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

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1 introduction

salient features of the constitution

The constitution of India is unique in many ways. It has several special features that distinguish it from other constitutions of the world.

(1) size of the constitution

It is the lengthiest constitution ever given to any nation. It is a very comprehensive document and includes many matters which could legitimately be the subject matters of ordinary legislation or administrative action. This happened because the government of India Act, 1935, which was after all basically a statute, was used as a model and an initial working draft and large portions of it got reproduced in the constitution. The size, complexities and the diversities of the Indian situation also necessitated several special, temporary, transitional and miscellaneous provisions for certain regions of the country or classes of people.

(2) types of constitution

• written or unwritten: Constitutions may be written like the U.S. constitution or unwritten and based on conventions like the British. Indian constitution is written even though conventions also play a part insofar as they are in keeping with the provisions of the constitution. It originally contained 395 articles and 8 schedules. It presently contains 395 articles (total number-444) divided into 22 parts and 12 schedules.

• rigid or flexible: Constitutions may be called rigid or flexible on the ground of the amending procedure being difficult or easy. Federal constitutions are usually classified as rigid because of their difficult amending processes.

Indian constitution may be said to be a combination of rigid and flexible inasmuch as certain provisions of the constitution can be amended like ordinary legislation by simple majority in the houses of parliament, other provisions can be amended by a special majority.

Indian constitution: whether federal or unitary?

(3) parliamentary or presidential system of government

India is a republic (i.e. the supreme power rests in all the citizens entitled to vote— the electorate, and is exercised by representatives elected, directly or indirectly, by them and responsible to them) and the head is the president in whom all the executives power vests and in whose name it is to be exercised. He is also the supreme commander of the armed forces. However, unlike the U.S. president, Indian president is only a nominal or constitutional head of the executive; he acts only with the aid and advice of the real political executive which is the council of ministers. The ministers are collectively responsible to the popular house of parliament i.e. the Lok Sabha.

Thus, following the British "Westminster" 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. In the U.S. system, the president chooses his team of ministers from among the citizens at large and the ministers are not
members of the legislature while in the parliamentary system, the ministers are from parliament and remain part of it and responsible to its house of the people. the parliamentary system may be said to be laying greater stress on the concept of the responsibility of the executive while the presidential system obviously promotes more the stability of the executive.

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 still largely unitary, while ours is largely federal. they are a monarchy with a hereditary king while we are a 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. our constitution includes a charter of justiciable fundamental rights which are enforceable by the courts not only against the executive but also against the legislature unlike the position in u.k.

in a highly pluralistic society with india's size and diversity and with many pulls of various kinds, the founding fathers believed that the parliamentary form was the most suited for accommodating a variety of interests and building a united india. dr. ambedkar had said in the constituent assembly: "the draft constitution in recommending the parliamentary system of executive has preferred more responsibility to more stability."

however, some commentators argue that it causes political instability and dysfunction viz. hung parliaments or compulsions of coalition dharma.

(4) **parliamentary sovereignty versus judicial supremacy**

in india, the constitution has arrived at a compromise between the british sovereignty of parliament and american judicial supremacy. we are governed by the rule of law and judicial review of administrative action is an essential part of rule of law. thus, courts can determine not only the constitutionality of the law but also the procedural part of administrative action (*state of bihar verses subhash singh*). but, since we have a written constitution and the powers and functions of every organ are defined and delimited by the constitution, there is no question of any organ - not even parliament - being sovereign. both parliament and the supreme court are supreme in their respective spheres. while the supreme court may declare a law passed by parliament *ultra vires* as being violative of the constitution, parliament may within certain restrictions amend most parts of the constitution.

(5) **adult franchise**

dr. ambedkar said in the constituent assembly that by *parliamentary democracy* we mean 'one man, one vote'. almost as an act of faith, the founding fathers decided to opt for 'universal adult suffrage' with every adult indian without any distinction at once having equal voting rights. this was particularly remarkable in the context of the vast poverty and illiteracy of the indian populace.

(6) **secular state**

india has been declared secular state because of its policy of non-discrimination towards any religion. all religions are held equally in high esteem by the state and there is no state religion (unlike a theocratic state) or a preference for a particular religion.

(7) **charter of fundamental rights**

by and large, the fundamental rights incorporated in part iii of the constitution are the inviolable rights of the individual against the state/any law or executive action depriving an individual citizen of his
freedom, for example, can be challenged in the supreme court or high court. the constitution also lays down the machinery and mechanism for the enforcement of these rights. in the u.s. constitution, the fundamental rights were expressed in absolute terms. but there can be no absolute individual rights. for, the rights of each individual are limited at least by similar rights of other individuals. the supreme court of the united states had to find out and identify the legitimate restrictions on fundamental rights. our founding fathers, however, decided to incorporate the restrictions within the relevant provisions themselves.

(8) directive principles
the directive principles of state policy inspired by the irish precedent, are a unique feature of our constitution. most of the socio-economic rights of the people have been included under this head. even though said to be not enforceable in courts of law, these principles are expected to guide the governance of the country. they are in the nature of ideals set by the founding fathers before the state and all the organs of the state must strive to achieve them. in recent years, the directive principles have increasingly assumed greater relevance and importance not only for the legislatures but also in the eyes of the courts.

(9) fundamental duties
the 42nd amendment to the constitution inter alia added a new part to the constitution under the head fundamental duties. it lays down a code often duties for all the citizens of india. inasmuch as there can be no rights without corresponding duties and rights of citizens have no meaning without respect for political obligations of the citizens towards the state, it is unfortunate that the code of fundamental duties of the citizens has not so far been accorded the importance it deserves.

(10) citizenship
in keeping with their aim of building an integrated indian fraternity and a united nation, the founding fathers provided for 'one single citizenship' despite the federal structure. in federal states like usa and switzerland, there is a dual citizenship, viz., the federal or national citizenship and the citizenship of the state where a person is born or permanently resides. unlike the u.s., there was to be no separate citizenship of the union and of the states and all citizens were entitled to same rights all over the country without any discrimination subject to a few special protections in case of the state of jammu and kashmir, tribal areas etc. (the constitution of jammu & kashmir provides for citizenship of the state).

the population is divided into two classes: citizens and non-citizens. non-citizens or aliens do not enjoy all rights granted by the constitution. indian citizens exclusively possess the following rights:

(1) some of the fundamental rights viz. articles 15, 16, 19, 29 and 30.
(2) only citizens are eligible for offices such as those of the president [article. 58]; vice president [article. 66]; judge of the supreme court [article. 124] or a high court [article. 217]; attorney general [article. 76]; governor [article. 157].
(3) the right to vote [article. 326]; the right to become a member of parliament [art. 84] and state legislature [article. 191].

it may be noted that the rights guaranteed by articles. 14 and 21 are available to aliens also. the enemy aliens, however, suffer from a special handicap. they are not entitled to the benefit of article. 22.

the constitution does not lay down a permanent or comprehensive provision relating to citizenship in india. part 2 of the constitution simply describes classes of person who would be deemed to be the citizen of india at the commencement of the constitution, the 26th january 1950. the...
parliament, under article 11, has enacted the Indian Citizenship Act, 1955, which provides for the acquisition and termination of citizenship subsequent to the commencement of the constitution.

(11) **Independent Judiciary**

The Constitution of India establishes an independent judiciary with powers of judicial review. The High Courts and the Supreme Court from a single integrated judicial structure with jurisdiction over all laws - union, state, civil, criminal or constitutional. Unlike the U.S., we do not have separate federal and state court systems. The entire judiciary is one hierarchy of courts. It not only adjudicates disputes and acts as the custodian of individual rights and freedoms but also may from time to time need to interpret the Constitution and review legislation to determine its vires vis-a-vis the Constitution.

(12) **Union and Its Territories**

The Constitution of India does not protect territorial integrity of States. Part 1 of the Constitution comprising articles 1 to 4 provides a self-contained mechanism for effecting changes in the Constitution of States or Union Territories of the Union of India. There are at present 28 States and 7 Union Territories in the Union of India.

(13) **Special Status of Jammu and Kashmir**

By virtue of Article 370 of the Constitution, the State of Jammu & Kashmir enjoys a special status within the Indian Union. It is the only State possessing a separate Constitution which came into force on 26th January, 1957. However, it is included in the list of States in the First Schedule of the Constitution of India. The jurisdiction of Parliament is limited to matters in the Union List and only some matters in the Concurrent List. The provisions of Indian Constitution did not automatically apply to Jammu and Kashmir. They were gradually made applicable (some in modified form) under Article 370. Art. 370 was incorporated in the Constitution in pursuance of the commitment made by Pandit Jawaharlal Nehru to Maharaja Hari Singh in October 1947 at the time of signing the Instrument of Accession of Jammu and Kashmir to India. Article 370(1) stipulates, "notwithstanding anything in this Constitution-

(a) the provision of Article 238 in Part 7 (which was subsequently omitted from the Constitution by the 7th Amendment in 1956) shall not apply in relation to the State of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said State shall be limited to those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make law for that State; and such other matters in the said lists, as with the concurrence of the Government of the State, the President may by order specify;

(c) the provisions of Article 1 of this Constitution shall apply in relation to that State;

(d) such other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify."

(14) **Panchayati Raj and Nagar Palika Institutions**

The Constitution 73rd Amendment Act, 1992 and the 74th Amendment Act, 1992 have added new parts 9 and 9-A to the Constitution. Under these two parts, 34 new articles (243 to 243-zg) and two new Schedules (11 and 12) have been added. These amendments do not apply to the States of
meghalaya, mizoram, nagaland and j & k, union territory of delhi, hill areas in manipur and darjeeling in west bengal. also, these do not apply unless extended to scheduled areas and tribal areas under article 244.

nature of the constitution: the fundamental law

the constitution is the supreme law of land, and all governmental organs, which owe their origin to the constitution and derive their powers from its provisions, must function within the framework of constitution, and must not do anything which is inconsistent with provisions of constitution. all the functionaries take oath of allegiance to the constitution. the constitution of india is the "will of the people" of the country. its place is higher than legislation because the validity of legislation is determined with reference to the constitution. in case of conflict between two, it is constitution (reflecting the will of the people) that will prevail. the constitution has entrusted to the judicature the task of construing the provisions of the constitution and of safeguarding the fundamental rights.

theory of basic structure

in the below-discussed case, the supreme court laid down the 'theory of basic structure.' the parliament has wide powers of amending the constitution and it extends to all the articles, but amending power is not unlimited and does not include the power to destroy or abrogate the 'basic feature' or 'framework' of constitution. there are implied or inherent limitations on the power of amendment under article 368. within these limits parliament can amend every article of constitution.

the 'basic feature' comes into picture when it is found that legislature transgresses the boundary defined initially by the constitution, powers are given by the constitution to the legislature to frame laws to fulfill the requirements of the people. but the parliament cannot enlarge its own powers so as to abrogate the limitation in the terms, on which the power to amend was conferred. thus, the parliament cannot destroy the human rights and the fundamental freedoms which are reserved by the people for themselves when they gave to themselves the constitution.

whether there are implied limitations on the amending power or not would depend upon the interpretation of word 'amendment.' khanna j., said that the word 'amendment' postulated that the old constitution must survive without loss of identity and must be retained though in the amended form and, thus, the power does not include the power to abrogate the basic structure.

the preamble: source of constitution

the preamble indicates the source from which the constitution comes viz. the people of india. it is ordained by the people of india through their representatives assembled in a sovereign constituent assembly. the preamble declares clearly that it is the people of india who have adopted, enacted and given to themselves the constitution.

the preamble embodies the great purposes, objectives and the policy underlying its provisions apart from the basic character of the state which was to come into existence i.e. a sovereign democratic republic. the preamble to the indian constitution reads:

"we, the people of india, having solemnly resolved to constitute india into a sovereign, socialist, secular, democratic republic and to secure to all its citizens:

justice, social, economic and political;
liberty of thought, expression, belief, faith and worship;
equality of status and of opportunity; and to promote among them all fraternity assuring the dignity of
the individual and the unity and integrity of the nation:
in our constituent assembly, this twenty-sixth day of november 1949, do hereby adopt, enact and
give to ourselves this constitution."

(the words 'socialist' and 'secular' have been added to the preamble by the 42nd amendment act, 1976.
also, 'unity of the nation' was amended to read 'unity and integrity of the nation').

the objectives of the preamble are: justice, liberty, equality and fraternity. the ultimate goal is that
of "securing the dignity of the individual and unity and integrity of the nation."

the preamble sets out the aims and aspirations of people, and these have been translated into
various provisions of constitution. the people will continue to be governed under the constitution so
long as it is acceptable to them and its provisions promote their aims and aspirations. following the
course of indian history and pattern of indian politics, it may be said that, unlike the western society, it
is the elite of indian society rather than people themselves who have set the tone for reformation of society.
for example, in field of legislative activity, enactment of a law is not brought about as a culmination of
urges of people reflecting changes in socio-economic order, but a measure which was enacted and adopted by
constituent assembly which took the lead in projecting a system to be identified with aims and aspirations of
people (though constituent assembly was not directly elected by people, it doesn't necessarily mean that it
didn't project the feeling of people). the constitution though not ratified by people, came into force in
1949.

besides the fact that the preamble provides it is the people of india who have enacted and given to
themselves the constitution, the successful working of the constitution and its continued acceptance by
people over the years, leads to no other conclusion that the binding force of constitution is the sovereign
will of people of india. if at any stage of history, the people find that constitution is not serving the needs
of society, they may set in motion a machinery which provides for a system suited to aims and aspirations of
people. it may, therefore, be rightly observed that the 'sovereignty' lies with the people of india -
preamble declares that source of authority under the constitution is the people of india (sovereignty,
is not located in parliament, as it is bound by constitution.... which in a sense may appear to be
sovereign as it is supreme law. however, it is the people who have given ... constitution).

thus, the source of the constitution are the people themselves from whom the constitution receives
its ultimate sanction. the constitution has not been imposed on them by any external authority, but is the
work of the indians themselves.

utility of preamble

preamble represents the quintessence, the philosophy, the ideals, the soul or spirit of the entire
constitution of india. it had the stamp of "deep deliberation", was "marked by precision": it was "an
epitome" of the broad features of the constitution which were an amplification or concretization of the
concepts set out in the preamble (madhlokar, j. in saijjan singh verses state of rajasthan ).

the preamble does not grant any power but it gives a direction and purpose to the constitution. the
utility of the preamble is as follows: utility of preamble

(1) it contains the enacting clause which brings the constitution into force.
(2) it indicates the source of constitution.
(3) it declares the basic type of government and polity which is sought to be established in the country.

(4) a statement of objectives of the constitution - which the legislation is intended to achieve (example implementation of directive principles). it epitomizes principles on which the government is to function.

(5) it serves as a challenge to the people to adhere to the ideals enshrined in it ('justice, liberty, equality, fraternity, etc.).

(6) it is a sort of introduction to the statute and many a times very helpful to understand the policy and legislative intent. it is a 'key-note' i.e. key to the minds of the framers of the constitution.

(7) several decisions of the supreme court pointed out the importance and utility of it. by itself, it is not enforceable in a court of law, yet it states objects and aids legal interpretation of the constitution, where language is ambiguous..... construction which fits the preamble may be preferred (however, the preamble cannot override the express provisions of an act).

**amendment of preamble**

in *berubaris* case, the supreme court held that preamble is not a part of constitution and thus not a source of any substantive powers and doesn't import any limitations. however, in *keshavanand's* case the court held that preamble is part of constitution and it is of extreme importance; and constitution should be read and interpreted in the light of grand and noble vision expressed in preamble. in fact the preamble was relied on in imposing implied limitations on amendment under the art. 368.

held that since preamble is part of constitution, it can be amended, but 'basic features' in it can't be amended. as edifice of our constitution is based upon these features and if they removed, it will not be the 'same' constitution. amending power can't change the constitution in such a way that it ceases to be a 'sovereign democratic republic'.

it may be noted that in exercise of the amending power under art. 368, the constitution (42nd) amendment act, 1976 amended the preamble inserting the terms 'socialist', 'secular' and 'integrity.'
part 1 of the constitution comprising articles 1 to 4, provides a self-contained mechanism for effecting changes in the constitution of states or union territories of the union of India.

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.

article 1: India - a union of states, its territory

article 1(1) declares that "India, that is Bharat, shall be a union of states". the expression "union" indicates that the Indian federation is not the result of an agreement between the units it consisted of and that the component units have no freedom to secede from the union so created.

article 1(3) mentions that the "territory of India" comprises of the (a) state territories, (b) union territories, and (c) such other territories as may be acquired by the government of India at any time.

there are at present 28 states and 7 union territories in the union of India. article 1(3)(c) does not expressly confer power on the government of India to acquire new territories, but it is the inherent right of a sovereign state to acquire a foreign territory and no parliamentary legislation is required for this purpose. article 1(3)(c) merely states a factual situation and does not confer a power on parliament to acquire foreign territory. it is to be noted that only 'states' are the members of the union of India (by virtue of art.

in n. masthan sahib verses chief commr., Pondicherry, the apex court held that the expression 'acquired' [article. 1 (3)(c)] should be taken to be a reference to 'acquisition' as understood in public international law. if there was any public notification, assertion or declaration by which the government of India had declared or treated a territory as part and parcel of India, the courts would be bound to recognize an 'acquisition' as having taken place, with the consequence that the territory would be part of the territory of the union within art. 1 (3) (c). a statement by the government of India that it did not consider a particular area to have been acquired by it is binding on the court.

the territory can be said to have acquired when the Indian union acquires sovereignty. a foreign territory would not come within art. 1(3)(c) until there is legal transfer of territory to India so as to constitute its "acquisition" in international law.

article 2: admission or establishment of new states

article 2 provides: "parliament may by law admit into the union, or establish, new states, on such terms and conditions as it thinks fit."

the expression "admit" refers to the admission of a state already in existence as a 'state' i.e. duly organized political community. the term "establish" refers to the creation of a state where none existed before (in re Berubari case).

a new state may be admitted into the union in any of the following ways—

(1) an inferior category such as a union territory, may be raised to the status of full state,

(2) a foreign territory acquired by India may be made a state and admitted into the union,
article. 3(a): formation of new states

article. 3(a) empowers the parliament to form new states, by law. it may do so by any of the following modes -

(1) by separation of territory from any state,
(2) by uniting two or more states,
(3) by uniting parts of states
(4) by uniting any territory to a part of any state.

while article. 2 relates to admission or establishment of new states which are not part of the union, art. 3 provides for the formation of or changes in the existing states including union territories. it is important to note that "foreign territories" which become part of india on acquisition may:

(1) either be admitted into the union;
(2) constituted into new states under article. 2; or
(3) merged into an existing state under art. 3(a) or 3(b); or
(4) formed into a union territory.

the constitution of india does not guarantee the territorial integrity of any state of the union (in re berubari case). parliament may even cut away the entire area of the state to form a new state. when a new state is formed by uniting two or more states, the states cannot unite in some matters and not to unite in respect of other matters.

it may also be noted that there is nothing in the constitution which would entitle a new state, after its formation or admission into the union, to claim complete equality of status with a state existing at the commencement of the constitution, or formed thereafter under article. 3.

article. 3(b) to (e): alteration of areas, boundaries or names of states

the parliament may, by law, (b) increase the area of any state, (c) diminish the area of any state, (d) alter the boundaries of any state, and (e) alter the name of any state. the parliamentary legislation is subject to the condition laid down in proviso to art. 3.

proviso to article 3 - "no bill for this purpose shall be introduced in either house of parliament except on the recommendation of the president, and such a bill has to be referred by the president to the legislature of that state for expressing its views thereon".

the state legislature is required to express its view within a specified time period as directed by the president. he may extend the time so specified. the parliament, however, is not bound to accept these views.

once the bill has been referred to the concerned state legislatures, and thereafter duly introduced in parliament, subsequent amendments seeking to make provisions different from those contained in the original bill at the time of its introduction, are not required to be referred again to the state legislatures (if the amendments are germane to the subject matter of the original proposal or are not a direct negation
thereof). also, no fresh recommendation of the president is necessary for the consideration of the proposed amendment to the bill (*babulal parate verses state of bombay*)

**explanation 1 to article. 3** - the term "state" in clauses (a) to (e) of article. 3 include a "union territory". but the term "state" used in proviso to article. 3 does not include a union territory (the reason being that the union territories are under the administration of the president himself).

**explanation 2 to article. 3** - the power conferred on parliament by clause (a) of article. 3, to form a new state, include the power to form a new union territory also.

**article. 4: supplemental matters**

article. 4(1) directs the parliament, in case it makes a law under article. 2 or 3, to include therein necessary provisions (supplement, incidental and consequential) for the amendment of first and fourth schedules of the constitution. the *first* schedule specifies the number of states which are members of the union and their respective territories. the *fourth* schedule specifies the number of seats to which each state is entitled to in the council of states.

article. 4(2) said that laws relatable to article. 2 or 3 do not amount to constitutional amendments for the purposes of article. 368. thus, such laws may be passed by the parliament by simple majority procedure (subject to the requirements laid down by proviso to article. 3) and without going through the special majority procedure prescribed by article 368.

**cession of territory to a foreign state**

the powers given to parliament to reorganize states cannot be availed of by it to cede any indian territory to a foreign country. this was held so in an advisory opinion in the below-mentioned case.
3
character of union-state relationship: concept of federalism

essential features of federalism

A federal constitution usually has the following essential characteristics:-

(1) duality of government and distribution of powers — the basis of distribution of powers between central and state governments is that in matters of national importance, authority is entrusted in the union, and matters of local importance remain with the states.

example of federal constitution

The American Federation can be described as the outcome of the process of evolution, in that, the separate states first formed into a confederation (1781) and then into a federation (1789). Although the states may have their own constitutions, the federal constitution is the suprema lex and is made binding on the states. That is because under the American constitution, amendments to the constitution are required to be ratified by three-fourths of the states.

Besides under that constitution there is a single legislative list enumerating the powers of the union and, therefore, automatically the other subjects are left to the states. This is evident from the tenth amendment. Of course, the responsibility to protect the states against invasion is of the federal government. The states are, therefore, prohibited from entering into any treaty, alliance, etc., with any foreign power.

The principle of dual sovereignty is carried in the judicial set-up as well since disputes under federal laws are to be adjudicated by federal courts, while those under state laws are to be adjudicated by state courts, subject of course to an appeal to the Supreme Court of the United States. The interpretation of the constitution is by the United States Supreme Court.

Indian constitution: federal or quasi-federal

The Indian federalism was designed on the basis of the working of the federalism in U.S.A., Canada and Australia. Yet it deviates from those federalism in many respects and establishes its own distinctive features. There is a difference of opinion among scholars about the nature of Indian constitution — whether it is federal or not.

Federal characteristics of Indian constitution

There is a dual polity i.e. central and state governments. There is a supreme constitution. Our constitution is a written and controlled (rigid) constitution. It can be amended only to the extent of and in accordance with the provisions contained therein, the principal provision being Article 368. Further, the constitution establishes an apex court in the form of the Supreme Court to maintain the authority of the courts.

The constitution does incorporate the concept of federalism in various provisions. The provisions which establish the essence of federalism i.e. having states and a centre, with a division of functions between them with sanction of the constitution include, among others, lists 2 and 3 of the seventh schedule that give plenary powers to the state legislatures; the authority to Parliament to legislate in a field covered by the states under Article 252, only with the consent of two or more states; the competence of Parliament to legislate in matters pertaining to the state list, only for a limited period, under Article 249, "in the national interest"; and, under Article 258 (1) to entrust a state government (with the governor's consent) functions in relation to which executive power of the Union extends; decentralization of power through 73rd and 74th
deviations from federal characteristics: unitary features of indian constitution

in the following matters, it is pointed out, the indian constitution modifies the strict application of the federal principle:-

(1) legislative relations - under the art. 249, parliament is empowered to make laws with respect to every matter enumerated in the state list, if it is necessary in the national interest. similarly, legislation for giving effect to international agreements (article. 253). in case of inconsistency between the laws made by parliament and laws made by legislature of states, the laws made by parliament whether passed before or after the state law in matters enumerated in concurrent list, to the extent of repugnancy prevail over the state law. in case of an overlapping between the matters of three lists i.e. union, state and concurrent list, predominance has been given to the union (article. 246). previous sanction of the president is required for introduction of certain bills in the state legislatures (viz. art. 304).

(2) administrative or executive relations - all planning is at the union level (via planning commission), the states only implement the plans formulated by the union. further, there is all-india services.

the executive power of every state has to be exercised as to ensure compliance with the laws made by parliament. article. 365 authorises the president to hold that a situation has arisen in which government of a state cannot be carried on in accordance with the provisions of constitution, if the state fails to comply with or give effect to any directions given in exercise of the executive power of the union.

(3) financial relations - the states depend largely upon financial assistance from the union (through grants-in-aids). power of taxation (which is exercisable by the states in comparatively minor fields, the more important such as income-tax, wealth-tax, excise-duties other than those on certain specified articles and customs, being reserved to the union) conferred by various entries under list ii on the states is also severely restricted.

(4) parliament's power to form new states and alter boundaries of existing states - the very existence of the state thus, under article. 3, depends upon the sweet will of union.

(5) appointment of governors - the governors of states are appointed by president and answerable to him. they hold the office at the pleasure of the president. they thus act in a manner suitable to the president even at the cost of the interest of the states of which they are governors. there are provisions in constitution under which the governor is required to send certain state laws for the assent of president and the president is not bound to give his assent.

(6) emergency provisions - under emergency, the normal distribution of powers between the centre and states undergo a vital change (in the favour of the centre). under article. 356, the state legislature can be dissolved and president's rule can be imposed either on the governor's report or otherwise when there is a failure of the constitutional machinery in a state.

(7) single and uniform citizenship - for the whole country.

(8) uniform and integrated judicial system - for the whole country.

(9) inter-state council - if at any time it appears to the president that the public interests would be served by the establishment of a council charged with the duty of- (a) inquiring into and advising upon disputes which may have arisen between states; (b) investigating and discussing subjects in which some or all of the states, or the union and one or more of the states, have a common interest; or (c) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject, it shall be lawful for the president to
establish such a council, and to define the nature of the duties to be performed by it and its organization and procedure (article. 263).

(10) freedom of trade and commerce — for the whole country, the comprehensive provisions of part 13 seek to make India a single economic unit for purposes of trade and commerce under the overall control of the union parliament and the union executive.

thus, in certain circumstances, the constitution empowers the centre to interfere in the state matters and thus places the states in a subordinate position or converts the union into a unitary state, which violates the federal principle. the similar views were expressed in state of w.b. verses union of India case (discussed later).

criticism of wheare's views
the term "quasi-federal" as suggested by wheare is very vague as it does not denote how powerful the centre is, how much deviation there is from the pure 'federal model', etc. it may be that centre has been assigned a larger role than the states but that by itself does not detract from the federal nature of constitution, for it is not the essence of federalism to say that only so much, and not more power, is to be given to the centre.

the federalism varies from place to place, and from time to time depending on factors like - historical, geographical, economical and political. indian constitution is sufficiently federal, and it is no less federal than american federalism. the framers of indian constitution kept in view the practical needs of country designed on federal structure not on the footing that it should conform to some theoretical or standard pattern, but on the basis that it should be able to subserve the need of the vast and diverse country like India.

carations: indian federalism is 'unique'
india adopted a federal structure as the different parts of the country were at different stages of development and it would have been difficult to control from one centre; and to ensure minorities their due place.

however, the indian federalism is unique because of its mode of formation i.e. from union to states (creation of autonomous units and then combining them into a federation), and not vice versa. it is to be noted that term 'union of states' (article. 1) and not 'federation' is used in the constitution. also, the units have no right to secede (as in a confederation).

the constitution of india is neither purely federal nor purely unitary, but is a combination of both. it is a union of composite states of a novel type. neither the parliament nor the state legislation is 'sovereign' because each being limited by the constitutional provisions affecting the distribution of powers. the constitution enshrines the principle that in spite of federalism, the national interest ought to be paramount. thus, the indian constitution is mainly federal with unique safeguards for enforcing national unity and growth.

the scope of application of federal principle in india is shown by the scope of state legislatures. however, indian federation is not defective; the defect is political because there is a conflict between opposition-party ruled states and the central government. also, federalism is not dead in India, as evidenced by the fact that new regions are demanding statehood and union has yielded, thus states like manipur, tripura, goa, etc. have been created. moreover, in spite of conflicts, the opposition-party ruled states do exist.
union and state powers: executive powers

the union executive consists of the president, the vice-president, the council of ministers and the attorney general.

nature and extent of executive power

article 73 provides that executive power of union shall extend to the matters with respect to which parliament has power to make laws and includes the exercise of such rights, authority and jurisdiction as are exercisable by the government of india by virtue of any treaty or agreement. thus, executive power is co-extensive with legislative powers of union.

the expression 'executive power' is nowhere defined in the constitution. in ram jawaya kapur verses state of punjab, it was observed, 'ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. it is neither necessary nor possible to give an exhaustive enumeration of kinds and categories of executive functions. executive power is not confined to administration of laws already enacted but it includes determination of governmental policy, initiation of legislation, maintenance of law and order, promotion of social and economic welfare, foreign policy, etc.; in short, carrying on the general administration of state.

the court further observed: while the executive has no authority to act against the provisions of a law, it does not follow that to enable the executive to function relating to any matter within the scope of its authority, there must be a law which specifically authorizes such action. it is the executive that has the main responsibility for formulating the governmental policy by "transmitting it into law" whenever necessary. the executive function comprises both the determination of the policy as well as carrying it into execution. if executive formulates a policy to start a trade or business, it is not always necessary to have legislative sanction, unless it requires expenditure of funds. specific legislation may be necessary, if government requires certain powers in addition to what it possess under ordinary law.

thus, in respect of matters covered by list iii (concurrent list), the union as well as states possess executive powers. however, it is only in exceptional cases that parliament may entrust the administration of a law on a concurrent subject to the union executive. the proviso to clause (1) lays down that the executive power of the union shall not extend to a matter in the concurrent list unless: (1) the union law expressly entrusts the execution thereof to union authorities; or (2) the power is expressly conferred by the constitution itself on union authorities. a law on a concurrent subject, therefore, though enacted by parliament, shall be executed by the states except when the parliament has directed otherwise. the proviso does not affect the union's power to exercise any executive power which it may otherwise possess under the constitution (example articles. 256, 257, 353, 356, etc.).

under article. 53(1), the executive power of the union is vested in the president and is exercisable by him in accordance with the constitution. article. 53(2) vests the supreme command of the defence forces in the president 'without prejudice to the generality of the foregoing provision' i.e. article. 53(1). military power is thus subordinate to civil power and the exercise of the supreme command can be regulated by 'law' i.e. acts of parliament. thus, the war power vested in parliament would enable it to give directions to the president as to the exercise of the supreme command power and the power to carry on a military campaign.

article. 53(3) makes it clear that from the fact that the executive power of the union shall be vested in the president, it shall not be inferred that the functions conferred by any existing law on
the government of any state or other authorities have to be transferred to the president. Article 53(3) further lays down that though executive power is vested in the president, it will not prevent parliament from conferring functions on authorities other than the president, but powers which are expressly conferred on the president by the constitution cannot be transferred by parliament to any other authority.

