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Subject: Constitutional Law –I Paper Code: 205

Brief notes on the subject of Constitutional Law-I

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Unit – I Constitution

a) Definition and Classification, b) Sources of Constitution, c) Constitutional Conventions, d) Salient features of Indian Constitution, e) Rule of Law, f) Separation of powers.

Summary:

Definition

Constitution means a document having a special legal sanctity which sets out the frame-work and the principal functions of the organs of the Government of a State and declares the principles governing the operation of those organs.

The term constitutional law has been defined by many writers. Hibbert defines Constitutional Law as "the body of rules governing the relation between the sovereign and his subjects and the different parts of the sovereign body".

According to Dicey: "Constitutional law includes all rules which directly or indirectly affect the distribution or exercise of the sovereign power of the State. Hence it includes all rules which define the members of the sovereign power; all rules which regulate the relation of such members to each other or which determine the mode in which the sovereign power or the members thereof exercise their authority".

Classification:

State can be either unitary or Composite. A unitary state in one which is not made up of territorial divisions which are states them selves. The Central Government is all-powerful; such states can make a constitutional law applicable to such government only. A composite state is one which is itself an aggregate or group of constituent states. Composite states are also three in kinds those are imperial, federal or confederal to which there exists central governments. The constitutions also can be prepared as per the pattern of the governments are formed.

Sources of Constitution:

The framers of the Indian Constitution framed, the most important chapter of the Fundamental Rights on the model of the American Constitution, and adopted the parliamentary system of government from the United Kingdom; they have taken the idea of the directive principles of state policy from the Constitution of Ireland, and added elaborate provisions relating to Emergency in the light of the Constitution of the German Reich and the Government of India act, 1935.

Constitutional Conventions:

The first meeting of the Assembly was held on 9th December, 1946 as the sovereign Constituent Assembly for India. On December 11, Dr.Rajendra Prasad was elected its permanent Chairman. It was held in an atmosphere of uncertainty, because the Muslim League boycotted the Assembly. In spite of this, the Assembly made a substantial progress and adopted and 'Objective Resolution' which later became the Preamble of the Constitution. It appointed various Committees to deal with different aspects of the Constitution. The report of the Committees formed the basis on which the first draft of the constitution was prepared. On August 29, 1947, a Drafting Committee of 7 members was set up under the Chairmanship of Dr.Ambedkar.

SALIENT FEATURES OF THE INDIAN CONSTITUTION:

1. The lengthiest Constitution in the world:

The Indian Constitution is the lengthiest and the most detailed of all the written Constitutions of the world. While the American Constitution originally consisted of only 7 Articles, the Australian Constitution 128 Articles, the Canadian Constitution 147 Articles, the Indian Constitution originally consisted of 395 Articles divided into 22 Parts and 8 Schedules, at present, the though still, the last numbered Article is 395 and the last numbered part is 22, yet the actual articles are 460 in number and 25 parts at present and the Schedules at present are 12 in number. Since 1950 Articles have been repealed and several Articles have been added to the Constitution.

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

(1) The framers of the Indian Constitution have gained experience from the working of all the known constitutions of the world. They were aware of the difficulties faced in the working of these constitutions. This was the reason that they sought to incorporate good provisions of those constitutions in order to avoid defects and loopholes that might come in future in the working of the Indian Constitution.

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(2) The Indian Constitution lays down the structure not only of the Central Government but also of the States. The American Constitution leaves the states to draw up their own constitutions.
(3) The vastnesses of the country and peculiar problems relating to the language have added to the bulk of the constitution.

Establishment of a Sovereign, Socialist, Secular, Democratic Republic:

The Preamble of the Constitution declares that India to be a Sovereign, Socialist, Secular, Democratic Republic. The word 'Sovereign' emphasizes that India is no more dependent upon any outside authority. It means that both internally and externally India is sovereign.

The term 'Socialist' has been inserted in the Preamble by the Constitution 42nd Amendment act, 1976. The word 'Socialism' is used in democratic as well as socialistic Constitutions.

The term 'Secularism' means a State which has no religion of its own as recognized religion of state. It treats all religions equally. In a secular State the State regulates the relation between man and man. It is not concerned with the relation of man and God.

The term 'Democratic' indicates that the Constitution has established a form of Government which gets its authority from the will of the people. The rulers are elected by the people and are responsible to them. Justice, Liberty, Equality and Fraternity which are essential characteristics of a democracy are declared in the preamble of the Constitution as the very objectives of the Constitution. The Preamble to the Constitution declares that the Constitution of India is adopted and enacted by the people of India and they are the ultimate master of the Republic. Thus the real power is in hands of the people of India, both in the Union and in the States.

The term 'Republic' signifies that there shall be an elected head of the State who will be the chief executive head. The President of India, unlike the British King, is not a hereditary monarch but an elected person chosen for a limited period. It is an essential ingredient of a Republic.

2. Parliamentary form of Government:

The Constitution of India establishes a parliamentary form of Government both at the Centre and the States. The framers of the Constitution preferred the parliamentary system of government mainly for two reasons—(1) the system was already in existence in India and people were well acquainted with it, (2) it provides for accountability of ministers to the Legislature.

3. Unique blend of rigidity and flexibility:

It has been the nature of the amending process itself in federations which had led political scientists to classify federal Constitution as rigid. A rigid Constitution is one which requires a special method of amendment of any of its provisions while in flexible Constitution any of its provisions can be amended by ordinary legislative process. A written Constitution is generally said to be rigid. The Indian Constitution, though written, is sufficiently flexible.

4. Fundamental Rights:

These rights are prohibitions against the State. The state cannot make a law which takes away or abridges any of the rights of the citizens guaranteed in the part III of the Constitution. If it passes such a law it may be declared unconstitutional by the courts. But mere declaration of certain Fundamental Rights will be of no use if there is no machinery for their enforcement.

5. Directive Principles of State Policy:

The directive Principles of State Policy contained in part IV of the Constitution set out the aims and objectives to be taken up by the States in the governance of the country.

6. A Federation with strong centralizing tendency:

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

7. Adult Suffrage:

The old system of communal electorates has been abolished and the uniform adult suffrage system has been adopted. Under the Indian Constitution every man and woman above 18 years of age has been given the right to elect representatives for the legislature. The adoption of the universal Adult Suffrage without any qualification either of sex, property, taxation, or the like is a bold experiment in India, having regard to the vast extent of the country and its population, with an overwhelming illiteracy. This suffrage is wider than all the democratic countries which have given right to vote to their people.

8. An Independent Judiciary:

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

9. A Secular State:

A Secular State has no religion of its own as recognized religion of State. It treats all religions equally.

10. Single Citizenship:

Though the Constitution of India is federal and provides for dual polity i.e., Centre and States, but it provides for a single citizenship for the whole of India. Every Indian is the citizen of India and enjoys the same rights of citizenship no matter in what State he resides.

11. Fundamental Duties:

The Fundamental Duties are indeed to serve as a constant reminder to every citizen that while the Constitution has specifically conferred on them certain Fundamental Rights, it also requires the citizens to observe certain basic norms of democratic behaviors.

RULE OF LAW:

Adjustment of law to the social needs is a continuing process. Law must always be responsive to the social development. This continuing process requires watchful legislature and alert judiciary. However, certain care and caution regarding the adjustment of law to social change should be observed. "The increasing use of device of legislation in modem societies and the general orientation of nearly all start and elites in favor of change and popular elections in democratic countries as also the decreasingly conservative attitudes of the lawmen including judges, provide rather simple ways of adjusting the law to social change. The problem today, as one writer sees it, is not as much of preventing lag of law behind social needs and development as of preserving legal security which is endangered by rapid changes in the law. "This is the interesting problem of the lag of society after changes in the law, which is a more novel problem, both from the theoretical and the practical point of view". "The problem one has to grapple with today appears to be one arising out of the tension between the ideology of rule of law and the need for recognition of law as a means of social action. Law shapes various social institutions, which in turn have direct impact on society, i.e., compulsory education system, prohibition of polygamy etc. It has indirect impact on social change as where a new patent law calls forth inventions and further changes in technological institutions. Law may set up new public bodies and an authority, which is turn bring about significant social and economic changes"

The guarantee of equality before the law is an aspect of what Dicey calls the rule of law in England. It means that no man is above the law and that every person, whatever be his rank. Dicey gave three meanings of the Rule of Law those are: 1) Absence of Arbitrary power or Supremacy of the, 2) Equality before the law, and, 3) The Constitution is the result of the ordinary law of the land.

