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VOTE FOR MY PANEL ON 13TH SEPTEMBER- ELECTION DAY.

RADHIKA SETH 2

FOR PRESIDENT

ANUBHAV SINGH 1

FOR SECRETARY

AMIT RANJAN 1

FOR CC

HARSH TOMAR 3

FOR CC

FURTHER QUESTIONS

Q.1 Discuss the constitutional procedure (legislative or executive) that should be adopted in the following situations:-

(a) Under an agreement with a neighbouring country, to surrender 100 sq.km. of territory which clearly and undisputedly belongs to India/State of Gujarat.

(b) To hand over 50 sq.km. of disputed territory to Pakistan in pursuance of an award of an International Tribunal.

(c) For implementing a treaty between India and Pakistan to convert the Line of Actual Control, in the State of J & K, dividing the Pak-occupied Kashmir and the rest of Kashmir, into the international border between the two countries.

(d) The King of Bhutan enters into an agreement with the Government of India by which he seeks to transfer a part of the territory of his country to India.

Discuss: Power of Parliament/Procedure to cede Indian Territory in favour of a foreign country. *[D.U.-2008/2010/2011]*

Discuss the powers of the President to promulgate an Ordinance to cede away Indian territory to a foreign country.

A.1 Cession of Indian Territory to a Foreign State

The power to *acquire* or *cede* territory is not expressly conferred by the Constitution. Articles 1 to 4 of the Constitution do not confer power on the Union to acquire or cede a territory *[In re Berubari Union and Exchange of Enclaves* AIR 1960 SC 845]. It may be noted that under Article 1, a territory acquired by the Union automatically becomes Indian territory, and no Parliamentary sanction is required for that purpose, but the formal or legal assimilation is brought about only by Parliamentary legislation made under Art. 2 or Art. 3.

The power to *acquire* new territories is an attribute of sovereignty. The usual modes of acquisition of territory by a State are cession, occupation, subjugation, acquisition, prescription, accretion and conquest.

The power to *cede* Indian territory to a foreign State is outside the scope of Parliamentary legislation, and for that a Constitutional amendment under Art. 368 is needed *[In re Berubari case}. No cession of Indian Territory can take place without a constitutional amendment.* The *cession* of territory is to be distinguished from *settlement of a boundary dispute* or a *bonafide* doubt or mistake as to boundaries between India and a foreign State *(Ram Kishore* verses *UOI*).

In cases where there are boundary disputes and the rights of the countries involved have yet to be ascertained, then the settlement of boundary dispute may involve transfer of some areas which *de facto* are under the control of one country, even though *de jure* they belong to another country, in such cases, the Supreme Court has held that there being *no* cession of territory, there is no requirement of a Constitutional amendment and a mere executive act would suffice *[Maganbhai Iskwarbhai Patel* verses *UOI*].

Lease *in perpetuity of* a part *of territory of India*

An Indo-Bangladesh Agreement of 1974 provided that India would lease in perpetuity to Bangladesh the area of TEEN BIGHA to connect Dhaagram and Panbari Monja of Bangladesh. By the Agreement of 1982, it was clarified that as a result of the said "lease in perpetuity", Bangladesh would have undisturbed possession and use of the area leased. Further, sovereignty over the said area would continue to vest in India; only limited rights were being granted to Bangladesh and not all or absolute rights over the territory involved. The Supreme Court held that the agreements did not involve cession of Indian territory. It did not amount to lease or surrender of sovereignty over the said area. The concessions given to Bangladesh over the said area might amount to servitudes suffered by India in its territory, as known in International law. In view of the facts of the matter, there being no cession of territory nor a lease in perpetuity, the agreements of 1974 and 1982 could be implemented without incorporating any change in the law or in the Constitution *(UOI* verses *Sukumar Sengupta*).

A.2 Formation of New State

Articles 1 to 4 demonstrate the flexibility of the Indian Constitution. By a simple majority and by ordinary legislative process, Parliament may form a new State or alter the boundaries, etc. of existing States and thereby change the political map of India. In *re Berubari case,* it was observed that the States are not sovereign or independent, and the Constitution contemplates change of the territorial limits of the constituent States and there is no guarantee about their territorial integrity. Thus, it is clear that the very existence of a State depends upon the sweet will of the Central Government. Parliament has even power to cut away the entire area of a State to form a new State.

Even though the admission or establishment of a new State will be on such terms and conditions as Parliament may think fit, such conditions cannot be imposed which go against the basic structure of the Constitution *(R.C. Poudyal* verses *UOI*). In this case, the State of Sikkim was admitted as a'new State. The majority ruled that it was in the wisdom of Parliament to admit a strategic border-State into the Union. There was no negation of the fundamental principles of democracy, equality and secularism.

The Apex Court, however, cautioned that the words "on such terms and conditions as it thinks fit" used in Art. 2 do not confer on Parliament an un-reviewable and unfettered power immune from judicial scrutiny. The terms and conditions which the Parliament may deem fit to impose cannot be inconsistent with the fundamental principles of the Constitution and cannot violate or subvert the Constitutional scheme. This is not to say that the conditions subject to which a new State or territory is admitted into the Union ought to exactly be the same as those States as at the time of the commencement of the Constitution.

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FURTHER QUESTIONS

Q.1 What are the main characteristics of a Federal Constitution? In the light of these characteristics examine whether or not the Indian Constitution can be described as a federal Constitution?

Point out the distinct features of the Constitution of India which show that it is not a federal Constitution in the real sense but point towards semi-federal Constitution. Would you suggest retention of those features?

"The Constitution of India does not indeed claim to establish a federal union, but the federal principle has been introduced into its terms to such an extent that it is justifiable to describe it as a quasi-federal Constitution. Whether, in its operations, it will provide another example of federal government remains to be seen." *(K.C. Wheare,* Federal Government). Comment critically. Critically examine the following statement of the Supreme Court in *State* of *West Bengal* verses *Union of India* "The, Constitution of India is not true to any traditional pattern of federation".

"The legal theory on which the Constitution was based was the withdrawal or resumption of all the powers of sovereignty into the people of this country and the distribution of these powers between the Union and States... The result was a Constitution which was not true to any traditional pattern of federalism.[11] Critically examine the federal nature of the Indian Constitution in the light of constitutional provisions and decided

Supreme Court's Views on Federalism

In *State of W.B.* verses *UOI*, it was held that the Indian Constitution is not truly federal because the States are not coordinate with the Union. *In re under Article 143*, the Supreme Court has characterized the Indian Constitution as federal.

In *State of Rajasthan* verses UIO, the Supreme Court has characterized the Indian Constitution more unitary than federal. It observed: "A conspectus of the provisions of our Constitution will indicate that, whatever appearance of a federal structure our Constitution may have, its operations are certainly, judged both by the contents of power which a number of its provisions carry with them and the use that has been made of them, more unitary than federal."

In *Satpal* verses *State of Punjab* , the court has expressed the view that there is combination of federal structure with unitary feature in the Indian Constitution. In *Pradeep Jain* verses *UOI*, it was held that India is not a compact of sovereign States which have come together to form a federation by ceding a part of their sovereignty to the federal State and thus, India cannot be characterised as a federal State. It has certain federal features but it is still not a federal State.

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FURTHER QUESTIONS

Q.1(a) Is the advice of a Prime Minister defeated on the floor of Lok Sabha binding on the President for the dissolution of Lok Sabha?

(b) The year 1995 was most wasteful in the history of Indian Parliament as one or the other 'scam' overtook the precious time which was meant for legislative business. Even a brief session of Parliament held during 1996 could not materialise the government's desire to enact the legislation on some important subjects and the Parliament was adjourned *sine die.* The Election Commission announced the general elections. The Union Council of Ministers advises the President to promulgate two Ordinances on those important subjects which the President refuses. Discuss the constitutional validity of the advice of the Council of Ministers in giving the advice and the decision of the President refusing to act on the advice in the light of the constitutional provisions.