**Position of President: Relation Between President and Council of Ministers**

All executive functions are executed in the name of president, authenticated in such manner as may be prescribed by rules to be made by president (article 77). The president has wide administrative powers (to appoint and dismiss officers, ministers, etc.), military powers, diplomatic and legislative powers.

The president, however, must exercise powers according to the constitution. Art. 53(1) which vests the executive power of the union in the president provides that the power may be exercised by the president either directly or through officers subordinates to him. For this purpose, ministers are deemed to be officers subordinate to him.

Article 74(1) provides that there shall be a council of ministers with prime minister at the head, to aid and advise president in exercise of his functions. Article 74(2) lays that question whether any, and if so, what advice was tendered by minister to the president shall not be inquired into in any court. Thus, relation between president and council of ministers are confidential.

Prior to the 42nd amendment, there was no clear provision in the constitution that president was bound by ministerial advice. This amendment amended article 74 which makes it clear that president shall be bound by the advice of council of ministers. However, by 44th amendment, president has been given one chance to send back advice to the council of ministers for reconsideration. However, president shall act in accordance with advice tendered after such reconsideration.

Article 75(1) says that prime minister shall be appointed by president and other ministers shall be appointed by president on the advice of prime minister. Article 75(2) lays that minister shall hold office during the pleasure of president. Article 75(3) lays down that council of ministers shall be collectively responsible to the lok sabha.

Clause (1a), added to article. 75(1) by the constitution 91st amendment (2003), provides that the size of the council of ministers including the prime minister shall not exceed 15 per cent of the total number of the members in the lok sabha.

It may be noted that the ministers are nominees of the prime minister. The constitution does not contain any restriction on the prime minister's choice of his colleagues. In practice, his choice is governed by considerations like party standing, capacity, educational skill, willingness to carry out a common policy, regional representation, representation of backward or scheduled classes, minorities, etc.

Before a minister enters upon his office, the president shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the third schedule [article. 75(4)]. The salaries and allowances of ministers shall be such as parliament may from time to time by law determine and, until parliament so determines, shall be as specified in the second schedule [article. 75(6)]. The salaries and allowances of ministers act, 1952, has been passed for this purpose.

**Prime Minister**

He is the leader of the majority party in the lok sabha. According to article. 74(1), he is the head of the council of ministers. He is primes inter pares ("first among equals") in council of ministers. His main function is to aid and advise the president in the exercise of his functions. In this way, he is the real or chief executive.
the prime minister's office is his personal secretariat. under the allocation of business rules, 1961, it occupies the status of a department of the government of india. 'cabinet' is the core of the council of ministers. the prime minister is the chairman of the planning commission. recently, he has been made the chairperson of the 'tiger conservation authority'.

deputy prime minister
the post of deputy prime minister is not prescribed in the constitution. however, seven deputy prime ministers have been made so far (example sardar patel - first, l.k. advani - last). such appointment depends on the discretion of the prime minister and the communication is sent to the president of india. he occupies the position of prime minister in assisting him in his absence. his office is meant to reduce the workload of the prime minister. he, however, lacks the powers of the prime minister.

the supreme court has ruled that the deputy prime minister is just a minister and he takes the same oath as a minister does.

president's discretion: a limited one
(council of ministers to aid and advise president)
alladi krishna ayyar, a member of the drafting committee of the constituent assembly, observed that the word "president" used in the constitution "merely stands for the fabric responsible to the legislature". what he means by the term 'president' is the union council of ministers which is declared to be collectively responsible to the house of people i.e. lok sabha.

the role of the president as a figurehead is reflected in his indirect election. it may also be noted that the constitution nowhere uses the terms like "discretion" and "individual judgment" for the president which were used for the governor-general under the government of india act, 1935.

according to dr. ambedkar, "under the draft constitution, the president occupies the same position as the king under the english constitution. he is the head of state but not of the executive. he represents nation but does not rule the nation. his place in the administration is that of a ceremonial device on a seal by which the nation's decisions are made known. he can do nothing contrary to the advice of council of ministers nor can do anything without their advice."

it is the council of ministers which makes decisions relating to the administration of the affairs of the union and its decisions are binding on the president. except in certain marginal cases, president shall have no power to act in his discretion in any case:-

(1) council of ministers is collectively responsible to lok sabha [article. 75(3)]. thus, for the policy decisions of the government, the council of ministers is answerable to parliament; the president is not responsible to parliament for the acts of government. it will be anomalous to hold that the ministers are answerable for the acts and policies of the government in the making of which they only give advice, while the final decisions are taken by the president.

if the president ignores the advice of ministers enjoying the confidence in lok sabha, it may resign and thus create a constitutional crisis. the president must then find another prime minister who, with his colleagues, can secure the support of the lok sabha. if the outgoing prime minister has the support of the lok sabha, it will not be possible for the president to have an alternative government. it is obligatory on the president to have always a council of ministers.

(2) if he dismisses any ministry having support of lok sabha, they may bring impeachment proceedings against him... this serves as a deterrent against the president assuming real powers.
(3) the president may not be able to incur any expenditure in case of any conflict between himself and the council of ministers. the latter has the support of lok sabha which in turn controls the executive primarily through its authority over the purse i.e. the power to levy and collect taxes. any amount incurred by the president without proper authorization by parliament would be unconstitutional.

(4) appointment of prime minister - president's discretion is limited. thus when a single party gains an absolute majority and has an accepted leader, president's choice of selecting prime minister is a

president's role: appointment of prime minister in hung parliament

article. 75(1) casts the burden of appointing the prime minister (pm) and other ministers on the president. the prime minister has been described as "the keystone of the cabinet arch, who is central to its formation, central to its life, and central to its death". therefore, he must be a person who can secure colleagues and with his colleagues he must be sure of the support of the popular house of parliament, the lok sabha. the system of parliamentary government requires that the pm along with his colleagues, not only be responsible to the lower house, but that he shall be able to justify his policy in parliament (laski, parliamentary government in england, 228). article. 75(3) lays down that the council of ministers shall be collectively responsible to the lok sabha.

appointment of prime minister is one act which the president performs in his discretion without the aid and advice of the council of ministers or the prime minister. however, under normal circumstances, when a political party has attained absolute majority in the lok sabha, the president has no choice or discretion but to invite the recognised leader of that party and appoint him the prime minister. this is the principal limitation in practice on the president's choice of prime minister. however, if no single party gains absolute or workable majority and a "coalition government" is to be formed, the president can exercise a little discretion and select the leader of any party who, in his opinion, can command the support of the majority in the lok sabha and form a stable government. "in accordance with the highest democratic traditions and in the interest of establishing healthy conventions", the prime minister should seek a vote of confidence in the lok sabha at the earliest.

even in such a situation (i.e. the case of "hung parliament"), the president's action is guided by certain conventions. the president usually seeks to put in office a prime minister who is able to muster majority support in the house. this is also the position in britain viz. when no party has an overall majority in the house, the queen will have to decide who has a 'reasonable prospect' of maintaining himself in the house. in view of the fact that the framers of the constitution of india have adopted the british cabinet system, the conventions operating under the english constitution are relevant in this regard:

(a) first, in the case of defeat of ruling party in the lower house by a no-confidence motion, the president should invite the leader of the opposition to explore the possibility of forming a stable ministry. it was done by the president, shri n. sanjeeva reddy, by inviting y.b. chavan, the leader of the opposition, to form the government after morarji desai tendered his resignation in 1979. however, after four days of hectic activities, y.b. chavan informed the president his inability to form the government.

(b) secondly, where none of the parties has attained absolute majority in the lok sabha, the president may invite the leader of the "single largest party" to form the government. in 1991, the president invited mr. narasimha rao, the leader of the congress party, which was the single largest party, to form the government. similarly, after the sixth general elections, the president appointed mr. vajpayee, the leader of the bjp, which was the single largest party. the president asked mr. vajpayee to prove the majority in the lok sabha within 13 days, which he was unable to prove. in the seventh general elections (1998), the president again appointed mr. vajpayee, the leader of the single largest party. this time, however, the bjp government was able to prove its
majority in the lok sabha.

(c) thirdly, if two or more parties form a coalition before the election and secure absolute majority in the election, the acknowledged leader of such a coalition should be invited to form the government. in 1977, mr. morarji desai, the leader of the janta party, a coalition of several parties who fought election on the common platform, formed the government. similarly, in 1989, mr. v.p. singh, the leader of the janta dal (a national front, consisting of several local and national parties) was invited to form the government.

(d) fourthly, the president should invite the leader of the coalition or alliance formed after the election, to form the government. in 1996, after the sixth general elections, mr. deve gowda, who was elected the leader of the united front (consisting of 13 parties), formed the government, was elected and appointed the prime minister by the president. the united front secured the requisite majority with the help of 'outside' support form the congress party. it may be noted that the president had first invited the bjp party, the single largest party in the sixth general elections, to form the government. on the bjp government's failure to prove the majority, the president invited the leader of the united front, a post-poll alliance; there was no pre-poll alliance which had secured absolute majority in the election.

it may be noted that before appointing any leader of a party/alliance as pm the president on the basis of documentary evidences (i.e. affidavits, signature-list, etc.) should be reasonably satisfied that the person concerned has the majority support with him in lok sabha. such ascertainment becomes necessary in view of the fact that after being sworn in as pm he may use unfair means to garner the lacking support and the very use of such means to remain in power is anathema to the spirit of the constitution.

the president should follow the conventions in the order in which they are mentioned above. however, many scholars do not favour a distinction between a pre-poll and post-poll alliance. according to them, such distinction is superficial as can a minority alliance be given chance just because it is pre-poll and vice versa. above all, the "sole test" is the possibility of commanding the majority in the lok sabha. and this is what the president is required to ascertain; he should not be concerned about the political manipulations or horse-trading. under the indian system, the gaining of political power through formation of several political parties is legal, hence a mere attempt to get more political power for a party is not unconstitutional. moreover, the president has to remain above the party politics.

but, some scholars are of the view that the ruling party should not be just able to command the majority in the house, it should be able to justify its policy in the parliament. therefore, the leader of the coalition/alliance formed after the elections should be given chance in the last, because such a coalition is not formed on any common principles and policies but solely with the object of getting into power. more so, when the coalition is formed with the help of the defectors from the ruling party and other parties join it simply to topple the government.

it is submitted that the "sole test" view appears to be correct. neither a pre-poll alliance nor a post-poll alliance guarantees a stable government (the failure of national front/janta dal, on both occasions, is a case in the point). a pre-poll alliance can create as many problems for the ruling party as a post-poll alliance. in 1998 elections, the bjp got support from the parties like aiadmk (ms. jayalalitha) and trimmul congress (mamta banerjee) - a pre-poll alliance. but, every second day, the bjp were involved in negotiating with ms. jayalalitha or ms. banerjee.

thus, the president should first invite the leader of the single largest party and ask him to prove his party's majority on the floor of the house. if the single largest party fails to get the majority support, then, the president should invite the second largest party to prove its majority on the floor of the house. it does not matter that the second largest party proves its majority via a pre-poll or post-poll alliance with the other parties. however, the president may look into certain factors like whether there is any condition attached to the support given by one party to the other, or whether the support is unconditional. the 'unconditional' support is to be preferred.

some scholars have suggested that in case of no clear majority in favour of any party, the president should send a message to the lok sabha under article 86(2) to select its leader (i.e. pm). it is, however, submitted that such a course is contrary to the spirit of the constitution as it is repugnant to the party-based system of democracy and a leader chosen by the house may never enjoy the majority support of it. here, it may also be noted that the direction given by the

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supreme court to hold a 'composite floor test' in the u.p. assembly to choose its chief minister is open to question due to similar reasons.

barring a few exceptions (for example in 1979, the president instead of inviting the leader of the largest single party, the janta party headed by mr. jagjivan ram, invited the leader of the coalition formed after elections, mr. charan singh, the leader of the janta (s), to form the government; the president's action, unjustified as it was, failed, as mr. charan singh could not garner the majority support because one of his coalition partner - congress (1) withdrew its support to his government), the presidents of india have followed the conventions and thus, upheld the sanctity of the constitution and ensured that they remain above the party politics.

mune formality. similarly, if on the death or resignation of a prime minister, the ruling party elects a new leader, president has no choice but to appoint him as prime minister.

however, if no single party gains majority and a "coalition government" is to be formed, president can exercise a little discretion and select the leader of any party who, in his opinion, can form a stable ministry. however, even in such a situation, his action should be guided by certain conventions like ').

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 this case, it was argued that it is only after a member of the lok sabha secures the vote of confidence of the lok sabha that he should be appointed as the prime minister. the court rejecting this argument said that it is the president and not the lok sabha that select the prime minister. the court held that the president exercised his discretion to dissolve the lok sabha after considering the advice of the council of ministers (though it did not secure the vote of confidence of the house) in a difficult and extraordinary situation.

incidentally, charan singh was the only prime minister who remained in office for a while without obtaining a vote of confidence from, and without ever facing, the lok sabha.

(5) dismissal of a minister/or cabinet - though ministers hold office during the pleasure of president [art. 75(2)], but president is bound to exercise his pleasure' accordance with prime minister's advice. thus, it is a power of prime minister against his (undesirable) colleagues (it is, however, necessary to realise the idea of collective responsibility).

'collective responsibility" implies that council of ministers is responsible (to the lok sabha) as a body for the general conduct of the affairs of the government. the entire council of ministers is made collectively responsible to the house and that ensures the smooth functioning of the democratic machinery. the council of ministers work as a team and all decisions taken by the cabinet are the joint decisions of all its members. no matter whatever be their personal differences of opinion within the cabinet, but once a decision has been taken by it, it is the duty of each and every minister to stand by it and support it both in the legislature and outside.

lord salisbury explained this principle of collective responsibility thus: "for all that passes in the cabinet each member of it who does not resign is absolutely irretrievably responsible, and has no right afterwards to say that he agreed in one sense to a compromise while in another he was persuaded by his colleagues."

thus, as soon as a ministry loses the confidence of the house or is defeated on any question of policy, it must resign. if a 'no-confidence motion' is passed against any one minister, the entire council of ministers. must resign.

if any minister does not agree with the majority decision of the council of ministers, his option is to resign or accept the majority decision. if he does not, the prime minister would drop him from his cabinet and thus ensure collective responsibility.11 this is a great weapon in the hands of the prime

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It needs to be clarified that along with the principle of collective responsibility the principle of 'individual responsibility' of each minister to the parliament also works. Every minister has to answer question regarding the affairs of his department in the parliament. He cannot throw the responsibility of his department either on his officials or another minister. If the minister has taken action with the cabinet's approval the principle of collective responsibility applies and the whole cabinet should support and defend his action. However, if the minister has taken action without the cabinet's approval, the cabinet may or may not support him. In case of non-support, the minister has to go and not the whole cabinet. But the cabinet cannot retain the minister and at the same time contend that the responsibility is all his (Ram Jawaya versus State of Punjab).

There is no doubt about the President's power to dismiss ministry that has lost the confidence of Lok Sabha. But, can President dismiss such ministry, which though enjoys the confidence of Lok Sabha, but has lost the support of the people. In India, such ministry enjoying the confidence of legislative assembly have been dismissed in various states.

It is no violation of constitutional practice if the President dismisses a ministry when he is satisfied on reasonable grounds that it has lost the support of the people. The will of the people must in the end prevail and President will be violating the Constitution if he allows discredited government to continue only because it has succeeded in managing to keep the members of legislature in its favour. But the real problem is how to know the will of people (press views, by-elections results, etc., may be used, however these methods are not free from difficulties). Nevertheless, if the President is clear and his decision is based on reasonable and proper grounds, there should be no difficulty in taking the action.

6 Dissolution of Lok Sabha - So long as Prime Minister and his cabinet enjoys confidence, the President is bound to dissolve Lok Sabha only when advised by Prime Minister. But, this advice will not be binding on the President, when Prime Minister loses his majority or unable to prove his majority or a vote of no-confidence passed against him or when he is not facing the parliament, but President has proof that ruling party does not have a majority.

In the above circumstances, the President must try to find out whether any alternative ministry can be possible. He should make all possible efforts to avoid a mid-term poll.

7 Communication with Prime Minister - Article 78 provides that it shall be the duty of Prime Minister to communicate to the President 'all decisions' of Council of Ministers relating to administration of affairs of union and proposals for legislation; to furnish such information relating to administration as President may call for; and if the President so requires to submit for the consideration of Council of Ministers any matter on which 'a decision' has been taken by a minister but which has not been considered by the cabinet. This is very necessary for the successful working of the principle of collective responsibility.

A controversy regarding the President's position and his relation with Prime Minister raised during the tenure of President Zail Singh and Prime Minister Rajiv Gandhi. The controversy mainly arose due to mistrust created by Prime Minister not meeting the President frequently and keeping him informed about the affairs of government particularly 'Bofors Gun Deal'.

The President has a right to know what his government is doing or proposes to do. But the question how much information is to be furnished by Prime Minister to the President is his prerogative. This should be a matter to be resolved by mutual confidence and cooperation between the two.

The working of the Constitution since 1950 has established that President is a nominal or
constitutional or formal head and the real executive power vests in the council of ministers.

**supreme court’s views**

The supreme court has consistently taken the view that position of president (and governors) under the constitution is similar to the position of crown under the British parliamentary system. It is a fundamental principle of English constitutional law that ministers must accept responsibility for every executive act. The power of the sovereign (or king) is conditioned by the practical rule that crown must find advisers to bear responsibility for his action. This rule of English law is incorporated in our constitution also.

It is the essence of parliamentary government that the real executive powers should be exercised by the council of ministers responsible to Lok Sabha. The council of ministers enjoying a majority in the legislature concentrated in itself the virtual control of both executive and legislative functions. *Ram Jawaya versus State of Punjab, Shamsher Singh versus State of Punjab* are the judicial precedents in this regard.

Wherever the constitution requires the satisfaction of president or governor, for example, in Article 123, 213, 311(2)(c), 356, 360, the satisfaction is not the personal satisfaction, but it is the satisfaction in the constitutional sense under the cabinet system of government. It is the satisfaction of council of ministers on whose aid and advice the president or governor generally exercises all his powers. Whether the functions exercised by the president are the functions of the union or the functions of the president, they have equally to be exercised on the aid and advice of the council of ministers except those which he has to exercise in his discretion (*Shamsher Singh versus State of Punjab*).

These few well-known exceptions (according to Krishna Iyer, J. in his separate concurring opinion in the aforesaid case) relate to: (1) the choice of prime minister (or chief minister) restricted by the consideration that the prime minister (or chief minister) should command a majority in the house; (2) the dismissal of a government which has lost the majority in the house but refuses to quit office; and (3) the dissolution of the house where an appeal to the country has become necessary, though the better course may be to act in this regard on the advice of the prime minister or chief minister. The motivation for taking such an action must be compelled by the peril to democracy, and the appeal to the house or to the country must become blatantly obligatory.

**judicial scrutiny of advice of council of ministers**[art. 74(2)]

Art. 74(2) lays down that the question whether any, and if so what, advice was tendered by ministers to the president shall not be inquired into in any court.

Thus, according to art. 74(2), the courts are barred from enquiring into what advice has been given by the cabinet to the president. The advice given by the cabinet or a minister is confidential and the courts can neither take cognizance thereof nor enquire as to what advice has been given to the president. That would also imply that if the president refuses to act on the advice of the cabinet, the courts are barred from compelling the president to act according to cabinet advice.

The reasons (or grounds) which may have weighed with the council of ministers in giving advice also form part of the advice and so are protected from judicial scrutiny. The notings of the officials which lead to the cabinet note and thus decision also form part of the advice tendered to the president.

The immunity from disclosure to courts, however, is restricted to the actual advice tendered to the president. Art. 74(2) is no bar to the production of all the material (viz. files, records) on which the ministerial advice is based (*S.R. Gupta versus President of India ‘Judges Transfer Case’*). For instance, the correspondence between the chief justice of India, the chief justice of the concerned high court and the central government (which constitutes the decision to continue or discontinue a high court judge) could be inquired into by courts.

If the court decides that the disclosure of documents relating to the advice is not against the public interest or the state interest and orders for disclosure, the order will be binding and its non-compliance will amount to contempt of court (*R.K. Jain versus UOI*).
conclusions: position of president

Thus, India has a president but not a presidential form of government, as found in America, the American president is the real executive head and is directly responsible to the people, who elect president. American president is the chief head of executive, and administration is vested in him, and he appoint members of cabinet who are responsible to him.

Indian president is head of the state but not of the executive. He represents the nation but does not rule the nation, as India has a parliamentary system of government. There is no provision in the constitution which makes the president answerable to the legislature. It will be meaningless to say that ministers are answerable for the policy and administration of the union to the Lok Sabha, unless they are recognized to possess the authority to finally decide the affairs relating to the government. The real directing force is the cabinet and not the president.

Our constituent assembly was deeply concerned about concentrating political power in a single office, with no shortage of despotic regimes wherever they turned, assembly members wanted desperately to avoid paving the way for a future dictator. According to Dr. Ambedkar, an ideal executive must be both stable as well as responsible to the people who elected it. There was no political system in vogue that satisfied both objectives equally. The American and Swiss presidencies offered greater stability, while British cabinet government seemed more accountable to the people. The assembly ultimately settled for accountability over stability, i.e., British pattern.

It is, however, submitted that it would have never been the intention of the framers of constitution to make the president a puppet or a passive spectator. In view of the oath which he takes... to preserve, protect and defend the constitution and law, and that ... devote myself to the service of people of India', he is duty bound to advise, to guide and exert his influence on decisions taken by the prime minister. Thus, the president can exercise a persuasive influence. His role is at best advisory.

The 44th amendment recognized this limited but essential role of the president. But the weak position of president doesn't mean that his office is superfluous. He is the symbol of Indian national unity. Every MP or MLA's presidential ballot is weighted by population. Thus, every citizen, even if otherwise ineligible or unwilling to vote, is indirectly involved in the presidential election. This makes the president the only nationally elected public official in India. Being impartial and above the party politics, he exerts his influence on the decisions of prime minister. The influence, however, will depend on his sterling character, magnetic personality and selfless devotion to the nation.

Mr. Nehru, the first prime minister of the country observed: "We want to emphasize the ministerial character of the government and that power really resided in the ministry and in the legislature and not in the president. At the same time, we did not want to make the president just a mere figurehead ... we did not give him any real power but we have made his position one of great authority and dignity. He is also the commander-in-chief of the defence forces....."

According to Dr. Jain, "The constitution envisages not a dictatorial but a democratic president who uses his judgment to keep the democratic and representative government functioning and not to thwart or to subvert the same".

President R. Venkataraman in his autobiography My Presidential Years on page 446 has expressed the view that advice of the cabinet violative of the constitutional provisions is not binding on the president. Dealing with recommendations of Chandra Shekhar's cabinet of 30 January, 1991, for dismissal of Karunanidhi government and dissolution of Tamil Nadu state assembly (which was made much before the Bommai case), Venkataraman wrote, "It was my duty to act on the advice of the cabinet so long as the proposed action was not violative of the provisions of the constitution". Thus, he meant that recommendations of the cabinet violative of the provisions of the constitution could be legally and constitutionally stalled by the president.

In 1998, the President K.R. Narayanan did not accept the united front cabinet's advice for the imposition of the president's rule in the state of U.P., as the state governor's recommendations was unconstitutional and violative of the decision in Bommai case. The president thus rescued the constitution and parliamentary democracy and put a blanket ban on misuse of Art. 356, the cabinet respected the decision of the president. Similar was the case when the President Zail Singh sent the Indian postal amendment bill, 1986 to the government in 1987 for reconsideration.

Api Abdul Kalam returned the office-of-profit bill. However, unwilling to budge, Parliament reaffirmed the bill forcing Kalam to eventually sign it. Another option would have simply been to keep the bill pending, as Venkataraman did with the much-criticised Indian postal bill. By contrast, Fakhruddin Ah Ahmed readily and unquestioningly approved the emergency proclamation in June 1975 despite being aware that the cabinet had not
discussed it.

nonetheless, the constitutional history and practice since the commencement of the constitution has established that except in the matter of appointment of a new prime minister in critical situations (viz. when no party emerged in majority and the choice of the leader of the house was not clear), the president has always acted on the aid and advice of his council of ministers. for instance, the current president pratibha patil ('the puppet president').

that is so when the president can be an influential sounding board for the cabinet on various constitutional and legal matters, as the supreme court has emphasized, the president has the "right" to be consulted by ministers as well as to "warn and encourage" them about major decisions, even if ultimately bound by their advice. and as venkataraman revealed in his memoirs, he frequently volunteered his opinions on foreign and economic policy matters to the four prime ministers who served with him. moreover, just as the president may return a bill unsigned, the president can formally request the cabinet to reconsider its advice on a matter. this is precisely what k.r. narayanan did when returning the vajpayee cabinet's recommendations to impose central rule in bihar.

to discharge these important constitutional duties, nehru and other assembly members believed that the president must not be a "political person," yet, it is unlikely they intended to disqualify anyone with a political background. they only wanted future presidents to act without partisan motives. indeed, it is probably essential for every future presidential candidate to have some experience in governance, public policy, and constitutional law, given the increasing number of issues that require presidential attention.

whether non-member of either house can be appointed minister/prime minister

a well-established convention in all countries having the parliamentary system of government is that a minister should normally be a member of either house of parliament. this is so because their presence in parliament makes a reality of their responsibility and accountability to parliament, and, facilitates co-operation and interaction between them and parliament.

but, it is not an absolute rule. in india, even a non-member may be appointed as a minister but he cannot hold the office for longer than six months without becoming a member of a house of parliament in the meantime [article 75(5)].

the minister can function effectively even though not a member of any house. in harsharan verma verses uoi, the court upheld the appointment of a non-member as a minister under article. 75(5) of the constitution read with art. 88 thereof, which article, inter alia, conferred on every minister the right to speak in, and otherwise to take part in the proceedings of, either house, in joint sitting of the houses, and in a committee of parliament of which he may be named a member, though not entitled to vote.

to appoint a non-member of parliament as a minister did not militate against the constitutional mechanism nor did it militate against the democratic principles embodied in the constitution (harsharan verma case). a non-member can remain a minister only for a short period of six months and as a minister he is collectively responsible to lok sabha. further, a person who may be competent to hold the post of a minister may be defeated in the election. there is no reason why he cannot be appointed as a minister pending his election to the house.

however, if he fails to become a member of the house in the stipulated time, he has to resign. then, he cannot be re-appointed as a minister for another term of six months. such a practice would be clearly derogatory to the constitutional scheme, improper, undemocratic and invalid. it would be "subverting the constitution" to allow such a practice (s. r. chaudhari verses state of punjab)

in this case, it was held that a non-member cannot be 'repeatedly' appointed as a minister for a term of 6 consecutive months without getting himself elected in the meanwhile. article. 164(4) is in the nature of an exception to the normal rule of only members of the legislature being ministers, restricted to a short period of 6 months. this exception must be strictly construed. this is only a one-time privilege. the non-member minister even during the period of 'six months' does not have the right to vote or the legislative immunity as provided by article. 194(2). he also cannot draw the benefits of an mla. the will of the people cannot be permitted to be subordinated to political expediency of the prime minister or the chief minister.

it may be noted that there is neither any specific provision in the constitution nor a mandatory convention
debarring a member of the rajya sabha from becoming the prime minister. for example, mrs. indira gandhi, a rajya sabha member, became the prime minister in 1966. but she was elected to the lok sabha soon thereafter. it is desirable that the prime minister should belong to the lok sabha because rajya sabha lacks contact with the contemporary public opinion as one-third of its members are indirectly elected every two years. thus, a member of the rajya sabha on becoming the prime minister should seek election to the lok sabha at the earliest opportunity.

**disqualified member cannot be appointed prime minister/chief minister**

in *b.r. kapoor versus state of tamil nadu* [2001 (6) scale 309], the supreme court held that a person convicted of criminal offence and sentenced to more than two years of imprisonment cannot be appointed as chief minister. smt. jayalalitha despite being disqualified to contest the election (in view of conviction under the prevention of corruption act) was elected as the leader of her party after the party has gained absolute majority in the assembly elections. the governor of tamil nadu appointed her as the chief minister. the court held that her appointment as chief minister was violative of article. 164(4) and, therefore, unconstitutional and invalid. a non-member who does not possess the qualifications prescribed by article. 173 or has been disqualified under article. 191 of the constitution cannot be appointed as chief minister or minister.

thus, in this case, the apex court has read a significant restriction in article. 75(5) [corresponding to article. 164(4)] i.e. a person who is not a member of a house of parliament can be appointed as the prime minister or a minister only if he has the qualifications for membership of parliament as prescribed in art. 84 and is not disqualified from the membership thereof by reason of the disqualifications set out in article. 102.

the governor of state

the executive power of the state is vested in the governor (constitutional head of the state) and the state council of ministers. article. 153 provides that there shall be a governor for each state, provided that nothing in this article shall prevent the appointment of the same person as governor for two or more states.