The first and the second aspects apply to Indian system but the third aspect of the Dicey's rule of law does not apply to Indian system as the source of rights of individuals is the Constitution of India. The rule of law imposes a duty upon the State to take special measure to prevent and punish brutality by police methodology to a federal Government. The supreme Constitution is essential if The Indian Constitution possesses all the essential characteristics of a federal Constitution. The Constitution establishes a dual polity, a system of double Government with the Central Government at one level and

the State Government at the other. There is a division of powers between the central and the State Government

Rule of Law under Constitution of India:

Dicey's rule of law has been adopted and incorporated in the Constitution of India. The Preamble itself enunciates the ideals of Justice, Liberty and Equality. In part III of the Constitution these concepts are enshrined as Fundamental Rights and are made enforceable. The Constitution is supreme and all the three organs of the Government, namely, Legislature, Executive and Judiciary are subordinate to and have to act in consonance with the Constitution. The doctrine of judicial review is embodied in the Constitution and the subjects can approach High Courts and the Supreme Court for the enforcement of Fundamental Rights guaranteed under the Constitution. If the executive or the Government abuses the power vested in it or if the action is mala fide, the same can be quashed by the ordinary courts of law.

Modern concept of Rule law:

Davis has given seven principal meanings of the term 'Rule of Law' :-(1) Law and order; (2) Fixed rules; (3) Elimination of discretion; (4) Due process of law or fairness; (5) Natural law or observance of the principles of natural justice; (6) Preference for judges and ordinary courts of law to executive authorities and administrative tribunals; and (7) Judicial review of administrative actions.

Separation of powers:

(a) Meaning:

It is generally accepted that there are three main categories of governmental functions—(i) Legislative, (ii) Executive, and (iii) Judiciary. According to the theory of separation of powers, these three powers and functions of the Government must, in a free democracy, always be kept separate and be exercised by three separate organs of the government. Thus, the Legislature cannot exercise executive or judicial power; the Executive cannot exercise legislative or judicial power and the Judiciary cannot exercise legislative or executive power of the Government.

(b) Historical background:

The doctrine of separation of powers has emerged in several forms at different periods. Its origin is traceable to Plato and Aristotle. In the 16th and 17th centuries, French philosopher John Bodin and British politician Locke expressed their views about the theory of separation of powers. But it was Montesquieu who for the first time formulated this doctrine systematically, scientifically and clearly in his book 'Esprit des Lois' (The Spirit of the Laws), published in the year 1748.

(c) Montesquieu doctrine:

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judicial power be not separated from the legislative and the executive. Where it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression.

Miserable indeed would be the case, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions and that of judging the crimes or differences of individuals."

(d) Effect of the doctrine:

The doctrine of separation of powers as propounded by Montesquieu had tremendous impact on the development of administrative law and functioning of Governments. It was appreciated by English and American jurists and accepted by politicians.

(e) Importance of the doctrine:

On the whole, the doctrine of Separation of powers in the strict sense is undesirable and impracticable and, therefore, it is not fully accepted in any country. Nevertheless, its value lies in the emphasis on those checks and balances which are necessary to prevent an abuse of enormous powers of the executive. The object of the doctrine is to have "a Government of law rather than of official will or whim". Montesquieu great point was that if the total power of Government is divided among autonomous organs, one will act as a check upon the other and in the check liberty can survive. Again almost all the jurists accept one feature of this doctrine that the judiciary must be independent of and separate from the remaining two organs of the Government, viz., Legislature and Executive.

The most important aspect of the doctrine of separation of powers is judicial independence from administrative discretion. "There is no liberty, if the judicial power be not separated from the legislative and executive." The judiciary is beyond comparison the weakest of the three departments of power. It has no influence over either the sword or the purse; no direction either of the strength or of the wealth of society and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment. There is no liberty, if the judicial power be not separated from the legislative and the executive.

Unit –II Distribution of powers between Center and States:

Generally, three models are followed in the matter of division of powers in a federation. In the first model, the powers of the Centre are defined and the residuary powers are left to the States. This model is found in America. In the second module, the powers of the federating units or States are defined and the residuary powers are given to the centre. Canada follows this model. And in the third model, the powers of both the governments are clearly laid down. Australia has this model of federation. In India, we follow the combination of both the Canadian and the Australian models.

The Constitution of India divides powers between the Union and the State governments. The Seventh Schedule of the Constitution includes three lists of subjects - the Union List, the State List and the Concurrent List. The Central or Union Government has exclusive power to make laws on the subjects which are mentioned in the Union List. The States have the power to make law on the subjects which are included in the Concurrent List. With regard to the Concurrent List, both the Central and State governments can make laws on the subjects mentioned in the Concurrent List. Finally, the subjects which are not mentioned in the above three lists are called residuary powers and the Union government can make laws on them.

It may be noted here that in making laws on the subjects of the Concurrent list, the Central government has more authority than the State governments. And on the subjects of the State List also the Central government has indirect control. All this shows that though the Indian Constitution has clearly divided powers between the two governments, yet the Central government has been made stronger than the State governments.

We can discuss the division of powers between the two governments in India under three headings, such as, legislative relations, administrative relations and financial relations with reference to the three lists.

a. Legislative powers

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

Every Bill passed by both Houses of Parliament is to be sent to the President for his assent (Article 111). He may give his assent to the Bill, or withhold his assent or in the case of a bill other than a

money-bill, may return it to the House for reconsideration on the line suggested by him. If the bill is again passed by both the houses of the Parliament with or without amendment, he must give his assent to it when it is sent to him for the second time. A bill for the recognition of a new State or alteration of State boundaries can only be introduced in either House of the Parliament after his recommendation (Article3). The State Bills for imposing restrictions on freedom of trade and commerce require his recommendation (Article 304). He nominates 12 members of the Rajya Sabha from among persons having special knowledge or practical experience of Literature, Science, Art and Social Services [Article 80(3)]. He is authorized by the Constitution to nominate two anglo-Indians to the Lok Sabha, if he is of opinion that the anglo-Indians community is not adequately represented in that House (Article 331). The President has to lay before the Parliament the Annual Finance Budget, the report of Auditor-General, the recommendations of the Finance Commission, Report of the Union Public Service Commission, and report of the Special Commission for Scheduled Castes and Scheduled Tribes, the report of the Commission of the Backward Classes and the report of the Special Officer for linguistic minorities

b. Administrative powers

As in legislative maters, in administrative matters also, the Central government has been made more powerful than the States. The Constitution has made it clear that the State governments cannot go against the Central government in administrative matters. The State governments have to work under the supervision and control of the Central government. The States should exercise its executive powers in accordance with the laws made by the Parliament. The Central government can make laws for maintaining good relations between the Centre and the States. It can control the State governments by directing them to take necessary steps for proper running of administration. If the State fails to work properly or according to the Constitution, it can impose President's rule there under Article 356 and take over its (the State's) administration. Again, there are some officials of the Central government, working in the States, through which it can have control over the State govern

1. Article 257 of the Constitution lays down that the executive authority of every State shall be exercised in such a way that it does not impede or prejudice the exercise of the executive power of the Union.

2. There are some functionaries of the Union government who serve the State governments. The Governor of a State is appointed by the President who acts as a central agent in the State. The Chief Justice and the Judges of a High Court are appointed by the President and he can also remove them if a resolution is passed by the Parliament in this regard. The offices of the All India Services are appointed by the Central government but they serve in different States.

c. Financial powers

Article 280 provides for the establishment of a Finance Commission. The President shall within two years from the commencement of the constitution and thereafter at the expiration of every fifth year or at such earlier time as he considers necessary constitute a Finance Commission. The Finance Commission shall consist of a Chairman and four other members appointed by the President. Parliament may by law prescribe qualifications which shall be requisite for appointment as members of the Commission and the manner in which they shall be selected.

In exercise of the power under Article 80 (1), Parliament has passed the Finance (Miscellaneous Provision) Act, 1951. It provides that the Chairman of the Commission shall be selected from among persons who have had experience in public affairs. The other four members shall be selected from among persons who (1) are, or have been, or are qualified to be appointed as judges of a High Court; or (2) have special knowledge of the Finance and accounts of Government, or (3) have had wide experience in financial matters and in administration, or (4) have special knowledge of economics.

The members of the Commission shall hold office for such period as may be specified in the Presidential order and shall be eligible for appointment. The Commission is empowered to determine its procedure and shall have all the powers of a civil court in respect of summoning and enforcing the attendance of witnesses, production of any document and requisitioning any public record from any court or office.

Relevant Doctrines:

(a) Territorial Nexus:

Article 245(1) of the Constitution says that subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State, according to Article 245(2) no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation. Thus, the Constitution confers the power to enact laws having extra-territorial operation only to the Union Parliament and not to the State legislature, and consequently and extra-territorial law enacted by any State is changeable unless the same is protected on the ground of territorial nexus. If a State law has sufficient nexus or connection with the Subject-matter of that law, the state law is valid even when it has extra-territorial operation. It could, therefore, be said that a State Legislature is also empowered to enact a law having extra-territorial operation subject to the condition that even though the subject-matter of that law is not located within the territorial limits of the State, there exists as sufficient nexus of connection between the two.

