to produce a majority party, and the factions concentrate on the centrifugal forces of special interest peripheral forces. This kind of diffusion of power does not hold promise for effective policy formulation.

Second, “by its very nature, it must transfer crucial decisions from a much divided electorate to the Parliament. Thus, representative body in turn must content itself with a government by the formation of a coalition attaining after extended bickering, the compromise which in two party system is largely the voter’s business to achieve within his own mind and primordial wisdom.”

Instability of the government further results in immobility where the executive leadership is timid and incapable of facing fundamental social, economic issues and drawing up a plan of action, even if unpopular. In the ***first*** place, the duration of governments is brief during which it is virtually impossible for it to take decision on important issues let alone ensure their implementation.

Secondly, because of the constant danger of split within its own ranks and attempts of the opposition to topple it, it tends to avoid any commitment on explosive issues. This is the terrible price paid for sheer survival of the government in power. Even then government does not survive for long.

3.3.3.3 *Relations between Constituents of Coalition*

The relationship between allies in a coalition government has to be seen keeping in view their formal relationship and their actual relationship. Formally they are bound by certain institutions in the government where they try to establish common attitudes, for instance, all constituents swear their support to the common programme arrived at, they cooperate in the matter of voting inside the parliament and they are also united against their opponents in the opposition and for carrying out all these promises over which agreement has been reached. If an electoral alliance has been affected along with the government alliances, this formal relationship is generally extended to the level of pooling of votes, supporting a common candidate etc.

But behind this facade of formal relationship is the complex actual relationship where each party wants to preserve its independence, individuality, distinct entity and freedom of action as different from the collective assembly of the coalition. In the actual power-relationship, it outlines its independence, by putting emphasis on its party programme of the coalition. It does not want to get submerged in the totality of the coalition. In actual power relationship, it is guided by the consideration of elections and its popular image. Each and every move of these parties, whether inside the coalition or outside, is motivated by the desire to influence the electorate. While the inter-relationship of allies inside the coalition reflects the respective strength of party, their actual relationship outside the coalition is governed by the desire to gain politically at the expense of others.

Since the parties to coalition retain the freedom of political propagation in consonance with their electoral programme (as different from the common programme) it gives them sufficient latitude to criticize the government for unpopular acts and for taking either too radical or too mild an action over a particular issue.

Outside the coalition, these parties are anxious to show to the electorate that they are sincerely tedded to the tenets of their electoral programme and that it is due to the intransigence of the other parties in the coalition that they are unable to get their programmes implemented.

It may be summed up in the light of the above discussion that the theories and concepts associated with the working of coalition governments do not uniformly apply even to all the multi-party coalitions. The coalition government would produce on a political structure would differ from country to country and would largely depend on such factors as historical circumstances, socio-economic structure, the nature of political Institutions, centrifugal and centripetal forces etc. The nature, structure and growth of political parties, which determine the fate of coalition governments, themselves, are influenced by the above mentioned factors.

3.4 One Party Dominance and its Decline

It is worth mentioning at the outset that pre-dominant party system should not be confused with one party system. *La Palombara* and *Weiner* have divided one-party system into '*one party authoritarian*', '*one party pluralistic*' and '*one party totalitarian*'. On party authoritarian system is dominated by a single-monolithic, ideologically oriented non-totalitarian party. One party pluralistic system in organization, pragmatic and absorptive rather than ruthlessly destructive in its relationship with other groups. One party totalitarian system involves the state in itself as an instrument of a monolithic party which professes and practices one ideological goal - the total use of power for the restructuring the society's social and economic system.

The three decades of continuous rule by the Indian National Congress (INC) in India (August 1947 to February 1977) is generally described as a system of one-party dominance. With a view to retain its dominant position, the Congress relied on a pyramid of class and caste alliance to sustain a national organization in a fragmented society. After its dethronement from dominant position or about three years (1977-1979) its catapult to centre stage continued for the entire decade of 1980s but for about two years (November 1989-May 1991) when it was out of power.

The Congress staged comeback in May 1991 as a minority party in the first half but turned into a majority party in the second half thanks to the splits and mergers and accretion of support by election in Punjab and remained in office for full term (1991-1996). Between 1996 and 2004 the Congress has been out of power thereby having forfeited its dominant

party status. But coming of the Congress to centre stage in the 14th Lok Sabha elections of 2004 had rekindle the hope of its revival but not the dominance of pre-1980s era. Similarly, the Congress came to centre stage in the 15th Lok Sabha election but not the dominance of pre-1980s era.

The political fortunes of the Congress started deteriorating in 1990s. The BJP could mop up only partially losses of the Congress. Concomitantly, the BJP's inability to capitalize on Congress decline provided an opportunity for the state parties to move into political vacuum to fill the space.

3.5 Instances of Coalition Governments

Coalition governments have become an inevitable feature of Indian politics. The increase in number of political parties makes government formation a difficult task. As no party is in a position to get majority, political parties are involved in either pre-electoral or post-electoral alliances to form a government. While forming a coalition government polities agree to common agenda of governance cutting across party lines. But, in due course, the basic principles of different parties collide against each other and attempt to supersede coalition agenda.

A pre-poll understanding provides a common platform to the parties in order to attract the electorate on the basis of a joint manifesto. The BJP and its allies did give unto themselves a formal identity, the National Democratic Alliance in 1999 elections. They campaigned jointly. But they stuck to their respective symbols. The BJP-led NDA fought the Lok Sabha elections on a common manifesto. The Congress (l) - led formation was only an electoral adjustment, not an alliance. The author find the coalition governments were formed of Janata Government at the Centre (1977) and its constituent political group of *Morarji Desai* headed the four party government for about two years (1977-1979); a new coalition government . was formed with *Charan Singh* as the Prime Minister in October 1979 and the November 1989 Lok Sabha elections, the country witnessed the first minority-cum coalition government at the Centre, though it was supported by a majority of MPs.

Almost all the non-Congress groups - big and small Rightist and Leftist have joined hands to back the National Front led by *V.P. Singh*. As Prime Minister *V.P. Singh* said, his was a minority coalition government with majority backing - that of the partners of the National Front - the BJP and the CPM.

On October 23,1990, BJP withdrew support to the V.P. Singh Government and the National Front Government lost the majority of Lok Sabha. In 1990, *Chandra Shekhar* formed the next Ministry Congress supported Chandra Shekhar unconditionally. But this coalition was short-lived, lasting only for a few months.

The United Front Coalition Government headed by *H.D. Deve Gowda* was like a chariot being pulled at time in different directions by 13 horses. There were personality clashes among the United Front leaders and because of that they lacked cohesion. Sitaram Kesri's decision to withdraw support to the Deve Gowda Government has thrown the nation into a fresh political turmoil.

The endorsement of I.K. Gujral's candidature by the Front's Steering Committee set the stage for the formation of a new United Front Coalition. The Congress gave an ultimatum to Gujral to drop the DMK ministers from the Government or face withdrawal of Congress support. The BJP led NDA government won a comfortable majority in 1999 elections. When the BJP government was sworn in 1999, the question before NDA government was, how long the coalition would work ? But thanks to the personality of *Atal Bihari Vajpayee* for holding the NDA together.

The 2004 elections for the fourteenth Lok Sabha in the months of April-May witnessed the revival of the congress led alliance called the United Progressive Alliance (UPA). Firstly, Congress (I) formed an alliance with DMA, RJD, BSP, PMK, MDMK, CPI, CPI (M) and J & K National Conference. After three years, BSP, CPI and CPI (M) were opposed strongly to Indian 123 Nuclear Agreement with United States of America. So, these parties withdrew support to the Congress (I) led coalition Government and a no-confidence motion was moved in the Lok Sabha by the Left Parties against the Congress (l) led coalition Government headed by *Dr. Manmohan Singh*. Despite opposition from the Left Parties in Lok Sabha, the Congress (I) led coalition Government was a minority coalition government with majority backing - that of the partners of the Samajwadi party, DMK, PMK, RJD and National Conference etc. They became co-sharers of power with Congress (I).

After the result of 2009 Lok Sabha elections, again, congress led coalition, i.e., UPA had a clear mandate. So, the Indian National Congress and its allies stormed back to power in the Lok Sabha as the country's voters decisively indicated Dr. Manmohan Singh to hold the reigns of the country. Recently, TMC withdrew support to the Congress (I) led coalition government but SP and BSP came to rescue the government.

3.6 India Finally Harnesses the Coalition Horse[1]

After four failed Coalition Governments and two mid-term elections, on October 13, 1999, *Shri Atal Bihari Vajpayee Ji* took oath as Prime Minister of India for the third time. The BJP - led NDA had won 303 seats in the 543 seat Lok Sabha, thereby securing a comfortable, stable majority. The Coalition Government that was formed lasted its full term of 5 years – the only non-Congress government to do so.

The National Democratic Alliance was widely expected to retain power after the 2004 general election. The parliament had been dissolved before the completion of term in order to capitalize on the economic boom and improved security and cultural atmosphere. However, the coalition sidestepped controversial and ideological questions in favour of bread-and-butter economic issues during the campaign and subsequently lost almost half its seats, with several prominent cabinet ministers being defeated.

The Indian National Congress, led by *Mrs. Sonia Gandhi* became the single largest party and, along with many minor parties, formed the United Progressive Alliance. With the conditional support of the leftist parties from the outside, the UPA formed a government under *Dr. Manmohan Singh*. The alliance completed a full term and remained in power after the 15th General Elections in May 2009. Although the left now longer supports the UPA but with new allies it has been able to extend its lead in the Lok Sabha.

India now looks forward to a stable future of Coalition Governments as single-party majority seem to be a thing of the past now.

3.7 Reasons for Coalition Politics in India[2]

(i) Growth of Regional Political Parties

Growth of regional parties has been reason for the emergence of coalition politics in India.

(ii) Inability to Represent India's Diversity

Coalition politics also thrives because of the inability of national parties to continue to give a feeling to the diverse population in India that they are able to adequately represent their disparate interests. The BJP's vote share increased from about 11 pc in 1989 to a little below 25 pc in recent elections.

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[1] http://www.prasannajeetpani.in/2009/06/coalition-politics-in-india-analysis.html

[2] http://iasexamportal.com/civilservices/article/coalition-politics-future-of-indian-political-system

(iii) Lose of Trust

The tendency of the national parties to speak of national level issues, and to force coherence in the politics and views on issues, is at odds with our extremely diverse population. In the initial years, to the extent that the Congress party was able to accommodate regional/ local interests and reflect their aspirations, it was possible to maintain a large single party identity. But over the years, regional and caste identities have begun to increasingly assert themselves in the political space.

(iv) The Moral Degeneration in Politics

Combined with regional parties' ability provide credible alternatives to the Congress party in the states, led to a situation, where '*horse trading'* became relatively commoninun settling state governments. The brazen manner in which political parties traded MLAs led to the passage of the anti-defection law in 1985.

3.8 Merits & Demerits of Coalition Politics

3.8.1 ***Merits***

- *(i)* The coalition government addresses the regional disparity more than the single party rule.

- *(ii)* Coalition government is more democratic, and hence fairer, because it represents a much broader spectrum of public opinion than government by one party alone. In almost all coalitions, a majority of citizens voted for the parties which form the government and so their views and interests are represented in political decision making.

- *(iii)* Coalition government creates a more honest and dynamic political system, allowing voters a clearer choice at election time. It is also easier for parties to split, or new ones to be formed, as new political issues divide opinion, because new parties still have a chance of a share in political power.

- *(iv)* Coalitions provide good government because their decisions are made in the interests of a majority of the people. A coalition government better reflects the popular opinion of the electorate within a country.

- *(v)* Coalition government provides more continuity in administration. Amore consensual style of politics also allows for a more gradual and constructive shift of policy between administrations.

- *(vi)* Such government functions on principle of politics of consensus. Besides, states are given more powers, and the base of concept of federalism is strengthened.

- *(vii)* Government will be more consensus based: resulting policies will be broadly approved of for the benefit of the nation.

- *(vii)* Better representation of the electorate's wishes

- *(viii)* Better quality of policy: enhanced scrutiny and increased attention paid to each policy

- *(ix)* Increased continuity: election does not lead to dramatic overhaul which can produce fragmented rule

- *(x)* Yet instability apart, coalition governments have been effective in enhancing democratic legitimacy, representativeness, and national unity.

3.8.2 ***Demerits***

- *(i)* Coalition government is actually less democratic as the balance of power is inevitably held by the small parties who can barter their support for concessions from the main groups within the coalition.

- *(ii)* Coalition government is less transparent, Because a party has no real chance of forming a government alone, the manifestos they present to the public become irrelevant and often wildly unrealistic.

- *(iii)* Coalitions provide bad government because they are unable to take a long term view.

- *(iv)* Coalition governments are very unstable, often collapsing and reforming at frequent intervals – Italy, for example, averages more than one government per year since 1945. This greatly restricts the ability of governments to deal with major reforms and means that politicians seldom stay in any particular ministerial post for long enough to get to grips with its demands.

- *(v)* Coalition governments are definitely far less effective, not durable, and non-dependable as compared to the governments formed by any one party with a definite ideology and principles.

- *(vi)* In coalition governments, MLAs and MPs from all the parties are given portfolios/ministries and appointed as Ministers. These ministers are appointed on the recommendations of the parent party, without taking the qualification, character and criminal /clean record of the MLAs and MPs.

From above discussion it can be concluded that since India is a diverse country with different ethnic, linguistic, and religious communities, it also has diverse ideologies. Due to this, the benefit that a coalition has is that it leads to more consensus based politics and

reflects the popular opinion of the electorate. In order to have stable coalitions, it is necessary that political parties moderate their ideologies and programmes. They should be more open to take others point of view as well. They must accommodate each other's interests and concerns. In India, parties do not always agree on the correct path for government policy. Different parties have different interests and beliefs and it is difficult to sustain a consensus on issues when disagreement arises.

However, this is not to say that we have never had successful coalitions. Governments in West Bengal, Kerala, N.D.A. last ministry as well as present U.P.A. Government led by Congress (twice) at centre have been successful coalition.

3.9 Power Politics

3.9.1 *Power Politics in Ancient*

Book Five of the *Mahabharata*, the *Udyoga Parva* (Book of Effort), deals with negotiations between the *Kauravas* and *Pandavas*. After thirteen years of exile, it is time for the *Kauravas* to return Indraprastha to the *Pandavas*, as per the terms of the agreement during the gambling match. *Krishna* knows that the *Kauravas* will use every trick in the book not to part with the land. Still, efforts are made for a peaceful transition of power. As we know from the epic, these efforts fail to bear fruit. First, *Drupada's* messenger makes the request to the *Kauravas*. Then the *Kauravas* send *Sanjaya*. The *Pandavas* then send *Krishna*, who even tries compromise for the sake of peace. Finally, the *Kauravas* send *Uluka* to insult the *Pandavas*.

During the exchange of messages and negotiations, *Dhritarashtra* consults with wise men like *Vidura* and *Sanatasujata*. The elders *Bhisma* and *Drona* want peace. *Duryodhana*, with *Karna* by his side, wants war. *Krishna* tries to get *Karna* to the *Pandava* side to avoid war but *Karna* chooses his integrity to peace. *Satyaki* speaks of how negotiations never work from a position of weakness.

3.9.2 *Power Politics in Present : Sizing Them Up*

Each side measures the strengths and weaknesses of the other. Some warlords like *Balarama* do not fight for any side. Those like Krishna help both sides. Others like *Shalya*, though related to the *Pandavas*, are tricked into helping the *Kauravas*. Still others like *Yuyutsu* change sides and prefer to fight on the side of the *Kauravas*. There are long conversations on what is right, what should matter to kings, on the value of peace, and the importance of digging heels and not submitting. Only then, after these long discussions, is war finally declared. As we witness the electoral process in various state elections of India,

we realise how much *Udyoga Parva* happens in democracy. No, there is no war. But there is continuous negotiation for getting allies in order to grab power.

In a democracy, the party with the largest number of seats in the state assembly becomes the ruling party, for a stipulated period of time. Which means, every few years, we see a civilized, non-violent warfare called elections at the level of the country, state, city and village.

In other words, democracy creates a continuous low-grade Mahabharata where politicians are constantly fighting for power, striving to grab maximum number of seats. Theoretically, it is the will of the people manifesting.

However, everyone knows that votes can be bought. In case of the very poor, this is done by giving them gifts like television sets, or sewing machines, that they cannot afford to buy. Obligated, they repay their debt by voting for the gift-giver.

In the case of the not-so-poor, the vote can be bought by indulging their emotions, whipping up emotions, and pointing to an '*enemy*'. Others can be influenced by promising to solve a long, unresolved issue. Thus, advertising and marketing play a key role in garnering votes. Is it all about manipulation? For the sake of efficiency, people are seen not as individuals but as belonging to communities: religious, caste-based or linguistic groups. And so during *Udyoga Parva*, different needs of different groups are satisfied. In the process, the nation, state, city and village are torn between various divisive thoughts. This leaves a bad taste in the mouth; yet, we are told this is good for governance. The most complex *Udyoga Parva* does not involve voters but parties, as pre-electoral alliances are made to ensure victory.

So at one time, BJP would support local parties to defeat Congress. Now, Congress is taking support of local parties to defeat BJP. Everyone claims to be the wounded *Pandava*. The fight continues within the party when a leader dies and a new leader has to be elected. Much as they would deny it, most Indian political parties are feudal and prefer dynastic succession. Many leaders in India are seen as legitimate because they are sons and daughters of leaders; just as in Bollywood (or in any other profession) many actors get their foot in the door as their parents are superstars. Things get complicated when a leader dies with no children or a pre-determined legitimate heir. Then there is a scramble for power, as MPs and MLAs are asked to select a leader. Loyalty ensures a ministerial seat in the government and a ticket in the future election.

3.9.3 ***Power Politics and Welfare State***

But is this Raj Dharma? When the *Pandavas* and *Kauravas* are negotiating, *Krishna* wonders how many of them are interested in the welfare of those who live in Indraprastha and Hastinapur. Are they fighting for property or for serving the people? The cousins in the *Mahabharata* are so unlike *Rama* (in the Ramayana) whose decision always involved the welfare of Ayodhya.

In fact, governance of Ayodhya ends up taking a toll on his personal happiness. That's why *Rama Rajya* is hailed as the ideal state, not *Pandava Rajya*. Questions must be asked: How many politicians are willing to sacrifice their political careers for the benefit of the people? What comes first, their career or the country; their party or the country? How much of democracy is about beating the rival to power and how much is about governing the country? The *maha-rathis*, or commanders in the electoral battle, seem to have lost sight of the larger picture of serving the people as public servants. When the *sva-jiva*, self, becomes more important than *parajiva*, the other, we walk the path of *matsya- nyaya*, jungle law, which is essentially *adharma*.[3]

Power has to do with whatever decisions men make about the arrangements under which they live, and about the events which make up the history of their times. Events that are beyond human decision do happen; social arrangements do change without benefit of explicit decision. But in so far as such decisions are-made, the problem of who is involved in making them are the basic problem of power. In so far as they could be made but are not, the problem becomes who fails to make them?

In the modern world, we must bear in mind, power is often not so authoritative as it seemed to be in the medieval epoch; ideas which justify rulers no longer seem so necessary to their exercise of power. At least for many of the decisions of our time-especially those of an international sort-mass '*persuasion*' has not been '*necessary*', the fact is simply accomplished. Furthermore, such ideas as are available to the powerful are often neither taken up nor used by them.

Power institutionalizes itself in human affairs. We do not confront one another directly in power relations as do atoms in physical relations. On the whole, with the exception of certain wartime experiences, we confront each other symbolically; and more specifically politically. In brief, power translates itself into political activity, just as, at a more intimate level, power translates social interaction into group differentiation and rationalized authority.

[3] https://www.speakingtree.in/article/power-politics

Even in the midst of a totalitarian and world war, it might appear an exaggeration to conceive international relations in terms of power politics. Yet though no statesman more ruthlessly apply these principles to inter - state affairs than the dictators, the other members of the international society have to model their behavior on the same patterns, if only because they cannot avoid contact with the wholesale addicts to the rule of force. There are certainly differences in degree between the policies which states are free to adopt within such a system, but it can serve no good purpose to disguise or minimize the strength of the ultimate driving forces behind the present international society.

As ***Hitler*** clearly realizes, "*my great political opportunity lies in my deliberate use of power at a time when there are still illusions abroad as to the forces that mould history*".

In fact, one party dominance in Indian politics for the first two decades too proved detrimental to multi-level governance. The tendency to confuse the governmental affairs (which has to be non-partisan) with party affairs (which is by nature partisan) introduced Incongruities in the constitutional processes. The starkest example of it was the use of *Article 356* in a year of the inauguration of the Constitution to solve intra-party problems in Punjab.

4. SUMMARY

The Conclusion it can be said that coalition in so far as they are based on concrete programmes, and not on political opportunism and just for power, can greatly contribute to the smooth working and representative government in India. Political theorists need to develop new theories and qualities that are essentially required for the success of a Chief Minister or a Prime Minister in a coalition government. If coalitions to fulfill the promise inherent in them in the Indian situation the following conventions and practices should be accepted and respected by the coalition partners as well as the key constitutional functionaries : -

(i) Coalitions should normally be formed on the basis of common minimum programme.

(ii) While an effort on the part of each of the coalitional parties to expand its support base was understandable and could not be avoided altogether, it should not be their immediate and exclusive objective. It should also owe loyalty to the coalition and its agreed common programme. This would serve as a safeguard against possible misuse of situational discretion by the Governor and the Chief Minister.

(iii) Constitutional functionaries such as the President, the Prime Minister, the Governor and the Chief Minister as well as the Civil Service should not transgress or be denied their normal role just because the government happened to be a coalition.

(iv) Parties should ensure consultation and cooperation between the organizational and ministerial wings through coordination, committees or other similar devices.

(v) The Legislature should remain the forum for determining whether the coalition government still retained or had lost the confidence of the legislature.

(vi) The Chief Minister should normally belong to the largest party in the coalition.

To be sure, the leader of the coalition government has to mobilize support from constituent partners and at the same time should not fall a prey to the extreme designs of the bargaining forces in the coalition. From a lifeboat strategy, coalition politics has slipped to the level of a necessary evil. The presence of a plethora of parties and the extent of internal groupism within these parties destroy the element of solidarity of coalition governments. The principle of collective responsibility of the cabinet government is often violated.

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6. SELF – ASSESSMENT QUESTIONS

1. Explain the-theories and concepts associated with the formation and working of coalition governments.
2. What is meant by Coalition Government? Discuss the basic issues in the context of current political trends and developments in India.
3. "Coalition governments have become an inevitable feature of Indian politics. The increase in number of political parties makes government formation a difficult task." Comment with recent instances.

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(DDE – 2018) **LL.M – I**

INDIAN CONSTITUTIONAL LAW AND THE NEW CHALLENGES

Paper : II (102) DE **Writer: Prof. Sunil Deshta** *
Lesson No. : 4 **Updated by: Dr. Sudhir Kumar Vats****

PARLIAMENT AND STATE LEGISLATURE, ELECTIONS AND CORRUPT PRACTICES

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2. OBJECTIVE
3. PRESENTATION OF CONTENTS
- **3.1 Composition of Legislature**
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  - **3.4.4 Bar to Interference by Courts in Electoral Matters**

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3.5 Corrupt Practices in Elections

3.5.1 Bribery

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3.5.4 Promotion of Feeling of Enmity, Hatred etc.

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3.5.10 Booth Capturing

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3.5.12 Electoral Offences

3.5.13 Criminalization of Politics

3.5.14 Marketability and Defections

3.5.15 Communalism, Casteism and Mushrooming of Political Parties

3.6 Reforms Suggested by Election Commission

4. SUMMARY

5. SUGGESTED READINGS

6. SELF – ASSESSMENT QUESTIONS

1. INTRODUCTION

The history of nations reveals that the integrity of a modern State depends on the strength and efficiency with which it's Constitution is able to withstand diverse social, economic or political pressures generated by its vibrant and alive people. India has had one Constitution since 1950, and it has kept the nation united and strong by providing political and legal infrastructure for successfully dealing with the challenges which the nation had to face from time to time.

The Constitution of India is of federal nature. Under it a two-tier system of Government is established with Central Government at one level and state government at the other. The Union Legislature is known as Parliament. It consists of President and the two Houses of Parliament. They are Lok Sabha (the House of the People) and the Rajya Sabha (the Council of States). For every state there is a Legislature which consists of the Governor and in the States of Andhra Pradesh, Bihar, Madhya Pradesh, Tamil Nadu, Maharashtra, Karnataka and Uttar Pradesh two Houses and in other states one House. Where there are two

Houses of the Legislature of a State, one shall be known as Legislative Council and the other Legislative Assembly, and where there is only one House, it shall be known as the Legislative Assembly, The members of the Legislature are elected by the people.

Constitution provides for an independent and autonomous Election Commission to superintend, direct and control the electorates. The study highlights that goat of politicians is to win elections by any means and they do not hesitate to adopt corrupt practices in this regard. The nexus between politicians, bureaucrats and black marketers is prevalent In India.

2. OBJECTIVE

India is a democratic country which has a well-defined electoral system. The Parliamentary system holds elections which gives opportunity to citizens in the country to choose their representatives and thus contribute in the composition of the government. Thus, Constitution provides for an independent and autonomous Election Commission to superintend, direct and control the elections. Only a citizen of India is qualified to be chosen a member of House of Parliament. He should also possess such other qualifications as Parliament may by Law prescribe for this purpose, and should not suffer, from any disqualification prescribed either by the Constitution or a law made by Parliament.

But ironically, elections has brought out to fore many serious distortions that have crept in either due to loopholes in the election laws or due to the incapacity of system. There have been constant references to three MPs - Money Power, Muscle Power and Mafia Power and four Cs-Criminalization, communalism, corruption and casteism. They never even hesitate to adopt different types of corrupt practices for this purpose. Keeping this in view, the present lesson is written to highlight or apprise the readers with the following objectives; What is the composition of Rajya Sabha, Lok Sabha, Their utility, tenure, allocation, readjustment of seats, composition of State Legislature, Constitution of Election Commission, its function, system of adult suffrage, election laws, corrupt practices etc.

3. PRESENTATION OF CONTENTS

3.1 Composition of Legislature

In India the establishment of bicameral legislatures started under the *Government of India Act, 1919*, when the Central Legislature was converted from unicameral to bicameral. Under the *Government of India Act, 1909*, the Central Legislature consisted only of the Governor-General and one House, called the Legislative Council. In the Provinces also the legislatures had consisted of only single houses, called the Legislative Councils.

In 1921 came into existence a second House of Legislature at the Centre, called the Council of State, while the old Legislative Council reconstituted under the Act of 1919, was named as the Legislative Assembly. The questionnaire of 17 March, 1947 prepared by the Constitutional Advisor for the Union Constitution Committee called for suggestions on whether the Union Legislature should have a single chamber or two chambers. The Constitutional Advisor noted that second chambers were useful for various reasons such as representation of special interests or classes as in Ireland; as a check on hasty and ill-conceived legislation of the lower House as in France (forth Republic); and to provide equal representation to the different constituents units of a federation as in USA.

He also observed that there was opposition to the second chamber for the following reasons, *viz*., (i) they tend to be reactionary, over – conservative and check urgently needed but radical reforms, (ii) they may be instrumental in delaying legislation, (iii) they tend to be undemocratic, since it is very difficult to constitute a truly democratic second chamber on a different basis than the lower chamber, (iv) they are expensive to the country and politically backward countries also lack able statesman to man a second chamber properly. He noted that the UK, Australia, Canada, USA, Ireland and Switzerland all had bicameral legislatures.

K.M.Panikkar and *S.P. Mukherjee* favoured setting up a bicameral legislature *Gopalaswami Ayyangar* and *Alladi K.Ayyar* suggested that besides the two Houses, the Parliament should also include the President. The Drafting Committee redrafted the clause as *Article 66* of the Draft Constitutuion on 21 February, 1948 as follows :-

"*There shall be a Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People*". Draft *Article 66* came up before the Constituent Assembly on 3 January, 1949 and at the revision stage, the Article was numbered as *Article 79* of the Constitution.

India's Parliament is bicameral. The lower House is designated as the '*House of the People*' or Lok Sabha, and the Upper House as the '*Council of States'* or Rajya Sabha. The two Houses along with the President constitute Parliament.[1] All these three organs are essential to the process of legislation by Parliament. The President does not sit or participate in the deliberations in any House but he is a constituent part of Parliament in the sense that he has certain important functions to discharge in relation thereto, as for example, he summons the Houses, dissolves the Lok Sabha, prorogues the meetings of the Houses, gives assent to the Bills passed by the two Houses, etc.

[1] Article 79.

In England, Parliament consists of the Crown, the House of Commons and House of Lords. India thus follows the British Model in making the President, a counterpart of British crown, a constituent part of Parliament. In the United States, the Central Legislature, known as the Congress, consist of the Senate and the House of Representatives. Unlike India or England, the President is not regarded as a constituent part of the Congress because of the doctrine of separation of powers.

The two Houses of Parliament in India differ from each other in many respects. They are constituted on entirely different principles, and, from a functional point of view, they do not enjoy a co-equal status. Lok Sabha is a democratic chamber elected directly by the people on the basis of adult suffrage. It is thus designed to reflect the popular will and in this lies its strength. It is to the Lok Sabha that the Council of Ministers is responsible and it has the last word in such matters as taxation and expenditure of public money.

Rajya Sabha, on the other hand, is constituted by indirect elections. Constitutionally, the Council of Minister is not responsible to it. Because of these reasons, the role of this House in the country's affair is somewhat secondary to that of the Lok Sabha, and this is no in spite of the fact that there are a few powers in the area of Centre-State relations which can be exercised only by the Rajya Sabha and not by the Lok Sabha. Rajya Sabha is designed to fulfill a number of purposes. First, it has been envisaged as a forum to which reasoned and experienced public men might get access without undergoing the din and bustle of general election which is inevitable for finding a seat in the Lik Sabha. Second, Rajya Sabha serves as a debating chamber to hold dignified debates and acts as a revising chamber over the Lok Sabha which, being a popular chamber, may at times be swayed to act hastily under pressure of public opinion or in the heat of passions of the moment. The existence of two debating chambers means that all proposals and programmes of the government are discussed twice and that these will be adopted after mature and calm consideration, and thus precipitous action may be prevented. As a revising chamber, the Rajya Sabha may also help in improving bill passed by the Lok Sabha.

Last, the Rajya Sabha is designed to serve as a chamber where the states of the Union of India are represented as states in keeping with the federal principle. The House has therefore been given in keeping with the federal principle. The House has, therefore, been given some federal functions to discharge in its character of a House representing the states. Rajya Sabha has thus emerged as a forum where problems are discussed and considered from a national rather than a local plane.

3.1.1 Composition of the Council of States (Rajya Sabha)

The Rajya Sabha or the Council of States is the upper House of the Union Parliament. The maximum strength of Rajya Sabha has been fixed at 250 members. Of these, upto 238 members are the elected representatives of the States and the Union Territories and twelve members are nominated by the President from amongst those who have special knowledge or practical experience of such matters as literature, science, art and social services. The representatives of states are elected by the members of the Legislative Assemblies in accordance with the system of proportional representation by means of single transferable vote. The seats are allotted among the states as detailed in the Fourth Schedule to the Constitution. The Council of States is a permanent body, one, third of its members retiring every second year. Consequently, the term of a member of the Council of States is 6 years.

The Vice-President of India is the ex-officio Chairman of the Council of States. The Rajya Sabha shall also elect a member of the House to be a Deputy Chairman (*Article 89*). When the official of Chairman is vacant or he is acting as the Vice-President or discharging the function of President, his duties shall be performed by the Deputy Chairman. If the office of the Deputy Chairman is also vacant the duties shall be performed by such member of the Rajya Sabha as the President may appoint for that purpose. The Chairman presides over the sittings of the House and in his absence the Deputy Chairman presides. If both are absent then such person as may be determined by the rule of procedure of the Council and if no such person is present such other person may be determined by the Council shall act as Chairman (*Article 91*).

A Deputy Chairman shall vacate his office if he ceases to be a member of the Council. He may resign his office by writing to the Chairman. He may also be removed from his office by a resolution of the Council passed by a majority of all the then members present (*Article 90*). But such a resolution can only be moved by giving at least 14 days' notice. While a resolution for the removal of the Chairman (Vice-President) is under consideration, the Chairman, and while a resolution for the removal of the Deputy Chairman, the Deputy Chairman shall not preside. The Chairman shall have the right to speak and take part in the proceedings but shall have no right to vote on such resolution or on any other proceedings (*Article 92*).

3.1.2 Composition of the House of People (Lok Sabha)

The Lok Sabha is a popular House. Its members are directly elected by the people. The House of the people is the lower House of Parliament. The maximum number of its membership is fixed at 550 out of whom, (a) not more than 530 are elected by the votes in the states, (b) not more than 20 to represent the Union Territories (*Article 81*). Under *Article 331* the President may nominate not more than two members of the Anglo-Indian community if in his opinion that community is not adequately represented in the Lok Sabha. The representatives of states are elected directly by the people of the state on the basis of adult franchise. The representatives of the Union Territories shall be elected in the manner prescribed by Parliament by law.

Every citizen of India, male or female who is not less than 18 years of age and is not disqualified on the grounds of non-residence, unsoundness of mind, crime or corrupt or illegal practice, is entitled to vote at election of the Lok Sabha (*Article 326*). Seats in the House are allotted to each state in such a way that, as far as practicable, the ratio between the number of seats allotted to a State and its population is the same for all the States.[2]

This provision does not apply to a state having a population of less than six millions. After every census, a readjustment is made, by such authority and in such manner as Parliament may by law prescribe, in allocation of seats to the various states in the Lok Sabha as well as in the division of each state into territorial constituencies. Accordingly, the Parliament has enacted the *Delimitation Commission Act, 1972*, for this purpose. It is for Parliament to prescribe by law the manner in which members of the Lok Sabha are to be chosen from the Union Territories. Provision has been made for reservation of seats in the Lok Sabha for scheduled castes and scheduled tribes.

The Lok Sabha shall continue for five years from the commencement of its first session. The President may, however, dissolve it even earlier. But while a proclamation of emergency is in operation, the Parliament may extend the life of the House of People for one year at a time. The Lok Sabha, whose life has been so extended, cannot continue beyond a period of six months after the proclamation of emergency has ceases to operate [*Article 83 (2)*].

3.1.3 Qualifications for Parliamentary Membership

Only a citizen of India is qualified to be chosen a member of a House of Parliament. He should not be less than 30 years of age for Rajya Sabha, and 25 years for Lok Sabha. He

[2] Article 81 (2) (a) and Article 81 (3).

should make and subscribe to the prescribed oath or affirmation before a person authorized by the Election Commission for this purpose. He should also possess such other qualifications as Parliament may by law prescribe for this purpose, and should not suffer from any disqualification prescribed either by the Constitution or a law made by Parliament.

3.2 The State Legislature

Like the Central Government, a State Government also is of the parliamentary type and follows closely the model of the Central Government. Structurally the state government may be resolved into three institutional components: *viz*., the legislative, as represented by the State Legislature; the executive, as represented by the Governor and the Council of Ministers; and the judicial, as represented by the High Court and the subordinate courts. Generally speaking, the basic structure of the State Government follows closely the pattern of the Central Government, but, in the nature of things, there are some significant differences as well.

Article 168 makes provision in respect of the Constitution of Legislatures in States. It provides that for every State, there shall be a legislature which shall consist of the Governor and in the State of Bihar, Maharashtra, Karnataka and Uttar Pradesh, two Houses (i.e. Legislative Assembly and Legislative Council) and in other states, one House (i.e. Legislative Assembly).

Article 168(2) makes it clear that were there are two Houses of the State Legislature, one shall be known as the Legislative Council and the other as the Legislative Assembly and where there is only one House, it shall be known as the Legislative Assembly.

3.2.1 The Composition of the Houses

The Constitution provides for a Legislature for every state. The legislature of every state consists of the Governor and one or two Houses. The legislatures in the state are either bicameral (consisting of two Houses) or unicameral (consisting of one House). The lower House is always known as the Legislative Assembly (*Vidhan Sabha*) and the Upper House wherever it exists as the Legislative Council (*Vidhan Parishad*).

At present only five states have a bicameral legislature- Bihar, Jammu & Kashmir, Karnataka, Maharashtra and Uttar Pradesh. All other states have only one house. The Legislative Councils can be created or abolished in a state by the Parliament under *Article 169*. by a simple procedure. If the Legislative Assembly of the state passes a resolution by a majority of the total membership of the Assembly and by a majority of not less than two-third of the members present and voting, the Parliament may approve the resolution by a simple majority.

3.2.2 Legislative Council

The Legislative Council commonly known as *Vidhan Parishad*, is the Upper House of the State Legislature. *Article 171(1)* provides that the total number of members in the Legislative Council of a State shall not exceed one-third of the total number of members in the Legislative Assembly of the State. But the total number of members shall in no case be less than 40. The Constitution thus fixes the minimum and the maximum limits regarding the strength of a Legislative Council. The actual strength of each House is however fixed by Parliament. Parliament may by law provide for the composition of the Legislative Council until Parliament passes such law Council shall be constituted as provided in Clause (3) of *Article 171*.

Of the total number of members of the Legislative Council of a state:-

- *(a)* as nearly as may be, one-third shall be elected by electorates consisting of members of Municipalities, district boards and such other local authorities in the state as Parliament may by law specify, (local bodies constituencies);

- *(b)* as nearly as may be, one-twelfth shall be elected by electorates consisting of persons residing in the States who have been for at least three years graduates of any University in India or have been for at least three years graduates of any University in India or have been for at least three years in possession of, qualifications prescribed by Parliament by law as equivalent to that of a graduate of a University, (Registered Graduates Constituencies).

- *(c)* as nearly as may be, one twelfth shall be elected electorate consisting of persons who have been for at least three years engaged in teaching in the educational institutions within the States not below secondary level (Teachers Constituencies),

- *(d)* as nearly as may be, one-third shall be elected by the members of the legislative Assembly of the State from amongst persons who are not members of the Assembly;

- *(e)* the remainder (nearly one-sixth) shall be nominated by the Governor from amongst persons having special knowledge or practical experience in respect of literature, science, art, co-operative movement and social service.

The members of a legislative council under heads (a), (b) arid (c) are chosen in such territorial constituencies as Parliament by law may prescribe. These members as well as the members under head (d) are elected in accordance with the system of prepositional representation by means of the single transferable vote.

The legislative council is not subject to dissolution but after every two years 1/3rd of its members retire, like the Rajya Sabha in the centre it is a permanent body.

3.2.3 Legislative Assembly (*Vldhan Sabha*)

The Legislative Assembly is the popular chamber, elected directly by the people in the state on the basis of adult franchise once in five years. The House may be dissolved earlier. In an emergency, its life may be extended by Parliament by taw. Every citizen of India, not less than 21 years of age and not suffering from any disqualifications is eligible to be registered as a voter at an election for this House. The minimum number of seats of the Legislative Assembly is fixed at 60 and the maximum number is fixed at 500. The representation in the House is on basis of population in respect of each territorial constituency in the State. The population is to be ascertained at the last preceding census. After the completion of each census, the number of seats in legislative assembly of each state and the division of each state into territorial constituencies is to be readjustment by such authority and in such manner as Parliament by taw determine.

Provisions have been made for reservation of seats in various Legislative Assemblies for scheduled castes and the scheduled tribes; and as regards the Anglo-Indian community, the Governor has the authority to nominate one member of the community to the legislature if he is of the opinion that the community needs representation in the Assembly and is not adequately represented therein.

3.2.4 Speaker and Deputy Speaker

A State Legislative Assembly has a speaker and a Deputy Speaker. Both are chosen by the House from amongst its members. The speaker is the Chief Presiding Officer of the Legislative Assembly of a State. The members of the Assembly elect him from their own members.

The Assembly elects its Deputy Speaker also from its own members (*Article 178*). The Deputy Speaker performs the duties of the speaker when the speaker is absent or while the office of the speaker is vacant. But if the office of the Deputy Speaker is also vacant, the duties of the Speaker are performed by such member of the Assembly as the Government may appoint for the purpose.

Both Speaker and Deputy Speaker vacate their offices when they cease to be members of the Assembly. They may also resign from their offices. They cannot be removed from their offices, by the resolution of the Assembly passed by a majority of all the members of the Assembly, [(*Article 180 (1)*]. For moving such a resolution fourteen days' notice is required

(*Article 179*). The Speaker does not vacate his office on the dissolution of the Assembly. He continues in office until a new Speaker is elected before the new House meets.

3.2.5 Qualifications of Membership

A person to be qualified to be chosen as a member in the State Legislature :-

- *(a)* must be a citizen of India and makes and subscribes before some persons authorized by the Election Commission on oath or affirmation prescribed in the 3rd Schedule;

- *(b)* must not be less than 25 years of age in case of Legislative Assembly and not less than 30 years in case of the Legislative Council;

- *(c)* must possess such other qualifications as may be prescribed by Parliament by law (*Article 173*).

3.2.6 Disqualifications for Membership

A person is disqualified for being chosen as a member of the legislature of a State :-

- *(a)* If he holds any office of profit under the Central or State government; or
- *(b)* If he is of unsound mind;
- *(c)* If he is an undischarged insolvent;
- *(d)* If he is not a citizen of India or has voluntarily acquired the citizenship of a foreign state or is under any acknowledgement of allegiance or adherence of a foreign state;
- *(e)* If he is so disqualified by or under any law of Parliament (*Article 191*).

3.2.7 Chairman and Deputy Chairman of Legislative Council

The Legislative Council of each State elects its Chairman and Deputy Chairman from among its own members. Like the Vice-President in the Rajya Sabha, the Governor is not the *ex-officio* Chairman of the Legislative Council.

Like the Speaker and Deputy Speaker, the Chairman and Deputy Chairman may resign their office, vacate their office when they cease to be Member of the Council and may be removed from their offices. Provisions regarding their powers and functions are similar to those of the Council of States in the Centre.

3.3 Role of the Legislature

Evaluation of the role of any constitutional limb has necessarily to be done in the light of the function that it was intended to perform as also of whether the composition of that limit was such as to enable it to do so. This is equally true of the institutions of the legislatures in India, technically called upper and lower Houses. In India the establishment of bicameral legislatures started under the *Government of India Act, 1919*, when the Central Legislature was converted from unicameral to bicameral.

Under the *Government of India Act, 1909*, the Central Legislature consisted only of the Governor-General and one House, called the Legislative Council. In the provinces also the legislatures had consisted of only single Houses, called the legislative councils. In 1921 came into existence a second House of Legislature at the Centre called the Council of State, while the old legislative Council reconstituted under the Act of 1919, was named as the Legislative Assembly.

Legislation which includes the imposing of taxes and appropriation of moneys is one of the main functions of Parliament. The legislative proposal is initiated in either of the House in the form of a Bill. The detailed procedure relating to the passage of Bill in House is laid down in the rules of procedure which each House has made. Clauses (1) and (2) of *Article 107* indicate the respective roles of two Houses in law-making process. The Constitution does not confer the same powers on both Houses. The powers of the Council of States or the Rajya Sabha are restricted in two ways. *Firstly*, it has no power to initiate money or financial bills and *secondly*, its consent is dispensed with the case of Money Bills. Other Bills, even if not consented to by the Council of States, may become laws if passed at a joint sitting in which the members of the House of People numerically dominate.

Clauses (3), (4) and (5) of *Article 107* describe the extent to which the pending legislative business lapses by prorogation of the Houses, or dissolution of the House of People. Prorogation brings to an end not the existence, but a session of Parliament. Prorogation has no effect on Bills pending in Parliament. They do not lapse and may be continued in the next session. A Bill remains pending even when it is referred to a Select Committee and need not be reintroduced after the Select Committee has submitted its report.

3.4 Elections

India has constitutional democracy with parliamentary system of government and at the heart of the system is a commitment to hold regular, free and fair elections. These elections determine the composition of the government, the membership of two Houses of Parliament, the State and Union Territory legislative assemblies, and the Presidency and Vice-Presidency. What for all the nations in the world were, are and will be striving for? It is for the development and welfare of its people. And who are the one's laying building blocks of development? It is our politicians - the representatives - the law makers and the people. And it is the Election Commission which is vested under *Article 324* of Indian Constitution with the duty of conducting free and fair elections in the country. Frankly admitting that mere conducting of elections periodically does not prove that we are republic and have an effective

democracy. It is the way elections are held, the quality of people elected, their performances that make our democracy effective.

In current scenario, the widespread disillusion in our political system is well visible. The poverty, unemployment, illiteracy level indicate the inefficiency of our political system. Even after 70 years of our independence, our people suffer from lack of basic amenities in life. If a law is passed as to those with criminal and corruption charges are to be disqualified from 93 MPs and 10 Ministers in Man Mohan Singh's ministry stand disqualified. We cannot put entire blame for current state of affairs on our political system because it is not functioning in vacuum. The society has share in the blame. The behaviour of our political system is its response to society and to reform our political system, we need to reform society and its sub-systems. This is where electoral reform becomes important.

Part-XV of the Constitution of India entitled as '*Elections*' constitutes a code in inself, providing the groundwork for the enactment of appropriate laws and the setting up of a suitable machinery for the conduct of elections. The Committee of the Constituent Assembly on fundamental rights had recommended that the independence of election should be regarded as a fundamental right to every citizen. The Assembly agreed with the view of the Committee that the question of fair elections was a matter of great importance but it was not in favour of embodying a right to that effect in the Chapter on the fundamental rights. In pursuance of the decision of the Assembly, the Drafting Committee removed the matter from the category of fundamental rights and put it in a separate part, which finally became Part XV of the Constitution. The draft of the Constitution was settled by the Drafting Committee on February 21, 1948 provided for an Election Commission for the Centre and each for the States. Considering the reports of the Union Constitution Committee and Provincial Constitution Committee, the Constituent Assembly had taken the decision to establish single election machinery in the country.

3.4.1 Election Commission (Article 324)

Article 324 provides for the appointment of an Election Commission to Superintend, direct and control elections. The Election Commission is an independent autonomous body, and the Constitution ensures, as in the case of the Supreme Court and the High Courts, that it may be able to function freely without any Executive interference. The text of *Article 324* is as under :-

"*324 Superintendence, direction and control of elections to be vested in an Election Commission -*

(1) The Superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution.[3] [***] shall be vested in a Commission (referred to in this Constitution as the Election Commission).

(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.

(3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.

(4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1).

(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of the office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine:

Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment;

Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner."

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[3] The word '*including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to the Legislatures of States*' omitted by the Constitution (Nineteenth Amendment) Act, 1966, S.2.

The President, or the Governor[4] [***] of a State, shall, when so requested by the Election Commission, make available to the Election.

Article 324 has to be read in the light of the Constitutional Scheme and the *Representation of the People Acts of 1950* and *1951*. Although it operates in areas left unoccupied by legislation, and the words '*superintendence, direction and control*' as well as '*conduct of all elections*' are in the broadest terms, the commission armed by *Article 324*, cannot defy the law, nor can it act arbitrarily. Its orders are subject to review. Two limitations are at least laid down on the exercise of plenary power of the Election Commissioner. *First,* when Parliament or any State Legislature has made a valid law, relating to or in connection with elections, the Commission shall act in conformity with such law. But where such a law is silent, *Article 324* is a reservoir of power to act for the avowed purpose of pushing forward a free and fair election with expedition.[5]

In ***Union of India v. Association for Democratic Reforms***,[6] the apex Court upheld the directions of the Delhi High Court to the Election Commission that to enable the voter to make the right choice the Commission must secure information from every candidate to Lok Sabha or Legislative Assembly regarding pendency of criminal cases, financial assets as candidate, his/her spouse and dependents and his/her competence and suitability as candidate and the political party fielding him/her. The court justified these directions as necessary element of free and fair election falling within the competence of Commission but not covered by any existing legislation. Parliament later incorporated these directions with modification in the *Representation of the People Act, 1951*.[7]

The Court invalidated the modified directions in ***People's Union for Civil Liberties v. Union of India***,[8] as violative of *Article 19 (1) (a)* - right to know the antecedents of a candidate. Thus, the Court's directions remain operative and are implemented by the Election Commission.

Secondly, the Commission shall conform to the rule of law, act *bona fide* and be amenable to the norms of natural justice in so far as conformance to such canons can

[4] The word 'or Rajpramukh' omitted by the Constitution (Seventh Amendment) Act, 1956, S.29 and Schedule.
[5] Mahendra P. Singh, *V.N.Shukla's Constitution of India*, 911 (2008).
[6] 2002 (5) SCC 294.
[7] Act 72 of 2002.
[8] (2003) 4 SC 399.

reasonably and realistically be required of it. Here, a question about the jurisdiction of Election Commission arose in ***Mohinder Singh Gill v. Chief Election Commissioner***.[9]

In the general elections to Parliament in 1977, the Election Commission cancelled the entire poll as a result of mob violence at the time of counting of votes, and ordered a repoll for the entire constituency. The Supreme Court held that such an order under compulsion of circumstances can be saved under *Article 324*. If hearing has been given to the candidates before taking the decision, it is sufficient to meet the ends of natural justice as their interest and claims are not indifferent but immediate, and it is not necessary that notice should be given to all members of the public if the Election Commission is satisfied that the procedure adopted has gone astray on a wholesale basis. The application of the rules of natural justice depends on circumstances and the matter is incapable of generalization.

Following the law laid down in Gill and some earlier cases the Court in ***A.C. Jose v. Slvan Pillar***,[10] held that use of electronic machines for casting of votes in an Assembly election on the direction of the Election Commission but in contravention of the rules framed under the *Representation of the People Act, 1951* (which contemplated only manual voting), vitiated the election and a defeated candidate could challenge the election on the ground of illegality. The Court made it very clear that the words '*superintendence, direction arid control*' are meant to supplement and not supplant the law and therefore cannot be availed of against a validly made law of Parliament or State Legislature concerning election matters. Later the use of electronic voting machines was authorized by making required changes in the rules. They are now used almost exclusively.

The power of superintendence, direction and control of elections includes the power to postpone the elections in any State or part of it if because of the disturbed conditions in the opinion of the Commission it is not possible to hold elections in that State or any part of it.[11] The exercise of this power is, however, subject to judicial review.[12] Subject to judicial review this power also includes the power to regulate the use of loudspeakers for electioneering.[13] This power read with clause (6) of *Article 324* includes the power to requisition Union and State government staff for conduct of election. But it does not include the power to requisition the staff of non-government bodies such as the State Bank of India or the Life

[9] (1978) 1 SCC 405; AIR 1978 SC 851.
[10] (1984) 2 SCC 656; AIR 1984 SC 921.
[11] Digvijay Mote v. Union of India, (1993) 4 SCC 175.
[12] *Ibid.*
[13] *Election Commission of India v. All India Anna DMK,* 1994 Supp. (2) SCC 689.

Insurance Corporation of India, unless such power is specifically conferred by a law made under *Article 327* or *Article 328* or both.[14]

In ***Gujarat Assembly Election Matter***, *In re*,[15] emphasizing that holding of periodic, free and fair elections by the Election Commission is part of the basic structure of the Constitution, the Court held that fixing of schedule for elections, is in the exclusive domain of the Election Commission and not subject to any law of Parliament. Parliament may make law for the conduct of elections but conducting of elections is the sole responsibility of the Commission. Abuse of power by the Commission is, however, subject to judicial review.

In addition to the Chief Election Commissioner, Election Commissioners may be appointed by the President under clause (2). The powers of the President to create the posts of Election Commissioners are unfettered. To have a multi-member Election Commission, President promulgated. The *Chief Election Commissioner and other, Election Commissions (Condition of Service) Amendment Ordinance, 1993* to amend the *Chief Election Commissioner and other Election Commissioners (Condition of Service) Act, 1991*. The Ordinance was later replaced by the Act passed by Parliament in 1994, which came into force on January 1994. The Ordinance has amended the law and equated the two Election Commissioners with the Chief Election Commissioner in respect of salary and other terms of service.

The incumbents to these posts cannot question the President's action if he decides to abolish them. The Election Commissioners do not hold the same position as does the Chief Election Commissioner. The latter is the creation of the Constitution and can be removed only in the manner provided in the proviso to clause (5) while the creation of number of former is determined by the President during whose pleasure they hold their office subject to any law made by Parliament in this regard.[16]

Later in ***T.N, Seshan v. Union of India***,[17] the Supreme Court has clarified that irrespective of these differences, the Chief Election Commissioner is only one of the members of the multi-member Election Commission. He, of course, presides over its meetings but is merely first among equals. Therefore, a law which lays down the procedure of the multi-member of Commission requiring it to take decisions unanimously or by majority does not conflict with the power or position of the Chief Election Commissioner.

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[14] *Election Commission of India v. State Bank of India*, 1995 Supp. (2) SCC 13; AIR 1995 SC 1078.

[15] (2002) 8 SCC 237.

[16] *S.S.Dhanoa v. Union of India*, (1991) 3 SCC 567; AIR 1991 SC 1745.

[17] (1995) 4 SCC 611.

The Chief Election Commissioner also does not hold the position of status of a judge of the Supreme Court merely because some of the provisions relating to the judge of the Supreme Court also apply to the Chief Election Commissioner. These clarifications were given in the context of certain actions and method of functioning of the then Chief Election Commissioner, T.N. Seshan, which required the creation of a three-member Commission. Seshan's overall demeanour led the Court to make these clarifications which in some ways have lowered the position of the Chief Election Commissioner as well as of the Commission.

This case is an example of a bad case leading to the laying down of bad law. It gives the impression that the independence of the Commission can be subjected to the will of the Government by appointing any number of Election Commissioners of its choice, who may constitute majority in the Commission. It may be hoped that the Court will come to the rescue of the Commission if it actually happens but the possibility of misuse of power has been created. In a further clarification, involving again the then Chief Election Commissioner, T.N. Seshan, the Court also ruled that just like the Supreme Court and the High Courts, a multi-member Election Commission could also sit in benches of single, double or multi-members.[18]

In that particular case which involved exercise of judicial power by the Commission, where it had to decide about the disqualification of a member of the Legislative Assembly in accordance, with *Article 192(2)*, the Court devised a procedure which involved the participation of almost the entire Commission. But it is doubtful whether the Court's comparison of the Commission, which primarily performs administrative functions, with the Supreme Court and the High Courts, which perform judicial functions, was appropriate.

Moreover, in the Courts every judge has the same amount of independence and security of tenure as the Chief Justice. But that is not the case with the Election Commission where only the Chief Election Commissioner has such security but not the other Election Commissioners. It may be hoped that only to meet the kind of situation that had arisen in that case the Commission may sit in benches; otherwise it must sit as one body except where it is authorized to sit in benches by the Commission itself and not by any outside authority.

Article 325

No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex - There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the

[18] *Election Commissioner of India v. Dr. Subramaniam Swamy*, (1996) 4 SCC 104.

House or either House of the legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.

Article 325 is of crucial significance. It ensures political equality to all citizens of India. There is no scope for communal electoral rolls or rolls that discriminate on the basis of religion, race, caste or sex. Disregarding these differences, all are equally entitled to be included in the same electoral role. Emphasizing its importance the Court has held that it is crucial for maintaining the secular character of the Constitution. Any contravention of this provision shall have adverse impact on the secular character of the Republic which is a basic feature of the Constitution.[19]

Section 22 of the *Representation of the People Act, 1950* empowers the Electoral Registration Officer of a constituency to delete the name of a person from the Electoral Roll on certain grounds. It has been held that such deletion must be done only after giving to the person concerned meaningful opportunity of hearing and after following requisite procedure.[20]

3.4.2 Election to the House of the People and to the Legislative Assemblies of States to be on the basis of Adult Suffrage (Article 326)

The elections to the Parliament and State Legislatures are to be held on the basis of adult suffrage. Every person who is a citizen and who is not less than 18 years of age is not otherwise disqualified under the Constitution or any law (*Representation of People Act, 1950*) made by the Legislature on the ground of non-residence, unsoundness of mind, crime, or illegal practice, has a right to be registered as a voter.

3.4.3 Power of Parliament and State Legislatures with Regard to Election Law (Article 327 and 328)

Article 327 empowers Parliament to make provisions with respect to all matters relating to or in connection with election to Parliament and State Legislature, the preparation of electoral rolls, the delimitation of constituencies and all other connected matters. In exercise of the power conferred by *Article 327*, Parliament has enacted the *Representation of People Acts, 1950* and *1951*; the *Presidential and Vice-Presidential Elections Act, 1952*; and the *Delimitation Commission Act, 1952*.

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[19] *R.C.Poudyal v. Union of India*, 1994 Supp. (1) SCC 324 at 410; AIR 1993 SC 1804.

[20] *Lal Babu Hassain v. Electoral Registration Officer*, AIR 1995 SC 1189.

Article 328 confers a similar power on State Legislatures. The delimitation of constituencies as enshrined in *Articles 82* and *170* is a necessary process, as important as the elections themselves. The preamble to the Delimitation Commission Act, 1962 shows that it is an Act to provide for the readjustment of the allocation of seats in the House of the People of the States, the total number of seats in the Legislative Assembly of each State, the division of each State into territorial constituencies for elections to the House of the People and Legislative Assemblies of the States and for matters connected therewith.

Article 82 only foreshadows that readjustments may be necessary upon completion of each census, but *Article 327* give power to Parliament to make elaborate provision for such readjustment including delimitation of constituencies and all other matters connected therewith as also elections to either House of Parliament.[21]

3.4.4 Article 329 - Bar to Interference by Courts in Electoral Matters[22] - (Notwithstanding anything in this Constitution[23] [* * *]

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under *Article 327* or *Article 328*, shall not be called in question in any Court;

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

Clause (a) enacts that law relating to delimitation of constituencies or the allotment of seats cannot be challenged in a court of law.

Clause (b) excludes the jurisdiction of the courts to entertain any matter relating to election disputes. Elections can be challenged only in the manner laid down in law made by the appropriate legislature, in pursuance of clause (b) of *Article 329*, Parliament has enacted the *Representation of the People Act, 1951*. Part VI of the Act deals with election disputes. Election petitions are triable by High Courts, as provide in the *Representation of the People (Amendment) Act, 1986*. No other court may decide election disputes.

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[21] *Meghraj Kothari v. Delimitation Commission*, AIR 1987 SC 669.

[22] Subs, by the Constitution (Tnirty-ninth Amendment) Act, 1975, S. 3, (w.e.f. 10.8 1975).

[23] The words, “but subject to the provisions of Article 329-A” added by the Constitution (Thirty-ninth Amendment) Act, 1975, S.3 omitted by the Constitution (Forth-fourth Amendment) Act, 1978, S.35 (w.e.f. 20.6.1979).

The word '*election*' has been used in this article as well as in other provisions of this Part of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the Legislature.[24] Rejection or acceptance of nomination paper is included in the term '*election*'.[25] But preparation of electoral roll is not '*election*' within the meaning of Article *329(b).*[26]

Article 329(b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election up to its culmination on the formal declaration of result. The constitutional provisions and the Representation of the People Act clearly express the rule that there is a remedy for every wrong done during the election process although it is postponed to the post-election stage. The sole remedy for an aggrieved party is an election petition. The reason for postponement of election petition is that elections should not unduly be protracted or obstructed. Anything done towards the completion of the election proceedings, such as decision by a returning officer on objections made to any nomination cannot be described as questioning the election.

So also the direction for cancellation integrated with the repoll cannot be considered under *Article 226* because the *prima facie* purpose of a repoll is to restore a detailed poll process and to complete it through the process of repoll. This conclusion is fortified by reading *Section 100* of the *Representation of the People Act, 1951* so as to give a substantial assurance of justice and as covering all conceivable grievances regarding an election.[27]

In ***Inderjlt Barua v. Election Commission of India***,[28] the validity of file Assam Legislative Assembly elections held in February 1983 was challenged generally on the ground of defective electoral rolls before the High Court under *Article 226*. On transfer of these petitions to the Supreme Court it was held that firstly preparation of electoral rolls is not part of '*election*', secondly, no election can be challenged on the ground of defect in electoral rolls and thirdly, an election can be challenged only by an election petition as required by *Article 329(b)* even if election not to a particular constituency or seat but to ail constituencies or seats generally is being challenged.

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[24] *N.P. Ponauswami v. Returning Officer*, AIR 1952 SC 64: 1952 SCR 218.

[25] *N.P. Ponauswami v. Returning Officer*, AIR 1952 SC 64: 1952 SCR 218.

[26] *Inderjit Bania v. Election Commission of India*, (1985) 1 SCC 21: AIR 1984 SC 1911; *Inderjit Bania v. Election Commission of India*, (1985) 4 SCC 722; AIR 1986 SC 103.

[27] *Mohinder Singh Gill v. Chief Election Commissioner*, (l978) 1 SCC 405: AIR 1978 SC 851; *Election Commission of India v. Shivaji*, (1988) 1 SCC 277: AIR 1988 SC 61.

[28] (1985) 1 SCC 21: AIR 1984 SC 1911*; lndrajit Barua v. Election Commission of India*, (1985) 4 SCC 722 : AIR 1986 SC 103; also see *Krishna Ballabh Prasad Singh v. Sub-Divl. Officer, Hilsa*, (1984) 4 SCC 194: AIR 1985 SC 1746.

In ***Hart Shankar Jain v. Sonia Gandhi***,[29] the Supreme Court has filled that In spite of a person having been enrolled in the voters list, the Question whether he is citizen of India and hence qualified for, or disqualified from, contesting an election, can be raised before and tried by the High Court hearing an election petition.

As regards to the *locus standi* to file an election petition, the Allahabad High Court in ***Harikrishan Lal v. Atat Blharl Bajpai***,[30] ruled that only a duly nominated candidate could file the petition. By mere filing nomination paper, a person does not become '*duly nominated candidate*'. Besides he is required by the Commission to file certain affidavits. The word '*candidate*' does not include a candidate who had withdrawn his candidature.[31]

Any challenge to an election, once the election is over, can be taken by an election petition, filed under the *Representation of People Act, 1951* and not by way of a writ petition.[32]

The Election Commission has taken several new initiatives in the recent past. Notable among these are, a scheme for use of State owned Electronic Media for broadcast/telecast by political parties, checking criminalization of politics, computerization of electoral rolls, providing electors with identity cards, simplifying the procedure for maintenance of accounts and filling of the same by the candidates and a variety of measures for strict compliance of Model Code of Conduct, for providing a level playing field to contestants during the elections.[33]

3.5 Corrupt Practices in Elections

India is a Democratic Republic. It has struggled against several odds and still survived on democratic path even with volumes of illiteracy, poverty, linguistic and cultural diversities. Parliamentary form of government is the first pillar of democracy in our country. People of India by exercise of their franchise, participate in the form of government Free and fair elections are a basic postulate of democratic form of government. They elect members for their law-making bodies at the Centre as well as States. These elections determine the composition of the government, the membership of the two houses of Parliament, the state and union territory, legislative assemblies, and the Presidency and Vice-Presidency. It is a truism that free and fair elections are essential in a healthy democracy. It is an essential

[29] AIR 2001 SC 3689.
[30] AIR 2003 All. 128.
[31] *Sulekha Ibrahim v. George Thomas*, AIR 2003 NOC 136 (Ker.).
[32] *N.C.Patel v. State of Gujrat*, AIR 2007 (NOC) 1348 (Guj.).
[33] http;//www,eci.gov.in. visited on 20.10.2011.

condition for the success of democracy that people maintain their allegiance towards the democratic institutions based on rule of law. The more the elections are free and fair, the stronger the allegiance the people will have towards democratic institutions. Contrary to this, if the elections are not free and fair, the people will not have faith in democracy.[34]

The past experience with successive elections at various levels has highlighted that generally people are able to deliver electoral verdict in a democratic way. In fact, our experience with elections has brought out to fore many serious distortions that have crept in either due to loopholes in the electoral laws or due to the incapacity of system to punish deviant and in many way unacceptable behaviour. There have been constant references to three MPs - Money Power, Muscle Power and Mafia Power and four Cs - Criminalization, Communalism, Corruption and Castetism. Some politicians take support of criminals because they lack faith in themselves and feet that they would not be able to win elections from their constituency without the help of muscleman. They spend huge sum of money and have been trying to come to power by hook or crook, believing that majority vote can only be won through corrupt means. Purity and sanctity of electoral process, sine qua non for a sound system of governance appears to have become a forgotten thing in view of a large number of criminals in the supreme legislative bodies at central and state level. *Shri G.V.C. Krishnamurthy*, the Election Commissioner (as he then was) has pointed out that almost forty members facing criminal charges were the members of the Eleventh Lok Sabha and seven hundred members of similar background were in the State legislatures.[35]

The painful fact is that today constitutional morality or ethics has become irrelevant. Corruption is the pervasive force in our political life and its works manifestation is the decline of standard of parliamentary Institutions. There are political parties having caste and communal base and cadres who have been trained in some particular ideology. They operate with money which comes from smuggling, narcotic trade, Hawala transactions and scams. These elements are being hired to do rigging and booth capturing in elections, or spreading violence and terrorize the voters.[36]

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[34] Sher Singh, Election and Electoral Reform in S.L. Shakhdar (ed.), The Constitution and the Parliament in India, 639-640 (1976).