**appointment and term of office**

the governor is appointed by the president by warrant under his hand and seal (article. 155). the president appoints him on the advice of the prime minister of india. in this way, he is also a representative of the centre in the state. however, he is not in employment under the government of india. it has been held that the governor's office is an independent office and is not under the control of or subordinate to the government of india.

in *hargovind verses raghukul tilak*, the court elaborated saying that the governor 'is not amenable to the directions of the government of india, nor is he accountable to them for the manner in which he carried out his functions and duties. the governor is the head of the state and holds a high constitutional office which carries with it important constitutional functions and duties and he cannot, therefore, be regarded as an employee or servant of the government of india.'

he holds office for a term of five years from the date on which he enters upon his office, he also continues to hold office until his successor enters upon his office [article. 156(3)-(4)]. he can be reappointed after his tenure as governor of the same state or of another state. the qualifications for appointment of governor are: (a) he must be a citizen of india, and (b) he must have completed the age of 35 years (article. 157). there is no bar to the selection of a governor from among the members of parliament or a state legislature but if such a member is appointed governor, he ceases to be a member immediately upon such appointment. the governor shall not hold any other office of profit [art. 158(1 (2))].

the governor shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by parliament by law. the emoluments and allowances of the governor shall not be diminished during his term of office [article. 158(3x4)].
the oath or affirmation by governor is taken in the presence of the chief justice of the high court or the seniormost judge of that court of the concerned state (article 159). in the event of death of the governor, the chief justice of the high court becomes the ‘acting governor’ in the state. art. 160 lays down that the president may make such provision as he thinks fit for the discharge of the functions of the governor of a state in any contingency not provided for in this chapter.

legislative powers of the executive

Ordinarily, under the constitution, the president is not the repository of the legislative power of the union. This power belongs to parliament. But, under certain circumstances, the constitution makes provision to invest the president with legislative power to promulgate ordinances.

In fact, the most important power of president is his ordinance making power (article 123). It is the power to legislate, when both houses of parliament are not in session, thus it is not possible to have a parliamentary enactment to deal with any unforeseen or urgent situation [art. 123(1)], and which cannot be dealt with under the ordinary law. An ordinance is only a temporary law. President can withdraw an ordinance at any time [article. 123(2) (b)], the governor possesses such power under article 213.

The ambit of this power is co-extensive with legislative powers of parliament i.e. it may relate to any subject (which parliament can legislate) and is subject to same constitutional limitations, as the legislation by parliament. This power is to be exercised by president (and governor) on the advice of council of ministers.

validity of ordinance making power: judicial scrutiny

The president cannot promulgate an ordinance unless he is satisfied that there are circumstances which render it necessary for him to take immediate action. But, president himself determine whether such a situation has arisen and a court cannot enquire into it i.e. propriety, expediency, necessity, and motive (behind) of legislative act. While an executive act can be struck down on the ground of non-application of mind or mala fides, an act or ordinance cannot. An ordinance can be invalidated only on the grounds of contravention of constitutional limitations (t. venkata reddy v. state of andhra pradesh).

The validity of ordinance had been challenged at times and the court has upheld its constitutionality in majority of cases. In r.k. garg v. union of india, the court held that special bearer bonds ordinance 1981 was not ultra vires of article. 123. President is competent to issue an ordinance amending or altering tax laws. ordinance power is coextensive with parliamentary power, and while considering the validity of law the court will have nothing to do with the morality of law and an ordinance might well include a situation created by a law, being declared void by a court of law. There is no inhibition on the ordinance-making power that it shall not deal with a matter already covered by a law made by parliament.

An ordinance stands on the same footing as an act passed by the legislature. It cannot be treated as an executive action or an administrative decision. It is clothed with all the attributes of an act of legislature, carrying with it all its incidents, immunities and limitations under the constitution (t. venkata reddy case). Further, like a law made by parliament, an ordinance is also subject to fundamental rights.

An ordinance has been held to be ‘law’ under article. 21 of the constitution (a.k. roy’s case). As the legislature can repeal an existing enactment or amend it, so also, the president by an ordinance can repeal or amend an existing legislation (janan prosanna das gupta v. province of w.b. an ordinance can override the judgment of the high court under article. 226 (state of orissa v. bhupendra kumar).

In a.k. roy v. union of india the court held that national security ordinance, 1980
(providing for preventive detention) was valid and not violative of article 14. an ordinance is like a parliamentary law. however, it held that ordinance would be subject to the test of vagueness, arbitrariness, reasonableness, and public interest and that it was passed only when legislatures were not in session. the court said that "judicial review is not totally excluded in regard to the question relating to the president's satisfaction." the exercise of power under article. 123 cannot be regarded as a purely political question.

the scheme of article. 123 is to place the ordinance-making power subject to the control of the parliament rather than that of the courts. in gyanender kumar versus uoi, the delhi high court observed: "it is for the petitioner to make out a prima facie case that there could not have existed any circumstances whatsoever necessitating the issuance of ordinances before the government could be called upon to disclose the facts which are within its knowledge. every casual challenge to the existence of such circumstances would not be enough a shift the burden of proof to the executive to establish those circumstances."

in a unique case, satya pal dang versus state of punjab, the apex court upheld the governor's ordinance regulating the proceedings of the house. in this case, the speaker of the punjab legislative assembly adjourned the house for two months making it impossible to pass the appropriation bill before the end of the financial year. the governor, in order to overcome the crisis prorogued the assembly on 11th march and promulgated an ordinance on 13th march, prescribing the procedure for passing the budget and the appropriation bill, purporting to make the law for the timely completion of financial business contemplated by article. 209.

the court held: "the power of the governor to prorogue the house under article. 174 was absolute. the governor's re-summoning the legislature immediately after the prorogation was also a step in the right direction as it set up once again the democratic machinery in the state which had been immediately disturbed by the speaker's action. the legislature could not be allowed to hibernate for two months while financial business and the constitutional machinery and democracy itself wrecked." commenting on the ruling of the speaker that the house could not be re-summoned by the governor when the house was adjourned the supreme court said 'this ruling was based on the wrong assumption.' the speaker cannot pronounce upon the validity of the governor's ordinance. it can only be challenged by the legislative assembly by a resolution.

validity of ordinance must be examined with higher degree of care and caution

b.a. hosanabha versus state of karnataka - though article. 213(2) declares that an ordinance promulgated under article. 213(1) has the same force and effect as an act of the legislature, the karnataka high court has distinguished it from the act. it observed: "an ordinance unlike an act is required to be very carefully scrutinized by a court if it is challenged because an ordinance is an unfettered, unbridled power to promulgate provisions which have the effect of law without their going through the constitutionally prescribed process. a bill when introduced in parliament is scrutinized/examined by the elected representatives and especially the opposition. a bill is seriously considered, reconsidered, modified and redrafted and the end result that ultimately emerges is a carefully considered and purified act.

whereas an ordinance would take effect in the form in which the government prepared it. therefore, when an ordinance was challenged particularly on the ground of mala fides or on grounds of vires, it would be extremely important that the court should examine it with a higher degree of meticulousness than it would in the case of any other enactment. hurriedly-drafted ordinances, promulgated overnight, have turned out to be draconian, thus, the scrutiny of an ordinance is something which a court must undertake with a higher degree of care and caution."

abuse of ordinance making power: parliamentary safeguards

in no country (including u.k. and usa), except india, the executive is vested with legislative power. in
&c. cooper verses union of india ('bank nationalization case'), the supreme court held that "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". such power may be abused by a minority government to enact a measure for a temporary period as not being sure of support in parliament; by a majority government in order to avoid debate in parliament and possible amendment, and advising the president to prorogue parliament at any time having this specific object in mind (mala fides) (by 44th amendment, judicial interference in the case of mala fides has been established).

the case of d.c. wadhawa verses state of bihar furnishes a glaring example of abuse of ordinance power. 256 ordinances promulgated in the state, and all of these kept alive by re-promulgation without being brought before the legislature, between 1976-81. the court called it a 'subversion of democratic process' and 'colourable exercise of powers' and held that this amounted to a fraud on the constitution. the executive cannot usurp the function assigned to the legislature under the constitution. the court insisted that the government cannot by-pass the legislature and keep ordinances alive indefinitely without enacting their provisions into acts of legislature.

it may be noted that while legislation through parliament, an elected body, is open and transparent and is subjected to criticism on the floor of the house, an ordinance is purely executive decision, neither transparent nor open nor subject to any open discussion in any forum. further, parliament's control over the executive's ordinance-making power is ex post facto i.e. it is exercised after the ordinance has been promulgated and not before.

the ordinance comes into effect as soon as it is promulgated. if later the ordinance comes to an end for any reason, the ordinance does not become void ab initio. it was valid when promulgated and whatever transactions have been completed under the ordinance cannot be reopened when the ordinance comes to an end.

parliamentary safeguards - the ordinance must be laid before the parliament when it reassembles and cease to operate at the end of six weeks from the date on which parliament reassembles; if, however, both houses pass resolution disapproving of it before the expiry of six weeks, the ordinance ceases to operate on the day of passing of such resolution [article. 123(2)(a)]. when the two houses of parliament assemble on different dates, the period of six weeks is to be reckoned from the later of the two dates [explanation, article. 123(2)]. thus, the parliament must pass a law to replace the ordinance within six weeks of its assembling. the maximum duration for which an ordinance may last is seven-and-a-half months as under art. 85, six months cannot intervene between two sessions of parliament, and the ordinance would cease to operate six weeks after the parliament meets.

besides passing resolutions disapproving of ordinance, parliament gets a chance to review the measure if government seeks to replace an ordinance by a bill; and when government seek so, a statement explaining circumstances which necessitated immediate action by ordinance must accompany such bill. however, no debate on above statement is allowed.

article 123 or 213 cannot be said to be undemocratic. an ordinance is promulgated on the advice of the council of ministers, which remains answerable to the parliament. if the executive misuses or abuses its power, the house of parliament may not only disapprove the ordinance but also pass a vote of no-confidence against the council of ministers (r.k. garg case).

as noted above, the power of the president to issue ordinance is coextensive with legislative power of parliament; it is no higher and no lower than the power of parliament to make laws. if and so far as an ordinance under this article makes any provision which parliament would not under this constitution be competent to enact, it shall be void [article. 123(3)]. however, an appropriation from out of the consolidated fund cannot be made by an ordinance [article. 114(3)]. further, an ordinance may make provision with respect to a matter in list i (union list) and list iii (concurrent list), but not in list 2 (state list), except when proclamation of emergency is in operation.

when ordinance ends

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an ordinance comes to an end in the following situations:

1. resolutions disapproving the ordinance are passed by parliament
2. if the ordinance is not replaced by an act within the stipulated period.
3. the executive lets it lapse without bringing it before the parliament
4. if it is withdrawn by president at any time.

the apex court, rejecting these contentions, upheld the validity of the ordinance-making power of the executive by reading certain limitations into such power:

1. it may be noted, and this was pointed out forcibly by dr. ambedkar while replying to the criticism against the introduction of article. 123 in the constituent assembly - that the legislative power conferred on the president under this article is not a parallel power of legislation.
2. it is a power exercisable only when both houses of parliament are not in session and it has been conferred ex necessitate in order to enable the executive to meet an emergent situation.
3. moreover, the law made by the president by issuing an ordinance is of strictly limited duration. it ceases to operate at the expiration of six weeks from the reassembly of parliament or if before the expiration of this period, resolutions disapproving it are passed by both houses, upon the passing of the second of those resolutions. this also affords the clearest indication that the president is invested with this legislative power only in order to enable the executive to tide over an emergent situation which may arise whilst the houses of parliament are not in session.

4. furthermore, this power to promulgate an ordinance conferred on the president is coextensive with the power of parliament to make laws and the president cannot issue an ordinance which parliament cannot enact into a law.
5. it will therefore be seen that legislative power has been conferred on the executive by the constitution makers for a necessary purpose and it is hedged in by limitations and conditions.
6. the conferment of such power may appear to be undemocratic but it is not so, because the executive is clearly answerable to the legislature and if the president, on the aid and advice of the executive, promulgates an ordinance in misuse or abuse of this power, the legislature can not only pass a resolution disapproving the ordinance but can also pass a vote of no confidence in the executive.

the court held: it may also be noted that article. 123(2) provides in terms clear and explicit that an ordinance promulgated under that article shall have the same force and effect as an act of parliament. that there is no qualitative difference between an ordinance issued by the president and an act passed by parliament is also emphasized by article. 367(2) which provides that any reference in the constitution to acts or laws made by parliament shall be construed as including a reference to an ordinance made by the president. we do not therefore think there is any substance in the contention of the petitioner that the president has no power under article. 123 to issue an ordinance amending or altering the tax laws and that the ordinance was therefore outside the legislative power of the president under that article.

now while considering the constitutional validity of a statute said to be violative of article 14, the preamble of the act which "affords useful light as to what the statute intends to reach" makes it clear that the act is intended to canalise for productive purposes 'black money' which has become a serious threat to the national economy. it is an undisputed fact that there is considerable amount of black money in circulation which is unaccounted or concealed and therefore outside the disclosed trading channels. it is largely the product of black market transactions and evasion of tax.

it is obvious that the act makes a classification between holders of black money and the rest and provides for issue of special bearer bonds with a view to inducing persons belonging
to the former class to invest their unaccounted money in purchase of special bearer bonds, so that such money which is today lying idle outside the regular economy of the country is canalised into productive purposes. The object of the act being to unearth black money for being utilized for productive purposes with a view to effective social and economic planning, there has necessarily to be a classification between persons possessing black money and others and such classification cannot be regarded as arbitrary or irrational.

It is true that one or the other of the immunities or exemptions granted under the provisions of the act may be taken advantage of by resourceful persons by adopting ingenious methods and devices with a view to avoiding or saving tax. But that cannot be helped because human ingenuity is so great when it comes to tax avoidance that it would be almost impossible to frame tax legislation which cannot be abused. Moreover, as already pointed out above, the trial and error method is inherent in every legislative effort to deal with an obstinate social or economic issue and if it is found that any immunity or exemption granted under the act is being utilized for tax evasion or avoidance not intended by the legislature, the act can always be amended and the abuse terminated. We are accordingly of the view that none of the provisions of the act is violative of article 14 and its constitutional validity must be upheld.

peculiarity of governor’s ordinance-making power

The governor possesses such power under article 213, which reads: if at any time, except when the legislative assembly of a state is in session, or where there is a legislative council in a state, except when both houses of the legislature are in session, the governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinance as the circumstances appear to him to require [article. 213(1)].

In comparison to president's power, the governor can't make ordinance without 'instructions' from the president if:

1. ordinance contains provisions which would require sanction of the president for introduction in state legislature.
2. governor would have deemed it necessary to reserve a bill containing the same provision for consideration of president.
3. an act of state legislature containing the same provision would be invalid without assent of president (when bill reserved for president's consideration) [proviso, article. 213(1)].

An ordinance promulgated under this article shall have the same force and effect as an act of legislature of the state assented to by the governor, but every such ordinance—(a) shall be laid before the legislative assembly of the state, or where there is a legislative council in the state, before both the house, and shall cease to operate at the expiration of six weeks from the reassembly of the legislature, or if before the expiration of that period a resolution disapproving it is passed by the legislative assembly and agreed to by the legislative council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the council; and (b) may be withdrawn at any time by the governor [article. 213(2)].

If and so far as an ordinance under this article makes any provision which would not be valid if enacted in an act of the legislature of the state assented to by the governor, it shall be void [article. 213(3)]. provided that, for the purposes of the provisions of this constitution relating to the effect of an act of the legislature of a state which is repugnant to an act of parliament or an existing law with respect to a matter enumerated in the concurrent list, an ordinance promulgated under this article in pursuance of instructions from the president shall be deemed to be an act of the legislature of the state which has been reserved for the consideration of the president and assented to by him.
judicial review over president's/governor's power to pardon

6
union and state relations:
legislative/administrative/
financial powers

legislative powers
the main characteristic of a federal constitution is the distribution of powers between the centre and the states. the indian constitution provides for a new kind of federalism to meet india's peculiar needs. in the matter of distribution of powers, the framers followed the pattern of the government of india act, 1935. thus, predominance has been given to the union parliament over the state legislatures or assemblies regarding the distribution of legislative powers.

the legislative powers are subject to the scheme of distribution of powers between the union and state legislatures (as provided in three lists under the constitution), fundamental rights (i.e. legislative powers cannot contravene the fundamental rights) and other provisions of the constitution (articles. 245-254).

there are three lists which provide for distribution of legislative powers (under 7th schedule to the constitution):-

1. union list (list 1) - it contains 97 items and comprises of the subjects which are of national importance and admit of uniform laws for the whole of the country. only the union parliament can legislate with respect to these matters for example. defence, foreign affairs, banking, currency, union taxes, etc.

2. state list (list 2) - it contains 66 items and comprises of subjects of local or state interest and thus lie within the legislative competence of the state legislatures, viz. public order and police, health, agriculture, forests, etc.

3. concurrent list (list 3) - it contains 47 items, with respect to which, both union parliament and the state legislature have concurrent power of legislation. the concurrent list (not found in any federal constitution) was to serve as a device to avoid excessive rigidity to a two-fold distribution. it is a 'twilight zone', as for not so important matters, the states can take initiative, while for the important matters, the parliament can do so. besides, the states can make supplementary laws in order to amplify the laws made by union parliament. the subjects include general laws and social welfare - civil and criminal procedure, marriage, contract, planning education, etc.

however, in spite of the distribution of legislative powers under the three lists, the predominance has been given to the union parliament over the state legislatures (for an analysis of the distribution of legislative powers, refer to the end of this chapter).

the constitution makes a two-fold distribution of legislative powers:-
(i) with respect to territory.
(2) with respect to subject matter of legislation, (i.e. three lists).

[1] territorial legislative jurisdiction [article. 245]

article 245 defines the ambit or territorial limits of legislative powers. "ci.t: subject to the constitutional provisions, parliament may make laws for whole or any part of territory of India, and a state legislature for the territory of that state. cl (2): no law made by the parliament would be invalid on the ground that it would have extra-territorial operation i.e. takes effect outside the territory of India."

theory of territorial nexus

the doctrine of territorial nexus is deeply rooted in laws of India even /before the commencement of constitution of India in 1950. the government

[2] distribution of legislative subjects
[article. 246]

article. 246 provides:-

(1) notwithstanding anything in clauses (2) and (3), parliament has exclusive power to make laws with respect to any of the matters enumerated in the list 1 (union list).
(2) notwithstanding anything in clause (3), parliament, and, subject to clause (1), the state legislature also, have power to make laws with respect to any of the matters enumerated in the list 3 (concurrent list).
(3) subject to clauses (1) and (2), the state legislature has exclusive power to make laws for such state with respect to any of the matters enumerated in list 2 (state list).
(4) parliament has power to make laws with respect to any matter for any part of the territory of India not included in a state, notwithstanding that such matter is a matter enumerated in the state list.

thus, article. 246 provides that the parliament has exclusive power to make laws with respect to union list; the state legislature for the state list; and, the parliament and state legislature, both, for the concurrent list. however, as it will be seen later, there is predominance of the union parliament in matters of legislative law making.

autonomy to centre and states (legislative powers)

in javed verses state of haryana, the apex court upheld the constitutional validity of certain provisions of haryana panchayati raj act, 1994, which disqualified a person for holding office of sarpanch or a panch of a gram panchayat, etc. if he had more than two living children, though a similar provision was not found to have been enacted by the parliament or other state legislatures.

rejecting the submission that people aspiring to participate in panchayati raj governance in the state of haryana had been singled out and meted out hostile discrimination, the apex court observed: the union parliament and every state legislature have power to make laws with respect to any of the matters which fall within their field of legislation under article. 246 read with seventh schedule of the constitution. the constitution gives autonomy to the centre and the states within
their respective fields. thus, a legislation by one of the states cannot be held to be discriminatory or suffering from the vice of hostile discrimination as against its citizens simply because the parliament or the legislatures of other states have not chosen to enact similar laws. the court ruled that it was not permissible to compare a piece of legislation enacted by a state in exercise of its own legislative power with the provisions of another law, though part materia it may be, but enacted by parliament or by another state legislature, within its own power to legislate.

in state of mp verses gc. mandawar it was held that two laws enacted by two different governments and by two different legislatures could be read neither in conjunction nor by comparison for the purpose of finding out if they were discriminatory.

[a] principles of interpretation of lists

the distribution of subject-matters cannot be claimed to be scientifically perfect and there happens to be overlapping between the subjects enumerated in the three lists. whether a particular subject falls in the sphere of one or other government (i.e. union or state), the supreme court has evolved following principles to determine respective powers of union and state legislatures.

(1) plenary power of legislature

it is an absolute power to enact laws (even if it is contrary to any understanding or guarantee given by the state), subject only to its legislative competence and other constitutional limitations. the parliamentary power of legislation to acquire property, for example, is unrestricted, as held in state of w. b. verses union of india; r. v burah (1878), no limitation can be read on the ground of legislative practice or legitimate expectations (sri srinivasa theatre verses govt. of t.n .).

the principle to interpret the entries (in lists) so as to make the legislative power of parliament and state legislatures 'plenary' is that the entries should not be read in narrow or restricted sense. each general word in an entry should be construed to include all ancillary or subsidiary matters which can fairly and reasonably be said to comprehend in it (state of w.b. verses union of india).

the following points are important to understand the nature of plenary power:

1. the power to make a law includes the power to give effect to it prospectively (i.e. for future acts - law to take effect from a future date) as well as retrospectively (i.e. for past acts - law to take effect from a back date) (rai ramkrishna verses state of bihar ).

2. the meaning of a validation act is to remove the causes for ineffectiveness or invalidity of actions or proceedings which are validated by a legislative measure. a validating law is upheld first by finding out whether legislature possesses competence over the subject matter/and, whether by validation the legislature has removed the defects which the courts have found in the previous law (shri prithvi cotton mills verses broach borough municipality ).

in the aforesaid case, it was held: the legislature may levy a tax either prospectively or retrospectively. ordinarily, a court hold a tax to be invalidly imposed because the power to tax is wanting or the statute or rules are invalid or do not sufficiently create jurisdiction. validation of a tax so declared illegal may be done only if grounds of invalidity are capable of being removed and in fact removed and tax thus made legal, but die legislature must have power and competence to do so.

3. where an impugned act (i.e. an act whose validity is questioned) passed by a state legislature is invalid on the ground that state legislature did not have legislative competence to deal with the topic covered by it, then even parliament cannot validate such act, because such validation would give the state legislature power over subjects outside its jurisdiction.

4. when the legislature cure the said infirmity and pass a validating law, it can make the said provisions of earlier law effective from the date when it was passed. the retrospective application of law thereby removing the basis of earlier judicial decision (i.e. a decision based on earlier law) is not an encroachment on
the judicial power. however, the legislature cannot by bare declaration, without anything more, reverse or override a judicial decision (state of i.n. verses k. shyam sunder).

but, the legislature cannot enact a legislation which overrules the decision of court and not to change the existing law retrospectively. thus, the legislature has no power to enact a provision, the effect of which is to overrule an individual decision and affect the rights and liabilities of the parties to that decision. such legislative act amounts to an encroachment on the power of judiciary (i.n. saxena verses state of m.p.).

(5) doctrine of colourable legislation

the constitution distributes the legislative powers between the parliament and the state legislature, and, they are required to act within their respective spheres. often the question arises as to whether or not the legislature enacting the law has transgressed the limits of its constitutional powers. such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect. the doctrine of colourable legislation is applied when the transgression is disguised, covert and indirect. the "colourable legislation" simply means a legislation which, while transgressing constitutional limitation, is made to appear as if it were quite constitutional.

if the law enacted by the legislature is found in substance and in reality beyond the competence of the legislature enacting it, it will be ultra vires and void, even though it apparently purports to be within the competence of the legislature enacting it. it is the substance of the act that is material and not merely the form or outward appearance. this doctrine is based on the maxim that 'what one cannot do directly, that cannot be done indirectly.' it is also characterized as a fraud on the constitution because no legislature can violate the constitution by employing an indirect method (k.c.g narayan deo verses state of orissa).

'colourability' is thus bound up with incompetency and not tainted with bad faith or evil motive. if the legislature has power to make law, motive in making the law is irrelevant (nageshwar verses a.rs.r. t. corp.). a thing is colourable which in appearance only and not in reality, what it purports to be. the court will look into the true nature and character of the legislation and for that its object, purpose or design to make law on a subject is relevant and not its motive (jalan trading verses mill mazdoor sabha). the propriety, expediency and necessity of a legislative act are for the determination of the legislative authority and are not for determination by courts (t. venkai;a reddy verses state of a.p.).

it is not too often that a law is declared bad on the ground of colourable legislation. further, if a statute is found to be invalid on the ground of legislative incompetence, it does not permanently inhibit the legislature from re-enacting the same if the power to do so is properly traced and established. in such a situation, it cannot be said that subsequent legislation is merely a colourable legislation or a camouflage to re-enact the invalidated previous legislation.

in state of bihar verses kameshwar singh, the court held that the bihar land reforms act, 1950 apparently purported to lay down rule for determination of compensation but in reality it did not lay down such rule and indirectly sought to deprive of the petitioner's property without any compensation and hence it was a colourable legislation and invalid. in this case, a state law dealing with the abolition of the landlord system, provided for payment of compensation on the basis of income accruing to the landlord by way of rent. arrears of the rent due to the landlord prior to the date of acquisition were to vest in the state, and half of these arrears were to be given to the landlord as compensation.

the entry 42, list 3, which provided for 'principles on which compensation for property acquired or requisitioned for the purpose of union/state or for other public purpose is to be determined,' was modified as 'the taking of the whole and returning a hair meaning nothing more or less than taking half without any return. it was held that this is naked confiscation, no matter in whatever specious form it may be clothed or disguised. the impugned provision, therefore, in reality does not lay down any principle for determining the compensation to be paid for acquiring the arrears of rent.

similarly, in k. t. moopil nair verses state of kerala, the travancore cochin land tax act was held to be invalid on the ground that the act apparently purported to be a taxing act but in reality it was not so but was confiscatory in character.
[c] inconsistency or repugnancy between union and state laws (article 254)

Clause (7): "if any provision of a law made by state legislature is repugnant to any provision of a law made by parliament which parliament is competent to enact, or to any provision of an existing law with respect to matters enumerated in concurrent list, then subject to clause (2) provisions, the parliamentary law, whether passed before or after state legislatures' law, or the existing law, shall prevail and state law shall, to the extent of repugnancy, be void."

Article 254(1) enumerates the rule that in the event of a conflict between a union and a state law, the former prevails. The union law may have been enacted prior to the state law or subsequent to the state law. The principle behind is that when there is legislation covering the same ground both by the centre and by the state, both of them competent to enact the same, the central law should prevail over the state law.

'repugnancy' between two pieces of legislation, generally speaking, means that conflicting results are produced when both the laws of state as well as union legislature with respect to concurrent list are applied to the same facts. The expression 'existing law' refers to laws made before the commencement of constitution by any legislature, authority, etc. example criminal law, civil procedure, evidence, contract, etc.

4 law made by parliament - which parliament is competent to enact doesn't include a law with respect to a matter in union list. As, if there is a repugnancy between... state list... and union list, state legislation will be ultra vires under the article. 246. however, a repugnancy may arise.... while legislating within their exclusive jurisdictions and yet dealing with the same subject matter. For example, in gujarat university verses krishna, the court observed that a repugnancy may arise on a matter other than in concurrent list, and in such cases doctrine of pith and substance resorted to resolve conflict if article 254(1) extended to a union law with respect to a matter in union list... such construction of article. 254 appears illogical.

Clause (2): Enacts an exception to the rule of clause (1). "where law made by state legislature with respect to matters in concurrent list contains any provision repugnant to an earlier parliamentary law or an existing law with respect to that matter, then state law shall, if reserved for consideration by president and has received his assent, prevail in that state. Provided that nothing in the clause shall prevent parliament from enacting at any time any law with respect to the same matter including a law adding, amending, varying or repealing state law."

Article 254(2) provides for curing of repugnancy which would otherwise invalidate a state law which is inconsistent with a union law or an existing law (gc. kamungo verses state of orissa. In order that the state law should prevail in that state, the following conditions must be satisfied:

1. There must be in existence a union law;
2. Subsequent to the union law the state legislature enacts a law with respect to a matter in the concurrent list;
3. The state law having been reserved for the president's consideration, has received his assent thereto.

However, the proviso to article. 254(2) lays down that parliament may again supersede state legislation which has been assented to by the president under clause (2) by making a law on the same matter. It is important that the later (union) legislation must deal with the same matter (as of earlier state legislation) and not distinct matter, though of cognate and allied character. Further, in the case of repugnancy, not the entire state law becomes void, it becomes void only to the extent it is repugnant to the central law [gauri shankar gaur verses state of u.r].

The state law may be amended or repealed by parliament either directly or by enacting a law repugnant to it with respect to the same matter. Where it does not expressly do so, even then, state law will be repealed by necessary implication. It is important to note that whether parliament should enact substantive provisions on the same subject matter... in lieu... when repealing a state law, is still an open question.

Legislative powers:
Predominance of union law and limitations of state legislatures

1. In case of an overlapping between the three lists, regarding a matter, the predominance is given to the
union (article 246), thus, entries in state list have to be interpreted according to those in the union and concurrent lists.