(c) Is the President of India bound to accept the advice given by a Care-taker Government?

A.1 (a) Position of President

The President is *not* bound to dissolve Lok Sabha on the advice of the Prime Minister or Council of Ministers who does not enjoy the confidence of the majority in the House. However, in England, even a Prime Minister who is defeated in a no-confidence motion can advise the King to dissolve the House of Commons. Recently, Mr. James Callaghan (PM) who was defeated in the House in a no-confidence motion, advised the King to dissolve the House. The King dissolved the House on his advice.

This precedent cannot be applied in the Indian situation. Firstly, because of the multiplicity of political parties and secondly, in view of the country's economic situation which cannot face frequent elections and thirdly, political immaturity of the electors. However, in extraordinary situations, this precedent could be applied.

It may be noted that the President may first invite a person and appoint him the Prime Minister and *then* ask him to prove his majority or seek a vote of confidence in the Lok Sabha within a reasonable time. In such a case, the action of the President in proroguing the Lok Sabha on the advice of the new Council of Ministers (headed by Prime Minister Charan Singh) and giving them time to seek a vote of confidence is not only proper but entirely constitutional *(Dinesh Chandra* verses *Chaudhury Charan Singh*).

In the aforesaid case, the court reasoned that it is not possible to expect the Council of Ministers to seek the approval of the House immediately on appointment. After some time, Charan Singh Ministry resigned and advised the President to dissolve the House and hold fresh elections to Lok Sabha. The President, accordingly, dissolved the House and asked the Ministry to remain in office till other arrangements could be made. The Court held that the President exercised his discretion after considering the advice of the Council of Ministers and in a difficult and extraordinary situation. Another petition was moved in the Calcutta High Court to show cause under what authority the Prime Minister and his colleagues resolved to advise the President to dissolve the Lok Sabha and also to show cause as to why Charan Singh should not be removed from the office of the Prime Minister. The Calcutta High Court observed: "In the facts and circumstances of the case, the President was legally and constitutionally justified in calling upon Charan Singh to form the Ministry. Once the Ministry was formed it was competent constitutionally and legally to function, aid and advice the President in terms of Art. 74(1) until the Cabinet resigned later. The President

has option to accept or not to accept the advice. If he accepts the advice he cannot be said to have acted unconstitutionally."

In such condition, the President makes his own assessment and takes his own judgment as to whether any alternative ministry is possible and midterm poll may be avoided. Whether he was politically justified or not in appointing the Prime Minister is not a matter for the court to determine. Further, after the Prime Minister and the Council of Ministers tendered their resignation, their continuance in office (as a 'Care-taker' government) until alternative arrangements could be made as directed by the President was mandatory and an imperative obligation for them as they hold their office during President's pleasure *[Madan Murari* verses *Ch. Charan Singh*].

Dr. Ambedkar has said in the Constituent Assembly, "The President of Indian Union will test the feelings of the House whether the House agrees that there should be dissolution or whether the House agrees that the affairs should be carried on with some other leader without dissolution."

(b) In *U.N. Rao verses Indira Gandhi* , the Supreme Court held that even after the dissolution of the Lok Sabha, the Council of Ministers does not cease to hold office. The provisions of Art. 75(3) which envisage the doctrine of ministerial responsibility (to the Lok Sabha) has to be harmoniously construed with the provisions of Arts. 74(1) and 75(2). Thus construed, Art. 75(3) apply only when the House does not stand dissolved or prorogued. It cannot, therefore, be said that on the dissolution of the House, the Prime Minister and other Ministers must resign or be dismissed by the President.

Art. 74(1) is mandatory and, therefore, the President cannot exercise the executive power without the aid and advice of the Council of Ministers. Any exercise of executive power without such aid and advice will be unconstitutional in view of Art. 74(1).

(c) In the case of a *'care-taker'* government, the President is not obliged to accept the advice tendered by the Council of Ministers to him except for day to day administration. The President is free to judge as to whether the advice of such Council of Ministers is necessary to carry on the day to day administration or beyond that *[Madan Murari* verses *Ch. Charan Singh*].

This no doubt would give powers to the President not expressly conferred on Him by the Constitution, but having regard to the basic principles behind the Constitution, in the peculiar facts and circumstances of the case, that "is the only legitimate, legal and workable conclusion that can be made."

A care-taker prime minister can take major decisions if the situation so demands but he cannot take such policy decisions which would benefit his party in the coming elections. It should defer all policy questions which could await disposal by a Council of Ministers responsible to the Lok Sabha. This was so because the care-taker government had never proved its responsibility to Parliament; it resigned before facing a vote of confidence.

FURTHER QUESTIONS

Q.1(a) An Act of Parliament is declared unconstitutional by the Supreme Court. The Parliament re-enacts that Act after removing the unconstitutionality and makes it retrospectively applicable from the same date from which the original Act applied. Can the amended Act be challenged on the ground of its retrospectivity?

(b) An Act of Parliament terminates/abates all judicial proceedings concerning a disputed plot of land without providing any alternative dispute-resolution mechanism. Can such law be challenged on the ground of lack of competence?

(b) Legislation declaring Earlier Judicial decisions Invalid is Unconstitutional

A Legislature has power to render ineffective the earlier judicial decisions by removing/altering/neutralising the legal basis in the unamended law on which such decisions were founded even retrospectively, but it does not have the power to render ineffective the earlier decisions by making a law which simply declares the earlier decision as invalid or not binding for such power if exercised would not be a legislative power but a judicial power which cannot be encroached upon by a legislature under our Constitution *[In the matter of Cauvery Water Disputes Tribunal* ; *GC. Kanungo* verses *State of Orissa* ; *S.R. Bhagwat verses State of Mysore*].

Adjudication of the rights of the parties according to law is *a judicial function.* On the other hand, it is for the legislature to lay down the law prescribing norms of conduct and that is *legislative function.* In view of this distinction, the legislature cannot by a bare declaration, directly overrule or reverse a judicial decision, it may, at any time, in exercise of plenary powers conferred on it by Articles 245 and 246 render a judicial decision ineffective by enacting a valid law on a topic within its legislative field fundamentally altering or changing with retrospective, curative or neutralising effect the conditions on which such decision is based. The rendering ineffective of judgments or orders of courts by changing their *basis* by legislative enactment is well-known pattern of all validating Acts. Such validating legislation which removes the causes for ineffectiveness or invalidity of actions or proceedings is *not* an encroachment on judicial powers *(IN. Saxena* verses *State of M.R*).

In *State of Haryana verses Karnal Co-opt. Farmer's Society* , it was held that the Punjab Village Common Lands (Regulation) Haryana Amendment Act, 1981 which merely directs the Assistant Collector to disregard or disobey the earlier civil court's decrees/orders (i.e. retrospectively) is unconstitutional as being an encroachment on judicial power.

On similar logic, in the *case in question*, an Act of Parliament which terminates/abates all judicial proceedings concerning a disputed plot of land without providing any alternative dispute-resolution mechanism would be tantamount to the exercise of judicial power of the State which is *ultra vires* the power of the legislature.

Q.2 Explain with the help of decided cases the meaning and scope of the rule of Harmonious construction in interpreting the Constitution of India.

Entry 66, List 1 reads: "Coordination and determination of standards in institutions of higher education/research and scientific and technical institutions". Entry 25, List 2 reads: "Education, including technical education, medical education and universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I..."

State of UP. enacts a law prescribing *Hindi* as the exclusive medium of instruction in all the State Universities and medical colleges. Discuss the validity of the UP. law. Will your answer be different if the Union Parliament passes a similar law applicable to all

universities/medical colleges in the country? What would be your answer when the State of UP. with a view to providing socially relevant and employment-oriented education from primary to university level, passes an Act providing *inter alia* for the creation of UP. Education Commission to supervise and suggest changes in the education system of the State.