The area in which the principle of territorial nexus has been applied most in India is taxation. In State of Bombay Vs R.M.D. Chamarbangwala, a newspaper printed and published at Bangalore had wide circulation in the State of Bombay. Through this news paper the respondent conducted and ran prize competitions for which the entries were received from the State of Bombay through agents and depots established in the State to collect entry forms and fees for being forwarded to the head office at Bangalore. The Bombay Legislature imposed a tax on the business of prize competitions in the state by enacting the Act of 1952 and amending the Bombay Lotteries and prize Competitions and Tax Act, 1948. The respondent contended that he was not bound to pay the said tax on the ground of extra-territoriality. The Supreme Court ruled that when the validity of an act is called in question the first thing for the court to do is to examine as to whether the Act is called in question the first thing for the court to do is to examine as to whether the Act is a law with respect to a topic assigned to the particular legislature which enacted it because under the provisions conferring legislative powers on it such legislature can only make a law for its territory or any part thereof and its laws cannot, in the absence of a territorial nexus, have any extra-territorial operation. For sufficiency of territorial connection, two elements were considered by the court, namely, (1) the connection must be real and not illusory, and (2) the liability sought to be imposed must be pertinent to that connection. It was held that all the activities which the competitor was ordinarily expected to undertake took place in the State of Bombay and there existed a sufficient territorial nexus to enable the Bombay Legislature to tax the respondent who was residing outside the state.

Some other example of cases:-

1. Tata Iron and Steel Company Vs. State of Bihar, AIR 1958 SC 452
2. State of Bihar vs. Charusila Das, AIR1959 SC 1002.

(b) Harmonious Construction

When two or more provisions of the same statute are repugnant, the court will try to construe the provisions in such a manner, if possible, as to give effect to both by harmonizing them with each other. The court may do so by regarding two or more apparently conflicting provisions as dealing with separate situations or by holding that one provision merely provides for an exception of the general rule contained in the other. The question as to whether separate provisions of the same statute are overlapping or are mutually exclusive may, however, be very difficult to determine. The basis of the principle of harmonious construction probably is that the legislature must not have intended to contradict itself. This principle has been applied in a very large number of cases dealing with interpretation of the Constitution. It can be assumed that when the legislature gives something by one hand it does not take away the same by the other. One provision of an Act does not make another provision of the same Act useless. The legislature cannot be presumed to contradict itself by enacting apparently two conflicting provisions in the same Act.

In State of Bombay v. F.N. Balasara, while deciding upon the constitutionality of the Bombay Prohibition Act, 1949, enacted by the Bombay Legislature, whereby restrictions on production and sale of liquor were put, the Supreme Court observed that the expression possession and sale occurring in entry 31 of List II are to be read without any qualification. Under that entry the State Legislature has the power to prohibit possession, use and sale of intoxicating liquor absolutely. The word import in Entry 19 of List I standing by itself does not include with sale or possession of the article imported into country by a person residing in the territory into which it is imported. There is, therefore, no real conflict between entry 31 of List II and Entry 19 of List I. Consequently, the Act of 1949, in so far as it purports to restrict possession, used and sale of foreign liquor, is not an encroachment on the field assigned to the Federal Legislature.

Some other cases:

1. Raj Krishna Vs Binod, AIR 1954 SC 202
2. Bengal Immunity Company Vs State of Bihar, AIR 1955 SC 661.

(c) Pith and Substance

: The Doctrine "Pith and Substance" means, that if an enactment substantially falls within the powers conferred by the Constitution upon the legislature by which it was enacted, it does not become invalid merely because it incidentally touches upon subjects within the domain of another legislature as designated by the Constitution. Within their respective spheres, the Union and the State Legislatures are made supreme and they should not encroach into the sphere reserved to the other. If a law passed by one encroaches upon the field assigned to the other the Court will apply the doctrine of 'pith and substance' to determine whether the Legislature concerned was competent to make it.

If the 'pith and substance' of law, i.e., the true object of the legislation or a statute, relates to a matter with the competence of Legislature which enacted it, it should be held to be intra virus even though it might incidentally trench on matters not within the competence of Legislature. In order to ascertain the true character of the legislation one must have regard to the enactment as a whole, to its object and to the scope and effect of its provisions.

The Privy Council applied this doctrine in *Profulla Kumar Mukerjee Vs Bank of Khulna, AIR 1947*. In this case the validity of the Bengal Money Lenders' Act, 1946, which limited the amount and the rate of interest recoverable by a money-lender on any loan was challenged on the ground that it was Ultra virus of the Bengal Legislature in so far as it related to 'Promissory Notes', a Central subject. The Privy Council held that the Bengal Money-lenders' Act was in pith and substance a law in respect of money-lending and money-lenders-a State subject, and was valid even though it trenched incidentally on "Promissory note"—a Central subject.

In 1980 in the case of Ishwari Khetal Sugar Mills Vs State of U.P., the validity of the U.P. Sugar Undertakings (Acquisition) Act,1971, was challenged on the ground that the State Legislature had no competence to enact the impugned law on the ground that it fell under Parliament's legislative power under Entry 52 of List I. It was contended that in view of the declaration the Parliament had made under Entry 52 List I to take the Sugar Industry under its control, that industry went out of Entry 24 of List II and hence the State Legislature was divested of all legislative power to legislate in respect of Sugar Industry and as the impugned legislation was in respect of industrial undertaking in Sugar (Entry 52 of List I) a central subject the impugned legislation was void. The Court, however, rejected these contentions and held that there was no conflict between that State Act and the Central Act under Industries Act, 1951. The power of acquisition or requisition of property in Entry 42, List III is an independent power and the impugned Act being in pith and substance, an Act to acquire scheduled undertakings the power of the State Legislature to legislate is referable to entry 42 and its control was taken over by the Central Government.

(d) Repugnancy**:**

Article 254 (1) says that if any provision of law made by the Legislature of the State is repugnant to any provision of a law made by Parliament which is competent to enact or to any provision of the existing law with respect to one of the matters enumerated in the Concurrent List, then the law made by Parliament, whether passed before or after the law made by the Legislature of such stage or, as the case may be, the existing law shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy be void.

Article 254 (1) only applies where there is inconsistency between a Central Law and a State Law relating to a subject mentioned in the Concurrent List. But the question is how the repugnancy is to be determined? In M.Karunanidhi vs Union of India, in 1979, Fazal Ali, J., reviewed all its earlier decisions and summarized the test of repugnancy. According to him a repugnancy would arise between the two statutes in the following situations:

1. It must be shown that there is clear and direct inconsistency between the two enactments [Central Act and State Act] which is irreconcilable, so that they cannot stand together or operate in the same field.
2. There can be no repeal by implication unless the inconsistency appears on the face of the two statutes.
3. Where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collusion with each other, no repugnancy results.
4. Where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field.

The above rule of repugnancy is, however, subject to the exception provided in clause (2) of this Article. According to clause (2) if a State law with respect to any of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament, or an existing law with respect of that matter, then the state law if it is has been reserved for the assent of the President and has received his assent, shall prevail not withstanding such repugnancy. But it would still be possible for the parliament under the provision to clause (2) to override such a law by subsequently making a law on the same matter. If it makes such a law the State Law would be void to the extent of repugnancy with the Union Law.

Unit – III: Constitutional Organs:

a. Parliament:

Parliament of India consists of three organs. The President, the Council of States (the Rajya Sabha) and the House of the People (the Lok Sabha). Though President is not a member of either House of Parliament yet, like the British Crown, he is an integral part of the Parliament and performs certain functions relating to its proceedings. The President of America is not an integral part of the Legislature. In India, the President summons the two Houses of Parliament, dissolves the House of People and gives assent of Bills.

It is to be noted that, though the Indian Constitution provides for the parliamentary form of Government but unlike Britain, the Parliament is not supreme under the Indian Constitution. In India, the Constitution is supreme. In England, laws passed by the parliament cannot be declared unconstitutional while the Indian Constitution expressly vests this power in the courts. The Indian Parliament is the creature of the Constitution and derives all its powers from the Constitution. It is not a sovereign body.

b. Parliamentary Sovereignty:
What is Sovereignty?

In its popular sense, the term sovereignty means supremacy or the right to demand obedience.

In the British Constitution, the legislative authority alone resides in Parliament while executive authority resides in the crown.

It is to be noted that, though the Indian Constitution provides for the parliamentary form of Government but unlike Britain, the Parliament is not supreme under the Indian Constitution. In India, the Constitution is supreme. In England, laws passed by the parliament cannot be declared unconstitutional while the Indian Constitution expressly vests this power in the courts. The Indian Parliament is the creature of the Constitution and derives all its powers from the Constitution. It is not a sovereign body.