(2) in the concurrent sphere, in case of a repugnancy or inconsistency between a union and state law relating to the same subject - the union law prevails (article 254).

(3) extensive nature of union list — some subjects normally intended to be in the jurisdiction of states are in the union list example industries, universities, election and audit, inter-state trade and rivers, etc.

(4) residuary powers - (article 248) - power to legislate with respect to any matter not enumerated in any of the three lists (example imposition of taxes) is given to the union.

(5) expansion of powers of union legislature under certain circumstances - in the following situations, parliament can legislate with respect to "state list" subjects:

(a) when rajya sabha declares by a resolution of 2/3 majority (members present and voting) that it is necessary in national interest; it shall be lawful for parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force (not exceeding one year and can be further extended by one year by means of a subsequent resolution) (article. 249).

(b) under a proclamation of emergency; it shall be lawful for parliament to make laws for the whole or any part of the territory of India with respect to matter in the state list (article. 250); thus, during emergency, the parliament can legislate on subjects in all the three lists and the federal constitution gets converted into unitary one.

nothing in articles 249 and 250 shall restrict the power of state legislature to make any law which under this constitution it has power to make, but if any provision of a law made by the legislature of a state is repugnant to any provision of a law made by parliament which parliament has under either of the said articles power to make, the law made by parliament, whether passed before or after the law made by the legislature of the state, shall prevail, and the law made by the legislature of the state shall to the extent of the repugnancy, but so long only as the law made by parliament continues to have effect, be inoperative (article. 251).

(c) by agreement between the states i.e. with the consent of state legislatures; if it appears to the legislatures of two or more states to be desirable that any of the matters with respect to which parliament has no power to make laws for the states (except as provided in articles. 249 and 250) should be regulated in such states by parliament by law, and if resolutions to that effect are passed by all the house of the legislatures of those states, it shall be lawful for parliament to pass an act for regulating that matter accordingly, and any act so passed shall apply to such states and to any other state by which it is adopted afterwards by resolution passed in that behalf by the states' house. the parliament (not state legislature) also reserves the right to amend or repeal any such act (article. 252).

(d) to implement treaties. notwithstanding anything in the foregoing provisions of this chapter, parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body (article. 253).

Treaties are not required to be ratified by parliament. they are, however, not self-operative. parliamentary legislation will be necessary for implementing them. but laws enacted for the enforcement of treaties will be subject to the constitutional limits i.e. such a law cannot infringe fundamental rights (sri krishna sharma versus state of w.b.).

(e) failure of constitutional machinery in a state (article. 356). the president can authorize the parliament to exercise the powers of the state legislature during the proclamation of emergency due to breakdown of constitutional machinery in a state.

(6) distribution of legislative powers does not apply to union territories, in which parliament can legislate with respect to 'any subject' including those in the state list.parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a state) notwithstanding that such matter is a matter enumerated in the state list [article. 246(4)].

(7) notwithstanding anything in this chapter, parliament may by law provide for the establishment of any additional
courts for the better administration of laws made by parliament or of any existing laws with respect to a matter enumerated in the union list (article. 247).

(8) certain types of bill cannot be moved in state legislatures without previous sanction of president. also, certain bills passed by state legislatures cannot become operative until receive president's assent, after having been reserved for his consideration by governor of state. for example, article. 200 (discussed earlier).
likewise, article. 288(2) authorizes a state to tax in respect of water or electricity stored, generated, consumed, distributed or sold by any authority established by law made by parliament. but no such law shall be valid unless it has been reserved for the consideration of the president and has received his assent.

article. 304(b) authorizes a state legislature to impose reasonable restriction on the freedom of trade, commerce and intercourse within the state in the "public interest." but such laws cannot be introduced in the state legislature without the previous sanction of the president. this provision is intended to ensure the free flow of trade and commerce which may be hampered by unreasonable restriction imposed by a state law.

concluding remarks
the rationale for such distribution of legislative powers between union and states is that a strong centre is necessary to coordinate the activities of various states in the interest of uniformity and to check fissiparous or anti-national tendencies. besides, the central control was considered necessary for the purpose of achieving rapid economic and industrial progress.

according to t.k. tope, these provisions are merits rather than demerits of indian constitution. they enable the centre to legislate in exceptional circumstances on the state subjects without amending the constitution and thus introducing "a certain amount of flexibility in the scheme of distribution of powers. moreover, they are invoked only for a limited period.

the sarkaria commission has also rejected the demand for curtailing the powers of the centre saying that a strong centre is necessary to preserve the unity and integrity of the country. the commission is also of the view that the supremacy of parliament envisaged in arts. 246 and 254 is essential and needs no change. the only suggestion given in this respect is that residual matters other than taxation should be in the concurrent list. the various suggestions asking for transfer of subjects to the state or concurrent list have been rejected. the commission has, however, suggested

that there should be consultation by the centre on all concurrent subjects before passing any law.
nature of judicial power

In order to maintain the supremacy of constitution, there must be an independent and impartial authority to decide disputes between units of federation. The supreme court under our constitution is such arbitrator. It is the apex court - the final interpreter and guardian of constitution, which keep the democratic structure intact, by preventing the arbitrary use of governmental authority and safeguarding the rights of citizens. It is the guardian of fundamental rights and defender of the fundamentals of 'rule of law.' It is the final court of appeal in all civil, criminal and other matters and thus helps in maintaining a uniformity of law throughout the country.

Adjudication by the administrative bodies has, in recent times, emerged as an alternative to traditional courts. The functioning of such adjudicating bodies is largely determined by the executive.

Though independence of judiciary is secured by our constitution in several ways (example in appointing a supreme court judge, president is required to consult chief justice; the removal of judges is a difficult and special process; discussion of conduct of a judge in parliament is not allowed, etc.), but independence of judiciary is eroded by union control over high courts in the form of 'transfer' of high court judges. There is a general atmosphere of distrust, favoritism in appointments and promotions which led to development of feeling that if they deliver anti-government judgments, they would be transferred. Several vacancies of judges are not filled by the government because search is not for 'merit' but for 'committed' judges - which fall in with official line.

composition of supreme/ high courts

The supreme court of India shall consist of the chief justice and not more than 30 other (puisne) judges (the number is prescribed by law made by parliament), thus, the total number of judges in the supreme court at present is 31. The strength of the supreme court was originally fixed at one chief justice and 7 other judges by virtue of article. 124(1). But parliament was given power to increase the number of judges. It has been held that the number of judges should commensurate to the amount of work, otherwise, "the judiciary cannot perform its constitutional obligation."

Each high court consists of a chief justice and such other judges as the president may appoint from time to time (article. 216). Thus, the constitution does not fix any maximum number of judges of a high court. There are over 750 judges in 21 high courts.

The supreme court of India is in New Delhi. However, the court may hold its sitting anywhere in India. The decision in this regard is taken by the chief justice in consultation with the president of India (article. 130). The constitution provides for a high court for each state. Parliament may, however
establish by law a common high court for two or more states or for two or more states and a union territory (articles. 214 and 230-231). the national capital territory of delhi has a high court of its own.

**qualifications** - for appointment as a judge of the supreme court, (1) a person must be a citizen of india; (2) must be, at least, five years in succession a judge of the high court or of two or more high courts in succession, or an advocate of a high court or of two or more high courts for 10 years in succession, or he must be in the opinion of the president a distinguished jurist [article. 124(3)].

To be appointed a high court judge, a person must be a citizen of India with ten years' service in a judicial office or ten years' experience as a high court advocate (article. 217).

**age of judge** - the age of a judge of the supreme court shall be determined by such authority and in such manner as parliament may by law provide [article. 124(2a)].

If any question arises as to the age of a judge of a high court, the question shall be decided by the president after consultation with the chief justice of India and the decision of the president shall be final [article. 217(3)]. Articles. 124(2a) and 217(3) have to be read harmoniously. Once the issue of the date of birth of a judge, while a judge of a high court, is settled by the president under article. 217(3), it should not be questioned on the elevation of the judge, as a judge of the supreme court. It has been held that the power to determine the age of a judge is a judicial power.

**appointment of judges** - 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 of the high courts in the states as the president may deem necessary for the purpose [article. 124(2)], provided that in the case of appointment of a judge other than the chief justice, the chief justice of India shall always be consulted. Article. 217(1) provides that every judge of a high court shall be appointed by the president after consultation with the chief justice of India, the state governor, and the chief justice of the high court.

Every person appointed to be a judge of the supreme court shall, before he enters upon his office, make and subscribe before the president, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the third schedule [article. 124(6)]. Article. 219 similarly provides for oath or affirmation by a high court judge before the governor of the state.

**tenure of office** - a supreme court judge shall hold office until he attains the age of 65 years [article. 124(2)]. The retirement age in case of a high court judge is 62 years.

A supreme/high court judge may, by writing under his hand addressed to the president, resign his office. He may be removed from his office in the manner provided in article. 124(4) [article. 124(2)/217(1)].

**restriction on practice after being a permanent judge** - a retired judge of the supreme court is prohibited from pleading (practicing law) in any court or before any authority (article. 124). After being a permanent judge of a high court, a person shall not plead in any court in India except the supreme court or other high courts (article. 220).

**transfer of high court judges** - the office of a high court judge shall be vacated by his being appointed by the president to be a judge of the supreme court or by his being transferred by the president to any other high court within the territory of India [article. 217(1)]. The president may, after consultation with the chief justice of India, transfer a judge from one high court to any other high court [article. 222(1)].

**other provisions: supreme/high court judges**

(1) **appointment of acting chief justice of India/high courts** - when the office of the chief justice is vacant, or when he is absent or otherwise, unable to perform the duties of his office, a judge of the supreme court may be appointed temporarily as acting chief justice of...
india by the president (article 126). the president may appoint an acting chief justice for a high court (article. 223). normally, the senior-most judge is appointed as acting chief justice.

(2) appointment of ad hoc judges - if there is want of quorum in the supreme court, the chief justice of india may, with the previous consent of the president and after consultation with the chief justice of the high court concerned, appoint a regular judge of a high court (having qualification to be appointed as a judge of the supreme court) as an ad hoc judge (article. 127). such judge shall have all the jurisdiction, powers and privileges, and shall discharge the duties, of a judge of the supreme court.

also, in case of need, the president may appoint additional judges of the high court for a period not exceeding two years. 'additional' judges are appointed by the president if it appears to him that by reason of any temporary increase in the business of the high court or by reason of arrears of work therein, the number of judges of that court for the time being increased [article. 224(1)]. likewise, 'acting' judges are appointed when any judge of a high court (other than the chief justice) is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as chief justice; the president may appoint a duly qualified person to act as a judge of that court until the permanent judge has resumed his duties [article. 224(2)].

no person appointed as an additional or acting judge of a high court shall hold office after attaining the age of 62 years [art. 224(3)].

(3) attendance of retired judges at sittings of the supreme court/ high courts - the chief justice of india may also invite, with the previous consent of the president and of the person to be appointed, a retired judge of the supreme/ high court, to sit and act as a judge of the supreme court for such period as he deems necessary (article. 128). such judge shall have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a judge of that court.

the chief justice of a high court may, with the consent of the president, appoint a retired judge to sit and act as a judge of that high court (article. 224a).

removal of judges: disciplining the judges

a judge of supreme/ high court can only be removed for proved misbehaviour or incapacity, and even so, a difficult procedure of impeachment is necessary (articles. 124/218): a judge can only be removed by a president's order passed after an address in each house of parliament. such address must be supported by a majority of the total membership of that house and by a majority of not less than two-thirds of members present and voting. it must be presented to the president in the same session. the constitution-makers adopted this method of removal by impeachment by parliament from the u.k. and the u.s.

parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour .or incapacity of a judge under clause (4) [article. 124(5)]. in pursuance of clause (5), parliament passed the judges (inquiry) act, 1968. the judges (inquiry) rules, 1969 lay down the details of procedure for investigation and inquiry into the allegations against a judge. if not less than 100 members of lok sabha or 50 members of rajya sabha give notice of a motion for the removal of a judge on grounds of some definite allegations of misbehaviour or incapacity, the speaker/chairman of lok sabha/rajya sabha, would decide the admissibility of the motion. if the motion is admitted, a committee would be appointed for holding the necessary investigations.

the judge concerned would be provided with reasonable opportunity for defence. if the committee does not found him guilty, the whole matter would be dropped; otherwise, if found guilty, the house would proceed to consider the motion. if the motion was passed by each house, misbehaviour or incapacity of the judge shall be deemed to have been proved and an address shall be presented to the president during the same session of parliament for the removal of the judge.

on may 10, 1993, the last day of the last session of the ninth lok sabha, for the first time ever a
sitting judge of the supreme court (justice verses ramaswami) was arraigned for trial before the lok sabha on charges of misuse of funds. speaker of the lok sabha admitted the motion and announced a three-member committee. soon after that, the house was adjourned. the committee found that certain charges in regard to misuse of funds stood established. even though the committee held justice ramaswami guilty of misconduct, when the matter came up before the lok sabha, the motion for presenting an address to the president for his removal was lost for want of the requisite number of votes. it was said that the matter had become highly politicised. the congress members absented themselves from voting. justice ramaswami retired only on his normal scheduled date of retirement in 1994.

the 'ramaswami' case proved that the method for removal of a judge is cumbersome, dilatory and political. several high court judges have had charges of misconduct levelled against them. many of them resigned (the latest instances were of justice somitra sen, and, justice p.d. dinakaran in 2011), but no one 'removed.' a second impeachment motion of a judge in the history of india (after the first impeachment motion against ramaswami) but for the first time in rajya sabha was introduced against justice somitra sen - a sitting judge of the calcutta high court, for financial irregularities committed by him when he was a practising lawyer and appointed as a receiver by the calcutta high court. chief justice of india had ordered an inquiry against him by a committees of judges before which he refused to appear. parliamentary committee set up by the rajya sabha declared him guilty. the impeachment motion was passed by a large majority in the rajya sabha. however, justice sen resigned one day before the impeachment motion was to be taken in lok sabha. he said that since impeachment motion had been passed in the rajya sabha he, decided in his wisdom not to continue as a judge but to live as an ordinary citizen. it may be noted that "misbehaviour" on the part of a judge may relate even to the period prior to the assuming of office by a person as a judge. however, "incapacity" must relate to the period during which a person holds the office of judgeship.

when the supreme court in 2009 announced that justice p.d. dinakaran would be elevated as a judge of the supreme court, the several members of bar council of india opposed the move because of his misconduct, as a judge and corruption by him. the chairman of rajya sabha admitted a motion for his removal. an impeachment motion was brought against him in the rajya sabha. chairman of the rajya sabha constituted an inquiry committee comprised of judges of supreme/high court and a senior advocate of supreme court. the objection was taken in the writ petition that some of the charges were not in consonance with the notice of motion of impeachment. it was held that the minor deviation would not warrant quashing of all the charges but it would be open to the petitioner to contend before the committee that this charge should be ignored for not founded on the allegations contained in the notice of motion or explanatory note. justice dinakaran, however, resigned expressing lack of confidence in the inquiry committee. he alleged denial of fair opportunity to defend himself and he sneaked suspicion about his misfortune due to his birth in socially oppressed and under-privileged section of the society (justice p.d. dinakaran verses hon'ble judges inquiry committee).

if the reputation of, and confidence in, the higher judiciary is to be maintained there is an urgent need to set up a credible statutory machinery for investigating charges against judges so that responsible criticism of the conduct of judges is immediately looked into and action taken, and at the same time unfounded allegations against them are nipped in the bud. short of removal of judges, there can be a law to investigate misconduct by judges and take appropriate action. the u.s. constitution has the method of removal by impeachment of federal judges, but there is a supplemental law to consider complaints of misbehaviour by federal court judges and discipline them, short of their removal. the judicial councils reform and judicial conduct and disability act, 1980 which was made by congress in consultation with the u.s. supreme court, provides a method by which federal judges can be effectively disciplined by their own peers.

under the 1980 u.s. act, complaints that a judge "has engaged in conduct prejudicial to the effective and expeditious administration of the business of courts" can be made to the chief judge of
a judicial council of judges. if the complaint is frivolous, it is dismissed. if not, it is investigated by a special committee of judges. upon receiving their report, the judicial council may take one of five steps. it may direct the judge under investigation to take such action as the judicial council may deem fit. it may request the judge to retire voluntarily. it may order that no further cases be assigned to him for the time being. it may censure or reprimand such a judge publicly or privately. or, if the judge deserves removal, his case is reported to the house of representatives for impeachment. the judge has a full opportunity to defend himself and he has a right of review by a higher federal judicial conference. the proceedings of the judicial council are confidential. experience shows that a judge who is found guilty resigns on an adverse report being made by the judicial council.

this method ensures the independence of the judiciary as the investigation is made by a peer body of judges. also, it will provide protection to judges against groundless charges being levelled against them, and at the same time satisfy lawyers and the public that complaints against judges of superior courts can be made and will be investigated by lawful machinery. it may be noted that in c. ravi chandran lyer verses justice a.m. bhattcharjee, the supreme court gave legal sanction to an 'in-house procedure' by judiciary only to be adopted by the chief justice of india (cji, considered to be 'first among judges') for taking action against a high court judge or chief justice so that he could be disciplined by self-regulation. the cji can take action against an erring judge whose bad conduct falls short of punishment by impeachment. it was held that the constitution has already put the nail squarely on the projections or attempts by any other forum or group of individuals or associations, statutory or otherwise (example cbi) to investigate or inquire into or discuss the conduct of a judge or the performance of his duties and on-off court behaviour except as per the impeachment procedure. 'forced resignation' of a judge is not provided for in the constitution, as it will affect the independence of the judiciary.

cji appoints a committee of judges to enquire into allegations of impropriety by judges of high courts. such committees, which do not have any authority of law to enquire into charges or summon evidence and effectively investigate the matter, have not inspired confidence in lawyers. even if the committee finds a judge guilty of misconduct, he cannot be removed from office by the chief justice or even suspended. a convenient way to avoid disciplinary action being taken against a judge who has come under a cloud has been for the cji to 'transfer' him to another high court. this sometimes results in protests from the bar of the high court to which he is transferred, which understandably does not want a delinquent judge in their court.

in 2006, a judges (inquiry) bill was formulated by the government of india on the recommendation of the 195th report of the law commission. it had the essential features of the u.s. judicial council act, 1980. it received the approval of the then chief justice of india in principle. had it been passed by parliament, many of the present problems of judicial misbehaviour could have been dealt with. unfortunately, an adverse report on it was made by a parliamentary committee in august 2007, mainly for seeking to entrust the disciplinary action to a body composed only of judges. this criticism was misconceived.

the judges (inquiry) amendment bill, 2008, is believed to provide for establishing a 'national judicial council' to inquire into allegations of misconduct, etc. on the part of judges.

powers and jurisdiction of the supreme court a court of record

article. 129 provides that the supreme court shall be a 'court of record' and shall have all the powers of such a court. being the highest court of the land, its proceedings, acts and decisions are kept in record for perpetual memory and for presentation as evidence, when need be, in support of what the law is. being a court of record implies that its records can be used as evidence and cannot be questioned for their authenticity in any court (daphtary verses gupta).

court of record also means that it can punish for its own contempt. but this is a summary power, used sparingly and under pressing circumstances where the public interest demands (hira lal verses state of u.p. ). it does not inhibit genuine and well-intentioned criticism of court and its functioning. fair and reasonable criticism of a judicial act in the interest of public good does
original, appellate and advisory jurisdiction

the supreme court has original, appellate, review, and, advisory jurisdiction.

(a) original jurisdiction

original exclusive jurisdiction - it means the power to hear and determine a dispute in the first instance. the supreme court has been given 'exclusive' original jurisdiction which extends to disputes (a) between the government of india and one or more states (example *state of west bengal versus union of india*), (b) between the government of india and one or more states on one side and one or more states on the other, (c) between two or more states. also, the dispute must involve any question (whether of law or fact) on which the existence or extent of a legal right depends (article 131).

however, this jurisdiction shall not extend to a dispute arising out of a treaty, agreement, covenant, *sanad*, etc. which is in operation (i.e. executed before the commencement of the constitution), or which provides that the said jurisdiction shall not extend to such a dispute (article 131, proviso).

article 131 opens with the subjective clause i.e. "subject to the provisions of this constitution." therefore, the jurisdiction conferred by article 131 is to be read with subject to other provisions of the constitution. the jurisdiction of the supreme court may also be excluded in certain other matters by parliamentary law, example inter-state water (river) disputes (article 262), matters referred to the finance commission (article. 280) and adjustment of certain expenses and pensions between the union and the states (article 290). the court in its original jurisdiction cannot entertain any suits brought by private individuals against the government of india except in cases of violation of the fundamental rights of individual.

recovery of damages against the government of india cannot be claimed by a state before the supreme court under article 131. the article does not cover such ordinary commercial matters between the union and the states [union of india verses state of rajasthan ]. also, a dispute to be so brought before the supreme court must involve a question, whether of law or fact, on which the existence or extent of a legal right depends. thus, the court has no jurisdiction in matters of political nature.

in the aforesaid case, it was held that the term "state" in article 131 also includes within its purview "state government." the dispute arose out of a directive issued by the government of india requiring the chief ministers of the congress-ruled states to advise their governors to dissolve their legislative assemblies, in the wake of the defeat of congress party in the 1977 lok sabha elections. holding that article 131 should not be given a restrictive meaning, it was held that a dispute between the central and state governments involves a 'legal right' (exercise of centre's power under article. 356 in respect to state legislatures) and thus would be included under article. 131.

article 71 provides another instance of "original exclusive jurisdiction" conferred on the supreme court. it lays down: "all doubts and disputes arising out of or in connection with the election of the president or vice-president of india shall be inquired into and decided by the supreme court whose decision shall be final."

original concurrent jurisdiction - the original jurisdiction of the supreme court also extends to cases of violation of the fundamental rights of individuals and the court can issue several writs for the enforcement of these rights (article. 32); a similar power has been entrusted to the high court (article. 226). it is a unique feature of our constitution that in principle, any individual can straightaway approach the highest court in case of violation of his fundamental rights (discussed later).
(b) appellate jurisdiction

The supreme court is the final appellate tribunal of the land. The appellate jurisdiction of the supreme court extends to civil, criminal and constitutional matters (articles 132-135).

Under article 132, an appeal will lie to the supreme court from any judgment, decree or final order of a high court in the territory of India, whether in a civil, criminal or other proceeding, if the high court certifies under article 134a that the case involves 'a substantial question of law as to the interpretation of the constitution.' Where such a certificate is given, any party in the case may appeal to the supreme court on the ground that any such question as aforesaid has been wrongly decided.

In a 'civil' matter, an appeal lies to the supreme court from any judgment, decree or final order of a high court if the high court certifies under article 134a that 'a substantial question of law of general importance' is involved and in the opinion of the high court the matter needs to be decided by the supreme court (article 133). Thus, article 133 requires from the high court - both viz. a 'certificate of fitness for appeal to the supreme court' as well as the 'opinion of the high court that the case needs to be decided by the apex court.'

In 'criminal' cases, an appeal to the supreme court shall lie from any judgment, decree or final order of a high court if the high court (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death, or (b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; and (c) in some other cases (article 134(1)) (Ram Kumar verses State of M.P.). In the first two cases, an appeal will lie to the supreme court without the certificate of the high court; the accused person may go for appeal to the supreme court in his own right.

The term 'acquittal' in article 134(1)(a) does not mean that the trial must have ended in a complete acquittal but would also include the case where the accused has been acquitted of the charge of murder and has been convicted of a lesser sentence. In Tarachand verses State of Maharashtra, the accused who was charged under section 301, IPC for murder was convicted by the sessions court under section 304 ('culpable homicide not amounting to murder'). The high court reversed the order and convicted the accused for murder under section 302 and sentenced him to death. The apex court held that the accused was entitled to come in appeal before it without a certificate of fitness under article 134a.

Under article 134(1)(c) an appeal against a decision of a high court can be filed before the supreme court if the high court certifies under article 134a that the case is a fit one for appeal to the supreme court. But the proviso to sub-clause (c) lays down that such appeals shall be subject to rules made by the supreme court (under article 145) and to such other conditions as the high court may decide.

In State of Gujarat verses S.A. Shaikh, the apex court observed: It is the settled practice of this court that if on the face of it the court is satisfied that the high court has not properly exercised the discretion under article 134(1)(c), the matter may be either remitted or the apex court may exercise that discretion itself or treat the appeal as one under article 136.

The 'grant of the certificate' by the high court for appeals in criminal cases to the supreme court depends on an evaluation whether the case involves a substantial question of law and its interpretation on which the supreme court is urgently required to pronounce its opinion and whether it would result in grave injustice to the accused. Thus, a certificate cannot be granted by the high court on mere question of fact.

The certificate under ah.134a may be granted by the high court on its own motion or on the oral application of the aggrieved party. It is obligatory on the high court to determine the question of granting certificate immediately on the passing of the judgment, decree, final order or sentence.

Under article 135, it is laid down that the federal court's (in existence before the commencement of the constitution) jurisdiction (under any existing law) is to be exercised by the supreme court. The supreme court shall exercise such jurisdiction if articles 133 and 134 do not apply.
to the case and the case was one in which the federal court had the jurisdiction to entertain appeals.

(c) appeal by special leave

under article. 136, the supreme court, at its discretion, may grant special leave to appeal from "any judgment, decree, determination, sentence or order, in any cause or matter passed or made by any court or tribunal in the territory of India." this is called 'special leave petition' (slp).

these powers of the supreme court to grant special leave to appeal are far wider than the high courts' power to grant certificates to appeal to the supreme court under article. 134. the supreme court can grant special leave against judgments of any court or tribunal in the territory, except the military courts, and in any type of cases viz. civil, criminal or revenue.

but, the supreme court has itself said that it will grant special leave to appeal only in cases where there has been "gross miscarriage of justice" (for example disregard of the forms of legal process or the violation of principles of natural justice) or where the high court or tribunal is found to have been wrong in law. if the judgment of the court below shakes the conscience and shocks the sense of justice, the supreme court shall interfere [haripada dey versus state of w.b.; mahesh versus state of delhi] article. 136 confers a wide discretionary power on the supreme court. it is in the nature of a residuary or reserve power and therefore, it cannot be defined exhaustively. it is in the nature of special power, exercisable outside the purview of ordinary law. it, however, has to be exercised sparingly. the constitution for the best of reasons does not choose to fetter or circumscribe the powers, exercisable under this article, in any way. it is an extraordinary jurisdiction vested by the constitution in the apex court with implicit trust and faith, and, extraordinary care and caution has to be observed in the exercise of this jurisdiction. in jyotendra singhji versus s.t. tripathi, it was held that a party cannot gain advantage by approaching the supreme court directly under article. 136 instead of approaching the high court under article. 226. this is not a limitation inherent in article. 136, it is a limitation which the supreme court imposes itself.

in appeal under article. 136, the supreme court does not interfere with the concurrent findings of fact unless it is established that the finding is based on no evidence or that the finding is perverse or is based on inadmissible evidence or the vital piece of evidence has been overlooked. in appeal under article. 136, the supreme court does not allow the appellant to raise the new plea for the first time (m/s. badrikedar paper pvt. ltd. versus electricity regulatory commission).

in ramakant rai versus madan rai, the supreme court held that where an accused is acquitted by the high court and no appeal against the acquittal is filed by the state, a 'private party' can file appeal under article. 136 against the acquittal order of the high court. the appellate power under article. 136 is not to be confused with ordinary appellate power exercised by appellate courts or tribunals.

it may be noted that the jurisdiction under article. 136 cannot be limited or taken away by any legislation subordinate to the constitution. it may also be noted that an "order" against which appeal is maintainable under article. 136 must be a judicial or quasi-judicial order (and not a purely executive or administrative order) and must be passed by a court or tribunal in the territory of India.

distinction between article. 136 and articles. 132-135

the supreme court's power under article. 136 is not fettered with any of the limitations contained in articles. 132-135. under the latter, appeal can be entertained only against the 'final order', but under article. 136, the word 'order' is not qualified by adjective 'final' and hence the court can grant special leave to appeal even from 'interlocutory orders.'

under articles. 132-134, appeal lies only against the final order of the 'high court'; under article. 136, the supreme court can grant leave for appeal from 'any court or tribunal', even without following the usual procedure of filing appeal in the high court or even where the law applicable to the
dispute does not make provision for such an appeal (*bharat bank verses employees of bharat bank*).

under articles. 132-134, appeal lies only against 'any judgment, decree, determination, sentence or order', but under article. 136, an appeal may lie against 'any cause or matter.'

(d) *review jurisdiction*

article 137 provides for the supreme court having the power to review its own judgments and orders. however, this is subject to any law passed by the parliament and any rules made by the apex court under article. 145.

thus, the power of review is not an inherent power, it must be conferred by law either specifically or by necessary implication. as per the rules, the review petition has to be moved before the same bench which had passed the judgment sought to be reviewed. the rules provide that the court may review its judgments on the grounds mentioned in order 47, rule 1, civil procedure code, 1908. these grounds are:

- discovery of new and important matter or evidence;
- any mistake or error apparent on the face of the record; and
- any other sufficient reason. in a review petition, thus, an error of substantial nature only can be reviewed.