[35] Rabi Ray, Electoral Reforms : Need of the Hour, 13 Politics India 7 at 8 (1998).

[36] Anand Ballabh Kafaltiya, Democracy and Election Law, 46 (2006).

Similarly in a general election, *T.N. Seshan*, the Chief Election Commissioner (as he then was) countermanded polls in five parliamentary and fifteen assembly constituencies in Uttar Pradesh and Bihar because of booth capturing violence,[37] It is also true that Bihar, Uttar Pradesh and Andhra Pradesh have been notorious for electoral malpractices like rigging and booth capturing.[38] In order to highlight the derailment of democratic polity train G.R.S. Rao observes[39] :

> *"Hundreds of criminal groups with an average strength of 500 each, some of them on bail, lakhs of licensed and equally daunting unlicensed and indigenous weapons apart from vast quantities of ammunition and bombs constitute on integral part of the election scenario in states like UP. and Bihar in particular and others In general. Killing of party workers and candidates has become common place, making it look like our internal threats to democracy as far more deadly than the external".*

He further points out that of the 14,000 candidates in one general election as many as 1500 candidates had a record of violent crimes, such as, murder, rape, decoity, robbery or extortion. The two states, U.P. and Bihar accounted for 870 candidates with such a criminal record.[40]

Dinesh Goswami Committee (1990) suggested that legislative measures must be taken to check booth capturing, rigging and intimidation of voters. Further, *N.N. Vohra Committee (1995)* gave its report which reveals that there has been rapid spread and growth of criminal gangs, drug mafias, smuggling gangs and economic lobbies in the country which have over the years, developed an extensive network of contacts with bureaucrats, government functionaries at the local levels, politicians and mafia persons. The cost of contesting elections has thrown the politicians into the lap of the bad elements. Mafia is running a parallel government.

Further, *Inderjeet Gupta Committee* was formed by the United Front Government and it submitted its report in 1998. The main recommendations of the committee were: (i) elections should be made free from the influence of criminals and use of money and muscle power should be checked; (ii) restrictions should be imposed on wall writings and display of banners and reasonable restraint should be fixed for taking out processions and holding of

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[37] Meant Roy, Chief EJectioo.Ckmnnuaioner's Controversial Role in Election. JCPs, 1991, Vol. 25, p. 72.
[38] *Id.,* at 74.
[39] G.R.S. Rao, Electoral Reforms: Touchstone of the Bask Process of Power, 3 Politics India, 18 at 20(1998).
[40] *Id*. at 20-21; Nearly 700 out of4072 were involved in crimes and trial pending against them in 25 States and Union Territories.

public meetings; (iii) all donations from Rs. 10,000/- upwards should be accepted by cheques or drafts and the names of the donors be disclosed: and (iv) political parties must file a return of their income and expenditure after every general election to the Election Commission.

In its 170th Report, the Law Commission of India recommended that in electoral offences and certain other serious offences framing of charge by the Court should itself be a ground of disqualification in addition to conviction.[41] The Commission also noticed[42] :-

> *"There have been several instances of persons charged with serious and heinous crimes like murder, rape, dacoity etc. contesting election pending their trial and even getting elected in a large number of cases. This leads to a very undesirable and embarrassing situation of law breakers becoming law makers and moving around under police protection".*

The future of democracy and the destiny of our country lie in the way we elect our political leaders. If democracy is to be accepted as the form of government of the people, for the people, by the people, it will only be possible when the electorates are given free hand to exercise their voting rights without coercion, intimidation and corrupt practices of vote bank politics. The role of the electorates in electoral reform is paramount and no amount of legislation in electoral reforms is likely to bring any tangible result. Chapter I of Part VII of the *Representation of People Act, 1951*, lists '*corrupt practices'* and the list contains a large number of items. Whether the various activities listed as corrupt practices have been prevented by the legal provisions, is a different matter. We already have laws to check electoral malpractices in the form of Representation of People Act, Indian Penal Code etc. but successful implementation of Acts and Codes has remained elusive inspite of the best efforts of the Election Commission of India.[43]

After every election, a certain number of election petitions are filed before the High Courts, and if a court declares that a corrupt practice had been resorted to the question of disqualification under *Section 8-A* of the *Representation of People Act, 1951*, arises, and has to be decided by the President, or the Governor, as the case may be, on the advice of the Chief Election Commissioner. There are certain corrupt practices which are also electoral offences punishable with imprisonment or/and fine; and there are electoral offences under Chapter ill of Part VII of the *Representation of People Act, 1951* and *Sections 170-A* to *171-1*

[41] 170th Report on the Reform of the Electoral Laws, 1999.

[42]http:// www.cci.giv.in/proposed electoral reforms.pdf. visited on 04-10-2011.

[43] Chawla, Election Law and Practice, 320 (1998).

of the Indian Penal Code, which constitute corrupt practices as well. These Sections define and provide punishment for offences, such as bribery, undue influence personation at elections. The maximum punishment for the offence of bribery is one year's imprisonment of either description or fine or both but bribery by treating is punishable only with fine. Whereas the maximum punishment for undue influence or personation at an election is one year's imprisonment of either description or fine or both.

Section 171 G of *Indian Penal Code* provides the punishment of fine for false statement in connection with elections and for illegal payment in connection with an election. In Indian Penal Code, provisions have been made to check election evils but nominal punishments have been provided and interest is not taken in prosecution of election offenders. These provisions have failed to check criminalization of politics.

Section 8 of the Chapter III of the *Representation of People Act, 1951* contains provisions regarding disqualifications of candidates on conviction of certain offences. This section appears to be more deterrent and debars convicted criminals from contesting elections for six years since his release. However, those who had serious charges against them and were undergoing trial but were not yet convicted continued to occupy high offices. The legal process is lengthy and confusing. The person is innocent until proved guilty and conviction takes longer time than the term of the elected member. When the final verdict of the Court comes the person accused might have already been completed his term as Member of Parliament or the State Assembly as the case may be.

Section 2(c) of the *Representation of People Act, 1951* says that '*corrupt practices*' means any of the practices specified in *Section 123* of the Act. The elaborate definition of various corrupt practices under *Section 123* are bribery; undue influence; appeal to vote or refrain from voting on grounds of the religion, race, caste, community, language; promotion of feelings of enmity or hatred on grounds of religion, race, caste, community for language; propagation of practice of commission of sati; publication of false statements in respect of character and conduct of the candidate; hiring of vehicles or vessels for free conveyance of elector; incurring excessive expenditure; procuring the assistance of government servants; and booth capturing and in addition several '*Electoral Offences*' are prescribed by the *Representation of People Act, 1951* itself.

The following shall be deemed to be corrupt practices for the purposes of this Act:-

3.5.1 Bribery Section 123(1)

The word Bribery means:

(1) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever with the object, directly or indirectly of inducing :-

- (a) a person to stand or not to stand as, or (to withdraw or not to withdraw from) being a candidate, at an election, or

- (b) an elector to vote or refrain from voting at an election, or as a reward to person for having so stood or not stood, or for (having withdrawn or not having withdrawn) his candidature; or an elector for having voted or refrained from voting;

(2) The receipt of, or agreement to receive, any gratification, as a motive or a reward:-

- (a) by a person for standing or not standing as, or for (withdrawing or not withdrawing) from being, a candidate; or

- (b) by any person whomsoever for himself or any other person for voting or refraining from voting, or inducing or attempting to induce any elector to vote or refrain from voting, or any candidate (to withdraw or not to withdraw) his candidature.

Explanation to this clause provides that term '*gratification*' is not restricted to pecuniary '*gratification*' is not restricted to pecuniary gratifications or gratifications estimable in money and it includes all forms of entertainment and all forms of employment for reward but it does not include the payment of any expenses bona fide incurred at, or for the purpose of, any election and duly entered in the account of election expenses.

A single instance of bribery even without having any material effect on the election is sufficient to declare the election void. In ***Rajendra Prasad Jain v. Sheet Bhadrayajee***,[44] bribery was not only ground for setting aside the election but also an offence under Indian Penal Code. A person found guilty of bribery under *Section 171 E* of *Indian Penal Code* could also be disqualified under the *Indian Election Offences and inquiries Act, 1920*. Though any gift, offer or gratification has been treated as corrupt practice under *Section 123 (1)* of the *Representation of the People Act, 1951*. The effect of the provision has been diluted by the Supreme Court by introducing the principle that whether there was any '*bargaining with the electors*'.

[44] AIR 1966 SC 1445.

Supreme Court through its decisions in ***Harjit Singh v. Umarao Singh***[45] and ***Dhartipakar Madan Lal Agarwal v. Shri Rajiv Gandhi***,[46] held that in order the constitute the corrupt practice of bribery there must be an element of bargaining. The decision of the ***Andhra Pradesh High Court in Mohd. All Shabbir v. Yousuff Ali***,[47] establishes that this criterion of bargaining with the electors may provide an escape route to the many persons who commit the corrupt practice of bribery.

3.5.2 Undue Influence (Session 123 (2))

It means any direct or indirect interference or attempt to interfere on the part of the candidate or his agent or of any other person with the, consent of the candidate or his election agent, with the free exercise of any electoral right:-

Proviso to the clause says that any person who :-

(i) Threatens any candidate of any elector, or any person in whom a candidate or an elector is interested, with injury or any kind including social ostracism and ex-communication or expulsion from any caste or community; or

(ii) Induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure of spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector. However, a declaration of public policy, or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right shall not be deemed to be interference within the meaning of this clause.

The essence of undue influence lies in between the right of free choice to elect and the right of the candidate to convass and if the canvassing results in interference unduly into the free choice or judgment for vote that Interference requires to be regulated by law, because '*mere influence*' is not a corrupt practice. An influence in election amounts '*undue*' only when abuse of influence is exercised in contradiction of proper influence.

Thus legitimate canvassing or appeal to reason and judgment of the voters by lawful means persuading them to vote or not to vote for any candidate, is not vitiated under the law. Yet any situation in which choice of candidate on merit is affected due to extraneous consideration tike social, economic, political or religious constraints or any type of threat,

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[45] AIR 1980 SC 701.
[46] AIR 1987 SC 1577.
[47] AIR 2007 AP 160.

fear or duress or falsehood which impedes or prevents the free exercise of the franchise of an elector, is prohibited under *Section 123(2)* of *Representation of People Act, 1951*.

In ***Avtar Singh v. Taj Singh***,[48] the returned candidate admitted that certain pamphlets and candidates had withdrawn and that any vote given to the returned candidate would be considered as a vote given to the withdrawing candidate. The statement was circulated at the instance of the returned candidate. It was held that the candidate was guilty of corrupt practice. Further, having regard to the fact that the margin of votes between the defeated and the returned candidate was very small, there was a strong presumption that the votes polled in favour of the candidates who had been alleged to have withdrawn would have gone to the defeated candidate. In the circumstances, the election was set aside, its result having been materially affected by a corrupt practice.

In ***Inder Singh v. Rangila Ram Rao***,[49] the allegation was that the returned candidate had illegally used red light on the top of his vehicle and hence illegally influenced the electors to vote for him in the election. The High Court rejected the contention of the election petitioner that the alleged action of the respondent would amount to undue Influence. It was observed:-

> "*The alleged act of use of red tight on top of a vehicle by itself, is my view, does not constitute any 'inducement' or 'threat' to influence the discretion of an individual to act in an independent manner. Even if the red light is unauthorized used by the returned candidate during election it is not an act of 'inducement' or 'threat. It may be an illegal act but is incapable of affecting the election result*."[50]

In ***Sushil v. Prabhu Narain Yadav***,[51] the election petition contained the allegation that the returned candidate in collusion with the election officers prevented voters from casting their vote. All the witnesses stated that the returned candidate and his supporters threatened them and made them to run. However, the Court refused to treat it as undue influence pointing out that there was no displaying of weapons or fire arms or creation of such atmosphere, which may have reasonably caused apprehensions of physical abuse or threat to electorates.

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[48] AIR 1984 SC 619.
[49] AIR 2005 P & H 11.
[50] *Id.,* at 18.
[51] AIR 2007 All. 187.

3.5.3 The Appeal to Vote or Refrain from Voting on Grounds of the Religion, Race, Caste, Community, Language etc. [Section 123 (3)]

The appeal by a candidate or his agent or any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as, the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause.

Unity and integrity of the nation and secularism are the basic features of the Constitution. The provisions of the Act is in line with this feature of the Constitution and prohibit a candidate or anybody on his behalf with his or his election agent's consent to seek votes by making appeal to the religious sentiments of the people or by arousing feeling of enmity and hatred among different classes of citizens.

The Supreme Court in ***S.R. Bommai v. Union of India***,[52] laid down that the introduction of religion into policies is not merely in negation of constitutional mandate but also a positive violation of Constitutional obligation, duty, responsibility and positive prescription or prohibition specifically enjoined by the Constitution and the *Representation of People Act, 1951*.

In ***Dr. Ramesh Yashwant Prabhoo v. Prabhakar K. Kunti***,[53] the apex Court stated that when it is said that politics and religions do not mix, it merely means that the religion of a candidate cannot be used for gaining political mileage by seeking votes on the grounds of the candidate is religion or alienating the electorate against another candidate on the ground of the other candidate is religion. It also means that state has no religion and the state practices the policy of neutrality in the matter of religion.

3.5.4 Promotion of Feeling of Enmity or Hatred on Grounds or Religion, Race, Caste, Community, Language etc. for furtherance of Prospects of Election [section 123 (3-A) J]

The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste community, or language, by a candidate or his agent or any other person with the consent of a candidate or

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[52] AIR 1994 SC 1918.
[53] AIR 1996 SC 1113.

his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

An appeal by any other person with the consent of the candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, caste, community or language or use of appeal to religious symbol etc., for the furtherance of the prosperity of the election of that candidate or for prejudicially affecting the election of any candidate amount to corrupt practice.

An issue falling within the ambit of these provisions came before the Constitution Bench of Supreme Court in ***R.P. Moldutty v. P.T. Kunju Mohammed***,[54] In the instant case, Videotape, titled as *Vicharana* (trial), relating to the demolition of Bahri mosque, was allegedly shown by the returned candidate throughout his constituency during the election campaign. The election petition was dismissed by the High Court by holding that the exhibition of the video cassette could not be held a corrupt practice within the meaning of *Section 123 (3A)* of the *Representation of People Act, 1951*. For the resolution of the issue in appeal, the Supreme Court identified in the first instance the following two principles that must be borne in mind while deciding election petition. One, it is the basic law of the elections and election petitions that in a democracy, the mandate of the people was expressed at the hosting must prevail and be respected by the Courts.[55] Two, if the court arrives at a finding of commission of corrupt practice by a returned candidate or his election agent or by any other person with the consent of the returned candidate or his election agent then the election of the returned candidate shall be declared void, in that case the result of the election does not eco the true voice of the people.[56]

On the consideration of these two principles together, it was inferred that a heavy burden lay on the petitioner seeking to set aside the election to make out a clear case for such relief '*both in the pleadings and at the trial*'.[57] The Supreme Court categorically stated that in their opinion, unless the defect in verification was rectified the petition could not have been tried.[58] For want of affidavit in required form and also for lack of particulars, the allegations of corrupt practice could not have enquired into and tried at all.[59]

[54] AIR 2000 SC 388.
[55] *Id*., at 392.
[56] *Ibid.*
[57] *Ibid*
[58] Virender Kumar, Annual Survey of Indian Law, 2000, p.219 at 245.
[59] *Ibid.*

In short, the Court concluded, 'the petition should have been rejected at the threshold for non-compliance with the mandatory provision of law as to pleadings".[60]

3.5.5 Propagation of Practice of Commission of Sati, etc. for furtherance of Prospectus of elections [Section 123 (3-B)]

The propagation of this practice or the commission of *Sati* or its glorification by a candidate or his agent or any other persons with the consent of the candidate or his election agent for the furtherance of prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

Explanation to this clause provides that for the purposes of this clause, '*Sati*' and '*Glorification*' in relation to Sati shall have the meanings respectively assigned to them in the commission of *Sati (Prevention) Act, 1987* (3 of 1988).

3.5.6 Publication of a False Statement in respect of Character, Conduct etc.

The publication by a candidate or his agent or by any other person, (with the consent of a candidate or his election agent), of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election.

Freedom of speech and expression is not only a fundamental right of all citizens but is also an important mode in helping the electorate to form their will about the right candidate. An election which does not reflect the popular will of the electorate cannot be said to be free and pure. The individual merit or demerit of candidates, their policy and the policies and programmes of their political parties are brought to the notice of the electors by exercise of this right.[61] The public interest also requires that the electors must be fully informed about the political or socio-economic philosophy or antecedents and character of their would be representatives and their political parties.

On the other hand, the freedom of election also imply that the candidate or his supporters with his consent or with the consent of his election agent should not be allowed to level false and malicious campaign on personal character or conduct of his rivals. Publication of false statement of the character and conduct of a candidate is a corrupt practice under *Section 123(4)* of the *Representation of People Act, 1951*.

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[60] *Ibid.*

[61] *Sheopa Singh v. Ram Pratap*, AIR 1965 SC 677.

In ***Mahendra Singh v. Gulab***,[62] the allegation was that in public meeting the respondent had made the following statement against his opponent:

"*I have learned that he has indulged in unfair practice at college examination and, therefore he is raw in his studies*".

The Supreme Court refused to treat it as corrupt practice stating that the sentence in the context of the speech could not be said to be specific allegation against the appellant that he had indulged in unfair practice in his examinations in his college days.[63]

3.5.7 The Hiring or Procuring or Use of any Vehicle or Vessel for Free Conveyance of Elector to and from of any Polling Station [Section 123(5)]

The hiring or procuring, whether on payment or otherwise, of any vehicle or vessel by a candidate or his agent or by any other person (with the consent of a candidate or his election-agent), (or the use of such vehicle or vessel for the free conveyance) of any elector (other than the candidate himself, the members of his family or his agent) to or from any polling station provided under *Section 25* or a place fixed under sub-section (1) of *Section 29* for the poll.

Provided that the hiring of a vehicle or vessel by an elector or by several electors at their joint costs for the purpose of conveying him or them to and from any such polling station or place fixed for the poll shall not be deemed to be a corrupt, practice under this clause if the vehicle or vessel so hired is a vehicle for vessel not propelled by mechanical power.

Provided further that the use of any public transport, vehicle or vessel of any tramcar or railway carriage by any elector at his own cost for the purpose of going to or coming from any such polling station or place fixed for the poll shall not be deemed to be corrupt practice under this clause.

Explanation - In this clause, the expression '*vehicle*' means by vehicle used or capable of being used for the purpose of road transport, whether propelled by mechanical power or otherwise and whether used for drawing other vehicles or otherwise,

The free conveyance of the voters may be done by the party workers. The candidate is liable for the act of party workers if said fact is with his knowledge. If the elector or electors hire the vehicle or vessel for themselves it does not constitute corrupt practice.

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[62] AIR 2005 SC 2515.

[63] *Id.,* at 2520.

Supreme Court in such circumstances held in ***Dadasaheb Dattatraya Pawar v. Pandurang Rao Jagtap***,[64] (i) that any vehicle or vessel was hired or procured, whether on payment or otherwise, by the candidate or by his election .agent or by any other person with the consent of the candidate or of his agent; (ii) that it was used for conveyance of the electors to or for any polling station; and (iii) that such conveyance was free of cost to the electors failure to substantiate any of these ingredient leads to the collapse of the whole charge under *Section 123(5).*

Any person guilty of any such corrupt practice as specified in *Section 123(5)* is liable for punishment under *Section 133* with imprisonment which may extend to three months and with fine.

3.5.8 Expenditure in Contravention to Section 77 [Section 123 (6)]

It is commonly said that defective electoral system is the main reason for political party, supporters and sympathizers despite the prohibition imposed by law. The use of government machinery for such contribution is also not uncommon. The incurring or authorizing of expenditure in contravention of *Section 77* is also considered as corrupt practice.

Section 77(1) says "Every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure or authorized by him or by his election agent between the date on which he has been nominated and the date of declaration of the result thereof, both dates inclusive."[65]

Section 77(3) further provides that the total of the election expenditure shall not exceed such amount as may be prescribed. The amount is regulated by *The Conduct of Election Rules, 1961*.[66]

In ***L.R. Shrivaramagowda v. T.M. Chandrashakhar***,[67] the Supreme Court observed that the language of that section is so clear that the corrupt practice defined therein can relate only to *Section 77(3),* that is the incurring or authorizing of expenditure in excess of the amount prescribed, and that it cannot by any stretch of imagination be said that non-compliance with *Section 77(1)* and *77(2)* would also fall within the scope of *Section 123(6).*

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[64] AIR 1970 SC 351.
[65] Section 123 (6).
[66] Rule 90.
[67] 1999 (1) SCC 666.

3.5.9 Obtaining Assistance etc. of Government Servants for furtherance of Prospects of Elections [Section 123 (7)]

A government employee plays an important role in framing and implementation of the policy and programmes of government. All the government works are done through its servants. It is, therefore, the policy of law to keep the government servants aloof from politics. They are also protected from any kind of imposition and influence from those who are in a position of authority and power, and to prevent the machinery of the government from being used in furtherance of candidate's election. The obtaining or procuring or abetting or attempting to obtain or .procure by a candidate or his agent or, by any other person (with the consent of a candidate or his election agent), any assistance (other than the giving of vote) for the furtherance of the prospects of that candidate's election, from any person in the service of the Government and belonging to any of the following classes, namely:-

- (a) Gazetted officers;
- (b) Stipendiary judges and magistrates;
- (c) Members of the armed forces of the Union;
- (d) Members of the police forces;
- (e) Excise officers;
- (f) Revenue officers other than village revenue officers known as *lambardars, malguzars, patels, deshmukhs* or by any other name, whose duty is to collect land revenue and who are remunerated by a share of, or commission on, the amount of land revenue collected by them but who do not discharge any police functions; and)
- (g) Such other class of persons in the service of the Government as may be prescribed:-

Provided that where any person, in the service of the Government and belonging to any of the classes aforesaid, in the discharge or purported discharge of his official duty, makes any arrangements or provides any facilities or does any other act or thing, for, to, or in relation to, any candidate or his agent or any other person acting with the consent of the candidate or his election agent, (whether by reason of the office held by the candidate or for any other reason), such arrangements facilities or act or thing shall hot be deemed to be assistance for the furtherance of the prospects of that candidate's election).

However, the role of the government servants as polling agent or counting agent is sought to be checked by providing penalty for them under the Act in itself. Where the government servant transgresses the provisions of his service rules or *Section 134 A* of this Act, he can be held liable for penalty but his act would not be a corrupt practice.

3.5.10 Booth Capturing by a Candidate or his Agent or other Persons [Section 123(7)]

Booth capturing by a candidate or his agent or other person was made as separate corrupt practice by the *Representation of People (Amendment) Act, 1989*. Prior to this amendment the act of booth capturing was covered under undue influence. *Sub-section (8)* of *Section 123* does not define the term booth capturing1. Booth capturing shall have the same meaning as in *Section 135-A* (Expl. 4 to Sec. 123)

Booth capturing includes, among other things, all or any of the following activities namely :-

- *(a)* seizure of a polling station or a place fixed for the poll by any person or persons, making polling authorities surrender ballot papers or voting machines and doing of any other act, which affects the orderly conduct of elections;

- *(b)* Taking possession of a polling station or a place fixed for the poll by any person or persons and allowing only his or other own supporters to exercise their right to vote and [prevent others free exercise of their right to vote];

- *(c)* Coercing or intimidating or threatening directly or indirectly; any elector and preventing him from going to the Polling station or a place fixed for the poll to cast his vote;

- *(d)* Seizure of a place for counting of votes by any person or persons, making the counting authorities surrender the ballot papers or voting machines and the doing of anything which affects the orderly counting of votes;

- *(e)* Doing by any person in the service of Government, of all or any of the aforesaid activities or aiding or conniving at, any such activity in the furtherance of the prospects of the election of a candidate.

Explanation (1) to *Section 123* provides that the expression '*agent*' includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate.

Explanation (2) to the Section says that person shall be deemed to assist in the furtherance of the Prospects of a Candidate's election if he acts as an election agent of that candidate.

Explanation (3) to the Section says that for the purpose of Clause (7) notwithstanding anything contained in any other law, the publication in the Official Gazettee of the appointment, resignation, termination of service, dismissal of removal from service of a person in the service of the Central Government (including a person serving in connection with the administration of a Union Territory) or of a State Government shall be conclusive proof :-

- *(i)* of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be; and
- *(ii)* where the date of taking effect of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be, is stated in such publication, also of the act that such person was appointed with effect from the said date, or in the case of resignation, termination of service, dismissal or removal from service, such person ceased to be in such service with effect from the said date.

3.5.11 Impersonation

Impersonation is a more serious problem in urban than in rural areas where voters are known to one another, and usually also to the polling agents of the candidates. *Section 171 D* defines personation at elections under Indian Penal Code. The offence is punishable under *Section 171 F* with imprisonment of either description for a term which may extend to one year, or with fine or with both. The essence of the offence of false personation is the offender pretending to be other than he really is. The gist of offence being false personation, this section does not come into play when the candidate or his agent does not claim to be the voter himself. The definition of personation closely follow the definition in *Section 24* of the *Ballot Act, 1872* and covers both a person who attempts to vote in another person's name or in a fictitious name a voter who attempts to vote twice and any person, who abets, procures or attempts to procure such voting.

3.5.12 Electoral Offences

Electoral offences are contained in *Section 125* to *136* of Act 1951. These are as follows:

- *(i)* Promoting enmity between classes in connection with election.[68]

- *(ii)* Convening, holding, attending, joining or addressing public meeting etc. during the period of 48 hours ending with the hour fined for conclusion of the pool.[69]

- *(iii)* Disturbance at election meeting.[70]

- *(iv)* Printing or publishing of the Pamphlets and posters etc.[71]

- *(v)* Maintenance of secrecy of voting.[72]

- *(vi)* Disorderly conduct in or near polling stations.[73]

In a prosecution for putting inhibits or any notice within a distance of 100 yards of the polling station, there must be proof of distance.

- *(vii)* Officers etc. at elections acting for candidates, or influencing voting.[74]

- *(viii)* Canvassing in or near polling stations.[75]

- *(ix)* Misconduct at the polling station.[76]

- *(x)* Future to observe procedure for voting.[77]

- *(xi)* Illegal hiring or procuring of conveyance at Elections.[78]

- *(xii)* Breaches in official duty in connection with Elections.[79]

- *(xiii)* Person in service of the Govt, acting as an Election agent.[80]

- *(xiv)* Going armed to or near a polling station.[81]

- *(xv)* Removal of ballot papers from polling stations.[82]

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[68] Section 125.
[69] Section 126.
[70] Section 127.
[71] Section 127 - A.
[72] Section 128.
[73] Section 130.
[74] Section 129.
[75] Section 130.
[76] Section 132.
[77] Section 132 - A.
[78] Section 133.
[79] Section 134.
[80] Section 134.
[81] Section 134 - B.
[82] Section 135.

- *(xvi)* Booth capturing.[83]

- *(xvii)* Granting of paid holiday to employers on the day of poll.[84]

- *(xviii)* Selling, giving or distributing the liquor or polling day.[85]

- *(xix)* Miscellaneous offences.[86]

3.5.13 Criminalization of Politics

Corruption in public life and criminalization of politics are two sides of the same coin. In two early days' criminals and goonda elements were by large keep away from direct involvement in the political process, but today they have acquired a political base of their own and are a law unit themselves. Gives enough hint to come to the conclusion that criminalization of politics and corruption in high level is destroying the very system and edifice of our parliamentary democracy, political authorities, the civil servants and even the judiciary.[87]

In ***Ankur Chandra Pradhan v. Union of India***,[88] the Supreme Court said that any provision enacted with the object to prevent criminalization of politics and maintain probity of elections must be welcomed and upheld as suberwing the constitutional purpose.

3.5.14 Marketability and Defections

The endless game of defections and toppling of government is perhaps the most glaring example of the erosion of the democratic and moral values in the parliamentary life of India. In the era of outside support and the coalition governments in the states and at the center, it is an admitted fact that parliament accept money to support a particular government.[89]

The statement of objects and reasons appended to the bill which was adopted as the *Constitution (Fifty Second Amendment) Act, 1985* says: "*The Evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy and the principles which sustain it*".

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[83] Section 135 - A.
[84] Section 135 - B.
[85] Section 135 - C.
[86] Section 136.
[87] The Vobra Committee Report, Paragraph 6 .2, p.4.
[88] (1997) 6SCCI.
[89] The Committee on Defections, Report dated January 7, 1969.

3.5.15 Communaltsm, Casteism and Mushrooming of Political Parties

In 1993, the Central Government attempted to introduce the Constitution (80th Amendment) Bill to de-link religion from politics and thereby to amend the Constitution. The said Bill was accompanied by the *Representation of People (Amendment) Bill, 1993*. The proposed amendment had three main clauses: Role of judiciary in curbing Malpractices:

According to *Section 100* of *Representation of People Act, 1951* where a corrupt practices is proved to have been committed either by the returned candidates or by his election agent or by other person with the consent of a returned candidate is bound to be set aside. Even a single instance of such corrupt practice is sufficient to avoid the election. The position is differed where a corrupt practice is committed by a third person without the consent of candidate of his election agent and contrary to their orders. In such cases the election can be declared as void only when the following conditions concur :-

- *(i)* The third person is an agent of the candidate.
- *(ii)* The corrupt practices was committed in the interest of the returned candidate; and
- *(iii)* The result of the election, in so far as it concerns a returned candidate, has been materially affected by the corrupt practice [Section 100 (1) (a), Act - 1951]. The High Court may decide that the Election of the returned candidate is not void, notwithstanding the fact that the returned candidate has been guilty of corrupt practice by an agent other than his election agent; In ***Sheopal Singh v. Harish Chandra***,[90] the Supreme Court held that where a candidate after getting knowledge of the act of corrupt practice (conveyance of voters to the poles) on the polling day does not prohibit the regular repetition of similar acts on the following days, it is reasonable interference to draw that all the acts were committed, not haphazardly but by design and that the candidate must have consumed to them. In ***Common Cause (A Registered Society) v. Union of India***,[91] the Supreme Court has tried to limit the expenditure shown in the name of the political parties. The Supreme Court in this case had laid down the following guidelines: -

- *(a)* The political parties who have not been filing returns of income for several years *prima facie* violated the statutory provision of the income Tax Act.

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[90] AIR 1960 SC 1217.
[91] AIR 1996 SC 3081.

- *(b)* The Secretary, Minister of Finance, Department of Revenue, Government of India shall appoint an inquiry body to find out why and in what circumstances the mandatory provision of the Income Tax Act were not enforced.

- *(c)* A political party which is not maintaining audited and authenticated accounts and has not filed the return of Income for the relevant period, cannot ordinarily be permitted to say that it has incurred or authorized expenditure in connection with the election of his candidates in term of Explanation 1 to Section 77 of the R.P.Act, 1951.

- *(d)* The superintendence and control over the conduct of an election by the Election Commission envisaged under which Article 324 includes the scrutiny of all expenses incurred by a political party, or by any individual in course of election. ***Roop Lal Sathi v. Macchhattar Singh***,[92] his appeal by Supreme Court is from a judgment and order of the Punjab and Haryana High Court directed the deletion of para 4 to 18 of the election petition filed by the appellant under *Section 18* read with *Section 100* of the *Representative of People Act, 1951*, calling in question the Election of respondent Nachattar Singh Gill to the State Legislative Assembly of Punjab from the Moga Assembly Constitutency No. 99 on the ground that there is non-disclosure of material facts on which he alleges that the change of allotment of symbols by the returning officer, Moga amounts to non-compliance with the provisions of the Constitution or of the Act or any rules or order made there under. It was held that High Court was not justified in striking out para 4 to 98 of the election petition acting presumably under Order VI, Rule 16 of the *Code of Civil Procedure, 1908* on the ground that the facts stated therein were not sufficient to formulate a complete cause of action under *Section 100 (1) (d)* of the *Representative of People Act, 1951*.

In ***F.A. Sapa v. Singora & Ors***.,[93] the Supreme Court held that Election law, being statutory in character, must be strictly complied with, since an election petition is not guided by ever changing common law principles of justice and notions of equity. Being statutory in characters it is essential that it must conform to the requirements of our Election law. But at the same time the purity of election process must be maintained at all cost and those who violate the statutory norms must suffer for such violation. If the returned candidate is shown to have secured his success at the Election by corrupt means he must suffer for his misdeeds.

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[92] AIR 1982 SC 1559.

[93] (1991) 3 SCC 375.

In ***S.R.Bommai v. Union of India***,[94] the Supreme Court observed that India is a secular democracy where every citizen whether he is s Hindu, Muslim or Sikh has equal rights and privileges. Rise of fundamentalism and communalism in national and regional politics are anti-secular and tends to encourage separatist and divisive forces sowing the seeds to disintegrate the parliamentary democratic system. The political parties or candidates should be stopped to run after vote banks.

The recline landmark judgment of the Supreme Court in Common Cause is really significant and timely. It has cleared many unsolved problems faced so far in the election fields in relation to money, power and to clause politics and inducting sanity into the most daunting problem created by huge amount of political contributions and election expenditures which give rise to the black money economy and corruption in government.

3.6 Reforms Suggested by Election Commission

The question of bringing about comprehensive changes in election laws and electoral process has been receiving the attention at various levels right from the time of the first general election. The most recent official exercises in this regard have been :-

- (1) The Goswami Committee on Electoral Reforms (1990).
- (2) The Indrajit Gupta Committee on State Finding of Elections (1998).
- (3) The Law Commission's Report on Reform of the Electoral laws (1999).
- (4) The Election Commission comments on the recommendations of the above three and its own proposal based on experience of ground realities :-

- *(i)* The Commission reached the conclusion that while some for reaching reforms in the electoral process were necessary, no major constitutional amendment was called off the necessary corrective could be achieved by ordinary legislation modifying the existing laws or, in many cases, merely by subordinate legislation and executive action.

- *(ii)* The commission recommends a fool proof method of preparing the Electoral Roll right at the panchayat level constituency of a vote and supplementing it by a fool proof vote ID card which may intact also serve as a multi- purpose citizenship card for all adults.

- *(iii)* The Commission recommends the introduction of Electronic Voting Machines (EVMs) in ail constituencies all over the country for all electrons as rapidly as possible.

- *(iv)* The Commission recommends: (i) Under *Section 58A* of the *Representation of People Act, 1951*, the election should be authorized to take a decision regarding booth

[94] AIR 1994 SC 1918.

capturing on the report of the returning offices, observes or citizen groups. Also, the Commission should be empowered to counterman and the election and order a fresh election or to declare the earlier poll to be void and order a re-poll in the entire constituency (ii) EC should consider the use of temper proof video and other electronic surveillance at sensitive polling stations.

- *(v)* The commission recommends that any Election campaigning on the basis of caste or religion and any attempt to spread caste and communal hatred during election should be punished mandatory imprisonment.

- *(vi)* The Commission recommends that the R.P. Acts be amended to provide that any person charged with any offence punishable with imprisonment for a maximum term of five years or more should be disqualified for being chosen as or for being, a member of parliament or legislature of a state on the expiry of a period of one year from the date the charges were framed against him by the Court in that offence and unless cleared during that one year period, be shall continue to remain so disqualified till the conclusion of the trial for that offence.

- *(vii)* The special courts should be constituted at the level of High Courts and their decisions should be applicable to the Supreme Court only. The special courts should decide the cases within a period of six months.

- *(viii)* The Commission feels that the benefit of this provision should be available only for the continuance in office by a sitting member of parliament or a state legislature.

- *(ix)* The Commission recommends that in matter of disqualification on grounds of corrupt practices, the President should determine the period of disqualification under *Section 8A* on the direct opinion of EC and avoid the delay currently experienced.

- *(x)* The Commission recommends that the political parties as well as individual candidates be made subject to a proper statutory audit of the amounts they spend.

- *(xi)* The Commission recommends that every candidate must declare his assets and liabilities along with those of these close relatives.

- *(xii)* The Commission recommends that any system of state funding of elections bears close news to the reputation of work of political parties by law and to creation of fool proof mechanism under law with a view to implementing the financial limit strictly.

- *(xiii)* Campaign period should be reduced considerably.

- *(xiv)* The election code of conduct which should come into operation as soon as the Elections are announced should be given the sanctity of law and its violation should attract penal action.

- *(xv)* The Commission recommends that intra-state delimitations exercise may be undertaken by the Election Commission for Lok Sabha and Assembly constituencies and the schedule caste and non-scheduled area scheduled tribes seats should be rotated.

- *(xvi)* The Commission recommends that the provisions of the Tenth Schedule of the Constitution should be amended specifically to provide that all persons defecting. Whether individually or in groups from the party or the alliance of parties, on whose ticket they had been elected, must resign from their parliamentary or assembly seats and must consists fresh elections.

- *(xvii)* The practice of having oversized council of Ministers must be prohibited by law. A ceiling on the number of ministers in any state or the union government is fined at the maximum of 10 percent of the total strength of the popular house of the legislature.

- *(xviii)* The Commission recommends the independent candidates be discouraged and only those who have a track record of having won any local election who are nominated by at least elected members of panchayat, municipalities or other local bodies spread out in majority of electoral districts in their constituency should be allowed to contest for assembly or parliament.

- *(xix)* The commission recommends that the Chief Election Commissioner and the other Election Commission should be appointed on the recommendation of a body consisting of the prime minister, leader of the opposition in the Lok Sabha, leader of the opposition in the Rajya Sabha, the speaker of the Lok Sabha and the Deputy Chairman of the Rajya Sabha.

- *(xx)* In order to obviate the uncertainty, the Commission recommends that by suitable amendment in the Constitution the Election Commission may be empowered to identify and declare the various offices under the Government of India or of a state to be office of profit for the purposes of being chosen, and for being, a number of the appropriate legislature.

- *(xxi)* The Commission recommends that there should be a comprehensive legislation (may be named political parties or alliances of parties in India).

- *(xxii)* The Commission recommends that the Election Commission should progressively increase the threshold criterion for eligibility for recognition.

- *(xxiii)* The Commission recommends that the proposed law on political parties should provide that no political party should sponsor or provide ticket to a candidate for contesting elections if he was convicted by any court for any criminal offence or if the courts have framed criminal charges against him.

- *(xxiv)* The Commission recommends that a comprehensive legislation providing for regulation of contribute to the political parties and towards election expenses should be enacted by consolidating such laws. The new law should aim at bringing transparency into political finding.[95]

4. SUMMARY

The Constitution of India is a fine document. A critical and objective analysis of our Constitution indicates that by a large it has functioned well. The shortcomings of it is solely due to failure on the part of politicians to evolve democratic culture, ethos, ethics and should conventions in the absence of which written text of the Constitution is bound to become dysfunctional if not non-functional. Persons who are entrusted with the task of governance have deviated from the righteous path and are primarily responsible for the present day maladies of corruption, criminalization of politics spreading communal and caste feelings among the masses and mushrooming of political parties. These are the root causes of instability of governments leading to frequent elections in the country. The Tenth Schedule of the Constitution of India has also failed in its mission and instead it has promoted group defections and horse-grading.

The prime need of the country is to secure stability of the government. The basic of law forming the government is the Constitution of India. There is no bar on Elected Representatives of the people to withdraw their confidence in government at any time they choose. Some suggestions are as :-

- (1) Lack of morality, floor crossing defections and horse trading is need an immediate legal check. As soon as elections are over and the Lok Sabha is duly constituted, the President should convene a meeting of the House and direct the newly electric House to elect the leader of the House.

- (2) Law must impose a complete ban on all communal parties or restrain them from contesting elections to the legislature. *Section 123(3)* and *(3-A)* of the *Representation of People Act, 1951*, should be enforced ruthlessly.

[95] http://www.lawmin.nic.in.accessed on 9 November, 2011.

- (3) *Section 29-A* of the *Representation of People Act, 1951* should be amended to the effect that there is compulsory legislation of all political parties.

- (4) Parliament must consider the legal infirmities existing in the provisions of Election law relating to entry of criminals in politics. Classification between general criminal and sitting members criminal under *Section 8* of *Representation of People Act, 1951* must be omitted.

- (5) The Legal provisions should therefore provide restricting those members who defy the no-confidence motion, vote of thanks on presidential address, on money bills or any other crucial matter when government is at stake.

- (6) Bribery by the Ministers, party in power or members of the legislature should be seriously viewed especially when they use public funds for therefore, needs reconsideration by the Supreme Court.

- (7) Giving the literal interpretation to the expression 'his religion' under Section 123(3) of the Act is apparently opposite to the spirit of the provision.

- (8) Immediate remedy is to repeal the Explanation 1 to *Section 77* of the *Representation of People Act, 1951*. A clear provision should be made which may require political parties to maintain proper accounts of the donations and contributions they receive and get audited them.

- (9) The legal Infirmities in the existing provision of law relating to Election expenses are minutely examined by the Supreme Court In ***Common Cause (Registered Society) v. Union of india***.[96] If the ruling of the apex Court is properly implemented, the evil of unauthorized and unaccounted expenditure by the candidate or his political party shall go away from the elections to a large extent.

- (10) As long as the Electoral malpractices continue, the democracy will never be the government of the people and wishes of the people will remain a distance dream. Public awareness of democratic rights, political awareness of the voter is the main impetus to be given for remedial measures.

- (11) The entry of criminals in election politics must be restricted at any cost. If It is not checked, it will erode the system totally. The dearth of talented persons in politics may collapse the country internally as well as externally. A number of commissions and committees such as the Law Commission of India, Election Commission and Vohra Commission etc. have examined the issue of criminalization of politics but the menace is increasing day by day.

[96] AIR 1996 Section 3081.

- (12) There is a need of setting up special courts for trying the cases of criminalization of politics; it would be more desirable to try all cases of politicians by special courts. It will help to maintain sanctity and purity of elections.

5. SUGGESTED READINGS

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6. SELF – ASSESSMENT QUESTIONS

1. Explain the composition of Rajya Sabha and Lok Sabha. Which of the two is permanent House? Explain.
2. What is the composition of State Legislative Council and Legislative Assembly? All the States in India don't have bicameral Legislature. Explain.
3. Define Corrupt Practice in relation to elections referring to Section 123 of the Representation of People Act, 1951.
4. What is the nexus of politics with criminals in India? How this nexus can be broken? Make concrete suggestions within the constitutional frame work.

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(DDE – 2018) **LL.M – I**
INDIAN CONSTITUTIONAL LAW AND THE NEW CHALLENGES

Paper : II (102 - DE)
Lesson No. : 5

Writer: Prof. Sunil Deshta*
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JUDICIARY IN INDIA – QUALIFICATIONS, SALARIES & ALLOWANCES, TENURE AND PROMOTIONS, REMOVAL AND TRANSFER OF THE JUDGES, CODE OF CONDUCT FOR JUDGES

1. INTRODUCTION
2. OBJECTIVE
3. PRESENTATION OF CONTENTS
- **3.1 Qualifications, Salaries & Allowances, Tenure and Promotions**
  - **3.1.1 Qualifications**
  - **3.1.2 Salaries & Allowances**
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  - **3.1.4 Promotion**
- **3.2 Removal of Judges**
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- **3.4 Judicial Analysis on Transfer of Judges**
- **3.5 Accountability of the Judiciary : Need for Code of Conduct**
- **3.6 The Judicial Standards and Accountability Bill, 2010**

4. SUMMARY
5. SUGGESTED READINGS
6. SELF – ASSESSMENT QUESTIONS

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1. INTRODUCTION

Rule of Law and Independent Judiciary go hand in hand. There cannot be a rule of law without an independent judiciary. In any rule of law society judiciary is an essential part of the life of a nation like the legislature and the executive. No rule of law society can ever exist without an independent and accountable system of dispute resolution mechanism. The impartiality and independence of the judiciary, however, depends on the high standards of conduct followed by judges.

The Constitution of India has given a considerable importance to the judiciary, and has provided the Supreme Court of India at the top. The essence of fair and fearless administration of justice is a sine qua non of a successful democratic government. Independence of the judiciary is in fact the independence of the individuals manning it which in turn depends on various personal and institutional factors. Judicial independence is not the same thing as impartiality of the Judges or equidistance from the government. The concept of judicial independence is something that goes beyond it and touches upon the freedom of a judge not only from various social, economic, political and personal interests but commitment to the Constitution also.

On the other hand, accountability is a natural consequence of independence. The concept of public accountability of the judicial system is a matter of vital importance and without accountability, the concept and claim of independence becomes merely a hollow concept. The judges should make themselves accountable and ensure that, their actions are transparent and within the parameters set by the Constitution. Views are being expressed from various quarters regarding the concern of the judiciary in respect of various issues. Since accountability has been specifically prescribed on other organs of the State in order to have an effective functioning and control. Time has come to think about the accountability of the judiciary itself. But the accountability to what extent, to whom and in what form ? These are the areas which require deeper consideration and anxious thought. All social and political institutions are under massive challenges and pressures of reassessment of their relevance and utility. Judiciary as a watchman is also to be watched because the basic concept of any democratic system is check and balance.

But the judiciary is also accountable but not to other body but to law in general and Constitution in particular. There are many restrictions on courts other than judicial restraint to make the judiciary accountable for its independence. One must appreciate that the immunities

provided to ensure judicial independence are intended for the benefit of the litigants in particular and the citizens in general. Misuse of these privileges by some, has led to a call for common standards of conduct and better accountability from the judiciary.

In the modern welfare State, the society has got a right to demand better governance from the judiciary. The citizens now want judges to be accountable as they feel that there are no avenues for them to remedy the minor misbehavior and mal-treatment of witnesses or litigants at the hands of the judges. They sometimes feel that these minor misbehaviour and mal-treatments are not corrected by superior courts and that the superior courts would shield their own men and it is useless to make complaints. The expectation of independence and impartiality is much higher from the judiciary than any other organ. Deciding the cases before them in expeditious and fair manner and giving reasoned orders is another aspect of such accountability. Judiciary should not feel that adhering to the standards of accountability is inimical to its independence. The strength of any judicial institution must depend on the standards of accountability that it sets.

In the past, Indian judiciary has become a decaying institution that has no internal mechanisms or will or strength to adapt to the changing times. The judiciary has become almost a law unto itself, answerable to none and under no pressure to reform or change with time.

Further, various norms have been evolved in order to see that justice not only done but also seen to have been done. These self-imposed restrictions are nothing but an attempt to make the judiciary accountable to a procedure and practice established by law. The greatest threat to the independence of judiciary is the erosion of credibility of the judiciary in the mind of public, for whatever reasons.

By and large the Indian judiciary has enjoyed immense public confidence. The common man considers the judiciary as '*the ultimate guardian of his right and liberties*'.

2. OBJECTIVE

Notwithstanding several salient strengths of the Indian Civil Justice System and its proactively independent judiciary, inefficient court administration systems, judicial passivity in an adversarial legal process, and limited alternatives to a protracted and discontinuous full trial frustrate several goals of the adversarial process itself. Inefficiency in court administration denies timely access to legal dispositions. Excessive party control places those

seeking legal redress in an unequal position because respondents can abuse and delay the resolution procedures with impunity. Corruption and protracted delays erode public trust and confidence in legal institutions, and act as significant barriers to India's chosen path to social justice and economic development.

Inevitably, one of the most obligations of the State is administration of justice through its one organ, that is, judiciary. There is a demand for replacing our own justice delivery system in place of English justicing system. Our own experience shows that it does not suit to our own societal conditions. The present delivery of justicing system requires the wholesale review in matters of appointment, transfer and removal of Judges of High Courts and Supreme Court.

3. PRESENTATION OF CONTENTS

3.1 Qualifications, Salaries & Allowances, Tenure and Promotions

The salary allowance and other amenities enjoyed by the judges of High Court cannot be modified to their disadvantage during their tenure of office. However, the President is authorized to their reduce their salaries during the proclamation of financial emergency.

As the salaries and other expenses of the judges and the maintenance of state High Courts are charged to the Consolidated Fund of the state, they are to subject to the vote of the state legislature. A judge shall hold office till he attains the age of sixty two years. However, he may resign his office by writing to the President. He can be removed from his office by the President, in the manner provided for the removal of a judge of the Supreme Court.

3.1.1 Qualifications

The next issue which has a direct bearing on the independence of Judiciary is the quality of the person who is asked to serve in the Courts. The quality of the judges depends on the conditions necessary for the appointment of judges. The framers of our Constitution incorporated specific provisions in the Constitution to make available the talented persons to serve in the judiciary. The Constitution of India provides that for the Judge of the Supreme Court a person must be a citizen of India, has been a Judge of High Court at least for five years, and has been for at last ten years as an advocate of the High Court and if one is distinguished jurist in the opinion of the President.[1]

[1] For details see, Constitution of India, Article 121

In case of High Court a person to be qualified for appointment as a Judge, must be a citizen of India, must have held a judicial office for at least ten years in the territory of India, and must have been an advocate of High Court for at least ten years.[2] In India, so far no person from outside the profession has been given chance to serve the judicial system of the country. This means that political affiliation is one of the qualifications apart from the qualifications prescribed by the Constitution, if this was not the case than at least one jurist must have been provided with the honour to serve the country through the judiciary.

In United States of America, its justices were picked from all sorts of sources, ranging from senators to administrators or law teachers.[3] In fact one of the most celebrated names in the world of judiciary *viz.* Chief Justice *John Marshal* was the Secretary of the State under President Adams, who nominated Marshal after the former lost the election to *Thomas Jeffersons* and became a lame duck President. Marshal had no previous judicial experience, but remained Chief Justice of U.S. Supreme Court for 34 years. There are several other celebrated names in the American Judicial history that had no judicial or legal experience when they were nominated.[4]

In India, time and again, the experience has shown that lawyers commending good practice do not necessary end up as good judges and stated conversely good judges were not generally rich lawyers - which only underlines the fact that the process of selecting a right judge is a difficult one and presently we have no selection machinery at all. The proposed Judicial Commission can be made to fill the void.

3.1.2 Salaries & Allowances

The Government of India Order, 1937, fixed the salaries of Chief Justice of Federal Court and to other Judges Rs. 7000/- and 5500/-respectively. On January 28, 1950 when Supreme Court of India occupied the seat of Federal Court with greatly enlarged jurisdiction. However, the salary of the Chief Justice was fixed to Rs. 5000/- and that of other Judges Rs.

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[2] *Ibid*., Article 217.

[3] Occupations of Supreme Court designees at the time of appointments : Federal office – holder in Executive Branch 22; Judges of Inferior Court 2; Judges of State Court 21; Private Practice of Law18; U.S. Senator 8; U.S.Representative 4; State Governor3; Professor of Law 3; Associate Justice U.S. Supreme Court 2; Justice of the Permanent Court of International Justice 1.

[4] They are story, Brandeis, Stone, Frankfurthjer, Douglas, Clarke, Warren and Rehnquist. Out of 100 Judges of the Supreme Court appointed between 1789 and 1971, 43 had no prior judicial experience. For more details see, Henry J. Abraham, The Judicial Process, Oxford University Press).

4000/- plus,[5] other perks.[6] The salaries of Chief Justice of High Court and other Judges were fixed at Rs. 4000/- and Rs. 3500/-respectively. While fixing salary the other factors like high cost of living and taxation were ignored.

In 1986, the salaries were increased by a Constitution Amendment. The Chief Justice and other Judges of Supreme Court were to be paid Rs 10,000/- and Rs. 9000/- and the Chief Justice of the High Courts and other Judges Rs. 9000/- and Rs. 8000/-. In 1998, the Chief Justice in India were to be paid a salary of Rs. 33000/- and other Judges of the Supreme Court received Rs. 30,000/-. The Chief Justices of High Courts were paid Rs. 30,000/- and other Judges Rs. 26,000/-.

Even taking into consideration the prerequisites attached to the office of judge, judicial salaries have become unrewarding and unattractive to lawyers in good practice, leaving aside lawyers in top practice. In the past, lawyers in India as in the United Kingdom in good practice took judgeship as a career and as a matter of honour even though rewards at the Bar were higher. Today, judicial salaries, apart from becoming unreal with the passage of time, do not stand comparison with the average earnings at the Bar, resulting in fewer and fewer competent lawyers from the Bar taking judgeship.

It is ironical that today fledging graduates passing out of the National Law Schools are offered salaries between Rs. 50,000/- and Rs. 1,00,000/- by law firms and Corporate Houses. Some retired judges as arbitrators, earn fees which far exceed their previous judicial salaries, such a disparity between judicial salaries and rewards at the Bar and elsewhere in the legal profession not only tends to detract talent from coming to the Bench but also creates in sitting judges a feeling that their work is not properly appreciated and rewarded. Low salaries have a direct impact on the efficiency of the higher judiciary, including the disposal of cases. It is little realized by even the legal profession that what is at stake is the functioning of an independent, incorruptible and efficient judiciary.

The Bill introduced in the Lok Sabha proposing to triple the salaries and perks of the judges of the Supreme Court and the High Courts from September 1, 2008, The Chief Justice of India will get Rs. 1,00 lakh, other judges of the Supreme Court and Chief Justices of High Courts will draw Rs. 90,000/- plus Dearness Allowance thereon. The judges of High Courts

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[5] See, The Commission of India, Fourteenth Report, Vol. 1, Reform of Judicial Administration, 1958, p. 40; See also Article 125 (2) Constitution of India.

[6] It included free furnished residence, vehicle and other extra accessories necessary for decent standard of living.

will draw Rs. 80,000/- plus Dearness Allowances. The sumptuary and furnishing allowances of the Judges have been doubled.[7] This will to a great extent maintain in the independence of judiciary. This is also essential for the quality and cheap justice as it is said that if you want cheap justice you must have costly judges.

The Lok Sabha took up a *Salaries and Conditions of Service) Amendment Bill, 2017* which seeks to hike the salaries of judges of the Supreme Court and high courts by over two folds amid demands by parliamentarians for higher remuneration for themselves.

Once the bill is cleared by Parliament and becomes a law, the Chief Justice of India will get a monthly salary of Rs 2.80 lakh from the present Rs 1 lakh. Similarly, judges of the Supreme Court and chief justices of the high courts will draw a monthly salary of Rs 2.50 lakh from the current Rs 90,000.

The judges of the high courts, who get Rs 80,000 per month now, will get Rs 2.25 lakh per month, the bill states.

The *High Court and Supreme Court Judges (Salaries and Conditions of Service) Amendment Bill, 2017* also seeks to revise the rates of house rent allowance with effect from July 1, 2017 and the rates of sumptuary allowance with effect from September 22.[8]

President *Ram Nath Kovind* gave his approval to a Bill that will more than double the salaries of Supreme Court and High Court judges.[9]

3.1.3 Tenure

The Constitution of India does not provide the tenure,[10] for the Judges of higher judiciary. The Judges of the Supreme Court retires at the age of 65 years whereas the age of retirement of High Court Judges is fixed at 62 years. The independence of the judiciary depends to a great extent on the security of tenure of judges. If judge's tenure is uncertain it would be difficult for him to perform his onerous duties of his august office without fear or favour.[11]

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[7] The Tribune (Editorial), September 12, 2008 at p.8.

[8] The High Court and Supreme Court Judges (Salaries and Conditions of Service) Amendment Bill, 2017 (Bill No. 225 of 2017).

[9] http://www.thehindu.com/news/national/kovind-approves-bill-to-hike-judges-salary/article22597948.ece accessed on 01-03-2018.

[10] In advanced countries like USA and U.K., there is no age limit fixed for Judges. They work till they are deemed fit. They are removed only in case of gross judicial misconduct.

[11] Nani A- Palkhivala, "The Supreme Court's Judgment in the Judges Case", Journal of the Bar Council of India, Vol. 9 (2), 1982,p.2l3.

A Judge of the Supreme Court shall hold office until he attains the age of 65 years. The age of the Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide [*Article 124 (2-A) (a)]*.

A Judge may, however, resign his office by writing to the President [*Article 124 (2) (a)*]. Under Clause (b) it is not clear whether a resignation sent to the President becomes final immediately or it becomes effective only when accepted by the President or can it be withdrawn before it is accepted by the President?

This question was raised before the Supreme Court in the case of *Union of India v. Gopal Chandra Mishra*. Although the case is based on *Article 217* relating to the resignation of a High Court Judge yet it applies to *Article 124 (6)* also because *Article 124 (6)* is in similar terms. The Court has held that in the absence of a legal, contractual or constitutional base a '*prospective*' resignation be withdrawn before it becomes effective and it becomes effective when it operates to terminate the employment of the office tenure of the resignor.

'*Resignation*' takes place when a Judge of his own volition chooses to sever his connections with his office. If in terms of his own writing he resigns in presenti the resignation terminates his office tenure forthwith, and cannot, therefore, be withdrawn or revoked thereafter. But, if by such writing he chooses to resign from a future date, the act of resigning is not complete because it does not terminate his tenure before such date and the Judge can at time before the arrival of that prospective date on which it was intended to be effective, withdraw it, because the Constitution does not bar such withdrawal.

3.1.4 Promotions

The instrument of consultation has great bearing in case of promotion. In case of appointment of Chief Justice to the Supreme Court, the President may or may not consult the judges of Supreme Court and High Courts. In the second place, the Constitution is silent and does not provide criteria for Chief Justice. Further the word '*may*' signify that it is not mandatory for the President to consult any one.

Till 1973, the senior most judge of the Supreme Court was elevated to the post of Chief Justice. But in 1973 this practice was suddenly and unfortunately dispensed by the Government.[12] This action of the Government was condemned from all quarters. The action of the Government was considered as purely political one. The said attitude of the

[12] Justice A.N. Ray was appointed as Chief Justice of India superseding three senior colleagues namely, Justice Grover, Justice Hegde and Justice Shelat.

Government depicts the intolerance of the Government on the one hand and undermines the independence and impartiality of the judiciary on the other.

Thus, there is an imminent need to evolve some formula in this regard so that independence of the judiciary may remain intact. The Law Commission of India in its Eightieth Report recommended that a judicial committee or National Commission or high level panel consisting of persons known for their integrity, independence and judicial background in the matter of appointments be constituted. It is for these reasons for the Supreme Court has taken over the power of appointment of Judges to the Supreme Court and High Court. The Chief Justice in consultation with two senior most Judges,[13] (now four senior most Judges)[14] may appoint the Judges.

3.2 Removal of Judges

In India, both the Supreme Court and High Court Judges are appointed by the President under *Article 124* and *217*, and they enjoyed a fixed tenure and are removable under *Article 124(4)* and *217* on proved misbehavior or incapacity after an impeachment motion passed by each House supported by a stipulated majority. Their tenure and different process of removal are also in tune with their independent function. In England, the judges are appointed by the Lord Chancellor; they hold office during good behavior and can be removed by the Crown when both the Houses present an address. In United States of America, the judge's a removed by impeachment proceedings. The grounds for moving impeachment motion are, '*treason', 'bribery'*, or '*other high crimes and misdemeanors*'.

In India a judge may be removed from his office by an order of President. The President can pass an order only when it has been addressed to the both Houses of Parliament in the same session. The address must be supported by a majority of the total membership of that House and also by a majority of not less than two third of the members of that House present and voting. The Constitution prescribes the procedure for investigating and proof of the misbehavior incapacity of a judge of the Supreme Court or of a High Court and for the presentation of an address by Parliament to the President.

The *Judges (Inquiry) Act, 1968* prescribes procedure for removal of Judges of the Supreme Court or High Court which can be initiated only if a notice of motion for presenting an address to President praying for his removal, signed by not less than 100 members of the

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[13] *Supreme Court Advocates-on-Rccord v. Union of India*, AIR 1994 SC 268.

[14] In Re: Presidential Reference, AIR, 1999 SC 1.

House of the People or 50 members of the Council of States is given to the Speaker or Chairman.[15] The Speaker or Chairman is empowered to either admit or refuse to admit the motion, "*after consulting such persons, if any, as he thinks fit and after considering such materials, if any as may be available to him*". If the Speaker or Chairman admits the motion, he may constitute a Committee of three members of whom one shall be from among the Chief Justice and other Judges of the Supreme Court, one from the Chief Justice of the High Courts and a distinguished jurist.[16] The high powered Committee shall investigate and frame charges against the judge. The copy of charges along with the grounds on these charges are sent to the judge concerned so that he may get a detailed information of all the allegations against him. After this, he is given a reasonable opportunity of presenting a written statement of defence, within such time as may be specified in this behalf by the Committee.[17] Where the reports of the Committee contain the findings that the judge is guilty of any misbehavior or suffers from any physical or mental incapacity, then the motion is taken up for consideration by the House together with the report of the Committee.

The impeachment power has been used sparingly since the creation of judiciary. The experience with the removal process in *Justice v. Ramaswami's case*[18] has shown clear fallibility in the Constitutional frame work. A time has shown that the judicial system is not beyond re-approach. Aspersions have been cast and charges have been leveled. The current constitutional framework has prayed to be totally inadequate to deal with removal of judges. Failure of impeaching proceedings against *Justice v. Ramaswami* suggests that there must be disciplinary action against erring judges besides punitive transfers. In case of judges of Supreme Court there cannot be transfers.

Recently, the Chief Justice of India in a recommendation to the Union Government asked for initiation of '*impeachment proceedings*' against *Soumitra Sen*, a sitting judge of Calcutta High Court after a peer Committee of the Supreme Court found him guilty on charges of grave misconduct. The Chief Justice of India became inevitable as the indicted Judge had refused to put in his papers, thus not abiding by past conventions in this regard.

[15] See Section 3 (2) of Judges (Inquiry) Act, 1968.
[16] *Ibid*., Section 3 (2).
[17] *Ibid*., Section 4 (4).
[18] (1991) 3 SCR 189.

Now the ball is in the Court of executive government, who would have to take future action with respects to setting cumbersome and marathon process of impeaching in motion.

Justice Sen being the first person recommended for impeachment by a Chief Justice does not mean that the judiciary is immune from corruption and other vicious practices. The aforesaid incident has occurred at a time when a case being popularly referred as '*cash-at-Judge's-door scam*' of Chandigarh is also hitting the news headlines. The matter has once again brought to limelight the presence of unholy nexus existing between certain members of legal fraternity and judiciary. If a clerk of a senior law officer is found delivering a packet containing lakhs of rupees at the door of the official residence of High Court Judge, surely it sends disturbing signals among the members of the society, who may form their own perceptions about the deplorable incident. The Chief Justice of India has already permitted CBI, which is investigating the case, to question the two Judges of the Punjab and Haryana High Court in this regard, whose names cropped up during investigations.

Even reports of misuse of official position by a former Chief Justice of India *Y.K. Sabharwal* came some time back. Thus one thing that cannot be denied is that public confidence over judiciary has indeed been shaken by occurrence of these unfortunate incidents. Concerns regarding the lack of accountability of the judiciary have been expressed also by judges. *Justice J.S. Verma*, a former Chief Justice of India has said "*here is no point in saying that there is no corruption in the judiciary. No one is going to say it, much less accept it. One cannot go on sweeping it under the carpet and not expect it to show up. It is showing up now*".

Justice Verma further stated that in a Court of 20 judges two by default are corrupt. This means that in the absence of any open accountability mechanisms within the Indian judiciary that litigant as of now faces 10 per cent chance for a case to decide by an officer who is unfit to be a judge. It implies that the justice quotient of Indian judiciary is only 90 per cent. Accountability of the judiciary is fundamental to its independence. Indian judiciary cannot be an exception.[19] Keeping erring judges on Bench is against the independence and dignity of judiciary itself.

[19] See Asian Human Rights Commission, Hong Kong, 14th September, 2008.

Hence, there is a need to provide effective framework in the Constitution itself. Impracticability of impeachment and immunity from prosecution on charges of corruption without the consent of the Chief Justice of India make it necessary to devise a mechanism to ensure accountability of Judges. In an atmosphere of all pervasive corruption in the country, it is necessary that corrupt members of the judiciary be dealt with firmly to save the institution whose credibility is relatively very high.[20] The National Commission to Review the Working of Constitution in the year 2002, recommended, *inter alia*, setting up of a National Judicial Commission as well as a Peer Committee comprising of three senior-most judges of the apex Court to examine complaints of deviant behavior of all kinds and complaints of misbehavior and incapacity against judges of the Supreme Court and High Courts. The UPA government adopted a statutory route by tabling the *Judges (Inquiry) Bill, 2006* which provided for the setting up of a National Judicial Council to deal with incidental matters. The Bill, which did not find adequate support from judiciary for various reasons, is still awaiting passage in Parliament.