A.2 Doctrine of Harmonious Construction

The doctrine lays down that "every effort should be made to give effect to all the provisions of an Act by harmonising any apparent conflict between two or more of its provisions". A construction that reduces one of the provisions to a "useless lumber" or "dead letter" is not harmonious construction. To harmonise is not to destroy. To harmonise does not mean to defeat the purpose of Act. It means striking the balance and giving effect to meaning of both words. All provisions of a statute have their own importance so this rule protects the rights/interests of society at large.

The court may harmoniously construe the provisions, by regarding two or more apparently conflicting provisions as dealing with separate situations or by holding that one provision merely provides for an exception to the general rule contained in the other. The question as to whether separate provisions of the same statute are overlapping or are mutually exclusive may however, be very difficult to determine. The *basis* of the principle of harmonious construction probably is that the legislature must not have intended to contradict itself.

In *KM Nanavati* verses *State of Bombay*, the court held that the apparently absolute power of Governor under Art. 161 of Constitution to grant pardon/suspend a sentence passed on an accused person is not available during the period the matter becomes *subjudice* before the Supreme Court (i.e. matter has been referred to the court), as otherwise it will conflict with the judicial power of that court provided under Art. 142.

In *MSM Sharma* verses *Shri Krishna Sinha*, the Supreme Court resolved the conflict between Arts. 19 (1) (a) and 194 (3) of the Constitution and held that the right of freedom of speech under Art. 19(l)(a) is to be read as subject to powers, privileges and immunities of a House of the Legislature as declared by Art. 194(3).

In *Keshavananda Bharati* verses *State of Kerala* , the Supreme Court held that the Fundamental Rights and Directive Principles are conscience of the Constitution and in cases of conflicts the court should endeavour to maintain both of them by applying the principle of harmonious construction. The court established a fair balance between the individual interests and the welfare of the society.

The *Doctrine* and *the Legislative Lists*

Whenever the entries in different lists are found to overlap or conflict with each other, the court applies the doctrine of harmonious construction so as to reconcile them and bring about harmony between them. However, when reconciliation becomes impossible, then Union List is to prevail (in view of the *non-obstante* clause in Art. 246).

In *Re C.P. & Berar, Sales of Motor spirits and Lubricants Taxation Act 1938* , Gwyer, CJ. reconciled the federal power to impose 'excise duty' and the States' power to impose 'sales tax' by limiting excise duty to a tax levied on the incidence of sale of goods. This was done on the principle of harmonious construction, wherein Entry 48 of List II was read along with Entry 45 of List I, and each Entry was modified in the light of the other so that effect could be given to both.

In *O.N. Mahindra* verses *Bar Council* , the issue was whether the Advocates Act fell under Entries 77 and 78 of the Union List or under Entry 26 of the Concurrent List. Entry 77 provides for 'Constitution, organisation, jurisdiction and powers of the Supreme Court..., persons entitled to practice before the Supreme Court'. Entry 78 provides similarly for the 'High Courts'. Entry 26 provides for 'Legal, medical and other professions'. The court applied the doctrine of harmonious construction and held that all the advocates are entitled to practise before the Supreme Court and the High Courts and therefore, the Advocates Act should be treated as a legislation falling

under Entries 77 and 78 of the Union List. However, the power to legislate with respect to the other legal practitioners falls under Entry 26 of the Concurrent List.

In *State of Bombay* verses *EN. Balsara* , the Bombay Prohibition Act which prohibited the sale and possession of liquors in the State was challenged. The possession, production, sale, etc. of intoxicating liquors fall under Entry 8 of the State List while import of liquors under Entry 41 of Union List. The Supreme Court gave a narrow meaning to the word "import" and held that it should *not* be taken to mean that importer of prohibited liquor in the State of Bombay could possess and sell it. The Act was held valid.

In *Gujarat University* verses *Krishna* , it was held that the power to legislate with respect to medium of education was a necessary incidence of coordination and determination of standards; the State law was thus held to be invalid.

In *Osmania Univ. Teachers Asscn.* verses *State of A.P.* , the Union set up the University Grants Commission (UGC) for coordination and determination of standards under Entry 66, List I. The State of Andhra Pradesh acting under Entry 25, List II set up a Commission (A.P. Commissionerate of Higher Education) similar to U.GC. to coordinate and determine standards in institutions for higher education for the State. The Supreme Court held the State law to be *ultra vires* as by the principle of harmonious construction the power to coordinate and determine standards was excluded from Entry 25, List II. In *Prem Chand Jain verses R.K. Chhabra* , this Court has held that UGC Act fall under Entry 66, List I. It is then unthinkable as to how the State could pass a 'parallel' enactment under Entry 25, unless it encroaches Entry 66.

In *State of T.N.* verses *Adhiyaman Ed. & Res. Institute* (1995), the Union acting under Entry 66 (List I) created the All India Council for Technical Education and gave it power to recognize and de-recognize colleges. The State acting under Entry 25 (List 2) laid down even higher standards then that laid down by the Central Council and assumed the power to recognize and de-recognize colleges of technical education. Held that State law directly impinged upon coordinated and integrated development of technical education and was thus *ultra vires.* The word "co-ordination" was held to mean harmonization with a view to forge a uniform pattern.

Decision of the case in question

In the *case in question,* power to prescribe medium of instruction in higher institutions belong to Entry 66, List I. Thus, State of U.P. *cannot* make a valid law on this subject, regardless of the existence of a Parliamentary law under Entry 66, List I.

Second part of question — In view of the decision in *Osmania University* case, setting up of U.P. Education Commission by the State of U.P. is *ultra vires* the Constitution.

Q.3 Write a short note on: Distinction between doctrines of 'harmonious construction' and 'pith and substance'.

A3 **Distinction between Doctrines of Harmonious Construction and Pith and Substance**

(1) Both, the doctrine of pith and substance and the doctrine of harmonious construction, are used for the interpretation of entries in the three lists of the Seventh Schedule of the Constitution. There need not be a law made by the Parliament under an entry, both the doctrines will apply regardless.

(2) When a subject is apparently covered in both the Union and State List, the rule of harmonious construction is applied. When a law dealing with a subject in one list touching on a subject in another list, the rule of pith and substance is applied.

(3) The purpose of the harmonious construction rule is to prevent or avoid inconsistency/repugnancy/apparent conflict between two lists, and giving effect to meaning of both

entries. Entries of two lists must be read together and the language of one interpreted and, when necessary, modified by that of the other.

The purpose of pith and substance rule is also to avoid apparent conflict between two lists, but the method adopted by it to do so is different. If the law is in substance upon a matter assigned to legislature, then notwithstanding incidental encroachments upon an entry reserved for another legislature, it is upheld as valid.

(4) Both the doctrines though distinct, are similar in action as they prevent many State laws from being declared invalid, which would have been the result if the *non-obstante* clause in Art. 246 was used unmitigated by these principles. It may be noted that if reconciliation between entries of Union and State List is not possible, then in view of Art. 246, Union List is to prevail over State List.

Q.4 Discuss the scope of Residuary Powers of Parliament particularly with reference to a subject which had been excluded from Union List but is not included in any other List also.

Write a short note on Residuary powers of Parliament.

"Distribution of legislative powers between the Union and the States has been heavily tilted in favour of the Union by a liberal interpretation of the residuary power clause by the Supreme Court". Discuss.

Entry 82 of List I authorizes Parliament to impose "taxes on income other than agricultural income", but there is no entry in List II in respect of agricultural income. Can Parliament make a law imposing a tax on agricultural income, even if this power is expressly excluded from Entry 82, List I? Does it make any difference in your answer if the impugned law is a State law?