(e) *advisory jurisdiction*

article 143 confers upon the supreme court advisory jurisdiction. the president may seek the opinion of the supreme court on any question of law or fact of public importance (which has arisen or is likely to arise) on which he thinks it expedient to obtain such an opinion. on such reference from the president, the supreme court, after giving it such hearing as it deems fit, may report to the president its opinion thereon [article. 143(1)].

the power vested in the president under article. 143 is purely discretionary and no direction can be issued by the court for the exercise of the power by the president. it is for the president to decide what questions should be referred to the supreme court. if the president does not entertain any serious doubt on the matter, it is not for the party to say that doubts arise out of them.

the opinion is only advisory, which the president is free to follow or not to follow. the first such reference was made in the *re delhi laws* case,. it may be noted that there is no provision for advisory jurisdiction in the constitutions of usa and australia, but in canada. it may be noted that a governor cannot seek advice from a high court.

the supreme court also is not bound to answer a reference made to it by president. thus, it has discretion in the matter and for good reason to refuse to express any opinion on the question submitted to it. the advisory opinion of the court, though entitled to great respect, is not binding on all courts because it is not a law within the meaning of article. 141 (*re kerala education bill* case . but, in *re special courts bill* case, the court made it clear that the views of it under article. 143 are binding on all courts. the court, however, suggested that the reference should not be vague and general but must be made on specific questions otherwise the courts would not be bound to answer. the advisory opinion of the supreme court has been taken on such important issues as cauvery dispute, ayodhya dispute, appointment and transfer of judges, etc.

the president may also seek the opinion of the supreme court, through a similar reference, on any treaty, agreement, covenant, engagement, *sanad* or other similar instrument which had been entered into or executed before the commencement of this constitution, and has continued in operation thereafter. on such matters (in respect of which the original jurisdiction of the supreme...
court is excluded), the court is \textit{bound} to give its opinion. article 143(2) lays down: "the president may, notwithstanding anything in the proviso to article 131, refer a dispute of the kind mentioned in the said proviso to the supreme court for opinion and the supreme court \textit{shall}, after such hearing as it thinks fit, report to the president its opinion thereon."

however, in \textit{re special courts bill} case, it was held that even in matters arising out of clause (2), the court may be justified in returning the reference unanswered for a valid reason.

\textbf{a critique of advisory jurisdiction}

advisory jurisdiction differs from ordinary jurisdiction in that there is no litigation between two parties and the advisory opinion of the court is not binding on the government. the u.s. supreme court decided early on against such a role, on the argument that it would encroach upon the legislative function and thereby negate the separation of powers that underpins the u.s. constitution.

this gives a soft option to the indian government on some politically difficult issues. the judiciary exists to interpret laws, expound the constitution and ensure that the rule of law prevails. the responsibility for maintaining law and order vests in the executive arm of the government. the cabinet can weigh popular opinion in the balance before deciding upon issues of public policy. the judiciary cannot decide upon questions of belief, opinion or political wisdom, nor pronounce upon questions of history, archaeology and mythology. the cabinet cannot shift the burden of responsibility to the courts for matters of policy for which the government (or prime minister) of the day is too weak, timid or confused to make and implement a firm decision. the judiciary cannot compensate for the inadequacies of governments or the failure of the political process.

the government of india had referred aspects of the babri masjid dispute to the supreme court for an advisory opinion. since there was no legal point as such at issue, there was a danger that the referral would politicise the judiciary instead of resolving a quintessentially political problem. on october 24, 1994, a five-member bench of the supreme court ruled that the reference to it, of the question of a temple having existed at the disputed site in ayodhya, was "superfluous, unnecessary and does not require to be answered."

it is also argued sometimes that the supreme court could not be treated as the government of india's counsel to which a case for opinion was sent and answers were sought to the queries raised in the case. the supreme court, under article. 143, was not invested with appellate or review jurisdiction in respect of a judgment which had attained \textit{finality}. such presidential reference would be plainly \textit{ultra vires} article. 143, and, not maintainable. it would be a \textit{mala fide} reference made by the government; when there was no ambiguity in the judgment, a larger bench could not overrule the judgment in a reference.

the aforesaid issues were recently raised in the presidential reference which, in effect and substance, seeks to question the correctness of the judgment in the "2g spectrum allocation case" (2012). it was asserted that "in no presidential reference under article. 143 made hitherto have answers been sought to questions which, according to the reference itself, have been answered by the supreme court in a catena of decisions." the president "can refer a question of law only when this court has not decided the question of law. constitutional short-cuts are not permissible and entertaining the present reference would set an unhealthy precedent and, moreover, will be clearly contrary to the judgment of this court in the \textit{cauvery water disputes tribunal case}?

\textbf{additional/ supplemental jurisdiction}

\textit{(enlargement of the supreme court's jurisdiction)}

under article. 138, the supreme court shall have such \textit{further} jurisdiction and powers with respect to any
of the matters in the union list as parliament may by law confer. It shall have such jurisdiction and powers with respect to any matter as the government of India and the government of any state may by special agreement confer, if the parliament by law provides for the exercise of such jurisdiction. This enlarges the jurisdiction of the supreme court and provides it with very special jurisdiction to hear cases of most urgent nature directly and in its original jurisdiction for speedy disposal.

Article 139 lays down that parliament may by law confer on the supreme court power to issue directions, orders or writs in matters not already covered under Article 32(2).

Under Article 140, parliament may by law supplement the powers of the supreme court (ancillary powers) so that it can effectively perform its functions. But, such supplemental powers should not be inconsistent with any of the provisions of the constitution.

Power to withdraw and transfer cases
Under the new Article 139A inserted by the 44th amendment in 1978, the supreme court may transfer to itself cases from one or more high courts if these involve same or substantially the same questions of law as pending before it, and that such questions are substantially the questions of general importance. The court may move on its own or on an application made by the attorney general or by a party to such case.

Provided that the supreme court may after determining the said questions of law return any case so withdrawn together with a copy of its judgment on such questions to the high court from which the case has been withdrawn, and the high court shall on receipt thereof, proceed to dispose of the case in conformity with such judgment.

Also, the supreme court may transfer cases, appeals or other proceedings from one high court to another in the interests of justice. This article enables the supreme court to decide cases involving same questions of law without delay and thus avoid conflicting interpretations of the provisions of the constitution by the different high courts.

Law declared by it to be binding on all courts
Law declared by the supreme court is binding on all courts in India vide Article 141 (Vineet Narain versus Union of India) but no law can be taken to have been 'declared' where no reasons are given. Also, what is binding is the principle or the ratio of the decision and not findings on facts, opinions (obiter dicta) or arguments (supreme court employees versus Union of India). The supreme court is not bound by its own decisions and may in proper case 'reverse' its previous decisions.

Articles 141, 142 and 144 of the constitution make the position of the supreme court clear. The supreme court has singular constitutional role and therefore all authorities, civil or judicial in the territory of India are directed to act in the aid of the supreme court. The supreme court has power to initiate contempt proceedings against an erring judge of the high court, when that judge flouts the order of the supreme court.

Inherent powers and enforcement of decree and orders of supreme court
Article 142(1) provides that "the supreme court in exercise of its jurisdiction, may pass such decrees or orders as is necessary for doing complete justice in the matter pending before it". Decrees and orders of the supreme court shall be enforceable throughout India in such manner as may be prescribed by the parliament. Until provision is made by the parliament the orders of the court will be enforced in the manner prescribed by the president. Inherent powers under article 142 cannot be invoked when alternative remedy is available (viz. review) and has already been availed of. The inherent power is meant only to correct orders when other remedy is not available.

The power under article 142 is very wide and the court can formulate legal doctrines to meet the ends of justice. The object of this article is to enable the court to declare law to give such directions or
pass such orders as are necessary "to do complete justice". in *e.s.p. rajaram verses uoi*, the supreme court observed: "the provision contains no limitation regarding the causes or the circumstances in which the power can be exercised nor does it lays down any condition to be satisfied before such power is exercised. the exercise of the power is left completely to the discretion of the court. however, this power is not be exercised to override any express provision. it is not to be exercised in a case where there is no basis in law for doing an act."

subject to the provisions of any law made in this behalf by parliament, the supreme court shall, as respect the whole of the territory of india, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself [article. 142(2)].

for purposes of giving effect to the directions and decisions of the supreme court, all authorities, civil and judicial, in the territory of india, have been made subordinate to the authority of the supreme court in as much as all these are required to "act in aid of the supreme court" (article. 144).

**rules and procedure of supreme court**

subject to the provisions of any law made by parliament, the supreme court may, from time to time, with the approval of the president, make rules for regulating generally the practice and procedure of the court. for example, the minimum number of judges to decide an issue involving the interpretation of constitution or a presidential reference under article. 143 shall be five. all cases will be decided by a majority of the judges hearing the case; a judge who does not concur could deliver a dissenting judgment or opinion (article. 145). article. 147 clarifies that references to interpretation of the constitution shall cover interpretation of the government of india act, 1935, indian independence act, 1947, etc.

**curative petition**

a curative petition is a petition filed, for reconsideration of a final judgment/ order, passed by the supreme court, after exhausting the remedy of review under article. 137.

**powers and jurisdiction of the high court**

like the supreme court, each high court is also to be a 'court of record' and of original and appellate jurisdiction with all the powers of such a court including the power to punish for its contempt (article. 215). just as the law declared by the supreme court is binding on all courts in india, that declared by the high court is binding on all subordinate courts within the state or within the territory covered by the jurisdiction of the high court (*state of m.p. verses bhailal*), it is the highest court of appeal in a state.

the pre-constitutional jurisdiction of the high courts is preserved by the constitution (article. 225). the jurisdiction and powers of the high courts can be changed both by the parliament and the state legislature. the power conferred on the high court by article. 226 cannot be taken away or abridged by any law except by an amendment of the constitution (*sangram singh verses election tribunal*).

in *tirupati balaji developers (p) ltd. verses state of bihar*, the apex court examined the relationship between the supreme court and the high courts. it was held that both are constitutionally independent of each other, both being courts of record, and high court is not a court "subordinate/inferior" to supreme court except for purposes of supreme court's appellate jurisdiction over high court in terms of articles. 132-136, in which context high court exercises an inferior or subordinate jurisdiction. moreover, articles. 139-a, 141 and 144 give an edge and assign a superior place in the constitutional hierarchy to supreme court in the context of their operation.
as well, however, high court does have a larger jurisdiction in the context of operation of articles. 226 and 227. "if the supreme court and the high courts both were to be thought of as brothers in the administration of justice, the high court has larger jurisdiction but the supreme court still remains the elder brother" (per r.c. lahoti, j.).

**original jurisdiction** - article. 226 lays down that notwithstanding anything in article. 32, every high court shall have power throughout the territory under its jurisdiction to issue to any person or authority, directions, orders or writs or any of them for the enforcement of the fundamental rights or for any other purpose. the high court may set aside an illegal order, may declare the law or the right, may order relief by way of, for example, refund of illegal tax, etc.

there are certain other cases also which fall under the original jurisdiction of the high courts. the cases pertaining to marriage laws, divorce, company laws, wills of the deceased, cases involving a sum or property of certain value (pecuniary jurisdiction) may originate in the high courts. for example, bombay high court has original jurisdiction in matters of parsi marriage.

**appellate jurisdiction** - a high court is essentially a court of appeal. it has appellate jurisdiction over subordinate courts. it may reduce the sentence or even acquit the accused against the judgment of a lower court. further, where any high court is satisfied that a case pending in the lower courts involves a substantial question of law as to the interpretation of the constitution, it may withdraw the case and either itself decide it or determine the said question of law and return the case to the court concerned for disposal. when the high court has so returned the case, the court concerned shall dispose of the case in conformity with the judgment of the high court on that question (article. 228- transfer of cases). the object of article. 228 is to make the high court the sole interpreter of the constitution in a state.

**supervisory and disciplinary jurisdiction** - each high court also has powers of superintendence over all the courts and tribunals — other than those set up under any law relating to armed forces — in the area of its jurisdiction (article. 227). further, this power of superintendence includes a revisional jurisdiction to intervene in cases of gross injustice or non-exercise or abuse of jurisdiction, even though no appeal or revision against the orders of such tribunal was otherwise available. this power of superintendence is wider than the power conferred on the high court to control inferior courts through writs under article. 226. it is not confined only to administrative superintendence (calling of returns, rules for regulating the practice and proceedings of the lower courts) but also judicial superintendence (waryam singh verses amarnath).

the power being extraordinary is to be exercised most sparingly and only in appropriate cases to keep the subordinate courts within the bounds of their authority. the main grounds on which the high court, usually interferes are when the inferior courts act arbitrarily or act in excess of jurisdiction vested in them, or fail to exercise jurisdiction vested in them, or act in violation of principles of natural justice (santosh singh verses mool singh).

there is a difference between jurisdiction under article 226 to issue a writ (certiorari, for example) and supervisory jurisdiction under article. 227. firstly, the writ of certiorari is in exercise of its original jurisdiction by the high court but supervisory jurisdiction is akin to appellate revisional or corrective jurisdiction. secondly, in a writ of certiorari the record of the proceedings certified by inferior courts or tribunals is sent to the high court and if it wishes to exercise its jurisdiction it may simply annul, or quash the proceedings and then do no more. but in exercise of supervisory jurisdiction the high court may not only quash the impugned proceedings, judgment or order but it may make such directions as the facts and circumstances of the case may warrant for guiding the inferior court or tribunal to proceed further or afresh. in appropriate cases the high court may substitute its own decision. thirdly, the jurisdiction under article. 226 can be exercised on a prayer made on behalf of the party aggrieved, but the supervisory jurisdiction can be exercised suo motu as well (surya dev rai verses ram chandra rai).
every high court has full control over its staff. the salaries and allowances of the judges and
of the high court staff are all charged on the consolidated fund of the state. appointments of officers
and staff of a high court are made by the chief justice of the court or by such other judge or officer
of the court as he may decide (subject to the provisions of any law made by the legislature of the
state). the terms and conditions of service of the staff and officers of the court should appropriately
be settled by rules made by the chief justice and approved by the governor (article. 229).

the jurisdiction of a high court may be extended to or excluded from a union territory. where the
high court of a state exercises jurisdiction in relation to a union territory, nothing in this constitution
shall be construed as empowering the legislature of the state to increase, restrict or abolish that
jurisdiction (article. 230).

under article. 235, the high court has disciplinary jurisdiction over subordinate courts; only a
high court can exercise disciplinary power against a judge of the inferior court. the 'control' over
district courts and courts subordinate thereto including the posting and promotion of, and the
grant of leave to, persons belonging to the judicial service of a state and holding any post inferior
to the post of district judge shall be vested in the high court. appointments of persons to be, and
the posting and promotion of, district judges in any state shall be made by the governor of the
state in consultation with the high court exercising jurisdiction in relation to such state (article. 233).

the word "control" referred to in article. 235 has been used in a comprehensive sense and
includes the control and superintendence of the high court over the subordinate courts and the
persons manning them, both on the judicial and administrative side. such control and consultation are
not a matter of mere formality, they are the constitutional power and privileges of the high court.
its obligation cannot be diluted by sheer inaction or failing to act when the high court must act.
the "consultation" implies meaningful, effective and conscious consultation (madan mohan verses
state of bihar).

writ jurisdiction of the supreme and high courts
a "writ" is a quick remedy against injustice, a device for the protection of the rights of citizens against
any encroachment by the governmental authority. writs originated in britain where they were king's
or queen's 'prerogative' writs and were commands to the judicial tribunals or other bodies to do or
not to do something. since writs carried the authority of the crown they were to be obeyed.
later, writs came to be enjoyed by the judges of the king's bench. in india, the power to issue
writs has been vested in the supreme court and the high courts. it is an extraordinary remedy
which can be expected in special circumstances.

the supreme court has been empowered to issue writs in the nature of habeas corpus, mandamus,
prohibition, certiorari and quo warranto for protecting the fundamental rights [article. 32(2)]. similar power has been conferred on the high courts via after. 226. the high court can issue the
above writs for protecting the fundamental as well as statutory and common law rights. the high
courts can issue writs to any governmental authority outside their territorial jurisdiction, provided
the cause of action arises (in whole or in part) within their territorial jurisdiction.

a writ is a discretionary remedy and the high court can refuse it on the ground of
acquiescence, laches (delay), available alternative remedy and no benefit to the party. under article.
226(3), a high court can grant interim relief by way of interlocutory orders.

while the jurisdiction of the high court is more extensive than that of the supreme court, art.
226 (4) provides that the powers conferred on a high court shall not be in derogation of the
powers conferred on the supreme court by article. 32(2). in l chandra kumar verses uoi, held that
a person cannot go directly to the supreme court from a decision of a tribunal, without first going
to the high courts. thus, the aggrieved person has got another remedy by way of a writ petition
before the high court concerned. thus, what was earlier a two-tier litigation has now become a
three-tier litigation. the tribunals cannot oust the jurisdiction of the high courts under articles 226/227.

the scope of the writs in Indian law is wider than that of the prerogative writs in England. This is because, firstly, the constitution uses the words "writs in the nature of which does not make our writs identical with those in England but only draws an analogy from the latter. Secondly, article 32(2) do not require the supreme court to observe all procedural technicalities which were relevant for the issuance of writs under English law. Therefore, even if the conditions for the issue of any of the writs are not fulfilled, the court may still issue a writ in an appropriate case (except cases of government policy).

thirdly, our high court can issue directions, orders or writs other than the prerogative writs. This enables the courts to mould the reliefs to meet peculiar and complicated requirements of this country. Under article 226, writs can be issued to "any persons or authority" (any person or body performing public duty) (Shri Anadi Mukta Sadguru Trust Versus V.R. Rudani). There are five well-known writs:

(a) habeas corpus
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.

Since now, article 21 cannot be suspended even during the proclamation of emergency, this becomes a very valuable writ for safeguarding the personal liberty of the individual. While the supreme court can issue the writ of habeas corpus only against the state in cases of violation of fundamental rights, the high court can issue it also against private individuals illegally or arbitrarily detaining any other person.

Writ of habeas corpus can be filed by any person on behalf of the person detained or by the detained person himself. In Sunil Batra 2 Versus Delhi Administration, a letter written by a convict to one of the judges of the supreme court was treated as a writ petition. The court employed this writ for the neglect of state penal facilities. The writ was also issued when a ban was imposed on the law students to conduct interviews with prison mates for affording them legal relief.

(b) mandamus
it is a command to act lawfully and to desist from perpetrating an unlawful act. Where a has a legal right which casts certain legal obligations on b, a can seek a writ of mandamus directing b 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.

The supreme court may issue a mandamus to enforce the fundamental right of a person when its violation by some governmental order or act is alleged. The high courts may issue this writ to direct an officer to exercise his constitutional and legal powers, to compel any person to discharge duties cast on him by the constitution or the statute, to compel a judicial authority to exercise its jurisdiction and to order the government not to enforce any unconstitutional law.

Mandamus is a judicial remedy in the form of "an order' to do or to forbear from doing some specific act" which that agency is obliged to do or to refrain from doing under the law and which is in the nature of a public duty or a statutory duty. It is considered as a residuary remedy of the public law. It is a general remedy whenever justice has been denied to any person. It may be
issued not only to compel the authority to do something but also to restrain it from doing something. therefore, it is both negative and positive and hence can do the work of all other writs. it can be issued on all those counts on which certiorari and prohibition can be issued.

mandamus would lie only to enforce a duty which is 'public' in nature. there must be a specific demand for the fulfillment of duty and there must be specific refusal by the authority. the applicant must've a legal right to the performance of a legal duty. if the rights are purely of a private character no mandamus can be issued. a 'public duty' is one which is created either by a statute, the constitution or by some rule of common law. the public duty enforceable through mandamus must also be an absolute duty i.e. which is mandatory and not discretionary. mandamus would not lie where the duty is ministerial in nature i.e. where the authority has to act on the instructions of his superior. the remedy of mandamus will not be available against any person involved in the election process.

in jatinder kumar verses state of punjab, held that article. 320(3) of the constitution which provided that before a government servant was dismissed, the u.p.s.c. should be consulted, did not confer any right on a public servant and hence failure to consult the public service commission did not entitle the public servant to get mandamus for compelling the government to consult the commission. however, if the authority is under law obliged to exercise a discretion, mandamus would lie to exercise it in one way or the other.

in praga tools corporation. verses c v. i manual, held that a mandamus could issue against a person or body to carry out the duties placed on them by the statutes even though they are not public officials or statutory body. technicalities should not come in the way of granting that relief under article. 226. in unni krishnan verses union of india, held that a private medical/engineering college comes within the writ jurisdiction of the court irrespective of the question of aid and affiliation.

in hearing the petition for mandamus, the court does not sit as a court of appeal. the court will not examine the correctness or otherwise of the decision on merits. it cannot substitute its own wisdom for the discretion vested in the authority unless the exercise of discretion is illegal. this is true for other writs also.

in uoi verses prakash p. hindu , it was held that parliament exercises sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. similarly, no mandamus can be issued to enforce an act which has been passed by the legislature. therefore, the direction issued by the apex court in vineet narain case regarding conferment of statutory status on cvc cannot be treated to be of such a nature the non-compliance whereof may amount to contempt.

where, however, the issuance of mandamus directing the investigating agencies to investigate into offences was found futile, the court forged out a new tool of 'continuing mandamus' requiring the agencies to report the progress to the court so that monitoring by the court could ensure continuance of the investigation (vineet narain case).

(c) certiorari

'certiorari' is a latin word meaning 'to inform' or 'to certify.' it was essentially a royal demand for information. the king wishing to be certified of some matter, ordered that the necessary information be provided for him. 'certiorari'

may be defined as a judicial order operating in personam and made in the original legal proceedings, directed to any constitutional, 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.

it can be issued against constitutional bodies (legislature, executive and judiciary or their officers), statutory bodies like corporations, non-statutory bodies like companies and cooperative
societies and private bodies and persons. certiorari can be issued to quash judicial, quasi-judicial as well as administrative actions (a.k. krai pak versus union of india ). in this case, the writ of certiorari was issued to quash the action of a selection board, on the ground of personal bias.

the writ is corrective in nature, thus its scope of operation is quite large. the purpose of certiorari is not only negative (to quash an action) but it contains affirmative or positive action also. in gujarat steel tubes v mazdoor sabha , held that while quashing the dismissal order, the court can also order reinstatement and the payment of back wages.

grounds for the issue of certiorari are: (1) lack of jurisdiction; or the authority declining jurisdiction where it legally belongs to it. (2) excess of jurisdiction. (3) abuse of jurisdiction. (4) violation of the principles of natural justice. (5) error of law apparent on the face of the record - it includes not a mere error but a manifest error based on clear ignorance or disregard of the law, or on a wrong proposition of the law, or on clear inconsistency between facts and the law and the decision.

in syed yakoob versus radhakrishnan, held that the jurisdiction of the high court to issue a writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. an error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, howsoever grave it may appear to be. however, if a finding of fact is based on 'no evidence,' that would be regarded as an error of law which can be corrected by certiorari.

(d) prohibition

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).

prohibition does not lie against an authority discharging purely administrative or executive functions, it issues only against an authority discharging judicial functions (isha beevi versus tax recovery officer).

before the writ of prohibition can be issued there must be something to be done. it is a 'writ of right'. prohibition has much in common with certiorari, both are 'jurisdictional writs' issued against judicial or quasi-judicial authorities on similar grounds. however, prohibition is issued while judicial process is in motion to prevent it from proceeding further, certiorari is issued to quash the proceedings and is therefore issued when the judicial process has ended in a decision (i.e. on completion of the proceeding). thus, the object of the writ of prohibition is in short 'prevention' rather than cure, while certiorari is used as a 'cure.'

however, these remedies may be applied simultaneously, certiorari to quash the proceedings and prohibition to stop the tribunal from continuing to exceed its jurisdiction. the usual practice is to pray for prohibition and alternatively certiorari because it may happen that pending proceedings for prohibition the agency may hand over its final decision.

(e) quo-warranto

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.

it can be issued against offices created by the constitution such as the advocate-general, the speaker of legislative assembly, officers under the municipal act, members of a local government board, university officials and teachers, but it will not issue against the managing committee of a private school which is not appointed under the authority of a statute.

judicial review: basis and scop

philosophy of judicial review is rooted in the principle that constitution is the fundamental law, all governmental organs must not do anything which is inconsistent with the provisions of constitution; and the theory of 'limited government.' when a contradiction between the constitution and enacted law exists, it is the duty of judges to resolve it. thus, judicial review makes constitution legalistic. in a federal system, it is a necessary consequence to have an independent and impartial judiciary to resolve disputes. -

'judicial review' means that the judiciary can declare a law or legislation as unconstitutional if it is beyond the competence of legislature according to the distribution of powers (under article 246), or it is in contravention of fundamental rights or any of the mandatory provisions of the constitution (for example. article 301, 304). even in the absence of such express constitutional provisions, the court can invalidate a law which contravenes any right or is ultra vires, for such power of judicial review follows from the very nature of the constitutional law. thus, under article 132, the substantial question of law as to the interpretation of constitution is referred to the supreme court. the 'reasonable restrictions' in case of fundamental rights are subject to court's supervision. judicial review is thus 'the interposition of judicial restraint on the legislative as well as executive organs of the government.'

in a.k. gopalan verses state of madras, the power of judicial review was firmly established and the limitations for its exercise were clearly enunciated. in india, the position of the judiciary is somewhere in between the courts in england and the united states. in england, a law duly made by parliament cannot be challenged in any court. the english courts have to interpret and apply the law; they have no authority to declare such a law illegal or unconstitutional. in united states, the supreme court is supreme and can declare any law unconstitutional on the ground of its not being in "due process of law."

our constitution, unlike the english constitution, recognises the court's supremacy over the legislative authority, but such supremacy is a very limited one, for it is confined to the field where the legislative power is circumscribed by limitations put upon it by the constitution itself. within this restricted field the court may, on a scrutiny of law made by the legislature, declare it void if it is found to have transgressed the constitutional limitations. unlike the u.s.a. constitution, the courts in india have no authority to question the wisdom or policy of the law duly made by the legislature.

limited supremacy of courts

under article 245(1), the legislative powers conferred under article 246 are also made "subject to the provision of constitution." article 13(2) provides as follows: "the state shall not make any law which takes away or abridges the right conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void." thus, this article protects the fundamental rights.

scope of judicial review

while the basis of judicial review of legislative acts is far more secure under our constitution (because of express and implied provisions in constitution), its potentialities are much more limited as compared to that in u.s.a. this is due to the detailed provisions of constitution and the easy method of its
amendment - major portion of constitution is liable to be amended if the judiciary proves too obtrusive. also, during emergency, the legislature given supremacy, as it represents the will of the community.

in india, the exercise of power of judicial review is itself made subject to the limitations, expressly provided in the constitution example articles 32,226, 74, 77, 163, 166, 105, 194, 12, 212. the supreme court has also evolved certain self-imposed limitations on its powers of judicial review, as found in res judicata, laches, standing, waiver, etc.

nevertheless, in several cases, it has been held that the supreme court can act as the custodian, defender of rights of people, and democratic system of government only through the judicial review. in keshavanand bharti's case, it was held that the judicial review is a 'basic feature' of the constitution and cannot be amended.

the scope of judicial review is sufficient in india, to make supreme court a powerful agency to control the activities of executive and the legislature. in no way, judicial review makes the supreme court a rival of the parliament.

limits of judicial review - scope of articles. 32/226: standing and public interest litigation

dr. ambedkar in the drafting committee of the constituent assembly stated that article. 32 was the "most important" article and that "it is the very soul of the constitution and the very heart of it." article. 32(1) guarantees the right to move supreme court by 'appropriate proceedings' for the enforcement of fundamental rights (part iii of the constitution). clause (2) - deals with supreme court’s power to issue directions, order or writs, whichever may be appropriate, for the enforcement of fundamental rights.

article 32 thus provides an expeditious and inexpensive remedy for the protection of fundamental rights from legislative and executive interference. however, a petition under article 32 may be filed to challenge the validity of a law with reference to a provision other than those involving fundamental rights, provided it inevitably causes a restriction on the enjoyment of fundamental rights.

the supreme court cannot refuse relief under article 32 on the ground that the aggrieved person may have his remedy from other court (a person need not first exhaust the other remedies and then go to the supreme court); the disputed facts have to be investigated before the relief given; and that petitioner has not asked for proper writ applicable to his case.

in rn. kumar verses municipal corpn. of delhi, a two-judge bench of the supreme court held that the citizens should not come to the court directly for the enforcement of their fundamental rights, but they should first seek remedy in the high courts and then if the parties are dissatisfied with the high court’s judgment, they can approach the supreme court by way of appeal. in this case, the petitioner challenged the imposition of various taxes on their hotel. disposing the petition the apex court laid down following guidelines for the exercise of the right under art. 32:

(1) the scope of article. 226 is wider than article. 32.
(2) hearing of the case at the level of high courts is more convenient to the parties. it saves lot of time.
(3) the high court has its own tradition and eminent judges/ lawyers,
(4) the supreme court’s workload is too much with cases pending before it for the last 10-15 years.

similarly, in kanubhai brahmbhatt verses state of gujarat, the apex court directed the petitioner to first seek remedy in the high court.