In ***K. Veeraswami v. Union of India***,[21] a five Judge Bench of the Supreme Court by a majority of 4:1 has held that a Judge of the Supreme Court and High Court can be prosecuted and convicted for criminal misconduct. The expression '*misbehaviour*' in *Article 124 (5)* includes criminal misconduct defined in the Prevention of Corruption Act. The expression '*public servant*' in *Section 6(1) (c)* and *(2)* includes Judges of the High Court and the Supreme Court. The *Judges (Inquiry) Act, 1968* enacted by Parliament under *Article 124 (5)* and the *Judges (Inquiry) Rules, 1969* made thereunder provide for removal of a Judge on the ground of proved misbehaviour or inability. It does not provide for prosecution of a Judge for offences under *Section 5 (1) (e)* of the *Prevention Corruption Act*.

The proceeding initiated for removal against *Mr. Justice V. Ramaswami*, a sitting Judge of the Supreme Court of India, was the first case after the Constitution came in to force. The motion was, however, defeated in the Lok Sabha as it failed to get the support of the two-thirds majority of the members present and voting.

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[20] P.P.Rao, 'Judicial Accountability', Indian Advocate, 1998, Vol. 28, pp. 23-33 .

[21] (1991) 3 SCC 655.

The Constitution prohibits a person who has held office as a Judge of the Supreme Court from practising or acting as a Judge many Court before any authority within the territory of India. But under *Article 128*, the Chief Justice may appoint the retired Judges of the Supreme Court to sit and act as ad hoc Judges in the Supreme Court.

3.3 Transfer of Judges

Article 222(1) empowers the President after consultation with Chief Justice of India transfer a judge from one High Court to another. Initially, the transfers were few and far between. During emergency the power was liberally used, but not in the interests of the institution of Judiciary as such.[22] There has been a lot of debate on whether judges should be transferred from one High Court to another. There is a great deal that can be said in favour of policy based on transfers because such a system would promote uniformity in judgments and also no judge would develop routes in his/her home State.[23] It is essential, however, that a uniform policy should be followed and it should be made clear to the Judge concerned at the inception of service that he/she would be liable to transfer at the end of the prescribed period (say 3/5 years). What should be avoided is *ad-hocism* in the applicant of the policy giving rise to resentment to the transferee judges.

The transfer of Judges from one High Court to another may be necessary and, if only it can be regulated by policies and norms which are reasonably transparent, the execution of which is just and predictable, there may not be serious objection to the concept. Unfortunately, the taw declared by the majority in the Second Judges case has not won the confidence of potential victims of the policy *viz.,* the present and prospective Judges of the High Courts. The Judge made law is as under :-

- "(i) The opinion of the Chief Justice of India has not mere primacy, but it is determinative in the matter of transfers of High Court Judges/Chief Justices.

- (ii) Consent of transferred Judges/Chief Justice is not required for either the first or any subsequent transfer from one High Court to another.

- (iii) Any transfer made on the recommendation of the Chief Justice of India is not to be deemed to be punitive, and such transfer is not justiciable on any ground.

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[22] P.P. Rao, '*Judicial Accountability'*, op.cit., p. 29.

[23] Shyamlha Pappu, '*Appointment, Transfer and Removal of Judges'* in Subbasb C. Kasyap (ed), 'The Citizen and Judicial Reforms under Indian Polity'. (2003), p. 156.

- (iv) In making all appointments and transfers, the norms indicated must be followed. However, the same do not confer any justiciable right in any one."[24]

Transfer has become a convenient way of shifting Judges from their own High Courts to other High Courts, in the event of complaints against them or on account of their close relatives practicing in the same High Court. Of late, consent is obtained from the candidate concerned before appointment for his transfer to another High Court soon after his appointment. As there is no transparency in exercising the power of transfer, there is ample scope for misunderstanding the reason for transferring a particular Judge. It is time to review the transfer policy. Transfer can never be a solution to tackle judges of doubtful integrity. There should be a mechanism by which such judges who do not enjoy good reputation could be prematurely retired from the service after an objective assessment of each case by a Judicial Committee of the Supreme Court chaired by the Chief Justice of India or by the National Judicial Commission. This, no doubt, requires an amendment to the Constitution.

3.4 Judicial Analysis on Transfer of Judges

Judges Transfer Case – I [25]

The Supreme held that the word '*consultation*', did not mean concurrence and the Executive was not bound by the advice given by the judges. Thus, the power of appointment of the Judges of the Supreme Court and transfer of the High Court Judges was solely vested in the Executive from whose dominance the judiciary was expected to be free. Mr. Justice Bhagwati of the Supreme Court in the S.P.Gupta's case had suggested for establishment of a Judicial Commission for recommending the names of persons for appointment of the Judges of the Supreme Court and High Court, Secondly, the power of the President under Article 222 to transfer a judge from one High Court to another may also be used to undermine the independence of the judiciary.

Judges Transfer Case – II [26]

The Supreme Court by a 7 : 2 majority overruled S.P.Gupta's case and held that the opinion of the Chief Justice of India must be given the greatest weight in the selection of the

[24] 1993 (4) SCC 441 at 710.
[25] *S.P.Gupta v. Union of India*, AIR 1982 SC 149.
[26] *S.C Advocate on Record Association v. Union of India*, (1993) 4 SCC 441.

Judges of the Supreme Court and High Courts and the transfer of the High Court Judges. The selection should be made as a result of a particularly consultative process. The Chief Justice was required to consult two senior most Judges of the Supreme Court before sending his recommendations to the Government.

Thus, the executive element in the appointment process was reduced to minimum and any political influence is eliminated. The majority said that initiation of the proposal for appointment for the Judges must be started well in time and the appointment should be duly announced soon.

No appointment of any Judge to the Supreme Court or any High Court could be made unless it was in conformity with the opinion of the Chief Justice of India. The Judges made it clear that the opinion of the Chief Justice of India has not mere primacy, but is determinative in manner of transfer of High Court Judges and Chief Justices.

Judges Transfer Case – III [27]

A nine judges Bench of the Supreme Court has unanimously held that the recommendations made by the Chief Justice of India on the appointment of Judges to Supreme Court without following the consultation process are not binding on the Government. Widening the scope of Chief Justice of India's consultation process, the Court gave its opinion on the 9 questions in the Presidential Reference. The President had sought the Supreme Court's clarification under Article 143, on the consultation process, as laid down in S.C. Advocates on Record Association Case in 1993. In that case the Court gave primacy to the opinion of the CJI formed in consultation with two senior most Judges of the Supreme Court in regard to the appointment of Judges and their transfers.

Thus, the main question on which the advisory opinion of the Court was sought was whether the government was bound by the recommendation of CJI sent to it without consulting his two senior most colleagues.

The Court held that the '*consultation process to be adopted by the CJI requires consultation of plurality of Judges*'. "*The expression consultation with the Chief Justice of India in Article 217 (1) and 222 (1) of the Constitution requires a consultation with a polarity*

[27] In Re Presidential Reference, AIR 1999 SC 1.

of Judges in the formation of the opinion of the CJI. The sole opinion of the CJI does not constitute consultation process". The Court, held that the Chief Justice of India must consult a collegium of four senior most Judges of the Supreme Court and made it clear that "*if two Judges give adverse opinion the CJI should not send the recommendation*" to the President.

"*The collegium should*" the Court said, "*make the decision in consensus and unless the opinion of the collegium is in conformity with that of the CJI, no recommendation is to be made*". In regard to transfer of High Court Judges, the Court said, in addition to the collegium of four Judges, the CJI was obliged to consult Chief Justices of the High Courts (one from which the Judge was being transferred and the other receiving him).

However, the Court said in regard to appointment of High Court Judges, the CJI is required to consult only two senior most Judges of the Supreme Court. The Court held that the CJI should make recommendations in regard to appointment and transfer in accordance with the guidelines laid down in the 1993 judgment and as per opinion given in the present Presidential Reference of 1999.

3.5 Accountability of the Judiciary : Need for Code of Conduct

During modern period, the independence of the judiciary has been accepted as a cardinal principle by the leading democracies of the world in their Constitutions. Similarly, this principle was well recognized by the framers of our Constitution and accordingly they incorporated the provisions in the Constitution. There is no doubt in it that judiciary must be accorded a position of independence under the Constitution but at the same time it is also true that the judiciary like other institutions, those exercise public power and accountable to the people, must be made accountable to the people.

The founding-fathers of the Constitution were the view that due to nature of the functions of Judges it is not desirable to make judges directly accountable to the people for their functions. The Constitution provides the only remedy to make judges accountable in the shape of impeachment. The judiciary is neither democratically accountable to the people, nor to any other institution. The only recourse against a judge committing judicial misconduct is impeachment, which has been found to be a totally impractical remedy.

To initiate the impeachment process one needs the signatures of 100 Lok Sabha or 50 Rajya Sabha members of Parliament. This one cannot secure unless tow conditions are satisfied. First, one must have conclusive documentary evidence of very serious misconduct against s judge. And second, such that it has assumed the proportions of a public scandal. Till that happens, there are few MPs who are willing to put their signatures on an impeachment motion. Most MPs or their parties have cases in court, and nobody wants to invite the wrath of the judiciary.

Further, the media is afraid and unwilling to publicize the charges against the judges (even when they have documentary evidence to back the charges) because of the fear of contempt of court which constantly hangs as a sword over their necks. Of late, a thinking process is gaining ground in all the leading democracies to find out an impeachment. Some of the countries have established institutions with a power to hear complaints against the judges of higher judiciary.

Hence, the judiciary of India is not an exception to this. In India doubts have been raised regarding the integrity and honesty of even the Judges of higher judiciary. Consequently, the subject matter regarding the judicial accountability of higher judiciary has become important in India also.

Truly admitting, accountability of any public institution is very vital for the survival of democracy itself. The absolute and unlimited powers to any public institution without accountability are harmful to the society at large. The Constitution of India contains certain provisions for fixing the responsibility of an individual judge. The provisions of oath of office make judges accountable to their conscience. There is no mechanism or device in our present system to make judges of higher judiciary accountable to any institution superior to it. There is a dire need of the hour to make judges of higher judiciary accountable in matters of behavior, conduct, discipline and corruption. In the recent years, the credibility of judiciary has eroded. The charges of corruption against some of the Judges of High Courts and charges of misusing government funds against a sitting judge of the Supreme Court have made the judiciary a target of attack.[28]

[28] See, Arbind Kala, Judging the Judge, The Tribune, June 23, 1994, p. 9.

Recently, the Chief Justice of India in a recommendation to the Union Government asked for initiation of '*Impeachment Proceedings*' against *Soumitra Sen*, a sitting Judge of Calcutta High Court, after a peer Committee of the Supreme Court found him guilty on charges of grave misconduct. Prior to this, *Justice V. Ramaswami* faced impeachment in 1991. In *Ramaswami's case* impeachment failed due to the absence of a political consensus. Further, the enquiry report concerning the allegation involving three judges of High Court of Karnataka is yet to be made available in the public domain. The enquiry that exonerated the three judges in question was completed in 2003. The accusation against former *Chief Justice Y.K. Sabharwal* that his sons were deriving illegal profit from their real-estate business making use of their father's job as a Judge faced contempt of Court action from the Delhi High Court. The Court refused the defendants the possibility to take '*truth*' as a legal defence.[29]

Further, Chief Justice of India has already constituted an in-house Committee comprising three senior Judges of the High Courts to probe into the Chandigarh's scam (in addition to investigation being conducted by CBI), and it is expected that truth would come to the surface expeditiously, of course, without causing any harm of reputation and victimization to any party.[30] Prior to these instances, the Courts here however consistently avoided calls for accountability despite there being many instances of serious allegation of misconduct and misdemeanor. At one time *Justice S.P.Bharucha*, a former Chief Justice of India admitted that about 20 per cent of the High Judiciary in India is corrupt. According to *Justice Michael Saldhana* of Karnataka High Court, it is 33 per cent. Despite there being such admission, no enquiry has ever been initiated against any judge for past 15 years.[31]

There is no point in saying that there is no corruption in the judiciary. No one is going to say it, much less accept it. One cannot go on sweeping it under the carpet and not expect it to show. It is showing now. Therefore, the time has come to enact a law to hold judges accountable, says former *Chief Justice J.S. Verma*, because '*when moral sanction does not work, then legal sanction is required*'.

[29] http://www.ahrchk.net/statements/mainfile.php/2008 statements/1684/ September 10, 2008.
[30] Hemant Kumar, '*Judging the Judges*', Lawyers Update, October 2008, pp.7-8.
[31] A statement by the Asian Legal Resource Centre, September 25, 2007.

In an exclusive interview to the Indian Express, his first after demitting the office on January 18, 1998, *Justice Verma* expressed concern at the perception that '*traditions and conventions*' are not good enough guarantees for judicial accountability anymore." Citing the example of *Shiv Prasad Sinha*, a judge of Allahabad High Court, he said, "*there are allegations against him and the finding was that some judgments of his appeared to be made for extraneous consideration. And he resigned*."

Today, what is alarming is the reality that a nexus has developed between the corrupt members of judiciary, the government and the powerful and influential sections of the society who contrive to make gains for themselves. The nexus many a time includes some of the legal profession as well.[32]

Thus, it is in the interest of anyone of these quarters to change the system so as to have an independent and incorruptible judiciary. The judiciary itself is wary of the charge and many of its members consider any proposal of change as an incursion into their domain. That is why accepting that all is not well in their house, proposals have been made that the judiciary itself would lay down norms of behavior and an in-house method by which its errant members may be dealt with. This too is eyewash, it is revealed from the foregoing study, and the rot that has set in judiciary has undermined the judicial system to a point beyond salvation. Unless bold and drastic measures are initiated without further delay, nothing worthwhile can be achieved.

There is now insistent demand from the public that in, matters dealing with appointments and other misdemeanors by High Judiciary needs to be carried out by an Independent Body using transparent criteria, instead of present unsatisfactory mechanism shrouded in secrecy and controlled by a small cabal. It is for this reason that National Commission to Review the Constitution headed by former *Chief Justice Venkatachaliah* has also advised the Constitution of a National Judicial Commission. Justice Venkatachaliah states in a consultation paper that of late there is public concern over judging behaving in un-judge like manner and such conduct calls for a disciplinary system.[33]

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[32] Hardev Singh, '*On Corruption in Judiciary and Judicial Accountability*', Peopled Democracy, June 8,2003, Vol: XXVT1, No. 23.

[33] Anil Diwan, '*Contempt of Court and Accountability of Judiciary*' in Subhash C. Kashyap, 9th ed.

The need for judicial accountability and greater transparency, not only in matters of appointment and transfer of Judges but in all spheres of judicial activity, is far greater today than ever before for the simple reason that the Court has enlarged its jurisdiction limitlessly and has accumulated a vast reservoir of judicial power. It is necessary to have a constitutional mechanism which can ensure appointments of a high quality to the High Courts and Supreme Court, exercise of power of transfer of a High Court Judges on a rational basis and effectively dealing with the black sheep among the judges and judicial officers, if any, to enable the judiciary to dispense quick and inexpensive justice to the litigant public and also contain the superior judiciary within the constitutional limits. It is in this context the Government of India has introduced a Constitution (98th Amendment) Bill seeking to constitute the National Judicial Commission.

The judiciary claims that any outside body having disciplinary powers over them would compromise their independence. They claim that they have set up an '*in-house mechanism*' for investigating and taking action on complaints against judges. It is this "in-house procedure" which is sought to be given statutory status by the *Judges Inquiry Act (Amendment) Bill 2006*. One major problem with the '*in-house procedure*' is that judges regard themselves as a close brotherhood, and are reluctant to take action those they regard as their brothers and with whom they sit and interact every day inside and outside the courts.

Moreover, they feel that exposing bad apples among them would reflect poorly on the judiciary as a whole. That is why most complaints (even serious ones made with documentary evidence) against judges are just brushed under the carpet and not investigated or inquired into. Moreover, even if the in-house body finds a judge guilty of serious misconduct, they will only recommend impeachment and the matter will again go for voting to Parliament, which can be frustrated by partisan political considerations as happened in the *Ramaswami case*. Also, the judge has been given a right of appeal to the Supreme Court even after Parliament votes to remove him. All this will ensure that no judge will be removed till he retires.

3.6 The Judicial Standards and Accountability Bill, 2010

The *Judicial Standards and Accountability Bill, 2010* providing for a mechanism to deal with complaints against judges of High Courts and the Supreme Court was tabled in the Lok Sabha on December 1, 2010 by Law Minister Veerappa Moily. At present, there is no legal mechanism for dealing with complaints against judges, who are currently governed by '*Restatement of Values of Judicial Life*,' adopted by the judiciary as a code of conduct without any statutory sanction.

The enactment of the bill will address the growing concerns regarding the need to ensure greater accountability of the higher judiciary by bringing in more transparency and would further strengthen the credibility of the Judiciary.

The Bill sets judicial standards and makes judges accountable for their lapses and mandates judges of the High Courts and the Supreme Court to declare their assets and liabilities, including those of their spouses and dependents and to file an annual return in this regard.

The Bill mandates that judges should not have close association with individual members of the Bar and not allow any member of their immediate family to appear before them in courts. Judges should not contest any election to any office of club, society or other association, except those associated with the law or any court.

Further, they should not have any bias in judicial work or judgments on the basis of religion, race, caste, sex or place of birth. This most recent Bill that is put forth for consideration seeks to replace the *Judges (Inquiry) Act, 1968*.

It seeks to:

- (a) create enforceable standards for the conduct of judges of High Courts and the Supreme Court;
- (b) change the existing mechanism for investigation into allegations of misbehaviour or incapacity of judges of High Courts and the Supreme Court;
- (c) change the process of removal of judges;
- (d) enable minor disciplinary measures to be taken against judges; and
- (e) require the declaration of assets of judges.

4. SUMMARY

It is revealed from the foregoing study that in a democracy all organs of the State are responsible and accountable to the people at large. Judiciary is no exception. Subhash C. Kashyap has rightly stated that '*it is necessary for the High Courts and Supreme Court to set examples and provide role models worth emulation'*.[34] The absolute and unlimited power to any high public institution without accountability is harmful to the society at large. Judges are human beings and one cannot proceed on the assumption that they can never go wrong.

Hence, in a civilized society there is a need of checks and balances to restrain the misuse of power. A powerful judiciary without accountability is not only an anathema to our Constitution but also a recipe for disaster for our democracy. The situation needs to be urgently rectified. The issue of judicial accountability cannot be pushed under the carpet for long transparency and accountability cannot be pushed under the carpet for long Transparency and accountability are the values the judiciary of a democratic country can hardly refuse. There cannot be any justification for the judiciary of India to consider itself beyond scrutiny.

Judicial independence does not mean the absence of accountability. Accountability ensures transparency and, therefore, *raison d'etre* for independence. Mere statements of principles acknowledging need to have judicial accountability are not enough. Practicable mechanism for judicial accountability is necessary for preservation of judicial independence in India.

It cannot be said that every judge is corrupt dishonest. There are many honorable judges in our system, who on a day to day basis, try to fight the sleaze that is eating the judiciary from inside-out. They have also become the victims of this once upright institution. But they are not enough alone to bring about any changes. Media and public pressure will play an instrumental role in the transformation and revolution of the judiciary. The recent discontent shown by the public has stirred the sleeping government to act in this direction.

Groups like Campaign for Judicial Accountability and Reforms are putting in tremendous efforts to meet the problem of Judicial Accountability head on. Today every democracy recognizes the institutional value of Judicial Accountability. Unless the Indian government moves on from the ancient and out dated laws with regards to Judicial Accountability, the judiciary is headed towards unfathomable decline. It is only possible to fight the disease of corruption by extensive procedural reforms.

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[34] Subhash C. Kashyap, '*Judicial Reforms'*, The Pioneer, December 2, 1999.

‘*Power corrupts and absolute power corrupts absolutely*’. No more can the judges hide behind the cloak of judicial independence and secrecy which is an allergy to democracy. It is aptly said that independence of judiciary is not the property of the judiciary, but a commodity to be held by the judiciary in the trust of the public.[35]

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6. SELF – ASSESSMENT QUESTIONS

1. What is the procedure for the appointment and transfer of High Court Judges?
2. Explain the procedure prescribed in the Constitution for the appointment of judges of Supreme Court. Also examine the need for Judicial Commission.
3. What do you mean by Independence of Judiciary? How it has been incorporated in the Constitution of India?
4. Comment upon the “Code of Conduct for Judges”. How can we ensure a more accountable and responsible Judicial system in India? Discuss.

[35] https://www.lawteacher.net/free-law-essays/constitutional-law/problems-in-judicial-accountability-constitutional-law-essay.php#ftn1

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(DDE – 2018) **LL.M – I**
INDIAN CONSTITUTIONAL LAW AND THE NEW CHALLENGES

Paper : II (102 - DE)
Lesson No. : 5 - A

Writer : Dr. Sudhir Kumar Vats*
Vetter : Prof. Rajpal Sharma**

JUDICIARY IN INDIA – INDEPENDENCE OF JUDICIARY AND APPOINTMENT OF JUDGES

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2. OBJECTIVE
3. PRESENTATION OF CONTENTS
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- **3.2 Meaning and Concept of Independence of Judiciary**
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4. SUMMARY

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1. INTRODUCTION

An independent judiciary is necessary for a free society and a constituent democracy. It ensures the rule of law and realization of human rights and also prosperity and stability of the society. The independence of the judiciary is normally assures through the Constitution but it may also be assured through legislations, conventions and other suitable norms and practices. Following the constitution of United States, almost all constitutions lay down at least the foundation if not the entire edifices of an independent judiciary. The constitutions or the foundational laws on judiciary are however, only the starting point in the process of securing judicial independence. Ultimately the independence of the judiciary depends on the totality of a favorable environment created and backed by all state organs including the judiciary and the public opinion. The independence of judiciary also needs to be constantly guarded against the unexpected events and the changing social, political, economic conditions; it is too fragile to be left unguarded.[1]

India has given itself a liberal constitution in the Euro- American traditions, which aims at establishing a free and democratic society. It also aims at prosperity and safety of the society. Its makers believed that such a society could be created through the guarantee of fundamental rights and an independent judiciary to guard and enforce these rights. Therefore the framers of the Indian Constitution dealt with these two aspects with maximum and identical idealism.[2]

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[1] file:///C:/Users/Dell/Downloads/SSRN-id1558979.pdf accessed on 23-06-2017.

[2] *Ibid.*

Rule of Law and Independent Judiciary go hand in hand. There cannot be a rule of law without an independent judiciary. In any rule of law society judiciary is an essential part of the life of a nation like the legislature and the executive. No rule of law society can ever exist without an independent and accountable system of dispute resolution mechanism. The impartiality and independence of the judiciary, however, depends on the high standards of conduct followed by judges.

The Constitution of India has given a considerable importance to the judiciary, and has provided the Supreme Court of India at the top. The essence of fair and fearless administration of justice is a sine qua non of a successful democratic government. Independence of the judiciary is in fact the independence of the individuals manning it which in turn depends on various personal and institutional factors. Judicial independence is not the same thing as impartiality of the Judges or equidistance from the government. The concept of judicial independence is something that goes beyond it and touches upon the freedom of a judge not only from various social, economic, political and personal interests but commitment to the Constitution also.

On the other hand, accountability is a natural consequence of independence. The concept of public accountability of the judicial system is a matter of vital importance and without accountability, the concept and claim of independence becomes merely a hollow concept. The judges should make themselves accountable and ensure that, their actions are transparent and within the parameters set by the Constitution. Views are being expressed from various quarters regarding the concern of the judiciary in respect of various issues. Since accountability has been specifically prescribed on other organs of the State in order to have an effective functioning and control. Time has come to think about the accountability of the judiciary itself. But the accountability to what extent, to whom and in what form ? These are the areas which require deeper consideration and anxious thought. All social and political institutions are under massive challenges and pressures of reassessment of their relevance and utility. Judiciary as a watchman is also to be watched because the basic concept of any democratic system is check and balance.

But the judiciary is also accountable but not to other body but to law in general and Constitution in particular. There are many restrictions on courts other than judicial restraint to make the judiciary accountable for its independence. One must appreciate that the immunities provided to ensure judicial independence are intended for the benefit of the litigants in

particular and the citizens in general. Misuse of these privileges by some, has led to a call for common standards of conduct and better accountability from the judiciary.

In the modern welfare State, the society has got a right to demand better governance from the judiciary. The citizens now want judges to be accountable as they feel that there are no avenues for them to remedy the minor misbehavior and mal-treatment of witnesses or litigants at the hands of the judges. They sometimes feel that these minor misbehaviour and mal-treatments are not corrected by superior courts and that the superior courts would shield their own men and it is useless to make complaints. The expectation of independence and impartiality is much higher from the judiciary than any other organ. Deciding the cases before them in expeditious and fair manner and giving reasoned orders is another aspect of such accountability. Judiciary should not feel that adhering to the standards of accountability is inimical to its independence. The strength of any judicial institution must depend on the standards of accountability that it sets.

In the past, Indian judiciary has become a decaying institution that has no internal mechanisms or will or strength to adapt to the changing times. The judiciary has become almost a law unto itself, answerable to none and under no pressure to reform or change with time.

Further, various norms have been evolved in order to see that justice not only done but also seen to have been done. These self-imposed restrictions are nothing but an attempt to make the judiciary accountable to a procedure and practice established by law. The greatest threat to the independence of judiciary is the erosion of credibility of the judiciary in the mind of public, for whatever reasons.

By and large the Indian judiciary has enjoyed immense public confidence. The common man considers the judiciary as '*the ultimate guardian of his right and liberties*'.

2. OBJECTIVE

The main objective of this chapter is to discuss the Independence of Judiciary and Appointment of Judges in India. This chapter also deals with Objective of Independence of Judiciary, Constitutional Position of Independence of Judiciary, Judicial Immunities and Implications of Independence of Judiciary.

Further, this chapter also deals with National Judicial Appointments Commission, Procedure for appointment to be regulated by the Parliament and Collegium System in India.

3. PRESENTATION OF CONTENTS

3.1 Historical Perspective of Independence of Judiciary

Independence gets essentially with individual freedom. '*Freedom from want*' and '*freedom from fear*' are, in the context basic instincts cherished historically even by the primitive man and his efforts in the process of living.

In India, independence and impartiality were considered to be the essential qualities of a Judge from the earliest times.[3] Ancient texts reveal that speedy and satisfactory disposal of cases depends on competence and personality of judges. The judges selected should be men of character and integrity. They should be well-versed in Law and Jurisprudence. Our ancient scripture provide in very clear terms the qualities that judge should possess and the duties that he should perform.

One who is well-versed in civil and criminal law and procedure, sprightful, of sterling character, impartial towards friends and foes, of *Dharma* aiding nature, truthful, ever active and who has established control over anger, desire and greed and pleasant in speech and demeanor should be appointed a judge.

In Shukraniti, it is stated that there are five causes which give rise to the charge of partiality[4] against the judges. They are: *(i) Raga* (affection in favour of a party); *(ii) Lobha* (greed); *(iii) Bhaya* (fear); *(iv) Dwesha* (ill will against a party); and *(v) Vadinoscha rahashruthi* (the judge meeting and hearing a party to a case secretly).

According to *Yajnavalkya*, independence of character, great learning in the various branches of law and impartiality were the essential qualities of a person occupying a judicial office.[5] According to our *Dharamshastras*, a judge must possess the following qualities :-

"*He should be learned, sagacious, eloquent, dispassionate, impartial; he should pronounce judgment only after due deliberation and enquiry; he should be a guardian to the weak, a terror to the wicked; his heart should covet nothing, his mind be intent on nothing but equity and truth.*" [6]

In India, in so many Provincial States, there was independent and well-knitted judicial system. Though the judges were appointed by the Crown in many States, the judges were allowed to act independently from any interference from the Crown. The Indian judiciary

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[3] S.M.N.Raina, *Law, Judge and Justice*, 201 (1986).

[4] Ch. V : 14-15.

[5] V.R.R. Dixitar, *Hindu Administrative Institutions,* Madras University of Madras (I Edn: 1929), p. 223.

[6] *Ibid*., at 223-224.

started as an extension of the colonial regime. British set up a poor copy of the British judicial system as Indian Judicial System. The judges appointed were the symbol of imperial power and all the systems and procedures were intended to humiliate the natives. Even after Indians were appointed as judges, any contact between judges and the common people was discouraged. The concept of jury was anathema since it would have involved the local people in decision making process.

The most important and difficult task that fell on the shoulders of the framers of our Constitution in the earlier stages of Constitution making was to make provisions for the establishment of an independent and impartial judiciary. This was sought to be ensured primarily through the procedure for the appointment of judges and a fixed tenure for them. For this purpose an *adhoc* committee consisting of a former Judge of the Federal Court, Alladi Krishnaswami Ayyer, B.L. Mitter, K.M. Munshi and B.N.Rau was constituted.[7] The Committee explicitly expressed the view that "the appointment of judges should not be left to the unfettered discretion of the Chief Justice of the Supreme Court, nominates a person whom he consider fit to be appointed and the nomination should be confirmed by a majority of at least 7 out of a panel of 11 person. This panel would be composed of some of the Chief Justices of High Courts. Some members of both the Houses of Parliament and some law officers of the Union Government. The alternative method suggested was that the panel should recommend three names out of which the President in consultation with the Chief Justice may select a Judge for the post. The same procedure was to be followed for the appointment of the Chief Justice of India. To ensure independence of the panel, it was suggested that each panel should function for a period of ten years.[8] B.N. Rau has mooted a proposal in which he suggested that the appointment of *ad-hoc* judges should be made by the President with the approval of at least two-third of the Council of States.[9]

The Union Constitution Committee, also recommended that "there shall be Supreme Court with constituent powers and jurisdiction by the *adhoc* Committee of Union Judiciary, except that a judge of the Supreme Court shall be appointed by the President after consulting the Chief Justice and such other Judges of the Supreme Court as also such judges of the High

[7] B. Shiva Rao, *The Framing of India's Constitution : A Study*, 283 (1968).
[8] Rajev Dhawan, *Justice on Trial : The Supreme Court Today*, 34 (1980).
[9] *Id*., at 35.

Court as may be necessary for the purpose. The Constituent Assembly unanimously endorsed the recommendation regarding the appointment of judges.

The above mentioned recommendations were discussed in the Constituent Assembly on July 28, 1947 and incorporated in the Draft Constitution of October 1947. When the Draft Constitution was circulated several suggestions were received and marathon discussion for strong and vibrant judiciary took place in the Constituent Assembly. The Drafting Committee, therefore, submitted : "*There shall be a Supreme Court of India consisting of Chief Justice of India and such number of other Judges not being less than seven as the Parliament may by law prescribe. Every Judge of Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges necessary for the purpose and shall hold until he attains the age of sixty-five years*".

It was further made clear that in case of appointment of a judge, other than the Chief Justice, the Chief Justice of India should always be consulted.

The framers envisaged simple, independent accountable and working judiciary for India. They gave deep thought for establishing a fearless, impartial and independent judiciary for India. They studied various judicial systems of different countries and took five points out of each and prepared a draft article for judicial system in India. They were aware about the importance and utility of judiciary in a democratic State.

Hence, each article was thoroughly cross-examined by the members of the Constituent Assembly. Before giving them final shape each article was put to vote in the House. Majority of the articles were accepted unanimously. At last, the Constitution makers reached at the consensus and thrashed out a three tiers judicial system for an independent India. The subordinate judiciary at the lowest rung of an ascending ladder; the State judiciary at the middle and the Union judiciary at the top of judiciary ladder.

3.2 Meaning and Concept of Independence of Judiciary

3.2.1 *Meaning*

The independence of judiciary is not a new concept but it's meaning is still imprecise. The starting and the central point of this concept is apparently the doctrine of separation of powers. Therefore, it primarily means the independence of judiciary from legislature and executive. But that amounts to only the independence of judiciary as an independent institution form the other two institutions of the state without regards to the independence of the judges in exercising of their functions. In such a case there is not much that is achieved.

The independence of judiciary does not mean just creation of an autonomous institution free from control and influence of the legislature and the executive. The underlying purpose of independence of judiciary is that judges must be able to decide disputes before them, according to the law, uninfluenced by any other factor. For this reason independence of judiciary is the independence of each and every judge. Whether such independence would be ensured to the judge only as members of an institution or irrespective of it is one of the most important considerations in determining and understanding the meaning of independence of judiciary.

In a comprehensive analysis based on the contribution of leading jurists and international bodies on independence of judiciary, *Shimon Shetreet*[10] takes into account all these considerations. Explaining the term '*independence*' and '*judiciary*' separately, he says that the judiciary is the organ of the government not forming a part of the executive or the legislative, which is not subject to personal, substantive or collective control and which perform the primary function of adjudication. Dealing with independence, he differentiates between the independence of the individual judges and the collective independence of the judiciary that together constitutes '*independence*'.

To *Shimon Shetreet*, independence of individual judges consists of the judge's substantive and personal independence. The former means subjection of the judge to no other authority other than law in making of judicial decisions and exercising other official duties while the latter means adequate security of judicial terms of office and tenure. The independence of the individual judges also includes independence from their judicial superior and colleagues.

Shimon Shetreet's treatment establishes that the independence of judiciary means and includes the independence of judiciary as a collective body or organ of the government from its two other organs as well as independence of each and every member of the judiciary-the judges- in the performance of their roles as judges. Without the former the latter cannot be secured and without the latter the former does not serve much purpose.

Therefore the two, though separable, must be pursued together. A system that ignores one or the other cannot make much progress towards, much less achieve, the independence of judiciary.

[10] Shimon Shetreet is an author of the book '*Judicial Independence'* and '*the Culture of Judicial Independence : Rule of Law and World Peace*'.

3.2.2 *Concept*

Independence of judiciary means a fair and neutral judiciary system of a country, which can afford to take its decisions without any interference of executive or legislative branch of government. In other words, judges should be independent and free from restrictions, inducement, influence, pressures, and threats directs or indirect from executive or legislative. Not only this, judges must be independent and free of their colleagues and superiors in discharge of their judicial functions. Beijing Statement of Independence of the Judiciary (a statement resulting from the cumulated views of thirty-two Asian and Pacific Chief Justices) defined in its report as a judiciary uninhibited by outside influences which may jeopardize the neutrality of jurisdiction, which may include, but is not limited to, influence from another organ of the government (functional and collective independence) from the media (person independence), or from the superior officers (internal independence).[11]

Substantive independence of the Judges refers to as *(i)* functional or decisional independence which means the independence of judges to arrive at their decisions without submitting to any inside, or outside pressure; *(ii)* personal independence which means the judges are not dependent on government in any way in which might influence them in reaching at decisions in particular cases; *(iii)* collective independence which means institutional administrative and financial independence of judiciary as a whole *vis-a-vis* other branches of the government namely the executive and the legislative; and *(iv)* internal independence which means independence of judges from the judicial superiors and colleagues. It refers to, in other words, independence of a judge or judicial officer from any kind of order, indication or pressure from his judicial superiors and colleagues in deciding cases.

Independence of judiciary depends on some certain conditions like mode of appointment of the judges, security of their tenure in the office and adequate remuneration and privileges. Satisfactory implementation of these conditions enables the judiciary to perform its due role in the society thus inviting public confidence in it.[12]

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[11] Mizanur Rahman, '*Governance and Judiciary'* in Hasnat Abdul Hye edition Governance: South Asian Perspective, Dhaka University Press (2000); see also Sierd Hadley, *Separation of Judiciary and Judicial Independence in Bangladesh* (2004).

[12] *Ibid.* at 147.

3.3 Objective of Independence of Judiciary

Independence of Judiciary is sine guenon of democracy. In a democratic polity, the supreme power of state is shared among the three principle organs constitutional functionaries namely the constitutional task assigned to the Judiciary is no way less than that of other functionaries legislature and executive.

Indeed it is the role of the Judiciary to carry out the constitutional message and it is its responsibility to keep a vigilant watch over the functioning of democracy in accordance with the dictates, directives, and imperative commands of the constitution by checking excessive authority of other constitutional functionaries beyond the ken of constitution. So the Judiciary has to act as the sentinel sine qua vive.[13]

Our Constitution does not strictly adhered to the doctrine of separation of powers but it does provide for distribution of power to ensure that one organ of the govt. does not trench on the constitutional powers of other organs. The distribution of powers concept assumes the existence of judicial system free from external as well as internal presses. Under our constitute the Judiciary has been assigned the onerous task of safeguarding the fundamental rights of our citizens and upholding the Rule of Law. Since the courts are entrusted the duty to uphold the constitution and the laws, it very often comes in conflict with the state when it dries to enforce orders by exacting obedience. Therefore, the need for an independent and impartial Judiciary manned by persons of sterling quality and character, underling courage and determination and resolution impartiality and independence who would dispose justice without fear fervor, ill will or affection. Justice without fear or fervor, ill will or affection, is the cordial creed of our constitution and a solemn assurance of every Judge to the people of this great country.

Secondly, the Judiciary, which is a repartee but equal branch of the state, to transform the status quo into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be quality of status and opportunity for all. The Judiciary has therefore a socio- economic distinction and creative function.

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[13] *UOI v. Sankalchand Himatlal Sheth* (1997) 4 SCC 193 at 212.

It has, to use the words of Granville Austin to become an arm of the Socio-economic revolution and perform an active role calculated to bring social justice within the reach of common man. Approach to judicial function is entirely different for a society pulsating with needs and urges of gender justice, worker justice minority's justice and equal justice between chronic unequal. Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge adopts a merely passive or negative role and does not adopt a passive and creative approach. The Judiciary cannot remain a mere bystander or spectator but it must become an active participant in the judicial process ready to use law in the service of social justice through a pro-active goal oriented approach. But this cannot be achieved unless we have judicial cadres who share the fighting faith of the constitution and are imbued with constitutional values.

3.4 Constitutional Position of Independence of Judiciary

The Constitution of India, which came into force on 26th January, 1950 has in its Preamble declared unequivocally that the Sovereign, Socialist, Secular, Democratic Republic shall secure to all its citizens Justice, social, economic and political and the dignity of the individual which is compatible with the unity of the Nation shall be assured. The founding fathers of our Constitution gave importance to justice at the highest pedestal than the other principles in the Preamble of our Constitution. The Preamble clearly demonstrates the precedence of social and economic justice over political justice because the people go to the judiciary in quest of justice. Keeping this in view, the framers of our Constitution made specific provisions for establishing a single hierarchical system of judiciary for the whole country. They also made provisions for ensuring its independence from interference by the executive or the legislature. In other words, the makers of the Constitution place judiciary higher than the other organs of the government.

The Constitution lays down the structure and defines the limits and democrats the role and functions of every organ of the State, including the judiciary, and establishes the norms for their inter-relationship, checks and balances. Independence of judiciary is essential for upholding the rule of law.

Article 50 of the Constitution provides that the State shall take steps to separate the judiciary from the executive in the public service of the state. The object behind this provision was to maintain independence of the judiciary. Judicial independence characterizes a state of kind, which is concerned with the judge's impartiality in act and reality, and a set of institutional and operational arrangements, which define the relationships between judiciary and others, particularly, the other branches of the government so as to assure both, the reality and appearance of independence and impartiality. Individual independence of a judge is reflected in such matters as security of tenure, while the institutional Independence of the court over which the judge presides is reflected in its institutional or administrative relationships to the legislative and executive branches of the State.

The founding-fathers of the Constitution made provisions for ensuring its independence from interference by executive or the legislature. These provisions include appointment of judges of the Supreme Court and the High Courts;[14] security of tenure;[15] removal on ground of proved misbehavior and incapacity,[16] salaries;[17] protection against unwarranted criticism by the legislative,[18] appointments of ministerial staff of the court etc.[19] This puts the judges in a constitutional pillbox in which they cannot be reached by ordinary executive or legislative arsenal. The Court must have control over the administrative staff to maintain discipline and efficiency of work. The problems faced in actual practice would be examined in the light of relevant provisions of the Constitution because the above mentioned issues are of vital importance for the independence of the judiciary as a whole.

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[14] See Constitution of India, Article 124(3), 217.233 and 234.

[15] *Id*., Articles 124(2), (5) and 218.

[16] *Id.*

[17] The salary of a Supreme Court Judge was fixed at Rs. 4000/- except the Chief Justice who got a salary of Rs. 5000/- per month. The Chief Justice and other Judges of a High Court were paid a monthly salary of Rs. 4000/- and 3500/- respectively. Since these sums were charged on the Consolidated Fund of India or the States as .the case may be, they were not subject to vote of parliament or a State legislature.
Now bill is cleared by Parliament and becomes a law, the Chief Justice of India will get a monthly salary of Rs 2.80 lakh from the present Rs 1 lakh. Similarly, judges of the Supreme Court and chief justices of the high courts will draw a monthly salary of Rs 2.50 lakh from the current Rs 90,000. The Judge of the High Court will get Rs. 2.25 Lakh per month as the bill states.

[18] See Articles 121 and 211 of Constitution of India.

[19] See Articles 146 and 229.

3.5 Independence of Judiciary in India

Only an impartial and independent judiciary can protect the rights of the individual and provide equal justice without fear or favour. It is, therefore, very necessary that the Supreme Court should be allowed to perform its functions in an atmosphere of independence and be free from all kinds of political pressures. The Constitution has made several provisions to ensure Independence of Judiciary as :-

3.5.1 *Security of Tenure*

The Judge of the Supreme Court have security of tenure. They cannot be removed from office except by an order of the President and that also only on the ground of proved misbehavior or incapacity, supported by a resolution adopted by a majority of total membership of each House and also by a majority of not less than 2/3 of the members of the House present and voting. Parliament may, however, regulate the procedure for presentation of the address and for investigation and proof of the misbehavior or incapacity of a Judge. But Parliament cannot misuse this power, because the special procedure for their removal must be followed.

3.5.2 *Salary of Judges Fixed, not subject to Vote of Legislature*

The salaries and allowances of the Judges of the Supreme Court are fixed by the Constitution and charged on the Consolidated Fund of India. They are not subject to vote of Legislature. During the term of their office, their salaries and allowances cannot be altered to their disadvantage except in grave financial emergency.

3.5.3 *Parliament can Extent, but cannot curtail the Jurisdiction and Power of the Supreme Court*

In respect of its jurisdiction, Parliament may change pecuniary limit for appeals to the Supreme Court in civil cases, enhance the appellate jurisdiction of the Supreme Court, confer supplementary power to enable it to work more effectively, confer power to issue directions, order or writs including all the prerogative writs for any purpose other than those mentioned in *Article 32*. The point to be noted in all these provisions is that the Parliament can exceed, but cannot curtail the jurisdiction and power of the Supreme Court (*Article 138*).

3.5.4 ***No Discussion in Legislature on the Conduct of the Judges***

Neither in Parliament nor in a State Legislature a discussion can take place with respect to the conduct of a Judge of the Supreme Court in discharge of his duties (*Article 121*).

3.5.5 ***Power to Punish for its Contempt***

The Supreme Court and High Court have the power to punish any person for its contempt (*Articles 129 and 215*). This power is very essential for maintaining the impartiality and independence of the Judiciary.

3.5.6 ***Separation of Judiciary from Executive***

Article 50 directs the State to take steps to separate the judiciary from executive in the public services of the State. It emphasizes the need of securing the judiciary from the interference by the executive.

3.5.7 ***Judges of the Supreme Court are appointed by the Executive with the Constitution of Legal Experts***

The Constitution does not leave the appointment of the Judges of the Supreme Court to the unguided discretion of the Executive. The Executive is required to consult Judges of the Supreme Court and High Courts in the appointment of the Judges of the Supreme Court [*Article 124 (2*)]. The independence of the Supreme Court is emphasized by *Article 229* which provides that appointment of officers and servants shall be made by the Chief Justice or such other Judge or officer as he may appoint.

The independence of Judiciary is inextricably linked and connected with the constitutional process of appointment of Judges of the higher Judiciary. To expect an independent Judiciary when executive has the power to do so is illogical. This is because centre and state governments are parties before the courts in large number of cases where Judiciary acts as adjudicator.

So it cannot be accepted that framers of the constitution could have left the power to appoint the Judges of the Supreme Court and High Courts in the hands of the executive. I have an independent Judiciary to meet all challenges, unbending before all authorities and to uphold the imperatives of the constitution at all times, thereby preserving the judicial integrity, the person to be elevated to the Judiciary must be possessed with the highest reputation for independence uncommitted to any prior interest, loyalty and obligation and

prepared to pay any price, bear any burden and to always wedded only to the principles of constitution and '*Rule of Law'*.[20]

If the selected bears a particular stamp for the purpose of changing the cause of decisions bowing to the distal of his appointing authority, then the independence of Judiciary cannot be secured notwithstanding the guaranteed tenure of office, rights and privileges, safeguards conditions of service and immunity. In this context mandate of Article 50 becomes significant which, creates an obligation on the Government to refrain from any interference in judicial appointments.

In the matter of appointments of Judges of the Superior Judiciary, the interaction and harmonization of *Article 74(l)* with *Article 124(2)* and *217(l)* has to be home in mind to serve the constitutional purpose.[21]

In the case of Appointment of Supreme Court Judges, the Constitutional requirement is that President is to act in accordance with advice of the Council of Ministers as provided in *Article 74(l).* And the advice of the Council of Ministers is to be given in accordance with *Article 124(2)* so *Article74 (l)* is circumscribed by the requirements of *Articles 124 (2)* and *217(l).*

3.5.8 *Prohibition on Practice after Retirement*

Article 124 (7) prohibits a retired Judge of the Supreme Court to appear and plead in any court or before any authority within the territory of India. Thus, the independence of the judiciary it is adequately guaranteed.

3.5.9 *Impartiality of Judges*

A judge is under a duty not to adjudicate on cases in which he has either an interest personal or financial or where he may be influenced by biases. A fundamental doctrine of judicial impartiality is '*nemo judex in sua causa'*- no one should be the judge in his own case.[22]

3.5.10 *Other Bias*

Judges exhibit bias by the virtue of race, sex, politics, background, associations and opinions. When adjudicating they must, however, be demonstrably impartial. This involves that the judge listens to each side with equal attention and comes to the decision on the

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[20] *UOI v. Jyoti Prakash* (I 971) 1 SCC 396.

[21] See Constitution of India, Bare Act.

[22] file:///C:/Users/Dell/Downloads/SSRN-id1558979.pdf

arguments, irrespective of his personal views about the litigation; and further that whatever his personal belief, the judge should seek to give effect to the common values of the community, rather than any sectional system of values to which he may adhere.

There has however been uncertainty and inconsistency in the interpretation of '*bias*'. In ***R. v. Gough***,[23] Opposing Counsel presented two different tests of bias. The first suggested criterion was whether a reasonable and fair-minded person sitting in the court and knowing all there relevant facts would have had a reasonable suspicion that fair trail of the defendant was not possible. This test is known as '*reasonable suspicion'* test.

The second suggested test was whether there was a likelihood of bias. The question to be asked is whether there was a '*real danger*' that a trial may not have been fair as a result of bias – '*the real likelihood*' test. The House of Lords declared that the actual test was the real likelihood test where the judge himself feels that he has been bias against one party; he may disqualify himself from hearing the case, as did Lord Denning in Ex Party Church Scientology of California.[24] There the council for the church requested that he disqualify himself as a result of eight previous cases involving the Church on which he had adjudicated and in which in the eyes of Church, he displayed against them.

3.6 Judicial Immunities

Judicial independence requires that the judges should be protected against the attacks on their conduct in court. This is secured from two branches of law. Firstly, judges are immune from personal action for damages in respect of their personal action. Anything said by the judge in the court by judges, advocates or witnesses is absolutely privileged against an action of libel and slander and to this extent is similar to parliamentary privilege.

Enforcing the independence of judges, convention dictate that there should be no criticism leveled it them from the members of the executive- but not of the legislature. Parliamentary practice prohibits the criticism of the judges other than the motion expressing criticism or leading to impeachment of the judge.

The judges are also immune from suits if they have acted within their jurisdiction or their powers. The situation here remains unclear. If a superior court acts beyond its jurisdiction, it remains immune to suit till it does not come to know about the violation of

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[23] [1993] 2 All ER 724.

[24] The Times, 21 Feb. 1978. See also file:///C:/Users/Dell/Downloads/SSRN-id1558979.pdf

jurisdiction. On the contrary, if the magistrate acts beyond his authority, whether innocently or knowingly, lie is not immune from a suit.

Part of the immunity enjoyed by the judiciary is extended to other participants of the judicial proceedings. This relates to the law of defamation so that everything said in the court is absolutely privileged. They also enjoy certain protection. They are not required to give reasons for their verdict nor will they be punished for not giving a verdict.

3.7 Implications of Independence of Judiciary

Judicial Review and Judicial Activism are the remarkable implications of the Independence of Judiciary in India as follows :-

3.7.1 *Judicial Review*

In many countries with written constitution, there prevails the doctrine of Judicial Review. It means that constitution is the Supreme law of the land and any law in consistent with it is void the courts perform the side of expounding the provisions of the constitution and exercise power of declaring any law or administrative action which may be in consistent with the constitution as unconstitutional and hence void this judicial function stems from the feeling that a system based on a written constitution can hardly be effective in practice without an authoritative, independent and impartial arbiter of constitutional issues and also that it is necessary to restrain governmental organs from exercising powers which may not been sanctioned by the constitution. Judicial Review has two prime functions:-

- *(i)* Legitimizing governmental action;
- *(ii)* To protect the Constitution against any under encroachments by the government by the government.

So, under the Indian Constitution, it is the Judiciary which is entrusted with the task of keeping organ of the state within the limits of the law and thereby making the rule of law meaning full and effective.[25]

The Judiciary in India has to act as an impartial compare to reduce the disputes between the Governments and the private individuals as well as between the governments inter se. It has also to protect the fundamental rights of the Individuals guaranteed under Part-III of the constitution. The courts in the country have already expanded the scope of the judicial review by bringing in its ambit social, economic and political Justice. Keeping in view this expanding horizon of judicial review, it is the paramount need of the time that the Judiciary must be independent from executive pressure or influence.

[25] Article 13 (4).

3.7.2 *Judicial Activism*

The Supreme Court identified *Article 142* of the Constitution as an unlimited source of power, a veritable *Kamadhenu*, on which it could draw for whatever the Judges felt, were the demands of the justice. In seeking the aid of the poor, the illiterate and the disadvantaged sections of the society, the post 1980 court emigrated upon a path of judicial activism unparalleled in the history of any modem democracy. It became a center of political power. Activist lawyers and Public Interest groups invoked its jurisdiction. As a result, there was no area of political or social action into which the Supreme Court did not deliver its verdict.

It did with its craftsmanship, it was able to achieve those goals which the government even was unable to achieve, and did in a year that which government would not have been able to do in a decade it dealt with *illegal mining*[26], *pollution in the Ganges*[27], *guidelines for the adoption of Indian children abroad*[28], *forced prostitution of girls and devdasis and jogins*[29], *the extreme poverty and starvation in Kalahandi*[30], *the eliminate of injurious drugs and maintenance of approved standards in drugs*[31], *employment of children in match factories*[32], *sexual harassment of women in the work place*[33] and numerous other serious concerns in other areas of life in country.

3.8 Appointment of Judges

3.8.1 *Appointment of Judges - Position before 99th Amendment of Constitution*

The provisions of the appointment of Judges of the Supreme Court before 99th Amendment of the Constitution which received the assent of the President on 31st December, 2014 were as follows:-

The Judges of the Supreme Court were appointed by the President. The Chief Justice of the Supreme Court was appointed by the President with the consultation of such of Judges of the Supreme Court and the High Courts as he deemed necessary for the purpose. But in appointing other Judges, the President would always consult Justice of India. He might consult such other Judges of the Supreme Court and High Courts as he might deem necessary

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[26] *Rural entitlement and Litigation Kendra v. State of UP* (1987) Sup SCC 487.
[27] *MC Mehta v. Kanpur tanneries* (1984) 4 SCC 463.
[28] *Karnataka State council for child welfare v. Society of Sisters Charity* (1995) 4 SCC 529.
[29] *Vishal Jeet v. UOI* (I990) 3 SCC 701.
[30] *Kishen patnaik v. State of Orissa* (1989) Supp SCC 258.
[31] *Vincent Panikulangra v. UOI* (1987) 2 SCC 165.
[32] *MC Mehta v. State of TN.*, (1991) AIR 417.
[33] *Vishakha v. State of Rajasthan* (1997) 6 SCC 241.

[Article 124(2)]. In the appointment of Judges the Executive under this Article was required to consult persons who are *ex-hypothesis* well qualified to give proper advice in matters of appointment of Judges.[34]

Under *Article 124 (2)* the President, in appointing other Judges of the Supreme Court was bound to consult the Chief Justice of India. But in appointing the Chief Justice of India he was not bound to consult anyone. The word '*may*' used in *Article 124* made it clear that it was not mandatory on him to consult anyone.

Till 1973, the practice was to appoint the senior most Judge of the Supreme Court as the Chief Justice of India. This practice had virtually been transformed into a convention and was followed by the Executive without any exception. In 1956, the Law Commission headed by the then *Attorney-General M.C. Setalvad* disfavoured this practice and recommended that in appointing the Chief Justice of India the experience of a person as a Judge, his administrative competence and merit should be judged and seniority should not only be the main consideration.

On April 25, 1973, however, this practice was suddenly broken by the Government and three Senior Judges[35] of the Supreme Court were superseded which was subjected to severe criticism by the Bar and general public. Government, however, justified its action on the grounds of absolute discretion of the President, recommendation of the Law Commission and philosophy of Judges to be taken into account by the executive.

3.8.2 *Supremacy of Executive*

Though according to the language used in Article 124 the President is required to '*consult*' legal experts but prior to the decision of the Supreme Court in ***S.C. Advocate-on-Record Association v. Union of India***,[36] it had always been interpreted that the President was not bound to act in accordance with such consultation. The meaning of the word '*consultation*' came for the consideration of the Supreme Court in the ***Sankalchand Sheth's case***,[37] which was related to the scope of *Article 222* of the Constitution. It was held that the word '*consultation*' meant full and effective consultation. For a full and effective consultation it is necessary that the three constitutional functionaries '*must have for its*

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[34] CAD, Vol. 8, p.285.

[35] *Shelat, Hegde and Grover* JJ.

[36] (1993) 4 SCC 441.

[37] *Union of India v. Sankalchand Sheth*, AIR 1977 SC 2328.

consideration full and identical facts' on the basis of which they would be able to take a decision. The President, however, has a right to differ from them and take a contrary view. Consultation does not mean concurrence and the President is not bound by it.

In ***S.P. Gupta v. Union of India***,[38] popularly known as the Judges Transfer Case, the Supreme Court unanimously agreed with the meaning of the term '*consultation*' as explained by the majority in *Sankalchand Sheth's case*. The meaning of the word '*consultation*' in *Article 124 (2)* is the same as the meaning of the word '*consultation*' in *Article 212* and *Article 222* of the Constitution. The only ground on which the decision of the Government can be challenged is that it is based on *mala fide* and irrelevant considerations, that is, when constitutional functionaries expressed an opinion against the appointment.

This means that the ultimate power to appoint judges is vested in the Executive from whose dominance and subordination it was sought to be protected. The Supreme Court had abdicated its power by ruling that Constitution functionaries had merely a consultative role and that power of appointment of Judges is '*solely and exclusively*' vested in the Central Government.

It is submitted that the majority judgment of Supreme Court in the Judges transfer was bound to have an adverse effect on the independence and impartiality of the judiciary which is the only hope for the citizens in democracy. ***Bhagwati J.,*** in his judgment suggested for the appointment of a Judicial Committee for recommending names of persons for appointment as judges of the higher courts. He observed, "*It is unwise to entrust power in any significant or sensitive area to a single individual however high or important may be the office, which he is occupying*".

3.8.3 *Judicial Supremacy*

In ***S. C. Advocate-on-Record Association v. Union of India***,[39] popularly known as Judges Transfer case, a nine Judge Bench of the Supreme Court by a 7: 2 majority overruled its earlier judgement in the *Judges Transfer case*[40] and held that in the matter of appointment of the Judges of the Supreme Court and the High Courts, the Chief Justice of India should have primacy. The matter was brought before the Court through a PIL writ petition filed by an advocated of the Supreme Court seeking relief of filling up vacancies in the higher

[38] AIR 1982 SC 149.
[39] (1993) 4 SCC 441.
[40] *S.P.Gupta v. Union of India*, AIR 1982 SC 149.

judiciary. The appointment of Chief Justice of India shall be on the basis of seniority. The Court laid down detailed guidelines governing appointment and transfer of Judges and held that the greatest significance should be attached to the view of the Chief Justice of India formed after taking into account the views of two senior most Judges of the Supreme Court.

It, thus, reduced to the minimum individual discretion conferred upon the Prime Minister and the Chief Justice of India so as to ensure that neither political bias nor personal favoritism nor animosity should play any part in the appointment of Judges of the Supreme Court and High Courts. The selection should be made as a result of a participatory consultative process in which the executive should have power to act as a mere check on exercise of power by the Chief Justice of India. *Mr. Justice Verma* who delivered the majority judgment along with *Mr. Justice A. N. Ray, Mr. Justice A. S. Anand and Mr. Justice S. P. Bharucha* observed :

"*Thus, the executive element in the appointment process has been reduced to minimum and political influence is eliminated. It is for this reason that the word 'consultation' instead of 'concurrence' was used in the Constitution but that was done merely to indicate that absolute discretion was not given to any one, not even to the Chief Justice of India as an individual, much less to the executive*".

S. R. Pandian and *Kuidip Singh, JJ.*, agreed with the majority view but delivered their separate judgment while A. M. Ahmadi and M. N. Punchhi, JJ., delivered the dissenting judgments. He said that if primacy is given to the Chief Justice of India the view of other constitutional functionaries would become redundant.

The majority held that the initiation of proposal for appointment in case of the Supreme Court must be by the Chief Justice of India and in the case of a High Court by the Chief Justice of the High Court, and for a transfer of a judge of the Chief Justice of the High Court the proposal has to be initiated by the Chief Justice of India.

No appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India. Only in exceptional cases and for strong reasons, the names recommended by the Chief Justice may not be made.

3.8.4 ***Sole opinion of Chief Justice of India without following consultation process : Not binding on Government***

In ***re Presidential Reference***[41] a nine judge bench of the Supreme Court unanimously held that the recommendation made by the Chief Justice of India on the appointment of Judges of the Supreme Court and the High Courts without following the consultation process are not binding on the Government. The Court also widened the scope of the Chief Justice's consultation process upholding the government's stand on consultation process, the Court gave its opinion on the nine questions raised by the President in his reference to the Supreme Court, under *Article 143* of the Constitution. The President had sought the Supreme Court's clarification on the consultation process, as laid down in *S.C. Advocates case* for the appointment and transfer of Judges following a controversy over the recommendation by former Chief Justice of India *M.M.Punchi*.

The Court held that the consultation process to be adopted by the Chief Justice of India requires consultation of '*Plurality of Judges*'. The expressions '*consultation with the Chief Justice of India*' in *Articles 217 (1)* and *222 (1)* of the Constitution of India require consultation with plurality of Judges in the formation of opinion of the Chief Justice of India. The sole individual opinion of the Chief Justice of India does not constitute '*consultation*' within the meaning of the said articles. The majority held that in regard to the appointment of Judges to the Supreme Court under *Article 124 (2)*, the Chief Justice of India should consult '*a collegium of four senior most Judges of the Supreme Court*' and made it clear that if '*two Judges give adverse opinion the Chief Justice should not send the recommendation to the Government'*. The collegium must include the successor Chief Justice of India. The opinion of the collegium must be in writing and the Chief Justice of India should send the recommendation to the President along with his own recommendations.

The recommendations of the collegium should be based on a consensus and unless the opinion is in conformity with that of the Chief Justice of India, no recommendation is to be made. In regard to the appointment of Judges of the High Courts, the Court held that the collegium should consist of the Chief Justice of India and any two senior most judges of the Supreme Court. In regard to transfer of High Court Judge the Court held that in addition to

[41] AIR 1999 SC 1.

the collegium of four Judges, the Chief Justice of India is required to consult Chief Justices of the two High Courts (one from which the Judge is being transferred and the other receiving him).

The appointment of the Judges of higher Courts can be challenged only on the ground that the consultation power has not been in conformity with the guidelines laid down in the 1993 judgment and as per opinion given in 1999 decision i.e., without consulting four senior most Judges of the Supreme Court.

3.8.5 *Appointment of the Chief Justice of India*

The majority held that the appointment to the office of the Chief Justice of India should be made on the basis of seniority, that is the senior most Judge considered suitable to hold office be appointed as the Chief Justice of India.The important guidelines laid by the Court were the following :-

- *(i)* Individual Initiation of high constitutional functionaries in the matter of Judges appointments reduced to minimum. It gave primacy to the Chief Justice of India but put a rider that he must consult his two colleagues.

- *(ii)* Constitutional functionaries must act collectively in judicial appointments.

- *(iii)* Chief Justice of India was given the final say in transfer of Chief Justice and Judges of High Court.

- *(iv)* Transfers of Chief Justices and Judges of High Courts could not be challenged in Courts.

- *(v)* Appointment of the Chief Justice of India by seniority.

- *(vi)* No Judge could be appointed by the Union Government without consulting the Chief Justice of India.

- *(vii)* Fixation of the strength in High Courts was justiciable.

3.8.6 *Appointment of Acting Chief Justice*

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

3.8.7 *Appointment of ad hoc Judges*

Judges - Position prior to the 99th Amendment of constitution

Prior to 99th Amendment of Constitution, the provisions regarding the appointment of ad hoc Judges were as follows :-

At any time there is no quorum of the Judges available in the Court to hold and continue any session of the Court, the Chief Justice of India may, with the previous consent of the President and after the consultation with the Chief Justice of the High Court concerned, request in writing a Judge of the High Court attendance at the sittings of the Court as an ad hoc Judge in the Supreme Court for such period as may be necessary. The ad hoc Judge should be qualified to be appointed as a Judge of the Supreme Court (*Article 127*).

Position after 99th Amendment of Constitution

After 99th Amendment of Constitution, the National Judicial Appointments Commission on a reference made to it by the Chief Justice of India, may with the previous consent of the President make such request in writing the attendance at the sittings of the Supreme Court, as an ad hoc Judge.

Due to declaration of the 99th Amendment of the Constitution as unconstitutional, the position prior to this amendment shall continue. Therefore, the President after consultation with the Chief Justice of the High Court concerned request a Judge of the High Court to sit as an ad hoc Judge of the Supreme Court.

3.9 National Judicial Appointments Commission

In ***S.P. Gupta v. Union of India***,[42] *Justice Bhagwati* had suggested for the appointment of a Judicial Commission on the line of Australian Judicial Commission. The Law Commission suggested in 1987 that a National Judicial Service Commission should have the final say in matters of selection, promotion and transfer of Judges. The Law Commission suggested that the National Judicial Commission should be headed by the Chief Justice of India which should include three Judges each of the Supreme Court and the High Courts, the previous occupants of the office of the Chief Justice, the Attorney General, an outstanding legal academician and a representative of the Ministry of Law and Justice.

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[42] AIR 1982 SC 149.

A Bill was introduced in Lok Sabha for, setting up a National Judicial Commission in 1990 empowering the President to constitute a high level Judicial Commission for making recommendation for the appointment of a Judge to the Supreme Court (other than the Chief Justice of India), Chief Justice of High Courts and to the transfer of Judges from one High Court to another. However, the Constitution Amendment Bill lapsed consequent to the dissolution of the Lok Sabha.

3.9.1 *Position after 99th Amendment of Constitution*

The *Constitution (Ninety-ninth Amendment) Act, 2014* amended *Articles 124 (2), 127* and *128*. It inserted *Articles 124A, 124B* and *124C*. According to the amended *Article 124 (2),* every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal on the recommendation of the National Judicial Appointments Commission referred to in *Article 124A*. After this amendment, no consultation is required by the President with the Judges of the Supreme Court and the High Court. The first proviso which provided the consultation with the Chief Justice of India in case of appointment of a Judge other than Chief Justice of India has been omitted.

3.9.2 *The Provisions of National Judicial Appointments Commission*

Article 124A provides that : -

- *(i)* There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely :-

- *(a)* the Chief Justice of India, Chairperson, *ex officio*;

- *(b)* two other senior Judges of the Supreme Court next to the Chief Justice of India - Members, *ex officio*;

- *(c)* the Union Minister in charge of Law and Justice - Member, *ex officio*;

- *(d)* two eminent persons to be nominated by the Committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People - Members:

Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women :

Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for re-nomination.