A.4 Residuary Powers (Art. 248)

Article 248: "Parliament has exclusive power to make any law with respect to any matter not enumerated in List II or III. Such power shall include the power of making any law imposing a tax not mentioned in either of those lists" (It is to be noted that before independence, Governor General, and not the federal legislature, which had such powers). Entry 97 of List I also lays down that Parliament has exclusive power to make laws with respect to any matter not enumerated in List II or III.

Article 248 and Entry 97, List I, assign residuary powers of legislation exclusively to the Union Parliament. If no entry in any of the three lists covers a piece of legislation, it must be regarded as a matter not enumerated in any of the three lists, and belonging exclusively to Parliament under Entry 97, List I. By virtue of Art. 248, Parliament has exclusive power to make any law with respect to any matter not enumerated in List II or List III, and for this purpose, and to avoid any doubts, Entry 97 has also been included in List I. In other words, the scope and extent of Art. 248 is identified with that of Entry 97, List I *(Hari Krishna Bhargava* verses *UOI)*

However, *scope* of residuary powers is restricted, as the three lists covers all possible subjects and because of the court's interpretation as to a matter falls under residuary powers or not. The *rationale* behind such powers is that it enables Parliament to legislate on any subject which has escaped the scrutiny of the House, and the subject which is not recognizable at present. Thus, it enables the Parliament to make laws on subject matter which have come up with advancement of society. However, the framers of Constitution intended that recourse to residuary powers should be the *last resort*, and not the first step. Residuary power is a well-known convention in federal Constitutions. In USA, and Australia, such powers are vested in States, while in Canada, in the Centre. Nevertheless, residuary powers are criticised, as they promote a 'strong' Centre and curb the autonomy of States.

There is no field of legislation which has not been allotted either to Parliament or to the State Legislature and therefore, if a law made by Parliament is challenged on the ground that it is beyond its legislative competence, it is enough to inquire, if it is with respect to any matters enumerated in the State List and if it is

not so, no further question arises (i.e. it would be unnecessary to go into the question whether it falls under any entry in the Union or Concurrent List). Parliament can combine its power under an Entry in the Union List or Concurrent List and the residuary power under Art. 248 *[UOI* verses *H.S. Dhillon's* case; *Kartar Singh verses State of Punjab]*.

Several Acts have been enacted by Parliament under its residuary power. For example, the Wealth Tax Act *(UOI* verses *Dhillon 's* case), Gift Tax Act, Commissions of Inquiry Act, etc. which have been held valid under the residuary power of Parliament.

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FURTHER QUESTIONS

Q.1(a) Can Delhi's garbage disposal system be scrutinized by the Supreme Court on a public interest petition filed by a citizen under Art. 32 of the Constitution? Discuss.

(b) Do you agree with the view that even after a decade's experience with PIL, the parameters of judicial action in such cases remain unsettled and ambiguous? Give your reasoned opinion.

Comment on the statement that "PIL is not a PILL against all the ILLS."

(c) "Through the strategy of PIL, the Supreme Court has been able to remove all Constitutional restraints on its powers. The relief to the weaker segments of the society is only the by product". Do you agree? Discuss the evolution of PIL in the light of the above statement.

(d) A group of persons are primarily injured as a result of a Government order. But they accepted it willingly and without protest. Can a member of the public, who complains of a *secondary* public injury, maintain an action under PIL?

A.l(a) Right to a clean and healthy environment has been recognized as an implied fundamental right by the Supreme Court in a number of recent decisions. In *Ratlam Municipality* and *Ganga Pollution cases,* the Supreme Court observed that the municipalities and other bodies are under a duty to ensure garbage disposal. A recent case on the point is *Dr. B.L. Wadhera* verses *UOI*. Thus, the Supreme Court can scrutinise this subject and give appropriate directions.

(b) PIL: Uncertainty and Guidelines

The grounds on which PIL would lie have been noted by the Supreme Court in *State of H.P.* verses *Parent of a Student of Medical College* : "Whenever the court finds that the executive is remiss in discharging its obligations under the Constitution or the law so that the poor/underprivileged continue to be subjected to exploitation and injustice; or are deprived of their social and economic entitlements; or that social legislation enacted for their benefit is not being implemented, they can and must interfere and compel the executive to carry out its constitutional and legal obligations".

However, the moment judiciary steps into the executive domain, it creates an illusion in the minds of the common men that it is the panacea of all ills. The necessary *limitation* of PIL is that the jurisdiction cannot be allowed to be abused by a meddlesome interloper or a busybody or a personal action for personal gains, private profit or with political considerations (See 5.*P. Gupta's* case).

Public interest litigation has been criticised on a number of grounds, viz. that it can be misused for private motive or political ends, that it would result in the tremendous increase in the litigation, that it would develop uncertainty as to the admission of the petition for hearing. It is said that there is no guideline as to the cases which should be admitted and the cases which should not be admitted. Due to this, the PIL has become unpredictable. Moreover, the court has no capacity to enforce its orders and in many cases the conditions have not changed.

In some cases, the affected parties addressed letters directly in the name of the Judges of the Supreme Court and they used to convert the letters into writ petitions. This practice has been criticised on the ground that there would be a danger of litigants choosing a judge and in turn judges choosing their litigants. The *suo motu* action by Judges based upon the news reports is criticised as thereby the judge assumes the role of advocate as well and thus acting against the judicial precept 'no body should be a judge in his own case'.

To avoid these defects, the Supreme Court has framed certain *guidelines* for entertaining letters/petitions as PIL *[Public Interest Litigation* - A study by P. Bhaskara Menon, Published in Journal Section, P. 17]:

The petition involving individual/personal matter shall not be entertained as a PIL matter except as indicated hereinafter. Ordinarily the letter/petition under the following categories should be entertained as PIL - (a) Neglected children (b) Bonded labours matters (c) Non-payment of minimum wages to workers and exploitation of casual workers and violation of labour laws (except in individual cases) (d) Petition from Prisons (e) Speedy trial (f) Petitions against atrocities on women (g) Petitions against Police excesses (h) Petitions against atrocities on SC, STs and OBCs, (i) Petition from riot victims (j) Petition relating to family pension (k) Petitions pertaining to the environmental pollution, disturbance of eco-balance, maintenance of forests and wild life, maintenance of heritage and culture and (1) Other matters of public importance (viz. maintenance of communal harmony, public health, etc.).

Petition for early hearing of cases pending in courts, petitions relating to service matters, pension and gratuity, petitions pertaining to the landlord-tenant matters, and, petitions relating to the admission to the Medical and other educational institutions will *not* be entertained as PIL.

In some recent cases, the Supreme Court has laid down some guidelines to check the abuse of PIL by third persons. In *Simranjit Singh Mann verses UOI* , it was held that in criminal matters, so far as possible, the court should be approached only by the accused. A petitioner-third party, who was a total stranger to the prosecution culminating in the conviction of the accused, had no 'locus standi' to challenge the conviction. Even the plea that such a PIL commenced by a leader of a recognised political party who had a genuine interest in the future of the convicts was held to be untenable. It was held that unless an aggrieved party is under some disability recognised by law, it would be unsafe to allow any third party to question the decision against him.

In *Karamjeet Singh* verses *UOI* , it was held that a mere obsession based on religious belief or any other personal philosophy cannot be regarded as a legal disability of the type recognised by the Cr. PC., 1973 or any other law which would permit initiation of proceedings by a third party, be he a friend. In *Krishna Swami* verses *UOI*, it was held that a petition, by way of PIL, could not be filed by any person seeking review of earlier decision of the court in which they were not parties.

At present, the courts have been cautions to act on news reports. They usually insist on affidavit of the writer or the person having knowledge of the details of the complaint. Now it is important to specify the fundamental right which has been violated in case the petition presented under Art. 32 and the fundamental right or other legal right which has been violated in case the petition presented under Art. 226. The concept being based on rule of law and not on the benediction of individual judges, the Supreme Court has proscribed letters being addressed directly to judges in *Sheela Barse* case. Today there is a 'PIL Cell' where all such petitions are scrutinised and then posted before various benches.