PREPARED BY RADHIKA SETH, PLEASE VOTE, BALLOT No. 2
standing and public interest litigation (pil)

the traditional rule of locus standi is that a petition under article 32 can only be filed by an aggrieved person whose fundamental right is infringed. this rule emerged as all developed legal systems have to face the problem of adjusting conflict between two aspects of public interests namely, (1) encouraging individual citizen to participate actively in enforcement of law; and (2) undesirability of encouraging professional litigants.

this rule has now been considerably relaxed by supreme court in its recent rulings. the court now permits 'social action litigation' or 'public interest litigation' (pro bono publico litigation) at the instance of 'public-spirited citizens', for the enforcement of any constitutional or legal right of any person or group of persons who because of their poverty or socio- economic disadvantaged position or otherwise (example being in custody) are unable to approach the court for relief.

the expression 'public interest litigation' (pil) means 'a legal action initiated in a court for enforcement of public interest.' the grievance in a public interest action is about the content and conduct of government action in relation to the constitutional or statutory rights of segments of society and in certain circumstances the conduct of government policy. the doctrine of pil applies to any case of public injury arising from:

(a) the breach of any public duty, or
(b) the violation of some provision of the constitution, or
(c) of the law (s.r gupta's case).

the relief to be granted looks to the future and is, generally, corrective rather then compensatory which, sometimes it also is. public interest litigation involves collaboration and cooperation between the government and its officers, the bar and the bench, for the purpose of making human rights meaningful for the weaker sections of the community (u. baxi 's case).

the traditional doctrine of standing means that judicial redress is available only to a person who has suffered (or is likely to suffer) a legal injury by reason of violation of his legal right or legally protected interest. however, there are a few exceptions to it, which have been evolved by the courts over the years. thus, a tax payer of a local authority is accorded standing to challenge an illegal action of local authority. the reason for liberalisation of the rule in the case of a tax payer of a municipality is that his interest in the application of the money of municipality is direct and immediate. the statute itself may expressly recognise the locus standi of an applicant, even though no legal right of the applicant has been violated resulting in legal injury to him. for example, in j.m desai verses roshan kumar, the court noticed that the bombay cinematograph act 1918 and the bombay cinema rules, 1954 made under that act, recognised a special interest of persons residing, or concerned with any institution such as a school, temple, etc. located within a distance of 200 yards of the site on which the cinema house is proposed to be constructed and held that as the petitioner, a rival cinema owner, did not fall within the category of such persons having a special interest in the locality, he had no locus standi to maintain a writ petition.

in sunil batra verses delhi administration , the court accepted the habeas corpus petition of a prisoner complaining of a brutal assault by a head warden on another prisoner. in this case, the supreme court broadened the scope of habeas corpus by holding that this writ can be issued not only for releasing a prisoner from illegal detention, but also for protecting prisoners from inhuman and barbarous treatment. in dr. upendra baxi verses state of uttar pradesh , the supreme court permitted the petitioner, a law professor, to raise infringement of article 21 on behalf of the inmates of the agra protective home, who were living in inhuman and degrading conditions.

in these cases, the court recognised the rights of a member of a class to initiate action when the whole class is likely to be affected by an action. however, for matters of public concern a person
acquires *locus standi* not because he belongs to a class or he has any special interest or has suffered personal injury, but because being a responsible citizen he feels concerned about a matter [*Pudra verses Union of India*] above all, public duties are owed by the state to the people at large. therefore, every citizen has a right to enforce the performance of such duties for the benefit of all [*municipal council, Ratlam verses Varndichand*].

**Judicial self-restraint on exercise of power**

**(a) Locus Standi (PIL)**

**(b) Territorial extent of jurisdiction**

Art. 226 permits high court within whose jurisdiction the cause of action in whole or in part arises to issue directions, orders, or writs to any government or authority notwithstanding that the authority or the government is located in Delhi if the cause of action in whole or in part arises in its jurisdiction.

However, merely because a company at Calcutta read the advertisement (relating to tenders) at Calcutta, submitted the offer from Calcutta, made representation from Calcutta and sent messages from Calcutta and received a reply thereto at Calcutta did not constitute facts forming an integral part of the cause of action. Thus, the Calcutta high court had no jurisdiction in the matter [*ONGC verses Utpal Kumar Basu*].

**(c) Laches**

The remedy provided under article 32/226 should be sought within a reasonable time. Inordinate delay in invoking the jurisdiction of the court may be good ground for refusing to grant relief. In the absence of any prescribed period of limitation, the only principle is that the court should not examine stale causes. But where the explanation offered for the delay is convincing and acceptable, the writ petition should not be dismissed on the sole ground of delay (*State of U.P. verses Bahadur Singh*).

The delay caused on account of government machinery, administrative set-up, poverty of the petitioner, etc. is usually condoned by the courts. A departmental authority may delay the moving of higher court for oblique motives and the public interest may suffer if such cause is thrown out merely on the ground of some delay. However, where a government servant slept over the promotions of his juniors over his head for 14 years and then approached the high court challenging the relaxation of relevant rules in favour of the junior, the writ petition was liable to be dismissed *in limine* (*S.R. Sadasiwasmamy verses State of T.N.*).

The exercise of the discretion by the court even where application is delayed is to be governed by the doctrine of promoting public interest and good administration.

**(d) Res Judicata**

**(e) Exhaustion of alternative remedies**

The remedy provided for in article 226 is a discretionary remedy and the high court may refuse to grant a writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere (*Rashid Ahmad verses Income-tax Investigation Commission*). The high court, however, must exercise its discretion on judicial consideration and on well-established principles unless it is
satisfied that normal statutory remedy is likely to be too dilatory or difficult to give reasonable quick relief.

but the rule that the high court may refuse to grant any writ where alternative remedy is available is only a rule of direction and not a rule of law, and instances are numerous where a writ had been issued in spite of the fact that the aggrieved party had other adequate legal remedy (state of u.p. versus mohd. nooh).

the existence of alternative-remedy is, however, no bar to the exercise of writ jurisdiction where the relief is invoked in case of infringement of fundamental rights (himmat lal versus state of u.p.). similar would be the case where there is complete lack of jurisdiction or where the order has been passed in violation of natural justice. thus, existence of alternative remedy is no ground to refuse to issue writ where the action is being taken under any invalid law or arbitrarily without sanction of law.

also, in exceptional cases or extraordinary circumstances, there is no justification for high courts to refuse to entertain petitions on the ground of alternative remedy provided under the statute. in t.k. rangarajan versus govt. of t.n., the state employees went on strike for their demands. the state took an unprecedented action and terminated the services of 2 lac government employees for going on strike. the division bench of the high court held that the writ petitions were not maintainable as the petitioners have not exhausted the alternative remedy of approaching the administrative tribunal. the supreme court held that the refusal by the high court to hear the case was unjustified.

(f) dispute between private parties
the dispute between private parties is not covered by article. 226. in mohan pandey versus us harini raj garia (1992), it was held that the extraordinary jurisdiction of the high court under art. 226 cannot be exercised for deciding disputes between private parties relating to property rights, unless there is violation of some statutory duty on the part of the statutory authority alleged.

a regular suit is the appropriate remedy for settlement of disputes between private persons. the high court cannot allow the constitutional jurisdiction to be used for deciding disputes, for which remedies under the general law, civil or criminal, are available.

(g) disputed questions of facts
the high court will not go into the disputed questions of fact in exercise of its writ jurisdiction under artcle. 226 (burmah construction co. versus state of orissa).

court's power to issue appropriate orders/directions

courts and enactment i enforcement of law)

in all india judges ascn. versus uoi, it was held that the supreme court can issue directions to the executive and legislature to perform their obligatory duties.

in vineet narain versus uoi, the supreme court observed: “there are ample powers conferred by art. 32 read with article 142 to make orders which have the effect of 'law' by virtue of article 141 and there is mandate to all authorities to act in aid of the court's orders as provided in article. 144. the court can issue necessary directions (in exercise of its constitutional obligations) to fill the vacuum till such time the legislature steps in to cover the gap or executive discharges its role. in this case, the supreme court used this power for laying down comprehensive methodology for the appointment of central vigilance
comissioner (cvc) and the director of cbi.

in uoi verses prakash p. hinduja , however, it was held that parliament exercises sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. similarly, no mandamus can be issued to enforce an act which has been passed by the legislature. therefore, the direction issued by the apex court in vineet narain case regarding conferment of statutory status on cvc cannot be treated to be of such a nature the non-compliance whereof may amount to contempt.

similarly, in state of h.p. verses parent of a student of medical collage, it was held that the high court while exercising extraordinary jurisdiction under art. 226 cannot direct the state legislature to enact a law. it is entirely a matter for the executive branch of the government to decide whether or not to introduce any particular legislation. the court cannot usurp the function assigned to the executive and the legislature under the constitution and it cannot even indirectly require the executive to introduce a particular legislation or the legislature to pass it or assume to itself a supervisory role over the law making activities of the executive and the legislature.

the above decision was followed by the supreme court in asif hameed verses state of j & k in which the high court had directed the state government to constitute statutory independent body to make admissions to medical colleges in the state.

in aeltemesh rein verses uoi, the question was whether the court can issue a writ in the nature of mandamus to the central government to bring sec. 30 of the advocates act, 1961 into force. the said section has not yet been brought into force. the above issue also arose in a.k. roy verses uoi. in that case, it was observed that it is not open to this court to issue a writ of mandamus to the central government to bring a statute or a statutory provision into force when according to the said statute the date on which it should be brought into force is left to the discretion of the government.

in that case, the constitution bench observed: "the executive is responsible to the parliament and if the parliament considers that the executive has betrayed its trust by not bringing any provision of the amendment into force, it can censure the executive. it would be quite anomalous that the inaction of the executive should have the approval of the parliament and yet we should show our disapproval of it by issuing a mandamus".

however, in the present case, the apex court held that though the court cannot direct the exercise of discretionary power in a particular manner, it can issue a writ of mandamus to the central government to consider within a period of 6 months whether sec. 30 of the act should be brought into force or not. if on such consideration the government feels that the prevailing circumstances are such that sec. 30 should not be brought into force immediately it is a different matter. but it cannot be allowed to leave the matter to lie over without applying its mind to the said question. "every discretionary power vested in the executive should be exercised in a just, reasonable and fair manner. that is the essence of rule of law".

in murli s. deora verses uoi, realizing the gravity of the situation and considering the adverse effect of smoking on smokers and passive smokers, the court directed and prohibited smoking in public places and issued direction to the union of india, state governments and uts to take effective steps to ensure prohibiting smoking in public places.

court's power to award compensation

in rudal shah verses state of bihar , the apex court clarified that ordinarily a petition under article. 32 "should not be used as a substitute for enforcement of the right through the ordinary process of the civil court". however, in certain cases it would be gravely unjust to ask the victim to go to the civil court for claiming compensation, where it would take many years to get a relief. in the present case, the court awarded rupees. 30, 000 as compensation to the petitioner who had to remain in jail for 14 years because of the irresponsible conduct of the state authorities. the court observed that
"respect for the rights of individuals is true bastion of democracy". therefore, the state must repair the damage done by its officers to the petitioner's rights.

similarly, in bhim singh verses state of j&k, the petitioner was awarded compensation of rupees. 50,000 for the violation of his constitutional right of personal liberty under act. 21. the petitioner (an ml a) was arrested and detained in police custody and deliberately prevented from attending session of the legislative assembly. the court held that "when the constitutional right of personal liberty is invaded, the invasion is not washed away by his being set free."

in nilabati behera verses state of orissa, the apex court granted rupees. 1,50,000 to the petitioner for the death of her son in police custody. the court also relied on art. 9(5) of the international covenant on civil and political rights, 1966, which indicated that anyone who had been the victim of unlawful arrest or detention, should have an enforceable right to compensation. compensation was also awarded by the court in sebastian m. hongray verses uoi).

in kewal pati verses state of u.p, a convict was killed in jail by the co-accused. it was held that it was the duty of the jail authorities to protect him in jail but they failed to do so. the court directed the state to pay one lakh rupees to the widow and children of the deceased.

in chairman, railway board verses chandrima das, the supreme court held that where a foreign national (a bangladeshi woman) was gang raped, compensation can be granted under public law (constitution) for violation of fundamental rights on the ground of domestic jurisdiction based on constitutional provisions and human rights jurisprudence. the court held that according to the language of art. 21, it will be available not merely to every citizen of this country but also to a person who may not be a citizen of the country.

in m.c. mehta verses kamal nath, the court levied exemplary damages on the respondent to serve as "a deterrent for others not to cause pollution in any manner". the court observed that environment pollution is a tort against the community and therefore a person who is guilty of causing pollution has to pay damages to those who have suffered loss on account of the act of the offender.

in a case of frivolous arguments and mala fides in conducting litigation before the high court and supreme court by the state and its instrumentalities the supreme court imposed cost of rupees. five lakhs on the state [state of karnataka verses all india manufacturers organisation].

conclusions: judicial activism

the role of judiciary in india is to interpret the laws and not to make them. further, it is not for the judiciary to lay down general norms of behaviour for the government or to decide upon public policy. the concept is 'judicial review' and not 'judicial activism.' in the constituent assembly, nehru had stated: "no supreme court and no judiciary can stand in judgment over the sovereign will of parliament, representing the will of the entire community. if we go wrong here and there, it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way... ultimately the fact remains that the legislature must be supreme and must not be interfered with by the court of law in measures of social reform."

in india, however, due to executive inaction, several laws and schemes in the social and economic sectors have remained mere declarations of good intentions. in such a state of affairs, if a complaint is brought before the court - mainly the high court and the supreme court - that a particular law or provision or scheme is not being implemented properly and a direction is asked for its implementation, what should it do? should the court say the matter is none of its concern, that the administrators know their duty and are expected to do it, or call upon the authorities concerned to discharge the functions entrusted to them by the law? after all, the judiciary is also an organ of
the state ordained by the constitution to achieve the goals set out in the preamble and parts 3 and 4.

but when such directions are made, it is called an instance of 'judicial activism' in a pejorative sense. such directions are often made at the instance of a public spirited individual or organization, on the basis of public interest litigation (pil). maybe, the court does not have the means or machinery to enforce its orders and directions and has to depend upon the very same official machinery, which is found to be lax. even so, orders made by the courts do carry sanction - the power to punish for contempt - and are thus more effective. no one suggests that court can correct all the ills afflicting society but the effort should be to try to do the little good that one can do rather than inventing arguments for not doing anything.41

the activist phase of the supreme court became discernible clearly after the emergency was revoked in 1977. in fact, "judicial activism" had a strong moral basis after the emergency (on account of the high-handedness of the government). the apex court strongly came out to protect the right to equality and right to life and personal liberty, etc. in similar vein, the supreme court has enforced socio-economic rights, though they are not considered enforceable by the constitution. it may be noted, here, that 'judicial activism' has virtually been constitutionalised in south africa, where the court is constitutionally expected to enforce socio-economic rights such as the right to food, clothing and housing.

however, judicial activism in india has now taken on an interesting face. the courts in india pursue a form of review which can be described at best as 'dialogic' - a term used famously by peter hogg and allison bushell in the context of the canadian supreme court's decisions. the indian supreme court's gaze has now gone beyond the protection of the socially and economically downtrodden, and into the realm of public administration. however, its opinions often resemble aspirations rather than binding pronouncements. for example, the supreme court issued guidelines in 2006 to reform the police administration - which is a state subject. similar guidelines have been issued increasingly in legislative spheres

by the broad view of locus standi permitting pil, the supreme court has considerably widened the scope of article 32. now, the court has jurisdiction to give appropriate remedy to aggrieved persons in various situations like - flesh trade in protective homes (upendra baxi's case), injustice done to children in jails, protection of pavement and slum-dwellers (olga tellis' case ), abolition of bonded labour, protection of environment and ecology, etc. in lakshmi k. pandey verses union of india, a writ-petition was filed on the basis of a letter complaining of malpractices indulged in by social and voluntary agencies engaged in the work of offering indian children in adoption to foreign parents.

in mohanlal sharma verses state of u.p a telegram was sent to the court from the petitioner alleging that his son was murdered by police in police lock-up. the telegram was treated as a writ-petition, and case was directed to be referred to c.b.i, for a detailed investigation. it may be noted that in petitions against police excesses, the individual/personal matters are treated as a pil matter.

besides providing remedies or reliefs to aggrieved persons, the supreme court, in many pil cases, have entered into fields traditionally reserved for the executive. the court has used its interim directions to influence the quality of administration. prof. baxi ('taking suffering seriously: social action litigation in the supreme court of india') described this gradual judicial takeover of "the direction of administration in a particular arena from the executive" as "creeping jurisdiction". thus, in shriram fertiliser gas leak case the court ordered the plant to be closed, set up a victim compensation scheme, and then ordered the plant reopening subject to extensive directions. in bonded labourers case, it appointed a commission of inquiry. in the dehradun quarrying case, the court considered, balanced and resolved competing policies - including the need for development, environmental conservation, preserving jobs etc. - in deciding to close a number of limestone
quarries in mussoorie hills and to allow others to continue operating until detailed conditions. the court reviewed the highly technical reports of various geological experts.

the supreme court, in sheela barse verses union of india, directed that the children's acts enacted by various states be must brought into force and their provisions be implemented vigorously (in connection with children detained in jails). it is desirable that parliament should pass a central legislation on the subject. thus, the supreme court has also shown its willingness to foray into the legislative arena, under the cover of pil

against judicial activism
the grave problem that courts are often faced with is this: on the one hand, the constitution is the supreme law of the land and, on the other hand, in the grab of interpreting the constitution, the court must not seek an unnecessary confrontation with the legislature, particularly since the legislature consists of representatives democratically elected by the people. unlike legislatures, the courts are not representative bodies reflecting a wide range of social interest.

the court certainly has power to decide constitutional issues. however, as pointed out by justice frankfurter in west virginia state board of education verses barnette 319 u.s. ), "since this great power can prevent the full play of the democratic process, it is vital that it should be exercised with rigorous self restraint." while exercise of powers by the legislature and executive is subject to judicial restraint, the only check on the court's own exercise of power is the self imposed discipline of judicial restraint. it may be noted that of the three organs of the state, only the judiciary is empowered to declare the limits of jurisdiction of all three organs. further, the errors of the lower courts can be corrected by the higher courts, but there is none above the supreme court to correct its errors.

some people justify judicial activism by saying that the legislature and executive are not performing their functions properly. the reply to this argument is that the same charge is often levelled against the judiciary. should the legislature or the executive then take over judicial functions? if the legislature and the executive do not perform their functions properly, it is for the people to correct them by exercising their franchise properly, or by peaceful and lawful public meetings and demonstrations, and/or by public criticism through the media and by other lawful means.

the remedy is not in the judiciary taking over these functions, because the judiciary has neither the expertise nor the resources to perform these functions. further, judicial over-activism would deprive the people of "the political experience and the moral education and stimulus that comes from fighting the problems in the ordinary way, and correcting their own errors."

recently, in divisional manager, aravali golf course verses chander haas (2006), the supreme court observed: "judges must know their limits and not try to run the government. they must have modesty and humility and not behave like emperors." the judiciary cannot be the ultimate policy making body without accountability. if the judiciary does not maintain restraint and crosses its limits there will be a reaction which may do great damage to the judiciary, its independence, and its respect in the society.

in dennis verses u.s. (1950), justice frankfurter observed: "courts are not representative bodies. they are not designed to be a good reflex of a democratic society. their essential quality is detachment, founded on independence. history teaches that the independence of the judiciary is jeopardised when courts become embroiled in the passions of the day, and assume primary responsibility in choosing between competing political, economic, and, social pressures."

concluding remarks
some of the recent pronouncements by the supreme court look like advisory opinions since it would be difficult to enforce them comprehensively as law. they nonetheless set the tone for public discourse and debate. their greatest value lies in the creation of a dialogue with the other branches of government, in the
consequent endeavour towards transparency in public administration, and in their giving a voice to the Indian citizen.

it is true that on some occasions, PIL is abused. But any remedy under the law can be abused, for instance, writ petitions. Does a writ petition become bad on this account or should we look to the enormous good this remedy has done to the cause of liberty, equality, and the freedom of citizens? Similar is the case with PIL. It is quite true that on some occasions, the courts might have overstepped their limits. For example, orders directing the construction of roads or bridges, orders seeking to lay a timetable for the running of trains, admitting PILs against late M.F. Husain, etc. But these again are mere aberrations.

the Supreme Court's high public visibility makes it an ideal forum for an exchange of ideas. However, its incursions into traditionally political questions may lead it down a slippery slope. If foreign policy should become justiciable, then will the courts soon invalidate declarations of war? If budgetary allocations are judicially reviewed, then can challenges to the railway budget be far away?

the concerns were expressed, of course, after the Supreme Court itself had urged caution over excessive judicial activism. The activism causing discomfort among analysts, politicians and even the Supreme Court itself stems from 'judicial romanticism' in parts of civil society, political cowardice on the part of political leaders and parties and of course judicial overreach on the part of some judges and courts. "Judicial romanticism" is the habit of mind that always looks to courts as a solution to any problem. The romanticists discount political and diplomatic alternatives.

the transgressing of the defined space by any of the organs is bound to create not merely friction, but gross mis-governance. The inadequacies of the executive, compounded by frequent disruptions of the legislature, negating the latter's vigilance over the former, has often laid the basis for the judiciary to intervene. Justice Verma notes: "the deliberate misuse of the judicial process by some vested interests to settle political scores, or to shift the responsibility to the judiciary for deciding some delicate political issue found inconvenient by the political executive," has left the judiciary pronouncing on matters that should be dealt with exclusively by the executive.

It is not that a judge should never be activist, but such activism should be done only in exceptional and rare cases, and ordinarily judges should exercise self restraint.

a.1(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 versus 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 air 1993
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, st 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 (l) 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 (1) no one's character is besmirched and

(2) 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).

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 [sections. 11, c.p.c.]. thus, where the matter had been 'heard' and 'decided' by the high court under article. 226, the writ under article. 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 article. 32, the same question cannot be re-opened again under article. 226. however, a petition under article. 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 article. 32, a fresh petition under article. 32 on the same matter cannot be filed in the supreme court [lokhanpal verses uoi], it is to be noted that a petition filed in the supreme court under article. 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 government. of madras].

if a writ petition is filed for the violation of a fundamental right in the high court under article. 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 article. 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 res judicata and, thus, will not bar petition under article. 32 (joseph verses state of kerala). such a dismissal may, however, constitute a bar to subsequent application under article. 32 where if the facts found by the high court are relevant even under article. 32 (daryao verses state of u.r).

the principle of res judicata does not apply in the case of petition for habeas corpus. further, repeated petitions can be filed under article 32 itself. the rule of constructive res judicata also does not apply in such cases. in ghulam sarwar verses uoi, a writ petition was filed in the high court under article. 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 article. 32 (daryao verses state of u.r).

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 [article. 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 [article. 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 (articles. 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 (article. 125 and 221). further, no discussion in legislature can take place on the conduct of the judges (article. 121).

(5) *administrative powers* - article 146 and art. 229 place the administration and recruitment of staff in the hands of supreme court and the high courts. article. 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 (articles. 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 (article. 138).

(8) *separation of judiciary from executive* - article. 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* - 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.

**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:
part 13 of the constitution contains provisions relating to the freedom of trade, commerce and intercourse within the territory of India. The provisions are laid down in articles 301-307. While the general rule of freedom of trade and intercourse is enunciated in article 301, it may be subjected to restrictions laid down in articles 302-305.

The union control is predominant, as the union government can impose reasonable restrictions in the public interest, thus restricting the freedom of trade or commerce. A state legislature too can impose reasonable restrictions, but requires President's sanction for it. Thus the union possesses a control over the state legislature. Part 13 seeks to make India a single economic unit for the purposes of trade and commerce under the overall control of the union.

**Article 301: Freedom of Trade, Commerce, etc.**

Article 301 reads: "Subject to the other provisions of this part, trade, commerce and intercourse throughout the territory of India shall be free."

The "freedom" declared under article 301 may be defined as a right to free movement of persons or things (goods), tangible or intangible, commercial or non-commercial, unobstructed by barriers, inter-state or intra-state or any other impediment operating as such barriers. Thus, 'freedom of trade,
commerce and intercourse' means the free movement/transport and exchange of goods. It means that there shall be no prior restraint upon trade and commerce.

Article. 301 is an adaptation from section. 92 of the Australian constitution, which reads: "...trade, commerce and intercourse among the states, whether by means of internal carriage or ocean navigation, shall be absolutely free." It may be noted that, while section. 92 guarantees the freedom among the states i.e. at inter-state level, article. 301 guarantees it throughout the territory of India, inter-state as well as intra-state (within a state). Further, section. 92 declares the freedom "absolutely free" leaving it for the courts to import certain restrictions/limitations on the freedom as dictated by common sense and the exigencies of changing society. Article. 301, on the other hand, secures the freedom subjected to restrictions/limitations which may be imposed under other provisions of part 13.

The "commerce clause" contained in the American constitution gives power to the congress to regulate commerce with foreign nations and among the several states. It has been held that where the subject matter is national in character or requires uniform legislation, the power to regulate that matter is with the congress and the state regulation will not be permitted [southern Pacific Co. versus Arizona].

The word 'trade' under article. 301, would mean some real, substantial and systematic or organised course of activity or conduct with a set purpose. It simply means buying and selling of goods. But it also includes other activities which may be regarded as integral parts of the transaction of buying and selling, such as transport of goods or merchandise from one place to another, the interchange or exchange of commodities [Atiabari Tea Co. versus State of Assam]. The word 'commerce' is wider than 'trade.' Technically, it also means buying and selling of goods. But, what is essential for 'commerce' is transmission and not the profit-making as is there in 'trade.' It includes transportation of not only goods but also men or animals.

It has been held that the protection offered by article. 301 is confined to such activities as may be regarded a lawful trading activity and does not extend to activities which are res extra commercium i.e. activities which could not be said to be trade or commerce or business (State of Bombay versus R.M.D.C.). In this case, the Bombay lotteries and prize competitions control and tax (amendment) act, 1952, imposing restrictions on prize competition was upheld as not violative of article. 301 for, being of gambling nature, holding of lotteries and prize competitions, could not be regarded as trade or commerce.

In 'lottery', there is no skill but only an element of chance, it falls outside the realm of res commercium. The right of sale of lottery tickets is not a right under article. 301. Even state lotteries cannot be said to constitute "trade" as contemplated by article. 301. Since state lotteries cannot be construed to be trade and commerce within the meaning of article. 301, there could possibly be no question of any discrimination or violation of article. 303. Therefore, the central lotteries (regulation) act under which power is conferred on states to ban sale of lotteries of other states does not violate articles. 301-303 of the constitution and is, thus, valid [M/S. B.R. Enterprises versus State of U.P.].

Thus, 'unlawful' trading activities example drug-trafficking, flesh trade, smuggling, liquor trade, hiring of goondas for committing crimes, gambling (holding of lotteries, etc.), rural money lending by unscrupulous persons etc., are not protected by article. 301. In Fateh Chand versus State of Maharashtra, the supreme court while upholding the validity of the Maharashtra debt relief act, 1976, ruled that though the systematic business of money-lending amongst the commercial community was a "trade" under article. 301, but rural money-lending by unscrupulous persons was a means of exploitation of the weaker sections of the society and was opposed to the directive principles of state policy, and could be banned as a pernicious trade.

The word 'intercourse' is used to give the freedom declared by article. 301. The largest import. It thus includes the freedom to import things for personal (non-commercial) or commercial use. It would thus mean the freedom of an individual to travel across the barriers and have dealings with the citizens of another part of the country. Thus, intercourse between citizens involving movement of property from one place to another is covered by article. 301. It may be noted that article. 301 guarantees freedom not only from geographical barriers but also from restrictions imposed upon the

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individual to carry on trade or business.

**Object behind article. 301**

The main objective of article. 301 is to break down the border barriers between the states and to create **one economic unit** with a view to encouraging the free movement and exchange of goods, which may be utilized to the common advantage of the entire nation. The object behind this all is to create and preserve a national economic fabric (atiabari tea co. case); at the same time, state or regional interests must not altogether be ignored (automobile ltd. case).

In a federation, it is necessary to minimise the inter-state barriers as much as possible, so as to inculcate in the minds of the people the feeling that they are members of one nation, though residing in different geographical divisions of the country (a.k. gopalan verses state of madras).

**Regulatory measures or compensatory taxes**

A regulation is not a restriction, the former applies to incidental or non-essential transactions of a trade (viz. matters relating to hours, equipment, weight/size of load, lights, which form the incidents of transportation), the latter applies to direct or essential transactions of a trade (viz. a total prohibition on movement of certain goods during a specified period, or prohibition of any class of commercial or financial transactions relating to any goods, such as forward contracts). The object of a regulation is to ensure the orderly conduct of a trade. Though such regulation may involve some restraints (example elimination of middle-men or prevention of hoarding), such restraints do not restrict the flow of a trade, but rather facilitate such flow (gk. krishnan verses state of t.n.).

Regulations like rules of traffic facilitate freedom of trade and commerce, whereas restrictions impede that freedom. Requirement of export permit pass for the removal of timber from the forest, the authorities being bound to permit transportation of timber covered by the pass, was held to be valid as regulatory and not restrictive in nature [south kamrup (meghalayd) timber merchant association verses state of assam].

However, it is not that regulatory measures cannot, in any case, be challenged as interfering with the freedom guaranteed by article. 301. These can be challenged when they are colourable measures to restrict the flow of trade, commerce and intercourse. Thus, if the amount of a compensatory tax is unduly high or the regulatory measure is too burdensome or is discriminatory, it certainly would hamper trade.

**Compensatory faxes**

It is only such taxes as directly and immediately restrict trade that fall within the purview of article. 301. In determining whether a tax directly offends against article. 301, it is the movement of the goods which are the subject of the trade that has to be borne in mind. If a tax is imposed solely on the basis that the goods are carried or transported, that directly affects the freedom of trade (atiabari tea co. case; maharaja tourist services verses state of gujarat). On the other hand, a tax on 'luxuries' enjoyed by a person in a hotel cannot have a direct and immediate effect impeding the freedom of intercourse (express hotels verses state of gujarat).