- ***(ii)*** No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission.

3.9.3 *Functions of National Judicial Appointments Commission*

Under *Article 124B*, the National Judicial Appointments Commission shall have following duties :-

- *(a)* to recommend persons for appointment, as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judge High Courts;

- *(b)* to recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and

- *(c)* to ensure that the person recommended is of ability and integrity.

3.10 Procedure for appointment to be regulated by the Parliament

Under *Article 124C*, the Parliament may, by law, regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission to lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it.

In ***Supreme Court Advocates-on-Record Association v. Union of India***,[43] Supreme Court by its order declared *Constitution (Ninety-ninth) Amendment Act, 2014* and *National Judicial Appointments Commission Act, 2014* unconstitutional and void. The system of appointment of Judges to the Supreme Court, Chief Justices and Judges to the High Courts and transfer of Chief Justices and Judges of High Courts from one High Court to another as existing prior to the *Constitution (Ninety-ninth Amendment) 2014* (called the '*collegium system'*) to be operative. The Court also ordered to list the case to consider introduction of appropriate measures, if any, for an improved working system of the '*Collegium System*'. All the five Judges gave their separate judgments. Four Judges held the amendment unconstitutional. *Justice ChaIemeswar* upheld the amendment.[44]

[43] (2015) AIR SCW 5457.

[44] The case was heard by a Constitution Bench consisting of *Jagdish Singh Kehar, Chalemeswar, Madan B. Lokur, Kurian Joseph and Adrash Kumar Goel* JJ.

3.10.1 ***Main points of Judgment of Justice Jagdish Singh Khehar - Fit to hold the office***

Section 5 (1) of *the National Judicial Appointments Commission Act, 2014 (*NJAC Act) provided the senior most Judge of the Supreme Court to be appointed as Chief Justice of India subject to the condition of being considered '*fit*' to hold the office. Regarding it, the Supreme Court held that it was not within the realm of Parliament to subject the process of selection of Judges to the Supreme Court, as well as, to the position of Chief Justice of India in uncertain and ambiguous terms. It was imperative to express the clear parameters of the term '*fit*' with reference to the senior most Judge of the Supreme Court under *Section 5* of the NJAC Act. The term '*fit*' can be tailor-made to choose a candidate for below in the seniority list.

3.10.2 ***Seniority***

The Court struck down *Section 5 (2)* of the NJAC Act also. It held that undoubtedly postulating seniority in the first proviso under *Section 5 (2)* of NJAC Act is a laudable object and if seniority is to be enmeshed with ability and merit, the most deal approach, can be seen to have been adopted. But what appears on paper may sometimes not be correct in practice. As per experience, the Judges to every High Court are appointed in batches, each batch may just have two or three appointees, or may sometimes have even ten or more individuals. A group of Judges to one High Court, will be separated from the lot of Judges appointed to another High Court, by, just a few days or by just a few weeks, and sometimes by just a few months.

In the all India seniority of Judges, the complete batch appointed on the same day to one High Court will be placed in a running serial order (in seniority) above the other Judges appointed in another High Court, just after a few days or weeks or months. Judges appointed latter will have to be placed in mass below the earlier batch, in seniority. If appointment to the Judges of the Supreme Court is to be made on the basis of seniority, as a primary consideration, then the earlier batch would have priority in the matter of elevation to the Supreme Court. And hypothetically, if the batch had ten Judges (appointed together to a particular High Court) and if all of them have proved themselves able and meritorious as High Court Judges, they will have to be appointed to the Supreme Court till the entire batch is exhausted.

Judges from the same High Court, in the above situation where the batch comprised of 10 Judges, will occupy a third of the total Judge positions in the Supreme Court. That would be clearly unacceptable, for the reasons indicated by the petitioners that the mandate contained in the first proviso under *Section 5 (2)* of the NJAC Act clearly breached the convention of regional representation in the Supreme Court. The regional representation being one of the '*federal characters*' of distribution of powers, one of the recognized '*basic structures*' could not have been overlooked. The convention in vague is to maintain regional representation. The consideration of Judges on the basis of their seniority, by treating the same, as primary consideration, would adversely affect the present convention of ensuring representation from as many State High Courts, as is possible.

Section 6 (1) of the NJAC Act which applied to the Judge of a High Court as Chief Justice of High Court has the same seniority connotation as expressed above is also liable to meet the same fate as the first proviso under *Section 5 (2)*.[45]

3.10.3 *Veto power to any two members of NJAC*

Section 6 (6) of the NJAC Act which gives power of veto to any two members of the National Judicial Appointments Commission (NJAC) would adversely impact primacy of judiciary in the matter of selection and appointment of Judges to the higher judiciary.[46] The two eminent members '*cannot be left to the free will and choice of the nominating authorities irrespective of high constitutional positions held by them. Specially so, because the two eminent person*s' comprise of 1/3 strength of NJAC and double of that political executive component, and as such, will have a supremely important role in the decision making process of the NJAC.

Article 124(1) (d) is, therefore, liable to be set aside and struck down for having not laid down the qualifications of eligibility for being nominated as '*eminent persons*' and for having left the same vague and undefined.[47]

Sections 5 (2) and *6 (6)* also breach the basic structure of the Constitution with reference to '*independence of the judiciary*' and '*separation of powers*' *Sections 5 (2)* and *6 (6)* are therefore ultra vires the Constitution.[48]

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[45] *Ibid*., para 238.

[46] The case was heard by a Constitution Bench consisting of *Jagdish Singh Khehar, Chalemeswar, Madan B. Lokur, Kurian Joseph and Adarsh Kumar Goel* JJ, para 239.

[47] *Ibid*., para 183.

[48] *Ibid*., para 240.

3.10.4 ***Alternative procedure can be provided***

The Indian Constitution is an organic document of governance, which needs to change with the development of civil society. In the wisdom of framers of the Constitution, primacy of the matter of selection of Judges to the higher Judiciary must remain with the Chief Justice of India arrived at, in consultation with a plurality of Judges.[49]

Undoubtedly, it is open to the Parliament, while exercising its power under *Article 368* to provide for some other alternative procedure for the selection and appointment of Judges to the Higher Judiciary, so long as, the attributes of '*separation of powers*' and '*independence of the judiciary*' which are '*core*' components of the '*basic structure*' of the Constitution, are maintained.[50]

3.10.5 ***NJAC Act could not come into effect prior to the coming into operation of the Ninety-ninth Amendment Act of the Constitution***

The Court held that it was possible in terms of Rule 388 to introduce and pass NJAC Bill in anticipation of the passing of the Constitution (121st) Bill. But it was still not possible to contemplate that a Bill which was dependant wholly or in part upon another Bill could be brought into operation till the depended Bill was passed and brought into effect.[51]

3.10.6 ***For the enactment of NJAC Act procedure provided under Article 368 need to be followed***

The Court also held that for the enactment of the NJAC Act, it was not imperative for the Parliament to follow the procedure contemplated under Article 368. The Constitution (99th Amendment) Act amended *Articles 124* and *217* (as also Articles 127, 128, 222, 224, 224A, 231) and inserted *Articles 124A* to *124C* in the Constitution. While engineering the above amendment the procedural requirement contained in *Article 368* were complied with and no procedural lapse was committed. *Article 124A* authorized the Parliament to enact a legislation in the nature of NJAC Act. This could validly be done by following the procedure contemplated for an ordinary legislation.[52]

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[49] *Ibid.*

[50] Reasons recorded in Second Judges case.

[51] Reasons recorded in the Second Judges case, para 210.

[52] *Ibid.*, para 213.

3.10.7 ***An ordinary Legislation can be invalidated for violating the constitutional provisions***

The basic structure of the Constitution is inviolable and as such, the Constitution cannot be amended so as to negate any '*basic feature*' thereof and so also, if a challenge is raised to an ordinary legislation based on one of the '*basic features*' of the Constitution, it would be valid to do so. It would be technically sound to refer to Articles which are violated, when an ordinary legislation is sought to be struck down, and being *ultra vires* the provisions of the Constitution but that would not lead to the inference that to strike down an ordinary legislative enactment, as being violative of the basic structure would be wrong.[53]

3.10.8 ***Effect of Striking down the impugned constitutional amendment***

In case of setting aside of the impugned *Constitution (99th Amendment) Act*, the provisions of the Constitution sought to be amended thereby, would automatically revive.

3.10.9 ***Article 124-A is the edifice of the Constitution (Ninety-ninth Amendment) Act***

Article 124 A constitutes the edifice of the *Constitution (99th) Amendment) Act, 2014*. The striking down of *Article 124A* would automatically lead to the undoing of the amendments made to *Articles 124, 1248, 124C, 127, 128, 217, 222, 224. 224A* and *231*. This, for the simple reason, that the latter Articles are sustainable only if *Article 124A*, which provides for the composition and constitution of the National Judicial Appointments Commission (NJAC), is upheld.

3.11 Collegium System in India

3.11.1 ***Collegium System***

Collegiums system in India is the system by which the judges are appointed by the judges only also referred to as '*Judges- selecting- Judges*'. It is the system of appointment and transfer of judges that has evolved through judgments of the Supreme Court, and not by an Act of Parliament or by a provision of the Constitution. The Supreme Court collegium is headed by the Chief Justice of India and comprises four other senior most judges of the court. A High Court collegium is led by its Chief Justice and four other senior most judges of that court. Names recommended for appointment by a High Court collegium reaches the government only after approval by the CJI and the Supreme Court collegium.

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[53] Reasons recorded in the Second Judges case, para 221.

Judges of the higher judiciary are appointed only through the collegium system — and the government has a role only after names have been decided by the collegium. The government's role is limited to getting an inquiry conducted by the Intelligence Bureau (IB) if a lawyer is to be elevated as a judge in a High Court or the Supreme Court. It can also raise objections and seek clarifications regarding the collegium's choices, but if the collegium reiterates the same names, the government is bound, under Constitution Bench judgments, to appoint them as judges.[54]

3.11.2 ***Genesis of Collegium system***

Collegium system has evolved through the series of judgement of '*Judges case'*. There were three cases namely :-

(i) S. P. Gupta v. Union of India (1982)

It was found that CJI does not have any primacy. The Constitution Bench also held that the term '*consultation*' used in *Articles 124* and *217* was not 'concurrence' - meaning that although the President will consult these functionaries, his decision was not bound to be in concurrence with all of them.

(ii) Supreme Court Advocates-on Record Association v. Union of India (1993)

A nine-judge Constitution Bench overruled the decision in *S. P. Gupta* and devised a specific procedure called '*Collegium System'* for the appointment and transfer of judges in the higher judiciary. The majority verdict accorded primacy to the CJI in matters of appointment and transfers while also ruling that the the term '*consultation*' would not diminish the primary role of the CJI in judicial appointments. Ushering in the collegium system, the court said that the recommendation should be made by the CJI in consultation with his two seniormost colleagues, and that such recommendation should normally be given effect to by the executive.

(iii) In re Special Reference (1 of 1998)

In 1998, President *K. R. Narayanan* issued a Presidential Reference to the Supreme Court over the meaning of the term '*consultation*' under *Article 143* of the Constitution (advisory jurisdiction). The question was whether '*consultation*' required consultation with a number of judges in forming the CJI's opinion or whether the sole opinion of CJI could by itself constitute a '*consultation*'. In response, the Supreme Court laid down 9 guidelines for

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[54] http://www.beingyourlawyer.com/Collegium%20System%20in%20India.php

the functioning of the coram for appointments and transfers - this has come to be the present form of the collegium, and has been prevalent ever since. This opinion laid down that the recommendation should be made by the CJI and his four seniormost colleagues, instead of two. It also held that Supreme Court judges who hailed from the High Court for which the proposed name came, should also be consulted. It was also held that even if two judges gave an adverse opinion, the CJI should not send the recommendation to the government.

3.11.3 Guidelines for Improvement of Collegium System

In ***Supreme Court Advocates-on-Record Association v. Union of India***,[55] the Supreme Court struck down on 16th Oct, 2015 the Constitution (99th Amendment) Act for the appointment of Judges by the National Judicial Appointments Commission. The earlier collegium system was criticized for opacity and the Collegium system was revived. The senior counsels were heard. They submitted their views freely with the sole objective of introducing measures in the improvement of '*collegium system*'.

A Committee was formed to compile the suggestions. Suggestions were also invited from private individuals and the public upto 17.00 hrs on 13-11-2015 and suggestions were invited and upto 14-11-2015 by the Bar Council of India in the four categories - Transparency, Collegium, Secretariat, Eligibility criteria and Complaints. Hearing was limited for two days. In hearing, short-listed counsels were allowed time by a Committee consisting of Attorney-General of India, Chairman Bar Council of India and Senior Advocate, *Fall S. Nariman*. The memorandum of Procedure and introducing amendments therein had always been prepared by the Government of India in consultation with the President of India and Chief Justice of India. This practice had been consistently adopted in consonance with the directions contained in paragraph 478 of the Second Judges Case.[56]

The Court agreed with the suggestion of the Attorney-General that in order to allay any fear that may be entertained by any of the stake-holders, the same procedure would be adopted. The Court gave the following directions:-

The Government of India may finalize the existing Memorandum of Procedure by supplementing it in consultation with the Chief Justice of India. The Chief Justice of India will take a decision based on the unanimous view of the collegium comprising the four senior

[55] AIR 2016 SC 117.

[56] AIR 1994 SC 258.

most puisne judges of the Supreme Court. They shall take the following factors into consideration :-

(i) Eligibility Critieria

The Memorandum of Procedure may indicate the eligibility criteria, such as the minimum age, for the guidance of the collegium (both at the level of the High Court and the Supreme Court) for appointment of Judges, after inviting and taking into consideration the views of the State Government and the Government of India (as the case may be) from time to time.

(ii) Transparency in the Appointment Process

The eligibility criteria and the procedure as detailed in the Memorandum of Procedure for the appointment of Judges ought to be made available on the website of the Court concerned and on the website of the Department of Justice of the Government of India. The Memorandum of Procedure may provide for an appropriate procedure for minuting the discussions including recording the dissenting opinion of the Judges in the collegium while making provision for the confidentiality of the minutes consistent with the requirement of transparency in the system of appointment of Judges.

(iii) Secretariat

In the interest of better management of the system of appointment of Judges, the Memorandum of Procedure may provide for the establishment of a Secretariat for each High Court and the Supreme Court and prescribe its functions, duties and responsibilities.

(iv) Complaints

The Memorandum of Procedure may provide for an appropriate mechanism and procedure for dealing with complaints against anyone who is being considered for appointment as a Judge.

(v) Miscellaneous

The Memorandum of Procedure may provide for any other matter considered appropriate for ensuring transparency and accountability including interaction with the recommendee (s) by the collegium of the Supreme Court, without sacrificing the confidentiality of the appointment process.

The Court made it clear that the guidelines mentioned above are only broad suggestions for consideration and supplementing the Memorandum of Procedure for the faithful implementation of the principles laid down in the *Second Judges case*,[57] and the *Third Judges case*.[58]

3.11.4 *Criticism of Collegium System*

This system is criticised because it is considered to be non-transparent as there is no official mechanism involved. There are no prescribed norms regarding the eligibility criteria or even selection criteria. The NDA government has tried twice to replace the collegium system with National Judicial Appointments Commission (NJAC) to address the concerns but failed and the collegium system still prevailing but the parliament has slowed down the process of appointment and is drafting the MoP (*Memorandum of Procedure*) to guide future appointments so that concerns regarding lack of eligibility criteria and transparency could be redressed.[59]

4. SUMMARY

The constitution provides for a judiciary, which is independent. Independence of judiciary is important for the purpose of fair justice. There should be no interference by the legislature or the executive, in the proceedings of the judiciary so that it may take a judgment that seems reasonably fair. In case of intervention, there may be an element of bias on the part of the judges in taking a fair decision. It is difficult to suggest any other way to make the Indian courts more self-reliant and keep them away from the influence of the other two organs.

In spite of the foresaid, a growing unease is also being felt and expressed about the accountability of the judiciary and its extensive and frequent intrusion into the supposedly executive and the legislative domains. Although accountability of judiciary should scrutinize the act of legislation and executive are delicate controversial issues, the judiciary should not be left totally unchecked. The judiciary should not get attracted or tempted towards correcting every wrong in the society, a role that society has never assigned to it and it is not expected to perform the same. At all times the judiciary must be getting popular approbation of its intrusion into the domain of the legislature and the executive, but in the long run it may erode the very basis and justification of its own independence and endanger it.

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[57] *Supreme Court Advocates-on-Record Association v. Union of India*, AIR 1994 SC 268.

[58] *Special Reference No. 1 of 1998*, AIR 1999 SC 1.

[59] http://www.beingyourlawyer.com/Collegium%20System%20in%20India.php

Conclusively, only an impartial and independent Judiciary can stand as a bulwark for the protection of rights of the individual and mete out even handed justice without fear or fervour. The Judiciary has to strike down executive, administration and legislative acts of the centre and the states. Supreme Court, should it is very necessary be allowed to work in an atmosphere of independence and is insulated from all kinds of pressures, political or otherwise.

The collegium system as established by the three judges cases specially the second judges case and clarified by the third judges case, suffers from certain problems which includes lack of transparency, non-accountability etc. but its biggest loophole is the question regarding its constitutionality. The basic criterion of appointment of judges in this system is the one of independence of judiciary which is held to be of paramount value. Thus, the collegium system of appointment and transfer is not the most efficacious one as it was criticized by *Justice J.S.Verma*, the very author of the judgment who said that it was being misused and its working entailed certain serious questions which cannot be regarded as unreasonable.

The judicial accountability by giving both the exclusive and judiciary a role to play in the process of appointment of judges, tries to solve mainly the problem of accountability but it entails its own set of loopholes and is still unable to address most of the concerns with the collegium system. The commission holds a big danger to the independence of judiciary, an aspect in which the collegiums system excelled and thus it wins over the judicial accountability commission on this account.

The Supreme Court in the NJAS judgment formulated four areas in which the collegium system could improve so as to make it more efficacious. This included – transparency, an eligibility criteria, a secretariat to assist the collegium and dealing with complaints against persons being considered for appointment.[60]

As put by ***Justice Khehar***, these improvements were suggested after inculcating the suggestions of the government, eminent persons from legal fraternity etc.[61]

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[60] Shreeja Sen, Supreme Court Identifies Four Ways to Improve Collegium System, Live Mint, November4, 2015 ; Available at http:/www.livemint.com/Politics/IXZxASF3QwbwOp6wM5VvN/SC-Identifies-four-points-forconsidering-improvement-of-col.html

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6. SELF – ASSESSMENT QUESTIONS

1. What is the procedure for the appointment and transfer of High Court Judges?
2. Explain the procedure prescribed in the Constitution for the appointment of judges of Supreme Court. Also examine the need for Judicial Commission.
3. What do you mean by Independence of Judiciary? How it has been incorporated in the Constitution of India?
4. How the independence of judiciary has been guaranteed under Indian Constitution? Explain the word 'consultation' in the appointment and transfer of judges of the superior courts with the help of recent presidential reference under Article 143.
5. How do you evaluate the Collegium system evolved by the Supreme Court in the appointment of Judges of Supreme Court and High Courts? Comment on its merits and demerits. Suggest some better alternative systems if any.
6. Comment upon the merits and demerits of the procedure for appointment and removal of the Judges of the Supreme Court and High Courts as laid down under the Constitution and evolved by the Supreme Court. Can you suggest some other better method ensuring the Independence of Judiciary under the Constitution?
7. Critically comment upon the merits and demerits of the procedure for appointment of the judges of Supreme Court and High Courts as provided under the Constitution, although, the Supreme Court in various cases has suggested maintaining independency of judiciary. Give your reasons to settle this controversy.
8. Explain the process of appointment of judges of the Supreme Court of India and various High Courts with reference to latest controversies in the matter including the NJAC Act and the MOP (Memorandum of Procedure) as being processed.
9. "The Collegium system is criticised because it is considered to be non-transparent as there is no official mechanism involved". Elaborate this statement with recent case law.
10. What is Collegium system? Discuss Genesis of Collegium system and Guidelines for Improvement of Collegium System in India.
11. Discuss provisions and functions of National Judicial Appointments Commission (NJAC). Suggest with reason some better alternative systems if any in your view.

12. What is the Meaning, Concept and Historical perspective of Independence of Judiciary? Discuss the Objective and Constitutional Position of Independence of Judiciary in India with the help of decided case law.

13. "The Constitution of India has made several provisions to ensure Independence of Judiciary". Discuss. Also discuss Immunities and Implications of Independence of Judiciary in India.

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INDIAN CONSTITUTIONAL LAW AND THE NEW CHALLENGES

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Writer: Prof. Sunil Deshta *

Updated by: Dr. Sudhir Kumar Vats**

POWER OF JUDICIAL REVIEW, WRIT JURISDICTION AND OTHER POWERS OF COURT, JUDICIAL ACTIVISM

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4. SUMMARY

5. SUGGESTED READINGS

6. SELF – ASSESSMENT QUESTIONS

1. INTRODUCTION

Indian Constitution is neither an original creation of the constitution - makers, framed in the heat and turmoil of any revolution, nor an essay on '*first*' principles. It represents a synthesis of the ideas of several constitutions of the world and honest efforts of cream of the nation's intellect, who sought to provide in a single document the wealth of accumulated experience and ideas of all leading democracies preceding it. It is a 'social renascence' that strikes a wonderful harmony between idealism and realism. Our constitution is an administrative blueprint and a great vehicle for social revolution. Thus, the success and failure of judicial review depends on the fact that to what extent it is extended to lofty ideal of constitutionalism as well as the spirit and tempter of a dynamic society.

2. OBJECTIVE

The Indian Judicial System is one of the oldest legal systems in the world today. It is part of the inheritance India received from the British after more than 200 years of their colonial rule and the same is obvious from the many similarities. The Indian Legal System shows with the English Legal System. In fact, Constitution of India, which was adopted in 1950 is the world's longest written Constitution. This document not only laid down the framework of Indian Judicial System, but has also laid out the powers, duties, procedure and structure of the various branches of the Government at the Union and State Levels.

Moreover, the Judiciary in India is an independent body and is separate from the Executive and Legislative bodies of the Indian Government. The Supreme Court of India is the topmost institution in the Legal echelon. Under the Supervision of the Supreme Court, there are High Courts in almost all the State capitals and in Union Territories. Below the High Court's there are district courts in every district of the State. All district courts are administratively and judicially helped by the High Courts. Below the district courts, there are also secondary courts, which work under the former. At the apex level, the power of judiciary to review and determine validity of a law or an order may be described as the power of judicial review.

The probable objective of this Chapter is to give full account/scenario of power, functions and responsibility of judiciary in India in the changing paradise of Indian Legal System. In the present chapter, the main emphasis is on the power of Judicial review. Doctrine of Severability, Doctrine of Eclipse, Powers of Court, Appointment and Removal of Judges, Jurisdiction of Courts, Writ Jurisdictions etc.

Moreover, the chapter is further strengthened by discussing the concept of Judicial activism with the help of case law as well.

3. PRESENTATION OF CONTENTS

3.1 Meaning of Judicial Review

'*Judicial Review*' is used differently for different purpose. The wide sense, it simply means a final consideration and decision by a court of law. The review of any dispute between private parties or between a private party and the state authority. It would include even appeals on the merits of a decision which may be of an administrative authority or even of a Civil Court. All questions of fact and law, that is, the merits of the whole case would be open to review. It does not go into the merits of the impugned decision but on the contrary examines only the constitutionality or the basic legality of it. The contention is that the decision given was contrary to fundamental provisions of a statute or either without jurisdiction.

3.1.1 *Originally against Administrative Action*

The Judicial review may be of two kinds depending on the nature of the state action against which it is directed. If it is against administrative action, it is called as judicial review, of administrative action. When it is directed against a statute of legislation, rules, regulations and by-laws, since it seeks to determine the validity of legislation it is called judicial review of legislation basically judicial review is the assertion of the rule of law as controlling state action.

3.1.2 *Extended against Legislative Action*

The supremacy of common law was sufficient to ensure the rule of law as against administration action. For it was for the judges to say what the common law was but when the law started becoming-increasingly statute made and parliament asserted legislative sovereignty, the question that became important was whether there could be any control against legislative action.

Sir Edward Coke, *Chief Justice of England* - in 1610 asserted the power of Judicial review even against legislation. Therefore, the constitution of India provides that the power of parliament and state legislature was not to be exercised contrary to Fundamental Rights. The validity and supremacy of constitution was placed above law, Judicial review is subject of public law because all the three institutions involved in it are parts of the union of Indian in Part V or of the states in Part VI of the constitution.

3.2 Area of Judicial Review

A major area of Judicial review is provided by '*laws*' made by the legislature or the Executive (i.e. Subordinate legislation) and the action of the Executive whenever any of them is alleged to infringe the Fundamental Rights guaranteed in Part III of the constitution, for the essence of the judicial review is a collateral attack against legislative or executive but not the Judiciary and to be decided by High Courts under *Article 226* and Supreme Court under *Article 32* The decision of the court is not such action of the state within the meaning of *Article 12* which can be said to contravene a Fundamental Right.

3.3 Judicial Review in the Constitution of India

The constitution of India has no legal source but it is the political origin of the legal state in India. The powers of different organs of the state in India. The powers of different organs of the state, namely the legislature, the Executive and the Judiciary are derived from it. No pre-constitutional law which is inconsistent with it can continue to be valid after the commencement of the consultation in view of *Article 372(1)*. Judicial review under Indian Constitution is to have more direct basis then in the constitution of U.S.A. where the doctrine was more an '*inferred*' than a '*conferred*' power.

The Judiciary stands outside the Government under Part III and Part IV of the constitution so that it may be able to enforce not only the fundamental rights in Part III of the constitution but also the legislation enacted in pursuance of Part IV of the constitution. The legal control of the Government by the courts, therefore, takes the form of subjecting the legislative and administrative organs under surveillance of the Judicial System.

3.4 Origin of the Doctrine of Judicial Review

It is sometimes believed that the institution of Judicial Review is predicated upon the existence of a written constitution. The doctrine has its origin on the Supreme Court of America. This seems to get its emphatic assertion in the judgement of ***Marbury v. Madison***,[1] in which *Chief Justice Marshall* uttered: Certainly all those who have framed written constitutions contemplate them as forming the paramount and fundamental law of the nation. This theory is essentially attached to a written constitution and is consequently to be considered by the court, as one of the fundamental principles of our society.

The facts of the case were as follows : the federalists had lost the election of 1800, but before leaving the office they had succeeded in creating several new judicial posts. Among these were 42 justice of peace, to which the retiring Federalists Presidents John Adams

[1] Cranch 137, 2 Led, 60 (1803).

appointed forty federalists. The appointments of commissions were confirmed by the senate and they were signed and sealed, but Adam's secretary of state *John Marshall*, failed to deliver certain of them. When the new president, *Thomas Jefferson*, assumed office he instructed his secretary of state *James Madison* not to deliver seventeen of these commissions including one for *William Marbur Marbury*. He filed a writ in the Supreme Court for the issue of the writ of mandamus to Secretary Madison ordering him to deliver the Commission. He asserted that the law of the land under Section 31 of the *Judicial Act of 1789* which provides "*The Supreme Court of U.S. Shall have the power to issue….Writs of mandamus, in cases warranted by the principles and usages of law, to person's holding offices, under the authority of United States*". The court speaking through *Marshall*, who has now become Chief Justice, held that *Section 13* of The Judiciary Act was repugnant to Article III, *Section 2* of the constitution inasmuch as the constitution itself limited the Supreme Court's original Jurisdiction to cases affecting ambassadors other public ministers and consuls and those to which a state is party, since Marbury fell in none of these categories the court has no jurisdiction In this case.

Thus, Judicial Review, at least in the sense in which it has developed in the USA is an implied not a substantive power.

The observations of *Marshall*, Chief Justice in that case are pertinent to note:-

> "*It is emphatically the province and duty of the Judicial department to say what the law is - Judicial Review denote the 'substantive' or 'intrinsic' examination of content and spirit of the law on the touchstone of the letter and spirit of the constitution, Judicial Review is apparent since a majority of the countries of the world which have written constitution*."

That a court called upon to interpret and apply a statute is valid in terms of some higher constitutional law must, of course; be admitted in view of the fact that the courts in many countries possess no such additional power.[2]

Under *Chief Justice Marshall's* theory, Judicial Review is less a necessary adjunct to written constitution than a supplement to limited government and a paramount constitution. The supremacy of the organic, constitutional law, and the fundamental distinction between this law and the ordinary - law, quite logically imply that any act of the law making bodies, which contravenes the provisions of the paramount law must be void and must be some

[2] R.K,Carr, The Supreme Court and Judicial Review at 23.

mechanism by and through which this can be done. Once the constitution is regarded as the supreme law of the land and the powers of all the other organs are considered limited by its provisions.

3.5 Article-13- Laws Inconsistent with Fundamental Rights

Article 13 (1) declares that all laws in force in the territory of India immediately before the commencement of this Constitution shall be void to the extent to which they are inconsistent with the provisions of Part III of the Constitution.

Clause (2) of this *Article 13* provides that the State shall not make any law which takes or abridges the fundamental rights conferred by Part III of the Constitution; and any law made in contravention of fundamental rights shall, to the extent of contravention, be void.

Clause (3) of this *Article 13* gives the term '*law*' a very broad connotation which includes any ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law. Thus, not only the legislative enactment, but anything mentioned here can be challenged as infringing a fundamental right.

3.5.1 *Power of Judicial Review*

Article 13 in fact provides for the judicial Review of all legislations in India past as well as future. The power has been conferred, on the –

(a) High Court : Under *Article 226* which can declare law is inconsistent with ant part of the Constitution.

(b) Supreme court : Under *Article 32*, unconstitutional if it any part of the Constitution.

3.5.2 *Basis of Judicial Review*

(i) Judicial Review is the power of the courts to pronounce upon the constitutionality of the legislature acts.

(ii) The use of a constitution to impose these limitations and ensure a '*government of laws and not of men*'.

(iii) To secure the tenants of the Constitutional provisions, advanced by a system of checks and balances involving either a formal separation of powers or the instrument of judicial review to be the most efficacious for the fulfillment of this essential condition for democratic government.

3.5.3 *Concept of Judicial Review*

(1) All laws whether made by (i) legislature (ii) delegated authority and (iii) all executive acts – must respect and conform to Fundamental Rights.

(2) The ordinance passed by the President under *Article 123* and by the Governor under *Article 213*, must also, not be inconsistent to Fundamental Rights.

(3) Article 13 provides basic to Fundamental Rights and makes them enforceable.

(4) Fundamental Rights are constitutions limitations on the legislative power *Article 13 (2)* expressly states this limitation.

3.5.4 *Judicial Review – 'Reasonable Restrictions'*

(1) Judicial Review can declare a law unconstitutional if it is beyond the competence of the (law) legislation according to *Article 246*.

(2) Even the absence of express constitutional provisions, the court can invalidate a law, which contravenes any right or is *ultra vires*.

3.5.5 *Judicial Review under Indian Constitution*

In the Indian Constitution there is an express provision for judicial review, and in this sense it is on a more solid footing than it is in America. In the State of Madaras[3] V.V.G. Row, Patanjali Sastri, C.J., Observed, " our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted 'due process clause in the Fifth and Fourteen amendments. Such power of Judicial Review follows from the very nature of Constitutional law.

In ***A.K. Gopalan v. State of Madaras***,[4] Kania C.J., pointed out that it was only by way of abundant caution that the framers of our constitution inserted the specific provisions in Article 13 while the basis of judicial review of legislative acts is far more secure under our constitution its potentialities are much more limited as compared to that in U.S.A. this is due to detailed provision of the Indian Constitution and the easy method of its amendment in contradiction to American Constitution's vogue and rigid method of its amendments. Thus, under the power of judicial review the highest court of the Nation can test pre-constitution and post-constitution or future laws, and declare them unconstitutional in case they contravene any of the provisions of Part – III of the Constitution.

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[3] AIR 1952 SC 196.

[4] AIR 1950 SC 27.

In ***Kesavanand Bharti Case***[5] (Fundamental Rights Case) it has been held that Judicial Review is the basic features of Indian Constitution and therefore it cannot be damaged or destroyed by amending the constitution and can be ousted or excluded even by the Constitutional Amendment.

3.5.6 ***Article 13 and Pre-Constitutional Laws***

According to clause (1) of *Article 13* all pre-constitution or existing laws. i.e. laws which were in force immediately before the commencement of the constitution shall be void to the extent to which they are inconsistent with Fundamental Rights from the date of the commencement of the constitution.

3.5.7 ***Article 13 not Retrospective in Effect***

(i) Article 13 (1) is prospective in nature. All pre-constitutional laws inconsistent with Fundamental Rights will become void only after the commencement of the constitution. They are not void *ab initio*.

(ii) Such inconsistent law is not wiped out so far as the post Acts are concerned. A declaration of invalidity by the courts will, however, be necessary to make the laws invalid.

(iii) The Supreme Court in ***Keshawa Madhav Menon v. State of Bombay***,[6] observed, "*There is no fundamental Right that a person shall not be prosecuted and punished for an offence committed before the constitution came into force*".

3.5.8 ***Features of Judicial Review***

(a) Doctrine of Severability

(b) Doctrine of Eclipse

(c) Doctrine of Waiver

3.5.8.1 ***Doctrine of Severability***

Origin - When a part of the statute is declared unconstitutional then a question arises whether the whole of the statute is to be declared void or only part which is unconstitutional should be declared as void - to resolve this doctrine of severability was evolved. That the offending part is to be declared as void and not the entire statute.

Application of the Doctrine

Article 13 - To the extent of such inconsistency be void not the entire provision, but only repugnant provision. It means that if offending provision can be separated from what is constitutional then only that part which is offending is to be declared void, not the entire

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[5] AIR 1973.

[6] AIR 1951 SC 128.

statute. Application to legislation which is party ultra vires that is beyond legislation competence of the legislation.

In ***A.K. Gopalan v. State of Madras***,[7] the Hon'ble Supreme Court while declaring *Section 4* of *The Prevention Detention Act 1950*, as *ultra vires*. The impugned act minus this section remain unaffected.

3.5.8.2 ***Doctrine of Eclipse***

Meaning

- (i) It is based on the principle that a law which violates fundamental rights is not nullity or void abolition but become unenforceable. It is over shadowed by the fundamental rights and remain dormant; but it is not dead.

- (ii) Such dormant condition is for the citizens as against non-citizens, who are not entitled to fundamental rights.[8]

Supreme Court formulated the doctrine of eclipse in *Bhikaji v. State of M.P.*, AIR 1955.

Post constitutional Laws - Clause (2) of *Article 13* prohibit state to make any law which takes away or abridges rights conferred by Part III. If such laws are made - such laws are void from its inception yet declaration by the court of that invalidity is necessary.

As distinguished from clause (1) clause (2) makes the inconsistent laws - void of *ab initio* and even conviction made under it are to be set aside, anything done under such a law whether closed completed or inchoate will be wholly illegal and person adversely affected by it will be entitled to relief.

Does doctrine of eclipse apply to post constitutional law?

In ***Deep Chand v. State of V.P.***,[9] post constitutional law made U/A 13 (2) which contravenes a fundamental right is nullity from in its inception. It is a void *ab initio*. The doctrine of eclipse does not apply to post constitutional laws and subsequent amendments cannot revive it but in ***State of Gujrat v. Ambica Mills***,[10] Supreme Court modified its view expressed in Deep Chand's case and held that a post constitutional law which is inconsistent with fundamental right is not nullity or non-existence in all cases and for all purposes because Fundamental Rights are not available to non-citizens.

In ***Dularelodh v. IIIrd Add. District Judge, Kanpur***,[11] the Supreme Court applied the doctrine of eclipse to post constitutional law even against citizens.

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[7] AIR 1950 SC 27.

[8] *State of Gujrat v. Ambica Mills*, AIR 1974.

[9] AIR 1959.

[10] AIR 1974.

[11] AIR 1984.

3.5.8.3 ***Doctrine of Waiver***

Can Citizen Waive his Fundamental Rights?

Doctrine of waiver has no application to the provisions of law enshrined in part III. It is not open to an accused person to waive or give up his constitutional rights and get convicted.

In ***Behram v. State of Bombay***,[12] the issue directly arose in Bashesher Nath v. Income Tax com., 1959. Part III enshrined in the constitution not for the benefit of the individual but for general public.

The question of waiver directly arose in Bashesher Nath v. Income Tax-Commissioner.[13] The petitioner whose case was referred to the Income-tax Investigation Commissioner under Section 5 (1) of the Act was found to have concealed large amount of income. He, thereupon, agreed at a settlement in 1954 to pay Rs. 3 lakhs in monthly installments by way of arrears of tax and penalty.

In 1955, the Supreme Court in *Muthiah v. I.T. Commissioner*,[14] held that *Section 5 (1)* of the *Taxation of Income (Investigation Commission) Act* was *ultra vires* of *Article 14*. The petitioner then challenged the settlement between him and the Income Tax Investigation. The respondent contended that even if *Section 5 (1)* was invalid, the petitioner by entering into an agreement to pay the tax had waived his fundamental right guaranted under *Article 14*.

The majority expressed the view that the doctrine of waiver as formulated by some American Judges interpreting the American Constitution cannot be applied in interpreting the Indian Constitution. The Court held that, it is not open to a citizen to waive any of the fundamental rights conferred by Part III of the Constitution. These rights have been put in the Constitution not merely for the benefit of the individual but as a matter of public policy for the benefit of the general public. It is an obligation imposed upon the State by the Constitution. No person can relieve the State of this obligation, because a large majority of our people are economically poor, educationally backward and politically not yet conscious of their rights. In such circumstances, it is the duty of this Court to protect their rights against themselves.

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[12] AIR 1955.

[13] AIR 1959 SC 149; See also *Olga Tellis v. Bombay Minicipal Corporation*, AIR 1986 SC 108.

[14] AIR 1956 SC 269.

3.6 Power of the Court (*Article 124-147*)

According to G. Austin Supreme Court to play the role of '*guardian of the social revolution*'.

The parliament of India has power to make laws, organizing jurisdiction and powers of Supreme Court. The number of judges can be increased or decreased by the parliament by legislation. There was a Provision in our constitution originally that there will be a CJ and 7 other judges. This number was raised to 10 in 1956, 13 in 1960, 17 in 1977, 25 in 1985. Later number of judges in the Supreme Court was raised from 26 (25+1) to 31 (30+1). Current sanctioned strength of the Supreme Court is thus 31.

3.6.1 *Supremacy of Executive: Judges transfer Case-I*

Though according to the language used in *Article 124* the President is required to '*consult*' legal expert but prior to the decision of the Supreme Court in *S.C Advocate-on-Record-Association case*, it has always been interpreted that the president was not bound to act in accordance with such consultation.

'*Consultation*' came for the consideration of the Supreme Court in the *Sankalchand sheth's case*, which was related to the scope of *Article 222* of the constitution. The word 'consultation' mean full and effective consultation.

3.6.2 *Judicial Supremacy*

Supreme Court Advocate-on-Record Ass. v. U.O.I (appointment and transfer of judges case)

Sole opinion of Chief Justice of India without following consultation process: not binding on Government. In *re presidental Reference*, AIR 1999 the court also widened the scope of Chief Justice's Consultation process upholding the government's stand on consultation process.

3.6.3 *Qualification of Judges of Supreme Court [Article 124 (6)]*

(i) Should be a Citizen of Indian.

(ii) Judge of High Court for 5 years.

(iii) practicing as an Advocate for at least 10 years in High Court.

(iv) In the opinion of President a distinguished jurist.

Tenure

Till 65 years of age.

3.6.4 ***Removal of Judges: Impeachment Process [Article 124(4) (5)]***

(i) A judge may be removed only on grounds of proved misbehavior or incapacity.

(ii) Addressed to both houses in the same session with majority - not less than 2/3 of the members.

(iii) Investigation and proof of the misbehavior will be determined by law.

In historic judgement of ***K. Veeraswami v.U.O.I***, 1991, The held that the judges of Supreme Court/High Court can be prosecuted and convicted for criminal misconduct.

3.7 Jurisdiction of the Supreme Court

3.7.1 As court of record - Art 129 - has power to punish for contempt - The Contempt of Court Act, 1971. Punished with simple imprisonment 6 months. Fine - upto 2000 or both.

3.7.2 Original Jurisdiction *- Article 131 in any dispute :*

(a) Between Govt. of India and one or more states.

(b) Between Govt. of India and one or many states. On side and one or more states on other side.

(c) Between two or more states.

3.7.3 Limitations of the Powers of the Supreme Court

Supreme Court cannot entertain any suits brought by - private individuals in its original jurisdiction.

3.7.4 Essentials

The dispute of original jurisdiction of the court must involve a '*question of law*' and capable of being enforced by the power of the state but not necessarily in a court of law-legal right. In ***State of Karnataka v. U.O.I***, (1998) the plaintiff filed a suit U/A 131 because the action of the Central Govt. against the state affects the interest of the ministers who exercise the power .The word '*right*' used is in a generic sense - any advantage or benefit conferred upon by a rule of law.

Jurisdiction of S.C Excluded

(1) Inter- State water disputes, *Article 262*.

(2) Matters referred to finance commission. *Article 280*.

(3) Adjustment of certain expenses and pension b/w Union and State, *Article 290*.

Proviso to *Article 131* - The jurisdiction of S.C Shall not extend to a dispute arising out of any :-

- *(i)* Treaty
- *(ii)* Agreement
- *(iii)* Covenant
- *(iv)* Engagement

Enforcement of fundamental rights under original Jurisdiction issue several writs.

3.7.5 Appellate Jurisdiction - Art-132

Appellate Jurisdiction can be divided into four categories :-

(A) Appeal in Constitutional Matters [*Article 132 (1)*]

(B) Appeal in Civil Cases (Article 133)

(C) Appeal in Criminal Cases (Article 134)

(D) Special Leave to Appeal (Article 136)

(A) Appeal shall lie from any judgment, decree, and order. Involves substantial question of law Under [Article 132 (1)]

Conditions necessary for grant of certificate by the High Court :-

- *(i)* The order appealed must be against judgment decree or final order made by H.C. in civil, criminal or other proceedings.

- *(ii)* The case must involve a question of law.

- *(iii)* If the High Court U/A -134-A certifies case to be heard by Supreme Court. Only when its decision amount to a final order when right is determined.

(B) Appeal in Civil Cases - Article 133

Conditions are:-

- *(i)* Case involves a substantial question of law of general importance.

- *(ii)* In the opinion of High Court the said question needs to be decided by the Supreme Court.

The 30th Amendment Act, 1972 - condition of monetary value was eradicated.

(C) Appeal in Criminal Cases - Article 134

- (i) Without certificate *Article 134 (a) (b).*

- (ii) with a certificate *Article 134 (c).*

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

(b) Has withdrawn for civil any case before subordinate court and has ordered the conviction.

Power of the S.C it withdraw and transfer cases *Article 139-A*, if think it expedient to do so. Federal courts jurisdiction to be exercised by the Supreme Court-Under *Article 135*.

(d) Appeal by special leave-Article 136

These are special residuary powers which are exercisable outside the preview of ordinary law. *Articles 132-135* deals with ordinary appeals to the Supreme Court in cases where the needs of justice demand interference. *Article 136* the power is not fleered with any of the limitations contained in *Articles 132-135*.

Criminal Cases

The power of SC U/A 136 has been more frequently been worked in criminal cases

Article 136 merely confers discretionary power on the court to scrutinize and to go into the evidence in circumstances in order to see that substantial and grave injustice has not been done, it does not confer a right of appeal on the party.

Matru v. State of U.P, AIR 1971

The Court held that private party can file appeal U/A 136 challenging acquittal. That when an accused is acquitted by the H.C and no appeal against the acquittal is field by the state private party can file appeal U/A 136.

Advisory Jurisdiction (Article 143)

If It appears to president that-

- *(i)* A question of law or fact has arisen or is likely to arise.
- *(ii)* The question is of such a nature and of such public importance.

In ***Re Kerala Education Bill***, *AIR 1958* the Supreme Court laid down fall principle to be followed in such cases :-

(i) The SC has under clause (1) a discretion in the matter to refuse any opinion on the question.

(ii) It is for the president to decide what questions should be referred to court.

Power to Review its Judgment (Article 137)

(i) Discovery of new important matters of evidence.

(ii) Mistake or error on face of the record.

(iii) Any other sufficient reason.

3.8 Writ Jurisdiction

A writ is a quick remedy against injustice for the protection of the rights of citizens against any encroachment by the government authority. It is a speedy remedy and is made available without going into avoidable technicalities.

3.8.1 *Scope of Writs under High Court*

A writ is a discretionary remedy and the High Court can refuse it on the ground of acquiescence, laches (delay), available as alternative remedy and no benefit to the party. Under *Article 226*, a High Court can grant interim relief by way of interlocutory orders. The scope of the writs in India law is wider than the prerogative writs is England.

3.8.2 *Writ Jurisdiction of the Supreme and High Courts*

There are five well-known writs:-

3.8.2.1 *Writ of Habeas corpus- A demand to produce the body*

It literally means '*a demand to produce the body*' or '*you may have the body*' (whether dead or alive). the issuance of the writ means an order to the detaining authority or person to physically present before the court the detained person and show the cause of detention so that the court can determine its legality or otherwise (however, the production of the body of the person alleged to be unlawfully detained is not essential). If the detention is found to be illegal, the detained person is set free forthwith. Its purpose is not to punish the wrongdoer but merely to secure the release of the person illegally detained.

Object /Purpose

Its purpose is not to punish the wrongdoer but merely to secure the release of the person illegally detained. Increased importance since *Article 21* cannot be suspended even during emergency, this becomes a very valuable writ safeguarded personal liberty of the …..

When it will lie

- *(i)*The writ of Habeas corpus will lie if the power of detention vested in an authority was exercised malafide and is made in collateral or ulterior purpose.[15]

- *(ii)* If the detention is justified the high court will not grant the writ of habeas corpus.

- *(iii)*The detention should not have been according to the procedure established by law to invoke this remedy.

- *(iv)* To proceed with lawful detention procedure must be strictly followed under *Article 21*. The detention is lawful if the conditions of *Article 22* are compiled with.

[15] *A.K. Gopalan v. state of Madras*, AIR 1950 SC 27.

- *(v)* The detention becomes unlawful when a person arrested is not produces before the magistrate within 24 hours of his arrest and is entitled to be released under writ of *habeas corpus*.

3.8.2.2 ***Writ of Mandamus***

It is a command to act lawfully and to desist from perpetrating an unlawful act. Where it has a legal right which casts certain legal obligations on b, a can seek a writ of mandamus directing to perform its legal duty? Mandamus may lie against any authority, officers, government or even judicial bodies that fail to or refuse to perform a public duty and discharge a legal obligation.

It is a command to act lawfully and to desist from perpetrating an unlawful act. Mandamus may lie against any authority officers government or even judicial bodies that fail to or refuse to perform a public duty and discharge a legal obligation.

Supreme Court may issue a mandamus to enforce Fundamental Rights of a person when its volition is by some govt. orders or illegal act. Mandamus is judicial remedy in the form of an order to do or forbear from doing some specific act under public or statutory duty. It is considered as a residuary remedy the public law. It is a general remedy whenever justice has been denied to any person. There must be specific demand for the fulfillment of the duty and must be specific refusal by the authority. There must be a legal right to the performance of a legal duty.

3.8.2.3 ***Writ of Prohibition***

Writ of Prohibition is issued when the administrative process is in motion to prevent it from proceeding further. Prohibition is a judicial order to the agencies (constitutional, statutory or non-statutory) from continuing their proceedings in excess or abuse of their jurisdiction or in violation of the principles of natural justice or in contravention of the law of the land. it is issued primarily to prevent an inferior court or tribunal from exercising its jurisdiction (i.e. exercising power or authority not vested in them).

Issued in cases

- (i) Where there is excess of jurisdiction
- (ii) Where there is absence of jurisdiction

Before writ of prohibition is issued - there must be something to be done it is a writ of right it can be issued even when the agency has reached a decision to stop the authority from enforcing its decision. In India prohibition is issued to protect the individual from arbitrary administrative actions judicial function.

The usual practice is to pray for prohibition and alternatively *certiorari* because it may happen that pending proceeding for prohibition the agency may hand over its final decision.

It can be applicable only against judicial and curse judicial bodies. Does not lie against public authority which acts purely in an administrative executive capacity.

3.8.2.4 ***Writ of Certiorari***

Writ of Certiorari is a latin word, mean '*to inform*'.

It is essentially a royal demand for information the king working to be certified with some matter, ordered the necessary information be provided to him. It is defined as a judicial order operating in persona and made in original legal proceedings directed to any consecutions statutory or non-statutory body or person, requiring the records of any action to be certified by the court and dealt with according to law.

Issued By

A superior court (Supreme Court to High Court) to an inferior court or body exercising judicial or quoin-judicial functions to remover a suit such inferior court or body and adjudicate upon the validity of the proceedings. How it can be issued before the trial to prevent excess or abuse of jurisdiction and remove the case to the higher court. It can be worked after the trial to quash an order which has been made without jurisdiction or in violation of the rules of natural justice. It can be issued against constitutional bodies (legislative executive and judiciary or their official's statutory bodies like cooperation's non-statutory bodies like companies and co-operative societies and private persons and bodies. It can be issued to judicial curse judicial and administrative actions.[16] Writ issued to cash action of selection board on around of personal bias grounds of issuing the writ :-

(i) Where there is want/ excess of jurisdictions

(ii) Where there is violation of the principles of natural justice.

(iii) Where there is error of law apparent on the face of record and not error of fact.

Scope

The writ is corrective in nature, its scope of operation is quite large. The purpose of the writ is not only negative to quash and action but it contains affirmative action also.

In ***Gujarat steel tubes v. Mazdoor Sabha***,[17] held white quashing the dismissal order the court can also order restatement and payment of back wages :-

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[16] *A.K Kraipak v.U.O.I*, AIR 1970.

[17] AIR 1980.

(i) A error of law which is apparent on the face of the record can be corrected by a certiorari but not an error of fact, however grave it may appear to be.

(ii) However if a finding of a fact is based on no evidence that would be regarded as an error of law which can be corrected by certain.

It will not lie

(i) Cannot be issued against a private body.

(ii) A cooperative caloricity supply society limited incorporated under the cooperative societies Act is a private body and not a public body therefore writ not issued against private body.

3.8.2.5 Writ *of Quo-warrantor*

Quo-warranto is a question asking '*with what authority or warrant*'. The writ may be sought to clarify in public interest the legal position in regard to claim of a person to hold a public office. An application seeking such a writ may be made by any person provided the office in question is a substantive public office of a permanent nature created by the constitution or law and a person has been appointed to it without a legal title and in contravention of the constitution or the laws.

The Writ is sought to clarify in public interest the legal position in regard to claim of a person to hold a public office.

Object of the writ

It is to prevent a person to hold an office which he is not legally entitled to hold. By this writ a holder of an office is called upon to show to the court under what authority he holds the office. It the enquiry leads to the findings that the holder of the office has no valid title to it the court may pass an order preventing the holder to continue in office and also declare the office vacant. The doctrine of the writ is that in cases where the initial disqualification is removed it would be open to the authorities concerned to appoint the same person immediately even if the court grants the writ of *quo-warranto* as desired by the petitioner.

Who can apply

A writ of *Quo-warranto* can be claimed by a person if he satisfies the court that :-

(i) Office in question is a public office and

(ii) Is held by a person without legal authority. A writ of *quo-warranto* is never issued as a matter of course it is always within the discretion of the court to decide after determination facts of the case.

(iii) A court may refuse to grant a writ if it is venations.

3.9 Judicial Activism

Judicial Activism is an '*active*' role of the judicial system in promoting justice. It is a judicial creativity, a process by which new juristic principles are evolved to update the existing law to bring it in conformity with the current needs of the society and thereby, to subservice the constitutional purpose of advancing public interest under the rule of law. Since *Artlcle 141* of the constitution of India lays down that the law as declared by the Supreme Court of India establish the law of the state. The process of law making by judges is what is called judicial activism. It is an active interpretation of existing legislation by a judge, made with a view to enhance the utility of that legislation for social betterment.

The phenomena which is now called judicial activism is, therefore, not one of recent origin. It originated with the firm establishment of courts as means of administration of justice. The recent examples from the time when judicial activism was recognized as a mode of legislation in modern India also require be noticed.

It denotes the '*proactive*' role played by the judiciary in the protection of the rights of citizens and in the promotion of justice in the society. It implies the '*assertive*' role played by the judiciary to force the legislature and the executive to discharge their constitutional duties. It is also known as ***Judicial Dynamism***. It is the antithesis of ***Judicial Restraint***, which means self-control exercised by the judiciary.

3.9.1 *Meaning and Definition of Judicial Activism*

Meaning

'*Judicial*' is an adjective from French- '*Judex*' which means administration of justice Courts of Justice.

'*Activism*' is an active role of the judiciary to fulfill the duty to redeem their constitutional oath.

Judicial Activism means judicial pronouncements on different intricate issues. It is a new creative legal philosophy to meet social needs. It is a measure that enables issue of directions to state which may involve a positive action with a view to secure enforcements of fundamental rights. Some may dislike the nation of judicial activism and term it as an unchallenged authority or judicial co-governance. But it is based on the judicial philosophy that judiciary cannot betray people's faith as they are the protector and guardian of the rule of law.

Definition

According to Black's Law Dictionary judicial activism is a "*philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions*." Judicial activism is articulated and enforced by judicial rulings suspected of being based on personal or political considerations rather than on existing law. Judicial activism implies going beyond the normal constraints applied to jurists and the Constitution, which gives jurists the right to strike down any legislation or rule against the precedent if it goes against the Constitution. Judicial activism is premised upon the fact that judges assume a role as independent policy makers or independent "trustees" on behalf of society that goes beyond their traditional role as interpreters of the Constitution and laws.[18]

3.9.2 Evolution and Origin of Judicial Activism

The origin of judicial activism through judicial review can be traced back under the unwritten Constitution of Britain during the Stuart period of (1603-1688). Sometime, in the year 1610, the power of judicial review was asserted for the first time in Britain through the activism of Justice Coke. Evolving the principles of judicial review, Chief Justice Coke declared that if a law made by the Parliament violated the principles of '*common law*' and '*reason*' then the courts might review and adjudge it as void.

Coke's theory of judicial review was repeated by *Sir Henry Hobart* in 1615 and again in 1702 by *Sir John Holt*. The British chief justices asserted the power of the judiciary to review acts of the British Parliament under '*reason*' and '*common law*'. "Though Coke's words were repeated", *John Agresto* finds that "*except for Dr. Bonham's case instances of actual nullification of parliamentary laws by British courts cannot be cited*." Since then, however, judicial review did not get a upper hand as it was over-shadowed by the evolution of parliamentary sovereignty in Britain.[19]

In 1804, *Marshall, J.*, observed in ***Marbury v. Madison***, the widest amplitude of the judicial system to conserve and preserve constitutional tenants. It is a necessity to respect both the traditions of the past and convenience of the present. It is an outcome of the onerous

[18] http://www.bigislandchronicle.com/2010/07/25/dispatches-from-curt-%E2%80%94-female-leaders-in-judiciary-and-anticipated-post-scripts/

[19] http://shodhganga.inflibnet.ac.in:8080/jspui/bitstream/10603/20809/10/10_chapter%202.pdf

responsibility upholding federal character, and to protect sacred and valuable fundamental rights.[20]

3.9.3 *Concept of Judicial Activism*

Judicial Activism is a tool of social engineering and an example of legal realism. It enables protecting scared civil - liberties and maintain constitutional discipline it enunciates concept of basic structure and has a democratized access to apex court. Activism of any kind is always welcome, especially from the judiciary for it is the only institution where citizens continue to repose faith. Sadly, all other institutions have filed to live up to people's expectations.

Judicial activism is more a matter of compulsion than choice. It is only when the other wings of the administration shy away from carrying out their responsibilities and performing their statutory deities due is political considerations populist considerations vested in or just secretarial negligence that the judiciary has to step in the objective behind judicial intervention is not just to protect larger public interest or safeguard the cell-being of an individual but to restore people's faith in the justice delivery system.

People's confidence in the judiciary has to be safeguarded from erosion with the tool of judicial activism. At times, it becomes essential for the judges to look beyond the law, to scratch more than just the surface.

3.9.4 Various Theories of Concept of Judicial Activism

As far as the origin and evolution of judicial activism go, there are two theories behind the whole concept. They are: (i) Theory of vacuum filling and (ii) Theory of Social Want.

Theory of Vacuum Filling

The theory of vacuum filling states that a power vacuum is created in the governance system due to the inaction and laziness of any one organ. When such a vacuum is formed, it is against the good being of the nation and may cause disaster to the democratic set up of the country. Hence, nature does not permit this vacuum to continue and other organs of governance expand their horizons and take up this vacuum.

In this case, the vacuum is created by the inactivity, incompetence, disregard of law, negligence, corruption, utter indiscipline and lack of character among the two organs of governance *viz.* the legislature and the executive.[21]

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[20] (1803) 2 Led. 60.

[21] S.C.Kashyap, Judiciary-Legislature Interface , Universal Pubblishing House, New Delhi, 1997), p.71.

Hence the remaining organ of the governance system i.e. the judiciary is left with no other alternative but to expand its horizons and fill up; the vacuums created by the executive and the legislature. Thus according to this theory, the so-called *hyper-activism* of the judiciary is a result of filling up of the vacuum or the void created by the non-activism of the legislature and the executive.

Theory of Social Want

The Theory of Social Want states that judicial activism emerged due to the failure of the existing legislations to cope up with existing situations and problems in the country. When the existing legislations failed to provide any pathway, it became incumbent upon the judiciary to take on itself the problems of the oppressed and to find a way to solve them. The only way left to them within the framework of governance to achieve this end was to provide non-conventional interpretations to the existing legislations, so as to apply them for greater good.

Hence, the judicial activism has emerged. The supporters of this theory opine that - judicial activism plays a vital role in bringing in the societal transformation. It is the judicial wing of the state that injects life into law and supplies the missing links in the legislation. Having been armed with the power of review, the judiciary comes to acquire the status of a catalyst on change.[22]

3.9.5 Situations that Lead to Judicial Activism

The violation of basic human rights has also led to judicial activism. Finally, due to the misuse and abuse of some of the provisions of the Constitution, judicial activism has gained significance. Besides the above mentioned factors, there are some other situations that lead to judicial activism. These are:-

- ***(i)*** When the legislature fails to discharge its responsibilities.
- ***(ii)*** In case of a hung parliament where the government is very weak and instable.
- ***(iii)*** When the governments fail to protect the basic rights of the citizens or provide an honest, efficient and just system of law and administration,
- ***(iv)*** When the party in power misuses the courts of law for ulterior motives as was done during the Emergency period, and
- ***(v)*** Finally, the court may on its own try to expand its jurisdiction and confer on themselves more functions and powers.

[22] Shailja Chander, Justice V.R.Krishna Iyer on Fundamental Rights and Directive Principles, (Deep and Deep Publications, New Delhi. 1998), p.223.

3.9.7 Areas of Judicial Activism

During the past decade, many instances of judicial activism have gained prominence. The areas in which judiciary has become active are health, child labour, political corruption, environment, education, etc.

Through various cases relating to *Bandhua Mukti Morcha, Bihar Under trials, Punjab Police, Bombay Pavement Dwellers, Bihar Care Home cases*, the judiciary has shown its firm commitment to participatory justice, just standards of procedures, immediate access to justice, and preventing arbitrary state action.

3.9.6 Landmark Judgments on Judicial Activism

(a) AK Gopalan v. State of Madras[23]

Significant decision was observed because it represented the first case where the court meaningfully examined and interpreted key fundamental rights enlisted in the constitution including *Article 19* and *21*.[24]

A writ of *habeas corpus* was filed. The contention was whether under this writ and the provisions of the *Preventive Detention Act, 1950*, there was a violation of his fundamental rights which were *Article 13, 19, 21* and *22*. The counsel on behalf of the petitioner argued that the right to movement was a fundamental right under *Article 19* and hence the defense counsel must prove that the law of preventive detention was a reasonable restriction as per the five clauses of *Article 19 (2)*.

Judge restricted the scope of fundamental rights and by reading them in isolation of *Article 21* and *22* which provided guidelines for preventive detention. Foreign precedent like cases of UK and US were used in limiting the scope of *Article 21*. *Justice Kania* said that the term due process prevented the courts from engaging in substantive due process analysis in determining the reasonableness of the level of process provided by the legislature. He remarked:-

> *The word 'due' in the expression 'due process of law' in the American Constitution is interpreted to mean 'just', according to the opinion of the Supreme Court of U.S.A. That word imparts jurisdiction to the Courts to pronounce what is 'due' from otherwise, according to law. The deliberate omission of the word 'due' from Article 21 lends strength to the contention that the justifiable aspect of 'law', i.e., to consider whether it is reasonable or not by the Court, does not form part of the Indian*

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[23] AIR 1950 SC 27.

[24] 1967 AIR 1643.

Constitution. The omission of the word 'due', the limitation imposed by the word 'procedure' and the insertion of the word 'established' thus brings out more clearly the idea of legislative prescription in the expression used in Article 21. By adopting the phrase 'procedure established by law' the Constitution gave the legislature the final word to determine the law.[25]

Fazl Ali's dissent broadly construed the provision '*procedure established by law*' in *Article 21* to encompass higher principles of natural law and justice, and not just statutory law. he said that the Indian Constitution intended to incorporate the same language as the Japanese Constitution and encompass '*procedural due process*' conception, he still cited to American , British and foreign precedent to support a much more expanded view of due process. They were based on the principles of Natural Justice. Fazal Ali highlighted a series of US decisions; the US Supreme Court recognized that the word law does not exclude certain fundamental provisions. Drawing on British and US legal sources he argued for incorporating procedural due process into *Article 21*, guided by principles of Natural Justice in accordance with universal, transactional and legal norms.

In the above case two major points were held: *Articles 19, 21* and *22* are mutually exclusive. *Article 19* was to not apply to a law affecting personal liberty to which *Article 21* applies. In the above case, the restrictions under *Article 19* applied only on free people. Unless the state arrested a person for making a speech, holding an assembly, forming an association or for entering a territory, the arrest had to be examined under *Article 21*. A '*Law*' affecting life and liberty could not be declared unconstitutional merely because it lacked natural justice or due procedure. Hence *Article 21* provided no immunity against competent legislative action.

(b) Kharak Singh v. State of Uttar Pradesh[26]

The petition under *Article 32* of the Constitution of India challenged the constitutional validity of Chapter 20 of the Uttar Pradesh Police Regulations and the powers conferred upon police officials by its provisions on the ground that they violate the rights guaranteed to citizens by *Articles 19(1) (d)* and *21* of the Constitution of India. On the basis of the accusations made against him, he had police constables entering his house and shout at his door, waking him up in the process. On a number of occasions they had compelled him to accompany them to the station and had also put restrictions on him leaving the town.

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[25] Indian Bureau of Parliamentary Studies,1971.

[26] AIR 1963 SC 1295.

The judges made a breakthrough while interpreting and finding the connection between *Article 19* and *21* by remarking that:

> *"If a person's fundamental right under Article 21 is infringed the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Article 19(2) of the Constitution. But in this petition no such defence is available, as admittedly there is no such law".*

So the petitioner Kharak Singh could legitimately plead that his fundamental rights, both under *Articles 19(1) (d)* and *21*, were infringed by the State. Hence, on these grounds the petitioner Kharak Singh was entitled to issue of a writ of mandamus directing the respondent-State of Uttar Pradesh- not to continue visit to his house.

Here, the majority adopted a restrictive conception of liberty that only extended to direct infringement of the freedom of movement, and refused to recognize the existence of a right to privacy.

(c) ***Satwant Singh Sawhney v. Union of India***[27]

Satwant Singh the petitioner was a manufacturer; importer and exporter who were asked to surrender the passport on the ground that he was likely to leave India to avoid a trial. For the first time, the Court was able to author a majority decision and binding precedent in the area of personal liberty that built and relied on foreign precedents dealing with substantive due process.

Moreover, *Chief Justice Subba Rao* used combination of American precedents, along with the opinions in Kharak Singh, to rule that the term '*personal liberty*' is as broad in India as the term '*liberty*' is in the 5th Amendment of the U.S. Constitution. The court recognized that right to life and liberty could be taken away by a '*procedure established by law*'.

However it cancelled the government's order to the petitioner to surrender his passports. Its judgement was found on the limited ground of the failure to provide for any procedure regulating the denial/surrender of passports under the *Indian Passports Act, 1920*. The court's objection was based on the absence of a procedure rather than the merits of the existing system.[28] Soon after the Satwant Singh Judgement, the parliament enacted the

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[27] ILR 1986 Delhi 451 b.

