

LL.M-I
PAPER II –
INDIAN CONSTITUTIONAL LAW: THE NEW
CHALLENGES.

Index

1. Federalism

- 1.1 Creation of new states
- 1.2 Allocation and share of resources - distribution of grants in aid
- 1.3 The inter-state disputes on resources
- 1.4 Rehabilitation of internally displaced persons.
- 1.5 Centre's responsibility and internal disturbance within States.
- 1.6 Directions of the Centre to the State under Article 356 and 365
- 1.7 Federal Comity: Relationship of trust and faith between Centre and State.
- 1.8 Special status of certain States.
- 1.9 Tribal Areas, Scheduled Areas.

2. "State": Need for widening the definition in the wake of liberalisation.

3. Right to equality: privatisation and its impact on affirmative action.

4. Empowerment of women.

5. Freedom of press and challenges of new scientific development

- 5.1. Freedom of speech and right to broadcast and telecast.
- 5.2. Right to strikes, *hartal* and *bandh*.

6. Democratic process

- 6.1. Nexus of politics with criminals and the business.**
- 6.2. Election**
- 6.3. Election commission: status.**
- 6.4. Electoral Reforms**

7. Right of minorities to establish and administer educational institutions and state control.

8. Secularism and religious fanaticism.

UNIT I

Federalism

1.0 Objectives

1.1 Introduction

1.2 Topic Explanation

- 1.2.1 Creation of new states
- 1.2.2 Allocation and share of resources - distribution of grants-in-aid
- 1.2.3 The inter-state disputes on resources
- 1.2.4 Rehabilitation of internally displaced persons.
- 1.2.5 Centre's responsibility and internal disturbance within States.
- 1.2.6 Directions of the Centre to the State under Article 356 and 365
- 1.2.7 Federal Comity: Relationship of trust and faith between Centre and State.
- 1.2.8 Special status of certain States.
- 1.2.9 Tribal Areas, Scheduled Areas.

1.3. Questions for self learning

1.4. Let us sum up

1.5. Glossary

1.6. References

1.0 Objectives

- 1) To make students aware of the nature of the Indian Constitution.
- 2) To examine whether the Indian Constitution possesses the characteristics of federal government.

3) To understand the different aspects of relationship between the centre and states in various matters.

1.1 Introduction

According to the traditional classification followed by the political scientists constitutions are either unitary or federal. In the unitary Constitution the powers of government are centralized in one government viz, the central government. The provinces are sub-ordinate to the centre.

In federal constitution, there is a division of powers between the federal and the state governments and both are independent in their own spheres.

Federalism constitutes a complex governmental mechanism for the governance of the country.

K.C. Ware – “federalism means the method of dividing powers, so that the general and regional governments are each within a sphere co-ordinate and independent. Both the federal and the regional governments are co-ordinate and independent in their spheres and not sub-ordinate to one another”.

The American Constitution is universally regarded as an example of federal constitution. It establishes dual policy or dual form of government that is the federal and the state governments. The power of both the central and state governments are divided and both are independent in their own spheres. The existence of co-ordinate authorities independence of each other is the gist of federal principles.

Test for identifying federalism-

It is laid down by Prof. Jennings in the form of questions. They are-

1) Are we to confine the forms to case where the federal principle has been applied completely and without exception?

2) The federal principle is predominant in the Federalism. It comprises a complex government mechanism for the governance of the country. It seeks to draw a balance between the forces working in favour of concentration of power in the centre and those urging a dispersal of it in number of units. The framer of Indian Constitution attempted to avoid the difficulties faced by the federal constitution of U.S.A., Canada and Australia and incorporated certain unique features in the working of Indian Constitution. Thus our Constitution contains novel provisions suited to the Indian conditions. The doubt which emerges about the federal nature of the Indian Constitution is the powers of intervention in the affairs of states given to the Central Government by the Constitution.

According to Ware– “in practice the constitution of India is quasi-federal in nature and not strictly federal”

Sir Jennings was of the view that India has ‘a federation with strong center policy’.

In the words of D.D. Basu – “The Constitution of India is neither purely federal nor unitary but is a combination of both. It is a Union or a composite of a novel type”.

The Indian Constitution is not only regarded as federal or unitary in the strict sense of terms. It is often defined to be quasi federal in nature also. Through the Constitution, emphasis is laid on the fact that India is a single united nation. India is described as a Union of states and is constituted into a Sovereign, Secular, Socialist, Democratic and Republic.

The constituent Assembly being aware that notwithstanding a common cultural heritage without political unity the country would disintegrate under the pressure of various forces therefore it addressed itself to the immensely complex task of devising a union with a strong centre. Article 1 says that – *India will be*

union of states. The constitution thus postulated India as Union of states and consequently the existence of federal structure of governance for this Union of states becomes a basic structure of the Union of India.