In *BALCO Employees' Union verses UOI*, declining to entertain the petition under Art. 32 and 226 against the disinvestment policy of the Government, the court ruled that unless violation of Art. 21 is specifically alleged and the affected persons are incapable of approaching the court, such challenge is not permissible under a public interest litigation.

In *Guruvayoor Devaswom Managing Committee* verses *C. K. Rajan*, the Apex Court sketched the development of PIL. There was initial activist mode when the scope of the Supreme Court's intervention in this area was enlarged. Later, a need felt that greater care be exercised before intervening due to abuse of PIL for settling of private disputes or garnering publicity. Even though it was difficult to draw a strict line of demarcation as to which matters and to what extent a PIL should be entertained, the decisions of the Supreme Court render broad guidelines. Prohibiting a roving enquiry it was laid down that the Supreme Court or the High Courts should not undertake an unnecessary journey through the PIL path unless there exist strong reasons to deviate or depart along such a path. Principles of natural justice and fair play ought to be followed even in *pro bono publico* proceedings.

The Court observed: A PIL would only be entertained if a segment of public is interested, and the petitioner is not aggrieved in his individual capacity alone and only after exhaustion of alternative remedies. The court before admitting a PIL has to be satisfied about: (a) the credentials of the applicant; (b) the prima facie correctness of nature of information given by him; and (c) the information being not vague and indefinite. Besides the court should also see that (i) no one's character is besmirched and (ii) public mischief is avoided and justifiable executive actions are not assailed for oblique motives. The court has to be extremely careful that it does not encroach upon the spheres reserved to the executive and the legislature in the guise of redressing public grievances.

It may be noted that though the same term (PIL) is used in the U.S., it means something quite different and is not so commonly found. American PIL is funded by government and private foundations and its focus is not so much on State repression or government lawlessness as on public participation in government decision making.

(c) It is *prima facie* difficult to agree with the above statement as the Supreme Court has merely liberalized the traditional rule of standing but in doing so it has not transgressed any constitutional limitation. Rather, no such limitation exists under the Constitution. However, in many PIL cases, the Supreme Court has entered into fields traditionally reserved for the *executive* or *legislature.* The court has used its interim directions to influence the quality of administration. In *Sheela Barse* case, the court said that it is desirable that Parliament should pass a Central legislation on the subject relating to children detained in jails.

Further, relief to the weaker section is not the by-product, rather it is the *raison d'etre* (the most important reason for doing it) for the existence of PIL.

(d) The member of the public *cannot* maintain an action under PIL, for the effect of entertaining the action at the instance of such member of the public would be to grant a relief on the person... or persons primarily injured which they do not want *(S.P. Gupta's* case).

It may be noted that where the petitioner seeks any relief to serve his self-interest, apart from that of the community, that relief would be refused *(Subhash* verses *State of Bihar*).

Q.2 Write a critical note on the desirability or otherwise of the application of the doctrine of *res judicata* to the proceedings or the enforcement of fundamental right Discuss: Every decision of a writ court will not operate as *res judicata.*

Explain the principle of *res judicata* in its application to writ petitions.

Decide: Maintainability of a *habeas corpus* petition under Art. 32 of the Constitution after dismissal of a similar petition under Art. 226.

A.2 **Res Judicata and Art.** 32

Res judicata is a rule of public policy that there should be finality to binding decisions of courts of competent jurisdiction and that parties to the litigation should not be vexed with the same litigation again [Section 11, C.P.C.]. Thus, where the matter had been 'heard' and 'decided' by the High Court under Art. 226, the writ under Art. 32 is barred by the rule of*res judicata* and could not be entertained. Similarly, if a question has been once decided by the Supreme Court under Art. 32, the same question cannot be re-opened again under Art. 226. However, a petition under Art. 32 for *habeas corpus* is an exception to this general rule.

Thus, the Supreme Court cannot be moved more than once on the same facts. It has been held that in the absence of new circumstances arising since the dismissal of the petition filed in Supreme Court under Art. 32, a fresh petition under Art. 32 on the same matter cannot be filed in the Supreme Court *[Lakhanpal verses UOI*]. It is to be noted that a petition filed in the Supreme Court under Art. 32 and dismissed by it on suit by a speaking order will also be operative as *res judicata,* even though the order has been made *ex parte [Virudhanagar Mills* verses *Govt. of Madras*].

If a writ petition is filed for the violation of a fundamental right in the High Court under Art. 226 and it is dismissed by the High Court on the ground that the contravention of the fundamental rights is constitutionally justified and thereafter, the petitioner files writ petition (on the same facts and grounds) under Art. 32 in the Supreme Court, instead of filing a regular appeal to the Supreme Court, the decision of the High Court will operate as *res judicata* and the writ petition will not be entertained by the Supreme Court *[Trilok Chand Motichand* verses *H.B. Munshi Daryao* verses *State of U.R*].

However, for this purpose the writ petition under Art. 226 must have been dismissed by the High Court on *merit.* If the petition is dismissed *in limine* without a speaking order, such dismissal cannot be treated as creating a bar of *resjudicata.* Likewise, if it has been dismissed not on merit but some preliminary grounds viz. on the ground of laches (delay in filing the petition) or on the ground of alternative remedy available to the petitioner, it will not operate as *resjudicata* and, thus, will not bar petition under Art. 32 *(Joseph* verses *State of Kerala*). Such a dismissal may, however, constitute a bar to subsequent application under Art. 32 where if the facts found by the High Court are relevant even under Art. 32 *(Daryao* verses *State of U.R).*

The principle of *resjudicata* does not apply in the case of petition for *habeas corpus.* Further, repeated petitions can be filed under Art. 32 itself. The rule of constructive *resjudicata* also does not apply in such cases. In *Ghulam Sarwar* verses *UOI*, a writ petition was filed in the High Court under Art. 226 challenging the detention of the petitioner but it was dismissed by the High Court on merit, the petitioner then moved the Supreme Court for the issue of same writ. The Supreme Court entertained the petition and decided it on merit, although the petition was dismissed on some other ground. In *Sunil Dutt* verses *UOI*, the petitioner's father was detained under the COFEPOSA Act. A petition for the writ of *habeas corpus* was dismissed by the Supreme Court *in limine* (summarily, at the initial stage). After sometime a petition was filed in the Supreme Court seeking release of the detenu. The Supreme Court entertained it and observed that the earlier petition would not be operative as *res judicata.*

Desirability of Resjudicata

The right given to the citizen to move the Supreme Court by a petition under Art. 32 and claim an appropriate writ against the unconstitutional infringement of his fundamental rights itself is a matter of fundamental right. However, the rule *of res judicata* itself embodies a principle of public policy which in turn is an essential part of the rule of law, thus, the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. The doctrine of *res judicata* is not a technical doctrine applicable only to records; it is a fundamental

doctrine of all courts that there must be an end of litigation. Thus, the general rule *of res judicata* cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petition filed under Art. 32 *(Daryao verses State of U.R)*

Q.3 "It is necessary to eliminate political influence at the stage of initial appointment of judges as provisions for securing independence after the appointment are not adequate to safeguard independence of judges."

Describe the concept of "collegium" and "consultation" for the appointment of judges of the Supreme Court and the High Courts. Can the appointment of a judge made after "consultation" be challenged on any ground? Can the appointment of judge made by collegium be challenged on any ground?

Who recommends names for the appointment of judges of the Supreme Court and High Courts? Can the recommendations be ignored or challenged in a court of law on any ground?

In the light of decided cases, explain the process of formation of opinion by the Chief Justice of India regarding the appointment of Supreme Court and High Court judges and the process of 'consultation' between the CJI and the President in this regard.

Discuss: 'Independence of judiciary being a basic feature of the Constitution, appointment of judges should not be influenced by political considerations.'