Under the Indian Constitution, Article 53 provides that the executive power of the Indian Union is vested in the President of India. Legislative power resides in Parliament which comprises the President, the Council of States and the House of the People. The Constitution can be amended only when the amending bill after being duly passed as required by article 368, has received the assent of the President.

According to Austin, the sovereign possesses unlimited powers, but experience shows that there is no power on earth which can wield unlimited powers.

It is suggested that sovereignty may be located in the constitution-amending body. However, that cannot be done in India whose Constitution does not prescribe only one procedure for amending the Constitution. Some amendments can be made by Parliament itself without the concurrence of the States. Some amendments mentioned in the Proviso to Article 368 of the Indian Constitution require in addition ratification by the legislatures of one-half of the States. As there is not one constitution-amending body for all purposes, it is not the repository of sovereign power. Moreover, the constitution-amending body functions rarely and it is artificial to ascribe sovereignty to it.

c. Parliamentary Privileges:

Parliamentary Privilege is defined by Sir T.F.May as:

"Some of the peculiar rights enjoyed by each House collectively as a constituent part of the Parliament and by the members of each house individually, without which they could not discharge their functions and which exceed those possessed by other bodies or individuals.

The constitutional provisions regarding privileges of the state Legislature and Parliament are identical. Articles 105 and 194 provide for privileges of the Legislature in India. While Article 105 deals with Parliament Article 194 deals with State Legislatures. The Constitution expressly mentions two privileges (a) freedom of speech in the legislature and (b) right of publication of its proceedings. Prior to the 44th Amendment with regard to other privileges Article 105 (3) provided that the powers, privileges and immunities of each House until they were defined by the Parliament shall be those of the House of Commons in England. After the 44th Amendment Article 105 now provides that in other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of the 44th Amendment Act, 1978.

Freedom of Speech:-

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

The Indian Constitution expressly guarantees this privilege in Article 105 which says—

"There shall be freedom of speech in Parliament and that no Member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any Committee thereof."

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

d. **Anti-defection Law**

The 10th Schedule to the Constitution, popularly referred to as the 'Anti-Defection Law,' was inserted by the 52nd Amendment in 1985.

The grounds of disqualification are specified in Paragraph 2 of the 10th Schedule.

A member would incur a disqualification under paragraph 2 (1) (a) when he "voluntarily gives up his membership of a party" and under 2 (1) (b) when he/she votes (or abstains from voting) contrary to the directive issued by the party.

Two important questions arise in this regard: what would constitute the member 'voluntarily' giving up of membership of a party? And, what is the full import of 2 (1) (b), wherein voting/abstention from voting against the party is mentioned?

The Supreme Court, in the Ravi Naik vs. Union of India case, has interpreted the phrase 'voluntarily gives up his membership.' It says: "The words 'voluntarily gives up his membership' are not synonymous with 'resignation' and have a wider connotation. A person may voluntarily give up his membership of a political party even though he has not tendered his resignation from the membership of that party.

"Even in the absence of a formal resignation from membership, an inference can be drawn from the conduct of a member that he has voluntarily given up his membership of the political party to which he belongs."

In another judgment in the case of Rajendra Singh Rana vs. Swami Prasad Maurya and Others, the Supreme Court held that the act of giving a letter requesting the Governor to call upon the leader of the other side to form a Government itself would amount to an act of voluntarily giving up membership of the party on whose ticket the said members had got elected.

The anti-defection law was passed by parliament in 1985. Twenty-five years down the road, it is pertinent to trace the several modifications and to evaluate how well the law has worked.

The 52nd amendment to the Constitution added the Tenth Schedule which laid down the process by which legislators may be disqualified on grounds of defection. A member of parliament or state legislature was deemed to have defected if he either voluntarily resigned from his party or disobeyed the directives of the party leadership on a vote. That is, they may not vote on any issue in contravention to the party's whip. Independent members would be disqualified if they joined a political party. Nominated members who were not members of a party could choose to join a party within six months; after that period, they were treated as a party member or independent member.

The law also made a few exceptions. Any person elected as speaker or chairman could resign from his party, and rejoin the party if he demitted that post. A party could be merged into another if at least two-thirds of its party legislators voted for the merger. The law initially permitted splitting of parties, but that has now been outlawed.

Experience so far

In the 24 years of this law, complaints have been made against 62 Lok Sabha MPs. Of these, 26 were disqualified. It is pertinent to note that ten of these disqualifications were after the trust vote of July 2008 (over India-US civil nuclear co-operation). Four cases were made against Rajya Sabha MPs (two in 1989 and two in 2008) and all were upheld. In state legislatures, up to 2004, out of 268 complaints, 113 were upheld.

Challenges and Interpretations

The anti-defection law raises a number of questions, several of which have been addressed by the courts and the presiding officers.

Does the law impinge on the right of free speech of the legislators? This issue was addressed by the five-judge Constitution Bench of the Supreme Court in 1992 (Kihoto Hollohan vs Zachilhu and others). The court said that "the anti-defection law seeks to recognise the practical need to place the proprieties of political and personal conduct…above certain theoretical assumptions." It held that the law does not violate any rights or freedoms, or the basic structure of parliamentary democracy.

What constitutes "voluntarily" resigning from a party? Various judgements and orders indicate that a member who publicly opposes the party or states his support for another party would be deemed to have resigned from his party. News reports may be used as evidence for this purpose.

Can the decision of the presiding officer be challenged in the courts? The law states that the decision is final and not subject to judicial review. The Supreme Court struck down part of this condition. It held that there may not be any judicial intervention until the presiding officer gives his order. However, the final decision is subject to appeal in the High Courts and Supreme Court.

Issues for consideration

Should the law be valid for all votes or only for those that determine the stability of the government (such as the confidence and no-confidence motions)? The main intent of the law was to deter "the evil of political defections" by legislators motivated by lure of office or other similar considerations. However, loss of membership is hardly a penalty in cases ahead of the scheduled time of general elections—as seen last year. It also loses significance if the House is likely to be dissolved. On the other hand, the voting behaviour may be affected even on issues not related to the stability of the government. A member may be unable to express his actual belief or the interests of his constituents. Therefore, a case may be made for restricting the law to confidence and no-confidence motions. The Dinesh Goswami Committee on electoral reforms (1990) recommended this change, while the Law Commission (170th report, 1999) suggested that political parties issue whips only when the government was in danger.

Should the law apply only to pre-poll alliances? The rationale that a representative is elected on the basis of the party's programme can be extended to pre-poll alliances. The Law Commission proposed this change with the condition that partners of such alliances inform the Election Commission before the elections.

Should the judgement be made by the presiding officers? Several MPs had raised this issue at the time of passage of the law. The Supreme Court upheld the law in the Kihoto Hollohon judgment. The Goswami Committee, the Election Commission and the Venkatachaliah Commission to Review the Constitution (2002) have recommended that the decision should be made by the president or the governor on the advice of the Election Commission. This would be similar to the process for disqualification on grounds of office of profit.

Should there be any additional penalties on defectors? The Venkatachaliah Commission recommended that defectors should be barred from holding any ministerial or remunerative political office for the remaining term of the House. It also said that the vote of any defector should not be counted in a confidence or no-confidence motion.

There is no ambiguity in the legality of current provisions related to these issues. Any change would require legislative action. There is, however, need for public debate on the working of the anti-defection law.

e. Executive Power

The Constitution has conferred extensive executive powers on the President. The executive power of the Union of India is vested in him. He is the head of the Indian Republic. All executive functions are executed in the name of the President, authenticated in such manner as may be prescribed by rules to be made by the President (Article 77). He has power to appoint the Prime Minister and on his advice other Ministers of the Union, the Judges of the Supreme Court, and the High Courts, the Governors of the States, the Attorney-General, the Comptroller and Auditor-General, the Chairman and Members of the Public Service Commission, the Members of the Finance Commission and Official Commissions, Special Officer for Scheduled castes and Scheduled Tribes, Commission to report on the administration of Scheduled Areas, Commission to investigate into the conditions of backward classes, Special Officer for Linguistic minorities. The above-mentioned official holds their office during the pleasure of the President. This means that he has the power to remove them from their post. This power, however, to be exercised subject to the procedure prescribed by the Constitution. It is, however, to be noted that he has to exercise his executive powers on the advice of the Council of Ministers.

f. Collective Responsibility of Cabinet:

The basic principle of Parliamentary form of Government is the principle of collective responsibility. In England, this principle works on well established conventions. In India, this principle ensured by marking specific provisions in the Constitution. Article 75 (3) provides that the Council of Ministers shall be collective responsibility to the Lok Sabha. The principle of collective responsibility means that the Council of Ministers is as a body responsible to the Lok Sabha for the general conduct of affairs of the Government. 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 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 afterward to say that he agreed in one sense to a compromise while in another he was persuaded by his colleagues.