Dr. Ambedkar, the principal architect of the constitution observed that – the use of word Union is deliberate. The drafting committee wanted to make it clear that though the Idea was to be a federation, the federation was not a result of an agreement by the states to join in the federation and that federation not being the result of an agreement no state has right to separate from it. Though the country and the people may be divided into different states for convenience of administration the whole country is one integral whole.

1.2 Topic Explanation

1.2.1. Creation of New States

Under Article (1) India has been characterized as a ‘Union of states, Union territories and any other territories’ that may be acquired by the government of India at any time. Article 1(3)-Parliament’s power to reorganise states.

a) Admission of New states- Article 2

Under Article 2 of the Constitution Parliament is empowered to enact a law to admit into the union or establish, new states on such terms and conditions as it thinks fit.

Thus Article 2 gives two powers to the parliament-

- (i) To admit new states into the Union.
- (ii) The power to establish new states.

The first refers to the admission of states which are already in existence and are dully formed. The second refers to the admission and formation of a state which was not in existence before.

It is worth noticing that the admission or establishment of a new state will be “on such terms and conditions as parliament may think fit” Here again our Indian Constitution differs from the American and Australian Constitutions which accept the theory of equality of states.

Article 2 gives complete discretion to the parliament to admit or establish new states on such terms as it thinks fit.

After new state is admitted or the boundaries of the existing states are altered the parliament can by law make all consequential changes in the Constitution by simple majority and any Act of the parliament for the aforesaid purpose will not be deemed to be an amendment of the Constitution.

1.2.1.1. Formation of new states and alteration of boundaries etc. of existing states- [Art.3]

Under Art.3 a new state may be formed or established in the following way-

- a) By separation of territory from any states
- b) By uniting 2 or more states or
- c) By uniting any parts of states or
- d) By uniting any territory to a part of any state.

Parliament under this article can also increase or decrease the area of any state, alter the boundaries or change that of any state. Article 3 deals with formation of new state out of territory of the existing states. The power to form new states under Article 3(a) includes the power to form a new state or union territory by uniting a part of any state or union territory to any other state or union territory. The word ‘state’ under Article 3 clauses (a) to (e) includes a ‘Union Territory’

The Indian Constitution empowers the parliament to alter the territory or names etc of state without their consent or concurrence. That means new state can be formed by law passed by simple majority.

Thus it is clear that the very existence of a state depends upon the sweet will of the central government. Parliament may form a new state or alter the boundaries etc. of existing states and thereby changes the political map of India.

1.2.1.3. Cession of Indian Territory to foreign country

Under Article 3(c) Parliament may by law increase or diminish the area of any state. The diminution of the area of any state occurs where the part of the state is separated. Parliament has power to cut away the entire area of a state to form a new state or to increase the area of any state.

Supreme Court in-In re by president of India¹

It was held that the — of parliament under Art.3 to diminish the area of any state does not cover ceding of Indian territory to a foreign state. Hence the court held that the parliament had no power.

Under Art 3 (c) to make a law to implement a Berubari agreement (this agreement was entered into with the government of Pak and India). However it could be only be implemented by an amendment of the constitution in accordance with Art. 368.

1.2.2. Allocation and share of resources distribution of grant-in-aid

Inter-governmental financial relationship in a federation is a vital or even critical matter. The way in which the relationship between center and states

¹ AIR 1960 SC 845

function affects the whole content and working of federal polity finance is an essential and pre-requisite of good government

In the words of D.D. Basu.-“No system of federation can be successful unless both union and states have at their disposal adequate financial resources to enable them to discharge their respective responsibilities under the constitution.”

In Canada and Australia the sources of revenue allotted to the units are so meager that they have to be substantially satisfied by centre grants.

In India the scheme of distribute of sources of revenue between the Centre and states is based on the scheme laid down in the Government of India Act 1935.

The constitution of India provides for the appointment of finance commission under Art. 280 which itself whose very unique feature of flexibility.

Taxing powers are divided between the centre and states. The constitution provides separate provisions relating to taxation by centre and states. The taxes enumerated in the union List (List I) are leviable by centre exclusively while those mentioned in the state list (List II) are leviable by the state exclusively. Art. 265- Article 256 says that no tax can be levied or collected except by the authority of law.

Grants-in-aid to the states serve two purposes-

- 1) Through grant-in-aid the central Government exercises strict control over the states because grants are granted subject to certain conditions. If any state does not agree to the condition the Central Government may withdraw the grants. and
- 2) It generates the centre state co-ordination and co-operation if a state wants to develop its welfare schemes for the people of the state it may ask for the financial help from the centre.

Distribution of Revenue between Union and states – Art. 268.