"The recent judicial pronouncement on the question of the appointment of the judges of the Supreme Court/High Courts is dominated by the emphasis on 'integrated participatory consultative process' for selecting the best and most suitable persons available for the appointment." Elucidate the above statement highlighting the norms laid down by the Supreme Court for appointment of Supreme Court's/High Courts' judges and for the transfer of High Court judges.

Examine in detail the provisions of the Constitution regarding appointment of Judges of the Supreme Court of India. Is it necessary to constitute a Commission to review and reform the prevailing provisions of the Constitution in this regard? Give reasons.

(a) Examine whether the opinion of the Chief Justice of India in regard to the appointment of Judges to the Supreme Court and High Courts is entitled to primacy? Can the President disregard the said opinion when it is in conflict with the advice tendered by the Council of Ministers? Refer to the constitutional issues and the case-law on the point
(b) Can the appointment of the judge of a High Court challenged on the ground that the Chief Justice of India did not recommend the name of the judge when the President consulted him?
(c) D, a judge of the High Court was transferred by the Presidential order to another High Court. D challenges the transfer on the ground that the order was issued without his consent and without the concurrence of the Chief Justices of the two State High Courts concerned and of the Chief Justice of India. Examine the legal issues involved.

A.3 Independence of Judiciary

The independence and impartiality of the judiciary is one of the hall-marks of the democratic set-up of Government. It is the first condition of liberty and rule of law in a democracy. Indeed, an independent judiciary is part of the 'basic structure' of the Constitution. The Constitution has made several provisions to ensure independence of judiciary:-

(1) *Appointment* — Appointment of judges to the High Courts and Supreme Court is done by President only after consultation with the Chief Justice of India [Art. 124(2) and 217(1)].

(2) *Transfer* - In the matter of transfer of High Court judges, Chief Justice of India must be consulted by President [Art. 222(1)].

(3) *Security of tenure* - A judge can only be removed for proved misbehaviour or incapacity, and even so, a difficult procedure of impeachment is necessary (Arts. 124 and 218).

(4) *Conditions of service* - The salary, privileges, rights and allowances of judges cannot be altered to their disadvantage once they are appointed. They are not subject to vote of legislature (Art. 125 and

221). Further, no discussion in legislature can take place on the conduct of the judges (Art. 121).

(5) *Administrative powers* - Art. 146 and Art. 229 place the administration and recruitment of staff in the hands of Supreme Court and the High Courts. Art. 235 gives High Courts the power of administration over subordinate courts.

(6) *Power to punish for its contempt* - The Supreme Court and the High Courts have the power to punish any person for its contempt (Arts. 129 and 215). This power is very essential for maintaining the independence of judiciary.

(7) Parliament can extend, but cannot curtail the jurisdiction and powers of the Supreme Court (Art. 138).

(8) *Separation of judiciary from executive* - Art. 50 directs the State to take steps to separate the judiciary from the executive in the public services of the State.

(9) *Prohibition on practice after retirement* - Art. 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.

Appointment, Transfer and Promotion of Judges

Articles 124(2), 217(1) (appointment of judges), Article 222(1) (transfer of judges) and Article 216 (Number of judges to be determined by President) leave scope for executive interference. If such crucial areas are left to *'executive discretion'* (President acting on the advice of Council of Ministers), the independence of judiciary cannot be secured, notwithstanding the guaranteed tenure of office, rights, privileges, safeguards and immunities provided by the Constitution. Thus, only 'favourite' or 'committed' judges got appointed or promoted, while 'inconvenient' judges punitively treated by way of transfer.

In India, today, the executive is the biggest litigant before the courts and allowing it such powers can be but inimical to the independence of judiciary as also to the very survival of democracy. This fear is not hypothetical, the executive actions *qua* judiciary during emergency are too infamous to bear repetition.

The following issues are contained within the issues of independence of the judiciary and judicial appointments:

- Considerations of caste figured in the appointments of judges or in their behaviour on the bench.
- Susceptibility of High Court judges to influences from local parties, private or governmental, including actual bribery.
- Intrusion of family relationships into a court's functioning, especially the matter of a judge's close kin practising as advocates in his High Court.
- Long unfilled vacancies on High Courts, often believed to be an executive branch technique for diminishing the court's capabilities.
- Manipulation of appointments by executive branches in New Delhi and the State capitals with the intention of influencing judicial decision-making.

The appointment of judges (and transfers) - involving as it does what sort of individual should be chosen and who should do the choosing - would bring forth the play of personal and group interests and perceptions existing in the most homogeneous society. More so in India's vertically and horizontally compartmented society, with its enormous gaps between economic classes, which nurtures suspiciousness and where the clash of interests, political and personal, makes judges' selection often seem a zero-sum affair to those concerned. The constitutional implications become secondary in importance. All in all, the wonder is not that appointments have been messy on occasion, but that the society may have found a more satisfactory appointment process.

Criticism of the Chief Justice of India's 'primacy' has already been heard. Suggestions have been revived for the formation of a 'National Judicial Council', or some similar arrangement, for the appointment of judges.

Consultation In Appointment: Primacy to Judiciary or Executive?

The requirement of consultation, by the President of the Chief Justice of India, is a mandatory requirement and any appointment/transfer made without consultation would be unconstitutional. 'Consultation' does not mean concurrence, but it certainly means that, there must be due deliberation between the Chief Justice of India and the President on full and identical facts. However, the Central Government is not bound by the opinion of Chief Justice of India, though his opinion is entitled to great weight, as the opinion of the head of the judiciary *[UOI* verses *Sankalchand Sheth*].

In *S.R Gupta* verses *UOI Judges Transfer Case-P)* (Majority opinion), it was held that no primacy need be given to the opinion of the Chief Justice of India; it is the executive which has primacy. Thus, the Central Government can override the opinion given to it and arrive at its own decision with regard to appointment of a judge, so long as the decision is based on relevant considerations and is not otherwise *mala fide.*

The court, however, suggested for the appointment of a Judicial Committee (consisting of the Attorney-General, Law Minister, President of the Bar Council of India, President of the Supreme Court Bar Association, and the Retiring Chief Justice of India) for the appointment of judges.

The said decision was very much criticised. Thus, in *Subhash Sharma* verses *UOI* , the Supreme Court felt that the appointment or transfer of judges is not an executive act but the result of constitutional process which must be observed in word and spirit. They directed that the *S.R Gupta's* case be reviewed by a nine-judge bench. A 9-judge bench reviewed the judgment and established the "judicial supremacy" in the below-mentioned *"Transfer of Judges Case-IF:*

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FURTHER QUESTIONS

Q.1 "The interpretation which was accepted by the majority in the *Atiabari case* is correct subject to this clarification: Regulatory measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Art. 301 and such measures need not comply with the requirements of the proviso to Art. 304(b) of the Constitution" [Per S.K. Das, J., in *Automobile Transport Ltd.* verses State *of Rajasthan].*

Is this merely a clarification? Discuss critically. Does a simple tax law enacted by a State Legislature attract Art. 301 of the Constitution and accordingly, require due compliance with Art. 304?

A tax measure may sometimes, but not always, restrict the freedom of trade, commerce and intercourse. Discuss. Also examine critically the reasons why the Supreme Court in *Automobile case* rejected the widest view of Shah, J. and narrower view of Sinha, J. about Art. 301 in *Atiabari case.*

How have the Courts reconciled the conflict between the freedom of trade and taxing powers of the States?

A.1 Freedom of Trade and Taxation

Part 12 of the Constitution relates to 'taxation', while Part XIII to 'freedom of trade, commerce and intercourse'. Part 13 of the Constitution presents a number of problems in its interpretation. Two types of interpretation - *wide* and *narrow,* have been adopted by the courts in a number of cases.