Thus the only alternative before a Minister who is not prepared to support and defend the decision of the Cabinet is to resign. This is a great weapon in the hands of the Prime Minister through which he maintains unity and discipline in his colleagues (Cabinet). A Minister who does not agree with Prime Minster or the Cabinet has the only alternative, that is, to resign from the Cabinet. According to this rule, the Council of Ministers is collectively responsible to the Lok Sabha, hence as soon as a Ministry looses the confidence of the House or is defeated on any question of policy, it must resign.

g. Judiciary – Jurisdiction of Supreme Court and High Courts:

Supreme Court—the Guardian of the Constitution:

The Supreme Court under our Constitution is such arbitration. It is the final interpreter and guardian of the Constitution. In addition, to the above function of maintaining the supremacy of the Constitution, the Supreme Court is also the guardian of the Fundamental rights of the people.

Jurisdiction of the Supreme Court:

A Court of Record: Article 129 makes the Supreme Court a 'Court of Record' and confers all the powers of such a court including the power to punish for its contempt. A Court of Record is a court whose records are admitted to be of evidentiary value and they are not to be questioned when they are produced before the court. Once a court is made a Court of Record, its power to punish for contempt necessarily follows from that position. The power to punish for contempt of court has been expressly conferred on the Supreme Court by our Constitution. This extraordinary power must be sparingly exercised only where the public interest demands.

Original Jurisdiction—Article 131:

The Supreme Court has original jurisdiction in any dispute:-

(a) Between the Government of India and one or more States;
(b) Between the Government of India and any State or States on one side one or more other States on the other;
(c) Between two or more States.

The Supreme Court in its original jurisdiction cannot entertain any suits brought by private individuals against the Government of India. The dispute relating to the original jurisdiction of the Court must involve a question of law or fact on which the existence of legal right depends. This means that the Court has no jurisdiction in matters of political nature. The term 'legal right' means a right recognized by law and capable of being enforced by the power of a State but not necessarily in a court of law.

The original jurisdiction of the Supreme Court, however, does not extend to the following matters:

(1) Article 131 of the Constitution says, that, the jurisdiction of the Supreme Court shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which was executed before the commencement of the Constitution and continues to be in operation or which provides that the jurisdiction of the Supreme Court shall not extend to such a dispute.
(2) Under Article 264 Parliament may by law exclude the jurisdiction of the Supreme Court in disputes with respect to the use, distribution or control of the water of any inter-State river or river-valley.
(3) Matters referred to the Finance Commission (Article 280

(4) The adjustment of certain expenses between the Union and the State (Article 290).

Appellate Jurisdiction—Article 132:

The Supreme Court is the highest Court of Appeal in the country. The writ and decrees of the Court run throughout the country. It can be truly said that the jurisdiction and powers of the Supreme Court in their nature and extent are wider than those exercised by the High Courts of any country in the Commonwealth or by the Supreme Court of the U.S.A.

The Appellate Jurisdiction of the Supreme Court can be divided into four main categories:-

(a) Constitutional matters,
(b) Civil matters,
(c) Criminal matters,
(d) Special leave to appeal.

Power of the Supreme Court to withdraw and transfer cases –article 139-A:

Article 139-A (1) provides that if on an application made by the Attorney-General of India or by a party or on its own motion the Supreme Court is satisfied that cases involving the same or substantially the same question of law are pending before the supreme Court and one or more High Courts or before two or more High Courts and that such questions are substantially question of general importance, it may withdraw them and dispose them itself. It may after disposing of the said question of law return any case to the High Court with a copy of its judgment and then the High Court will dispose of the case in accordance with such judgment. Clause (2) of Article 139-A empowers the Supreme Court to transfer cases, appeals or other proceedings from any High Court to another High Court it thinks it expedient to do so for the end of justice.

Advisory Jurisdiction of the Supreme Court—Article 143:

Article 143 provides that if at any time it appears to the President that—(a) a question of law or fact has arisen or is likely to arise, and (b) the question is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question for the Advisory opinion of the Court and the Court may after such hearing as it thinks fit, report to the President its opinion thereon.

Under clause (2), if the President refers to the Supreme Court matters which are excluded from its jurisdiction under the provision to Article 131, the Court shall be bound to give its opinion there on.

Law declared by the Supreme Court to be binding on all courts—Article 141:

The judgment of the Supreme Court will be binding on all courts in India. The expression "all courts, within the territory of India" clearly means courts other than the Supreme Court. Thus the Supreme Court is not bound by its own decisions and may in proper case reverse its previous decisions.

Jurisdiction of the High Courts:

A Court of Record:-

Article 215 declares that every High Court shall be a Court of Record and shall have all powers of such a court including the power to punish to punish for its contempt. The scope and nature of the power of High Court under this Article is similar to the powers of the Supreme Court under Article 129.

General Jurisdiction:

Article 225 says that subject to the provisions of the Constitution and to the provision of any law of the appropriate Legislature (a) the jurisdiction of the High Court, (b) the law administered in the existing High Court, (c) the powers of the judges in relation to the administration of justice in the courts, (d) the power to make rule of the High Court shall be the same as immediately before the commencement of this Constitution. Thus the pre-Constitutional jurisdiction of the High Court is preserved by the Constitution. Article 225 thus gives jurisdiction over revenue matters. In pre-Constitution period the decisions of the Privy Council were binding on all the High Courts under Section 212 of the Government of India Act. The effect of the present Article is the same and they are still binding on the High Courts unless it is reversed by the Supreme Court or by a law of the appropriate legislature.

This means that the jurisdiction and powers of the High Courts can be changed both by the Union Parliament and the State Legislatures.

Power of superintendence over all courts by the High Courts:

Under Article 227 every High Court has the power of the superintendence over all courts and tribunals throughout the territory in relation to which it exercises jurisdiction. For this purpose, the High Court may call returns from them, make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts and prescribe forms in which books, entries and accounts are to be kept by the officers of such courts, and settle table of fees to be given to the sheriff, clerks, attorneys, advocates and pleaders. However this power has given for superintendence of High Court does not extend over any Court or Tribunal constituted by law relating to the Armed Forces.

Transfer of certain cases to High Courts:

Under 228 the High Court has power to withdraw a case from a subordinate Court, if it satisfied that a case pending in a subordinate Court involves a substantial question of law as to the interpretation of the Constitution. It may then either dispose of the case itself or may determine the said question of law

and return the case to the subordinate Court with a copy of its judgment. The subordinate Court will then decide the case in conformity with the High Court's judgment.

Writ Jurisdiction of the High Court (Article 226):

Article 226 provides that not withstanding anything in Article 32 every High Court shall have power, throughout the territorial limits in relation to which it exercises jurisdiction to issue to any person or authority including the appropriate cases, any government, within those territories, directions, orders of writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them –(a) for the enforcement of fundamental rights conferred by Part III, and (b) for 'any other purpose'. Thus the jurisdiction of a High Court is not limited to the protection of the fundamental rights but also other legal rights as is clear from the words "any other purpose". Those words make the jurisdiction of the High Court more extensive than that of the Supreme Court which is confined to only for the enforcement of fundamental rights. The words "for any other purpose", refer to enforcement of a legal right or legal duty. They do not mean that a High Court can issue writs for any purpose it pleases.

Extension of jurisdiction of High Court:

Under article 230, Parliament can by law extend or exclude jurisdiction of a high Court over any Union Territory. The Legislature of a State cannot increase, restrict or abolish the jurisdiction.

h. Independence of Judiciary:
Independence of judiciary—Under the Constitution:

Only an impartial and independent judiciary can protect the rights of the individual and provide equal justice without fear or favor. It is, therefore, very necessary that the Supreme Court should be allowed to perform its functions in an atmosphere of independence and be free from all kinds of political pressures. The Constitution has made several provisions to ensure independence of Judiciary.

Security of tenure:

The Judges of the Supreme Court have security of tenure. They cannot be removed from office except by an order of the President and that also only on the ground of proved misbehavior or incapacity, supported by a resolution adopted by a majority of total membership of each House and also by a majority of not less than 2/3 of the members of the House present and voting. Parliament may, however, regulate the procedure for presentation of the address and for investigation and proof of the

misbehavior or incapacity of a Judge. But Parliament cannot misuse this power, because the special procedure for their removal must be followed.

The following are some of other important grounds explaining independence of Judiciary:-

1. Salary of Judges fixed, not subject to vote of Legislature,
2. Parliament can extend, but cannot curtail the jurisdiction and power of the Supreme Court,
3. No discussion in Legislature on the conduct of the Judges,
4. Power to punish for its contempt,
5. Separation of Judiciary from executive,
6. Judges of the Supreme Court are appointed by the Executive with the consultation of Legal Experts,
7. Prohibition on Practice after Retirement.