The very idea of a 'compensatory tax' is service more or less commensurate with the tax levied. Trade, commerce and intercourse must pay for the facilities provided by the state by way of constructing, maintaining and regulating roads, bridges and other means of transportation necessary for such trade, commerce or intercourse. All that is necessary to uphold a tax as compensatory is the 'existence of a specific, identifiable object behind the levy and a nexus between the subject and object of levy', though the exact determination of benefit received and expenditure incurred and levying the tax accordingly is not necessary. Once the nexus between the levy and service is seen, the levy must be upheld, unless the compensatory character is shown to be wholly or partly, a mere mockery and in truth...
restrictive of the freedom of trade (*automobile transport ltd* case).

so long as there is some correlation between the tax recovered and the cost incurred by the state, the tax cannot be challenged as expropriatory, even though there may be a marginal excess over the cost. merely because the budget estimates indicated that the income raised by imposition of the tax was more than the expenditure incurred on roads/bridges, the tax cannot be said to be not compensatory in character. it is not necessary to show that the whole or a substantial part of collected is utilized. once it is held that the tax is either compensatory or regulatory in character, that would form the guideline for the state government to be kept in view to determine the rate at which the tax be levied [maharaja tourist services verses state of gujarat; international tourist corporation. verses state of haryana].

a compensatory tax, however, becomes "confiscatory" and thus violative of the freedom contemplated by article. 301, if:

(1) it is so excessive or heavy and prohibitive as to become an impediment in the free flow of trade and commerce example an excise duty on foreign liquor, or
(2) the burden imposed disproportionately exceeds the cost of the facilities, or
(3) no facilities are provided by the taxing state and the tax is purely fiscal in its object, or
(4) where no machinery is provided by the taxing state for the assessment and levy of tax, or
(5) the tax is discriminatory i.e. discriminates between the goods produced within the taxing state and the similar goods brought from other states within the taxing state (see article. 304).

but, a compensatory tax cannot be struck down as confiscatory merely because the tax, once imposed, is enhanced, and that, retrospectively (*international corpn. verses state of haryana*). further, sales-tax as such (*sodhi transport verses state of u.p.*), or a mere increase of a tax on the sale of particular commodity in a state at a rate higher than in a neighbouring state, cannot be held to violate article. 301 (*vraj lal verses state of m.r*).

still further, an octroi duty (i.e. a tax on the entry of goods in the corporate area) is not clearly a tax on any trade. the basis of such duty is not the movement or transport or the carriage of goods, thus, it is not violative of the freedom conferred by article. 301 (*state of bihar verses bihar chamber of commerce*). similarly, a toll tax (a charge for the use of roads, bridges, market-place, etc.) cannot be equated with a general tax for the use of certain facilities, thus, not violative of article. 301.

**case-law**

the court said that imposition of a tax or duty in every case would not amount per se to an infringement of article. 301. taxation simpliciter as opposed to discriminatory taxation was not within the terms of article. 301. in determining the scope of the freedom, each case must be judged on its own facts and in its own setting of times and circumstances.

*meenakshi verses state of karnataka* - in this case, the supreme court upheld as compensatory tax, the increase in passenger tax on vehicles of bus operators even though the enhancement was done to compensate the loss from the abolition of octroi. the court said that abolition of octroi rather facilitated the free, smooth, unobstructed flow of goods and passenger vehicles and was welcome in trade and business circles.

*b.a. jayaram verses union of india* - in this case, to promote all-india and inter-state tourist traffic and thus to advance the trade and commerce, a provision was made in the central motor vehicles act that tax should be paid in 'home state' by tourist vehicles and vehicles should be exempted from the payment of tax in other states (thus, states would exempt from the taxation tourist vehicles registered in other states). various states enacted this law, but later withdrawn the exemption because of its misuse by the transporters. the question was whether by such withdrawal the freedom of trade and
commerce guaranteed by article. 301 gets impaired. it was held that the freedom is not impaired merely because exemption is granted or withdrawn in respect of a particular class of traffic. the exemption was no doubt a compensatory and regulatory measure (... for services, benefits and facilities provided by the state for motor vehicles operating within its territory), but, the states are obliged neither to grant an exemption to advance the object of parliamentary legislation under the m.v. act, nor to perpetuate an exemption once granted.

m. s. widia (india) ltd. verses state of karnataka - in this case, it was held that merely because the budget estimates indicated that the income raised by imposition of the tax was more than the expenditure incurred on roads and bridges, or that the precise or specific amount collected by imposition of a tax is not used to providing any facilities, the tax cannot be said to be not compensatory in character.

sharma transport verses govt. of a. p. - in this case, it was held that imposition of tax does not infringe article. 301 in every case. it has to be seen whether the impugned provision amounts to a restriction directly and immediately on the movement of trade or commerce. freedom granted by article. 301 is of the widest amplitude and is subject to only such restrictions as are contained in the succeeding articles in part 13 of the constitution.

the court observed: for the tax to become a prohibited tax it has to be a direct tax the effect of which is to hinder the movement part of trade. it is the reality or substance of the matter that has to be determined. so long as a tax remains compensatory it cannot operate as a hindrance. a mere claim that tax is compensatory would not suffice. to that extent the observations in b. a. jayaram case do not reflect the correct position in law. the jayaram's case has been overruled to this extent. thus, whether a tax is compensatory or not cannot be made to depend on the preamble of the charging statute it should in reality or substance not be a deterrent to any trade.

it may be noted that in the present case, in order to promote and encourage all-india tourist traffic, the central government requested all the state governments in the federal union to exempt the owner of the tourist coaches which pass through their states from the payment of tax under their tax laws if they have already paid the same in the states where their vehicles are registered. while most of the states acceded to this request, the state of a.p. did not and insisted on the payment of tax under its tax law. held that the state government was competent to enact the impugned act. the act was held valid on the ground that it was a request by the central govt. to the state governments to take necessary action to make provisions relating to composite fee. it was not a directive of the central government.

shree digvijay cement co. ltd. verses state of rajasthan -in this case, the apex court upheld the validity of notification issued by the state of rajasthan under section. 8(5) of cement sales tax act, 1956. the said notification reducing sales tax on inter-state sale of cement by any dealer from that state to 40% was held not violative of article. 301 on the ground that it had effect of preventing or hindering free movement of goods from one state to another. in fact, the impugned notification had the opposite effect, namely, it increased the movement of cement from rajasthan to other states.

state of u.p. verses m/s laxmi paper mart - in this case, it was held that sales tax imposed on exercise books prepared outside state and brought and sold within state while exercise books prepared from paper purchased within the state were exempted from such tax would be discriminatory and offending articles. 301 to 304.

state of h.p. verses yash pal garg - in this case, it was held that it is now a well settled law that to uphold levy of tax as compensatory or regulatory, what is necessary is existence of nexus between the subject and object of levy and it is not necessary to show that the whole or a substantial part of tax collected is utilised. once it is held that the tax is either compensatory or regulatory in character, it cannot operate as a hindrance.

restrictions upon the freedom of trade and commerce

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the freedom granted under article 301 is not absolute freedom but freedom from all restrictions except those which are provided in other articles of part 13 (article. 301 is subject to the other provisions of this part), as well as regulatory and compensatory measures. the power of the union or the state to exercise legitimate regulatory control is independent of the restrictions imposed by articles. 302-305 (state of madras verses nataraja).

on the other hand, 'restriction' would not be valid if it does not come under articles. 302-305. now, since restrictions under the latter provisions can be imposed only by 'law' the freedom under article. 301 cannot be taken away by mere executive action (dy. collector verses ibrahim & co.). however, restrictions may be imposed by an executive action if taken in the exercise of power delegated by the parliament (government of tamil nadu verses salem association).

the limitations imposed upon inter-state freedom of trade, commerce and intercourse, by the other provisions of part 13 are:
(1) it is subject to non-discriminatory restriction imposed by parliament, in the public interest [article. 302].

(2) even discriminatory or preferential provisions may be made by parliament, for the purpose of dealing with a scarcity of goods arising in any part of india [article. 303(2)].

(3) non-discriminatory taxes may be imposed by states on goods imported from other states similarly as on goods produced within the state [article. 304(a)].

(4) reasonable restriction may be imposed by a state "in the public interest" [article. 304(b)].

(5) restrictions imposed by "existing law" (an act passed before the commencement of the constitution) and laws providing for state monopolies to continue except in so far as provided otherwise by an order of the president [article. 305].

(6) article. 307 empower parliament to appoint by law such authority, as it considers appropriate for carrying out the purposes of articles. 301-304.

(a) restrictions on freedom of trade under parliamentary law [articles. 302-303]

article. 302 reads: "parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one state and another or within any part of the territory of india as may be required in the public interest."

article. 303 reads:
(1) "notwithstanding anything in article. 302, neither parliament nor a state legislature shall have power to make any law giving any preference to one state over another, or making any discrimination between one state over another, by virtue of any entry relating to trade and commerce in any of the lists in the seventh schedule.

(2) nothing in clause (1) shall prevent parliament from making any law giving any preference or making any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of india".

article. 302 is, thus, subject to the condition that union law should not be discriminatory as between different states [article. 303(1)] except where it is necessary for dealing with a situation of scarcity of goods [article. 303(2)]. article. 303(2) was enacted with a view that it would be in the national interest as a whole that "the economy of the country will be balanced and everybody will be supplied with his necessities."

however, article. 302 is restrictive of the freedom guaranteed under article. 301. this means that even where a restriction imposed by law imposes a direct burden on the freedom of trade under article. 301, it may be constitutionally valid, if it is required in the 'public interest' example to prevent evasion of
tax, to canalise inter-state trade through registered or licenced dealers (state of t.n. verses seetalakshmi mills), or levying of terminal tax on all goods carried by railway/road into the territory of delhi from any place outside delhi (amrit bonaspati co. verses uoi).

in seetalakshmi case, in order to discourage inter-state sale to unregistered dealers, the parliament enacted the central sales tax act, 1956. section 8(2) of the act provided a high rate of tax namely, 10% or the rate applicable to the sale or purchase of such goods inside the appropriate state, whichever was higher. the main reason for enacting section. 8(2) was to canalise inter-state trade through registered dealers over whom the appropriate government had control and thus to prevent evasion of tax.

in order to be protected by article. 302, the nexus of the law with public interest must be 'reasonable', even though that word is not used in article. 302 (praglce mills verses uoi). if the condition of public interest' is satisfied, article. 302 would authorise both inter-state or intra-state restrictions. some of the instances of legislation under article. 302 are - essential commodities act, 1955 and orders made there under, defence of india act, 1962 and rules made there under, central sales tax act, 1956, mines & minerals (regulation & development) act, 1957.

in automobile co. case, the court observed that the expression "trade and commerce" in article. 303(1) was capable of a liberal interpretation as to include any law made under any entry in the seventh schedule, if such law directly and immediately impeded the free flow of trade and commerce. thus, the prohibition in article. 303(1) did extend to taxing laws made by parliament.

it may be noted that a law applied uniformly in all parts of the country, in effect, may result in differential treatment of the states owing to economic conditions prevailing therein. such a law, however, will not be hit by article. 303(1).

in state of madras verses nataraja, under the central sales tax act, 1956, parliament levied a tax on inter-state sales. the tax payable by a dealer was to be assessed by the sales tax authorities of each state. the central act did not fix a uniform rate of tax. it provided that the tax was to be levied at the rate of 7% or at the rate applicable to the sale or purchase of such goods inside the appropriate state, whichever was higher. the rates of central sales tax, thus, varied from state to state according to the rates of sales tax imposed under states' sales tax acts. upholding the validity of the tax, the court observed that the flow of trade depended upon a variety of factors such as the source of supply, the place of consumption, existence of trade channels, the rates of freight, trading facilities, credit facilities, etc. the central sales tax, though levied for and collected in the name of the central government, was a part of the states' tax levy, and imposed for the benefit of the states. by leaving it to the states to levy sales tax (at rates prevailing in the state, subject to limitation set out in the central act) in respect of a commodity on intra-state transaction, no discrimination was held to have been practised.

(b) restrictions on freedom of trade under a state law (article. 304)

article. 304 reads: "notwithstanding anything in article. 301 or article. 303, the state legislature may by law:

(a) impose on goods imported from other states or the union territories any tax to which similar goods manufactured or produced in that state are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that state as may be required in the public interest:

provided that no bill or amendment for the purpose of clause (b) shall be introduced or moved in the state legislature without the previous sanction of the president."

article. 304 (a): non-discriminatory taxation of import

article. 304 (a) enabled a state legislature to impose taxes on goods from other states, provided similar goods as are produced within the state are subjected to similar taxes. in other words, it validates a
taxation which undoubtedly fetters inter-state trade or commerce (i.e. a taxation which is violative of article 301), provided such taxation is non-discriminatory. if such tax is 'discriminatory', it will be hit by article 303(1). thus, article 304(a) has to be read with article 303(1). while article 303(1) prohibits discriminatory legislation in general being made by a state legislature, article 304(a) strikes at discriminatory tax laws being made by state legislature (weston electronics verses state of gujarat).

whether there has been discrimination between the imported goods and the local goods would depend upon a variety of factors, including the rate of tax and the item of goods in respect of the sale of which it is levied. thus, discrimination takes place if tax at the same rate is imposed on differently priced goods or tax at a higher rate is imposed on the higher priced goods. further, discrimination takes place if different rates of tax are imposed by a state on goods imported into the state and goods produced in that state. there is no discrimination unless the rate imposed is higher in respect of the imported goods (associated tanners verses c.t.o).

in state of m.p. verses bhailal bhai, the state of m.p. levied sales tax on tobacco and tobacco products, payable at the point of sale, by the importer in the state. import by itself was not subject to tax and if the imported tobacco was not sold in the state, no tax was payable. still the levy of tax on the sale of imported tobacco was struck down as it directly impeded trade and commerce between m.p. and its sister-states. further, the sales tax imposed was also not saved by article 304(a) as the similar goods manufactured or produced in the state of m.p. were not subjected to this tax.

in firm mehtab majid verses state of madras, the sales-tax imposed under the impugned act on tanned hides/skins imported from outside was higher as compared to the tax on tanned hides/skins manufactured in the state. the supreme court invalidated the tax as discriminatory, and unconstitutional under article 304(a). similarly, where an assessee purchases iron scrap both from local dealers in the state of karnataka as well as from dealers outside the state and the state of karnataka imposes a tax on the sale of ingots manufactured out of scrap purchased from outside the state while ingots manufactured from locally produced scrap would not be subjected to such a tax, the levy would be hit by article 304(a) (andhra steel corp. verses c.c.t.).

if there is a single area or any class of producers in a state who are exempted from any tax, that tax cannot be levied upon imported goods, and such taxing law must be held to be invalid so far as imported goods are concerned. in indian cement verses state of andhra pradesh, the impugned notification provided for the reduction in rate of tax on sale of cement by local cement manufacturers to manufacturers of cement-products in the state. the benefit of the reduced rate of tax was not available to the manufacturers of cement of other states having their sales offices in the state of andhra pradesh. the court invalidated the notification.

when there is no discrimination

a temporary exemption from sales tax to specified local goods, based on natural and business factors does not violate article. 304(a). in video electronics case, a notification issued under the punjab general sales tax act, 1948, reducing sales tax payable by electronic manufacturing units in punjab in case of electronic goods specified in notification was held not discriminatory. in another notification issued by the state of u.p. under the u.p. sales tax act, 1948 read with the central sales tax act, 1956, exempting new units of manufacturers, as defined in the act, in respect of various goods for 3-7 years from the payment of sales tax was held not violative of article. 304(a) and article. 301.

the apex court observed: a state which is technically and economically weak on account of various factors should be allowed to develop economically by granting concessions, exemptions and subsidies to new industries. all parts of the country are not equally developed, industrially and economically. economic unity is possible only when all the units of the country develop equally. the power to grant exemption is inherent in all taxing statutes and the government cannot be deprived of this power by invoking arts. 301 and 304. "a backward state or a disturbed state cannot with parity engage in competition with
advanced or developed states. Even within a state, there are often backward areas which can be developed only if some special incentives are granted. If the incentives in the form of subsidies or grants are given to any part of units of a state so that it may come out of its limping or infancy to compete as equals with others, that, in our opinion, does not and cannot contravene the spirit and the letter of part xiii of the constitution. However, this is permissible only if there is a valid reason, that is to say, if there are justifiable and rational reasons for differentiation. If there is none, it will amount to hostile discrimination."

Thus there is no discrimination, where concession from sales tax is given in respect of goods manufactured in certain states which are comparatively under-developed (such as Goa), or comparatively backward in industry because "it does not involve any intentional discrimination but is in furtherance of the economic development of the country and its unity by removing economic barriers" (video electronics case). A law applied uniformly in all parts of the country, in effect, may result in differential treatment of the states owing to economic conditions prevailing therein. Such a law will not be hit by article 303(1) on the ground of discrimination.

Where the rate of tax imposed by the legislature is the same but it operates as a higher burden when applied to the imported goods than the locally produced goods because of difference in local conditions in different states or, the inequality arises not as a direct and immediate effect of the imposition of the tax, there is no discrimination (associated tanners versus c.t.o.).

It may be noted that 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. Hence, if there is no foreign liquor produced within a state, it cannot, under article. 304(a), impose any duty on imported foreign liquor (kalyani stores versus state of Orissa). The apex court gave a wider interpretation of article. 304(a) and ruled that if the goods of a particular description were not produced within a state, the power to legislate under article. 304(a) would not be available to the state.

In the state of karnataka versus hansa corpn., the supreme court observed that 'the microscopic discrimination that there was differential treatment accorded to goods produced within a local area and those imported from outside the local area but produced within the state was hardly relevant for the purpose of article. 304(a).' In this case, the karnataka tax on entry of goods into local areas for consumption, use or sale therein act, 1979 was held valid for it imposed tax both on manufactured goods and similar goods imported from outside in a local area. There was no discrimination between the goods produced within the state or those imported from outside the state. The discrimination between the goods produced/ manufactured within a local area and those brought from outside the local area into it was held to be irrelevant.

**Article. 304(b): reasonable restrictions**

Article. 304(b) empowers a state legislature to impose such "reasonable restrictions" on the freedom of trade, etc., as may be required in the "public interest". The word 'reasonable' enables the court to interfere where the state, under the pretence of preventing injury to the welfare of the citizens, intends to prevent the flow of legitimate articles of inter-state commerce or to impose needlessly burdensome conditions so as to substantially obstruct the commerce (tika ramji versus state of U.R.). The restrictions which may be validly imposed under article. 304(b) are those which seek to protect public health, safety, morals and property within the territory of state (kalyani stores versus state of Orissa).

In tikaramji case, the u.p. sugar cane (regulation of supply and purchase) act, 1953 prevented the growers from selling their sugarcane to anyone outside the state. The act also prevented the sale of sugarcane to the sugar mills except through the co-operative societies consisting of the cane growers as members. The act was held to be imposing reasonable restriction within article. 304(b) to protect the interests of the cane growers and their cooperative societies. In subodhaya chit fund (p) ltd. versus
dir. of chits, it was held that a requirement to deposit a cash amount as security for realisation of the money due under a chit fund scheme is in the public interest.

in baijnath verses state of m.p., with a view to secure maximum supply of the essential commodity (rice) and to arrange for its equitable distribution and availability at fair price in the interest of the general public, the m.p. paddy procurement (levy) order, 1965, under the essential commodities act, 1955, preventing the sale of paddy by the agriculturist or dealers except to the director of food and civil supplies, was held to be valid.

any restriction which does not impede the movement of goods but only facilitates their passage cannot be held to be unreasonable merely because they cause some inconvenience example insisting on a transit pass (sodhi transport verses state of u.r; a despatch certificate; a 'toll-tax'; a permit disclosing particulars of the goods to be transported (state of bihar verses hanihar). the requirement of permit was intended to prevent evasion and to facilitate assessment of sales tax. similarly, a tax, which is regulatory or compensatory in nature, cannot be held to constitute an 'unreasonable' restriction, merely because a business rendered uneconomical by reason of the imposition (malwa bus service verses state of punjab).

a rule which totally prohibits the movement of the forest produce between specified hours is prohibitory of the right to transport forest products (state of mysore verses sanjeeviah . however, such a prohibition is justified in emergency, as held in state of t.n. verses m/s sanjeetha trading co. . in this case, after declaration of the timber as an essential article, a total ban was imposed on the movement of timber from the state of t.n. to any other place outside the state, under the tamil nadu (movement control) order, 1982. the supreme court held that the order was a regulatory measure issued to satisfy the local requirement of timber and to make it available to the common man at a reasonable price. in cases of total prohibition the state which has imposed such ban has to satisfy the court that in spite of total prohibition it amounts only to regulation of the trade in such articles or that even if it was a restriction it was reasonable within the meaning of article. 304(b).

the apex court observed: the onus of showing that the restrictions on the freedom of trade, commerce or intercourse are in the public interest and reasonable, is upon the state. in considering the question of reasonableness, the court has to balance one relevant consideration against another - the importance of freedom of trade as against the requirement of public interest. the court has to consider the totality of facts. it has to examine the facts and circumstances of the particular case whether the measure amounts to regulation only, taking into consideration the local conditions prevailing, the necessity for such prohibition and what public interest is sought to be served by such measure.

in the case of a 'licence tax' on tobacco, thus, the court may consider it as a reasonable restriction in the public interest in view of the fact that the consumption of tobacco is a luxury, which also involves a health hazard (a.b. abdul kadir verses state of kerala). similarly, total prohibition of trading in intoxicating liquors may be a reasonable restriction (sheo kumar verses state ). the court has upheld as reasonable and in the public interest an ad valorem tax on goods entering a local area for consumption, use or sale therein on the ground that the object of tax was to compensate the municipal corporation for loss caused by the abolition of 'octroi' duty (state of karnataka verses hansa corporatio ).

proviso to section. 304(b): president's sanction

the proviso says that though a state legislature is empowered by cl. (b) to impose reasonable restrictions on the freedom of trade in the public interest, no law or amendment for this purpose may be introduced in the state legislature without the previous assent of the president.

unless the presidential assent has been obtained, a law restricting trade or commerce cannot be upheld even if it imposes reasonable restriction or restriction which is merely regulatory with a view to
facilitating trade \textit{(m/s punjab traders verses state of punjab)}. however, if the imposition of tax is compensatory or regulatory in nature, it will not be hit by article. 301 or article. 303, and thus, article. 304 will not come into picture at all. in that case, there would be no question of obtaining the assent of the president under article. 304(b) \textit{(video electronics verses state of punjab)}.

the defect owing to want of previous assent may, however, be cured if the bill \textit{subsequently} receives the president's assent, by reason of article. 255 \textit{(atiabari tea co. case, automobile ltd. case)} where the original act received the president's sanction under article. 304(b), no fresh sanction is required where the amending act, without imposing any \textit{additional} restriction, merely varied the form of restriction. also, sanction for the rules framed under the act is not necessary \textit{[subodhaya chit fund (p) ltd. verses dir. of chits ]}.

in \textit{khyerbari tea co. ltd. verses state of assam}, it was held that the fact that the president had given his sanction to the introduction of the bill under article. 304(b), would lend, strong though not conclusive, support to the holding of the restrictions to be 'reasonable'.

\textbf{articles. 301/304 vis-a-vis compensatory tax}

article 304(b) confers a power upon the state legislature similar to that conferred upon parliament by article 302 subject to the following differences:

(1) while the power of parliament under article 302 is subject to the prohibition of preference and discrimination decreed by article 303(1) unless parliament makes the declaration under article 303(2), the state power contained in article 304(b) is made expressly free from the prohibition contained in article 303(1) because the opening words of article 304 contain a \textit{non obstante} clause both to article 301 and article 303.

(2) while parliament's power to impose restrictions under article 302 is not subject to the requirement of reasonableness, the power of the state to impose restrictions under article 304 is subject to the condition that they are reasonable.

(3) an additional requisite for the exercise of the power under article 304(b) by the state legislature is that previous presidential sanction is required for such legislation.

broadly, the above analysis of the scheme of articles 301 to 304 shows that article 304 relates to the state legislature while article 302 relates to parliament in the matter of lifting of limitation, which flows from the freedom of trade and commerce guaranteed under article 301.]

\textbf{article. 305: saving of existing laws}

article. 305 reads: "nothing in articles. 301 and 303 shall affect the provisions of any existing law except in so far as the president may by order otherwise direct, and nothing in article. 301 shall affect the operation of any law made before the commencement of the constitution \textit{(4th amendment) act, 1955, in so far as it relates to, or prevent parliament or a state legislature from making any law providing for state monopoly in a particular sphere of trade or commerce [i.e. a law under article. 19(6)(2)]}."

an act passed before the commencement of the constitution is included within the expression "existing law" even though the act has been brought into force after the commencement of the constitution. it has been held that where an "existing law" authorised the imposition of a tax, a resolution passed after the commencement of the constitution to levy such tax would be covered by the expression "existing law" \textit{(bangalor woollen mills verses corporation. of bangalore )}.

but if a bye-law, rule, order, notification or resolution made after the commencement of the constitution enhances or alters the rate of tax or duty authorised by the existing law, such subsequent bye-law, rule, etc. would not be "existing law". such 'subordinate legislation' (i.e. rules, regulations
or notifications) would not be covered by article. 305 (state of mysore verses h. sanjeeviah).

where under an "existing law", power was vested with an authority to impose a tax, the tax so levied by such authority would be saved by art. 305 even though such a levy could not be imposed after the commencement of the constitution (m/s pb. lime stone co. verses cantonment board ). if, by an amendment of "existing law" enacted after the commencement of the constitution, the character of the "existing law" is not changed, the amended law would be protected by article. 305 (lila vati bai verses state of bombay ).

article. 305 also lays down that laws creating state monopolies in a sphere of trade or commerce may not be declared invalid as infringing article. 301. article. 19(6) (2) also provides for such state monopoly.

article. 307: authority for carrying out purposes of articles. 301-304

article. 307 empowers parliament to appoint by law such authority as it considers appropriate for carrying out the purposes of articles. 301-304. the exact composition of the authority to be established, is left to the parliament.

since the matters relating to trade, commerce and intercourse are more economic in content than legal, a body consisting of experts such as economists, businessmen and lawyers, may do a much better job in this area than a court having merely legal expertise.

part 13: difficulties in textual constructions

text of the articles is a vital consideration in interpreting them. but, the text of-articles 301-307 is rather ambiguous. the expression 'subject to' and 'notwithstanding anything in article... (i.e. non-obstante clause) are used inappropriately and indiscriminately.

article. 302 makes a relaxation in the favour of parliament, but art. 303 imposes a restriction on that. article. 303 relates both to the parliament and state legislatures, though article. 302 makes no relaxation in favour of the state legislature [(clause 1) relates to both, but (clause 2) only to the parliament]. article. 304 again begins with a non-obstante clause mentioning both the article. 301 and article. 303, though article. 304 relates only to the state legislature.

p.k. tripathi has, thus, suggested the repeal of part 13 of the constitution.

freedom of trade and taxation

part 12 of the constitution relates to 'taxation', while part 13 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, article. 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 13'. the above view has two implications: firstly, article. 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 article. 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 article. 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 article. 304(b). the practical effect would be to stop or delay effective legislation which may be urgently necessary example 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 12 provisions, and except article. 304(a) none of the other provisions of part 13 extend to the taxing laws. also, the provisions of part 13 apply only to such legislation as is made under the entries relating to 'trade and commerce'. this will mean that the prohibition in article. 301 or article. 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 article. 301 does not mean freedom from taxation, because taxation is not a restriction within the meaning of relevant articles in part 13. thus, taxation simpliciter is not within the terms of article 301.

in atiabari case, the supreme court (dissenting opinion) adopted a narrower view of article. 301 but not that narrow as discussed above. the majority, however, adopted a wider view of article. 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 article. 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 13". thus, the supreme court in automobile case held that tax laws are not outside the comprehension of article. 301 but regulatory/compensatory taxes do not come within the purview of the restrictions contemplated by article. 301. only the taxes which directly impede the flow of trade or commerce are violative of the freedom guaranteed under article. 301.

atiabari tea co. case

the majority - shah j. took a very wide view of article. 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 article. 301. the argument that tax laws were governed by part xii alone is unacceptable. the doctrine of trade, commerce, etc. enunciated by article. 301 is not subject to the other provisions of the constitution but is made subject only to the other provisions of part 13. therefore, a tax legislation which implies any restriction on the movement of goods attracts the provisions of article. 301.

in a dissenting note chief justice sinha took a narrower view of article. 301: the freedom declared by article. 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 article. 301 and such measures need not comply with the requirements of the proviso to article. 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 article. 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 corp. 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 ii 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 article. 304(b) has been held not to include regulation. therefore, taxes or other measures which are regulatory will not come within article. 304(b).

9 emergency provisions

emergency

the term 'emergency' may be defined as 'a difficult situation arising suddenly and demanding immediate action by public authorities under powers specially granted to them by the constitution or otherwise to meet such exigencies'. dr. ambedkar claimed that the indian federation was unique inasmuch as in times of emergency it could convert itself into an entirely unitary state. the position was upheld by the supreme court in gulam sarwar verses uoi.

"the constitution of india is unique in respect that it contains a complete scheme for speedy re-
adjustment of the peace-time governmental machinery in moments of national peril. these provisions may appear to be particularly in a constitution which professes to be built upon an edifice of fundamental rights and democracy. but the provisions must be studied in the light of india's past history, india had her in glorious days whenever the central power grew weak. it is far well that the constitution guards against the forces of disintegration. events may take place threatening the very existence of the state and if there are no safeguards against such eventualities the state together with all that is desired to remain basic and immutable, will be swept away” (v.n. shukla, the constitution of india).

in india, three types of emergency are available under the constitution. these are:

(a) national emergency (proclamation of emergency).
(b) failure of constitutional machinery in a state.
(c) financial emergency.