[28] http://www.ijtr.nic.in/articles/art35.pdf

Passport Act, 1967 to regulate how passports would be issued, revoked, impounded or revoked- matters on which legislation did not exist earlier.

India's democratic structure following the Emergency was shaken to the core as it had severely impinged on a person's fundamental rights. The citizens were resentful and there was severe dishonesty on the part of the government along with the crippled nature of the highest court in land.

(d) Maneka Gandhi v Union of India[29]

In this case the Supreme Court restored the citizen's faith in judiciary. The three landmark judgements were depicting a great change in the thought process of the judiciary and had set the stage for Judicial Activism to be introduced.

The Supreme Court not only broadened the meaning of '*personal liberty*' but also adopted the theory of '*due process*' in '*procedure established by law*'. The court recognized that when a law restricts personal liberty, a court should examine whether the restriction on personal liberty also imposed restrictions on any of the rights given by *Article 19*.

The Court held that personal liberty includes '*a variety of rights which go to constitute the personal liberty of man*,' in addition to those mentioned in *Article 19*, and that one such right included in '*personal liberty*' is the right to go abroad.

The court also held that according to the '*audi alteram partem*' theory, impounding Mrs. Gandhi's passport without giving her a hearing violated procedure established by law. These were principles of natural justice and fair procedure. The court had to decide whether Mrs. Gandhi was entitled to a hearing before her passport was impounded. It was resolved that as there was no post decisional hearing, the impounding was *Unconstitutional and Void.*

Amongst the fundamental rights, *Article 14, 19* and *21* of the constitution composing the '*golden triangle*' have been invoked most often to declare legislation or arbitrary state action invalid. In this particular case, there was conflict whether the right to travel abroad formed a right to personal liberty under *Article 21*.

The Supreme Court departed from the stereotyped notion and held that fundamental rights form an integrated scheme under the constitution. Emphasizing the need to read Part III of the Constitution in a holistic manner, the SC said that the mere fact that a law satisfied the requirements of one fundamental right did not exempt it from the operation of other fundamental rights.

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[29] (1978) 2 S.C.R. 621.

The majority of the seven judge bench stated that any procedure established by law under *Article 21* would have to be '*fair, just and reasonable*' and it differed from the *Satwant Singh case* by establishing that even in presence of a law, an arbitrary law will not be considered. The Supreme Court after this judgement became the watchdog of the constitution instead of supervisors.

3.9.8 *Judicial creativity on Judicial Activism : Expansion of Right to Life*

The above topic was an exhaustive evaluation of judges and their path breaking performance with regard to changing the dynamics of *Article 21*. American Constitution's concept of Due process was finally embodied in the words '*procedure established by law*'. The current topic will deal with the expansion of the provision due to the revolution created by the ***Maneka Gandhi Judgement***.

The concept of PIL[30] started taking shape, which was pioneered by the great Justice *P.N Bhagwati* who took cognizance of the fact that in certain circumstances, A PIL may be introduced in a court of law by the court itself (*suo moto*), rather than the aggrieved party or another third party. Post Maneka Gandhi's case, the Supreme Court ascertained that :

> *"In order to treat a right as a fundamental right, it is not necessary that it should be expressly stated in the constitution as fundamental right. Political, social and economic changes in the country entail the recognition of new rights. The law grows to meet the demands of the ever evolving society"*

Hence the Supreme Court has found *Article 21* to incorporate the substantive freedom that serves as means to remove major areas such as poverty, poor economic opportunities as well as systematic social deprivation.

A most significant feature of expansion of *Article 21* has been that many of the Non-justifiable Directive Principles have been converted into '*Enforceable Fundamental Rights'* by the hands of judges. Guarantees of economic opportunities and protection against social deprivations were established in various decisions:-

- Quality of life
- Right to Livelihood
- Right to medical care
- Right to Die
- Sexual Harassment

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[30] http://www.bigislandchronicle.com/2010/07/25/dispatches-from-curt-%E2%80%94-female-leaders-in-judiciary-and-anticipated-post-scripts/

- Ecology and Environment
- Right to Privacy
- Right to Privacy available to a Woman of Easy Virtues
- Right to Privacy and Virginity Test
- Right of Women to Produce Child or Refuse to Participate in Sexual Act
- Right to Privacy and Aadhaar Card

Note : for details please see ***Lesson No. 11*** (*Right to Life and Personal Liberty : Various Dimensions of Right to Life and Personal Liberty*)

Right to Privacy

The constitution does not grant in specific and express terms any right to privacy as such Right to Privacy is not encumbered as a Fundamental Right in the Constitution. However, such a right has been culled by the Supreme Court from *Article 21* and several other provisions of the Constitution read with the Directive Principles of State Policy.

As mentioned above, the *Kharak Singh* was the first of its own kind, to inaugurate the idea of "privacy" where issues were raised regarding implying the right to privacy from existing fundamental rights such as *Article 19(1) (d)* and *19(1) (e)* and *21*. During that time, *J. Subba Rao* had commented

> "*The right to personal liberty takes in not only a right to be free from restrictions but also free from encroachments on his private life*"

In 1965, the Supreme Court of India heard and decided State of ***Uttar Pradesh v. Kaushaliyaa case***[31] which involved the question of whether women who are engaged in prostitution can be forcibly removed from their residences and places of occupation, or whether they were entitled, along with other citizens of India, to the fundamental right to move freely throughout the territory of India, and to reside and settle in any part of the territory of India.

In its decision, the Supreme Court denied them this right holding that "*the activities of a prostitute in a particular area are so subversive of public morals and so destructive of public health that it is necessary in public interest to deport her from that place. The statutory restrictions imposed by the Suppression of Immoral Traffic Act on prostitutes, were upheld by the Court as constitutionally permissible 'reasonable restrictions' on their movements*".

[31] 1964 AIR 416.

In 1972, the Supreme Court decided a case – one of the first of its kind – on wiretapping.[32] In ***R. M. Malkani v. State of Maharashtra***[33] the petitioner's voice had been recorded in the course of a telephonic conversation where he was attempting blackmail. He asserted in his defence that his right to privacy under *Article 21* had been violated.

The Supreme Court declined his plea holding that the telephonic conversation of an innocent citizen will be protected by Courts against wrongful or high handed interference by tapping the conversation. The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants. The case had fallen in the *Pre - Maneka era*.

In ***Govind v. State of Madhya Pradesh***[34], decided by a three-Judge Bench of the Supreme Court is regarded as being a setback to the right to privacy Jurisprudence where the judges established that surveillance is not an unreasonable restriction upon right to privacy. It is only persons who are suspected to be habitual criminals and those who are determined to lead a criminal life that is subjected to surveillance.

An interesting angle was brought about in the famous ***Naz Foundation Case***.[35] The petitioners argued 'to the effect that the prohibition of certain private, consensual sexual relations (homosexual) provided by *Section 377* IPC unreasonably abridges the right of privacy and dignity within the ambit of right to life and liberty under *Article 21* [which] can be abridged only for a compelling state interest which, in its submission, is amiss here'

The Court then disposed of claims that this invasion of privacy was justified within the exception to *Article 21*.

While it could be '*a compelling state interest*' to regulate by law, the area for the protection of children and others incapable of giving a valid consent or the area of non-consensual sex, enforcement of public morality does not amount to a '*compelling state interest*' to justify invasion of the zone of privacy of adult homosexuals engaged in consensual sex in private without intending to cause harm to each other or others.

However this case suffered a huge setback when Supreme Court overturned the ruling of the Delhi High Court condemning homosexuality by holding *Section 377* of the Indian Penal Code valid and demanding the legislature to take appropriate action pertaining to the

[32] http://www.lawctopus.com/academike/judicial-activism-under-article-21-going-beyond-the-four-walls-of-the-judiciary/
[33] 1973 AIR 157.
[34] (1975) 2 SCC.
[35] *Naaz foundation v. Govt. of NTC*, 106 Delhi Law Times 277.

abolishment of this particular provision. Right to privacy has been hence denied to anyone who commits the offence under *Section 377*.

A similar concept of '*public interest'* would seem to apply when private companies disclose personal information without a person's consent. Without delving into the issue in too much detail, it would suffice here to mention one of the most important cases to have come up on the issue. In *Mr. X v. Hospital Z*, a person sued a hospital for having disclosed his HIV status to his fiancé without his knowledge resulting in their wedding being called off. The Supreme Court held that the hospital was not guilty of a violation of privacy since the disclosure was made to protect the public interest.

The Times of India reported that the law ministry is working on a proposal to make right to privacy a fundamental right in the Indian Constitution. The right to privacy would include the right to confidentiality of communication, confidentiality of private or family life, protection of his honour and good name, protection from search, detention or exposure of lawful communication between individuals, privacy from surveillance, confidentiality of banking, financial, medical and legal information, protection from identity theft of various kinds protection of use of a person's photographs, fingerprints, DNA samples and other samples taken at police stations and other places and protection of data relating to individual.[36]

3.9.9 *Public Interest Litigation: An Innovative Step towards Judicial Activism*

Public interest litigation means a suit filed in a court of law for the protection of public interest such as pollution, terrorism, road safety etc. Judicial activism in India acquired importance due to public interest litigation. It is not defined in any statute or act.

It has been interpreted by judges to consider the intent of public at large. The court has to be satisfied that the person who has resorted to PIL has sufficient interest in the matter.

In India, PIL initially was resorted to towards improving the lot of the disadvantaged sections of the society who due to poverty and ignorance were not in a position to seek justice from the courts. After the *Constitution (Twenty Fifth Amendment Act, 1971)*, primacy was given to Directive Principles of State Policy by making them enforceable. The courts to improve administration by taking up PIL cases, for ensuring compliance constitutional provisions has also increased.

[36] http://www.lawctopus.com/academike/judicial-activism-under-article-21-going-beyond-the-four-walls-of-the-judiciary/

PIL is filed for a variety of cases such as maintenance of ecological balance, making municipal authorities comply with statutory obligations of provision of civic amenities, violation of fundamental rights etc. It has provided an opportunity to citizens, social groups, consumer rights activists etc., easier access to law and introduced a public interest perspective. *Justices P.N. Bhagwati* and *V.R. Krishna Ayer* have played a key role in promoting this avenue of approaching the apex court of the country, seeking legal remedies in areas where public interests are at stake.

PIL has been considered a boon, as it is an inexpensive legal remedy due to nominal costs involved in filing the litigation. But there are some problems also in the PIL cases.

There has been an increase in the number of frivolous cases being filed due to low court fees. Genuine cases got receded to the background and privately motivated interests started gaining predominance in PIL cases. In view of this, the Supreme Court has framed certain guidelines governing the PIL.

Presently the court entertains only writ petitions filled by an aggrieved person or public spirited individual or a social action group for enforcement of the constitutional or the legal rights of a person in custody or of a class of persons who due to reasons of poverty, disability, socially or economically disadvantaged position are finding it difficult to approach the court for redress.

PIL is an extraordinary remedy available at a cheaper cost. As ***Justice Bhagwati*** observed in the case of *Asiad workers case*:

> "*Now for the first time the portals of the court are being thrown open to the poor and the downtrodden. The courts must shed their character as upholders of the established order and the status quo. The time has come now when the courts must become the courts for the poor and the struggling masses of this country*".

4. SUMMARY

Though the courts have a responsibility to interfere with the functioning of legislature and executive when the latter digresses from the laid down constitutional and democratic norms, it should exercise restraint while dealing with the internal functioning and conduct of the legislature further, of late Judicial Activism is looked as a panacea for all ills of our country . In a democratic set up, all wings *viz.* legislative, executive and judiciary need to perform their functions effectively.

It is, therefore, obvious that judicial activism, rightly understood and practiced with judicial restraints is the felt need of the present times and it has gained acceptability of the people, the ultimate sovereign, because it subseries the constitutional purpose of public good and public interest, Judicial Acutrim is a means of evolving new juristic principles for the development and growth of law is long established part of the role of judiciary. Its need and efficacy under the constitution cannot be doubled. The significance and acceptance of the India experience is evident from its impact even beyond the frontiers of this country.

Further, the ushering in of Right to Information Act is expected to bring in the much needed transparency in governance which would ensure the effective discharge of functions by the legislature and executive. Judicial Activism has been there for decades and it is wrong to say that it is a new phenomenon.

Judicial activism connotes the assertive role played by the judiciary to forced the other organs of government to discharged their assigned constitutional functions towards the people. It has held reinforcing the strength of democracy and reaffirms the faith of people in rule of law. Judicial activism may have been force upon the judiciary by an insensitive and unresponsive administration that disregards the interest of the people and that the nation does not suffer because of the negligence on the part of the executive and legislature.[37]

Former *Justice S. H. Kapadia* said Parliament and executive had well-defined powers under the Constitution and these needed to be respected by the judiciary. "*Legality and legitimacy are important concepts and go hand in hand. If there is excess of judicial overreach, then the legitimacy of judgments will be obliterated*," he warned.[38]

However judicial activism may be a welcome measure on in a short run where it helps in maintaining the rule of law and allows one organ to sustain the administration of the country when other organs are not performing. If it is practiced for a long time it may dilute the theory of separation of power and the doctrine of checks and balances.

However at the end we can conclude by stating that judicial activism may be good for protecting the fundamental rights of the citizens and protecting their interest from the vicious bureaucrats and politicians but extreme activism will lead to overreach of judicial powers that may lead to a misuse of power by the judges leading to arbitrary decision making as well tyranny which may be against the rule of a democratic country and so to ensure that no

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[37] https://www.lawctopus.com/academike/separation-of-powers-and-judicial-activism-in-india/

[38] http://timesofindia.indiatimes.com/india/Judicial-overreach-may-tilt-balance-of-power-CJI/articleshow/15510771.cms

arbitrariness takes place judicial review should be practices by the respected Judiciary within the purview of doctrine of separation of powers and checks and balances.

The Judiciary cannot take over the functions of the Executive. The Courts themselves must display prudence and moderation and be conscious of the need for comity of instrumentalities as basic to good governance. Judicial activism has to be welcomed and its implications assimilated in letter and spirit. An activist Court is surely far more effective than a legal positivist conservative Court to protect the society against legislative adventurism and executive tyranny. When our chosen representatives have failed to give us a welfare state, Judiciary plays an active role. In judicial activism, the judge places his final decision with his heart and mind, which is emotionally handled.

Judicial activism is gaining prominence in the present days. In the form of Public Interest Litigation (PIL), citizens are getting access to justice.

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6. SELF – ASSESSMENT QUESTIONS

1. "Judicial Review is a potent instrument in the hands of Judiciary", comment.
2. Write short notes on:-
   (i) Writ of Habeas Corpus
   (ii) Writ of Quo-warranto
   (iii) Writ of Certiorari
3. Discuss Power of Judicial Review in Constitution of India.
4. What do you mean by 'Public Interest Litigation'? How has it helped the High Courts and the Supreme Courts in protecting the human rights in India? Explain by referring the decided cases.
5. How has judicial activism affected the right to life and personal liberty enshrined in Article 21 of the Indian Constitution? Explain by referring to leading cases.

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INDIAN CONSTITUTIONAL LAW AND THE NEW CHALLENGES

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SEPARATION OF POWERS, RELATIONSHIP OF EXECUTIVE, LEGISLATURE AND COURTS

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1. INTRODUCTION

The concept of '*separation of powers*' was first articulated by the French philosopher Montesquieu in the 18th century. He considered the Legislature, the Executive and the Judiciary as the three branches of the Government. After getting independence from the clutches of the colonial rulers, India also adopted this model of government by framing some articles to this effect in the Constitution of India. In recent times, India has been witnessing a conflict among these branches with regard to their encroachment upon one another. This became more pronounced when the provisions of the 9th schedule of the Constitution of India was brought under the purview of Judicial review.

The judiciary was alleged to have encroached upon the legislative in the name of judicial activism. Another example where the judiciary was said to have encroached upon the legislative is the issuing of directives by the Supreme Court regarding the bill for reservation of 27% for OBCs in educational institutions. There are very few cases where judicial encroachment on legislature has been debated given the 70 long years that has passed after independence.[1]

One of the important features of modern Constitutions is the doctrine of separation of powers. The doctrine has ancient origin. Different philosophers starting from *Plato* and *Aristotle* talked about the system of organizing the government and taking necessary steps to secure the freedom of the individuals. They suggested the method of distributing the powers so that there is no abuse of authority. Every measure was thought of to avoid the concentration of powers so that the evils arising from such a concentration could be dealt with. But the results achieved from these measures need to be measured in order to know what efforts were made to avoid the misuse of powers and abuse of authority by the administration of the State.

Frankly, admitting that the principle of separation of powers has received much legal and public attention in the last decade. Often, this doctrine is invoked in debates about the proper role of the courts *vis-a-vis* the legislature and the executive. The study of constitutional provisions makes it clear that the doctrine of separation of powers has not been accepted in India in its strict sense and there is functional overlapping under *Articles 192(1)* and *217(3)* and also the judicial powers. No Constitution implements the separation of powers in absolute form. In practice, most Constitutions put in place a system of checks and balances characterized by a partial separation of powers.

[1] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672222

2. OBJECTIVE

An important aspect of modern Constitutions is the theory of separation of the Executive, Legislative and Judicial powers of the governments. This doctrine/theory has a laudable object of protecting the liberty of individuals. The aim of the doctrine is to guard, against tyrannical and arbitrary powers of the State. The rationale underlying the doctrine has been that if all power is concentrated in one and the same organ, there would arise the danger that it may enact tyrannical laws, executive them in a despotic manner, and interpret them in an arbitrary fashion without any external control. Though, in the face of the complex socio-economic problems demanding solution in a modern welfare state, it may no longer be possible to apply the separation theory strictly, nevertheless, it has not become completely redundant and its chief value lies in emphasizing that it is essential to develop adequate checks and balances to prevent administrative arbitrariness.

Thus, it has been rightly stated about the doctrine: "*Its object is the preservation of political safeguards against the capricious exercise of power; and incidentally, it lays down the broad lines of an efficient division of functions, its logic is the logic of polarity rather than strict classification... the great end of the theory is, by dispersing in some measure the centres of authority, to prevent absolutism*."

3. PRESENTATION OF CONTENTS

3.1 Historical Background

The doctrine of Separation of power is of ancient origin. This history is traceable to the Greek philosopher *Aristotle* who advocated the theory of separation of powers. He is believed to have advocated this theory for the purpose of establishing good governance. So the theory of separation of powers in ancient Greece was not so much for the purpose of protecting the liberty of individuals as the one of securing efficiency in the administration of the country. At the time *Aristotle* pleaded such a theory Greece consisted of small political units, such as, Athens, Sparta, Macedonia etc. and each unit could allow all the three kinds of functions to be managed by a certain unit instead of separating of powers in three different units.

In Athens, therefore, the Sovereign Assembly exercised the three functions of making the laws, enforcing the laws and interpreting the laws. But later on Aristotle did insist upon the principle of assigning to the Assembly only a deliberative function. Without distinguishing the concept of '*functions*' from the concept of '*organs*' as such, Aristotle described the institution of government as consisting of three parts. He stated that those who

take part in government are either deliberators or magistrates or judicial functionaries. In his renowned work, '*Politics*' Aristotle wrote that, "*all states have three elements - first that which deliberates on public affairs, secondly that which is concerned with magistrates and determines what they should be, over whom they should exercise authority and what should be the mode of electing them, and thirdly that which has judicial power*."

Hence, it is clear from such an approach to the problem of administration was that the idea of separating the governmental powers was put forward by Aristotle as a safeguard against concentration of public power.

The text and treatises makes it abundantly clear that in ancient Rome, which was a Republic in the nascent form the popular assemblies exercised the legislative and administrative functions without following so much the principle of separation of powers. The Assemblies interfered with the working of the Administration through the process of passing resolutions in the form, of laws for the Republic. They exercised certain judicial functions too in regard to special classes of crimes. The author find that changes started coming in gradually when Rome moved from a Republican entity to kingship.

The Senate absorbed for itself the law making function which was considered to be the primary function of Roman society and left to the responsibility of the King and the Chiefs the secondary functions of the Kingdom. Though, such an arrangement cannot be considered as following the theory of Separation of Powers, what can be noticed is that the need was felt at that time of assigning specific functions to specific entities instead of allowing concentration of powers in one and the same entity.

In the feudal organization that prevailed in the ancient days in England there was concentration of governmental powers in the hands of the officials of the political organization. In the beginning the feudal lords attended to the function of administering justice and, in the process, attended to the function of making the law. But later on administration of justice was separated from the ordinary business of the governmental institutions. The change, in the system showed the symptoms of the emerging trend of '*Rule of Law*' as a fundamental principle of the system of government. In course of time however, the members of the King's Council became an advisory or legislative body, and those who dealt with the determination of disputes became a judicial body. This is how the idea of separation of powers emerged in the beginning in English legal system.

In the 16th and 17th centuries, French philosopher *John Bodin* and British politicians *Locke* respectively had expressed their views about the theory of separation of powers. John Locke was witness to the changes taking place in the system of government and reflected on the changing conditions declaring that there was protection to the freedom of the individuals in the changed conditions of society, Locke held the view that the peace and order in England was due largely to the political entities being separate rather than being united in one and the same institution. Locke distinguished between what he called; *(i) discontinuous legislative power; (ii) continuous executive powe*r; and *(iii) federative power*. He included within '*discontinuous legislative power*' the general rule-making power called into action from time to time and not continuously. '*Continuous executive power*' included all those powers which we now call executive and judicial. By '*federative power*' he meant the power of conducting foreign affairs.

The first systematic exponent of the idea of separation of powers was a French writer. *Baron de Montesquieu*, whose famous work '*Spirit of Laws*' was published in 1748. In his work Montesquieu acknowledged that he had borrowed the idea of separation of powers from the facts of the English Constitution. In other words, Montesquieu derived the contents of this doctrine from the developments in the British Constitutional history of the early 18th century. Montesquieu argued that in every government there are three sets of powers: the legislative, the executive and the judicial, and that to ensure the liberty of the subject they ought to be in the hands of separate institutions for there would be an end of everything where the same person or body of persons to exercise the three powers, that of enacting the laws, that of executing the public relations and that of trying the case of individuals.

3.2 Meaning of Separation of Powers

The powers of government are conceived of as falling within one of the three categories of making of laws, enforcing of laws, and interpreting of laws. To these three kinds of functions are given the name of legislative, executive and judicial powers. With regard to the organs exercising these powers the Government is deemed to be made of three branches having for their functions the making of laws, the enforcing of laws, and the interpretation of laws. To these three organs are given the names of the legislature, the executive and the executive. The doctrine of separation of powers means that the three kinds of government powers should be exercised by three distinct organs. Each department or organ should confine itself to its own sphere of action without encroaching upon the other and that each organ should be independent within its own sphere.

According to this doctrine, the executive should never legislate and the legislator should never try to administer its own laws. The courts should interpret and enforce the laws but should have no say in the making or administering of laws. According to the theory of separation of powers these three powers and functions of the Government must, in a free democracy, always be kept separate and be exercised by separate organs of the Government. Thus, the legislature cannot exercise executive or judicial power; the executive cannot exercise legislative or judicial power and the judiciary cannot exercise legislative or executive power of the Government.

3.3 Elements of Separation of Powers

It is generally acknowledged that there are three main categories of governmental functions :-

- *(i)* Legislative;
- *(ii)* Executive;
- *(iii)* Judicial.

Likewise, there are three main organs of the Government in a State :-

- *(i)* Legislature;
- *(ii)* Executive;
- *(iii)* Judiciary.

The theory of Separation of Powers confers all the three organs of the government should be separated from each other. Each department should be assigned to a different set of persons limited to its own sphere of activities having independent jurisdictions from, the other. No organ of the government should release any functions which it is not obliged to do.

The theory signified that, each branch of the Government must be confined to the exercise of its own function and not allowed to interrupt upon the functions of other branches. In this way each branch will be a check to others and so single group of people will be able to control the machinery of the state. The theory of separation of the powers signifies the following three different things:-

- *(i)* That the same person should not form part of more than one of the three organs of the government.

- *(ii)* That one organ of the government should not interfere with any other organ of the government.

- *(iii)* That one organ of the government should not exercise the functions assigned to any other organ. This is traditional concept of theory of separation of power, which is

dissimilar from modern conception. New concept of separation of power has arisen because in those days when these researchers and theorists explained their ideas as the economy was very simple. Furthermore, in earlier period, areas of governmental activities were not broad. Social problems were not very complex and national and international situations were not that tricky.

3.4 Importance of the Doctrine of Separation of Powers

The doctrine of separation of power in its true sense is very rigid and this is one of the reasons of why it is not accepted by a large number of countries in the world. The main object as per Montesquieu in the Doctrine of separation of power is that there should be government of law rather than having whims of the official. Also another most important feature of the above said doctrine is that there should be independence of judiciary i.e. it should be free from the other organs of the state and if it is so then justice would be delivered properly. The judiciary is the scale through which one can measure the actual development of the state if the judiciary is not independent then it is the first step towards a tyrannical form of government i.e. power is concentrated in a single hand and if it is so then there is a cent percent chance of misuse of power.

Hence the Doctrine of separation of power do plays a vital role in the creation of a fair government and also fair and proper justice is dispensed by the judiciary as there is independence of judiciary.

3.5 Adoption of the Doctrine of Separation of Powers in Modern Constitutions

The doctrine of separation of powers has found expression in the Constitutions of many nations although in no Constitution is the doctrine practiced in such a way as to render the three functions entirely exclusive. This can be explained with reference to the position existing in the legal systems of France, Great Britain, United States of America, and India.

3.5.1 *Adoption of the Doctrine of Separation of Powers in the Constitution of France*

The theory of separation of powers has been adopted in the Constitution of France. The teachings of *Montesquieu* gave fillip to the French Revolution. The famous Declaration of the Rights of Man laid down that "*Every society in which Separation of Powers is not determined has no Constitution*". The French Constitution of 1791 made the executive and the legislature independent of each other, and the judges elective and independent. For a short span of time, during the regime of Napoleon the doctrine was not followed but it was constantly in the minds of the people. As a Constitutional maxim it is jealously cherished even today.

3.5.2 *Adoption of the Doctrine of Separation of Powers in the Constitution of Great Britain*

Although Montesquieu has based his doctrine of separation of powers taking into account the British Constitution, as a matter of fact at no point of time was this doctrine accepted in its strict sense in England. On the contrary, in reality, the theory of integration of powers has been adopted in England. Though, the three fundamental powers of government exist in three different branches of government and each has its own peculiar features, it cannot be said that there is no '*sharing out*' of the powers of the Government. The King, though an executive head, is also an integral part of the legislature and all his ministers are also members of one or other of the Houses of Parliament. Furthermore, the Lord Chancellor is at the same time a member of the House of Lords, a member of the government, and the senior most member of the judiciary.

One find evidence of the functions resting with the respective branches of government there is much overlapping between them and between the authorities in which the powers are vested. Following are a few illustrations to indicate the limited application of the doctrine to the system of Government in Great Britain :-

- ***(i)*** The effective working executive consists of the Ministers who sit in the Cabinet. These Ministers, however, not only are, but must be, members of Parliament; not only are they members, but they are the leaders who decide upon the legislation to be undertaken, determine the content and form of the proposed legislation, introduce bills in the two Houses, and pilot them to eventual enactment.

- ***(ii)*** The Monarch who heads the Government is in effect part of the Parliament. He is also the '*fountain of justice*' being technically present in alt the courts of law. He makes the judicial appointments and exercises the Prerogative of mercy in respect of persons convicted by the criminal courts.

- ***(iii)*** Parliament while performing certain judicial functions becomes the '*High Court of Parliament*'; although the House of Commons carries out no judicial functions today, the House of Lords is still the ultimate Court of Appeal.

- ***(iv)*** The Lord Chancellor plays an important role in all three of the functions of government. He is a member of the House of Lords. He heads the courts and is responsible for a number of judicial appointments and is also a member of the government.

- ***(v)*** The power to make Delegated Legislation is usually vested by the Act of Parliament in the Government.

- *(vi)* The Justices of the Peace are primarily judges but still retain administrative duties such as licensing etc.

- *(vii)* The Local Government Boards created by Parliament or by a Royal Charter are both legislative and executive within the district and each local authority.

It is clear from the above illustrations that the British Constitution makes a limited use of the principle of Separation of Powers.

3.5.3 *Adoption of the Doctrine of Separation of Powers In the Constitution of United States of America*

The Constitution adopted by the people of the United States does not use the phrase '*Separation of Powers'*. The idea that each of the three branches of government should have exclusive control over its own peculiar variety of powers is implied from the first sentence of the first three Articles of the Constitution.

Article 1 begins with the words "*All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives*". The key word in this Article is 'all'.

Article 2 begins with a similar sweeping statement. "*The executive power shall be vested in a President of the United States*".

Article 3 asserts: "*The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish*". Clearly, the Fathers of the American Constitution intended 'Separation of Powers' even though they nowhere used the phrase in the provisions of the federal Constitution.

In ***Kilbourn v. Thompson***,[2] the Supreme Court of America declared that all powers of government are divided into executive, legislative and judicial, and that it is "*essential to the successful working of the system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and to no other*."

The idea of separation of Powers gathered from the provision of the Constitution and the decisions pronounced by the Supreme Court raised doubts about the legality of administrative agencies. Since the administrative agencies exercised may types of powers including the executive, legislative and judicial, a strict application of the theory of separation of powers would have meant the very existence of such agencies unconstitutional. Various

[2] 103 US 168, 191, 26, L.Ed. 377, 1881.

authorities from time to time had taken the position that the fundamental structure of the administrative system was unconstitutional. The theory of Separation of Powers had thus become a barrier to the development of administrative process.

In course of time however ideas about the observance of the theory of Separation of Powers underwent a change and a realization dawned that a rigid application of the theory would cause more damage to the system of administration than its simple breach.

At first, the Supreme Court recognized the power of the congress in assigning judicial work to the administrative agencies. In the year 1855 the Supreme Court held in the case, *D.E.M. Murray v. Hoboken Land & Improvement Company*,[3] that there may be matters involving public rights, but the Congress may bring those matters within the cognizance either of the courts or the administrative agencies. In ***E.G. Sunshine Anthracite Coal Company v. Adkins***,[4] again the Supreme Court held that the judicial powers may be conferred upon administrative agencies.

In later cases the Supreme Court recognized the power of the Congress, in assigning legislative work to the administrative agencies. In the case ***Humphrey's Executor v. United State***,[5] which involved the power of the Federal Trade Commission to legislate in certain matters, the Supreme Court said, " *To the extent that it exercises any executive functions – as distinguished from executive power in the constitutional sense – it does so in the discharge and effectuation of the quasi – legislative or quasi – judicial powers, or as an agency of the legislative or judicial departments of government*".

The result of all these developments is the dominant idea that Government cannot operate with total separation of powers and that an absolute separation would cause a governmental lockjaw.

The Doctrine of Separation of Powers today is never rigidly enforced at any level of government in United States of America. Administrators are always asked by the legislatures to perform various discretionary duties; they are always given the job of making rules or deciding when to apply or enforce certain laws, and of filing in the details of the statutes. The identifying badge of modern administrative agencies is the combination of judicial power (adjudication) with legislative power (rule-making power). Yet another important aspect of the Constitution of United States guiding the authorities in all matters of administration is the

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[3] 59 U.S. (18 How), 272, 284, 15 L.ed. 372.
[4] 310 U.S. 381, 60 S.Ct. 907 84 L.Ed. 1263, 1940.
[5] 295 U.S. 602, 628, 45 S.Ct 869, 874, 79, L.Ed. 1611 2936.

principle of checks and balances. Just as in establishing the system of government under the Constitution the authorities are guided by the principle of Checks and Balances, in establishing the system of administration also they have been guided by the same principle.

The principle of Checks and Balances is a modification of the theory of Separation of Powers. The idea behind Checks and Balances is to prevent any one department becoming too strong and this is sought to be done by allowing each department to exercise a certain amount of control over the actions of the other.

The idea that has received recognition from the legislature and approval from the judiciary is that the three kinds of powers may be blended in one set of hands at some level in the system of administration, and that there should at the same time be the principle of check followed by all. The authorities consider that the principle that should guide the allocation of power within the framework of administration should be not check. About this principle, Professor K.C. Davis says, "*The principle whose soundness has been confirmed by both early and recent experience is the principle of checks and balances. We have gone for beyond Montesquieu. We have learned that danger of tyranny of injustice lurks in unchecked power, not in blended power*."

3.5.4 *Adoption of the Doctrine of Separation of Powers in India*

The system of government prevalent in India shows that the Doctrine of Separation of Powers has not been adopted in its absolute form. *Article 53* of the Constitution of India dealing with the Union Executive, for example, says, the executive power of the Union shall be vested in the President and shall be exercised by directly or through officers subordinate to him in accordance with the Constitution.

Article 154 of the Constitution dealing with the State Executive says, the Executive power of the State shall be vested in the Governor of the State and shall be exercised by him either directly or through officers subordinates to him in accordance with the Constitution. It is only with regard to '*executive power*' of the Union and the State that such provisions are there in the Indian Constitution, but even with regard to this particular power the provisions are not like those as we find in the American Constitution because the executive power in India does not vest absolutely in the President as it does in the American Constitution.

In India, the doctrine of separation of powers has not been accorded, a constitutional status. Apart from the directive principle laid down in *Article 50* which enjoins separation of judiciary from the executive, the constitutional scheme does not embody any formalistic and dogmatic division of powers.

The apex Court in ***Ram Jawaya Kapur v. State of Punjab***,[6] held that Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute, rigidity but the functions of different parts or branches of the government have been sufficiently differentiated and consequently it can be very well said that our Constitution does not contemplate assumption by one organ or part of the state of functions that essentially belong to another.

In ***Indira Nehru Gandhi v. Raj Narain***,[7] *Ray, C.J.*, also observed that in the Indian Constitution there is separation of powers in a broad sense only. A rigid separation of powers as under the American Constitution or under the Australian Constitution does not apply to India. However, the Court held that though the constituent power is independent of the doctrine of separation of powers to implant the theory of basic structure as developed in the case of ***Keswananda Bharati v. State of Kerala***,[8] on the ordinary legislative powers will be an encroachment on the theory of separation of powers. Nevertheless, *Beg, J.,* added that separation of powers is a part of the basic structure of the Constitution. None of the three separate organs of the Republic can take over the functions assigned to the other. This scheme of the Constitution cannot be changed even by resorting to *Article 368* of the Constitution.

In India, not only is there a functional overlapping but there is personnel overlapping also. The Supreme Court has power to declare void the laws passed by the legislature and the actions taken by the executive if they violate any provision of the Constitution or the law passed by the legislature in case of executive actions. Even the power to amend the Constitution by Parliament is subject to the scrutiny of the Court. The Court can declare any amendment void if it changes the basic structure of the Constitution. The President of India in whom the executive authority of India is vested exercises law-making power in the shape of ordinance-making power and also the judicial powers under *Article 103(1)* and *Article 217(3)*. The Council of Ministers is selected from the legislature and is responsible to the legislature. The legislature besides exercising law-making powers exercises judicial powers in cases of breach of its privilege, impeachment of the President and the removal of the judges. The executive may further affect the functioning of the judiciary by making appointments to the office of Chief Justice or other judges.

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[6] AIR 1955 SC 549.

[7] AIR 1975 SC 2299.

[8] AIR 1973 SC 1461.

3.6 Relationship of Executive, Legislature and Courts

The principle of separation of powers has received much legal and public attention in the last decade. Often this principle is invoked in debates about the proper rile of the courts *vis-a-vis* the legislature and the executive. Besides the relationship of the judiciary with the legislature and the executive, concern with the separation of powers includes the relationship of the legislature with the executive and the emergence, of new independent constitutional institutions that defy easy categorization as the executive, legislature or the judiciary.

The Indian Constitution provides that the members of the executive may be elected or selected in different ways. The President is indirectly elected by the Central and the State legislatures, while the Governor of States is appointed by the President. The Prime Minister and the Council of Ministers are members of the legislature who are appointed to their office by the President, provided they enjoy the support of the majority of the members of the legislature. The Chief Minister and the Council of Ministers of the States are appointed by the Governor on the same principle. The lower level staff in the lower levels of the executive at the State and the Centre is selected by a public recruitment process. Despite the dual membership of a section of the higher executive in the legislature, there is no need to conclude that the separation of powers principle does not apply to the relationship between the executive and the legislature. We will look at the three examples where the principles should be applied with greater force.

The Constitution provides that the election of any member of the legislature is challenged on the grounds that they enjoy '*an office of profit*' under the government. The rationale for such a disqualification has been articulated by the courts in a rather confused fashion. While the court has acknowledged that the disqualification may be justified as an instance of the principle of separation of powers requiring the composition of institutions of government independently. It has also suggested that the rule may seek to prevent a conflict of interest between members of the legislature and executive and the abuse of state machinery in the election process.

A joint Parliament Committee has gone a report soon, which will form the basis for the office of profit disqualification in a principled fashion. While the Constitution does not expressly proclaim that there should be a complete separation of powers between the composition of the executive and legislature at all levels, we should recognize the need to keep the exception to the principle limited by ensuring that the distinctive membership and functioning of these two wings of government are kept separate as far possible. It is critical

for future legislation and the court to insist that the exception to the disqualification set out in the proviso to *Article 105 (2)*, which allows Parliament to exempt some offices of profit from the effect of the disqualification, to include only those offices which are ministerial in character.

The second instance, where it is critical to maintain the separation of powers between the executive and the legislature is where the legislators exercise executive powers. The influence of legislators on executive functioning is provided for in the constitutional arrangements through the support and scrutiny functions entrusted to the legislature. However, the legislators seldom exercise these powers to keep the executive in check and are keen to exercise executive powers at any available opportunity – these include the power to head executive boards and agencies of various descriptions, the capacity of participate in executive committee which ward contracts or select beneficiaries of various welfare schemes. The most flagrant violent of the principle of separation of powers is the grant of an annual fund to legislators to carry out activities of their choice in their constituency.

The '*local area funds'* granted to legislators transforms them into executive agents carrying out zones of influence in their constituencies. With every passing year, these funds grow in size and though the legislators execute the scheme through the existing executive machinery, they have emerged as a parallel local area fund scheme has been challenged before the Supreme Court and the Court has a significant opportunity to reverse this corruption of the constitutional fabric by restoring the basic division of functions between the executive and the legislature. There is an urgent need to stress this aspect of the separation of powers as the effort to keep the legislators from making executive decisions may be critical to the success these two institutional functional is all the more critical in a developing country, where widespread corruption impedes the translation of the normative commitments of the Constitution, to create a socially and economically just society. The third and final instance of the separation of powers between the separation of powers between the executive and legislature that has received considerable attention at an earlier part of our constitutional history.

P.B. Mukerji, in his celebrated lectures titled '*Critical Problems in Indian Constitution*' has devoted an entire chapter to the relationship between the President and the Prime Minister and the Council of Ministers in the manner of their functioning. The Constitution provides that the President ordinarily acts on the aid and advice of the Council of Ministers. The extent to which the President is bound to act in this fashion and the application of the British constitutional conventions to guide constitutional interpretation has been a source of much controversy.

The author is concerned with the separation of powers between the legislature and the executive, while the problem addressed here is about the relationship between the higher level executive authorities *inter se*. This objection ignores the hybrid character of the institutional arrangements in the Indian Constitution and the particular problems arising from the fusion of the executive and the legislature in our constitutional arrangements. In other words one could argue that the relationship between the President and the Council of Ministers is also about the extent to which an indirectly elected Presidential executive may exercise an independent sphere of decision making from that adopted by the legislature acting through the Prime Minister and Council of Ministers. By investing the President with the constitutional legitimacy to perform such a role, the court will infuse the Presidential office with the potential to play a critical constitutional function.

A notable feature of the Constitution is that it accords a dignified and crucial position to the judiciary. Well-ordered and well regulated judicial machinery has been introduced in the country with the Supreme Court at the apex, High Courts at the middle and subordinate courts at the lowest level. The jurisdiction of the Supreme Court is very broad. It is the general court of appeal from the High Courts, the ultimate arbiter in all constitutional matters and also enjoys an advisory jurisdiction. There is a High Court in each State. The High Courts have wide jurisdiction and have been constituted into important instruments of justice. The judiciary in India has been assigned a significant role to play. It has to dispense justice not only between one person and another, but also between the State and the citizens. It interprets the Constitution and acts as its guardian by keeping all authorities-legislative, executive, administrative, judicial and quasi-judicial-within bounds. The judiciary is entitled to scrutinize any governmental action in order to assess whether or not it authorities with the Constitution and the valid laws made thereunder.

3.6.1 Present context and Aspects of Imbalances

The organ of the states stepping into the domain of another organ happens at different times. Some instances of imbalances are as follows :-

- *(i)* *Rejection of the NJAC bill or act by the apex court*. Question of selection of judges by a collegium of judges has been an issue on which there are different opinions of legislature, executive and judiciary. Judiciary wants primacy or rather absolute right over selection of judges that is the real bone of contention.

- (ii) *SC deciding to levy taxes on polluting vehicles in Delhi*. Some of the steps taken by the judiciary in Delhi when the pollution was rising alarmingly affecting the health of the people have been effective. They ordered introduction of gas as a fuel which helped bring down the pollution level. But the point will arise whether it was duty or function of the judiciary. Essentially it is executive job for the government to decide but unfortunately the government did not do anything about it so the judiciary stepped into this.

- (iii) A few years ago, *there was unwarranted judicial overreach* when the entire functioning of the assembly was set by the Supreme Court which laid down its direction as to how the assembly should conduct its proceeding and how the voting should be done in the assembly and so on. This was repeated twice or thrice during the past many years. This is something that the judiciary cannot do under the Constitution as it is entirely for the legislature to conduct this proceeding.

Thus, before analyzing right or wrong of the particular issue, it is important to look at the context of decision made. If a particular organ fails in discharging its legitimate duty and responsibility towards the people, another organs steps in and tries to correct it.

4. SUMMARY

It may thus be summed up that the theory of separation of powers in the beginning was not so much for the protection of the liberty of the Individuals but for securing smooth functioning of the institutions of government. It was from the seventeenth century onwards the idea of separation of received an impetus; the Revolution of 1688 in England, the French Revolution and the developments in the system of government in America gave a new twist to the theory of separation of powers, from which time onwards the purpose of separation of powers came to be the protection of liberty of individuals.

The study also reveals that too much of our present constitutional debates are focused on the separation of powers, as it applies to the scope and extent of judicial power. In the-next fifty years, we will need to refocus our attention on the application of this principle to the relationship between the executive and legislature. It is essential to recognize that we need to critically re-examine the use of British constitutional law and practice to interpret the relationship, between these two wings of government. While the two jurisdictions no doubt share common features of institutional design, the presence of a written binding Constitution which embraces the separation of powers invites one to consider the extent to which we may need to take a different path.

So far, we have considered three instances where the development of robust doctrine of separation of powers between the legislature and the executive can revitalize our institutions of government and promote the cause of responsible and representative government. In order to take these possible futures seriously, we will need to recognize the hybrid character of our constitutional inheritance and develop our constitutional future with the self-confidence to rely on our vibrant constitutional culture and domestic scholarship on these issues.

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6. SELF – ASSESSMENT QUESTIONS

1. Explain the doctrine of Separation of Powers in detail.
2. What is the relationship between executive and judiciary?
3. What is the relationship between legislature and judiciary?
4. Discuss the applicability of theory of separations of power in Indian Constitution.

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(DDE – 2018) **LL.M – I**
INDIAN CONSTITUTIONAL LAW AND THE NEW CHALLENGES

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FUNDAMENTAL RIGHTS : DEFINITIONS OF STATE AND LAW

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4. SUMMARY

5. SUGGESTED READINGS

6. SELF – ASSESSMENT QUESTIONS

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1. INTRODUCTION

Indian began her '*tryst with destiny*' in 1947 when she became Independent. By and large, the national movement for Independence was led by lawyers. Galaxy of stalwarts like *Lok Manya Tilak, Mahatma Gandhi, Pandit Jawahar Lai Nehru, Rajendra Prasad, Lala Lajpat Rai, C.R. Das* and many others followed them, laid stress on constitutional methods for fighting for freedom India, despite vast poverty and Illiteracy of the people, has continued to remain a democracy. The Constitution of India is not a mere framework of government. It is forward looking statute which visualizes profound social and economic change. The Constitution emphasizes that such change must come through constitutional methods and without the sacrifice of the dignity and liberty of the individual. The very idea of a declaration of fundamental rights stems from the concept of limited government. These rights are limitations upon the power of the State.

Thus, the Constitution is the scheme by which various organs of the state are regulated and the distribution and the exercise of states power is maintained. It is that body of written or unwritten fundamental laws which regulate the basic and fundamental political institution, i.e., the State. It is the very framework of the body polity, its life and soul, being the fountain head of all its authority and the main spring of all its strength and power. The executive, the legislature and the judiciary all are its creation and derive their sustenance from it.

2. OBJECTIVE

In order to govern the nation, the Republic of India has laid down a few laws in the Constitution. As per the Constitution, every citizen has certain rights known as the fundamental rights of a citizen and the Constitution guarantees every citizen of those. Moreover, they include individual rights common to most liberal democracies, such as equality before the Law, freedom of speech and expression, freedom of association and peaceful assembly, freedom of religion, and the right to constitutional remedy for the protection of rights. Initially, the right to property was also Included in the fundamental right, however, 44th Amendment 1978, revised the status of property right by stating that, "*No person shall be deprived of his property save by authority of Law*". In fact all these fundamental rights as stated in Part III of the Constitution are guaranteed against the State.

The word '*State*' is defined under *Article 12* refers to the federating units, India Itself being a state consisting of these units. *Article 12* forms part of Part III of the Constitution which deals with fundamental rights. The object of this lesson is to study about the Genesis and Growth, Definition of State, Authorities under Government control, Definition of Law etc. which are said to be the essential instrument for the working of Constitution in the democratic setup in India.

3. PRESENTATION OF CONTENTS

3.1 Genesis and Growth of Fundamental Rights

Since the 17th century, if not earlier, human thinking has been veering round to the theory that man has certain essential, basic, natural and inalienable rights or freedoms and it is the function of the State, in order that human liberty may be preserved, human personality developed, and an effective social and democratic life prompted, to recognize these rights and freedoms and allow them a free play. The concept of human rights can be traced to the natural law philosophers. This concept protects individuals against the excesses of the State. The concept of human rights represents an attempt to protect the individual from oppression and injustice. It has, therefore come to be regarded as essential that these rights be entrenched in such a way that they may not violated, tampered or interfered with by an oppressive government. With this end in view some written Constitutions guarantee a few rights to the people and forbid governmental organs from interfering with the same.

The modern trend of guaranteeing fundamental rights to the people may be traced to the Constitution of the U.S.A. drafted in 1787. The original U.S. Constitution did not contain any fundamental rights. There was trenchant criticism of the Constitution on this score. Consequently, Bill of Rights came to incorporated in the Constitution in 1791 in the form of ten amendments. The very nature of the fundamental rights in the U.S.A. has been described thus:-

"*The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press/freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.*"[1]

[1] Justice Jackson in West Virginia State Board of Education v. Barnette, 319 US 624.

There is no formal declaration of people's fundamental rights in Britain. In England, where Parliament is supreme and there are no limits to its power, it is believed that the individual's liberty and prosperity are protected as a result of the working of the ordinary law. No fetters on Parliament's power are necessary for preserving such rights. The legal opinion in England, therefore, has always been averse to a declaration of fundamental rights being included in the Constitution.[2]

In the modern era, it has become almost a matter of course to prescribe formally the rights and the liberties of the people which are deemed worthy of protection from the government interference. The wide acceptance of the notion that a formal bill of rights is a near necessity in the effective constitutional government arises, to some extent, from a feeling that mere custom or tradition alone cannot provide to the fundamental rights the same protection as their importance deserves. "*The unique English situation is not simply exportable and other nations have generally felt that their governments need the constant reminder which a .bill of rights provides, while their people need the reassurance which it can supply*."[3]

The demand for inalienable human rights began to be raised in India in the late nineteenth century and was followed by the formation of the Indian National Congress in 1885. There was no fundamental law guaranteeing the subject's rights and liberties and they were humiliated and discriminated against in many ways, in their own country. In other words, the Constituent Acts enacted by the British Parliament for India did not contain a declaration of fundamental rights. The Indian opinion demanded the inclusion of such a declaration since 1895[4] because it was felt that such a declaration would allay the fears of the religious and linguistic minorities.[5]

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[2] A.V. Dicey, Introduction to the Study of the Law of the Constitution, 195-205 (1956) ; K. C. Where in Modern Constitution 71 (1951) says, " The Ideal Constitution ….would contain few or no declaration of rights, though the ideal system of law would define and guarantee many rights; Ivor Jennings in Some Characteristics of the Indian Constitution 4 (1953) says, "An English lawyer shies away for them. He does not like fundamental rights".

[3] Bowie, Studies in Federalism, 567 and 601.

[4] The Constitution of India Bill, 1895, which was the first non-official attempt of drafting a Constitution for India contained provisions guaranteeing fundamental rights such as right to bear arms (clause 14), freedom of speech, thought and expression (clause 16), inviolability of house (clause 17), right not to be punished except by competent authority and only for a distinct breach of law (clause 18-19), the right to equality (clause 20-21), the right to property (clause 23) and the right to vote (clause 29). See B. Shiva Rao, The Framing of India's Constitution: Selected Documents, 6-7 (1966).

[5] The Nehru Report said: 'it is obvious that our first care should be to have our Fundamental Rights guaranteed in a manner which will not permit their withdrawal under any circumstances... Another reason why great importance attaches to a Declaration of Rights is the unfortunate existence of communal differences in the country. Certain safeguards are necessary to create and establish a sense of security among those who look upon each other with distrust and suspicion". See Granville Austin, the Indian Constitution: Cornerstone of a Nation 54 (1966).

The British constitutional experts, however, did not favour the inclusion of such a declaration in the Constitution. A series of Congress resolutions between 1917 and 1919 reiterated the demand for inalienable rights, including equality and free speech. The emergence of Mahatma Gandhi on the Political scene gave to the freedom movement a new dimension: it ceased to be merely anti-British; it became a movement for the acquisition of rights of liberty for Indian community.

Mrs. Annie Besant's Commonwealth of India Bill, 1925 and the *Madras Congress Resolution of 1928* provided a striking continuity for that movement. The Motilal Nehru Committee appointed by All-Parties Conference in its Report (1928) incorporated a provision for the enumeration of such rights. The Motilal Nehru Committee appointed by the Madras Congress Resolution said, "*It is obvious that our first care should be to have our Fundamental lights guaranteed...*" All Parties Conference of 1928 recommended for incorporating a chapter on Fundamental Rights and also social and economic rights. The Indian Statutory Commission (*popularly known as the Simon Commission*), in its Report published in May, 1930, did not support the general for the enumeration and guaranteeing of fundamental rights in a Constitution Act on the ground that abstract declarations of such rights were useless unless there existed '*the will and the means to make them effective*'.

The First-Round Table Conference discussed the subject of economic rights independent of political rights. In the Second Round Table Conference, the question of inclusion of fundamental rights in the future Constitution of India was discussed. But in the Third Round Table Conference, the government expressed its inability in implementing some of these rights. Dr. B.R. Ambedkar suggested that such of the fundamental rights which could not be included in the Constitution may be included in the instrument of instructions. Finally, the British government in March, 1933 issued a white paper outling its proposals for constitutional reforms in India. The White Paper did not mention any fundamental rights including social and economic rights rather it calculated to perpetuate the political subjection and economic exploitation of the people.[6]

The *Sapru Committee (1945)* in its constitutional proposals recommended that declaration of fundamental rights in its wider sense was absolutely necessary and envisaged these rights as falling in two classes; one justiciable and, the other non-justiciable, the former being enforceable in the court of law and the latter not.

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[6] B. Shiva Rao, The Framing of India's Constitution : Select Documents, 76 (1966).

The British Cabinet Mission recognized the need for a written guarantee of fundamental rights in the Constitution of India. In paragraph 19 and 20 of its statements of 16 May 1946, envisaging a Constituent Assembly for framing the Constitution of India.

The Cabinet Mission lay down in its 16 May Plan that the Constituent Assembly should have an Advisory Committee whose duty it would be to report on the Assembly on the list of Fundamental Rights. The Cabinet Mission's recommendations and the intentions of the Congress drew up a resolution establishing the Advisory Committee at its meeting of 8 December 1946, the day before the Constituent Assembly was convened. The Constitutent Assembly, first convened on December 9, 1946 and its first great achievement was the adoption of the Objectives Resolution on January 22, 1947, moved by Pandit Jawahar Lal Nehru on December 13, 1946.

The first task which attracted the attention of the Assembly after the adoption of Objective Resolutions was the Constitution of an Advisory Committee on the subject of fundamental rights, minorities etc. At its first meeting held on February 27, 1947, the Advisory Committee constituted five sub-committees, including one on March 24, 1947 and lasted till March 31, 1947 to consider the proposals, suggestions, memoranda on fundamental rights which were prepared by *B.N. Rau, Alladi Krishnaswami Ayyar, Munshi, Professor Shah, Ambedkar and Harnam Singh*.

It is true that the fundamental human rights enshrined in the Constitution of India are hedged in by many limitations and restrictions. Replying to the criticism that the fundamental rights were riddled with so many restrictions that no value could be attached to them and referring in their contention that Fundamental Rights were not '*Fundamental*' unless they were also '*absolute*', ***Dr. Ambedkar*** observed in the Constituent Assembly on 4 November, 1948 as follows :-

"*The whole of the criticism about fundamental rights is based upon a misconception. In the first place, the criticism in so far as it seeks to distinguish fundamental rights from non-fundamental rights is not sound. It is incorrect to say that fundamental rights are absolute while non-fundamental rights are created by agreement between parties while fundamental rights are the gift of the law. Because fundamental rights are the gift of the law. Because fundamental rights are the gift of the State, it does not follow that the State cannot qualify them. In the second place, it is wrong to say that fundamental rights in America are absolute… The Supreme Court invented the doctrine of police power and refuted the advocates of absolute fundamental rights by the argument that every state has inherent in it*

police power which is not required to be conferred on it expressly by the Constitution...There is really no difference in the result. What one does directly, the other does indirectly. In both cases, the fundamental rights are not absolute."

Fundamental Rights occupy a unique place in the lives of civilized societies and have been variously described '*transcendental*', '*inalienable*', and '*primordial*'. They constitute the ark of the Constitution. The Fundamental Rights are constitutional guarantees given to the people of India and are not merely paper hopes or fleeting promises and so long they find a place in the Constitution, they should not be allowed to be emasculated in their application by a narrow and constricted judicial interpretation.

The very idea of a declaration of fundamental rights stems from the limited government. These rights are limitations upon the power of the State. The Constitution defines the word '*State*' broadly to include "*the Government and Parliament of India and the Government and the Legislature of each of the State and all local or other authorities within the territory of India or under the control of the Government of India*."[7]

If an authority is neither within the territory of India nor under the control of the Government of India it is not amendable to the jurisdiction of the courts. The term '*State*' includes executive as well as legislative organs of the Union and States. It is, therefore, the actions of these bodies that can be challenged before the courts as violating fundamental rights. By virtue of the above definition, Legislature and Executive are also brought within the purview of the definition so as to keep the substantive as well as procedural rules in conformity with the Fundamental Rights.

3.2 Definition of State

Most of the Fundamental rights provided to the citizens are claimed against the State and its instrumentalities and not against the private bodies. Article 13(2), bars the '*state*' from making any '*law*' infringing a Fundamental Right.

Article 12 gives an extended significance to the term '*state*'. *Article 12* clarifies that the term '*state*' occurring in *Article 13(2),* or any other provision concerning Fundamental Rights, has an expansive meaning. The framers of the Constitution used the words '*the State*' in a wider sense than what is understood in the ordinary or narrower sense. The word '*include*s' suggests that the definition is not exhaustive. The expanding dimension of the

[7] Article 12, The Constitution of India.

words '*the State'* through the judicial interpretation must be within the limitation otherwise the expansion may go much beyond what even the framers of *Article 12* may have thought of.[8]

Article 12 reads as: In this part, unless the context otherwise requires, "*the State*" includes the Government and Parliament of India and the Government and the Legislature of each of the State and all local or other authorities within the territory of India or under the control of the Government of India.

According to *Article 12*, the term '*State*' includes:-

(i) The Government and Parliament of India: the term "State" includes Government of India (Union Executive) and the Parliament of India (i.e., the Union Legislature)

(ii) The Government and the Legislature of a State i.e., the State Executive and the legislature of each state.

(iii) All local authorities; and

(iv) Other authorities within the territory of India; or under the control of the Central Government.

3.2.1 Important Terms

Here three important terms need to be interpreted :-

3.2.1.1*Territory of India*

Territory of India should be taken to mean territory of India as defined in *Article 1(3).*[9] According to Article 1(3) the territory of India shall comprise the territories of the States, the Union Territories specified in the first schedule and such other territories as may be acquired.

3.2.1.2 *Local Authority*

According to sub-section (31) of *Section 3* of the *General Clauses Act, 1897* '*Local Authority*' shall mean a municipal committee, district board, body of commissioner or other authority legally entitled to or entrusted by the Government within the control or management of a municipal or local fund. According to Entry 5 of the List II of 7th Schedule '*local government*' includes municipal corporation, improvement trust, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration. Village panchayat is also included within the meaning of the term local authority.[10]

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[8] *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111: JT 2002 (4) SC 146, per seven judge bench, ; *Bengal Immunity Co. Ltd. v. State of Biha*r, AIR 1955 SC 661.

[9] *Masthan Sahib v. Chief Commissioner, Pondicherry*, AIR 1963 SC 533.

[10] Ajit Singh v. State of Punjab, AIR 1967 SC 856.

In ***Mohammad Yasin v. Town Area Committee,***[11] the Supreme Court held that the Bye-laws of a Municipal Committee charging a prescribed fee on the wholesale dealer was an order by the State Authority contravened *Article 19(1) (g)*. These bye-laws in effect and in substance have brought about a total stoppage of the wholesale dealers' business in the commercial sense. The Supreme Court has ruled that to be characterized as a '*local authority'* the authority concerned must have separate legal existence as a corporate body, it must not be a mere government agency but must be legally an independent entity; it must function in a defined area and must ordinarily, wholly or partly, directly or indirectly, be elected by the inhabitants of the area. It must also enjoy a certain degree of autonomy either complete or partial, must be entrusted by statute with such governmental functions and duties as are usually entrusted to locally like health and education, water and sewerage, town planning and development roads, markets, transportation, social welfare services, etc. Finally, such body must have the power to raise funds for furtherance of its activities and fulfilment of its objectives by levying taxes, rates, charges or fees.

3.2.1.3 *Other Authorities*

The term '*other authorities'* in *Article 12* has nowhere been defined. Neither in the Constitution nor in the *general clauses Act, 1897* nor in any other statute of India. Therefore, its interpretation has caused a good deal of difficulty, and judicial opinion has undergone changes over time.

3.2.2 State under Article 12 : Judicial Analysis

Today's government performs a large number of functions because of the prevailing philosophy of a social welfare state. The government acts through natural persons as well as juridical persons. Some functions are discharged through the traditional governmental departments and officials while some functions are discharged through autonomous bodies existing outside the departmental structure, such as, companies, corporations etc. Hence, the term '*other authorities*' has been interpreted by the following judicial pronouncements in accordance with the facts and circumstances of different cases.

In the case of ***University of Madras v. Santa Bai***,[12] the Madras High Court held that '*other authorities'* could only indicate authorities of like nature, i.e., *ejusdem generis*. So construed it could only mean authorities exercising governmental or sovereign functions. It cannot include persons, natural or juristic. Such as, a university unless it is '*maintained by the State*'.

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[11] AIR 1952 SC 115.

[12] AIR 1954 Mad.67.

But in ***Ujjammabai v. State of U.P.***,[13] The Court rejected this restrictive interpretation of the expression 'other authorities' given by the Madras High Court and held that the *ejusdem generis* rule could not be resorted to the in interpreting tis expression. In Article 12 the bodies specifically named are the Government of Union and the States, the Legislature of the Union and States and local authorities. There is no common genus running through these named bodies nor can these bodies so placed in one single category on any rational basis.

In ***Electricity Board, Rajasthan v. Mohan Lal***,[14] the Supreme Court held that '*other authorities*' would include all authorities created by the constitution or statute on whom powers are conferred by law. It was not necessary that the statutory authority should be engaged in performing government or sovereign functions. The court emphasized that it is not material that some of the power conferred on the concerned authority are of commercial nature. This is because under *Article 298* the government is empowered to carry on any trade or commerce.

Thus, the court observed : "*The circumstances that the Board under the Electricity Supply Act is required to carry on some activities of the nature of trade or commerce does not, therefore give any indication that the 'Board" must be excluded from the scope of the word 'State' is used in Article 12*".

The next important case relating to the interpretation of the term '*other authorities'* is, ***Sukhdev Singh v. Bhagatram***.[15] The Supreme Court, following the test laid down in Electricity Board Rajasthan's Case by 4:1 majority has stated that the three statutory bodies *viz.,* LIC, ONCG & FCI were held to be '*authorities*' and thus fall within the term '*State*' in *Article 12*. These corporations were created by the statutes, had the statutory power to make binding rules & regulations and were subject to the pervasive governmental control. These corporations do have independent personalities in the eyes of law, but that does not mean that they are not subject to the control of the government or they are not instrumentalities of the government. The employees of these statutory bodies have a statutory status and they are entitled to declaration of being in employment when their dismissal or removal is in contravention of statutory provisions. The employees are entitled to claim protection of *Articles 14* and *16* against the corporations.

[13] AIR 1962 SC 1621.
[14] AIR 1967 SC 1857.
[15] AIR 1975 SC 1331.

Mathew, J., in a separate but concurring judgement, held that the Public Corporations is a new type of institution which sprang from the new social and economic functions of the government, and instead of classifying it into old legal category, it should be adopted to the changing time and conditions. The State being an abstract entity, could undertake trade or business as envisaged under Article 298 through an agency, instrumentality or juristic person. He preferred a broader test that if the functions of the Corporation are of public importance and closely related to governmental functions it should be treated an agency or instrumentality of government and hence a '*State*' within the ambit of *Article 12* of the Constitution.

In simple terms, Statutory corporations are agencies or instrumentalities of the state for carrying on trade or business which otherwise would have been carried out by the state departmentally. Therefore it has to be seen whether a body is acting as an agency or instrumentality of the state.

The approach in Sukhdev Singh case, was reiterated with approval in ***R D Shetty V. International Airport Authority***,[16] *Bhagwati, J.,* speaking for the Court, pointed out the corporations acting as instrumentality or agency of government would obviously be subject to the same limitation in the field of constitutional or administrative as the government itself, though in the eye of the law they would be distinct and independent legal entities. If the government acting through its officers is subject to certain constitutional and public law limitations, it must follow a fortiori, that government acting through the instrumentality or agency of corporations should equally be subject to the same limitations.

Bhagwati, J., discussed in detail various factors relevant for determining whether a body is an instrumentality or agency of the state. These factors as they were finally summarized by him in ***Ajay Hasia v. Khalid Mujib***,[17] are:-

- *(i)* if the entire share capital of the corporation is held by the government, it would go a long way towards indicating that the corporation is an instrumentality or authority of the government.

- *(ii)* Where the financial assistance of the state is so much as to meet almost entire expenditure of the corporation it would afford some indication of the corporation being impregnated with government character.

[16] AIR 1979 SC 1628.
[17] AIR 1981 SC 487.

- *(iii)* Whether the corporation enjoys monopoly status which is state conferred or state protected.

Existence of deep and pervasive state control may afford an indication of that the corporation is a state agency or instrumentality.

If the functions of the corporation are of public importance and closely related to government functions it would be relevant factor in classifying a corporation as an instrumentality or agency of government.

If a department of the government is transferred to corporation it would be a strong factor supporting the inference of the corporation being an instrumentality or agency of government.

The Supreme Court ruled in the instant case that where a corporation in an instrumentality or agency of the government, it must be held to be an authority under *Article 12*.However, these tests are not conclusive or clinching, and it must be realized that it would not be stretched so far as to bring in every autonomous body which has some nexus with the government within the sweep of the expression. Following this approach, it was held that the international Airport Authority constituted under the *International Airport Agency Act, 1971* was an authority and, therefore, '*State*' within the meaning of *Article 12*.

The concept of the instrumentality or agency of the government is not limited to a corporation created by statute but is equally applicable to a company or society.