Thus the position of the Supreme Court is very strong and its independence is adequately guaranteed. However, there are certain disturbing trends which are likely to threaten the independence of judiciary at present.

(1) Although Article 124 vests the legal power of appointment in the executive but the executive is required to 'consult' legal experts i.e., judges of the Supreme Court and High Courts in appointing judges of the higher courts. But unfortunately, the Supreme Court interpreted the word 'consultation' in such a literal manner that it gave virtually discretion in the matter. In judges transfer case I (S.P.Gupta Vs Union of India) the Supreme Court held that the word "consultation", did not mean concurrence and the Executive was not bound by the advice given by the judges. The Government may completely ignore the advice of legal experts. Thus the power of appointment of the Judges of the Supreme Court and the transfer of the High court Judges was solely vested in the Executive from whose dominance the Judiciary was expected to be free. By conceding the power of appointment exclusively to the Executive, it is submitted, the court had itself put the independence of the judiciary into danger. Mr. Justice Bhagwati of the Supreme Court in the S.P.Gupta's case had suggested for establishment of a judicial commission for recommending the names of persons for the appointment of the Judges of the Supreme Court and High Courts.

(2) The power of the President under article222 to transfer a judge from one High Court to another may also be used to undermine the independence of the judiciary.

i. **Public interest litigation**

Law-making has assumed new dimensions through judicial activism of law courts. Public Interest Litigation (PIL) or Social Action Litigation introduced by the Supreme Court of India in the Constitutional jurisprudence is a major example of Supreme Court's judicial activism. Hitherto, the rigidity of the

locus stand rule deprived the poorer sections of the society from approaching the courts for enforcement of their fundamental rights against the rich and affluent class of society but now the public interest litigation has liberalized the locus standee rule to such an extent that it has opened new vistas for the redressed of the social problems.

About the PIL the Supreme Court has written, "The question "What PIL means and is"? has been deeply surveyed, explored and explained not only by various judicial pronouncements in many countries, but also by eminent judges, jurists, activist lawyers, outstanding scholars, journalists and social scientists etc. with a vast erudition. Basically, the meaning of the words 'Public Interest' is defined in the OXFORD ENGLISH DICTIONARY, as "the common well being is also public welfare".

PIL means a legal action initiated in the Court of Law for the enforcement of public interest or general interest in which the public or a class or community have pecuniary interest or some interest by which their legal rights or liabilities are effected.

PIL originated from the United States where it was firmly established around 1965. In England, it was started in the name of Citizens' Action wherein any citizen could file a writ against public authorities for the cause of common man.

In India, the seeds of PIL were sown by the Justice Krishna Iyer in 1976 in the case of Mumbai Kamgar Sabha v. Abdulbhai. In this case, while disposing of an industrial dispute in regards to the payment of bonus, he observed:

"Our adjectival branch of jurisprudence by and large deals not with sophisticated litigants but the rural poor, the urban lay and the weaker societal segments for whom law will be an added terror if technical mis-descriptions and deficiencies in drafting pleadings and setting out the cause title create a secret weapon to non-suit a party. Where foul play is absent, and fairness is not faulted, latitude is grace of procedural justice. Test litigations, representative actions, *pro bono public* and like broadened forms of legal proceedings are in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to by-pass the real issues on the merits by suspect reliance on peripheral procedural shortcomings. Even Art 226, viewed on wider perspective, may be amenable to ventilation of collective or common grievances, as distinguished from assertion of individual rights although the traditional view, backed by precedents has opted for the narrower alternative. Public interest is promoted by a spacious construction of locus standi in our socio-economic circumstances, and conceptual latitudinarianism permits taking liberties with individualization

of the right to invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker. Less litigation, consistent with fair process, is the aim of adjectival law".

The court permits public interest litigation at the instance of 'public spirited citizens' for the enforcement of the Constitutional and legal rights of any person or groups of persons who because of their poverty or socially or economically disadvantaged position are unable to approach the court for relief.

In A.B.S.K. Sangh (Rly) v. Union of India, it was held that the Akhil Bhartiya Soshit Karamchari Sangh (Rly) though an unregistered association could maintain a writ petition under Art 32 for the redressal of a common grievance. KRISHNA IYER, J, declared that access to justice through 'class actions', ' public interest litigation' and 'representative proceedings' is the present Constitutional jurisprudence.

In the Judges Transfer Case the rule regarding the PIL was firmly established. The court held that any member of the public having "sufficient interest" can approach the court for enforcing Constitutional or legal rights of other persons and redressal of a common grievance. BHAGWATI, J., observed: "Where a legal wrong or legal injury is caused to person or to a determinate class of persons by reason of violation of any Constitutional or legal right and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction or order or writ in the High Court under Article 226 or in case of breach of any Fundamental Right to this court under Article 32. Where the weaker sections of the community are concerned such as under-trial prisoners languishing in jails without trial, inmates of the Protective Home in Agra or Harijan workers engaged in road construction in the District of Ajmer, who are living in poverty and desolation, who are barely eking out a miserable existence with their sweet and toil, who are helpless victims of an exploitative society and who do not have easy access to justice, the Supreme Court will not insist on a regular writ petition to be filed by the public spirited individual espousing their cause and seeking relief for them. The Supreme Court will readily respond to a letter addressed by such individual acting pro bono public. It is true that there are rules made by the Supreme Court prescribing the procedure for moving it for relief under Article 32 and they require various formalities to be of one through by a person seeking to approach it. But it must not be forgotten that procedure is but a handmade of justice and the cause of justice may never be allowed to be wasted by any

procedural technicalities. The Court will therefore unhesitatingly cast aside the technical rules of procedure in the exercising of its dispensing power and treat the letter of the public minded individual as a writ petition and act upon it".

Certain guidelines for taking precaution against misuse of PIL have also been given by BHAGWATI, C.J. In his words:

"But we must be careful to see that the member of the public, who approaches the court in case of this kind, is acting bonafide and not for personal gain or private profit or political motivation or other oblique consideration. The court must not allow its process to be abused by politicians and others……"

For example, in the case of Janta Dal v. H.S. Chowdhari ' (Bofors Gun case), the petitioner tried to abuse the Public Interest Litigation for political purposes. Similarly, Krishna Swami V/s. Union of India, Simranjit Singh Mann v. Union of India can also be included in this category. PIL jurisdiction has been actually evolved for socio-economic justice. Supreme Court has pointed out that "the compulsion for the judicial innovation of the technique of a public interest action is the Constitutional promise of a social and economic transformation to usher in an egalitarian social order and a welfare State. Effective solutions to the problems peculiar to this transformation are not available in the traditional judicial system. The proceedings in a public interest litigation are, therefore, intended to vindicate and effectuate the public interest by prevention of violation of the rights, Constitutional or statutory, of sizeable segments of the society, which owing to poverty, ignorance, social and economic disadvantages cannot themselves assert and quite often not even aware of those rights. The technique of public interest litigation serves to provide an effective remedy to enforce these rights and interests".

Thus under this jurisdiction Supreme Court proceeded to secure social justice to the weaker section of the society. It observed in People's Union for Democratic Rights v. Union of India.

"The time has now come when the courts must become the courts for the poor and struggling masses of this country. They must shed their character as upholders of the established order and the status quo. They must be sensitized to the need of doing justice to the larger masses of people to whom justice has been denied by a cruel and heartless society for generations. It is through public interest litigation that the problems of the poor are now coming to the forefront and the entire theatre of the law is changing. It holds out greater possibilities for the future.

Main grounds on which PIL is available are as follows:

Protection of weaker sections of society.-

Public or social interest litigation is innovative strategy which has been evolved by the Supreme Court for the purpose of providing easy access to justice to the weaker sections of Indian humanity and it is a powerful tool in the hands of public inspired individuals and social action groups for combating exploitation and injustice and securing for the underprivileged segments of society, their social and economic entitlements.

In Lakshmi Kant Pandey v. Union of India a writ petition was filed on the basis of a letter complaining of malpractices indulged in by social organizations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. Certain principles and norms were laid down in this case which were to be followed in determining whether a child should be allowed to be adopted by foreign parents.

In M.C. Mehta Vs Union of India it was held that the children cannot be employed in match factories which are directly connected with the manufacturing process as it is a hazardous employment within the meaning of the Employment of Children Act, 1938. In many cases Supreme Court has passed orders and issued directions for the welfare and protection of labor.