Wider view - According to the *wide* view, Art. 301 imposes a general restriction on the legislative power and grants a freedom of trade, commerce and intercourse in all its series of operations, from all barriers, from all regulations, and the only qualification (or restriction) that is to be found in the article is the opening clause, namely, 'subject to the other provisions of Part XIII'. The above view has two implications: *firstly,* Art. 301 is not confined to the Entries relating to 'trade and commerce'. Any law made under any Entry in any of the three

lists (under the Seventh Schedule), including taxing laws, may, accordingly interfere with the freedom guaranteed by Art. 301.

Secondly, regulatory measures or measures imposing compensatory taxes for the use of trading facilities also come within the purview of the restrictions contemplated by Art. 301. This will mean that if a State Legislature wishes to regulate trade or commerce, it cannot do so without obtaining the President's sanction as required by the proviso to Art. 304(b). The practical effect would be to stop or delay effective legislation which may be urgently necessary e.g. in the interest of public health, and this would curb the autonomy of States (as the legislative powers of a State Legislature has been held to be plenary with regard to subjects in List II, which also includes imposition of taxes).

Narrower view - According to the *narrow* view, taxing laws are governed by Part XII provisions, and except Art. 304(a) none of the other provisions of Part XIII extend to the taxing laws. Also, the provisions of Part XIII apply only to such legislation as is made under the Entries relating to 'trade and commerce'. This will mean that the prohibition in Art. 301 or Art. 303(1) did not extend to taxing laws, for, the taxing power was distinct from the entries relating to 'trade and commerce'. Therefore, the freedom guaranteed by Art. 301 does not mean freedom from taxation, because taxation is not a restriction *within* the meaning of relevant Articles in Part XIII. Thus, taxation *simpliciter* is not within the terms of Art. 301.

In *Atiabari* case , the Supreme Court *(dissenting* opinion) adopted a narrower view of Art. 301 but not that narrow as discussed above. The *majority,* however, adopted a *wider* view of Art. 301, as discussed above. In *Automobile Ltd.* case , the Supreme Court observed that neither the wide interpretation nor the narrow view is correct. "In our view, the concept of freedom of trade and commerce postulated by Art. 301 must be understood in the context of an orderly society and as part of a Constitution which envisages a distribution of powers between States and Union, and if so understood, the concept must recognise the need and legitimacy of some degree of *regulatory* control, whether by the Union or the States; this is irrespective of the restrictions imposed by other Articles in Part XIII". Thus, the Supreme Court in *Automobile* case held that tax laws are not outside the comprehension of Art. 301 but regulatory/compensatory taxes do not come within the purview of the restrictions contemplated by Art. 301. Only the taxes which directly impede the flow of trade or commerce are violative of the freedom guaranteed under Art. 301.

Atiabari Tea Co. Case

The majority - *Shah J.* took a very *wide* view of Art. 301. He observed that what is guaranteed is freedom in its widest amplitude - freedom from prohibition, control, burden or impediment in commercial intercourse. Thus, taxation on commercial intercourse, even imposed as a measure for collection of revenue is hit by Art. 301. The argument that tax laws were governed by Part XII alone is unacceptable. The doctrine of trade, commerce, etc. enunciated by Art. 301 is not subject to the other provisions of the Constitution but is made subject only to the other provisions of Part XIII. Therefore, a tax legislation which implies any restriction on the movement of goods attracts the provisions of Art. 301.

In a dissenting note Chief Justice *Sinha* took a *narrower* view of Art. 301: The freedom declared by Art. 301 does not mean freedom from taxation *simpliciter,* but does mean freedom from taxation which has the effect of *directly* impeding the free flow of trade.

Automobile Co. Case

A 7-judge bench in this case, by 4-3 majority concluded that the interpretation which was accepted by the majority in the *Atiabari* case is correct, but subject to this *clarification:* Regulatory measures or measures imposing *compensatory taxes* for the use of trading facilities do not come within the purview of the restrictions contemplated by Art. 301 and such measures need not comply with the requirements of the proviso to Art. 304(b).

Commenting on the outcome of the judgment Seervai has observed that it has overruled *Atiabari* "insofar as it *[Atiabari]* held that if State Legislature wanted to impose the tax to raise the money necessary for road maintenance (i.e. a compensatory tax), that could only be done after obtaining

the President's consent as provided in Art. 304(b)" *[GK. Krishnan* verses *State of T.N.*].

In *Automobile* case, the court developed the theory of compensatory and regulatory taxes. The court evolved a workable test to decide whether a tax is compensatory or not - 'One is to enquire whether the trades people are having the use of certain facilities for the better conduct of their business and paying not patently much more than what is required for providing the facilities and that it would be impossible to judge the compensatory nature of a tax by a meticulous test and, in the nature of things, it could not be done.'

'Compensatory tax' does not mean that measure of tax should be proportionate to the expenditure incurred. If tax were to be proportionate, it would not be a tax but fee. To uphold a compensatory tax, there must be a nexus between the subject and object of levy. If this is satisfied, it is not necessary that money realized should be put in a separate fund *[International Tourist Corpn.* verses *State of Haryana*]. Thus in *Malwa Bus Services (P) Ltd.* verses *State of Punjab*, court upheld the validity of vehicles tax, even though the State was shown to be spending less on road than what it was collected by way of tax. The court said that in addition to expenditure on roads other expenditures of the State facilitating orderly and safe movement of traffic have also to be taken into account.

The above theory is *criticised* by a number of jurists, authors, etc. Professor P.K. Tripathi said that "when the Constitution guarantees the power to tax, the object of that power is obviously to enable the State to collect revenue. To confine an entire tax **power** under an entry to regulatory/ compensatory legislation is to alter the very nature of the power itself. Professor M.P. Singh is of the view that "the Constitution clearly draws a distinction between 'taxes' and 'fees' through several provisions. To reduce a tax to the level of fee amounts to the elimination of that distinction. The condition that the tax should be compensatory or regulatory, brings it out from the definition of tax and converts it into fee". However, the compensatory theory is still a valid and binding proposition of law.

Prof. M.P. Singh in his book *Freedom of Trade and Commerce in India* concludes that taxes *simpliciter* are not inconsistent with the freedom (because taxes are not 'restrictions' within the purview of Art. 301) and Part XIII is not concerned with tax laws except to the extent provided in Art. 304(a).

Conclusions

(1) Taxes have been held to be generally outside the purview of Art. 301 (viz. compensatory/regulatory taxes) unless the tax is shown to be a mere pretext designed to injure inter-State trade, commerce, etc., i.e. directly impedes the flow of trade.

(2) Every State has power under Entry 56 and Entry 57 of List 2 to impose taxes to compensate it for the services, benefits and facilities provided by it. Thus, courts have rejected a construction of Art. 304 which would have rendered Entries 56 and 57 *otiose* or inoperative without the consent of Union executive.

(3) The word 'restriction' in Art. 304(b) has been held not to include regulation. Therefore, taxes or other measures which are regulatory will not come within Art. 304(b).

Q.2(a) A, an owner of a tourist coach, obtains an all-India permit unoor the provisions of M.V. Act. His tourist coach has to pass through several States during the course of its trip. These States sought to impose tax on his tourist coach under their respective taxation laws enacted under Entry 57 of List 2. Are these laws hit by Art. 301? Decide.

(b) With a view of facilitating and encouraging tourism and commercial intercourse, the State of UP. conceives a plan to widen the existing roads, construct flyovers, and also new roads. In order to meet the huge expenditure, the State

increases the tax on motor vehicles, carrying passengers and goods, *five* times higher than the existing rates. [Entry 56, List II: "Taxes on goods/passengers carried by road"; Entry 57, list 2: "Taxes on vehicles, suitable for use on roads"]. Discuss the validity of State law under Art. 301 and Art. 304(b).

(c) The State of Haryana imposes a heavy tax on passengers/ goods passing through all roads, including the national highways, in exercise of its power under Entry 56, List II. Discuss the validity of law under Art. 301 read with Art. 304.