This line of approach to the meaning of other authorities has been finally confirmed in ***Som Prakash Rekhi v. Union of India***.[18] Applying the criteria laid down in the International Airport Authority case, the Supreme Court reached the conclusion that there is enough material to hold that the Bharat Petroleum Corporation registered as a company under the Companies Act, is State within the enlarged meaning of *Article 12*. Consequent upon takeover of Burmah Shell under the *Burmah Shell (Acquisition of Undetakings in India) Act, 1976*, the right, title and interest of the company stood transferred and vested in the Government of India. Thereafter, the Central Government took necessary steps for vesting the undertaking in the BPC Ltd. which became the statutory successor of the petitioner employer. *Krishna Iyer, J.,* speaking for himself and *Chinnapa Reddy. J., Pathak, J.* concurring, observed that the various provisions of the Act of 1976 have transformed the

[18] 1981) 1 SCC 449; AIR 1981 SC 212. In Som Prakash these factors are laid down in SCC p. 471 and in AIR at 225. It may be noted that Krishna Iyer, J., who wrote Som Prakash opinion, was common to both the cases and since the decision in both the cases were pronounced on the same day it is natural, that Krishna Iyer, J., fully knew what was being said by his brother Bhagwati, J., in Ajay Hasia.

corporation into an instrumentality of the Central Government with a strong statutory flavour super-added are clear indicia of power to make it an 'authority'. Although registered as a company under the Companies Act, the BPC is clearly a creature of the statute, a limb of government, an agency of the State and is recognized and clothed with rights and duties by the Statute.

In ***Ajay Hasia v. Khalid Mujib***,[19] the question arose whether the Regional Engineering College, Srinagar, established, administered and managed by a society registered under the J & K Registration of Societies Act, was a State within the meaning of *Article 12*. *Bhagwati, J.,* speaking for the unanimous five judge-bench, reiterated that the tests for determining as to when a corporation falls within the definition of State in *Article 12* is whether it is an instrumentality or agency of government. The enquiry must be not how the juristic person is born but why it has been brought into existence. It is, therefore, immaterial whether the corporation is created by the statute or under a statute. The concept of instrumentality or agency of government, is not limited to a corporation created by the statute but is equally applicable to a company or society considering the relevant factors as explained in the International Airport Authority case.[20] Applying this criterion, it was held that the Society registered under the J&K Registration of Societies Act was an instrumentality or agency of the State and the Central Government, for the reason that these governments had full control of the working of the society and the society was merely a projection.

Following the law laid down in the Ajay Hasia case,[21] the Indian Statistical Institute,[22] Indian Council of Agricultural Research,[23] Sainik School Society,[24] U.P. State Cooperative Land Development Bank Ltd.,[25] all societies registered under the Societies Registration Act; Project and Equipment Corporation of India Ltd., a Government of India Undertaking[26]; Food Corporation of India,[27] a statutory corporation; the Steel Authority of India Ltd., a public

[19] (1981) 1 SCC 722; AIR 1981 SC 487.
[20] *Raman Dayanand Shetty v. International Airport Authority of India*, (1979) 3 SCC 489; AIR 1979 SC 1628.
[21] *Ajay Hasia v. Khalid Mujib*, 1981) 1 SCC 722; AIR 1981 SC 487.
[22] *B.S. Minhas v. Indian Statistical Institute*,(1983) 4 SCC 582; AIR 1984 SC 363.
[23] *P.K. Ramchandra Iyer v. Union of India*, (1984) 2 SCC 141; *S.M. Illyas (Dr.) v. Indian Council For Agriculture Research*, (1993) 1 SCC 182.
[24] *All India Sainik School Employees' Association v. Sainik Schools Society*, 1989 Supp (1) SCC 205.
[25] *U.P. State Cooperaive Land and Development Bank Ltd. v. Chandra Bhan Dubey*, AIR 1999 SC 753.
[26] *A.L. Kalra v. Project and Equipment Corpn*., (1984) 3 SCC 316.
[27] *Workmen of FCI v. FCI*, (1985) 2 SCC 136; *Food Corporation of India Workers' Union v. Food Corpn. Of India*, (1996) 9 SCC 439.

limited company owned, controlled and supervised by the Central Government[28]; the Indian Oil Corporation, a company registered under the Companies Act of 2013, a State-aided school, whose employees enjoy statutory protection and which is subject to regulations made by the State education department[29]; a medical college run by a municipal corporation[30]; several electricity boards[31] created on the lines of Rajasthan Electricity Board; Central Government and two State Governments[32]; a Government Company constituted as a development authority under a State town Planning Act[33]; regional rural banks established under the Regional Rural Banks Act, 1976[34]; port trusts created under the Major Port Trusts Act, 1889 or 1963[35] have been held to be "other authorities" within the meaning of *Article 12*.

In this expansive trend, there have been some discordant notes as well. One such example is furnished by *Tekraj Vasandi v. U.O.I.*, where the Supreme Court held the 'Institute of Constitutional and Parliamentary Studies', a society registered under the Societies Registration Act, 1860, as not being an 'authority' under Article 12, The Institute is a registered society receiving grants from the Central Government and having the President of India, Vice-President and the Prime Minister among its honorary members. The Central Government exercises a good deal of control over the Institute. Inspite of the government funding and control, the court has refused to hold it as an authority.

On the same basis, in the case of ***Chandra Mohan Khanna v. NCERT***,[36] NCERT, has been held to be outside the scope of Article 12. NCERT is a society registered under Societies Registration Act. It is largely an autonomous body; its activities are not wholly related to governmental functions; governmental control is confined mostly to ensuring that its funds are properly utilized; its funding is not entirely from government sources.

Another example of the expansive interpretation of the expression '*other authorities'* in *Article 12* is furnished by the decision of the Supreme Court in ***Pradeep Kr. Biswas v. Indian Institute of Chemical Biology***.[37] In this case, the Supreme Court held that the Council of Scientific and Industrial Research (CSIR) is an authority under Art. 12 and was bound by

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[28] *Bihar State Harijan Kalyan Parishad v. Union of India*, (1985) 2 SCC 644; *Balbir Kaur v. Steel Authority of India*, (2000) 6 SCC 493.

[29] *Manmohan Singh Jaitla v. Governor, Union Territory of Chandigarh*, 1984 Supp. SCC 540.

[30] *Dinesh Kumar v. Motilal Nehru Medical College, Allahabad*,(1985) 3 SCC 542.

[31] *Rohtas Industries Ltd. v. Bihar S.E.B*., 1984 Supp SCC 161 and *Surya Narain Yadav v. Bihar* S.E.B., (1985) 3 SCC 38; *W.B. State Electicity Board v. Desh Bandhu Ghosh*,(1985) 3 SCC 116.

[32] *Central Inland Water Transport Corp. Ltd. v. Brojo Nath Ganguly*,(1986) 3 SCC 156.

[33] *Star Enterprises v. City and Industrial Development Corpn. of Maharastra Ltd*., (1990) 3 SCC 280.

[34] *Prathama Bank v. Vijay Kumar Goel*, (1989) 4 SCC 441.

[35] *Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay*, (1989) 3 SCC 293.

[36] AIR 1992 SC 76.

[37] (2002) 5 SCC 111.

Article 14. The Court has ruled that the control of the Government in CSIR is ubiquitous. The court has now laid down the following proposition for identification of '*authority*' within *Article 12*.

The question in each case would be – whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a state within *Article 12*. On the other hand, when control is merely regulatory whether under statute or otherwise it would not serve to make the body a state.

3.2.3 Authorities under Government Control

The words '*under the control of the Government of India*', in *Article 12* are meant to bring into the definition of State not only every authority within the territory of India, but also those functioning outside, provided such authorities are under the control of the Government of India. Hence, a person can enforce his fundamental rights against an executive or administrative order of an authority under the control of the Government of India, functioning outside the territory of India. In such a case suitable orders may be passed against the Government of India directing them to give effect to the decision of the Court in the exercise of their power of control over the authority outside the territory of India.[38]

The Court also seems to have held that an authority within the reach of *Article 12* is automatically within the control of the Government of India.[39] This does not appear to be correct. Every authority under the control of Government of India is state within *Article 12*. But the reverse of it does not automatically follow.

3.2.4 State outside Article 12

In pursuing the definition of the '*State*' in *Article 12* the Court has time and again reminded that what is the State for the purposes of *Article 12* need not be the State for other purposes. For the purpose of wider application of fundamental rights State must be defined liberally, but not for other purposes. Thus, an employee of a public corporation may challenge the violation of his fundamental rights by the corporation but for that reason he does not become a State employee and cannot seek the protection, for example, of *Article 311*.

[38] *N . Masthan Sahib v. Chief Commr*., AIR 1963 SC 533.
[39] *Distt. Manager, A.P., SRTC v. K.Sivaji*, (2001) 2 SCC 135.

3.2.5 Whether 'State' includes 'the Judiciary'

In United States of America it is well-settled that the judiciary is within the prohibition of the 14th Amendment. It may be noted that the judiciary in India, though an organ of the State like the Executive and Legislature, is not specifically mentioned in *Article 12*. The important question is: Can judiciary be included within the meaning of the term '*other authorities*'? The present position appears to be this that when the judiciary acts in the judicial capacity, it is not included within the meaning of the term '*other authorities*' and, therefore, it is not State under *Article 12*, but when it acts in administrative capacity, it is included within the meaning of the term '*other authorities*' and, therefore, it is State.[40]

In other words, the answer depends on the distinction between the judicial and non-judicial function of the courts. In the exercise of non-judicial functions, the courts fall within the definition of the '*the State*'. The exercise of judicial functions will, however, not occasion the infringement of the fundamental rights and, therefore, the question of bringing the courts within the definition of '*the State*' would not arise.[41] It has been held that when a court, in the exercise of its statutory rule-making powers, make rules which contravene the fundamental rights of citizens, the rule could be held ultra vires and appropriate remedy under *Article 32* or *Article 226* could be sought and obtained.[42]

Similarly, the Chief Justice of India or of a High Court in exercising the powers of appointment of officers of the respective courts shall be amenable to the writ jurisdiction, if appointments are made in violation of the equality clause of the Constitution.[43] This is equally applicable to the appointments to subordinate judiciary by the High Courts.[44] But, even if a court is '*the state'*, the Supreme Court has held that a writ under *Article 32* cannot be issued to a High Court of competent jurisdiction against the judicial orders, because no violation of the fundamental rights can be attributed to such orders.

Apparently not much would be gained by including the judiciary within '*the State*' under *Article 12*. On the contrary, it will lead to the multiplicity of proceedings by raising the same issues first in appeal and then in writ proceedings. The only remote gain could be that

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[40] *Prem Chand Garg v. Excise Commissioner*, AIR 1963 SC 996.

[41] H.M.Seervai, Constitutional Law of India, 225 (1983) for a forceful argument that judicial is 'the State' even in exercise of its judicial functions. This would also seem the view taken by Justice Mukherji in *A.R.Antulay v. R.S.Nayak*, (1988) 2 SCC 602.

[42] AIR 1963 SC 996.

[43] See Articles 146 and 229; *Naresh S. Mirajkar v. State of Maharastra*, AIR 1967 SC 1; *State of Punjab v. Ajaib Singh*, AIR 1953 SC 10 at 15; *Ranjit Singh v. Union Territory of Chandigargh*, AIR 1991 SC 2296.

[44] *State of Bihar v. Bal Mukand Shah*, (2000) 4 SCC 640.

the courts will feel more obliged to enforce the Directives Principles of State Policy which in view of the definition of '*the State'* in *Article 36* would bind them as much the Legislature and the Executive. But it can also be argued that as guardians and sentinels of the Constitution, the courts must always be as much duty bound to defend and give effect to the Directive Principles as to the fundamental rights irrespective of their inclusion within the definition of the State.

In ***Naresh v. State of Maharashtra***,[45] it was held that even if a court is thee State a writ under *Article 32* cannot be issued to a High Court of competent jurisdiction against its judicial orders, because such orders cannot be said to violate the fundamental rights. What the judicial decisions purports to do is to decide the controversy between the parties and nothing more. The court said that the 'judiciary' while exercising its rule-making power under *Article 145* would be covered by the expression '*State*' within the meaning of *Article 12*, but while performing its judicial functions, it is not so included.

In ***Rupa Ashok Hurra v. Ashok Hurra***,[46] the apex court has re-affirmed and ruled that no judicial proceeding could be said to violate any of the fundamental rights. It was said to be settled position of law that the superior courts of justice did not fall within the ambit of '*State*' or '*other authorities'* under *Article 12.*

In ***A. R. Antulay v. R.S. Nayak***,[47] it was held that the court could not pass an order or issue a direction which would be violative of the fundamental rights, thus, it can be said that the expression 'state' includes judiciary also.

It is submitted that the judiciary, though not expressly mentioned in *Article 12*, it should be included so, since the courts are set up by statute and exercise power conferred by law. It is so suggested that discrimination may be brought about… even (by) judiciary. The courts, like any other organ of the state, are limited by the mandatory provisions of the Constitution.

3.3 Definition of Law

The term '*law*' in *Article 13* of the Constitution of India has been given wide connotation so as to include any ordinance, bye-law, regulation, notification, custom or usage having the force of law. Thus, not only a piece of legislation, but any of the things mentioned here can be challenged as infringing a fundamental right.

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[45] AIR 1967 SC 1.
[46] AIR 2002 SC 1771.
[47] AIR 1988 SC 1531.

According a resolution passed by a State Government under Fundamental Rule 44 of the State,[48] a government notification under the Commissions of inquiry Act setting up a commission of inquiry,[49] a notification,[50] or an order [51] under a Statute, an administrative order,[52] a custom or usage,[53] bye-laws of a municipal or a statutory body,[54] regulation made by a statutory corporation like the Life Insurance Corporation,[55] have been held to by '*law*' under *Article 13*. The bye-laws of the co-operative society framed under a Co-operative Societies Act do not fall within the purview of *Article 13*.[56]

Though a law as such may not be invalid, yet an order made under it can still be challenged as being inconsistent with a fundamental right because no law can be presumed to authorize anything unconstitutional. *Article 13* is a key provision as it makes fundamental rights justiciable. It confers a power, and imposes an obligation, on the courts to declare a law void if it is inconsistent with a fundamental right. The Supreme Court of India has figuratively characterized this role of the judiciary as that of a '*sentinel on the qui vive*.

3.3.1 Unconstitutionality and Eclipse

A void law is unenforceable, *non-est*, and devoid of any legal force; courts take no notice of it, and it is taken to be notionally obliterated for all purposes subject, however, to a few exceptions.[57] Some fundamental rights apply to all persons, citizens and non-citizens, while some of these rights apply only to citizens. A law inconsistent with a fundamental right of the former type is ineffective *qua* all persons. But a law inconsistent with a fundamental right available to citizens only, is *non-est* only *qua* citizens and not *qua non* citizens who cannot claim the benefit of the fundamental right in question.[58]

Article 13 (1) is prospective and not retrospective. Therefore, a pre-Constitution law inconsistent with a fundamental right becomes void only after the commencement of the Constitution. Any substantive rights and liabilities occurring under it prior to the enforcement

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[48] *Dalmia v. Justice Tendolkar*, AIR 1958 SC 538.
[49] *Madhbhai Amathalal Gandhi v. India*, AIR 1961 SC 21.
[50] *Pannalal Binjraj v. India*, AIR 1957 SC 397.
[51] *Balaji v. Mysore*, AIR 1963 SC 649.
[52] *Sant Ram v. Labh Singh*, AIR 1965 SC 314.
[53] *Tahir v. District Board*, AIR 1954 SC 630.
[54] *Sukhdev v. Bhagatram*, AIR 1975 SC 1331; Hirendra Nath Bakshi v.Life Insurance Corporation, AIR 1976 Cal. 88.
[55] *Co-op. Credit Bank v. Industrial Tribunal*, AIR 1970 SC 245.
[56] *Madras v. Row*, AIR 1952 SC 196.
[57] *Behran v. Bombat*, AIR 1955 SC 123.
[58] *Gujrat v. Shri Ambica Mills*, AIR 1974 SC 1300.

of the Constitution are not nullified. It is ineffective only with respect to the enforcement of the Constitution are not nullified. It is ineffective only with respect to the enforcement of rights and liabilities of the post-Constitution period. The doctrine of eclipse has been held to apply only to the pre-Constitution and not to the post-Constitution law was valid when enacted, and, therefore was not void *ab initio*, a post-Constitution law infringing a fundamental right is unconstitutional and a nullity from its very inception.

Therefore, it cannot be visualized by a subsequent amendment of the Constitution removing the infirmity in the way of passing the law. The Supreme Court has distinguished between *Articles 13(1)* and *13 (2)*. *Article 13 (2)* which applies to post-Constitution laws prohibits the making of a law abridgining fundamental rights, while *Article 13 (1)* which applies to pre-Constitution laws contains no such prohibition. Under *Article 13(1),* the pre-Constitution law subsists for certain purposes even if it becomes inoperative after the commencement of the Constitution. Under *Article 13(2)*, the words '*the State shall not make any law*' indicate that after the commencement of the Constitution, no law can be made so as to contravene a fundamental right. Such a law is void *ab initio*.

Therefore, the doctrine of eclipse cannot apply to it and it cannot revive even if the fundamental right is amended later to remove the hurdle. In case the law contravenes a fundamental right limited to the citizens only, it will operate with respect to non-citizens, but it will not be revived *qua* citizens merely by the amendment of the fundamental right involved.

3.3.2 Doctrine of Severability

According to *Article 13*, a law is void only '*to the extent of the inconsistency or contravention*' with the fundamental right. This means that an Act may not be void as a whole; only a part of it may be void and if that part is severable from the rest then the rest may continue to stand and remain operative. The Act will then be read as if the invalid portion was not there. If, however, it is not possible to separate the valid from the invalid portion, then the whole of the statute will have to go. In other words, this doctrine means that when some particular provision of a statute offends a statute, that offending provision is severable from the rest of the Constitution as only that offending can be declared void by the court and not the entire statute.

Therefore, the words, '*to the extent of inconsistency or contravention*' make it clear that when some of the provisions of a statute become unconstitutional on account of inconsistency with the fundamental right, only the repugnant provisions of the law in question shall be, treated by the courts as void, and not the whole statute.[59]

3.3.3 Doctrine of Waiver

In ***Behram v. State of Bombay***,[60] *Justice Venketarama Aiyar*, divided the fundamental rights into two broad categories: rights conferring a benefit on the individuals, and those conferring a benefit on the general public, and he opined that a law would not be a nullity but merely unenforceable if it was repugnant with a fundamental right in the former category, and that the affected individual could waive such an unconstitutionality, in which case the law would apply to him. The majority, however, repudiated the doctrine of waiver saying that the fundamental rights were not put in the Constitution merely for individual benefit.

The question of waiver of a fundamental right was discussed fully by Supreme Court in ***Basheshar Nath v. I.T. Commissioner***.[61] It is now established that an individual cannot waive any of his fundamental rights. This proposition has been applied in a number of cases. '*A citizen cannot voluntarily get discrimination or waive his fundamental right against discrimination*' as the right of not being discriminated against is enshrined in *Article 14* and is a fundamental right.[62]

4. SUMMARY

The Constitution is a living organ, and it has to keep pace with the changing needs of the society. The Constitution of a country is not only a legal document but also a social, political and national charter reflecting the hopes and aspirations of the people. It is a flexible instrument for carrying out socio-economic changes and to bring about the cherished values of the people. A fundamental right can be enforced against an authority when it is within the Indian Territory, or it is under the control of the Government of India though outside the Indian Territory.

The preponderant considerations for pronouncing an entity as State agency or instrumentality are: (1) financial resources of the state being the Chief finding source; (2) functional character being governmental in essence; (3) plenary control residing in government; (4) prior history of the same activity having been carried on by government and

[59] *Harakchand v. Union of India*, AIR 1970 SC 1453.
[60] AIR 1955 SC 123.
[61] AIR 1959 SC 149.
[62] *Omega Advertising Agency v. State Electricity Board*, AIR 1982 Gau. 37.

made over to the new body; (5) some element of authority or command. Whether the legal person is a corporation created by a statute, as distinguished from under a statute, is not an important criterion although it may be an indicium. The definition of State under *Article 12* of the Constitution does not explicitly mention the Judiciary. Hence, a significant amount of controversy surrounds its status *vis-a-vis* Part III of the Constitution. Bringing the Judiciary within the scope of *Article 12* would mean that it is deemed capable of acting in contravention of Fundamental Rights. It is well established that in its non-judicial functions, the Judiciary does come within the meaning of State. However, challenging a judicial decision which has achieved finality, under the writ jurisdiction of superior courts on the basis of violation of fundamental rights, remains open to debate.

Further, the study reveals that any law passed by legislature or a law already in existence, if inconsistent with the guarantee of fundamental rights will be void. *Article 13* is a key provision as it makes fundamental rights justiciable. It confers a power, an imposes an obligation, on the courts to declare a law void if it inconsistent with the fundamental right.

In other words, the responsibility of declaring such a law void is cast on the judiciary. The Supreme Court has figuratively characterized this role of the judiciary as that of a '*sentinel on the qui vive*'.

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6. SELF – ASSESSMENT QUESTIONS

1. State action violating fundamental rights is unconstitutional and void. Explain.
2. Discuss the tests as laid down by the Indian Supreme Court to determine whether a body is an agency or instrumentality of the government, and therefore, 'state' under Article 12. Explain with the help of case law.
3. Every action behind which is State is a State action and fundamental rights are enforceable against each such action. Comment upon the above statement. Give Case law in support of your answer.

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(DDE – 2018) **LL.M – I**
INDIAN CONSTITUTIONAL LAW AND THE NEW CHALLENGES

Paper : II (102) DE
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Writer: Prof. Sunil Deshta *
Updated by: Dr. Sudhir Kumar Vats **

FUNDAMENTAL RIGHTS : FUNDAMENTAL RIGHTS TO EQUALITY (Articles 14 - 18), REVERSE DISCRIMINATION

1. INTRODUCTION
2. OBJECTIVE
3. PRESENTATION OF CONTENTS
- **3.1 Right to Equality**
  - **3.1.1 New Dimension of Equality Clause - Spectacular but Impressible**
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- **3.6 Protective Discrimination - Substantive Equality**

4. SUMMARY
5. SUGGESTED READINGS
6. SELF – ASSESSMENT QUESTIONS

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1. INTRODUCTION

Articles 12 to *35* of the Constitution pertain to fundamental rights. These rights are reminiscent of some of the provisions of the Bill of Rights in the United States Constitution but the former cover a much wider ground than the latter. Also, the United States Constitution declares the fundamental rights in broad and general terms. But as no right is absolute, the courts have, in course of time, spelled out some restrictions and limitations on these rights.

Part III of the Constitution of India contains a long list of Fundamental Rights and can very well be considered as the *Magna Carta* of India. The purpose of the Fundamental Rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for all. *Articles 15* to *19*, no doubt fall within Part III of the Constitution, but every provision of Part III does not confer a Fundamental Right. Some of the provisions, of Part III are just definitional; others are on the effect of the Fundamental Rights on the existing and future laws. Still others provide for the enforcement and implementation of the Fundamental Rights while some others provide exceptions to the Fundamental Rights.

Articles 14 to *18* of the Constitution fall within the rubric of the '*Right to Equality*'. *Article 14* prohibits the State from denying equality before the law or the equal protection of the laws. *Article 15* provides for a particular application of the general principle embodied in *Article 14*; *Article 16* on the other hand, guarantees equality of opportunity to all citizens in the matter of appointment to any office or of any other employment under the State. The Constitution, however, directs and empowers the government to undertake special measures for the advancement of Backward Classes, Scheduled Castes and Scheduled Tribes. *Article 14* is the genus while *Article 15* and *16* are species. *Article 17* abolishes untouchability and makes it practice punishable.

Similarly, *Article 18* abolishes titles and prohibits their conferment by the State and acceptance by the individual.

2. OBJECTIVE

Part III of the Constitution of India contains a long list of fundamental rights. The purpose of the fundamental rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for all. In fact, *Article 14* stands for the establishment of a situation under which there is complete absence of any arbitrary discrimination by the Law themselves or in their administration. The Right to

Equality affords protection not only against discriminatory law passed by legislature but also prevents arbitrary discretion being vested in the executive.

In the modern State, the executive is armed with vast power in the matter of enforcing by laws, rules and regulation as well as in the performance of a number of other functions. This chapter highlighted the concept of Right to Equality in detail. In addition to this the concept of reasonable classification, prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, protective discrimination, special provision for women and children, provision for advancement of backward classes, classification, public employment, abolition of untouchability etc. are also discussed in detail to give full understanding of the multiplicity of concept of equality.

Moreover, an attempt has been made out to discuss all the important cases related to the concept of equality.

3. PRESENTATION OF CONTENTS

3.1 Right to Equality

The Constitution of India guarantees the Right to Equality through *Articles 14* to *18*. *Article 14* outlaws discrimination in a general way and guarantees equality before law to all persons. In other words, *Article 14* is general in nature which says that State is not to deny equality before the law or equal protection of laws. *Article 14* run as follows, "*The State shall not deny to any person equality before law or the equal protection of laws within the territory of India*'. This provision corresponds to the equal protection clause of the 14th Amendment of the United States Constitution which declares: "*No State shall deny to any person within its jurisdiction the equal protection of the laws*".

Two concepts are involved in *Article 14*, *viz.*, '*equality before law*' and '*equality protection of laws*'. The first is a negative concept which ensures that there is no special privilege in favour of any one, that all are equally subject to the ordinary law of the land and that no person, whatever be his rank or condition, is above the law. This is Equivalent to the second corollary of the Dicean concept of the Rule of Law in England. This, however, is not an absolute rule and there are a number of exceptions to it, e.g., foreign diplomats enjoy immunity from the country's judicial process, *Article 361* extends immunity to the President of India and the State Governors; public officers and judges also enjoy protection, and some special groups and interests, like the trade unions, have been accorded special privileges by law.

The second concept, '*equal protection of laws*', is positive in content. It does not mean that identically the same law should apply to all persons, or that every law must have a universal application within the country irrespective of differences or circumstances. What it postulates is the application of the same laws alike and without discrimination to all persons similarly situated. It denotes equality of treatment in equal circumstances. It implies that among equals the law should be equal and equally administered, that the like should be treated alike without distinction of race, religion, wealth, social status or political Influence.

Frankly, admitting that all persons are not equal by nature, attainment or circumstances. The varying needs of different classes or sections of people require differential and separate treatment. The Legislature is required to deal with diverse problems arising out of an infinite variety of human relations. It must, therefore, necessarily have the power of making laws to attain particular objects and, for that purpose, of distinguishing, selecting and classifying persons and things upon which its laws are to operate. The principle of equality of law, thus, means not that the same law should apply to everyone but that a law should deal alike with all in one class; that there should be an equality of treatment under equal circumstances. A Legislature is entitled to make reasonable classification for purposes of legislation and treat all in one class on an equal footing.

Article 14 has guaranteed, not the Right to Equality, but only the Right not to be denied Equality before the Law and the Equal Protection of the Laws. Whatever may be the difference between the two concepts of '*equality before the law*' and '*equal protection of the laws*' from the point of view of semantics or legal theory, in effect the two have come to mean the same thing and if the law affords equal protection to all, it cannot be denying equality before law to any. Needless to say, the expression '*equal protection of the laws*' which alone has been used in the American Constitution in its 14th Amendment, has also secured '*equality before the law*', for laws securing equal protections to all cannot but ensure '*equality before the law*'.

The purported conferment of the Right to Equality before the law has very often amounted to a pompous homily. The framers of our Constitution, many of whose knowledge in law and jurisprudence was outstanding, obviously knew that in America, and also elsewhere, this grandiloquent right to equality before the law or equal protection of the laws, has faltered, fainted and even failed as a result of systematic and continuous onslaught of innumerable classifications, held to be permissible under the equality clause. Equality, or even equality before law, might have been a cherished dream, but far from flourishing

anywhere in its fullest measure, the same has, in effect, being threatened of being perished more often than not; but still the same has been and is being engrafted as a solemn ritual in all the well-known Constitutions of the world, may be only to lull the ordinary people to some rosy assurances.

In the interpretation of *Article 14* of the Supreme Court has drawn liberally from American constitutional law. *Article 14* does not require that all persons irrespective of their natural differences should be treated as equal. A law is bad if it arbitrarily selects some persons for a differential treatment. But if a law provides differential treatment to a class of people it is not valid unless the classification is reasonable. A classification is reasonable if (i) it is founded on an intelligible differential which distinguishes those that are grouped together from others, and (ii) such a differential has a rational relation to the object of the Act. This test is known as the nexus test and it is followed as the universal criterion for judging the reasonableness of classification.

The importance of the doctrine of reasonable classification should be examined in the light of the doctrine of arbitrariness evolved by the Supreme Court. *Article 14* strikes at arbitrariness in State action because an arbitrary action will involve negation of equality. If the State action is arbitrary or irrational, it would be treated as being against *Article 14*. An arbitrary state action cannot be valid on the ground of reasonable classification. But, the classification permitted by *Article 14* must rest upon reasonable grounds of distinction. It must not be '*arbitrary, artificial or evasive*'. It must be a reasonable classification. The important grounds of reasonable Classification are (i) age (ii) sex (iii) geographical or territorial basis, (iv) nature of business or profession, (v) nature of source of authority (vi) nature of offences and offenders, (vii) basis under tax laws, (viii) state of Government, and (ix) single individual or body as a class.

The nexus test has always had its critics. However, the most eloquent and perhaps the most unorthodox criticism of the nexus test have come from *Professor P.K. Tripathi* in his Telang Memorial Lectures delivered at the University of Bombay. The principle that a law is not violative of equal protection if it is based on reasonable classification is recognized in the United States as well as India. The principle is broad enough to accommodate various situations which call for a differential treatment. However, the courts in India have unnecessarily bound themselves down to the nexus test which is much narrower and specific than the principle of classification. The nexus test may be useful in certain situations but cannot be of universal application.

Three questions are relevant in the examination, of the reasonableness of classification, (i) why has the differential treatment been provided? (ii) what is the differential treatment? (iii) to whom does the differential treatment apply ? According to *Professor P.K. Tripathi*, an objectionable feature of the nexus test is that it notices only the object and the criterion of classification and their mutual relationship. It altogether ignores the second or the '*what*' element i.e., the special treatment the statute devises for the selected class of persons and the relationship of this element with the other two. One effect of thus not taking the '*what*' element into consideration is that often it is mistaken for either the '*why*' element or the '*whom*' element.

In the ***State of West Bengal v. Anwar Ali***,[1] *Justice S.R. Das* treated '*speedier trial*' as the object of the statute. It was the '*what*' element and not the '*why*' element. On the other hand Justice Mukherjee mistook '*speedier trial*' for the differentia or the basis of selection of the classes of cases or offences, i.e., for the '*whom*' element.

Once we accept the principle of classification and '*classification*' means to divide or to put into classes, and thus inundate ourselves, as at present, with the myriad of classificatory legislations, then it would be extremely difficult to agree with what *Justice P.N. Bhagwati* said in his rapturous eulogy of *Article 14* to the effect that "*Article 14….. Shines like a beacon light pointing towards goal or classless egalitarian socio-economic order*" [2] or with what *Justice Chandrachud* said in similar eulogy of *Article 14* to the effect that the right guaranteed thereunder is a right which more than any other is a basic postulate of our Constitution.

In form and frame, *Article 14* is absolute and is no way hedged in by any condition or restriction. As observed by Chief justice *S.R. Das* in **Basheshar Nath**,[3] "*so far Article 14 is concerned, there is no relaxation of the restrictions imposed.by it, such as there are in some other articles, e.g., Article 19, Clauses (2) to (6)*". But the Vedantic doctrine that what is apparent is very often not real is to a great extent true in Law also and the aforesaid observation of the eminent Judge must be taken to have been made. *Chief Justice S.R. Das* and his other eminent colleagues in the Supreme Court, who have consistently applied the American doctrine of classification as a permanent adjunct to and inalienable super-imposition on *Article 14* and Chief Justice Das himself, while speaking for the Seven-Judge

[1] AIR 195 2 SC 75.
[2] *Maganlal v. Chhaganlal*, AIR 1974 SC 2009 at 2029.
[3] AIR 1959 SC 149.

Bench in ***Budhan Chowdhury***,[4] and then in ***Ramkrishna Dalmia***,[5] has categorically pointed out that this doctrine of classification has become an inseparable component of our Right to Equality before the Law and Equal Protection of the Laws and is a permanent adjunct to *Article 14*.

Incorporation of the doctrine of classification in the Equality clause of our Constitution was a step in the right direction from practical and pragmatic point of view as *Article 14* would have been unworkable in our class-ridden society unless the doctrine of classification was superimposed thereon. This doctrine of classification is a reasonable thesis and that there may be good, sufficient and reasonable cause to adopt and incorporate this doctrine in our Equality clause and thus, to go for classificatory legislations in full swing. But once we adopt the doctrine as an inalienable adjunct to *Article 14*, the Article would stand virtually restructured in some such words as hereunder :-

> "*The State shall not deny to any person equality before the law or the equal protection of the laws unless there are reasonable grounds to classify the subjects or the objects of legislations*."

And once we accept this principle of classification, and '*classification*' means to divide or to put into classes, and thus inundate ourselves, as at present, with the myriad of classificatory legislations.

3.1.1 ***New Dimension of Equality Clause - Spectacular but Impermissible***

In November 1973, however, three of our Supreme Court Judges while sitting in a five-Judge Constitution Bench in ***E.P. Royappa v. State of Tamil Nadu***,[6] propounded a startling thesis that any state action which is *mala fide*, arbitrary, unfair or unreasonable is also '*unequal*' both according to '*political logic and constitutional law*' and would be inhibited and struck down by our Equality Clause as contained in *Articles 14, 15* and *16*.

Later in ***Maganlal Chhaganlal (P) Ltd. v. Municipal Corporation of Greater Bombay***,[7] ***Bhagwati, J***., again in a concurring opinion, speaking for himself and ***Krishna Iyer, J***., emphasized:

> "*Article 14 enunciates a vital principle which lies at the core of our republicanism and shines like a beacon light pointing towards the goal of classless egalitarian socio-economic order which we promised to build for ourselves when we made a tryst*

[4] AIR 1955 SC 191.
[5] AIR 1958 SC 538.
[6] AIR 1974 SC 555.
[7] AIR 1974 SC 2009.

with destiny on that fateful day when we adopted our Constitution. If we have to choose between fanatical devotion to this great principle of equality and feeble allegiance to it, we, would unhesitatingly prefer to err on the side of the former as against the latter."

And further he said:

"*What the equality clause is intended to strike at are real and substantial disparities……and arbitrary or capricious actions of the executive and it would be contrary to the object and intendment of the equality clause to exalt delicate distinctions, shades of harshness and theoretical possibilities of prejudice into legislative inequality or executive discrimination*."

In ***Maneka Gandhi v. Union of India***,[8] quoting himself from ***Royappa case***, *Bhagwati, J.*, very clearly read the principle of reasonableness in *Article 14*. He said:

"*Article 14 strikes at arbitrariness in State Action and ensures fairness and equality of treatment. The principal of reasonableness, which logically as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence*."

In Francis Coralie Mullin,[9] *Justice Bhagwati* after reiterating that '*a new dimension was opened up by the Supreme Court in Menaka Gandhi, has himself eulogized his own decision in Menaka Gandhi as having sowed the seed for future development of law*' and to become "*the starting point, the springboard, for culminating in the decisions in M.H. Hoskot v. Mate of Maharashtra,[10] Hussainara Khatoon v. Home Secretary, Bihar,[11] the first and second Sunil Batra's cases*."

In ***Ajay Hasia v. Khalid Mijib***,[12] the Court tamped the new approach with unanimous opinion of a constitution Bench of the Court in the following words:-

"*It must ... now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not paraphrase of Article 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in*

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[8] AIR 1978 SC 597.
[9] AIR 1981 SC 746.
[10] 1978 (3) SCC 544.
[11] (1980) 1 SCC 81.
[12] AIR 1981 SC 487.

question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above [(i) intelligible differentia and (ii) rational relation between the differentia and the object sought], the impugned legislation of executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever, therefore, there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action."

These words are clear enough to distinguish the new approach from the old that reasonableness in State action is the demand of *Article 14* and the classification doctrine is one method of meeting that demand. What else is needed to meet that demand is yet to be crystallized.

Interestingly, in none of the above mentioned cases, in which the new approach to *Article 14* was propounded, state action was found wanting in reasonableness and therefore invalid under *Article 14*. As a matter of fact through these decisions a general principle of reasonableness has been established which has been applied in subsequent decisions particularly to issues arising under *Article 21* or to issue of conferment on or exercise of discretion by the administrative authorities.

In ***Mithu v. State of Punjab***,[13] is, however, a striking decision which may be mentioned here also as an example of the application of the new approach. In *Mithu case*, *Section 303* of the Indian Penal Code, which provided for mandatory death penalty for murder committed by a life convict, was invalidated. The court framed two issues – (i) whether there is any intelligible basis for giving differential treatment to an accused who commits the offence of murder whilst under a sentence of life imprisonment and (ii) is such a law just and fair? It answered both the issues in the negative.

Earlier in ***Bachan Singh v. State of Punjab***, [14] (*Bhagwati, J.* Dissenting), however, the Court refused that invalidate *Section 302* of the Indian Penal Code on the ground that it was unreasonable insofar as it gave discretion to the judge to choose between life imprisonment and death sentence.

[13] AIR 1983 SC 473.
[14] AIR 1980 SC 898.

Another and perhaps more appropriate example of the application of new approach is ***Karnataka State Tourism Development Corp. Ltd. V. Karnataka S.T.A.T***, [15] which invalidate clause (iv) of the proviso to *Section 63 (7)* of the *MotorVehicle Act, 1939*. Clause (iv) required the Regional Transport Authority to give preference to certain kinds of applicants for motor vehicles. Invalidating the clause under *Article 14*, the Court held :

> "*We find it difficult to sustain this clause and uphold its validity. The very idea that a Tribunal (Regional Transport Authority) created by a statute for the purpose of considering rival claims and granting permits on merits should be compelled to give preference to persons securing the approval of the executive government appears to us to be arbitrary and unreasonable*."

In ***Manchegowda v. State of Karnataka***,[16] the Court doubted and in ***Babubhai v. State of Gujrat***,[17] it clearly rejected the contention that mere absence of a provision for appeal against an administrative decision will make a legislation unreasonable under Article 14. Similarly, in ***Kharan Chand v. State of J&K***,[18] the Court held that a default could not challenge a provision enacted to make good the default such as recovery provision in tax legislation on ground of unreasonableness.

Public or government contracts have been the most fertile area for the evolution and application of the new approach to area for the evolution and application of the new approach to Article 14. ***International Airport Authority Case***,[19] and ***Kasturi Lal Case*** were government contract cases where Justice Bhagwati, very elaborately discussed the need of reasonableness in State action reading its source in Article 14.

Earlier in ***Erusian Equipment & Chemicals Ltd. v. State of W.B***,[20] the Court rejecting the right privilege dichotomy for purposes of fair play, held that the State could not blacklist and debar a person from government contracts without giving him an opportunity to be heard. Duty to act fairly in *Erusian Equipment case* was extended to duty to act reasonably in the *International Airport Authority* and *Kasturi Lal* cases.

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[15] (1986) 4 SCC 421.
[16] 1984 (3) SCC 301.
[17] 1985 (2) SCC 733.
[18] 1984 (2) SCC 456.
[19] AIR 1979 SC 1628.
[20] AIR 1975 SC 266.

Subsequently in ***Ram & Shyam Co. v. State of Haryana***,[21] the Court invalidated a grant of lease to a person who made a higher offer through private negotiations with the Chief Minister than the highest bid made by the appellant in the public auction. Refusal to grant lease to the appellant without affording it any opportunity to raise the bid was found unreasonable and violative of *Article 14*.

Similarly, in ***Harminder Singh Arora v. Union of India***,[22] where contrary to the terms of tender, the government for no valid reasons granted the contract to supply milk to a person other than the one who submitted valid tender for the supply of quality milk at much lower price, the court invalidated the government action relying upon the law laid down in International Airport Authority case. The Court has been consistently applying these principles to contracts if one of the parties to the Contract is '*the State*' within *Article 12*.

The Court has also laid down some guidelines for the allotment of petrol pumps out of discretionary quota of the Ministers. In ***Common Cause, A Registered Society v. Union of India***,[23] the Court invalidated allotment of petrol pumps by Petroleum Minister out of his discretionary quota because of unfairness and arbitrariness in such allotment for not following these guidelines and for the exercise of unfair and arbitrary discretion. On similar grounds allotments of shops and stalls by a Minister was invalidated. The Courts, however, are not concerned with the ultimate decision but only with the fairness of the decision making process.

In ***Mahabir Auto Stores v. Indian Oil Corpn***.,[24] even though there was no formal contact between the petitioner and the respondent, the Court found the decision of the respondent to suddenly stop the supply of lubricants to the petitioner, which it had been supplying for the last 18 years, to be unreasonable and arbitrary because there existed no good reasons for the action of the respondent.

Again, in ***Shrilekha Vidyarthi v. State of U.P***.,[25] the Court invalidated a U.P. Government Order terminating *en masse* the appointments of all government Counsel in the State. The Court held that even if the appointments of counsel were contractual they had to be governed by the requirements of reasonableness and non-arbitrariness inherent in *Article 14* and the principle of the rule of law which apply to all State action whatsoever.

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[21] 1985 (3) SCC 267.
[22] 1986 (3) SCC 247.
[23] 1996 (6) SCC 530.
[24] AIR 1980 SC 1031.
[25] AIR 1991 SC 537.

Determination and execution of policies is a matter of within the domain of the executive with which the courts do not interfere. However, the policy and its execution must be consistent with law. Indeed, the Court has said, '*arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional*'. In some cases the courts have also invalidated such policy matters as fixing of marks for interview or oral examination conducted for jobs or for admission to educational institutions. Thus allocation of 25 per cent marks for interview and group discussion (20 per cent each) has been found unreasonable. In the Court's view such marks should not exceed 15 per cent. In another case it refused to interfere with the requirement of 50 percent marks for oral examination without further proof of nepotism and favouritism. Charging of capitation fee by State recognized educational institutions has also been held arbitrary and violative of *Article 14.*

In ***Y. Srinivasa Rao v. J, Veeraiah***,[26] government policy of giving preference to less educated over more educated in the matter of appointing dealers for fair price shops and making such appointment exclusively on the basis of interview has been held arbitrary. Confining Life Insurance Corporation Policies to employees in government, semi-government and reputed commercial firms has also been found against *Article 14*.

Equality postulates not merely legal equality but also real equality. The equality of opportunity has to be distinguished from the equality of results. The various provisions of our Constitution and particularly those of *Articles 38, 46, 335, 338* and *340* together with the preamble, show that the right to equality enshrined in our Constitution is not merely a formal right or a vacuous declaration. It is a positive right, and the state is under an obligation to undertake measures to make it real and effective.[27]

3.1.2 *Tests for Reasonable Classification*

Our Constitution clearly forbids caste-based discrimination against the principle of equality by clause (1) and (2) of *Article 15* and clause (2) of the *Article 16*. Equality clause of United States of America Constitution is absolute without any limitation; the restrictions are imposed by Supreme Court restrictions are through the process of interpretation.

Willis observes that equal protection of laws forbids class legislation but does not forbid classification, which rests on reasonable grounds of distinction. Similarly, and not the identity of treatment is enough. The classification must be based on some real and just relations. It cannot be arbitrary without any substantial base so observed by Day but Holmes

[26] 1992 (3) SCC 63.

[27] *Indra Sawney v. Union of India*, AIR 1993 SC 477 at 637.

says, "*the classification cannot be mathematically precise*." Justice S.R.Das laid down the doctrine of reasonable classification on two tests :-

- (i) The classification must be based on intelligible differentia, which distinguish those where are grouped together from others.
- (ii) The differentia must have a rational nexus to the object sought to be achieved.

After laying down the two broad tests, the Court propounded the following principles which were to be borne in mind by the courts in determining the validity of a statute on the ground of violation of *Article 14*.

- *(a)* A law may be constitutional even though it relates to a single individual, if, on account of some special circumstances or reasons applicable to him and not applicable to other, that single individual may be treated as a class by himself.
- *(b)* There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a dear transgression of the constitutional principles.
- *(c)* The presumption may be rebutted in certain cases by showing that on the face of the Statute, there is no classification at all and not applicable to any other individual or class, yet the law hits only a particular individual or class.
- *(d)* It must be presumed that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that, its discriminations are based on adequate grounds.
- *(e)* The Legislation is free to recognize the degree of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.
- *(f)* In order to sustain the presumption of constitutionality, the court may take into consideration, matter of common knowledge, maters of Common report, the history of the times and may presume every state of facts which can be conceived existing at the time of legislation.
- *(g)* While good faith and knowledge of the existing conditions on the part of the Legislature are to be presumed, if there is nothing on the face of the law or the surroundings circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be

some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

The principles enunciated above have been consistently adopted and further elaborated in *Re Special Courts Bill, 1978*,[28] case by *Chandrachud*, the learned Judge and explained :-

- *(i)* that the underlying principle of the guarantee of Article 14 was that all persons similarly circumstances should be treated alike both in privileges conferred and liabilities imposed;
- *(ii)* that by the process of classification, the State had the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject;
- *(iii)* that classification meant segregation in clause which had a systematic relation, usually found in common properties and characteristics. It postulated a rational basis and did not mean herding together of certain person and class arbitrarily;
- *(iv)* that the law could make and set apart the classes according to the needs and experience of the society and as suggested by experience. It could recognize even degree of evil, but the classification should never be arbitrary, artificial or evasive;
- *(v)* that if the legislative policy was clear and definite and as an effective method of carrying out that policy, a discretion was vested by the Statute upon a body of administrators or officers to make selective application of the law to certain classes or groups or persons, the Statute itself could not be condemned as a piece of discriminatory legislation. On the other hand, if the Statute itself did not disclose a definite policy or objective and it conferred authority on another to make selection at its pleasure, the Statute would be held on the face of it to be discriminatory, irrespective of the way in which it was applied;
- *(vi)* that mere assumption that the authority conferred with discretion by law would act in an arbitrary manner in exercising the discretion would not be determinative of the constitutionality of the law. Discretionary power would not necessarily be a discriminatory power;
- *(vii)* that mere inequality in no manner would determine the matter of Constitutionality, for the very idea of classification implied inequality;
- *(viii)* that practical assessment of the operation of the law in the particular circumstances would be necessary;

[28] AIR 1978 SC 478.

- *(ix)* that a rule of procedure laid down by law came as much within the purview of *Article 14* as any rule of substantive law.

Some more general principles propounded by the Courts, from time to time, may be summarized as follows:-

- *(a)* The classification made by a Legislature need not be scientifically perfect, or logically complete. Mathematical nicety and perfect equality are not required. Similarly and not identity of treatment, is enough. The Equality before law does not require mathematical equality of all persons in all circumstance. Equal treatment does not mean identical treatment.

- *(b)* The classification may be made on different basis e.g. geographical or according to object or occupations or;

- *(c)* The *Article 14* condemns discrimination not only by a substantive law but also by a law of procedure. Thus, classification should be reasonable both from substantive and procedural standpoints.

3.2 Prohibition of Discrimination, on Grounds of Religion, Race, Caste, Sex or Place of Birth (Article 15)

The first clause of *Article 15* of the Constitution postulates that the State shall not discriminate as between citizen and citizen on grounds only of religion, race, sex, place of birth or any of them. The second clause of *Article 15* prohibits citizens as well as the States from making such discrimination with regard to access to shops, public restaurants, hotels and places of public entertainment; or the use of wells, tanks, bathing *ghats*, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

The word '*State*' in *Article 15* takes its connotation from *Article 12* in a distributive sense including the Government and Parliament of India, the Government and the Legislatures of the States concerned, and all local or other authorities within India, or under control of the Government of India.

The *first* clause of *Article 15* mentions the prohibited grounds in any matter which is exclusively within the control of the State.

The *second* clause prohibits both the State and the private individual, whosoever is in the control of the above mentioned places.

The *third* clause of *Article 15* empowers the State to make special laws for giving favourable treatment to women and children. The objective to incorporate *Article 15(3)* is to avoid any controversy and demonstrate the concern of the framers of the Constitution that

State shall strive to promote the welfare of women and children. The fourth clause has been added to *Article 15* by the *Constitution (First Amendment) Act, 1951*, so as to give special recognition for the advancement of any socially or educationally backward classes of citizens or of Scheduled Castes and Scheduled Tribes and to extend to them an exemption from *Articles 15* and *29 (2).*

3.2.1 ***Scope of Clause (I) of Article 15: Prohibition against Discrimination***

The scope of *Article 15 (1)* is very wide. It is leveled against any State action relating to the citizens' rights, whether political, civil or otherwise. The word '*discrimination*' means to make an adverse distinction or to distinguish unfavourable from others. It is to be noted that prohibited discrimination is limited to specific grounds such as religion, race, caste, sex, place of birth, etc. Any discrimination other than the above has to be viewed under the general provision, i.e. *Article 14* of the Constitution. If it is found to be unreasonable and inconsistent with the requirements or necessities of a particular situation that *Article 14* steps in and taboos it. Thus, a prohibition to employ children below a certain age will be valid as it will be injurious to their health. Similarly, women may be prohibited from working in mines as that is insanitary and unwholesome to their health.

The force of the word '*only*' under *Article 15* would indicate that the discrimination cannot be merely on the ground that one belongs to a particular caste, sex, etc. In other words, if other qualifications are equal, the caste, religion, sex, etc. should never be the deciding factor.

In ***D.P. Joshi v. State of M.B***.,[29] the Supreme Court pointed out that a law which discriminates on the ground of residence does not infringe *Article 15(1).* Place of birth is distinct from residence. In that case, a rule of the State Medical College requiring a capitation fee from non-Madhya Bharat students for admission to the college was held valid as the reason for exemption from payment of capitation fee was bonafide residence and not place of birth.

Similarly, in ***P. Raghunandha Rao v. State of Orissa***,[30] it was held that the requirement of a test in the regional languages for state employment, does hot contravene *Article 15* as the test is made compulsory for all persons seeking employment.

[29] AIR 1955 SC 334.

[30] AIR 1955 Orissa 1131.

3.2.2 *Clause (2) of Article 15*

Clause (2) of *Article 15* postulates that no citizen shall, on the grounds only of religion, race, caste, sex, place of birth or any of them, be subjected to any disability, liability, restriction or condition with regard to - (a) access to shop, public restaurants, hotels and places of public entertainment, or (b) the use of walls, tanks, bathing *ghats*, roads and public resorts maintained wholly or partly out of State funds or dedicated to the use of the general public. It may be noted that while clause (1) of *Article 15* restrains discrimination by the State, clause (2) prohibits both the state and private individual from effecting any discrimination. Such discrimination is taboo if done only on the various grounds such as religion, race, caste, etc., stipulated in the clause. The word '*shop*' in sub-clause (a) of clause (2) of *Article 15* is used in a generic sense and would include any premises where goods are sold either by retail or wholesale or both and would include a laundry, haircutting saloon, or such other places where services are rendered to customers. A doctor's clinic or a lawyer's office may well be included within the expression '*shop*'. It is, therefore, crystal clear that shops or public restaurants or other places of public entertainment cannot be reserved exclusively for members of a particular caste, religion or race.

In respect of the use of wells, tanks, bathing ghats, roads and places of public resort under sub-clause (b) of clause (2) of *Article I5* is maintained wholly or partly out of State funds or dedicated to the use of general public. The words '*places of public resort*' must be construed as *ejusdem generis* of the prior categories. Thus, a burial ground, omnibus, railway, a public park, ferry, public urinal, a court of law, a hospital, a public guest house, etc. can be included as '*place of public resort*'.

In ***Lakhshmidhar Misra v. Rangalal***,[31] the Privy Council has held that there cannot be a dedication only to a limited section of the public like the inhabitants of a village, though such a right can be claimed on the basis of custom. The words '*State-funds'* in sub-clause (b) of clause 2 of *Article 15* connotes fund of all organs of State which include local boards, ail local authorities, state governments, and Central Government within the meaning of *Article 12* of the Constitution.

3.2.3 Clause (3) Special Provisions for Women and Children

Clause (3) of *Article 15* is one of the two exceptions to the application of *Article 15 (1)* and *15 (2).* It enacts that nothing in *Article 15* shall prevent the State from making any special provision for women and children. Women and children require special treatment on

[31] AIR 1950 PC 56; 761 A 271.

account of their very nature. *Article 15 (3)* empowers the state to make special provision for them. Thus, under Article 42 women can be given special maternity relief and a law to this effect will not infringe *Article 15 (1)*. Again, it would not be violation of *Article 15* if educational institutions are established by the state exclusively for women. Similar provisions apply to children. The provision of free education for children, under *Article 45* and measure for prevention of their exploitation under *Article 39 (f)* would also not come within the prohibition of *Article 15 (1)* of the Constitution.

In ***Yusuf Abdul Aziz v. State of Bombay***,[32] the High Court of Bombay was invited to declare *Section 497* of the Indian Penal Code as discriminatory on the ground that it only punished men for adultery while left the wife unpunished who may be equally guilty as a willing participant in the crime of adultery. The last sentence in *Section 497* lays down that "*in such cases the wife shall not be punishable as abettor*". The High Court held the provision not to be repugnant to clause (1) of *Article 15*. The impugned law was justified on the ground that the discrimination was not based on the ground of sex alone. However, on appeal, the Supreme Court sustained the provision not on the ground that the discrimination fell outside the prohibition of clause (1) but on the ground that it was covered by clause (3) of *Article 15*.

Similarly, in ***Choki v. State***,[33] *Section 497 (1)*, Criminal Procedure Code provides special treatment for women and children in the case of granting bail and is *intra vires* of *Article 15 (3)*.

3.2.4 Clause (4): Special Provision for Advancement of Backward Classes

This new clause which has been introduced by the *Constitution (first Amendment) Act, 1951*, postulates that nothing in *Article 15* of clause (2) of *Article 29*, shall prevent the state from making any special provision for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

Article 15 (4) is another exception to clause (1) and (2) of *Article 15*. The object of this clause is to make it constitutional for the State to reserve seats for backward classes of citizens, Scheduled Castes and Scheduled Tribes, in the public educational institutions, as well as to make other special provisions as may be necessary for their advancement.

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[32] AIR 1954 SC 321.
[33] AIR 1957 Raj. 10.

The immediate object of this amendment was to override the decision in ***State of Madras v. Champakam***,[34] to the effect that *Article 29 (2)* was not controlled by *Article 46* and that the Constitution did not intend to protect the interest of the backward classes in matters of admission to educational institutions. But, though the amendment would validate reservation for the backward classes and Scheduled Castes and Tribes. It would not support the distribution of seats according to communities so as to discriminate between classes who are not backward, *inter se*; in short, the amendment would not sanction any communal order.

The provisions made in clause (4) of *Articles 15* is only an enabling provision and does not impose any obligation on the State to take any special action under it. It merely, leaves it to the discretion of the appropriate Government to take suitable action, if necessary. The class contemplated under the clause must be both socially and educationally backward. Definitely any provision for the advancement of any socially and educationally backward class or for Scheduled Castes and Scheduled Tribes cannot be termed or characterized as the one based on any prejudice, contempt or insult to any forward class.

Therefore, the scope and function of *Articles 15(4)* is not the same as the *Article 15 (1)* and *29 (2)*. Neither it overlaps with them nor does it carve out anything from them. *Article 15 (4)* ensures or promotes equality just as *Article 15(1)* and *29 (2)* do. The only difference between the two is that while the latter do it by prohibiting the State from making discrimination the former does it by requiring the State to take appropriate measures for the removal of such discrimination.

3.2.5 Backward and more Backward Classification is not Bad

In ***Balaji v. State of Mysore***,[35] it has been held that the caste of a group of persons cannot be the sole test for ascertaining whether a particular class is a backwardness under *Articles 15 (4)* must be social and educational, and that social backwardness is, in the ultimate analysis the result of poverty.

In ***R. Chitralekha v. State of Mysore***,[36] the Government of Mysore laid down that classification of socially and educationally backward classes should be made on the following basis: (i) economic conditions and (ii) occupations. But the order of the Government did not

[34] AIR 1951 S.C.R. 525.
[35] AIR 1963 SC 649.
[36] AIR 1964 SC 1823.

take into consideration the caste of the applicant as one of the criteria for backwardness. The Apex Court held that though the caste of a group of citizens might be a relevant circumstance for ascertaining their backwardness, it could not be sole or dominant test in that behalf. The Court accepted the criteria adopted by the Mysore Government for ascertaining the backwardness of a class.

In the historic case of ***Indra Sawhney v. Union of India***,[37] the Supreme Court by 6 : 3 majority has held that the sub-classification of backward classes into more backward and backward classes for the purpose of *Article 16 (4)* can be done. The notion should be on the basis of the degrees of social backwardness. In fact in such a classification would be necessary to help the more backward classes otherwise those of the backward Classes who are little more advanced than the more backward classes might walk away with all the seats. This interpretation is equally applicable to *Article 15 (4)* as the words '*backward classes of citizens*' in *Article 16 (4)* are wider and includes the Scheduled Castes and the Scheduled Tribes and other socially and educationally backward classes also.

3.3 Equality of Opportunity in Public Employment (Article 16)

Article 16 of the Constitution is an instance of the application of the general rule of equality before law laid down in *Article 14* and the prohibition of discrimination guaranteed by *Article 15 (1)* with special reference to the opportunity for employment or appointment to any office under the State. The Constitution itself guarantees his equality of opportunity for public employment and appointment by the State. *Article 16* does not govern any private service or public service not under the control of or connected with the Government in any manner. Institutions that get State grants or aids have necessarily to obey *Article 16* as otherwise they also stand the risk of withdrawal of such aids.

Article 16 (1) guarantees quality of opportunity to all citizens in matters of employment or appointment to any office under the State and *Article 16 (2)* states that no citizen can be discriminated against or be ineligible for any employment or office under the state on grounds only of religion, race, caste, sex, descent, place of birth or residence. Thus, these two clauses postulate the universality of Indian citizenship. As there is one common citizenship, residence qualification is not required for service in any State. *Article 16 (1)* is much wider in scope than *Article 16 (2)* and the grounds of discrimination expressly

[37] AIR 1993 SC 477.

mentioned in *Article 16 (2)* are not exhaustive. *Article 16 (2)* brings out emphatically, in a negative form, what is guaranteed affirmatively by *Article 16 (1)*. Discrimination is a double edged weapon; it would operate in favour of some persons but against some others. *Article 16* (2) prohibits discrimination and thus assures the effective enforcement of the Fundamental Rights guaranteed in *Article 16 (1).*

In *Article 16*, clauses (3), (4) and (5) are the three exceptions to this general rule of equality of opportunity. Thus, under clause (3), Parliament may prescribe residence as a condition for employment of a particular class within a State. The second exception, i.e., *Article 16 (4)* is that any State may make certain reservations in the matter of any posts in favour of backward classes not adequately represented in the service under the State. *Article 16 (5)* provides the third exception in respect of appointments in religious or denominational institutions which have to be manned by men of the particular persuasions in the very interests of development of such institutions.

In ***State of Kerala v. NM. Thomas***,[38] some of the judges opined that clause (4) of *Article 16* was not an exception to clause (1) or (2) of that article. This view in Thomas's case was reiterated, much more emphatically by *Chinnappa Reddy, J.*, in his concurring opinion in ***A.B.S.K. Sangh v. Union of India***,[39] and it has finally been accepted by court in ***Indra Sawney v. Union of India***.[40]

Thus, clause (4) of *Article 16* is not an exception to the rest of the article, but rather it is a facet of equality of opportunity guaranteed in clause (1) of that article and an effective method of realizing and implementing it. It is crystal clear that clause (4) does not derogate from anything in clauses (1) and (2) of *Article 16* but rather gives them positive support and content. It serves the same function, i.e. securing of equality of opportunity, as do clause (1) and (2). Obviously, therefore, it is as much a Fundamental Right as clauses (1) and (2) or any other provision of that article.

The scope and extent of *Article 16 (4)* has been examined thoroughly by the Supreme Court in the historic case of ***Indra Sawhney v. Union of India***,[41] popularly known as ***Mandal case***. The nine-Judge Constitutional bench of the Supreme Court by 6:3 majority concurring by separate judgments upheld the decision of the Union Government to reserve 27 per cent

[38] AIR (1976) 25 SCC 310.
[39] (1981) 1 SCC 246.
[40] AIR 1993 SC 477.
[41] AIR 1993 SC 477.

government jobs for backward classes provided socially advanced persons - Creamy layer among them are eliminated, it is only confined to initial appointments and not promotions and the total reservation shall not exceed 50 per cent. The Court accordingly partially held the two impugned notifications dated 13 August, 1990 and 25 September, 1991 as valid and enforceable but subject to the conditions indicated in the decision that socially advanced person's creamy layer-among backward classes are excluded. However, the Court struck down the Government's Office Memorandum reserving 10 per cent Government jobs for economically backward classes among higher classes.

In view of this, the majority did not express any opinion on the correctness or adequacy of the Mandal report. The dissenting judgment was given by *Justice T.K. Thommen, Kuldip Singh* and *R.M. Sahai*. The minority struck down the two Office Memoranda issued by the Union Government as unconstitutional. It also held that Mandal Report is unconstitutional and recommended for the appointment of another Commission for identifying the socially and educationally backward classes of citizens.

In the instant case, the apex Court has shown unprecedented courage to examine the scope and extent of *Article 16 (4)* in detail and clarified various aspects on which there were differences of opinion in various earlier judgments. Further, in accordance with the direction given by the Supreme Court, the Union Government had appointed an expert committee known as Ram *Nandan Committee* to identify the creamy layer among the socially and educationally backward classes. The Committee submitted its report on 16 March, 1993 which was accepted by the Government of India. The report identifies the '*creamy layer*' among the socially and educationally backward classes for excluding it from the list of Mandal beneficiaries. The Committee's Report states that only when the creamy layer is substantially and stably formed after crossing the rubicon limit of social backwardness, and then alone can it be made the basis for disentitlement.

The rule laid down by the Supreme Court has been modified as regards the members belonging to the Scheduled Castes and Scheduled Tribes, by the *Constitution (Seventy-seventh Amendment) Act, 1995*, which has added a new Clause (4A) to *Article 16* which provides:

"*Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State are not adequately represented in the services under the State*."

The 77th Amendment, 1995 has been upheld by the Supreme Court in Commissioner of Commercial Taxes, ***A.P. Hyderabad v. G. Sethumadhva Rao***.[42]

In State of ***Haryana v. Prem Singh***,[43] the apex Court explained that reservation policy would apply only in respect of transfer from a lower post to higher post and not in case of transfer to an equivalent post. It has also been ruled that reservation benefit cannot be granted in the grant of selection grade, since it is provided to avoid stagnation at the highest slab in the grade which is quite different from promotion to higher posts.

The Constitutional validity of the *Constitution (Eighty-fifth Amendment) Act, 2001* has been upheld by a Constitution Bench of the Supreme Court in ***M. Nagaraj v. Union of India***.[44] The Court ruled that obliteration of the '*catch-up'* rule or insertion of the concept of '*consequential seniority code*' did not violate the basic structure of the equality code enshrined in *Articles 14, 15* and *16*.

Further a new clause (4B) has been added to *Article 16* which enable the State to carry forward the unfilled reserved vacancies to be filled in any succeeding years so as to remove the backlog, notwithstanding the rule of 50 per cent ceiling.

3.4 Abolition of Untouchability (Article 17)

Under the Constitution, justice, political, economic and social, and equality aim at cutting the very roots of caste and working towards a casteless, possible also a classless society. The framers of the Constitution of India decide to secure the complete abolition of untouchability. That was one of the great ideals of Mahatma Gandhi and all patriotic forces which wanted secular state to be established in India supported this ideal. Article 17 of the Constitution enshrines that '*untouchability*' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of '*untouchability*' shall be an offence Unishable in accordance with law. The object of *Article 17* is to polish some iniquitous social customs and disabilities from our country.

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[42] AIR 1996 SC 1915.
[43] AIR 2000 SC 2078.
[44] AIR 2007 SC 71.

This Article, however, is not free from difficulties. Although we generally understand what is meant by '*untouchability*' in the context of our social system, yet, as legal term, it lacks precision since it has not been defined anywhere in our Constitution. It obviously means '*untouchability*' on the ground of descent, caste, race, or religion. But the word '*untouchability*' is applicable to so many varieties of things or conduct in different parts of our country that, in the absence of a clear definition, it may lead to any amount of vexatious litigation with the never increasing sense of self respect in the minds of those in whose interest the Article has been framed.