The court also has the power under Article 32 to award costs of public interest petition to the petitioner who was not in legal profession but brought an important matter before the court for its consideration. In Sheela Barse v. Union of India the Court directed the Central Government to pay to the petitioner, a social worker, Rs. 10,000 for the expenses and to extend all necessary assistance to him as he offered to personally visit different parts of the country to verify whether the information submitted by the Authorities regarding children bellow the age of 18 years detained in jails in different States of the country was correct.

Similarly, in D.C Wadhwa V/s State of Bihar the petitioner, a Professor of Political Science who had done substantial research and was deeply interested in ensuring proper implementation of the Constitutional provisions, challenged the practice followed by the State of Bihar in re promulgating a number of ordinances without getting the approval of the legislature. The Court held that the petitioner as a member of public has 'sufficient interest' to maintain a petition under Art. 32. The Court directed the State of Bihar to pay Rs. 10,000 to Dr. Wadhwa whose research brought to light this repressive practice.

In Bandhua Mukti Morcha v. Union of India the Supreme Court issued directions to Government to ensure the welfare of bonded labourers.

In Consumer Education and Research Center V/S. Union of India" the Supreme Court held asbestos factories or companies to be bound to compensate the workmen for the health hazards which were the cause for disease a workman was suffering from.

Protection of ecology and environmental pollution.-

In Rural Litigation and Entitlement Kendra v/s State of U.P., the Court ordered the closure of certain lime stone quarries on the ground that there were serious deficiencies regarding safety and hazards in them.

Similarly, in Shriram Food and Fertilizer case, the Supreme Court directed the company manufacturing hazardous and lethal chemicals and gases posing danger to health and life of workmen and people living in its neighborhood, to take all necessary safety measures before reopening the plant.

litigation was instituted to check invasion of the right to life of individuals by pollution caused by private sector companies. In India Council for Enviro Legal Action v. Union of India a public interest litigation was instituted to check invasion of the right to life of individuals by pollution caused by private sector companies.

In M.C Mehta V/s. Union of India," the Supreme Court ordered the closure of the tanneries at Jajmau near Kanpur, polluting the Ganga; the matter was brought to the notice of the court by the petitioner, a social worker, through public interest litigation.

In M C. Mehta v. Union of India, the Supreme Court directed that hazardous and noxious industries to be shifted away from Delhi as per provision of the Master Plan prepared under National Capital Region Planning Board Act.

In M.C. Mehta v. Union of India, the Supreme Court directed the closure of mining operations within 2 km. radius of Badkhal Lake and Suraj Kund and further directed that mining leases within areas of 2 to 5 km. should not be renewed unless no objection of State and Central Pollution Control Board was obtained.

Securing human rights and human dignity.-

In Ramesh v. Union of India" it has been held that public interest litigation for ensuring communal harmony is maintainable under Art 32 of the Constitution.

In a judgment of far reaching importance in Parmanand Katara v. Union of India the Supreme Court held that it is a paramount obligation of every member of medical profession (Private or Government) to give medical aid to every injured citizen brought for treatment immediately without waiting for procedural formalities to be completed in order to avoid negligent death. The matter was brought to the notice of the court by petitioner, a human right activist, fighting for general public interest.

In an important judgment in National Federation of Blind V/s U.P.S.C. the Supreme Court held that the visually handicapped persons are eligible to compete and take civil services examination in the categories of Group 'A' and 'B' posts which are suitable for the handicapped in Braille script or with the help of a scribe.

In National Human Rights Commission v. State of Arunachal Pradesh public interest litigation was instituted to restrain the Government of Arunachal Pradesh driving away from the State Chakma Refugees from Bangla Desh. In this case, the Supreme Court held that the right to life and equality clause is applicable to every person whether he be a citizen or otherwise.

Epistolary jurisdiction of the Supreme Court and the High Court is added new dimensions to the scope of PIL in India. Under this jurisdiction, even ordinary letters and newspaper cuttings have been treated as writ petitions and the courts have initiated suo motu action against the erring Authorities.

In Bandhua Mukti Morcha v. Union of India, an organization dedicated to the cause of release of bonded labors' informed the Supreme Court through a letter that they conducted a survey of the stone-quarries situated in Faridabad District of the State of Haryana and found that there were a large number of laborers working in these stone-quarries under "inhuman and intolerable conditions" and many of them were bonded laborers. The Supreme Court said: "Article 21 assures the right to live with human dignity, free from exploitation. The State is under a Constitutional obligation to see that there is no violation of the fundamental right of any person, particularly when he belongs to the weaker sections of the community and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him. Both the Central Government and the State Government are, therefore, bound to ensure observance of social welfare and labor laws enacted by Parliament for the purpose of securing to the workman a life of basic human dignity in compliance with the Directive Principles of State Policy".

In Consumer Education and Research Centre v. Union of India the court said that the right to life ensures to workmen right to health and medical care.

Matters of public interest.-

In Vineet Narain v. Union of India (Hawala case), the Supreme Court directed CBI and revenue authorities to properly and expeditiously investigate the matter. The Supreme Court has been exercising this jurisdiction to check arbitrary and mala fide acts by public servants. In Common Cause a, Registered Society v. Union of India, a PIL was filed challenging the allotment of petrol pumps made by Minister for Petroleum and Natural Gas, Captain Satish Sharma, from discretionary quota as arbitrary and mala fide and illegal. The Supreme Court found the allotments to be arbitrary, discriminatory, mala fide and illegal and directed the Minister to pay a sum of Rs 50 lakhs as exemplary damages to the Government Exchequer. However, the direction as to payment of exemplary damages was set aside in judicial review.

Similarly in Shiva Sagar Tiwari v. Union of India the Minister for Housing and Urban Development was held liable to pay Rs 60 lakhs as exemplary damages to the Government Exchequer for the arbitrary, mala fide and unconstitutional allotment of shops/stalls by the Minister to his own relatives/employees/domestic servants out of discretionary quota.

Granting of reliefs.-

In Delhi Judicial Service Associations v. State of Gujarat" the petitioner had filed a PIL before the Supreme Court that the Chief Judicial Magistrate of Nadiad, Gujarat had been arrested, assaulted, handcuffed and humiliated by police officers and prayed for taking action against the police officers for committing contempt of court and for saving the dignity and honor of judiciary. The Supreme Court on finding the truth sent those police officers to jail. The area of PIL has been growingly widening. The rule of locus standi has been further relaxed and High Courts are also exercising jurisdiction under Article 226 of the Constitution in this matter.

Interaction of social forces and law

In all societies intersection of social forces and law tend to mould each other. In democratic societies it is articulate and clearly discernible. In the words of Friedmann, "In a democracy the interplay between social opinion and the law moulding activities of the State is more obvious and articulate one. Public opinion on vital social issues constantly expresses itself not only through elected representatives in the Legislative Assemblies, but through public discussion in press, radio, public

lectures, pressure groups and, on a more sophisticated level, through scientific and professional associations, universities and a multitude of other channels.

Because of this constant interaction between the articulation of public opinion and the legislative process, the tension between the legal and the social norms can seldom be too great. It is not possible in a democratic system to impose a law on an utterly hostile community. But, a strong social ground-swell sooner or later compel the legal action. Between these two extremes, there is a great variety of the patterns of challenge and response. On the one hand, law may an irresistible tide of social habit or opinion. On the other hand, a determined and courageous individual or small minority group may initiate and pursue a legal change in the face of governmental or Parliamentary lethargy, and an indifferent public opinion. Such legislation as now exists in many countries for the preservation of forests or wild life, or the conservation of other vital resources has been the belated result of the determined efforts of small group of men who saw beyond the immediate interest not only of vested interests but of the ordinary legislator and government execution".

j. Power of Judicial Review:

Article 13 in fact provides for the 'judicial review' of all legislations in India, past as well as future. This power has been conferred on the High Courts and the Supreme Court of India (Article 226, Article32) which can declare a law unconstitutional if it is inconsistent with any of the provisions of Part III of the Constitution.

Meaning and basis of Judicial Review:

'Judicial Review" is the power of courts to pronounce upon the constitutionality of legislative acts which fall within their normal jurisdiction to enforce and power to refuse to enforce such as they find to be unconstitutional and hence void. "Judicial Review" said Khanna, J., in the Fundamental Rights case, "has thus become an integral part of our Constitutional System and a power has been vested in the High Courts and the Supreme Court to decide about the constitutional validity of the provisions of statutes. If the provisions of the statutes are found to be violative of any of the articles of the Constitution which is the touchstone for the validity of all laws the Supreme Court and the High Courts are empowered to strike down the said provisions".

The doctrine of judicial review was for the first time propounded by the Supreme Court of America. Originally, the United States Constitution did not contain an express provision for judicial review. The

power of judicial review was however assumed by the Supreme Court of America in the historic case of Marbury Vs Madison.