A.2(a) Every State has power under Entry 56, List 2 to impose taxes to *compensate* it for the services, benefits and facilities provided by it. Such taxation does not infringe Art. 301 or Art. 304(b).

(b) States have full power to impose taxes unless such taxes are mere pretexts designed to injure inter-State trade and commerce. In the present case, tax sought to be imposed is not a mere pretext to harm trade, rather it will facilitate it, thus not hit by Art. 301 or Art. 304(b). A Presidential sanction is not required for such taxes (i.e. compensatory taxes) under Art. 304(b).

(c) *See* answers to parts (a) and (b) above.

Q.3 Discuss the constitutional validity of the following laws under Part XIII of the Constitution:

(a) A law passed by a State banning the movement of forest produce within the State between sunset and sunrise.

(b) A ban imposed by the Delhi Administration on plying of trucks through the main bazar of Chandni Chowk between 8 a.m. to 8 p.m. each day in order to avoid congestion of traffic in the area.

(c) With a view to ensure availability of timber to the common man at a reasonable price, the State of T.N. declares timber as an essential commodity and imposes a total ban on the movement of timber from the State to any other area outside the State.

(d) A law passed by State M imposing a tax of 9% on tobacco imported from State N. State M itself does not manufacture or produce tobacco. Will your answer be different if State M itself produce tobacco and imposes a tax of only 5% on it?

(e) State A imposes restrictions on the import of goods from State B only. The purpose of such restriction was to protect the interest of domestic industry.

A3(a) In *State of Mysore* verses *H. Sanjeeviah* , it was held that a rule which totally prohibits the movement of forest produce between sunset and sunrise is prohibitory or restrictive, and not regulatory, because a rule regulating transport in essence permits transport subject to its orderly movement and prevention of harm and danger.

However, in *State of T.N.* verses *M/s. Sanjeetha Trading Co.*, the Supreme Court upheld the law totally prohibiting export of timber as it was a 'regulatory' measure for ensuring the availability of timber to a common man at a reasonable price (there was scarcity of timber in the State and it has to be declared as an essential item). It was held that even total prohibition on the movement of 'essential' commodity amounts to regulation only. The matter may be different in case of 'non-essential' commodity.

(b) The word 'free' under Art. 301 should not be taken to mean freedom from regulation. Thus, traffic laws are regulatory laws and they are not hit by Art. 301.

(c) *See* answer to part (a) above.

(d) Where goods similar to those imported from other States are not locally produced or manufactured within the State, Art. 304(a) will not authorise the levy of tax on the imported goods *(Kalyani Stores* verses

State of Orissa). Thus, State M cannot impose a tax on tobacco imported from State N, as State M itself does not manufacture or produce it.

However, if State M itself produce tobacco and imposes a *lesser* tax on it, as compared to the imported tobacco, then the taxation will be hit by Art. 301 and 304(a). A tax which has the effect of discriminating between goods of one State (e.g. home State) and goods of another, may affect the flow of trade or commerce.

(e) It may be noted that a State may grant some *temporary concessions* to the local goods, and thus differentiate between the local and imported goods. As in such cases the discrimination cannot be said to be intentional and there is no element of unfavourable bias. But, if a State restricts import of goods from a particular State only, then it is creating economic barriers, as the other State may also restrict import of goods from that State. Thus State A's action is invalid.

In *W.B. Hosiery Asscn.* verses *State of Bihar* (1988) , the notification issued by the State of Bihar exempting hosiery goods manufacturers in Bihar from levy of sales tax to grant incentives to hosiery industries in Bihar without allowing such benefit to the hosiery goods manufactured outside Bihar was held to be violative of Art. 301 as such discrimination is bound to affect free flow of goods from outside States into Bihar and amounts to hampering the free flow of trade and commerce. "Variation of the rate of inter-State sales tax does affect free trade and commerce and creates a local preference which is contrary to the scheme of Part 13 of Constitution *[India Cement* verses *State of A.R*].

Q.4 The State of Haryana enacts 'Haryana Sales Tax Act, 1996' which seeks to impose a tax at the rate of 50% of the price of all goods sold in that State. One of the dealers who is doing business in the sale of rice in the State challenged it under Art. 301. How would you decide the case? Does it make any difference in you answer if the law has been reserved for the consideration of President and obtained his sanction?

A.4 Art. 301 assures freedom of inter-State as well as *infra-State* (within the territory of State) trade and commerce. Normally a tax on sale of goods does not directly impede the free movement or transport of goods *[Andhra Sugars Ltd. verses State of A.R*], However, if sales tax is unduly high, it would hamper the trade and commerce (as in the case in question). Thus the State law is invalid.

A sales tax or a tax on goods/passengers carried by road, etc., though expressly authorised by the Constitution as heads of State taxation, may have to be justified under Art. 304(b), if they are challenged as excessive in amount, to such an extent that they really operate as a restriction upon the movement of goods/persons or they impose a burden upon the instrumentalities of commerce or activities which are an integral part of the flow of commerce in such manner that they must be held to be direct impositions upon the freedom of trade or commerce *(Mehtab Majid* verses *State of Madras*).

Art. 304(b) provides that notwithstanding anything contained in Art. 301, a State Legislature can impose restrictions on freedom of trade and commerce, but such restrictions must be reasonable and in public interest; a bill for such purpose requires previous sanction of President. Thus, if the President's assent has been obtained, the State law would be held valid. The fact that the President had given his sanction under Art. 304(b) would lend, strong though not conclusive, support to the holding of the restrictions to **be** 'reasonable' *(Khyerbari Tea Co.* verses *State of Assam*).

9

FURTHER QUESTIONS

Q.1 What are the circumstances and factual situations that may give rise to a presumption as to the failure of Constitutional machinery in a State and consequently imposition of President's rule? Can failure of constitutional machinery in a State be decided on any objective considerations? Can a presidential proclamation issued under Art. 356 be challenged in a court of law on any ground whatsoever? What is the maximum duration of the proclamation imposing Presidential rule in a State?

What is the meaning of 'failure of constitutional machinery in a State'? To what extent the Supreme Court has put a check on motivated and arbitrary dismissal of State governments by the Centre under Art. 356? Discuss.

(a) The Mayawati Government in U.P. fell due to the withdrawal of support given to it by BJP. The State Governor places the U.P. Assembly under suspended animation. Soon thereafter the Governor sends a report to the President recommending dissolution of Assembly and proclamation of President's rule under Art. 356 in the State. On the basis of the Governor's report President dissolved the Assembly.

On the basis of your understanding of S.R. *Bommai* case, discuss the following questions:-

(1) Is the Presidential action under Art. 356 dissolving the U.P. Assembly constitutionally valid?

(2) Can Assembly be restored/revived if the Supreme Court invalidates Presidential proclamation?

(3) Can the Presidential proclamation be challenged on the ground of *mala fide* exercise of power?

(b) "Article 355 enjoins upon the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of the Constitution." Communal clashes in a State created a serious law and order problem for the State government which requested the Union to send Central forces to meet the situation but the Union refused to do so. Instead, the President dismissed the State Council of Ministers and dissolved the Legislative Assembly. Discuss the constitutional provisions and judicial decisions. Could the President take the above action even without the Governor's report?

A.1 President's Rule in States (Art. 356)

Art. 356(1) reads: If the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution, the President may issue a Proclamation to that effect.

Article 356(3) reads: Every Proclamation under this article shall be laid before each House of Parliament and shall... cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament. Art. 356(4) provides that the duration of proclamation can be extended by *6 months* each time by both Houses of Parliament passing resolutions approving its continuance.

Maximum duration of Proclamation, is *three* years; beyond 1 year it may be continued only if emergency under Art. 352 is in force, and election commission certifies that it is not possible to hold elections to State legislature [Art 356(5)].