The *Harijan* untouchable problem of India was a social one. They were considered for long as outside the four castes of the Hindu Varnas and their social aloofness was enjoined in every Wage community due to various causes. These *Adidravidas*, *Harijans*, whichever appellation is given to these untouchables, were said to possess unclean habits and the doctrine of Karma was invoked to prove their hereditary degradation. The sin of such birth had no social redemption. With the advance of civilization, the untouchables have been changing their habits and some of them have come out as brilliant publicists, lawyers and statesman. The bulk of their populace is, however, yet to '*come up*' and so it is that the Constitution makers resolved to declare that '*untouchability*' is abolished i.e. in *toto*. *Article 17* knocks the whole problem of untouchability at the very bottom and throws it out lock stalk and barrel. It does not stop with a mere declaration but announces that this forbidden '*untouchability*' is not to practice in any form. If it is practiced, it shall be dealt with as an offence punishable in accordance with the law. It may be noted in this connection that, except as otherwise provided for in clause (b) of *Article 35* of the Constitution, under sub-clause (ii) of *Article 35 (a)*, the Parliament alone, and not the Legislature of any Constitutent State, has been empowered by the Constitution to make a law for prescribing punishment for any offence envisaged by *Article 17*. This power has been rightly given to Parliament alone with a view, as *Dr. Ambedkar* stated in Constitution Assembly on 29th November, 1948, to ensuring uniformity of legislation on the subject throughout the country.

In exercise of the powers conferred by *Article 35*, Parliament as enacted the *Untouchability (Offence) Act, 1955*. This Act was amended by the *Untouchability (Offence) Act, 1976*, in order to make the law more stringent to remove untouchability from the society. It has now been renamed as the Protection of Civil Rights Act. The expression '*Civil Right*' is defined as anyright accruing to a person by reason of the abolition of untouchability by *Article 17* of the Constitution. Under the amended Act, any discrimination on the ground of

untouchability will be considered an offence. It provides that if a public servant, willfully neglects the investigation of any offence punishable under this Act the State shall be deemed to have abetted an offence punishable under this Act. The protection of Civil Rights Act prescribes punishment which may extend to imprisonment upto six months and also with fine which may extend to five hundred rupees.

The role of judiciary towards abolition of untouchability has been examined thoroughly in ***People's Union for Democratic Rights v. Union of India***,[45] in which the Apex Court has held that the Fundamental Right under *Article 17* are available against private individuals and it is the constitutional duty of the State to take steps to see that these basis rights are not violated.

It should be further noted that *Article 15 (2)* also helps in eradication of untouchability. Thus, on the grounds of untouchability no person can be entertainment or the use of wells, tanks, bathing *ghats*, roads and funds or dedicated to the use of general public.

3.5 Abolition of Titles (Article 18)

Article 18 of the Constitution of India prohibits the State to confer titles on anybody whether a citizens or a non-citizens. Military and academic distinctions are, however, exempted from the prohibition for they are incentive to further efforts in the perfection of the military power of the State so necessary for its existence, and for the scientific endeavors so necessary for its prosperity. *Article 18 (2)* of the Constitution prohibits citizens of India from accepting any title from a foreign government.

A foreigner holding any office of profit or trust under the State cannot accept any title foreign State without the consent of the President under *Article 18 (3)*. This is to ensure loyalty to the Government he serves for the time-being and to shut out all foreign influence in Government affairs or administration. *Article 18 (4)* provides that no person holding any office profit or trust under the State shall accept, without the consent of the President, any present, emolument, or office of any kind from or under any foreign state.

The conferment of titles of '*Bharat Ratan'*, '*Padma Vibhushan'*, '*Padma Shri'* etc. are not prohibited under *Article 18* as they merely denote State recognition of good work done by the citizens in various fields of activity. But the possibilities are, these may degenerate into '*titles*' of the old type and public life may get marred by a scramble for such

[45] AIR 1982 SC 1473.

honorifics. They may not be personal titles but there is nothing to prevent ostentations persons decorating their name cards with these 'honorifics', if the number grows large, it may descend to be a separate caste. It is difficult to bring all these honorifics into the expected categories in *Article 18*, *viz.*, military or academic distinction. While the positive aspect is that such distinction may stimulate further zeal in the same field. Meritorious public work such as social uplift, philanthropy on a large scale such as '*Bhoodan*' or '*Sampatidan*' or any special service to the public, may attract State rewards of honorifics. But these cannot be '*academic*' or '*military distinction'*. It will be contrary to the Constitution to abuse the State's power under *Article 18* in these directions. *Article 18* merely enjoins the State not to give titles other than in recognition of the military academic distinctions. If they do grant it, recourse under *Article 32* could be had for writ against the recipient not to use it and against the Government to grant such titles and declare all prior grants of titles as void.

Therefore, in ***Balaji Raghvan v. Union of India*,**[46] (*Balaji Raghavan/S.P.Anand v. Union Of India on 15 December, 1995*), it advised that a committee under the Prime Minister consisting among others of the Speaker of the Lok Sabha, the Chief Justice of India or his nominee and the leader of the opposition in consultation with the President of India should nominate persons for these awards.

3.6 Protective Discrimination – Substantive Equality

'*Protective Discrimination'* may be defined as '*discrimination permissible under the Constitution'*. The object is to ensure '*substantive equality'*, to secure '*real equality'*. It is to provide for an egalitarian society woven into ideal of '*social justice'* enshrined in the preamble to the Constitution. The Constitution, therefore, while securing 'equality before law' and '*equal protection of law'* enables the State to make special provisions for the upliftment of the socially and educationally backward classes of citizens, in particular for Scheduled Castes and Scheduled Tribes. It is to enable these sections of citizens, to complete with the advanced sections of the people. The mechanism to attain the ideal of substantive equality may be read in the provisions, *viz.*, *Article 14, 15 (3), 15 (4) 15 (5-A), 16 (3), 16 (4), 16 (4-A), 16 (4-B), 243-D, 243 (T), 330* and *332*.

[46] (1996) 1 SCC 361.

4. SUMMARY

The foregoing study reveals that the Constitution of India guarantees the Right to Equality through *Article 14* to *18*. The Constitution of India intends to establish a welfare state and the concept of the rule of law aims at safeguarding and advancing the civil and political rights of the citizens of the country but also establishing social, economic, educational and cultural conditions under which their legitimate aspirations and dignity may be realized.

Further, whenever social inequality exists or an economic injustice is found, a democratic state enters the arena, and with aid of law, established a social equality and removes economic injustices. Therefore, it is, one of the objectives of the Constitution to secure to all citizens equality of status and of opportunity and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the nation.

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6. SELF – ASSESSMENT QUESTIONS

1. What do you understand by "equality before law" and "equal protection of laws". Explain different grounds on the basis of which the classification can be made with the help of decided case laws.
2. Explain the concept of Equality as laid down in Article 14. To what extent equality and arbitrariness are sworn enemies? Comment.

3. Discuss the right to equality as guaranteed in the constitution of India. Does the reservation under Articles 15 (4) and 16 (4) constitute any infraction of the light? Answer with reference to decided cases of Supreme Court.
4. Examine the scope of Articles 15 (4) and 16 (4) with specific reference to Indira Sawhney v. Union of India, AIR 1993 SC, 477.
5. Explain prohibition on grounds of religion, race, caste, sex, place of birth as enshrined under Article 15 (1) and 15 (2) of the Constitution of India.
6. Article 14 permits reasonable classification but, prohibits class legislation. Discuss this statement with the help of decided cases.
7. "What Article 14 strikes at, is arbitrariness because an action that is arbitrary must be necessity and involve negation of equality." Explain and illustrate.
8. "Apparently the values of equality and reservation are mutually conflicting, but in the ultimate analysis one fulfills the other." Comment critically with Case Law.

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(DDE – 2018) **LL.M – I**

INDIAN CONSTITUTIONAL LAW AND THE NEW CHALLENGES

Paper : II (102) DE **Writer: Prof. Sunil Deshta** *

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POLITICAL FREEDOM OF THE CITIZENS -_ REASONABLENESS RESTRICTIONS

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3.4 Freedom of Movement and Residence (Article 19(1) (c) arid 19(5)

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4. SUMMARY

5. SUGGESTED READINGS

6. SELF – ASSESSMENT QUESTIONS

1. INTRODUCTION

Freedom is natural longing of a man, therefore, *Bal Gangadhar Tilak* boldly declared, '*Freedom is my birth right and I shall have it*'. The lovers of freedom say that a dried bread of independence is better than lavish meals of dependence. A free bird flying in search of food is better than well fed golden caged bird. Such burning desire provoked the freedom fighters for self-immolation they tolerated unbearable inhuman atrocities in the hand of cruel British and their stooges.

Freedom as being natural instinct it is necessary for the full development of the personality of an individual and his dignity, therefore, it found place in the preamble of the constitution as one of the objectives. However, freedom may be necessary but it cannot be without limitations or qualifications. The concept of absolute freedom in anarchical sense is not desired and permitted. Rousseau observes that man is born free but he is bound every here.

Limitations keep the freedom on the right path, a necessary condition of harmonious life. A man is to live in society and he is to adjust his liberty to milieu of his society and society protects his freedom from unnecessary intervention in its proper enjoyment. Time, place and circumstances qualify liberty. *Article 19(1)* of the Constitution of India does not create right to freedom but only recognizes and guarantees its protection. *Article 19* guarantees to citizens six Fundamental Rights in the nature of freedoms.

2. OBJECTIVE

The Freedom of Speech is regarded as the first condition of liberty. Thus, *Article 19* of the Constitution guarantees to the citizens of India six freedoms i.e. speech and expression, peaceable assembly, association, free movement, residence and practicing any profession and carry on any business. These various freedoms are necessary not only to promote certain basic rights of citizen but also democratic values in the oneness of the country. At the same time it is also important to mention here that these freedoms are, however not absolute. Absolute individual rights cannot be guaranteed by any modern state. The requirement that a restriction should be reasonable is of great conditional significance, for it act as a limitation on the power of the Legislature and consequently, widens the scope of judicial review of laws restraining the exercise of freedoms guaranteed by Article 19. The determination by the Legislature of what constitutes a reasonable restriction is not final or conducive; it is subject to supervision of courts. In this chapter an attempt has been mad to discuss in detail about the freedoms guaranteed by the Constitution of India.

Moreover, grounds of restrictions upon the freedom is also discussed like security of the state friendly relations with foreign states, public order, decency and morality, contempt of court, defamation, incitement to an often. Sovereignty and integrity of India etc. To provide more clarity appropriate case law is also discussed in relevant as well as conspicuous system to provide more clarity in this regard.

3. PRESENTATION OF CONTENTS

3.1 Right to Freedom (Article 19)

Article 19 of the Constitution guarantees to the citizens of India six freedoms, *viz.*, of '*speech and expression', 'peaceably assemble', 'association', 'free movement', 'residence'*, and '*practising any profession and carrying on any business*'. These various freedoms are necessary not only to promote certain basic rights of citizens but also democratic values in, and the oneness of, the country. These freedoms are, however, not absolute. Absolute individual rights cannot be guaranteed by any modem State. An organized society is the pre-

condition of civil liberties. There cannot be any right which is injurious to the community as a whole. If the people were given complete and absolute liberty without any social control the result would be ruin. These rights are not exhaustive of all the rights of a free man who has far more wider rights. Some of these rights falling outside *Article 19* are *freedom to live, right of citizenship, the right to vote or contest election, the contractual right against the Government servants to continue in employment*, and the *right to strike*.

Some of these rights may otherwise have protection from the provisions of the Constitution outside Part III or of ordinary statutes. *Article 19* is a protection only against State action. It does not guarantee against private action. Only a person affected and not a third party can attack the constitutionality of an Act under *Article 19*. The onus is on the person questioning the statute. The guarantee of each of the above rights is, therefore, restricted by the Constitution itself by conferring upon the State a power to impose by law reasonable restrictions as may be necessary in the larger interest of the community. The restrictions on these freedoms are provided in clauses (2) to (6) of *Article 19* of the Constitution.

The restriction which may be imposed under any of the clauses must be a reasonable restriction. The restriction cannot be arbitrary. Hence a restriction to be constitutionally valid must satisfy the following two tests : -

- *(i)* the restriction must be for the purpose mentioned in clauses (2) to (6) of *Article 19*;
- *(ii)* the restriction must be a reasonable restriction.

It may be emphasized that the requirement that a restriction should be reasonable is of great constitutional significance, for it acts as a limitation on the power of the Legislature, and consequently, widens the scope of judicial review of laws restraining the exercise of freedoms guaranteed by *Article 19*. The determination by the Legislature of what constitutes a reasonable restriction is not final or conclusive; it is subject to supervision of courts.

However, it was held in ***Naresh S. Mirajkar v. State of Maharashtra***,[1] that a judicial verdict announced by a court in or in relation to a matter brought before it for its judicial verdict announced by a court in or in relation to a matter brought before it for its decision cannot be said to affect the Fundamental rights of citizens under *Article 19 (1)*.

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[1] AIR 1967 SC 1.

The above mentioned two tests are to be examined when a law is challenged as unconstitutional. Though the Supreme Court has settled certain tests for determining the reasonableness of restrictions in a series of decisions. The guidelines laid down by the Apex Court for determining the reasonableness of restrictions are as follows :-

- ***(i)*** It is the courts and not the Legislature which has judge finally whether a restriction is reasonable or not.
- ***(ii)*** State cannot impose arbitrary restrictions. There must be proximate relation between restrict on the freedom.
- ***(iii)*** For the reasonability of the restriction, it is necessary that there should be some relation between the restriction and the object sought to be achieved through that restriction.
- ***(iv)*** there is no exact standard or general pattern of reasonableness that can be laid down for all cases. Each case is to be judged on its own merit. The standard varies with the nature of the right infringed, the underlying purpose of the restrictions imposed, the extent and the urgency of the evil sought to be remedied, the disproportion of the imposition, and the prevailing condition at the time. These factors have to be taken into consideration for any judicial verdict.
- ***(v)*** The restriction must be reasonable from the substantive as well as procedural standpoint.
- ***(vi)*** A restriction which is imposed for securing the objects and laid down in the Directive Principles of State Policy may be regarded as reasonable restrictions.
- ***(vii)*** The Court must determine the reasonableness of a restriction by objective standard and not by subjective one.
- ***(viii)*** A restriction to be reasonable must have a rational relation with the object which the Legislature seeks to achieve and must not be in excess of that objects. The grounds for which the Legislation can impose restrictions are mentioned in clause (2) to (6) of *Article 19*.
- ***(ix)***The court must determine the reasonableness of the restriction and not the reasonableness of the law. The Court has only to see whether the restrictions imposed on citizens' rights are reasonable.

- *(x)* Under certain circumstances, total deprivation may amount to reasonable restriction. In case of dangerous trade, e.g.,trade of liquor or cultivation of opium trafficking in women, the total prohibition will amount to only reasonable restriction.
- *(xi)* Reasonable restriction must form a rational co-ordination between Individual right and social interest.
- *(xii)* Reasonable restriction can be imposed only upon natural persons as they are citizen of India. A foreigner or an alien is not a citizen of India and therefore, cannot claim right under *Article 19*. Similarly, a corporation or company cannot claim a right under *Article 19* because they are not natural persons.
- *(xiii)*Though the test of reasonableness laid down in clauses (2) to (6) of *Article 19* might in great part coincide with that for judging of '*due process*' under the American Constitution. It must not be assumed that these are identical, for it has to be borne in mind that the Constitution framers deliberately avoided in this context the use of the expression '*due process*' with its comprehensiveness flexibility and attendant vagueness, in favour of the somewhat more definite Word, '*reasonable*', and caution has, therefore, to be exercised before the literal application of American decisions. The test of reasonableness of the restriction under the Constitution of India has to be considered in each case in the light of the nature of the right infringed, the purpose of the restriction, the extent and the nature of the mischief required to be suppressed, and the prevailing social and other conditions at the time. It would, thus, be misleading to construe the concept of reasonableness in the light of American decisions.

Article 19 is rightly regarded as one of the most important Articles in the Constitution of India. As however, the Article is a long one and comprises of six specific rights guaranteed to Indian citizens clause (1) (a) to (1) (g) of *Article 19* are discussed as follow.

3.1.1 *Freedom of Speech and Expression (Articles 19 (1) and 19 (2)*

Article 19 (1) (a) guarantees all citizens the right of freedom of speech and expression which are basic foundation of all civilized governments and advanced organized societies. This clause should be read with clause (2), which provides that the right shall not prevent the operation of law relating to the matters specified therein. The freedom of speech and expression means the right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode.

It, thus, includes the expression of one's idea through any communicable medium or visible representation such as, gesture, signs and the like. There is no separate provision in our Constitution for the freedom of the press. It is implicit in the freedom of expression conferred on all citizens. However, the freedom of the press under our Constitution is not higher than the freedom of an ordinary citizen and is subject to the same limitations as are imposed on the citizens.

In the United States the freedom of speech and press are recognized as fundamental personal rights and liberties, the exercise of which lies at the foundation of free government by free man. Safeguarding of these rights of free speech and press to the end that men may speak as they think on matters vital to them and that falsehood may be exposed through the processes of education and discussion is essential to free government. The freedom of speech and expression includes liberty to propagate not one's views only. It also includes the right to propagate or publish the views of other people, otherwise this freedom would not include, the freedom of the press.

In ***Ramesh Thappar v. State of Madras***,[2] the Apex Court by majority expressed the view that there can be no doubt that the freedom of speech and expression includes freedom of propagation of ideas and that freedom is secured by freedom of circulation. Liberty of circulation is an essential to that freedom as the liberty of publication. Indeed, without circulation the publication would be of little value.

Freedom of circulation involves freedom of communication over which there can be no censorship. Though, secrecy of correspondence is not specifically enjoined in our Constitution, yet it is tacitly included in the term '*freedom of expression*'. Censorship in post, telephone, or telegraphy can only arise under the exception covered by clause (2) of *Article 19*. The imposition of pre-censorship on publication is, therefore, unless justified under clause (2), violative of freedom of speech and expression.

In ***Brij Bhushan v. State of Delhi***,[3] and other issued under *Section 7(1) (c)* of *East Punjab Safety Act, 1950*, directing the editor and publisher of a newspaper '*to submit for scrutiny, in duplicate before publication, till further orders, all communal matters and news and views about Pakistan, including photographs and cartoons*', was struck down by Supreme Court, observing : -

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[2] A.I.R. 1950 SC 124.

[3] AIR 1950 SC 129.

"*There can be little doubt that the imposition of pre-censorship on a journal is a restriction on the liberty of the press which is an essential part of freedom of speech and expression declared by Article 19(1) (a)*".

In ***Express Newspapers v. Union of India***,[4] the Supreme Court held that a law which imposes pre-censorship or curtails the circulation or prevents newspapers from being started or require the Government to seek Government aid in order to survive was violate of *Article 19 (1) (a)*. In this case, the validity of the *Working Journalists Act, 1955*, was challenged. The Act was enacted to regulate conditions of persons employed in newspaper industry, e.g. payment of gratuity, hours of work, leave, fixation of wages, etc. It was contended that the Act would adversely affect financial position of newspaper which might be forced to close down and would curtail circulation and thereby narrow the scope for dissemination of information and hence violative of *Article 19 (1)(a)*.

The court held the Act valid. The Act was passed to ameliorate the service conditions of Workmen in the newspaper industry and, therefore, imposed reasonable restriction on the right guaranteed by *Article 19 (I) (a)*.

In ***Sakal Papers Ltd. v. Union of India***,[5] the *Daily Newspapers (Price and Control) Order, 1960*, which fixed a minimum price and number of pages which a newspaper was entitled to publish was, challenged as unconstitutional by the petitioner on the ground that it infringed the liberty of the press. The government justified the law as reasonable restriction. The Court struck down the order rejecting the State's argument. It said that the right of freedom of speech and expression cannot be taken away with the object of placing restrictions on the business activity of a citizen. Freedom of speech can only be restricted on the grounds mentioned in clause (2) of *Article 19*.

Similarly, in ***Bennet Coleman & Co. v. Union of India***,[6] the validity of the Newsprint Control Order which fixed the minimum number of pages which a newspaper could publish was challenged as violative of *Article 19 (1) (a).* The Government argued this measure that limiting to all papers at ten pages level on the grounds that it would help small papers to develop and to check the monopoly of big papers. But the court held that the restriction is not reasonable within four corners of *Article 19 (2).*

[4] AIR 1958 SC 578.
[5] AIR 1962 SC 305.
[6] AIR 1973 SC 106.

In ***Odyssey Communication Pvt. Ltd. v. Lokvidayan Sanghatana***,[7] the respondent, a registered social organization of Pune, filed a public interest litigation under *Article 226* to restrain the Union of India, Ministry of Information and Broadcasting and the State of Maharastra from telecasting the serial '*Hony Anhoni*' on the ground that it was likely to spread false or bind beliefs and superstition amongst the members of the public. It was, however, held that the rights of a citizen to exhibit films on the Doordarshan, on the term and conditions imposed by the Doordarshan is a part of the Fundamental Right of freedom of expression guaranteed under *Article 19 (1) (a)* which can be curtailed only on the grounds mentioned in *Article 19 (2)*. The right is similar to the right of a citizen to publish his views through any other media. The respondents failed to show that exhibition of the serial was *prima facie* prejudicial to the community. It was also not likely to endanger public morality.

3.1.2 New Dimensions of Freedom of Speech and Expression

3.1.2.1 *Government has no Monopoly on Electronic Media*

The Supreme Court widened the scope and extent of the right to freedom of speech and expression and held that the government has no monopoly on electronic media and a citizen has under *Article 19 (1) (a)* a right to telecast and broadcast to the viewers/listeners through electronic media television and radio any important event. The government can impose restrictions on such a right only on grounds specified in clause (2) of *Article 19* and not on any other ground. A citizen has fundamental right to use the best means of imparting and receiving communication and as such have an access to telecasting for the purpose.

3.1.2.2 *Commercial Advertisements*

The court held that commercial speech (advertisement) is a part of the freedom of speech and expression. The court however made it clear that the government could regulate the commercial advertisements, which are deceptive, unfair, misleading and untruthful. Examined from another angle the Court said that the public at large has a right to receive the '*Commercial Speech*'. *Article 19 (1) (a)* of the constitution not only guaranteed freedom of speech and expression, it also protects the right of an individual to listen, read, and receive the said speech.

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[7] 1988 3 SCC 410.

3.1.2.3 *Telephone Tapping: Invasion on Right to Privacy*

Telephone tapping violates *Article 19 (1) (a)* unless it comes within grounds of restriction under *Article 19 (2).* Under the guidelines laid down by the Court, the Home Secretary of the center and state governments can only issue an order for telephone tapping. The order is subject to review by a higher power review committee and the period for telephone tapping cannot exceed two months unless approved by the review authority.

3.1.2.4 *Obscenity*

Freedom of speech, though guaranteed, is not absolute in India. Unlike the U.S. Constitution, the text of India's Constitution clearly sets out restrictions on free speech. The freedom of speech guarantee under *Article 19 (1) (a)* can be subject to reasonable state restriction in the interest of decency or morality. Obscenity in India is defined as "*offensive to modesty or decency; lewd, filthy and repulsive*." It stated that the test of obscenity is whether the publication, read as a whole, has a tendency to deprave and corrupt those whose minds are open to such immoral influences, and therefore each work must be examined by itself .

With respect to art and obscenity, the Court held that "*the art must be so preponderating as to throw obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked.*" The Court concluded that the test to adopt in India, emphasizing community mores, is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech.

3.1.2.5 *Right to Information*

Right to know, to information is other facet of freedom of speech. The right to know, to receive and to impart information has been recognized within the right to freedom of speech and expression. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. The right to know has, however, not yet extended to the extent of invalidating *Section 5* of the *Official Secrets Act, 1923* which prohibits disclosure of certain official documents. Even, *Right to Information Act-2005*, which specially talks about peoples' right to ask information from Government official, prohibits discloser of certain documents under *Section 8* of the Act. These exceptions are generally the grounds of reasonable restrictions over freedom of speech and expression under *Article 19 (1)* of Constitution of India. One can conclude that right to information is nothing but one small limb of right of speech and expression.

3.1.2.6 ***Voters have Right to Know about their Candidates***

In a landmark judgment in ***Union of India v. Association for Democratic Reforms***,[8] a three judge bench held that the amended Electoral Reforms Law passed by Parliament is unconstitutional as being volatile of citizen's right to know under *Article 19 (1) (g).*

3.1.2.7 ***Norms Set by the Election Commission for Recognition of a State Political Party***

For the recognition of a political party as a State party, the Election Commission's order amending Clause 6 of the *Election Symbols Order, 1968* providing that the political party would not only have to secure not less than 6% of the total valid votes polled but it had also to return at least at least two members of the Legislative Assembly of the State was held to be valid. It was a bench-mark set by the Election Commission and was not unreasonable. In order to gain recognition as a political party, a party has to prove itself and to establish its credibility as a serious player in the political arena of the State.

In ***Resurgence India v. Election Commission of India***,[9] the petitioner, a N.G.O. in a massive exercise under the banner 'Punjab Election Watch' during Punjab Legislative Assembly Election, 2007 analysed the verification of candidates of major political parties and found large scale irregularities in most of the affidavits filed by the candidates regarding a large number of non-disclosure by the candidates. On representation, the Election Commission expressed its inability in rejecting the nomination papers of the candidates solely on the ground of false/incomplete information in the nomination papers.

The Supreme Court held that an affidavit with blank particulars will render it nugatory. The information is very vital for giving effect to the '*right to know'* of the citizens. If the candidates fail to fill the blanks even after reminder by the Returning Officer, the nomination paper is fit to be rejected. If the Election Commission accepts the nomination papers in spite of blank particulars in the affidavits it will directly violate the fundamental right of the citizens to know the criminal antecedent, assets and liabilities and educational qualification of the candidate. The failure on the part of the candidate to furnish relevant information mandated by *Section 33 A* of *the Representative of Peoples Act* will result in prosecution of the candidate. Filing of affidavit with blank will be directly hit by *Section 125 (1)* of the *Representative of People Act*.[10]

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[8] AIR 2001.

[9] AIR 2014 SC 344.

[10] *Ibid.*

3.1.2.8 ***The 'Freedom of Speech and Expression' is indeed a Very High One***

In recent judgment of the Supreme Court in ***Khushboo v. Kannaiammal***,[11] upholds the right to freedom of speech and expression. Khushboo's right to freedom of speech was violated by the institution of multiple criminal cases against her in various courts across the country and consequent harassment that she suffered.

3.1.2.9 ***Right to Choose the Medium of Instruction***

A child and on his behalf his parent or guardian has the right to choose the medium of instruction at the primary school stage. This is a fundamental right under *Article 19 (1) (a)* and not under *Article 21* or *21-A*. the only permissible limits of this right will be those covered under Article 19 (2) of the Constitution.[12]

3.1.2.10 ***Suspension of M.L.A.***

Suspension of an MLA from the House disabling him to participate in proceedings of the House is not violating of *Article 19 (1) (a).* The curtailment of the legislator's constitutional right of free speech in the House under *Articles 105* and *194* is sanctioned by the Constitution because this right is subjected to the other provisions of the Constitution, the rules and standing orders regulating the procedure of the legislative bodies.[13]

3.1.2.11 ***Hijras and Transgenders – Right to Express Gender Identity***

A transgender has freedom to express one's chosen gender identity through varied ways and means by way of expression. Speech, mannerism, clothing etc. Values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to the members of transgender community under *Article 19 (1) (a),* and the State is bound to protect and recognize those rights.[14]

3.1.2.12 ***Publication of Photograph alongwith Government Advertisements***

In ***Common Cause v. Union of India***,[15] a PIL was filed for an appropriate writ under *Article 32* to restrain the Union of India and all State Government from misusing public funds on Government advertisement primarily intended to project individual functionaries of the Government or a political party and for laying down appropriate guidelines under *Article 142* by the Supreme Court to regulate Government action in the matter, because such advertisement not only result in gross wastage of public funds but constitute misuse of

[11] JT 2010 (4) SC 478.
[12] *State of Karnataka v. Associated Management of P & S Schools*, AIR 2014 SC 2094.
[13] *Alagaapuram R. Mohanraj v. Tamil Nadu Legislative Assembly*, AIR 2016 SC 867 at p. 874.
[14] *National Legal Services Authority v. Union of India*, AIR 2014 SC 1863 p. 1892.
[15] AIR 2015 SC 2286.

government powers besides derogating the fundamental right of a large section of the citizens as guaranteed by *Article 14* and *21* of the Constitution. The Court in order to evolve the best practice constituted a committee of three members for appropriate recommendations. The Court accepted the Committee's recommendations which appeared to the court to be comprehensive and the Court held that the recommendations would serve public purpose by enabling dissemination of information and spreading awareness amongst the citizens not only of the Government policies, achievements made and targets to be reached but also the rights and entitlements of citizens including the availability of host of information. The Committee made some recommendations to prevent arbitrary use of public funds and exclude the possibility of misuse of funds for getting any political mileage. The Committee recommended permissibility of photographs of the President and Prime Minister and Governor or Chief Minister of the state along with the advertisements.

In ***State of Karnataka v. Union of India***,[16] the Supreme Court reviewed its judgment in *Common Cause v. Union of India*,[17] and extended the exception carved out permitting the publication of the photographs of the President, Prime Minister and Chief Justice of Country, subject to the said authorities themselves decideing the question, to the Governors and the Chief Ministers of the States. It also extended permission to publish the photograph of the Departmental (Cabinet) Minister/Minister in – Charge of the concerned Ministry in lieu of the photograph of the Prime Minister. Similarly, in the State, it extended permission for the publication of the photograph of the Departmental (Cabinet) Minister in-charge in lieu of the photograph of the Chief Minister if so desired. The Court made it clear that all other observations / directions in the judgment in the ***Common Cause v. Union of India***,[18] would continue to remain if force subject to the above modification.[19]

3.1.2 Grounds of Restriction

Any restriction imposed upon the right to freedom of speech and expression is prima facie unconstitutional, unless it can be justified under the limitations imposed by clause (2) of *Article 19*. This clause authorizes the State to impose restrictions upon the freedom of speech and expression only on certain specified grounds so that if in any particular case the restrictive law cannot rationally be shown to relate to any of these specified grounds, the law

[16] AIR 2016 SC 1437.
[17] AIR 2015 SC 2286.
[18] *Ibid.*
[19] AIR 2016 SC 1437 at p. 1438.

must be held to be void. Clause (2) of *Article 19* authorizes the Legislature to impose restrictions upon the freedom of speech and expression on the following grounds :-

- *(i)* Security of the State
- *(ii)* Friendly relations with foreign States
- *(iii)* Public Order
- *(iv)* Decency or morality
- *(v)* Contempt of Court
- *(vi)* Defamation
- *(vii)* Incitement to an offence
- *(viii)* Sovereignty and Integrity of India

3.1.2.1 ***Security of the State***

Security of the State means the absence of serious and aggravated forms of public disorder, as distinguished from ordinary breaches of public safety or public order which may not involve any danger to the State itself. The security of the State may well endangered by crimes of violence intended to overthrow the Government, external aggression or war etc. Thus, speeches or expression on the part of an individual which incite to or encourage the commission of violent crimes such as, murder are matters which would undermine the security of the State.

In ***Romesh Thapper v. State of Madaras***,[20] the Supreme Court has occasion to interpret the meaning of the words '*security of the State*'. The Court said that there are different grades of offences against '*public orde*r'. Every public disorder cannot amount to be regarded as threating the security of the State. The term '*security of the State*' refers only to serious and aggravated forms of public disorder, e.g., rebellion, waging war against the State, insurrection and not ordinary breaches of public order and public safety, e.g., unlawful assembly, riot, affray. Thus speeches or expression on the part of an individual which incite to or encourage the commission of violent crimes, such as, murder are matters which would undermine the security of the State.[21]

3.1.2.2 ***Friendly Relation with Foreign States***

This ground was added by *Constitution (First Amendment) Act, 1951*. The object of this ground of limitation on the freedom of speech and expression is to prevent libels against foreign States in the interests of maintaining friendly relations with them.

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[20] AIR 1950 SC 124.

[21] *State of Bihar v. Shailbala Devi*, AIR 1952 SC 329.

In India, the *Foreign Relations Act, 1932* provides punishment for libel by Indian citizens against foreign dignitaries. Again, the *Foreign Recruiting Act, 1874* empowers the Executive to prohibit recruitment of any citizen of India to the army of foreign States. But the interest of friendly relations with foreign States, would not justify the suppression of fair criticism of foreign policy of the Government.

It is to be noted that members of the Commonwealth including Pakistan are not a '*foreign State'* for the purposes of this Constitution. The result is that freedom of speech and expression cannot be restricted on the ground that the matter is adverse to Pakistan.

3.1.2.3 *Public Order*

The preservation of public order is one of the grounds for imposing restrictions on the freedom of speech and expression. This ground did not occur in the Constitution as framed in 1950. It was added by the *Constitution (First Amendment) Act, 1951*, in order to meet the situation arising from the Supreme Court's decision in ***Ramesh Thappar v. State of Madras***.[22] In this case, it was held that ordinary or local breaches of public order were no grounds for imposing restriction on the freedom of speech and expression guaranteed by the Constitution. The Supreme Court said that '*public order*' is in expression of wide connotation and signifies that State of tranquility which prevails among the members of political society as a result of internal regulations, enforced by the Government which they have established.

Public Order is something more than ordinary maintenance of law order. It is synonymous with public peace, safety and tranquility. Public order thus implies absence of violence and an orderly state of affairs in which citizens can peacefully pursue their normal avocation of life. Public order also includes public safety. Public safety means the safety of the community from the external and internal dangers.

3.1.2.4 *Decency or Morality*

This ground of limitation has been engrafted for the purpose of restraining speech and publications which tend to undermine public morals. Decency connotes the same as lack of obscenity. A law against obscenity is protected on the ground. Obscene means offensive to modesty or decency; lewd, filthy, repulsive. The test of obscenity is a question of degrees and varies with the moral standards of the community in question. If a publication read as a whole has a tendency to deprave and corrupt those whose minds are open to such moral influence and into whose hands a publication of to this sort may fall, it suffers from obscenity. It will be

[22] AIR 1950 SC 124.

noted that clause (2) of *Article 19* has used the expression '*decency or morality*'. The scope of the word '*morality*' is not very clear. The conception of morality differs from place to place and from time to time. Birth control which was once considered immoral is now considered proper as a means to check over-population.

The test of obscenity is '*whether the tendency of matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences*' and into whose hands a publication of this sort is likely to fall. Thus a publication is obscene if it tends to produce lascivious thoughts and arouses lustful desire in the minds of substantial numbers of that public into whose hands the book is likely to fall. This test was laid down in an English case of ***R. v. Hicklin***.[23]

In ***Aveek Sarkar v. State of West Bengal***,[24] the Supreme Court held 'Hicklin test' not the correct and applied 'community standard test' to determine obscenity. A picture of a nude/semi-nude woman as such cannot *per se* be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it. Only those sex related materials which have a tendency of exciting lustful thoughts can be held to be obscene but the obscenity has to be judged from the point of view of an average person. On the basis of '*community standard test*', the Court held that breast of Barbara Fultus fully covered with the arm of Boris Becker, a photograph of course semi-nude had no tendency to deprave and corrupt the minds of the people in whose hands the magazine newspaper would fall.[25]

3.1.2.5 *Contempt Court*

In relation to the freedom of speech and expression, one of the restrictions that can be constitutionally imposed is when that freedom exceeds reasonable and fair limits and amounts to contempt of Courts. *Section 2* of the *Contempt of Court Act, 1971*, defines the expression '*Contempt of Court*'. It may be '*Civil Contempt*' or '*Criminal Contempt*'. The Supreme Court and the High Courts have the powers to punish a person for their contempt.

In ***E.T. Sen v. E. Naryanan***,[26] the *Contempt of Court Act, 1950* was challenged as imposing reasonable restriction on the right conferred under *Article 19 (1) (a)* because it provides no definition of Contempt of Court. But, the Court rejected the arguments on the

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[23] LR 3 QB 360.

[24] AIR 2014 SC 1495.

[25] *Devidas Ramchandra Tuljapurkar v. State of Maharastra*, AIR 2015 SC 2615.

[26] AIR 1969 Del. 201.

ground that the expression has a well-recognized judicial Interpretation. The law of Contempt of Court administered by the Supreme Court under *Article 129* has been held to be reasonable under *Article 19 (2)* in a case of ***C.K. Daphtary v. O.P. Gupta***.[27]

3.1.2.6 ***Defamation***

Defamation is both a crime as well as tort. Just as a person possesses the freedom of speech and expression, every person also possesses a right to his reputation which is regarded as property. Hence, nobody can so use his freedom of speech or expression as to injure another's reputation. Laws penalizing defamation do not, therefore, constitute Infringement or freedom of speech.

In ***Subramanian Swamy v. Union of India***,[28] the Supreme Court held the term '*defamation*' used in Article 19 (2) cannot be given restricted meaning. Doctrine of *noscitur a sociis* cannot be applied to the expression 'incitement of an offence' as it would unnecessarily make it a restricted one which the founding fathers of the Consitution did not intend. The principle of *noscitur a sociis* cannot be applied to give restricted meaning to the term '*defamation*' to include criminal action if it gives rise to incitement to constitute an offence. It is difficult to accede to the submission that defamation can only get criminality if it incites to make an offence. Law of defamation protects the reputation the reputation of each individual in the perception of public at large. It matters to an individual in the eyes of the society. Protection of an individual right is imperative for social stability. The harm caused to an individual affects the society as a whole. The contention that the criminal offence meant to sub-serve the right of *inter se* private individual but not any public or collective interest in totality is *sans substance*.

Reputation is an inextricable aspect of right to life and a basic element of *Article 21* of the Constitution and the legislature in its wisdom has kept the penal provision under *Section 499* of IPC alive which does not have a chilling effect on the freedom of speech and expression. It is difficult to come to a conclusion that the existence of criminal defamation is absolutely obnoxious to freedom of speech and expression. It neither invites frown of any of the articles of the Constitution nor can its very existence be regarded as unreasonable restriction.[29]

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[27] AIR 1971 SC1132.

[28] AIR 2016 SC 2728.

[29] *Ibid*., at pp. 2774, 2775, 2776, 2793, 2794., 2798, 2800, 2805, 2806.

3.1.2.7 *Incitement to an Offence*

This ground was also added by the *Constitution (First Amendment) Act, 1951*. It will permit legislation not only to punish and present incitement to commit serious offences like murder which lead to breach of public order, but also to commit any offence, which according to the General Clauses Act means any or omission made punishable by any law for the time being in force.

3.1.2.8 *Sovereignty and Integrity of India*

This ground has been added as a ground of restriction to clause (2) of *Article 19* by the *Constitution (Sixteenth Amendment) Act, 1963*. The object was to enable the State to combat dries for secession and the like. It connotes that under this clause state may make law in the interest of integrity and sovereignty of State to put reasonable restriction on the freedom of speech and expression.

Sedition – As understood in English law, sedition embraces all those practices whether by word, or writing which are calculated to disturb the tranquility of the State and lead ignorant persons to subvert the Government.[30] Thus the gist to the offence of sedition is incitement to violence. Mere criticism of the Government is no offence.

Restriction to cover both within and outside permissible limits – In ***Shreya Singhal v. Union of India***,[31] *Sections 66 A* and *69 A* of the Information Technology Act were challenged on the ground of violating *Articles 19 (1) (a)* and *Article 14* of the Constitution, *Section 66-A* provides punishment for sending offensive messages by any person by means of a computer resource or a communication device.

3.2 Freedom of Assembly [Articles 19 (1) (b) and 19 (3)]

Article19 (1) (b) guarantees to all citizens of India the right of assembly which includes the right to hold meetings and to take out processions. The Constitution secures this right to the citizens subject to three limitations: (i) the assembly must be peaceful; (ii) it must be unarmed; and (iii) reasonable restrictions can be imposed under clause (3) of *Article 19* as may be deemed necessary in the interest of public order or the sovereignty and integrity of India.

Article 19 (1) (b) does not confer on any one a right to hold meetings in government premises. In ***Railway Board v. Niranjan Singh***,[32] it was held that Railway cart validly

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[30] *R. v. Salliven,* (1868) 11 Cases 55.
[31] AIR 2015 SC 1523.
[32] AIR 1969 SC 66.

prohibit holding of meetings in their premises either within or outside office hours. The right of assembly cannot be exercised on the property of somebody. Railways are entitled to enjoy their properties in the same manners as any private individual subject to such restrictions as may be placed on them by law or usage. But a right to hold public meetings on government property can be, created by usage.

The right of assembly is implied in the very idea of the democratic Government. This right, like other individual rights is not absolute but restrictive. The assembly must be non-violent and must not cause any breach of public peace. If the assembly is disorderly or riotous then, it is not protected under *Article 19(1) (b)* and reasonable restrictions may be imposed under clause (3) of *Article 19.*

3.3 Freedom to Form Association [Articles 19 (1) (c) and 19 (4)]

Article 19(1) (e) guarantees to the citizens of India the right to form associations or union, Under *Article 19 (4)*, reasonable restrictions in the interests of public order or morality or sovereignty and integrity of India may be imposed on this right by law. The right to form associations is the very lifeblood of democracy. Without such a right, political parties cannot be formed, and without such parties a democratic form of government, especially that of parliamentary type, cannot be run properly.

In ***K.A. Nair v. Union of India***,[33] an important question arose whether '*civilian*' employees, designated as '*non-combatants*' such as cooks, chowkidars, laskers, barbers, mechanics, boot-makers, tailors, etc. attached to the Defence Establishments have a right to form associations of unions. The Commandant declared their unions as unlawful associations. The appellants challenged that the impugned action was violative of their Fundamental Right to form associations or Unions under *Article 19 (1) (c)* of the Constitution. They contended that the members of the Unions, though attached to the Defence Establishments, were civilians and their service conditions were regulated by Civil Service Rules, and therefore, they could not be called '*members of the Armed Forces*' within the meaning of *Article 33* of the Constitution. The apex Court rejected the contentions of the appellants and held that the civilian employees of Defence establishments were not entitled to form trade unions.

In ***Balakotiah v. Union of India***,[34] the services of the appellant were terminated under Railway Service Rules for his being, a member of communist party and a trade union. The appellant argued that the termination amounted to the denial to him the right conferred under

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[33]AIR 1976 SC 1179.

[34] AIR 1958 SC 232.

Article 19 (1) (c). The apex Court held that the appellant had no doubt the Fundamental Right to form association, but he had no Fundamental Right to be continued in the government service. It was, therefore, held that the order terminating his services was not in contravention of *Article 19 (l) (c)* because the order did not prevent the appellant from continuing to be in Communist Party or trade unionist.

3.4 Freedom of Movement and Residence [Articles (19) (1) (e) and 19 (5)

Article 19 (1) (d) guarantees to every citizen the right to move freely throughout the territory of India. *Article 19 (l) (e)* guarantees to a citizen the right to reside and settle in any part of India. According to *Article 19 (5)*, however, the State may impose reasonable restrictions on these rights by law in the interests of general public or for the protection of the interests of any Scheduled Tribe. These constitutional provisions guarantee to the Indian citizens the right to go or to reside wherever they like within the Indian Territory, a citizen can move freely from one State to another or from one place to another within a State.

In ***State of Uttar Pradesh v. Kaushalya***,[35] the Supreme Court held that the right of movement of prostitutes may be restricted on the ground of public health and in the interest of public morals.

Similarly, in ***Ajay Canu v. Union of India***,[36] the Supreme Court held that *Rule 498 A* of *Andhra Pradesh Motor Vehicles Rules, 1964* was laid as it was made for the good of the people and imposed reasonable restriction on the freedom of movement. Rule 498 A ensures protection and safety to the head of the driver of two wheeler in case of an accident. The compulsion for putting on a helmet by the driver does not restrict on the freedom of movement.

In ***Ebrahim v. State of Bombay***,[37] it was held that a law which authorized the deportation of a citizen of India for committing a breach of passport regulations could not be justified as a reasonable restriction on the right guaranteed by *Article 19(1) (c)*.

In ***State of M.P. v. Bharat Singh***,[38] *Section 3(1)* of the *M.P. Public Security Act, 1959*, empowered the State Government to issue an order requiring a person to '*reside*' or remain in such a place as might be specified in the order or to ask him to leave the place and to go to another place selected by authorities in the interests of security of the State or public order. The apex Court held that *Section 3(1) (b)* of the Act imposes unreasonable restriction

[35] AIR 1964 SC 416.

[36] 1988) 4 SC 156.

[37] AIR 1954 SC 229.

[38] AIR 1957 SC 1170.

on the right guaranteed by *Article 19 (1) (d)* and therefore, void. The Act did not give an opportunity to the person concerned of being heard about the place where he was asked to reside. The place selected for him might have no residential accommodation or means of subsistence, etc. The section did not indicate the extent of the place, area on its distance from the residence of the person concerned.

A thorough examination of the cases concerning *Article 19 (1) (a)* to *(e)* will reveal that there appears to be a difference in judicial attitude towards the constitutionality of administrative discretion to curtail the Fundamental Rights of '*association*' and '*movement*' of '*residence*'. The right of association is better protected for the administrative authority cannot be empowered to restrict the right finally in its discretion; some kind of judicial security should be provided for in other cases. Judicial review may not be necessary over administrative discretion. In case of right of association, the Supreme Court held that since there is an advisory board in preventive detention cases; it does not mean that it writ be sufficient in cases of restraints on the right of association as well.

On the other head, in cases of restraints on the right of '*movement*' or '*residence*', the court has stated that advisory board is not necessary in such eases. The dichotomy in judicial attitude may be because of the realization that in a democracy right of '*association*' should be protected effectively as that is the basis of organization of parties.

3.5 Freedom of Profession, Occupation, Trade or Business [Article19 (l) (g) and 19 (6)]

Article 19 (I) (g) guarantees to all citizens the right to practice any profession or to carry on any occupation, trade or business. However, this right is not unqualified and can be restricted and regulated any authority of law. Thus, the state can under clause (6) of *Article 19* make any law - (a) imposing reasonable restriction on this right in the interest of public. (b) Prescribing professional or technical qualifications necessary for (practicing any profession or carrying on any occupation, trade or business, (c) enabling the State to carry on any trade or business to the exclusion of citizens wholly or partially.

The right to carry on a business includes the right to close it any time the owner likes. So, the State cannot compel a citizen to carry on business against his will. But as no right is absolute, the right to close a business is also not an absolute, right. It can be restricted, regulated or controlled by law in the interest of public. The right to close down a business cannot be equated or placed at par as high as the right not to start or carry on business.

In ***Excel Wear v. Union of India***,[39] the petitioner '*Excel Wear*' was a registered firm. The petitioner's factory of garments was running into a recurring loss due to serious labour trouble. It was almost impossible for the petitioner to carry on the business and served notice on the State Government for prior approval for its Closure. The Government refused approval in the public interest under *Section 25-O, 25-R* of the *Industrial Disputes Act, 1947*, *Section 25-O* requires an employer to take permission from the Government for closure of his industrial undertaking. The employer is required to give three months' notice to the Government could refuse the permission to close down the business if it is satisfied that the reason given by the employer were not adequate and sufficient or that such closure is prejudicial to the public interest. *Section 25-R* provides for punishment for violation of the provision of *Section 25-O*.

The court, in this case held that *Section 25-O* of the Act as a whole and *Section 25-R* in so far as it relates to the awarding of punishment for violation of the provision of *Section 25-O* were unconstitutional and invalid for violation of *Article 19 (l) (g)* of the Constitution. The Court remarked that nobody has got a right to carry on the business if he cannot pay even minimum wages to the labourers. He must then close down his business.

After the *Constitution (First Amendment) Act, 1951*, a law providing for nationalization of a trade is now presumed to be Constitutional. The Supreme Court in ***Akadasi v. State of Orissa***,[40] has, however, held that only those provision of the impugned law which constitute the essential and integral part of nationalization or creation of State monopoly are protected by that Clause.

In ***R.C. Cooper v. Union of India***,[41] the Supreme Court held that the impugned law (which authorized the nationalization of fourteen banks) in so far as it prohibited the banks from carrying banking business in future was an essential element of the State monopoly and hence was projected by *Article 19 (6) (ii)*.

The Supreme Court, in a judgment of far reaching importance in ***Sedan Singh v. New Delhi Municipal Committee***,[42] has held that hawkers have a fundamental right to carry on trade on pavements of roads, but subject to reasonable restrictions under *Article 19 (6)* of the Constitution. It was further remarked by the apex Court that the right to carry on trade or business mentioned in *Article 19 (1) (g)* on pavement of roads, it properly regulated, cannot

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[39] AIR 1979 SC 25.
[40] AIR 1963 SC 1047.
[41] AIR 1970 SC 564.
[42] AIR 1989 SC 1988.

be denied on the ground that streets are meant exclusively for passing for re-passing and for no other use. The right, if property regulated, would help both the small traders and the general public by making available ordinary articles to everyday use for a comparatively lesser price. It was further remarked that the right to practice any profession does not include right to carry on any illegal or immoral profession. The State has right to prohibit trades, which is illegal or immoral or injurious to the health and welfare of the public.

Shifting of shop on Tahbazari due to security reasons – In ***Dharam Chand v. Chairman, New Delhi Municipal Council***,[43] the appellant who had squatting in the area of Chandni Chowk, as a hawker selling cloths since 1965 was given *tehbazari* of selling tea by the enforcement Department of New Delhi Municipal Council at Bhagwan Das Road but thereafter he was shifted opposite to the Supreme Court towards Bhagwan Das Road persuannt to allocation of a shop by the Director (Enforcement) NDMC after decision of the Supreme Court in ***Sodan Singh v. New Delhi Municipal Corporation***.[44]

In last, The Supreme Court dismissed the appeal and held that the purpose of general interest of community as opposed to the interest of individual directly or indirectly has to be balanced. Merely because after the incident of bomb-blast in the Delhi High Court, no such incident took place till date, it cannot be presumed that no such incident will happen in near future. The Court cannot assume and presume that there is no threat to the safety or the security of the Supreme Court and its vicinity and allow the appellant to continue the said business.[45]

Trade in liquor not a fundamental right – The State has exclusive right or privilege regarding portable liquor. A citizen has no fundamental right to trade or business in liquor as a beverage and the activities, which are *res extra commercium*, cannot be carried on by any State Citizen. The State can create a monopoly; it can also create a monopoly in itself for the trade or business in such liquor.[46]

Dancing a Fundamental Right – dancing is a fundamental right and cannot be excluded by dubbing the same as *res extra commercium* and greater the restriction, the more is need for scrutiny.[47]

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[43] AIR 2015 SC 2819.

[44] AIR 1989 SC 1988.

[45] *Ibid.* at pp. 2823, 2824.

[46] *State of Kerala v. Kandath Distilleries*, AIR 2013 SC 1812.

[47] *State of Maharashtra v. Indian Hotel and Restaurant Assn*., AIR 2013 SC 5282.

No right to carry on business at a particular place – there is no right to carry on business at a particular place. The State may impose reasonable restriction in the interest of general public. Thus a competent authority may reasonably fix a place for a *bus stand*,[48] *a cinema house*,[49] or *a liquor shop*.[50]

3.6 Protection in respect of Conviction for Offences (Article 20)

Constitution of India guarantees certain fundamental rights because they are considered necessary for the development of human personality.

These rights enable a man to chalk out his own life in the manner he likes the best. These rights are manifests of man's inviolable and fundamental freedoms. The fundamental rights are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. These rights recognize the importance of the individual in the affairs of the State and seek to assure to every citizen full freedom to enjoy life, liberty and happiness as he likes.

Article 20 provides protection in respect of conviction for offences. It constitutes a limitation on the legislative power of the Parliament or the State Legislatures under *Article 246*, read with the three legislative lists contained in the Seventh Schedule to the Constitution. The protection contained in *Article 20* is available to all persons, citizens or non-citizens. The term '*person*' in *Article 20* includes a corporation which is accused, prosecuted, convicted or punished for an offence. *Article 20* provides protection against : --

- *(i)* Ex-post facto laws [Article 20(1)]
- *(ii)* Double Jeopardy [Article 20(2)
- *(iii)* Self-incrimination [Article 20(3)]

3.6.1 *Ex-post facto Laws*

Clause (1) of *Article 20* provides safeguards against *ex-post facto* law. *Ex-post facto* law means the law which imposed penalties retrospectively or which increases the penalties from the retrospective effect. Thus, *ex-post facto* law may be understood as the law which imposes penalties on the acts already done or which increases the penalties for the acts already done. The provisions of Clause (1) of *Article 20* may be divided into two parts:-

- (A) No person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charged as an offence.

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[48] *T. Ibrahim v. Regional Transport Authority*, AIR 1983 SC 79.
[49] *Ranchhorlalji v. Revenue Divisional Commissioner*, AIR 1960 Ori. 88.
[50] *Cooverji v. Excise Commissioner*, AIR 1954 SC 220.

- (B) No person shall be subject to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

The right secured by clause (1) corresponds to the provisions against *ex-post facto* laws of the American Constitution which declares that no *ex-post facto* laws shall be passed. Broadly speaking *ex-post facto* laws are laws nullified and punished what had been lawful when done. '*There can be no doubt*', said, *Jagannathadas, J.*, "*as to the paramount importance of the principle that such ex-post facto laws which retrospectively create offences and punish them are bad as being highly inequitable and unjust*".[51]

The first part of clause (1) lays down that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence. This means that a person can only be convicted of an offence under the law in force at the date of the Commission of the act. If at the date of the commission of an act, such commission was not prohibited by a law then in force, no future legislation prohibiting that act with retrospective effect will justify a conviction for such commission, in other words, if an act is not an offence at the date of commission, no future law can make it an offence.

The second part of *Article 20(1)* applies only to causes of retrospective increase of penalty for an offence and has no reference to retrospective increase of civil liability. The second part of *Article 20(1)* guarantees that no person shall be subject to penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

In ***Budh Singh v. State of Haryana,***[52] the petitioner was convicted under *Section 15* of the *NDPS Act, 1985* and senetenced to undergo imprisonment for a period of 10 years and also a fine of Rs. 1,00,000/- and in default to suffer RI for a period of three years. After undergoing custody for a period of more than seven years, the petitioner contented that taking into account the remission which had been due to him under different Government notifications/orders issued from time to time, he would have been entitled to be released from prison but by virtue of *Section 32-A* of *NDPS Act* the benefit was denied to him. He challenged constitutional validity of *Section 32-A* of the *NDPS Act* for violation of Fundamental Rights under *Articles 14, 20 (1)* and *21* of the Constitution. The Court referred to *Dadu v. State of Maharastra*,[53] wherein the Court held that *Sections 432* and *433* of Cr.P.C

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[51] *Rao Shiva Bahadur Singh v. State of U.P.*, AIR 1953 SC 394 at 398.
[52] AIR 2013 SC 2386.
[53] AIR 2000 SC 3203.

were not violate of *Article 14* of the Constitution and definition could not be held to be violate of right to life as it had not been taken away except according to procedure established by law. The section could not be said to encroach upon the personal liberty of the convict tried fairly and sentenced under the Act. *Section 32-A* was held not to be violative of *Article 20 (1)* as it had obliterated the benefit of remission(s) to a convict under NDPS Act. Since the remission(s) did not in any way touch or affect the penalty/sentence could be understood to have the effect of enlarging the period of incarceration of an accused convicted under the NDPS Act i.e., to undergo a longer period of sentence than contemplated at the time of commission of the offence.

In ***Mohan Lal v. State of Rajasthan*,**[54] the accused, a night chowkidar was convicted for the offences under *Sections 18* of *NDPS, Act* and *Sections 457* and *388* of I.P.C. for committing theft of 10 kgs. 420 gms opium and some other aricles from Malkhana on 13-11-1985. The accused's contention, interalia, in appeal was that the incident had occurred on 12th / 13th November, 1985 and the NDPS Act came into force only on 14-11-1985 and therefore the offence was punishable under *Opium Act, 1978* and not under *Section 18* of *NDPS, Act*.

The High Court and Supreme Court both dismissed the appeal. The Supreme Court held him guilty under *Section 18,* NDPS Act because he was in possession of the banned substance on the date of enforcement of the Act. He had both the '*corpus*' and '*animus*' which were necessary for possession under the law. Article 20 (1) was held to be not applicable because the *actus of possession* was not punishable with retrospective effect. The punishment of the prohibited article on or after a particular date on the enactment of the statute.

3.6.2 ***Double Jeopardy***

The right secured under clause (2) of *Article 20* is grounded on the common law maxim ***nemo debet bis yexari*** - which means that '*a man should not be put twice in peril for the same offence*'. If a person is charged again for the same offence in an English court, he can plead, as a complete defense, his former acquittal or conviction, or as it is technically expressed, take the plea of *autrefois acquit* or *autrefois convict*. The corresponding provision in the American Constitution is embodied in that part of the Fifth Amendment which declares that no person shall be subject for the same offence to be put twice in jeopardy of life or limit. To claim the protection against double jeopardy under *Article 20(2)* of the Indian Constitution, the following conditions are required to be satisfied :-

[54] AIR 2015 SC 2098.

- *(a)* There must be a person accused of an offence.

- *(b)* The person accused of an offence must have been prosecuted and punished.

- *(c)* The former presentation and punishment must be before a court of law of judicial tribunal of competent jurisdiction.

- *(d)* There should be prosecution and punishment for the second time for the same offence.

- *(e)* The offence must be the same in both the proceedings.

The plea of double jeopardy may be distinguished from the rule of issue estoppel in a criminal trial. The rule of issue estoppel is that where an issue of fact has been decided by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or *res judicatta* against the prosecution, not as a bar to the trial and conviction of the accused for a different or distinct offence but as barring the reception of evidence to disturb that finding of fact when the accused is tried subsequently even at a different trial. The rule is not the same as the plea of double jeopardy, because, *first*, the rule does not introduce any variation in the Code of Criminal Procedure, either in investigation, enquiry or trial and *second*, it does not prevent the trial of any offence as does the rule of double jeopardy, but only precludes evidence being led to prove a fact in issue as regards which, evidence has already been led and a specific finding recorded at an earlier trial before a competent court. The rule, thus, relates only to the admissibility. The rule depends upon well-known doctrines which control the re-litigation of issues which are settled by prior litigation.

Article 20(2) bars double punishment, the rule of issue estoppel bars reception of evidence on an issue on which the finding was in favour of the accused at a previous trial. *Article 20(2)* has no direct bearing on the question at issue while the rule of issue estoppel relates to evidence on the question in issue at the two trials. What is required for the application of the rule of issue, estoppel is the identity of issue and the acquittal of the accused at a previous trial on the same issue, while *Article 20(2)* would be attracted if the offence is the same in the second prosecution for which the accused has earlier been prosecuted and punished.

Article 20 (2) and Section 300 (1) of Cr. P.C. – The language used in **Section 300 (1)** of Cr.P.C. is different from the language used in *Article 20 (2)* of the Constitution. The former is wider than the later. *Article 20 (2)* of the Constitution states that '*no one can be prosecuted and punished for the same offence more than once*'. *Section 300 (1)* of Cr.P.C.

sates that "*A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence, for which a different charge from the one made against him might have been made under sub-section (1) of Section 221, or for which he might have been convicted under sub-section (2) thereof*".

So where the appellant had already been convicted under *Section 138* of the *Negotiable Instrument Act, 1881*, he could not be tried and punished on the same facts under *Section 420* or any other provision of IPC or any other statute.[55]

Issue Estoppel a Double Jeopardy – the principle of '*issue estoppel*' is also known as '*cause of action estoppel*' is different from the principle of double jeopardy or, *autre fois acqint*, as embodied in Section 403 of Cr.P.C. This principle of issue estopple applies where an issue of fact was tried by a competent Court and a finding was given in favour of accused which would operate an estoppel or *res judicata* against the prosecution. It would not bar the trial or conviction of the accused for a different or distinct offence. It would only preclude the reception of evidence that will disturb that finding of fact, even for a different offence which might be permitted by *Section 403 (2)* Cr.P.C. The rule of issue estoppel prevents re-litigation of an issue which has been determined in a Criminal Trial between the parties.[56]

3.6.3 *Prohibition against Self-incrimination*

The common law rule is that every accused is presumed to be innocent until contrary is proved and it is for the prosecution to establish the guilt and the accused cannot be compelled to make self-incriminatory statement. *Article 20(3)* embodies this rule of common law. It provides that no person accused of any offence shall be compelled to be a witness against himself. The Fifth Amendment of the American Constitution provides that no person shall be compelled in any criminal cases to be a witness against himself.

Article 20(3) of the Constitution of India provides protection to a person accused of an offence against compulsion to be a witness against himself. For the applicability of *Article 20 (3)* the following conditions are required to be satisfied :-

- *(a)* To claim the protection of *Article 20(3)* there should be a person accused of an offence, i.e. the protection of self-incrimination is available to a person accused of an offence.

- *(b)* It is a protection against compulsion to be a witness; and

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[55] *Kalla Veera Rao v. Goranthla Venkateswara Rao*, AIR 2011 SC 641.

[56] *Ravinder Singh v. Sukhbir Singh*, AIR 2013 SC 1048.

- *(c)* It is a protection against such compulsion resulting in his giving evidence against himself.

The scope of *Article 20(3) prima facie*, has been widened by our Supreme Court by interpreting the word '*witness*' to comprise both oral and documentary evidence, so that no person can be compelled to furnish any kind of evidence which is reasonably likely to support a prosecution against him. Such evidence must, however, be in the nature of a communication. The prohibition is not attracted where any object or document is searched and seized from the possession of the accused.[57]

Further, the immunity does not extend to civil proceedings or other than criminal proceedings.[58] The Supreme Court has also observed that in order to claim immunity from being compelled to make a self-incriminating statement, it must appear that a formal accusation has been made against the person at the time when he is asked to make the incriminating statement. He cannot claim the immunity at some general inquiry or investigation on the ground that his statement may at some later stage lead to an accusation.[59]

In ***Selvi v. State of Karnataka***,[60] the accused had challenged the validity of certain scientific techniques namely, Narcoanalysis, Polygraphy and Brain Finger Printing (BEAP) tests without their consent as violative of *Article 20 (3)* of the Constitution. They argued that these scientific techniques were softer alternatives to the regrettable use of third degree methods by investigations and violated right against self-incrimination in *Article 20 (3)* of the Constitution. The State argued that it was desirable that crime should be efficiently investigated particularly sex crimes as ordinary methods were not helpful in these cases.

So the issue was between '*efficient investigation*' and '*preservation of individual liberty*'. A three Judge Bench of the Supreme Court unanimously held – These tests are testimonial compulsions and are prohibited by *Article 20 (3)* of the Constitution. These tests do not fall within the scope of expression '*such other tests*' in Explanation of *Section 53*, Criminal Procedure Code. The Protection of self-incrimination is available at the stage of investigation also and it is also available to witnesses. In Narcoanalysis test, a drug is given to him so that he can divulge important information.

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[57] *M.P, Sharma v. Satish Chandra*, AIR 1954 SC 375.
[58] *Maqbool Hussain v. State of Bombay*, AIR 1953 SC 325.
[59] *Narayan Lal v. Maneek S. Mlstry*, AIR 1961 SC 29.
[60] AIR 2010 SC 1974.

The drug is known as Sodium Pentothal – used or introduced as general anaesthesia in surgical operations. The Polygraphy and Brain Finger Printing (BEAP) test is also known as the Wave Test. Electric waves are introduced into the mind. The compulsory administration of the narcoanalysis techniques constitutes cruel, inhuman or degrading treatment. *Article 21* of the Constitution disapproves of involuntary testimony irrespective of the nature and degree of coercion, threats fraud or inducement used to elicit the evidence.

The popular means of the terms such as '*torture and cruel*', '*inhuman or degrading*' treatment are associated with gory images of bloodletting and broken bones. A forcible invasion into a person's mental process is also an affront to human dignity and liberty often with grave and long and lasting consequences.

The International Conventions though not ratified by Parliament are of persuasive value since they represent an involving international consensus on the issue. *The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984)* – regarding the contention raised by the respondents that compelling interest demands such techniques for investigation of crimes in future the Court held that it is the function of the legislature to consider and make proper law on the issue. But if such matter comes before the Court, the Court shall interpret the mandate of the constitutional provisions available to the citizens and apply in their favour. The Court laid down the following guidelines for these tests :-

- *(i)* No Lie Detector Tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.
- *(ii)* If the Accused volunteers for a Lie Detector Test, he should be given access to a lawyer and physical, emotional and legal implications of such a test should be explained to him by the police and his lawyer.
- *(iii)* The consent should be recorded by a Judicial Magistrate.
- *(iv)* During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.
- *(v)* At the hearing the person in question should also be told in clear terms that the statement that if made shall not be a confidential statement to the Magistrate but will have the statement made to the police.
- *(vi)* The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.