In the Indian Constitution there is an express provision for judicial review, and in this sense it is on a more solid footing than it is in America. In The State of Madras Vs V.G.Row, Patanjali Sastri, C.J., observed, "Our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted 'due process' clause in the Fifth and Fourteenth Amendments. If then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority and a crusader's spirit, but in discharge of duty plainly laid upon them by the Constitution. This is especially true as regards the fundamental rights as to which the Court has been assigned the role of sentinel on the qui vive".

But even in the absence of the provision for judicial review, the courts would have been able to invalidate a law which contravened any constitutional provision, for, such power of judicial review follows from the very nature of constitutional law. In A.K. Gopalan Vs State of Madras, Kania,C.J., pointed out that it was only by way of abundant caution that the framers of our Constitution inserted the specific provisions in Article 13. He observed: "In India, it is the Constitution that is supreme and that a statute law to be valid, must be in all conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not."

In Kesavananda Bharati's case it has been held that Judicial Review is the 'basic features' of the Indian Constitution and, therefore, it "cannot be damaged or destroyed by amending the constitution under Article 368 of the Constitution".

Again, in L. Chandra Kumar Vs Union of India, 1997, the Supreme Court has held that the power of judicial review of legislative action as vested in the High Court under Article 226 and in the Supreme Court under Article 32 is part of the basic structure of the Constitution and can be ousted or excluded even by the constitutional amendment.

k. Doctrine of Political Question:

In 1962, the Supreme Court of U.S.A was seized of a matter that went down in history as one of its most important decisions ever. The matter involved a delineation of the extent of judicial review, while dealing with whether 'equal protection of laws' was violated by the borders of a district not being redrawn appropriately to adjust for population movement. The issue came down to whether the Court could in fact investigate and adjudicate on such issues, given the existence of a strict separation of

powers. The issue was of great political importance, perhaps the most important since Marbury v. Madison, and the conflicting views prevalent led Justice Whittaker to recuse himself from the Bench. The matter was ultimately reviewed by the Court on merits and the issue of redistricting was held reviewable, but the doctrine of political question was reaffirmed and established for posterity. This was the case of Baker v. Carr.

The doctrine of political question in public law, essentially limits judicial review in certain areas, since the judiciary would be the inappropriate arbiter for such disputes, lacking knowledge of issues with the polity would be best acquainted with. It acts as a check to judicial power and grants latitude to the political executive as regards a certain sense of absolutism in these specifically charted areas.

The Court, in Justice Brennan's majority opinion identified the following as the fundamental tests to determine what issues were political questions and what were not:

■Is there a textually demonstrable constitutional commitment of the issue to a coordinate political department (i.e. foreign affairs or executive war powers)?

■Is there a lack of judicially discoverable and manageable standards for resolving the issue?

■The impossibility of deciding the issue without an initial policy determination of a kind clearly for nonjudicial discretion.

■The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government.

■Is there an unusual need for unquestioning adherence to a political decision already made?

■Would attempting to resolve the matter create the possibility of embarrassment from multifarious pronouncements by various departments on one question?

In India, the doctrine stands on somewhat shaky ground. The question has been discussed only in a string of President's Rule cases, in the context of limits on the power of the Governor under Article 356. First discussed in cases such as State of Rajasthan v. Union of India and State of Karnataka v. Union of India, the doctrine has since been eroded by what Baxi aptly terms 'expansion of the frontiers of judicial power'. However, after the authoritative exposition of the law in S.R. Bommai v. Union of India, the position seems to be settled on the 'sufficiency of materials' test alone.

The Courts position has at all times been cognizant of the fact that in the United States of America, what is followed is a 'strict separation of powers', as opposed to India, where checks and balances in practice is preferred to watertight compartmentalisation (See Ram Jawaya Kapur v. State of Punjab). However, Justices Bhagwati and Chandrachud both speak of the methaporical 'political thicket' as a forbidden area for judicial intervention, stating in no uncertain terms that it is one from which Judges must 'scrupulously keep away'.

Indeed, ambivalence surrounds the position of law today, with cases like Ram Jethmalani only indicating that very often the thrill of entering the political thicket is one that the judiciary finds hard to resist. Nevertheless, the doctrine is a useful one in the context of a check on judicial power, something that is being clamoured for vehemently in the public arena even as this is written. Also, as an aside, it is important to note that the political question doctrine is independent and different from the 'policy decision' jurisprudence post BALCO Employees Union v. Union of India. In fact, my previous usage of the black money case as an example of breach of the political question doctrine would be apposite to the 'policy decision' context rather than this one.

In either case, the doctrine is extremely relevant in the context of separation of powers and judicial activism, as well as in light of the constant passing off by the Parliament of law-making responsibility to the SC. The Court could simply recuse itself from forced determination of such questions, since evidently it is seen only as a forum of convenience for the State. Examples of such questions abound: Vishakha, Indra Sawhney, Ashok Kumar Thakur, the Ayodhya case and even the Bhopal case in many aspects. A notable exception would be the guidelines regarding arrest procedure laid down in DK Basu v. State of West Bengal and the recent amendment to the CrPC.

Unit – IV: Emergency Provisions:

Amendment of Constitution:

Provision for amendment of the Constitution is made with a view to overcome the difficulties which may encounter in future in the working of the Constitution.

"It has been the nature of the amending process itself in federation which has led political scientist to classify federal Constitution as rigid. A federal Constitution is generally rigid in character as the procedure of amendment is unduly complicated. The procedure of amendment in American Constitution is very difficult. So is the case with Australia, Canada and Switzerland. It is a common critism of federal Constitution that is too conservative, too difficult to alter and that it is consequently behind the times."

The framers of the Indian Constitution were keen to avoid excessive rigidity. They were anxious to have a document which could grow with a growing nation, adapt itself to the changing need and circumstances of a growing people. The nature of the 'amending process' envisaged by the framers of our Constitution can best be understood by referring the following observation of the late Prime Minister Pt.Nehru, "While we want this Constitution be as solid and permanent as we can make it, there is no permanence in the Constitution. There should be certain flexibility. If you make anything rigid and permanent you stop the nation's growth, of a living, vital, organic people……In any event, we could not make this Constitution so 'rigid' that it cannot be adopted to changing conditions.

But the framers of Indian Constitution were also aware of the fact that if the Constitution was so flexible it would be a playing of the whims and caprices of the ruling party. They were, therefore, anxious

to avoid flexibility of the extreme type. Hence, they adopted a middle course. It is neither too rigid to admit necessary amendments, nor flexible for undesirable changes.

The machinery of amendment should be like a safety valve, so devised as neither to operate the machine with too great facility nor to require, in order setting in motion, an accumulation of force sufficient to explode it. The Constitution-makers have, therefore, kept the balance between the danger of having non-amendable Constitution and a Constitution which is too easily amendable.

For the purpose of amendment the various Articles of the Constitution are divided into three categories: (1) Amendment by Simple Majority, (2) Amendment by Special Majority and (3) By Special Majority and Ratification by States.

Procedure for Amendment:

A Bill to amend the Constitution may be introduced in either House of Parliament. It must be passed by each House by a majority of the total membership to that House and by a majority of not less than 2/3 of the members of that House present and voting. When a Bill is passed by both Houses it shall be presented to the president for his assent who shall give his assent to Bill and thereupon the Constitution shall stand amended. But a Bill which seeks to amend the provisions mentioned in Article 368 requires in addition to the special majority mentioned above the ratification by the ½ of the States.

Doctrine of Basic Structure:

Theory of Basic Structure of the Constitution – A limitation on amending power:

The Judges have enumerated certain essentials of the basic structure of the Constitution, but they have also made it clear that they were only illustrative and not exhaustive. They will be determined on the basis of the facts in each case.

The validity of the Constitution (24th Amendment) Act, 1971, was challenged in *Keshvananda Bharati Vs State of Kerala*, popularly known as the Fundamental Right's case the petitioners had challenged the validity of the Kerala Land Reforms Act 1963. But during the pendency of the petition the Kerala Act was amended in 1971 and was placed in the Ninth Scheduled by the 29th Amendment Act. The petitioners were permitted to challenge the validity of Twenty Fourth, Twenty Fifth and Twenty Ninth Amendment to the Constitution also. The question involved was as to what was the extent of the amending power conferred by Article 368 of the Constitution? On behalf of the Union of India it was claimed that amending power was unlimited and short of repeal of the Constitution any change could be

effected. On the other hand, the petitioner contended that the amending power was wide but not unlimited. Under Article 368 Parliament cannot destroy the "basic feature" of the Constitution. A Special Bench of 13 Judges was constituted to hear the case.

The Court by majority overruled the Golak Nath's case which denied Parliament the power to amend fundamental rights of citizens. The majority held that Article 368 even before the 24th Amendment contained the power as well as the procedure of amendment.

The Court held that underArt.368 Parliament is not empowered to amend the basic structure or framework of the Constitution.

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