[a] national emergency (article. 352)

article. 352 - if the president is satisfied that a grave emergency exists whereby the security of india or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he may, by proclamation, made a declaration to that effect in respect of the whole of india or of such part of the territory thereof as may be specified in the proclamation.

grounds for proclamation of emergency

'national emergency' is imposed due to war, external aggression or armed rebellion i.e. when there is a threat to the security of the country or any territory thereof. the president shall not issue a proclamation unless a decision of the union cabinet that such a proclamation may be issued (or varied), has been communicated to him in writing. such a proclamation may be made even before the actual war, external aggression or rebellion if the president is satisfied that there is imminent danger thereof.

the provisions of article 352 were made more stringent by the constitution 44th amendment act, 1978. to prevent the misuse of emergency provisions, the words 'armed rebellion' were substituted for 'internal disturbance'. the expression "internal disturbance" was found to be too vague and wide; it may cover a minor disturbance of law and order or even a political agitation. it gave wide discretion to the executive to declare emergency even on flimsy grounds. for instance, in 1975, the emergency was declared on the ground of internal disturbance by the then prime minister indira gandhi because the opposition parties had given a call to launch a movement with a view to compelling her to resign from her post as her election to the lok sabha was declared void by the allahabad high court.

thus, after the 44th amendment, 'internal disturbance not amounting to armed rebellion' would not be a ground for the issue of a proclamation of emergency. this change has restricted the scope of what may be known as 'internal emergency.'

it may also be noted that the president shall declare emergency only on the 'written advice' of the cabinet and not merely on the advice of prime minister as was done by the prime minister indira gandhi in 1975. she had advised the president to proclaim emergency without consulting her cabinet. the cabinet was simply informed about the proclamation of emergency. thus, cl. (3) was added to article. 352 by the 44th amendment to prevent the recurrence of such a situation in future.

there have been three proclamations of national emergency in india - in 1962 at the time of chinese aggression, in 1971 in the wake of war with pakistan and in june 1975 on grounds of internal disturbance.

approval and duration of proclamation
every proclamation is required to be laid before each house of the parliament, and is to cease to operate at the expiration of 1 month (before 44th amendment, it was two months, without the approval of both houses of parliament) from the date of its issue unless in the mean time it has been approved by resolutions of both the houses. however, once approved by parliament, the proclamation may continue for 6 months at a time unless revoked by the president earlier. resolutions approving the proclamation or its continuance have to be passed by both house of parliament by a majority of the total membership and not less than 2/3rd of those present and voting. provided that if and so often as a resolution approving the continuance in force of such a proclamation is passed by both houses of parliament the proclamation shall, unless revoked, continue in force for a further period of six months from the date on which it would otherwise have ceased to operate under this clause.

revocation of proclamation

prior to 44th amendment, a proclamation of emergency once approved by both houses of parliament could be revoked by the president by making a fresh proclamation. thus, the executive was the sole judge to decide as to when the proclamation should be revoked. in other words, once approved by parliament, emergency could remain in force indefinitely i.e. so long as the executive wanted it to continue, there was no provision for periodical review by parliament every six months.

now, after the 44th amendment, firstly, a proclamation may be revoked by the president by making a subsequent proclamation. secondly, the 44th amendment requires a periodical review, every six months, of the proclamation by both houses of parliament. thirdly, the president shall revoke the proclamation of emergency, if the lok sabha passes a resolution disapproving the proclamation (or varying it) or its continuance in force; for this, a notice in writing signed by not less than one-tenth of the total number of members of the lok sabha is needed.

judicial review of proclamation

a view was prevalent that the question whether emergency exists is essentially a political question entrusted by the constitution to the union executive and therefore not justiciable before the court. however, in minerva mills ltd. verses uoi, it was held that there is no bar to judicial review of the validity of a proclamation of emergency issued by the president under article. 352. merely because a question has a political complexion, it is no ground why the court should shrink from performing its duty under the constitution if it raises an issue of constitutional determination. the court's power, however, is limited only to examining whether the limitations conferred by the constitution have been observed or not. the court cannot go into question of adequacy of the facts and circumstances on which the president's satisfaction is based unless it can be shown that there is no satisfaction of the president at all (in that case the exercise of the power would be constitutionally invalid). where at all, the satisfaction is absurd or perverse or mala fide or based on wholly extraneous and irrelevant grounds, it would be no satisfaction at all and it would be liable to be challenged before a court of law.

consequences of proclamation of emergency

(1) effect of proclamation of emergency

though the state legislature and government are not suspended, the executive, legislative and financial powers rest in the centre.

notwithstanding anything in this constitution, the executive power of the union shall extend to the giving of directions to any state as to the manner in which the executive power thereof is to be exercised. the union parliament acquires the power to legislate on any subject included in the state
list (article. 353). but such emergency legislation ceases to have any effect at the expiry of 6 months after the proclamation ceases to operate. also, it may be noted that the executive power of the union to give directions and the power to make laws shall also extend to any state other than the state where emergency is in force, if the security of india or any part of the territory is threatened by activities in or in relation to that part of the territory of india in which the proclamation of emergency is in operation.

again, it may be noted that the law-making power of the state is not suspended during the emergency. the state can make law but it is subject to the overriding power of the union parliament. article. 354 provides for acquisition of powers by union executive relating to distribution of revenues.

while a proclamation of emergency is in operation, life of parliament can be extended by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the proclamation has ceased to operate [article. 83(2)].

(2) effect on fundamental rights (articles. 358-359)

as soon as the emergency is proclaimed on the ground of war or external aggression, all the freedoms guaranteed by article. 19 are automatically suspended. art. 358 make it clear that in the case of proclamation under article. 352, article. 19 shall not restrict the power of the state to make any law or to take any executive action abridging or taking away the fundamental rights guaranteed by art. 19. but, any law so made shall, to the extent of the incompetency, cease to have effect as soon as the proclamation ceases to operate. however, things done or omitted to be done during emergency cannot be challenged even after the emergency was over on the ground of the concerned emergency law had violated article. 19.

it may be noted that 44th amendment excluded the ground of 'armed rebellion'; thus, if emergency is declared on this ground, freedoms guaranteed by art. 19 cannot be suspended. further, the amendment made it clear that article. 358 will only protect 'emergency laws' from being challenged in a court of law and not other laws which are not related to the emergency. prior to this, the validity of even other laws, which were not related to emergency, could not be challenged under article. 358.

article 359(1) lays down that where a proclamation of emergency is in operation, the president may by order declare that the right to move any court for the enforcement of such of the rights conferred by part 111 (except articles. 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the proclamation is in force or for such shorter period as may be specified in the order. thus, the president has the power to suspend the right to move courts for the enforcement of any of the fundamental rights (except art. 358). the main difference between article. 358 and article. 359 is that fundamental rights are automatically suspended during emergency (article. 358), while under article. 359 it is president who gives the order. however, every order made under clause (1) shall, as soon may be after it is made, be laid before each house of parliament. further, under article. 359, the fundamental rights are not suspended, it is the right to seek remedy that is suspended.

the constitution (38th amendment) act, 1975, added a new clause (1-a) in art. 359 which provides that while an order under article. 359(1) is in operation, nothing in part 3 shall restrict the power of the state to make any law or to take any executive action. but, any law so made shall, to the extent of the incompetency, cease to have effect as soon as the proclamation ceases to operate (except as respects things done or omitted to be done before the law so ceases to have effect). the 44th amendment, besides saving articles. 20 and 21 from the purview of emergency also provides that those laws that are not related to the emergency can be challenged in a court even during the emergency.
the proclamation of emergency does not invalidate a law which was valid before the proclamation. in mm *pathak verses uoi*, it was held that the settlement (between lic and its employees) would revive and what could not be demanded during the period of emergency would become payable even for the period of emergency for which payment was suspended. in other words, the enactment will have effect even after the emergency had ceased. thus, valid claims cannot be washed off by the emergency *per se*. they can only be suspended by a law passed during the operation of articles. 358 and 359.

duty of union to protect states (article. 355)

article. 355 lays down that "it shall be the duty of 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 this constitution."

such provisions are also found in other federal constitutions i.e. usa and australia. but in us and australia the centre acts only when the request is made by states, while there is no such pre-condition under article. 355. the centre can thus interfere even without the state's request. further, it is this duty in performance of which the centre takes over the government of state under article. 356 in case of failure of the constitutional machinery in the state. in other federations, the centre cannot do so.

article. 355 may be invoked by the centre to interfere in the affairs of the state under certain situations like state's failure to provide adequate protection to the central government agencies in the state, the destruction of the properties of central government by agitators, etc. on several occasions, the central government has appointed commissions of inquiry under commission of inquiry act, 1952, to go into charges of omission or commission, bordering on corruption, against the state chief ministers, ex-chief minister, ex-ministers.

in *sarananda sonowal verses uoi*, the supreme court for the first time got an opportunity to interpret the word "aggression" used in article. 355. it held that the unabated influx of illegal migrants of bangladesh into assam leading to perceptible change in the demographic pattern of the state and contributory factor behind the outbreak of insurgency in the state having dangerous dimensions of greatly undermining national security is an act of aggression.

the court observed: the word "aggression" is not to be confined only with "war". though war would be included within the ambit and scope of the word "aggression" but it comprises many other acts which cannot be termed as war. according to the traditional international law, "war is a contest between two or more states through their armed forces, for the purpose of overpowering each other and imposing conditions of peace as the victor pleases". but with the passage of time, the nature of war has considerably changed. modern war may involve not merely the armed forces of belligerent states but their entire population. the framers of the constitution have consciously used the word "aggression" and not "war" in article. 355.

power of union executive to issue directions to states/ effect of non-compliance (article. 365)

article. 256 provides that the executive power of state shall be so exercised as to ensure compliance with parliamentary laws, and the executive power of union shall also extend to the giving of such directions to a state as it may deem essential for the purpose.

article. 257 lays down that states must exercise their executive power in such a way so as not to impede or prejudice the exercise of executive power of union in the state. for this, union can give directions to a state, also in two specific matters:- (1) construction and maintenance of means of communication of national or military importance, (2) measures to be taken for the protection of railways within the states. the constitution prescribes a coercive sanction for the enforcement of its directions...
article. 365 lays down that "where any state has failed to comply with, or to give effect to any directions given in the exercise of the executive power of the union under any of the provisions of this constitution, it shall be lawful for the president to hold that a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of this constitution."

[b] president's rule in states ('state emergency') (article. 356)

"failure of constitutional machinery in state" - if the president on governor's report, or otherwise is satisfied that a situation has arisen in which government of a state can't be carried on in accordance with the constitutional provisions, he may issue a proclamation to that effect [cl. (1)].

the following consequences ensue on the issuance of a proclamation under article. 356(1):-

1. president may assume to himself all or any of the functions of the state government, or powers vested in governor, or any body or authority in the state other than state legislature.
2. president may declare that powers of legislature of state shall be exercisable by parliament.
3. the president may make such incidental and consequential provisions as may appear to him to be necessary or desirable for giving effect to the object of proclamation.

the president cannot, however, assume to himself, any of the powers vested in high court, or to suspend any constitutional provision relating to it [proviso, article. 356(1)].

the proclamation issued under article. 356(1) may be revoked or varied by the president on a subsequent proclamation [article. 356(2)].

it is to be noted that under article. 356 the president acts on a report of the governor or on information received otherwise. this means that the president can act even without the governor's report. this is justified in view of the obligation of the centre imposed by article. 355 to ensure that the state government is carried on in accordance with the constitutional provisions. in view of the centre's ultimate responsibility to protect the constitutional machinery of the states, the framers thought it proper not to restrict the centre's action merely on the governor's report. the governor might not sometimes make a report.

Article. 365 (noted above) also provides that where any state failed to comply with or to give effect to union directives, it shall be lawful for the president to hold that such a situation has arisen in which the state government cannot be carried on in accordance with the constitutional provisions.

duration of proclamation under article. 356

article. 356(3) provides that a proclamation relating to state emergency shall be laid before each house of parliament and unless both houses approve it by a resolution, it shall cease to have effect (except the one which revokes the earlier one) at the expiration of two months, unless in the meantime, it has been approved by resolutions of both houses of parliament. if approved, it will be valid for six months.

however, proviso to clause (3) provides that if any such proclamation is issued at the time when lok sabha is dissolved or the dissolution takes place during the period of two months and the proclamation is passed by the rajya sabha but not by the lok sabha, it shall cease to operate at the expiry of 30 days from the date on which the new lok sabha meets, unless before the expiry of 30 days it has also been passed by the lok sabha.

article. 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. The proviso to clause (4) lays down that the maximum period for which a proclamation can remain in operation is 3 years from the date it is issued under article. 356(1). Thereafter, the president's rule must come to an end and the normal constitutional machinery to be restored in the state.

Article. 356(5) [inserted by 44th Amendment], however, lays down that beyond 1 year a proclamation can be continued only if emergency under article. 352 were in operation in the whole of India or in the whole or any part of the concerned state, and the election commission certifies that it is not possible to hold elections to the state legislature. This provision has put a restraint on the power of parliament to extend a proclamation; it can be extended beyond one year only if special circumstances exist.

It may be noted that in Punjab, the president's rule was imposed for 5 years but for this the constitution was amended several times.

Revocation of proclamation under article. 356

A proclamation issued under article. 356(1) expires:

1. After two months of its making, if it is not presented for approval before both houses of parliament.
2. Even before two months, if the proclamation on presentation to the houses of parliament fail to get approval from any house.
3. After 6 months from the date of proclamation, in case no further resolution is passed by the houses of parliament after the passage of the initial resolution approving the said proclamation.
4. After the expiry of 6 months from the passage of the last resolution of approval passed by parliament subject to an overall maximum limit of 3 years from the date of proclamation. Continuance of the proclamation beyond one year is subject to special circumstances.
5. The date on which the president issues a proclamation of revocation.

Exercise of legislative powers under proclamation issued under article. 356 (article. 357)

When a proclamation is made under article. 356(1), the powers of the state legislature are to be exercised by parliament. Parliament can confer on the president the power to make laws for the states. Parliament may also authorise the president to delegate such powers to any other authority as specified by him subject to such conditions as he may impose [article. 357(1)(a)]. The president may authorize (when the Lok Sabha is not in session), expenditure from the state consolidated fund pending its sanction by parliament [article. 357(9c)].

A law made under these provisions by parliament or the president, or the authority in which the power to make laws is vested under article. 357(1)(a), may confer powers and impose duties upon the union officers or authorities [article. 357(1)(b)]. Such a law continues to have effect, to the extent it could not have been made but for the issue of the proclamation under article. 356(1), even after the proclamation ceases. Such a law may, however, be altered, repealed or amended by the state legislature [article. 357(2)].

Thus, the life of a law made by parliament/president during the operation of article. 356 proclamation is not co-terminus with the subsistence of the proclamation. The law does not come to an end automatically as soon as the proclamation is revoked (though the power of the union to make laws for the state concerned on the subject within the state list ceases). An action by the state legislature is necessary to change these laws.

Distinction between article. 352 and article. 356
(1) article. 352 (‘national or internal emergency’) restricts central government’s intervention to a situation of war, external aggression, or armed rebellion. article. 356 (‘state emergency’) applies to a situation of failure of constitutional machinery in a state.

that means under article. 352, the relationship of all states with the centre undergoes a change. but, under article. 356, the relationship of only the concerned state with the centre is affected.

(2) it may be noted that in comparison to article 352, under article. 356, the state legislature remains suspended and dissolved. laws for the state are made by parliament and the governor administers the state on behalf of the president.

in case of national emergency, the state governments and legislatures continue to function normally and exercise the powers assigned to them under the constitution. all that happens under article. 352 is that the centre gets concurrent powers of legislation in state matters and thus it can make the states follow a uniform all-india policy.

(3) while article. 352 affects fundamental rights, fundamental rights remain unaffected under article. 356.

(4) a proclamation under article. 352 has to be approved by parliament within a month and thereafter every six months. but, there is no maximum duration prescribed for the operation of such a proclamation. thus, it can be continued indefinitely.

the proclamation under article. 356 is to be approved by parliament within two months, and thereafter every six months, and the maximum period for which it can remain in force is three years.

(5) though the scope and purpose of articles. 352 and 356 are very different, there might arise a situation when article. 356 may have to be invoked to effectuate article. 352 example when a state government does not cooperate with the centre in defence matters, or in quelling internal disturbances, or when it encourages the same.

control over president’s action under art. 356

(a) parliamentary control

the consideration of the proclamation of president’s rule in states has been specifically vested by the constitution in parliament. the proclamation has to be initially laid before each house of parliament. parliament can thus discuss at this time whether the proclamation should or should not have been made by the central government.

further, the proclamation has to be ratified by parliament every six months. the idea behind periodic parliamentary ratification of continuance of the proclamation under art. 356 is to afford an opportunity to parliament to review for itself the situation prevailing in the concerned state so that the central executive does not feel free to keep the proclamation in force any longer than what may be absolutely necessary. the central government is responsible and accountable for all its actions to parliament. a safeguard against any misuse of power by the executive is that the ultimate authority to decide whether a proclamation under article. 356 is to be continued or not lies with the parliament.

in 1999, a proclamation under article. 356(1) was issued in state of bihar; the state government and the state legislature were suspended. the proclamation was approved by the lok sabha but when it became clear that the rajya sabha would not approve it, because of the opposition by the opposition parties which were in a majority in that house, the government revoked the proclamation later in exercise of power under article. 356(2). the state government was installed in office and the state legislature which had been suspended was then revived.

(b) judicial review of presidential action under article. 356

the satisfaction of the president under article. 356 and the basis thereof "are subjective and are not subject to objective tests by judicial review." the question involves high executive and administrative
policy and the court will find out no standard for resolving it judicially.

In 1975, the 38th constitution (amendment) act introduced cl. (5) in article. 356 barring judicial review of a proclamation under article. 356(1) on any ground. the clause made presidential 'satisfaction' to issue a proclamation under article. 356(1) as 'final and conclusive' which 'shall not be questioned in any court on any ground.' this clause was, however, withdrawn by the 44th constitution (amendment) act, 1978.

In the below-discussed case, it was held that in spite of the broad ambit of the power under article. 356, a presidential proclamation could be challenged if power was exercised *mala fide*, or on "constitutionally or legally prohibited" grounds, or for "extraneous or collateral purposes."

**scanning of article 356**

India's federal system is one in which the structural-functional balance is in favour of the centre vis-a-vis the units, namely, the states. the constitution-makers stumbled on some provisions of the American and Australian constitutions to the effect that the federal government should ensure the maintenance of the constitution by the constituent states. in fact all the major federal countries of the world have either expressly kept some provision of this nature in their constitutions itself or have evolved it through judicial decisions to counter exceptional insurgencies in the federal units.

The purpose of article. 356 is that the centre can take remedial action to put the state government back in its place so that it can function according to the constitution. any misuse or abuse of power by the central government will damage the fabric of federalism.

Despite its utility, article. 356 has often remained under a cloud of criticism. the language of article. 356, which is quite wide and loose, has made the matter worse. article. 356 has been described as "an indiscriminate and politically motivated invasion of the union to supersede the state government". article. 356 do violate the federal nature of the polity and has often been misused by the union for political gains. even those who are staunchly opposed to its use invite the union government to resort to it when the rival party is in the saddle. article. 356 is also criticised as being undemocratic, because people of the state has no say in the matter.

Dr. Ambedkar, the architect of article. 356, had said that article. 356 should normally remain a "dead-letter" and would be used only as a last resort. however, until now, it has been used nearly 100 times (at the average rate of two instances per year) and on grounds as diverse as could be imagined. such a large scale recourse to article. 356 undermine the prestige and authority of state governments, and is therefore against public interest.

It is worth noting that article. 356 finds its place in part 17 of the constitution relating to emergency provisions. it is also to be noted that as per article. 355, it shall be the duty of the union to protect every state against external/internal disturbances and to ensure that the government of the state is carried on in accordance with the constitutional provisions. this implies that the union government has the obligation to do whatever is in its power to help the state in its endeavour to conform to the constitution. only when the union fails in its attempt or finds it impossible to do anything, that it should think of the next step, namely action under article. 356. the prescription of the constitution is far from looking at the first opportunity to interfere. *the power given under article. 356 is not the offshoot of a right, but the compliance of a duty*. it is the performance of this duty which justifies the total invasion of the state field. this shows that action under article. 356 is to be taken not out of liking, but out of compulsion when circumstances are so grave as it cannot be dispensed with [Dr. Annoussamy, 'scanning of article. 356', *Politics India*, March 1998].

**proper/improper grounds for application of article. 356**

**proper grounds**

(1) *Hung assembly scenario* - where, after a general election, no party is able to secure a working majority in the legislative assembly. or, where the party having a majority declines to.
form a ministry and the governor's attempt to find a coalition ministry able to command a majority have failed. or, where a ministry having resigned, the governor finds it impossible to form an alternative government.

it may be noted that when a new state is created as a result of territorial reorganization or upgrading of a union territory and there is no legislature for such state until election is held therefore, resort may be had to article. 356 as a "stop-gap" arrangement.

(2) corruption, maladministration, etc. - president's rule may be imposed when there is gross mismanagement of the affairs of a state government, or abuse of its power, or corruption on the part of the state government.

(3) acting contrary to the constitution of india - a subversion of the constitution by the state government while professing to work under the constitution or creating disunity or disaffection among the people to disintegrate the democratic social fabric, or to subvert its 'basic features' such as federation, secularism or democracy. thus, the president's rule may be imposed when a political party seeks to subvert the principles of responsible government and sets up a party dictatorship.

(4) acting contrary to the union directives - where a state government fails to comply with the directions issued by the union under the article. 257(2)-(3); 353a; 360(3); 339(2), even after warning.

(5) failure to meet an extraordinary situation - example an outbreak of unprecedented violence, a great natural calamity such as a severe earthquake, a flood, or a large epidemic, etc. failure to meet such situation amounts to an abdication of its governmental power by the state government.

(6) security concerns - a danger to national integration or security of the state (calling for an application of articles. 352 or 355) or aiding or abetting national disintegration or a claim for independent sovereign status.

improper grounds

(1) improper action by governor in case of political instability - where, after the resignation of a chief minister, or after the dismissal of the ministry on loosing the majority support in the assembly, the governor recommends dissolution under article. 356, without probing the possibility of the formation of an alternative government.

where the governor declines the request of a ministry which has not been defeated on the floor of the house and recommends its supersession, without giving the ministry an opportunity to demonstrate its majority support through the 'floor-test' and acting solely on his subjective assessment that the ministry no longer commands the confidence of the assembly. the floor-test may be dispensed with only in exceptional circumstances, such as an atmosphere of violence, it was not possible to convene a sitting of the assembly for the purpose [s.r. bommai case].

(2) overwhelming defeat in the lok sabha elections -the union government cannot dismiss a duly elected state government on the sole ground that the ruling party in the state suffered an overwhelming defeat in the election to the lok sabha (as held in bommai case, thus, disapproving contrary view in state of rajasthan verses uoi case).

further, if a state government is punished by repeated dissolution of its assembly, within a short period, the action under art. 356 is improper [state of rajasthan verses uoi case].

(3) power used merely for achieving 'good government" - the power cannot be used by the union executive merely for achieving 'good government' in a state, even while the ministry is enjoying confidence of the majority in the assembly. the cause must be a 'failure of the constitutional machinery'.

further, every non-compliance with a particular provision of the constitution does not call for action under article. 356. the non-compliance shall be such as to give rise to such a situation where the state government cannot be carried on in accordance with the constitutional provisions (bommai case).

(4) situation of 'internal disturbance' - where, in a situation of 'internal disturbance' not amounting to or verging an abdication of its governmental powers by the state government, all possible measures to contain the situation by the union, in the discharge of its duty under art. 355, have not been exhausted [article. 58].
if one looks at the past instances of imposition of president's rule in India, three common grounds emerge that have been invoked under Article 356 - breakdown of law and order, political instability, corruption and maladministration.

Maintenance of public order is a constitutional power and responsibility of the state [entry 1, list 2]. If failure to maintain public order on the part of a state government be taken as its failure to 'carry on the government in accordance with constitutional provisions' within the purview of articles 355-356, failure to maintain good local government [entry 5, list 2] or public health [entry 6, list 2], may also be legitimate grounds for intervention of the Union under Articles 355-356. Such a wide interpretation would make the federal system under the Indian constitution a mere licence at the will of the Union government. It is only when the situation becomes so grave as it cannot be controlled by the state government that it should be open to the state concerned to seek the help of the Union, as in the constitution of America and as indicated in Article 355 of our constitution. If the internal disturbance acquires the dimensions of an armed rebellion the proper course would be an action under Article 352.

Another ground frequently resorted to, is political instability. Instability is inherent in the parliamentary system. England too experienced such situation. In Bommai case, the Supreme Court ruled that the political instability invoked in respect of the states of Karnataka, Meghalaya and Nagaland was not a valid ground. Further, political instability is not a problem of the Union, but that of the Governor, who is the constitutional head of the state and has to handle the situation as per the traditions of parliamentary democracy. It is true that the lack of discipline and decorum among public men hampers the smooth working of the system. Resort to violence within the precincts of the Assembly, or refusal of the Chief Minister to step down when a criminal charge is impending or even framed, or frequent defections and change of loyalties by the Legislatures, shatters the parliamentary system. But they are by themselves no reason to invoke Article 356. These maladies of the political body have to be treated appropriately. The recourse to Article 356 will be justified only if no caretaker ministry may be put in place, or when election in the immediate future is not possible.

The third ground often invoked is corruption and maladministration. That is no ground to dislodge a government installed by public verdict and answerable to the electorate. If the Union government can have the right to stamp out a state government from power on that account, state governments may also ask the Union government to step down when corruption and maladministration become rampant in the Union government.

Sarkaria Commission’s Recommendations

The Sarkaria Commission has recommended that the President’s rule can be used only in the event of the political crisis, internal subversion, physical break-down, and non-compliance with constitutional directives of the Union executive. The Commission has pointed out that approval of the Parliament is to be secured before imposing the President’s rule.

The Commission inter alia recommended that before invoking Article 356, a warning in specific terms should be given to the erring state. All alternatives should be exhausted to contain the situation and all attempts to resolve the crisis at the state level should be made. Such alternatives may be dispensed with only in case of extreme urgency. The Governor’s report under Article 356(1) should be a speaking document and the material facts/grounds on which Article 356 is invoked must be made an integral part of the proclamation issued under Article 356(1) for the purpose of judicial review.

Suggestions

The consensus of opinion appears to veer round to amending the article. 356 to prevent its misuse instead of abrogating it altogether. An amendment in general terms (with explanation to the general rule in enumerating circumstances in which the powers should not be invoked) will do. It is suggested that the President’s satisfaction as envisaged by Art. 356 should be reached at after consultation with a five-member committee consisting of Prime...
minister, attorney general of India, chairman of rajya sabha, leader of the opposition party in lok sabha and the governor of the concerned state. It is also suggested that the corresponding provision should be made for the union as well (recent indications are that the union government is not immune from failure of constitutional machinery); in such a case, there is more chance of the article being construed correctly and not being misused as in the past.

Judicial review is a good safeguard to keep down the frequency of proclamations but a lasting solution resides elsewhere.

A healthy convention should be developed so that the power under article 356 is neither exercised capriciously nor arbitrarily. The emphasis should be put on developing the practice in consonance with the spirit of the constitution. This can be achieved if all the political parties appreciate the fact that in a democratic set up it is quite probable that beneficiary of article 356 today might become the victim of it tomorrow. Thus, art. 356 should be restored to only in case of failure of constitutional machinery. Since it is an emergency provision, it should be strictly construed.

The apex court observed: The sweep of article 355 seem quite wide. It is evident that it is this part of the duty of the union towards each state which is sought to be covered by a proclamation under art. 356. It is a proclamation intended either to safeguard against the failure of the constitutional machinery in a state or to repair the effects of a breakdown. It may be either a preventive or a curative action (Beg, C.J.).

Bhagwati and A.C. Gupta, J.J. emphasized that the defeat of the ruling party in a state at the lok sabha elections could not by itself, without anything more support the inference that the government of the state could not be carried on in accordance with the constitutional provisions. But where there had been a total rout of candidates belonging to the ruling party, and in some of the plaintiff-states, the ruling party had not been able to secure a single seat, it was "symptomatic of complete alienation between the government and the people". It was axiomatic that no government could function efficiently and effectively in accordance with the constitution in a democratic set up unless it enjoyed the goodwill and support of the people.

In Additional District Magistrate, Jabalpur v Shivkant, the court observed that the maxim - salus populi est suprema lex is important in regard to a declaration or proclamation under article 352 or 356; the stability of a state or country and its people are matters of paramount importance. And, it was on that principle which this court, deprived of the power to examine or question any materials on which such declaration may be based, has to base its decision regarding the validity of a proclamation.

Comments - These cases show that the central government takes a broad view of the expression "the government of the state cannot be carried on in accordance with the provisions of the constitution" and feels justified in invoking article 356(1) for intervening in the administration by the state government.

In State of Karnataka v Union of India, the supreme court observed: "The kind of federation established in India has a strong unitary bias, with power given to the centre of supervision, in certain circumstances, of the state government. Hence, it cannot be said that centre can take no action which result in interference with the governmental functions of the state government".

However, in the historic judgment - S.R. Bommai v Union of India, the supreme court has laid down various guidelines in regard to the use of article 356, which, it is hoped, would put a check on arbitrary dismissal of state governments in future and strengthen the federal structure of Indian polity.

The supreme court in the Bommai case observed: "In view of the pluralist democracy and the federal structure that has been accepted under the constitution, the party or parties in power at the centre and in the states may not be the same. Therefore, there is a need to confine the exercise of power under article 356(1) strictly to the situation mentioned therein which is a condition precedent to the said exercise."

[Note: The S.R. Bommai case is discussed in detail under the question section of this chapter.]
[c] financial emergency (article. 360)

the president is authorized by article. 360 to declare by a proclamation financial emergency if he is satisfied that the financial stability or credit of india or any part of its territory is threatened. it has to be laid before both houses of parliament and ceases to operate at the expiration of two months unless meanwhile approved by the resolutions of the two houses. once approved by parliament, unlike proclamations under article. 352, it may continue indefinitely until revoked or varied.

during the operation of financial emergency, the executive authority of the union extends to the giving of directions to any state to observe certain specified canons or financial propriety and such other direction that the president may find necessary or adequate. these directions may include reduction of salaries or allowances of all those serving a state and reserving for the president's consideration all money bills and other bills under art. 207 after these are passed by the state legislatures. the president may also direct reduction in salaries, etc. of all those serving in connection with the affairs of union including judges of the supreme court and the high courts.

thus far, there has been no occasion for the promulgation of financial emergency in india.