- *(vii)* The actual recording of the Lie Detector shall be done by an independent agency (such as hospital) and conducted in the presence of a lawyer.
- *(viii)* A full medical and factual narration of the manner of the information receive must be taken on record.

In ***State of Maharastra v. Kamal Ahmed Mohammed Vakil Ansari***,[61] a bomb blasts case in seven different first class compartments of local trains of Bombay resulting in death of 187 persons and severe injuries to 829 persons, the accused respondents pressed for summoning the witnesses at Serial No. 63 and 66 as defence witnesses. The object for summoning them was that they had recorded the confessional statements of three witnesses during the course of investigation in Special Case No. 4 of 2009. Based on confessional statement, the witness at serial number 63 had accorded sanction for prosecution of the accused in a Special Case No. 4 of the 2009. The object of the accused-respondent was to show that others were responsible for actions for whom the accused respondents were being blamed. The question involved was whether the confessional statements of the three accused persons recorded in a Special Case No. 4 of 2009 would be relevant in the Special Case No. 21 of 2006. The counsel for the accused-respondents contended that since no accused could be compelled to be a witness against himself, it would not be open to the accused-respondents to summon the three accused persons who had made confessional statement in view of *Article 20 (2).*

The Court held that the plea advanced would not be available in view of the protection afforded to a witness who would find himself in such a situation under Section 132 of the Evidence Act. The three accused person in Special Case No. 4 of 2009 were not the accused in Special Case Number 21 of 2006.

4. SUMMARY

The foregoing study reveals that right to freedom is not absolute. Man as rational being desires to do many things, but in a civil society desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals. Therefore, Constitution has imposed by law certain reasonable restrictions as may be necessary in the largest interest of the community.

Further the study reveals that no person shall be prosecuted and punished for the same offence more than once. The study also makes it abundantly clear that no accused of any offence shall be compelled to be witness against himself. *Article 20* gives protection

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[61] AIR 2013 SC 1441.

against *ex-post facto* legislation, double jeopardy and self-discrimination. The proceeding contemplated in *Article 20* is criminal proceedings before a Court of law or a judicial tribunal.

Prosecution in this context means an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates an offence and regulates the procedure. The protection guaranteed by the said article extends to all persons and not merely to the citizens of India.

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6. SELF – ASSESSMENT QUESTIONS

1. Discuss the scope of freedom of speech and expression as envisaged in Article 19 (1) (a). Also enumerate the restrictions which can be imposed on this freedom.
2. Explain the scope of 'Freedom of Press' in India is pre-censorship of films justified under Article 19(2)?
3. Explain Double Jeopardy. Whether the benefit of Double Jeopardy is available in administrative and departmental proceedings?
4. Discuss various protections available to all persons under Article 20 of the Constitution. Explain with the help of decided case taw.
5. Discuss 'Protection against Self-incrimination' as fundamental right under the Indian Constitution.

6. Discuss the scope and content of the Right to Freedom of Speech and Expression enshrined in Article 19 of the Constitution of India. Do the rights to hold 'Bandh, Rallies, Strikes' etc. are the part of this right? Discuss with the help of decided cases.

7. Discuss the reasonableness of restrictions on political freedom of the citizens of India.

8. Comment upon the expanding horizon of the Fundamental Right of 'Freedom of Speech and Expression' under Article 19 of the Constitution of India. What are the new dimensions included in this right by the Supreme Court to fortify democratic set-up in India. Refer to decided cases.

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(DDE – 2018) **LL.M – I**

INDIAN CONSTITUTIONAL LAW AND THE NEW CHALLENGES

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RIGHT TO LIFE AND PERSONAL LIBERTY : VARIOUS DIMENSIONS OF RIGHT TO LIFE AND PERSONAL LIBERTY

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2. OBJECTIVE
3. PRESENTATION OF CONTENTS
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  - **3.2 Meaning of Right to Life and Personal Liberty**
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  - **3.4 Procedure Established by Law**
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4. SUMMARY

5. SUGGESTED READINGS

6. SELF – ASSESSMENT QUESTIONS

1. INTRODUCTION

Right to Life and Personal Liberty is the most cherished and pivotal Fundamental Human Right around which other rights of the individual revolves. The concept itself has been borrowed from the English political thought and has been enshrined in our Constitution under *Article 21* which states that '*No person shall be deprived of his life or personal liberty except according to procedure established by law*'.

The smallest article of eighteen words has the greatest significance for those who cherish the ideals of liberty. What can be more important than the right to life and liberty? When these are put to an end, all other rights become meaningless. The expansion of the content and meaning of the right to life and personal liberty, contained in *Article 21* of the Constitution, by the Supreme Court in the late 1970's and 1980's is one of the most stunning

instances of judicial creativity after the Court's formulation of the doctrine of basic structure in ***Kesavananda Bharti v. Kerala***[1]. What the Court is doing with the right to life and liberty goes beyond mere semantic inventiveness, and involves conceptual discoveries and procedural innovations. It has not only opened up possibilities of finding legal redress to a whole range of individual sufferings as well as collective problems, but has also 'fundamentatized' the modes of such redresses by linking them to the basic right to life and personal liberty.

The reformulation of the right to life under *Article 21* has been achieved in Stages. In the first stage personal liberty was elaborated as a multi-dimensional right having Interconnection with, and overlapping over, other fundamental freedoms. In the second stage the term life as referred to in *Article 21* was conceptually and poetically expanded in order to broaden the humanistic range of the right.

2. OBJECTIVE

Right to Life and Personal Liberty has come to occupy the position of '*broadening omnipresence*' in the scheme of Fundamental Rights. It has become a '*sanctuary for human values*' and therefore has been rightly termed as the '*fundamental of fundamental rights*'. The concept has now become more vital to fulfill the requirements of the vibrant democracy. It covers a vast canvas and encompasses, to some extent, all those rights which were essential for leading a life of dignity in the polity.

Although it, the procedure established by law does not mean every enacted piece of legislation, but means only just and reasonable law. The procedure for deprivation of life and personal liberty must be just, reasonable and not arbitrary or fanciful and principles of natural justice form an integral part of the procedure established by law. The creativity of the Indian judicial system stands out as the beacon light for all freedom lovers promising the development of mere rights when needed and ensuring a minimum degree of fairness in all legal proceedings.

Further, it is a standing testimony to the organic character of the Constitution and to the role of Constitutional Jurisprudence to the strengthening of rule of law and democratic governance. The activist approach of the Supreme Court through liberal interpretations has given new dimensions to the right to life and personal liberty.

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[1] AIR 1973 SC 1461.

In case of infraction, now the Court does not remain silent spectator but provides remedial relief by way of compensation. The revolution in the basic concept makes it imperative that the concept of Right to Life and Personal Liberty should be examined a new with reference to its origin, development, meaning, along with its various dimensions.

3. PRESENTATION OF CONTENTS

3.1 Protection of Life and Liberty

Right to life and personal liberty is the most precious, sacrosanct inalienable and fundamental of the fundamental rights of citizens. It is one of the most essential basic human rights in a democratic state. It is the backbone of human right movements both at national and international levels. The individual cannot attain the highest in him, unless he is in possession of certain rights and liberties which leave him as it were to breathe and expand. Moreover, freedom is necessary to man as bread and air.

3.2 Meaning of Right to Life and Personal Liberty

The '*right to life*' though the most fundamental of all, yet most difficult to define. It is the immediate gift of God and a right inherited by nature in every individual. In common parlance life means animation from birth to death of every living being, but in broad sense life means activeness, liveliness, physical or intellectual force, energy and the vitality etc.

The notion of life means the principle of animation and has to be understood as an anti-thesis of lifeless. The individual cannot attain the highest in him unless he is in possession of certain rights which leave him as it were to breathe and expand. Life is beyond price. Freedom and liberties are only for the living. The liberty sustains other liberties because without liberty of life and personal freedom no other civil liberty is possible. Life and personal freedom are the prized assets of an individual which are basic and primary. For the well existence of civil liberties, it is essential that there should be a well ordered State capable of adequately maintaining law and order both in times of peace and war.

The right to life does not merely mean the sanctity of life. It means the fullest opportunity to develop one's personality and potentiality to the highest level possible in the existing stage of our civilization. The mere right to exist will have little value, if it is to be bereft of any opportunity to develop or to bring out what is in every man or woman. It follows inevitably that the right to life is the right to live decently as a member of a civilized society and have all the freedoms and advantages that would go to make life agreeable, and living assured in a reasonable standard of comfort and decency.

On the other hand, the word "*liberty*" is derived from the Latin words '*liber*' and '*libertus*' and is defined in Encyclopaedia Britanica as a '*State of Freedom*' which is '*specially, opposed to political subjection, imprisonment or slavery*'. It is also defined as '*being free from captivity, imprisonment, slavery or despotic control*'. It is difficult to provide a comprehensive definition of liberty.

It can be found that '*liberty*' generally means the prevention of restraints and providing such opportunities the denial of which would result in frustration and ultimately disorder. Restraint is felt as evil when it frustrates the life of spiritual enrichment. Freedoms are opportunities which history has shown to be essential to the development of personality. Liberty always demands a limitation on political authority. Power as such when uncontrolled is always the natural enemy of freedom.

Further, liberty postulates the creation of a climate wherein there is no suppression of human spirits, wherein there is no denial of opportunity for full growth of human personality, wherein is held high and there is no servility of the human mind or enslavement of the human body.

The traditional meaning of personal liberty in India underwent a change in the modern age especially after the enactment of the Constitution. The original Draft proposal of the Indian Constitution used the word '*liberty*' but the Drafting Committee deliberately inserted the word '*Personal*' before it, so as to limit it, they wanted to distinguish it from the broad and sweeping concept of liberty. It was included as a Fundamental Right under *Article 21* in *Part III* of the Constitution.

3.3 Meaning and Scope of Person

The use of the term 'person' in *Article 21* shows that this basic right is granted not only to citizens but also to non-citizens. Thus, even a foreigner can claim this right. The founding-fathers of the Constitution bestowed their attention upon the question of personal liberty and the article was drafted to ensure the right to life and personal liberty to all human beings.

However, *Article 21* applies to only to natural persons. This is evident from the words used in this article namely '*his*' and '*personal*'. It has no application to corporate bodies. Artificial persons, however, will not come under the purview of *Article 21*. Liquidation of a society cannot, thus, be equated to deprivation of life or personal liberty. *Article 21* can be claimed only when a person is deprived of his '*life*' or '*personal liberty*' by the '*State*' as

defined by *Article 12*. Violation of the right to personal liberty by a private individual is not within the purview of *Article 21*.

3.4 Procedure Established by Law

Article 21 of the Constitution of India lays down that '*no person shall be deprived of his life or personal liberty except according to procedure established by law'*. Two expressions are important in Article 21: (i) Life and (ii) Personal Liberty. They are guaranteed and can be affected only by '*procedure established by law*'. These words have been borrowed from *Article 31* of the *Japanese Constitution*.

These words were used in the Indian Constitution so as to avoid the repetition of the chequrred history of the American '*due process*' clause. Article 21 had been debated in the Constituent Assembly, the entire debate was on the subject whether the expression '*due process of law*' should find place in draft *Article 15*. The debate in the Constituent Assembly shows that the expression '*due process of law*' was not accepted basically because the words '*due process*' had come to be interpreted by the Supreme Court of the United States as meaning '*fundamental principles of liberty and justice*', which brought in the conception of substantive reasonableness; whether a particular statute satisfied these requirements depended upon the view of the Judges deciding the case. The legislative enactments, therefore, became subject-matter of review because of the small word '*due*' in the aforesaid expression regarding which it was stated that it means, '*what is just and proper*'. This generated great uncertainty and gave wide power to the judiciary. The founding-fathers of the Constitution were well aware of the indeterminate and flexible nature of the terms '*due process of law*' and '*save in accordance with law*'.

Alladi Krishna Swami Ayyar who supported the phrase '*Procedure established by law*' came for judicial scrutiny in ***A.K. Gopalan v. State of Madras***.[2] The court observed that the term '*established*' under *Article 21* implies some degree of fairness, permanence and general acceptance. It is now well established that the '*procedure established by law*' to deprive a person of his life or personal liberty, must be just, fair and reasonable and it must not be arbitrary, fanciful or oppressive, that the procedure to be valid must comply with the principles of natural justice.

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[2] AIR 1950 SC 27.

3.5 Right to Life: Different Facets of the Right to Life

Every individual in a democratic setup wants freedom. Without freedom no individual can lead a life as a free citizen of a country. Freedom and liberties are only for the living. The word '*life*' in *Article 21* can be interpreted in the widest possible manner. It does not mean physical life, but also covers other expressions of life. It is something more than a mere biological existence of a human body.

Life also includes personality and whatever is reasonably required to give expression to life, its fulfillment and its achievements. The right to life does not mean the continuance of a person's animal existence. It means '*the fullest opportunity to develop one's personality to the highest level possible in the existing stage of our civilization*'. Inevitably, it means the right to live decently as a member of a civilized society. It is to ensure all freedom and advantages that would go to make life agreeable. The right implies to reasonable standard of comfort and decency. The right to life guaranteed by *Article 21* of the Constitution of India is not merely a fundamental right; it is a basic human right.

The following are the different dimensions/facets of right to life :-

3.5.1 *Right to Shelter*

The right to shelter is one of the principle rights that constitute the entire spectrum of Human Rights jurisprudence. The right to shelter was for the first time accepted as a part of the right to life, in ***Francis Coralie Mullin v. Union Territory of Delhi***.[3] It is, however, the Constitution Bench decision in ***Olga Tellis v. Union of India***,[4] which has put life and vigour to this requirement by protecting the slum dwellers and alternative accommodation for some categories of people were provided.

In ***Chameli Singh v. State of U.P.***,[5] it has been held that the right to shelter is a fundamental right under *Article 21* of the Constitution. In any organized society, the right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to benefit himself. Right to live guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilized society. All civil, political, social and culture rights enshrined in the Universal Declaration of Human Rights and Convention or under the Constitution of India cannot be exercised without the basic human rights.

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[3] AIR 1981 SC 746.

[4] AIR 1986 SC 180.

[5] (1996) 2 SCC 549.

Shelter for human being, therefore, is not a mere protection of his life and limb. It is home where he had opportunities to grow physically, mentally, intellectually and spiritually. Right to shelter therefore, includes adequate living peace, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc. so as to have easy access to his daily avocation. The right to shelter, therefore, does not mean right to a roof over one's head but right to all the infrastructure necessary to enable them to live and develop as a human being.

In view of the importance of the right to shelter, the mandate of the Constitution, and the obligation under the Universal Declaration of Human Right, the Court held that it is the duty of the State to provide housing facilities to Dalits and Tribes, to enable them to come into the mainstream of national life.

3.5.2 ***Right to Livelihood and Right to Work***

The other facet of right to life is that no person can live without means of livelihood. Right to livelihood is an integral facet to life. In 1993, the case of ***D.K. Yadav v. J.M.A. Industries***,[6] the Supreme Court held that right to life enshrined under *Article 21* includes the right to livelihood. The procedure prescribed for depriving a person of livelihood must meet the challenge of *Article 14* and so it must be right, just and fair and not arbitrary and illegal.

3.5.2.1 ***Access to Employment – Not to be Discriminatory***

In ***Charu Khurana v. Union of India*****,**[7] the Supreme Court held that Clause 4 of bye - laws framed by Cine Constume, make-up Artist and Hair Dressers Association, a registered trade Union was violative of *Section 21* of the Act did not make any distinction between men and women. It was also violative of *Article 21* of the Constitution for offending livelihood because membership of association provided access to employment as make-up artist.

Further, the bye-laws also stipulated domicile in State as condition for membership which invited frown of *Articles 14, 15*, and *21* of the Constitution. Duties of citizens enshrined in Article 51-A has been extended to collective duty of State which as such owe duty to provide equal opportunity to all citizens and to frame polices to ensure livelihood to men and women.

[6] 1993 SCR (3) 930.
[7] AIR 2015 SC 839.

3.5.2.2 *Rehabilitation*

The appellants, small scale shop-keepers in the vicinity of internationally revered Sai Baba at Shirdi Taluq who had been consistently held, neither encroachers nor trespassers of public property let out to them by the erstwhile Gram Panchayat but were compelled to clear the area in the public interest and for its overall development resulting in their displacement as a compelling necessity, had to be essentially rehabilitated or adequately compensated.[8]

3.5.2.3 *Suspension of M.L.A*

The suspension of an MLA from the House depriving him salary and other benefits incidental to the membership for the period of suspension is not violative of fundamental right of livelihood under *Article 21*.[9]

3.5.2.4 *Discontinue Liquor Vends on National Highways*

In ***State of Tamil Nadu v. K.Balu***,[10] the Supreme Court held that the policy of the Union Government to discontinue liquor vends on national highways is necessary to enforce the policy of the Government to safeguard the human lives. In doing so, the Court does not fashion its own policy but enforces the rights to life under *Article 21* of the Constitution based on the considered view of expert bodies. Further, no distinction can be made between the national and State highways, the safety of the users of the road is of paramount importance. The prohibition would only regulate the grant of such licences in a manner that would ensure that the consumption of alcoholic liquor does not pose dangers to the lives and safety of users of national and State highways.

The Court therefore, issued necessary directions *inter alia*, to States and Union Territories to forth-with cease and desist from granting licences for the sale of liquor along national and State highways.[11]

In a landmark judgment of ***Delhi Development Horticulture Employee's Union v. Delhi Administration***,[12] the Supreme Court has held that daily wages workman employed under the Jawahar Rogzar Yojna has no right of automatic regularization even though they have put in work for 240 or more days. The Court further held that although broadly interpreted and a necessary logical corollary, the right to life would include the right to livelihood and therefore right to work but this country has so far not found feasible to

[8] *Sayyed Ratanbhai Syeed v. Shirdi Nagar Panchayat*, AIR 2016 SC 1042 at p. 1059.

[9] *Alagaapuram R. Mohanraj v. Tamil Nadu Legislative Assembly*, AIR 2016 SC 867 at p. 878.

[10] AIR 2017 SC 262.

[11] *Ibid*., at pp. 268-274.

[12] AIR 1992 SC 789.

incorporate the right to work as a fundamental right. This is because the country has so far not attained the capacity to guarantee it, and not because it considers it any-the-less fundamental to life.

Therefore, it has been placed in the chapter on Directive Principles, *Article 41* of which enjoins upon the State to make effective provision for securing the same '*within the limits of its economic capacity and development*'. Thus, even while giving direction to the State to ensure the right to work, the framers of the Constitution thought it prudent not to do so without qualifying it.

3.5.3 *Right to Education*

Constituent Assembly realized that the entire philosophy of education needs to be revolutionized and after a long debate *Articles 41*, *45* and *46* have been adopted obligating the State to provide within a period of 10 years from the commencement of the Constitution for free and compulsory education for all children until they complete the age of 14 years.

In ***Mohini Jain v. State of Karnataka***,[13] the two judge bench of the Supreme Court consisting of *Justice Kuldeep Singh* and *R.N. Sahai*, held that right to education at all level is a fundamental right of citizen under *Article 21* of the Constitution and charging capitation fee for admission to education institutions is illegal and amounted to denial of citizen's right to education and also violative of *Article 14* being arbitrary, unfair and unjust.

In ***J.P. Unnikrishnan v. State of Andhra Pradesh***,[14] the apex Court was asked to examine the correctness of the decision given by the Court in Mohini Jain's case. The matter was referred to Constitution Bench and held that right to education upto the primary stage alone is a fundamental right as per the majority. This view has been taken by referring to *Articles 41*, *45* and *46* of the Constitution, more particularly to *Article 45*, which though find place in Part IV dealing with Directive Principles, stating that the State shall endeavour to provide within a period of 10 years from the commencement of the Constitution for free and compulsory education until they complete the age of 14 years, was taken to be a part of fundamental right. Construing this right in the light of the aforesaid Directive Principles, the Court held that every child/citizen of this nation had a right to free education until he completes the age of 14 years. Therefore, his right to education would be subject to the limits of economic capacity and development of State.

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[13] AIR 1992 SC 1858.

[14] AIR 1993 SC 2187.

The founding-fathers of the Constitution were clear-sighted enough to recognize that if India were to progress, education must be made compulsory from the age of 6 to 14. This foresight has now been honoured with the *86th Amendment Act, 2002* and *Article 21-A* is added in the Constitution according to which it shall be the duty of the State to provide free and compulsory education for the children of the age of 6 to 14 is a fundamental right. The then Union Minister of State, for Human Resource Development (HRD) M.A.A. Fatmi introduced the '*Right of Children to Free and Compulsory Education Bill, 2008*' in the Rajya Sabha on 15th December. 2008. The introduction of the Bill came after several abortive efforts to draft the enabling legislation without which the fundamental right which was enacted in December 2002 cannot come into effect. The Bill will provide every child in the age group of 6 to 14, the right to free and compulsory education.

The Bill also seeks to evolve norms and standards for primary education; complete with minimum qualifications for teachers, pupil-teacher ratio, and a ban on private institutions by teachers. The Bill also tries to rope in the private sector in this endeavour. Private schools will have to reserve 25 per cent seats in Class 1 every year for the children from the disadvantaged sections of society. The Bill prohibits collection of capitation fee, screening of either the parent or the child at the time of admission, detention or expulsion in any class till completion of elementary education, and physical punishment. The Bill provides that no child be denied admission for the lack of age proof.

In India, about 10 crore below the age of fourteen years are not attending full-time school and are engaged in one or the other type of work. Can a child realize the fundamental right to education, as guaranteed under *Article 21-A*, if he is simultaneously asked to continue as child labour? Child labour and right to education cannot go together.

The *IL0 Minimum Age Convention, 1973* (No. 138) came into force on 19 June, 1976. *Article 1* of the said Convention provides policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons. Para 2 of *Article 2* provides that the minimum age shall not be less than the age of completion of compulsory schooling and in any case not less than 16 years. However, para 4 reduces this age limit to 14 years for members whose economy and additional facilities are insufficiently developed.

Moreover, *Article 32* of the UN Convention on the Rights of the Child recognizes the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the Child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, etc.

The existence of child labour after sixty-two years of independence of the country would make mockery of the right to compulsory schooling as envisaged in *Article 21-A* of the Constitution of India.

3.5.4 *Right to Health and Timely Medical Aid*

Guarantee to the right to life and personal liberty would be meaningless unless medical care is assured to a sick or unhealthy person as it may be essential for preservation of life. The Courts in India are showing keen interest in protecting the health of the people. In ***Consumer Education and Research Centre v. Union of India***,[15] the Supreme Court laid down that social justice which is a device to ensure life to be meaningful and liveable with human dignity required by the State to provide to workmen facilities and opportunities to reach minimum standard of health, economic security and civilized living. Right to health, medical aid to protect the health and vigour to a worker in service or post retirement is a fundamental right under *Article 21* read with *Articles 39(e)*, *41, 43, 48-A* and other related Articles.

In ***Paschim Bang Khet Mazdoor Samiti v. State of West Bengal***,[16] the Supreme Court has held that to receive timely medical aid by a person was his fundamental right under *Article 21* of the Constitution. The Court held that the State could not avoid the responsibility of providing medical aid to the people in the hospital run by the State.

3.5.5 *Duty to Preserve Life - Medico-Legal Cases*

The false notion that the doctors would not start medical treatment in medico-legal cases unless the police come and complete their formalities has also been removed once for all by the Supreme Court in ***Parmahand Katara v. Union of India***.[17] The Court held that when an injured citizen is brought for medical treatment, the professional ethics would require that he should be instantaneously attended and procedural criminal law should be allowed to operate thereafter. The court further held that *Article 21* of the Constitution casts the obligation on the State to preserve life.

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[15] AIR 1995 SC 922.
[16] (1996) 4 SCC 37.
[17] AIR 1989 SC 2039.

3.5.6 *Right to Access to Road*

The Supreme Court in ***State of Himachal Pradesh v. Umed Ram Sharma***,[18] held that the right to life includes the quality of life as understood in its richness and fullness by the ambit of the Constitution. The Court in clear cut words observed that right under Article 21 embraces not only physical existence of life but the quality of life and for residents of hilly areas, access to road is access to life itself. Accordingly, there should be road for communication in reasonable conditions in view of our Constitutional imperatives and denial of that right would be denial of life.

3.5.7 *Right to Live with Human Dignity*

Life is beyond price. A fruitful and meaningful life presupposes dignity, honour, health and welfare. In the modern '*Welfare Philosophy*', it is for the state to ensure these essentials of all life to all persons. The term dignity has been derived from Latin word '*dignitas*' which denotes a quality of being worthy or honourable. Dignity means, '*honour and authority: reputation*'.

In ***Menaka Gandhi v. Union of India***,[19] the Supreme Court added another dimension to *Article 21*. It held that the right to '*live*' is not merely confined to physical existence but it includes within the ambit the right to live with human dignity.

It is crystal clear that in any organized society, right to live to a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured all facilities to develop himself and is freed from restrictions which inhibit his growth.

3.5.8 *Right to Live in Healthy Environment*

The '*right to life*' under *Article 21* means a life of dignity to be lived in a proper environment free from dangers of diseases and infection. In 1991 in the case of ***Subhas Kumar v. State of Bihar***,[20] it has been held that public interest litigation is maintainable for ensuring enjoyment of pollution free air and water; and if anything endangers or impairs that quality of life in derogation of laws, a citizen has a right to take recourse even to *Article 32* of the Constitution for removing the pollution of water or air which is detrimental to the quality of life.

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[18] AIR 1986 SC 847.

[19] AIR 1978 SC 597.

[20] (1991) 1 SCC 598.

3.5.9 ***Protection of Ecology and Environmental Pollution***

The closure of polluting industries:-

- *(a)* Large-scale pollution as caused by limestone quarries adversely affecting the safety and health of the people living in the area.[21]

- *(b)* SC directed the company manufacturing hazardous and lethal chemicals and gases posing danger to health and life of workmen and people living in the neighborhoods, to take all necessary safety measures before re-opening the plant.[22]

- *(c)* The SC ordered the closure of tanneries at Jajman near Kanpur, polluting the river Ganga.[23]

- *(d)* In 1996 in the case of ***M.C. Mehta v. Union of India***, the SC ordered the shifting of 168 hazardous industries operating in Delhi as they were causing danger to the ecology and directed that they be reallocated lands to the NCR as provided in the Master Plan for Delhi. -

- *(e)* ln 1996 in ***Vellore Citizen's v. Welfare Forum Union of India***, the SC held that such industries though are of vital importance to the country's development but they cannot be allowed to destroy the ecology, degrade the environment and pose a health hazard and cannot be permitted to continue their operation unless they set up pollution control devices. The SC held that the '*precautionary principle*' and the polluter pays principle are essential feature of sustainable development and has to be adopted.

- (f) In 1997 in the case of ***S. Jaganath v. Union of India***, the SC held that setting up of shrimp (small fish) culture farms within the prohibited areas and in ecology fragile coastal areas have adverse effect on environment and coastal ecology and economics and, therefore, they cannot be permitted to operate.

3.5.10 ***Right to Sleep***

In ***Ramlila Maidan v. Home Secretary, Union of India,***[24] on the night of 4th June, 2011, the men and women belonging to different age groups who had come to Ramlila Maidan to participate in the Yoga Training camp led by Baba Ram Dev and for which permission had been given were sleeping. The permission to hold the camp was withdrawn and *Section 144* of Cr.P.C. was imposed and without any notice of it, the Police in an attempt to disperse gathering at about and after 1.00 A.M. on 4th / 5th June 2011 resorted to use of tear gas and lathi charge to disperse the peaceful sleeping crowd. A number of men and women

[21] *Rural Litigation and Entitlement Kendra v. State of UP*, 1985.
[22] *Shiram Food and Fertilizer case*, 1986.
[23] *MC Mehta v. Union of India*, 1987.
[24] 2012 Cr. LJ 3516 (SC).

were injured resulting into death of a woman. The people who were sudden woken up did not know where to go. A Bench of two Judges of the Supreme Court, Justice Swatanter Kumar and Justice Dr. B.S. Chauhan took *suo motu* cognizance of the matter and issued the necessary directions for imposing the provisions of *Section 144* of Cr.P.C., revoking the permission of holding the assembly and compensation to the deceased and injured persons or their representatives.

Justice Swatanter Kumar held that "*the decision to forcibly evict the innocent public sleeping in the mid-night was amiss and suffered from the element of arbitrariness and abuse of power to some extent. The Police force failed to act in accordance with the rules and standing orders*".

Primarily, negligence was attributed to some members of the force. The Police, in breach of their duty, acted with uncontrolled force. No material was placed on record by the Police authorities or the administration to show a genuine threat or reasonable bias of communal disharmony, social disorder and public tranquility or harmony on the night of 4th June, 2011. The restriction imposed on the right to freedom of speech and expression was unsupported by cogent reasons. It was an invasion of the liberties and fundamental freedoms. The restriction was unreasonable and unwarrantedly executed. The action demonstrated the might of the State and was an assault on the very basic democratic values enshrined in our Constitution.

Justice Dr. B.S. Chauhan held that Sleep is necessity and not a luxury. It is necessary for optimal health and happiness as it directly affects the quality of the life of an individual when awake inducing the mental sharpness, emotional balance, creativity and vitality. Sleep is a biological and essential ingredient of the basic necessities of life. If sleep is disturbed, the mind gets disoriented and it disrupts health cycle. If deprivation is brought about in odd hours, it also causes energy disbalances, indigestion and also affects cardiovascular health. The deprivation of sleep would result in mental and physical torture both. Sleep is a self-rejuvenating element of our social cycle and therefore is a part and parcel of human life. Right of privacy and right to sleep have always been treated to be fundamental right like a right to breath, to eat, to drink, to blink etc. Any suspicious or conspiratory thing on the part of the assembly could have been done in any unlawful and derogatory manner that did violate the basic human rights of the crowd to have a sound sleep which is also a constitutional freedom acknowledged under *Article 21* of the Constitution.

3. 5.11 *Right to Die*

The Right to Die is legal in countries like the Netherlands, Belgium, parts of Australia, and the American state of Oregon but it continues to be illegal in most of the world. Venkatesh's plea has once again started the discussion over the issue of right to die. Venkatesh's mother appealed to the Andhra Pradesh High Court on his behalf seeking permission for donating his organs. His plea was rejected.

The sanctity of the human life is a basic premise in the Constitution of India.

The question regarding the right to die was first raised before the jBombay High Court in ***State of Maharashtra v. Maruti Sripatl Dubal*** in 1987. In historic judgment the High Court held that the right to life guaranteed by *Article 21* includes a right to die. Therefore, the Bombay High Court struck down *Section 309* of IPC which provides punishment for attempt to commit suicide by a person as unconstitutional. But the Andhra Pradesh High Court in 1988 in the case of ***Chenna Jagadeesswar v. State of Andhra Pradesh,***[25] held that the right to die is not a fundamental right within the meaning of *Article 21* and hence *Section 309* of IPC is not unconstitutional.

In 1994, in the case of ***P. Rathinam v. Union of India***,[26] the Supreme Court upheld the verdict given by Bombay High Court in the case *Maruti Sripati Dubal* held that a person has a 'right to die' and therefore, *Section 309* of the IPC was violative of *Article 21* and hence it is void. A person cannot be forced to enjoy right to life to his detriment, disadvantage or disliking. The 'right to live' in *Article 21* of the Constitution includes the 'right to live' in *Article 21* of the Constitution includes the 'right not to live'.

But the court rejected the plea that '*euthanasia* (mercy killing)' should be permitted by law.

But in 1996, in ***Gian Kaur v. State of Punjab***, a five judge Constitution Bench of the Supreme Court overruled the *P. Rathinam's case* and held that the '*right to die*' is not a part of the '*right to life*' under *Article 21* of the Constitution. Whatever may be the philosophy of permitting a person to extinguish his life by committing suicide, it is difficult to construe *Article 21* to include within if the '*right to die*' as a part of the fundamental right guaranteed therein.

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[25] AIR 1988.

[26] (1994) Cr. L J 1605.

Thus, the *Section 309* of the Indian Penal .Code 1860 providing punishment for an attempt to commit suicide is not violative of *Article 21* and *14* of the Constitution of India. The apex court observed in that case '*Right to Life*' is a natural right embodied in *Article 21* but suicide is an unnatural termination or extinction of life and, incompatible and inconsistent with the concept of '*right to life'*.

3.5.11.1 *Present Status and Euthanasia*

In nutshell, the Supreme Court overruled the judgment of the Bombay High Court in *Maruti Sripati Dubal v. State of Maharashtra* and its earlier decision in *P. Rathinam v. Union of India* cases wherein *Section 309* IPC 1860 was held to be constitutional. It upheld the judgment of the Andhra Pradesh High Court holding that *Section 309* of the IPC was not violative of *Articles 21* and *14* of the Indian Constitution and therefore, it cannot be declared null and void. Considering this, the plea of Venkatesh was not entertained.

In ***Aruna Ramchandra Shanbaug v. Union of India***,[27] a petition was filed under *Article 32* of the Constitution for M.S. Shanbaug by Ms. Pinky Virani, a journalist, claiming to the next friend of the petitioner wherein a prayer was made for subjecting Ms. Shanbaug to mercy killing since she was being forced to live her life stripped of basic dignity. Ms. Aruna Ramchandra Shanbang stipped into coma after she was sexually assaulted by a ward boy at Mumbai's King Edward Memorial Hospital. It was stated in the petition that Ms. Shanbaug is in a persistent vegetative state, her brain is virtually dead and she is oblivious to the outside world. She can neither see nor hear anything nor can she express herself or communicate, in any manner whatsoever. There is not the slightest possibility of any improvement in her condition and her body lies on the bed in the Hospital, like a dead animal, and this has been the position for the last 37 years.

The prayer of the petitioner was that the respondents be directed to stop feeding Ms. Shanbaug and let her die peacefully. The Union of India opposed the plea of Aruna and submitted that Aruna have the right to live in her present state; terminating her life by withdrawing hydration/food/medical support will be cruel, inhuman and intolerable. More so it is contrary to law. Learned Attorney General stated that the report of the Law Commission of India on euthanasia has not been accepted by the Government of India and further submitted that Indian society is emotional and care-oriented. Attorney General opposed both forms of euthanasia (active and passive) and Mr. T.R. Andhyarujina, learned Senior Counsel only opposed active euthanasia.

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[27] AIR 2011 SC 1290.

Justice Markanday Katju and *Justice Gyan Sudha Mishra* dismissed the petition filed on behalf of Shanbaug and observed that passive euthanasia is permissible under supervision of law in exceptional circumstances but active euthanasia is not permitted under the law. Moreover, Supreme Court recommended to decriminalized attempt to suicide by erasing the punishment provided in Indian Penal Code and asked Parliament to examine it. They said that a person attempt to suicide in depression, and hence he needs help, rather than punishment.

The Supreme Court's decision has highlighted a significant legislative lacuna on the subject of euthanasia. It is upto the Parliament to consider the complexities while drafting a bill on the subject of euthanasia.

Meanwhile, society needs to be sensitized to the issue. Educating people about the law and the medical science would prepare them to take a right decision at appropriate time since tomorrow there may be cure to a medical state perceived as incurable today. Canadian writer ***Michael Coren*** has rightly stated that:

"You matter because you are you
You matter to the last moment of your life,
And we will do all we can,
Not only to help you die peacefully.
But also live until you die."

3.5.12 ***Abortion Issue and Right to Die***

The Bhayandar resident and his wife have initiated Mumbai's first legal challenge to the country's 37-years-old-law, preventing abortion beyond 20 weeks unless the pregnancy constitutes a health for the mother.

The Bombay High Court division bench comprising *Justice P.B. Mujumdar* and *A.A. Sayyadhas* has rejected the plea. The court said that since the medical report does not indicate either situation, 24 week old pregnancy cannot be terminated as per the codified law. The country's law permits termination of pregnancy within 20 weeks.

The government has ruled out amending the abortion laws in consideration of cases like that of Niketa Mehta who wanted to terminate her 26-week pregnancy as the child could be born with a congenital heart defect.

The Right to Die is legal in countries like the Netherlands, Belgium, parts of Australia, and the American state of Oregon but it continues to be illegal in most of the world. Venkatesh's plea has one again started the discussion over the issue of right to die. Venkatesh's mother appealed to the Andhra Pradesh High Court on his behalf seeking

permission for donating his organs. His plea was rejected. The sanctity of the human life is a basic premise in the Constitution of India.

The question regarding the right to die was first raised before the Bombay High Court in ***State of Maharashtra v. Maruti Sripatl Dubal*** in 1987. In historic judgment the High Court held that the right to life guaranteed by *Article 21* includes a right to die. Therefore, the Bombay High Court struck down *Section 309* of IPC which provides punishment for attempt to commit suicide by a person as unconstitutional. But the Andhra Pradesh High Court in 1988 in the case of ***Chenna Jagadeesswar v. State of Andhra Pradesh,***[28] held that the right to die is not a fundamental right within the meaning of *Article 21* and hence *Section 309* of IPC is not unconstitutional.

In 1994, in the case of ***P. Rathinam v. Union of India***,[29] the Supreme Court upheld the verdict given by Bombay High Court in the case *Maruti Sripati Dubal* held that a person has a 'right to die' and therefore, *Section 309* of the IPC was violative of *Article 21* and hence it is void. A person cannot be forced to enjoy right to life to his detriment, disadvantage or disliking. The '*right to live*' in *Article 21* of the Constitution includes the '*right to live*' in *Article 21* of the Constitution includes the '*right not to live*'.

But the court rejected the plea that '*euthanasia* (mercy killing)' should be permitted by law.

But in 1996, in ***Gian Kaur v. State of Punjab***, a five judge Constitution Bench of the Supreme Court overruled the *P. Rathinam's case* and held that the '*right to die*' is not a part of the '*right to life*' under *Article 21* of the Constitution. Whatever may be the philosophy of permitting a person to extinguish his life by committing suicide, it is difficult to construe *Article 21* to include within if the '*right to die*' as a part of the fundamental right guaranteed therein.

Thus, the *Section 309* of the Indian Penal Code 1860 providing punishment for an attempt to commit suicide is not violative of *Article 21* and *14* of the Constitution of India. The apex court observed in that case '*Right to Life*' is a natural right embodied in *Article 21* but suicide is an unnatural termination or extinction of life and, incompatible and inconsistent with the concept of '*right to life'*.

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[28] AIR 1988.

[29] (1994) Cr. L J 1605.

3.5.12.1 *Present Status*

In nutshell, the Supreme Court overruled the judgment of the Bombay High Court in *Maruti Sripati Dubal v. State of Maharashtra* and its earlier decision in *P. Rathinam v. Union of India* cases wherein *Section 309* IPC 1860 was held to be constitutional. It upheld the judgment of the Andhra Pradesh High Court holding that *Section 309* of the IPC was not violative of *Articles 21* and *14* of the Indian Constitution and therefore, it cannot be declared null and void. Considering this, the plea of Venkatesh was not entertained.

3.5.13 *Right to Social Security and Protection of the Family*

Right to Life guaranteed under *Article 21* has been given extended connotation so as to include within its ambit '*the right to social security and protection of the family*'.

In ***Calcutta Electricity Supply Corporation ((India) Ltd. v. Subhash Chandra Bose***,[30] K, Ramaswamy, J., while interpreting *Article 39 (e)* of the Constitution held that social and economic justice was a fundamental right. The Court explained that right to life and dignity of person and status without means, were cosmetic rights. Socio-economic rights were, therefore, basic aspirations for meaningful right to life and that '*the right to social security and protection of the family were integral part of the right to life'*.

3.5.14 Right against Inhuman Treatment by the Police

In ***Kishore Singh v. State of Rajasthan***,[31] the Supreme Court held that the use of 'third degree' method by police is violative of *Article 21* and directed the Government to take necessary steps to educate the police so as to inculcate a respect for the human person. The court also held that the punishment of solitary confinement for a long period from 8 to 11 months and putting bar fetters on the prisoner in jail for several days on filmsy ground like 'loitering in the prison', 'behaving insolently and in an uncivilized manner', 'tearing of his history ticket' must be regarded as barbarous and against human dignity and hence violative of *Articles 21, 19*, and *14* of the Constitution. Section 46 of the Prison Act and Rajasthan Prison Rules must be in conformity with *Article 21* of the Constitution. "*Humanity dignity is a clear value of our Constitution not to be bartered away for mere apprehension entertained by jail officials*" declared, *Krishna Iyer, J.*

Similarly, torture and ill-treatment of woman suspects in police lock-ups has been held to be violative of *Article 21* of the Constitution. The Court gave detailed instruction to concern authorities for providing security and safety in police lockup and particularly to

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[30] AIR 1992 SC 573.

[31] AIR 1981 SC 625.

women suspects. Female suspects should be kept in separate police lockups and not in the same in which male accused are detained and should be guarded by female constables. The Court directed the I.G. Prisons and State Board of Legal Aid Advice Committee to provide legal assistance to the poor and indigent accused (male and female) whether they are undertrial or convicted prisoners.[32]

In *Re-Inhuman Conditions in 1382 prisons*,[33] on a letter written by *Ex. CJI R.C. Lahoti* to the Supreme Court of India, inviting the attention of the Court as a citizen of India regarding the inhuman treatment to the person being sentenced from fellow prisoners and prison officials or poor preparation in prison for a productive life afterward and the Courts rarely considering tragic personel pasts partly responsible for criminal behavior, or how the communities and families of a defendant do suffer during and long after his imprisonment requesting the Court to treat it as P.I.L. The Supreme Court registered this letter as P.I.L and held that prisoners like all human beings deserved to be treated with dignity.

3.6 Personal Liberty: Different Facets

When the Constitution of India was being framed, the word used in the draft as prepared even upto to stage of the Advisory Committee was '*liberty*' without it being qualified by the word '*personal*'. But then, the Drafting Committee qualified the word '*liberty*' by '*personal*' being of the view that otherwise liberty '*might be construed very widely so as to include even the freedoms already dealt in draft Article 13*'. No objection was taken in the Constituent Assembly about the addition of the word '*personal*' when the draft was debated. The Result is that *Article 21* as it finally found place in our paramount parchment protects personal liberty.

The expression '*personal liberty*' has undergone a change through judicial process. The expression is not confined to mere freedom from bodily restraint and '*liberty*' under the law, but extends to full range of conduct which the individual is free to pursue. The width, scope and content of expression '*personal liberty*' came up for examination by a Constitution Bench in a meaningful was in ***Kharak Singh v. State of U.P.***, [34] in which it was stated:

> "*Having regard to the terms of Article 19(1)(d), it must be taken that the expression is used to include the right to move about or rather of locomotion. The right to move about being excluded, its narrowest interpretation would be that it comprehends*

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[32] *Sheela Barse v. State of Maharastra*, (1983) 2 SCC 96.

[33] AIR 2016 SC 993.

[34] AIR 1963 SC 1295.

nothing more than freedom from confinement within the bounds of a prison, in other words, freedom from arrest and detention, from false imprisonment or wrongful confinement."

Personal Liberty has both narrow and wider meaning. In its narrow sense, it means protection against arbitrary arrest or detention. But, in the wider sense, it includes all liberties essential in a democracy for the development of human personality in its fullest extent and happy life. Its purpose is to help the individual to find his own viability, to give expression to his creativity and to prevent governmental or other forces from alienating the individual from his impulses.

The author turns to examine some of the specific areas where courts have expanded the scope of personal liberty in India.

3.6.1 *Right to Privacy*

Privacy is a culturally limited concept. It varies with the times, historical context, the state of culture and the prevailing judicial philosophy. The customs related to privacy differ greatly from culture to culture, from situations to situations and from social system to social system. The question '*what is privacy*' has therefore, remained a problem for those who have made an attempt to define it and a few scholars have even abandoned their effort to define it. The concept of privacy in its broad sweep covers number of aspects, for example, non-disclosure of information about oneself, his sexual affairs, privacy of business secrets and non-observance by other etc. The right of privacy is defined as the right to be let alone, the right of a person to be free from unwarranted publicity and the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned.

The issue of privacy is pregnant matter in India. It shows the lack of privacy consciousness on the part of Indian citizens. The privacy is that '*area of man's life which, in any given circumstances, a reasonable man with an understanding of the legitimate needs of community would think it wrong to invade*'.

In ***Nihal Chand v. Bhagwan Del***,[35] the Allahabad High Court while emphasizing the importance of right of privacy, observed that right to privacy is based on natural modesty and human morality. It is not confined to any class, creed, colour or race. The birth right of a human being and is very sacred.

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[35] AIR 1935 All. 1002.

In ***re-Ratanmala***,[36] the right to privacy even of a prostitute was recognized as an important right. The behavior of a police officer who, while raiding a brothel, proceeded to the bed room of a girt, and pushed open the door even without the civility of knock to prepare her for the intrusion, was accordingly held legally inexcusable.

Similarly, in the ***State of Maharashtra v. Madhukar Narain,***[37] it has been held that the '*right to privacy*' is available to a woman of easy virtue and no one can invade her privacy.

In ***Mr. 'X' v. Hospital 'Z'***,[38] the question before the apex Court was whether the disclosure by the doctor that his patient, who was to get married had tested HIV positive, would be violative of patient's right to privacy, an essential component of right to life envisaged by *Article 21*. The Division Bench of the Supreme Court answered the question in negative and ruled that the right to privacy was not absolute and might be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.

The court observed that in case of clash in the patient's right to privacy and his proposed wife's right to lead a healthy life, the right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations could not be kept at bay.

Thus, the decisions discussed above enable us to conclude that the Supreme Court has, the cherished concept of right to privacy to a new and unprecedented height with a zeal to translate the philosophy of right to life and personal liberty into reality. The European Union decided to regulate the flow of information about individuals, ostensibly to prevent corporate intrusion upon individual privacy. The member nations have agreed to obstruct the export of personal data to nations that do not establish '*adequate*' privacy protection. Privacy is an interest with several dimensions. One of these dimensions is the privacy of personal data, also known as '*data privacy*' or '*information privacy*'. The essence of this privacy of personal data is the understanding that individuals can legitimately claim that data about themselves should not be automatically available to other individuals and organizations, and that, even where data is processed by another party; the individual must be able to exercise a substantial degree of control over that data and its use. India's Parliament seems to have

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[36] AIR 1962 Mad, 31.
[37] AIR 1991 SC 207.
[38] AIR 1989 SC 494.

largely neglected the issue of privacy of personally identifiable information. Therein only a single provision dealing with this and that provision is very limited in its scope. *Section 72* of the *Information Technology Act, 2000* establishes an Information Technology offence of '*Breach of Confidentiality and Privacy*'.

3.6.2 *Right to Privacy available to a Woman of Easy Virtues*

In ***State of Maharastra v. Madhulkar Narain***,[39] it has been held that the 'right to privacy' is available even to a woman of easy virtue and no one can invade her privacy. A Police Inspector visited the house of a lady in uniform and demanded to have sexual intercourse with her. On refusing he tried to have her by force. She raised a hue and cry. When he was prosecuted he told the Court that she was a lady of easy virtue and therefore her evidence was not to be relied. The Court rejected the argument of the applicant and held him liable for violating her right to privacy under *Article 21* of the Constitution.

3.6.3 *Right to Privacy and Virginity Test*

In ***Surjit Singh v. Kanwaljit Kaur*,**[40] the Punjab and Haryana High Court held that allowing medical examination of a woman for her virginity would amount to violation of her right to privacy and personal liberty enshrined under *Article 21* of the Constitution. In this case the wife filed a petition for a decree of nullity of marriage on the ground that the marriage had never been consummated because the husband was impotent. The husband took the defence that the marriage was consummated and he was not impotent. In order to prove that the wife was not virgin, the husband filed an application for her medical examination.

The Court held that allowing the medical examination of a woman's virginity violates her right to privacy under *Article 21* of the Constitution. Such an order would amount to roving enquiry against a female who is vulnerable even otherwise. The virginity test cannot constitute the sole basis, to prove the consummation of marriage.

3.6.4 *Right of Women to Produce Child or Refuse to Participate in Sexual Act*

In ***Suchitra Srivastava v. Chandigarh Administration*,**[41] the Supreme Court has held that personal liberty in *Article 21* includes the right to make reproductive choice (to produce child or not to produce). In view of this woman's right to privacy, dignity and bodily integrity should be respected. In the instant case, a woman of Chandigarh Nari Niketan had become pregnant due to rape. The Chandigarh Administration approached the High Court for

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[39] AIR 1991 SC 207.

[40] AIR 2003 P & H 353; See also *Sharda v. Dharmpal*, 2003 AIR SCW 1950.

[41] AIR 2010 SC 235.

approval for the termination of her pregnancy as she was '*mentally retarted'* and an orphan having no parent or guardian to look after her or her prospective child. Medical experts opinion was that she was suffering only from mild indication of congenital defects in child and had completed 19 weeks of pregnancy (maximum 20 weeks for termination).

The High Court directed to terminate pregnancy by invoking *parents partriae* doctrine. The appellants (private party) filed an appeal in the Supreme Court against this order. The Supreme Court held that a woman has the right of choice to have personal liberty as understood under Article 21 of the Constitution. There should be no restriction on the exercise of reproductive choice she can refuse to participate in sexual act or alternatively insist on the use of contraceptives methods. This means that she is entitled to carry on pregnancy to its full term, to give birth and subsequently raise children. There is surely the states 'compelling interest' in protecting the life of the prospective child. Therefore, termination of pregnancy is only permitted when conditions specified in the applicable statute have been fulfilled.

Hence, the MTP Act, 1971 can also put reasonable restrictions on the reproductive choices. The Act makes a distinction between '*mental illness'* and '*mental retardation'*. In case of mental illness guardian's consent is necessary for termination of pregnancy but in case of mental retardation the woman herself is capable of having her own consent. Accordingly, the Court quashed the order of the High Court. The doctrine of parents partriate invoked by the High Court is applicable in case of those persons who are minors or those who are found mentally incapable of making informed decisions for them. The Court also referred the principle contained in *the United Nations Declaration on Right to Mentally Retarded Person, 1971*. The Chairman of the National Trust for Welfare of persons has given an affidavit to look after interests of the woman.

3.6.5 ***Right to Privacy and Aadhaar Card***

In ***Justice K.S. Puttaswamy v. Union of India*,**[42] the Aadhaar Card Scheme of the Government of India, under which the Government of India was collecting and compiling both the demographic and biometric data of the residents of the country to be used for various purposes, was attacked on various counts including the violation of right to privacy.

[42] AIR 2015 SC 3081.

Shri Mukul Rohatgi, the Attorney-General, submitted that in view of Supreme Court's judgments in *M.P. Sharma v. Satish Chandra*,[43] and *Kharak Singh v. State of U.P.*,[44] decides by eight Judge Bench and six Judge Bench respectively. The legal position regarding right to privacy as a fundamental right to privacy was doubtful. The impermissible and divergence of opinion commenced with the judgment of Supreme Court decided by smaller Benches of two or three Judges in *Gobind v. State of M.P.*,[45] *R.Rajagopal v. State of Tamil Nadu*,[46] and *People Union for Civil Liberties, (PUCL) v. Union of India*.[47] Such divergence of opinion was also submitted by the counsel of one of the respondents.

Since there appeared to be certain amount of unresolved contradiction in the law declared by the Supreme Court, it directed the Registry the matter to be placed before the Chief Justice of India for appropriate orders. The Court by an interim order directed the Union of India to give wide publicity in the electronic and print media including radio and television networks that it was not mandatory for a citizen to obtain an Aadhaar Card and the production of an Aadhaar Card not to be a condition for obtaining any benefit otherwise due to a citizen. Besides, the Unique Identification Number or the Aadhaar Card would not be used by the respondents for any purpose other than PDS Scheme and in particular for the purpose of distribution of food grains, etc., and cooking fuel, such as kerosene and LPG distribution Scheme.[48]

3.6.6 *Right to Travel Abroad*

The right to travel has assumed a special significance particularly after World War. It is considered as one of the indispensable rights of persons in all democratic countries of the world. In India, *Article 19* of the Constitution which guarantees freedom of movement '*within the territory of India'* did not specifically provide for the right to travel abroad. Further, *Article 21* which guarantees personal liberty does not specifically include fight to travel abroad. Confronted with this situation, the Indian judiciary made a significant contribution by interpreting *Article 21* as to include right to travel abroad in it. To meet the emerging situation created by the judicial interpretation the Parliament enacted *Passport Act, 1967.*

[43] AIR 1954 SC 300.
[44] AIR 1963 SC 125.
[45] AIR 1975 SC 1378.
[46] (1994) 6 SCC 632; AIR 1995 SC 264.
[47] AIR 1997 SC 568.
[48] Per J. Chelameshwar, S.A. Bodde and C.Nagappa, JJ.

There are catena of cases wherein the courts have given wider meaning to the word '*personal liberty*'. In the absence of right to travel abroad in *Article 21*, the Indian judiciary made significant contribution by interpreting it to include right to travel abroad. The notable cases on right to travel abroad are ***Satwant Singh Sawhney v. Assistant Passport Officer***,[49] ; ***Maneka Gandhi v. Union of India***,[50] ; and ***Bhawanl Shankar Mukherjee v. State***.[51]

3.6.7 ***Right against Illegal Detention***

According to *Article 22(2)* of the Constitution of India a person arrested and detained in custody is to be produced before nearest Magistrate within a period of 24 hours of his arrest and no such person is to be detained in custody beyond this period without the authority of Magistrate. Hence, the accused can be detained in police custody or in jail only with the authority of the court. But often we find in newspaper reports of violations of these provisions by police.

The ***Khadra Pahadlya v. State of Bihar***,[52] is the glaring example of police apathy. The instances of illegal confinement seem to make the mockery of our legal system. The apex Court in ***Nilima Prlyadarshini v. Store of Bihar***,[53] took a serious view of delay in placing before it matter of illegal confinement of a woman. The court has observed that as a long time has already elapsed and suitable action against officials who were found responsible for this delay and also to ensure that such aberrations were not repeated.

In ***Joginder Kumar v. State of U.P***.,[54] the apex Court has laid down the following guidelines governing arrest of a person during investigation:-

- *(i)* An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person, who is known to him or likely to take an interest in his welfare, told as far as practicable that he has been arrested and where he is being detained.
- *(ii)* The police officer shall inform the arrested person when he is brought to the police station of this right.

[49] AIR 1967 SC 1836.
[50] AIR 1978 SC 597.
[51] AIR 1993 C. Cr. LR 23.
[52] AIR 1981 SC 941.
[53] AIR 1987 SC 2021.
[54] AIR 1994 SC 1349.

- *(iii)* An entry shall be required to be made in the diary as to who was informed of the arrest.

3.6.8 *Right of Prisoners to be Treated with Humanity*

One of the most basic and fundamental right of the prisoners/suspects/accused persons is the right to life. In fact, it the basis of all human rights and the *sanctum sanctorum* of the constitutional temple. If there were no right to life, there would be no point of having other rights. One of the significant post-independence developments in the field of prisons has been emergence of the prisoner's right touchstone, which has been responsible both for the demystification of prisons, as well as the movement towards standardization. There are catena of cases, for instance, *D.B.M. Patnaik v. State of Andhra Pradesh,*[55]*; Mohammad Glasuddin v. State of Andhra Pradesh,*[56] *; Charles Sobhraj v. Supdt. of Jail, Tihar, New Delhi,*[57]*; Sunil Batra v. Delhi Administration,*[58]*; Khadra Pahadiya v. State of Bihar,*[59]*; Sunil Batra v. Delhi Administration,*[60]*; Prem Kumar Shukla v. Delhi Administration,*[61]*; State of Gujarat v. Hon'ble High Court of Gujarat,*[62]*; and Gurdev Singh v. State,*[63] wherein the judiciary, by recognizing the prisoner's rights to be treated with humanity have been Implied.

3.6.9 *Right to Speedy Trial*

The most glaring malady which has afflicted the judicial system is tardy process, inordinate delays, mounting arrears and great expense. The piling arrears and accumulated workload of different courts present a frightening scenario. As a matter of fact, the whole system is crumbling down under the weight of pending cases which go on increasing every day.

Krishna Iyer, J., and *Bhagwati, J.,* were aware of all these maladies. In Maneka Gandhi v. Union of India,[64], these judges stressed the '*procedure established by law'*, should be just, fair and reasonable and not oppressive or fanciful. If the procedure is not just, fair or reasonable, then it would be violative of *Article 21* of the Constitution. The right of the

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[55] AIR 1974 SC 2092.
[56] AIR 1977 SC 1926
[57] AIR 1978 SC 1514.
[58] AIR 1978 SC 1675.
[59] AIR 1981 SC 939.
[60] AIR 1980 SC 1579.
[61] AIR 1980 SC 1535.
[62] AIR 1998 SC 3165.
[63] AIR 1992 Him. Para. 76.
[64] AIR 1978 SC 597.

accused to get speedy trial neither finds place neither in any statute nor in the Constitutional provisions. It is the contribution of Indian Supreme Court. It has been brought under the protective umbrella of *Article 21* of the Constitution by the judicial interpretation. The under-trial is entitled to claim a speedy trial as a part and parcel of his personal liberty. A speedy trial does not admit of any definition; but nevertheless, every trial which is delayed for no fault of the accused is a delayed trial. Where the trial is delayed by the actions of the accused himself that trial does not cease to be speedy trial. Speedy trial is a constituent of a fair trial because delay is a constituent of a fair trial because delay *per se* implies injustice. A delayed trial is not a trial according to procedure established by law and consequently it violates the provisions of *Article 21* of the Constitution.

3.6.10 ***Right to Bail***

Bail is a process by which a person is released from custody. It is a system in which the accused person is released on financial security or surety for his appearance at the trial because the guilt of the accused is to be established by the prosecution. Bait serves the bifocal interest of justice to the individual involved and the society effected; because without bail no system of criminal law function properly. Arrest or detention implies deprivation of personal liberty. Bail provides the necessary relief. The system of bail is, therefore, an essential constituent of the legal system of every civilized society. In violation of the provisions of *Article 21* of the Institution and contrary to the guidelines laid down by the Supreme Court for liberal approach in the grant of bail, the Indian Courts at lower level have unfortunately continued to adopt the age-old archaic concept of refusing bail while dealing with liberty of citizens who are innocent in the eyes of law, until proven guilty. Thus, when bail is refused, a man is deprived of his personal liberty, which is of precious value under our constitutional system, recognized by *Articles 19, 21* and *22*.

In ***Babu Singh v. State of U.P.***,[65] the apex Court speaking through V.R. Krishna Iyer, J. stated that '*personal liberty*', deprived when bail is refused. Is '*too precious a value of our constitutional system recognized under Article 21*', because of which the power to negate it must be exercised not casually, but judicially, with lively concern for the cost to the individual and the community.

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[65] AIR 1978 SC 527.

In ***Hussatnara Khatoon v. State of Bihar***,[66] the liberal use of bail was advocated for releasing the accused pending trial. But the problem of bail generally hinges upon the discretion of the Court. The system of bail is very discriminatory where the poor are priced out of their liberty in the justice market and it remains a remedy only for the rich.

3.6.11 ***Right to Legal Aid***

The equal and handed justice has been a cherished ideal of administration of justice since the dawn of civilization. Equal justice for all is the cardinal principle on which the entire system of administration is based. It is so deep rooted in the body and spirit of our jurisprudence that the very meaning which we ascribe to the word '*justice*' embraces it. We cannot conceive of justice which is not fair and equal, which is given to one denied to another. In the wake of changing social, economic and political conditions in the modern world, the social scientists, jurists, and politicians gave their thoughts to the philosophy of legal aid and they made the state responsible for eliminating social an economic wrongs, as also ensuring just and decent human living to the people at large.

In 1976, the apex Court took note of *Article 39-A* of the Constitution of India and ***M.H. Hoskot v. State of Maharashtra***,[67] laid down that *Article 21*, read with *Articles 39-A* and *42*, requires, *inter alia*, that where a prisoner is disabled from engaging a lawyer on reasonable grounds, such as, indigence or incommunicado situation, the court shall, if the circumstances of the case, the gravity of the sentence and the ends of justice so require, assign a competent counsel for prisoner's defence, provided the party does not object to that lawyer.

Hussainara Khatoon v. State of Bihar,[68] put this matter on a higher pedestal. Justice P.N. Bhagwati stated emphatically that free legal service to an indigent and poor accused is implicit in the guarantee given by *Article 21,* which is emphasized by *Article 39-A*.

Following *Hoskot* and *Hussainara*, a two-Judge Bench of the Supreme Court has again observed in ***State of Maharashtra v. Mannubhal Pragaji Vashi***,[69] that it is now fairly settled that the right to legal aid and speedy trial are parts of the guarantee of human right envisaged by *Article 21* of the Constitution. In the instant case, it was held that in a fit case the Court can direct the ruling politicians to carry out the Directive Principles even through these are stated to be unenforceable in a court of law.

[66] AIR 1979 SC 1380.
[67] AIR 1978 SC 1548.
[68] AIR 1979 SC 1369.
[69] AIR 1996 SC 19.

Further, when there is inaction or slow action by the politicians and administrative officers, the judiciary must intervene. *Justice V.R. Krishna Iyer*, noted for his unconventional approach and iconoclastic spirit observed that to provide free legal aid is state duty and not Government Charity.

4. SUMMARY

Thus, from the foregoing discussion it is crystal clear, about the prominence of *Article 21* in Domestic Jurisprudence based on Constitutional provisions. The judiciary in India is playing a significant role in protecting the rights of the people as it is evident from the plethora of land mark judgments discussed above. *Article 21*, though coached in negative language, confers the fundamental right to life and personal liberty. Right to life enshrined in *Article 21* means something more than survival or animal existence. The Indian Judges are now in a commanding position to expose the area of darkness which has evaded the executive of Indian democratic set up.

In the present scenario the life and personal liberty of the person cannot be effectively preserved unless the essential rights propounded by Supreme Court under *Article 21* are protected. Therefore, *Article 21* includes various aspects and new dimensions, *viz.*, right to shelter, livelihood, education, health, timely medical aid, live in healthy environment, access to road, live with human dignity, suicide, social security, privacy, travel abroad, prisoners, speedy and fair trial, bail, legal aid, illegal detention etc.

The real success of Indian Courts lies in the fact that they have to a great extent abandoned their mechanical role of interpreting law inherited from British and have, embarked on extensive judicial legislation in the area of Criminal Law, Industrial Law, Labour Law and Property Law. The functioning of Indian judiciary discloses that it has through progressive and humanistic interpretation been able to enlarge the rights of suspects and accused with a zeal to protect the interests of the innocent and prevent misuse and abuse of Police Powers.

The scope of *Article 21* of the Constitution has been widened in the light of changing values of Indian society. Time has shown that the higher judiciary is not only worthy of trust in the matter of the fundamental right to life and personal liberty, but it has paid worthy tributes to those who sacrificed their fives to attain this important right for the people of India, by giving it the scope and meaning which it has today. It has upheld the rule of law, preserved our Constitutional values and made some fundamental rights living realities for some of the deprived and oppressed segments of Indian humanity.

Further, its active role has also created a climate of transparency and engendered a sense of accountability in public functionaries. It may thus be safely concluded that the great strength of Judiciary must be utilized for public good and always in public interest and in the service of the people.

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6. SELF – ASSESSMENT QUESTIONS

1. In the light of Article 21, explain the meaning of ‘Right to Life’ and its various facets with the help of case law.
2. In the light of Article 21, explain the meaning of ‘Right to Personal Liberty’ and its various dimensions with the help of case law.

3. What is relationship between Articles 19 and 21? How can a citizen make a claim under both articles simultaneously? Trace the developments in this regard since A. K. Gopalan's Case.
4. 'Personality Liberty has been interpreted much liberally than intended by the Constitution'. Explain this statement with the help of decided cases.
5. How has judicial activism affected the right to life and personal liberty enshrined in Article 21 of the Indian Constitution? Explain by referring to leading cases.
6. Does the right to life and personal liberty in Article 21 embrace a right to clean, healthy and livable environment, using "Environment" in its broadest sense as understood in Contemporary Constitutional Jurisprudence? Explain with the help of leading decided cases.
7. "The Supreme Court of India has not only imported "Procedural due process" but "Substantive process" also in Article 21. Further, to make the rights effective, compensatory relief is now provided for the violation of the rights". Comment with the support of relevant Case laws.
8. The scope of Article 21 has been considerably enhanced by judicial interpretation but as remarked by Markandey Katju J. "Article 21 cannot be targeted as 'Brahmastra' to justify every type of direction." Discuss pros and cons of the new dimension of Article 21.

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