Article 268 provides for scheme of distribution of revenue between the Union and states. The state process exclusive jurisdiction over taxes enumerated in the state List. The union is entitled to the proceeds of taxes in the Union List. The concurrent list includes no taxes. However there are certain taxes in the Union List which may be allowed to be retained by the states – wholly or partially. These are-

- 1) Duties levied by the Union but collected and appropriated by the states- These are stamp duties and duties of medicinal and toilet preparations though mentioned in the Union List, levied by the Central Government but proceeds are assigned to the states.
- 2) Service Tax levied by Union and collected and appropriated by Union and states- Art 268 A. It is inserted by 80th Amendment Act. 2003. Such taxes are collected and appropriated by the Union and states as per the principles formulated by the parliament although they are levied by the Union of India.
- 3) Taxes levied and collected by Union and assigned to the states (constitution 80th Amendment Act 2000) on the recommendation of the tenth finance commission the amendment was made that out of total income obtained from certain central taxes and duties 29% shall be given to the states Accordingly Art. 269 was amended.
- 4) Taxes levied and collected by the Union but distributed between the Union and states. The constitution (80th Amendment) Act. 2000 which says that –
“All the taxes and duties returned to in Union List excepts the duties and taxes referred to in Art. 271 and any cess levied for specific purposes under any law made by parliament shall be levied and collected by the Government of India and shall be distributed between the Union and states in the manner provided in clause (2) of Art. 270.

- 5) Taxes for the purpose of Union : It says that if the parliament at any time increases any of the duties or taxes mentioned in Art. 269 and 270 by imposing a surcharge, the whole proceeds of any such surcharge shall from part of the consolidated fund of India.
- 6) Grants-in-aid- The constitution provides for three kinds of grants-in-aid to the states from the Union resources-

Under Art. 273 – grants-in-aid will be given to the states of Assam, Bihar, Orissa and west Bengal in lieu of export duty on the jute products. The sums of such grants are prescribed by the president with the consultation of finance commission. The sums will be given to the states for the period of 10 years from the commencement of the constitution.

Under Art. 275- empowers parliament to make such grants, as it may deem essential to the states which are in need of financial assistance. The constitution also provides for special grants given to the states which undertakes schemes of development for the purpose of promoting the welfare of the scheduled tribes or raising the level of administration of the scheduled areas. A Special grant to Assam is given for this purpose.

Under Art. 282 both the Union and States make grant for any Public purpose even if it relates to a subject over which it cannot make laws. The central government can under this Article make grants to hospitals or to schools.

Under Art. 271 Parliament is empowered to increase any of the duties or the tax mentioned in Arts. 269 and 270 by a surcharge for the purposes of the union and entire proceeds of any such surcharge shall go to the Union and from part of the consolidated fund of India according to Art. 274 no Bill which imposes or varies any tax or duty in which states are interested or which varies the meaning of ‘agricultural income’ or which affects the principle of distribution of moneys to

states or which imposes a surcharge for the purpose of Union, shall be introduced or moved in either house of parliament except on the recommendation of the president.

Taxes for the purposes of States-

Article 276 and 277 save the authority of the state to levy taxes on subject now forming part of Union List. Thus taxes which are being levied by a state or a Municipality or other local authority notwithstanding those taxes are mentioned in the union list continue to be levied by those authorities until parliament by law makes contrary provisions. Art. 276 empowers the states to impose taxes on professions, trades callings and employment for the benefit of the state or of municipality district board, local boards or other local authorities. But the provisions of Art.277 does not extend to taxes levied under a law passed after the constitution came into force.

No other federal constitution makes such elaborate provisions as the constitution of India with respect to relationship between union and states in the financial field. In fact, by providing for the establishment of finance commission for the purpose of allocating and re-adjusting the receipts from certain sources the constitution has made an original contribution in this extremely complicated aspect of federal relationship.'

1.2. 3. The Inter-state dispute on resources

(Relevant Arts. 262, 263 and 131 of Constitution)

The supreme court under article 131 of the constitution has original jurisdiction in any dispute between the Government of India and one or more states. between the Government of India and any state or states on one side and one or more other states on the other and between the two or more states. But other

than the provisions are made under art. 262 of the constitution by conferring power upon parliament of making law relating to justification of any dispute or complaint with respect to the uses. Distribution or control of water of any inter-state rivers and river valleys and accordingly parliament has passed the River Board Act. 1956 and the Inter-state water disputes act, 1956.

India has a number of Inter-state rivers and river valleys. Some Inter-state disputes would arise regarding sharing of river-waters as water of inter-state would pass through several states. Such water cannot be regarded as belonging to any single riparian state. The waters are in the state of flow and therefore no state can claim exclusive ownership of such waters. No state can legislate for the use of such waters since no state can claim legislative power beyond its territory Accordingly the constitution confers the legislative over such rivers on the parliament. The constitution makes special provisions for creating suitable machinery for resolving such disputes

Article 262(1) empowers the parliament to provide by law for adjudication of any dispute or complaint with respect to the use distribution or control of the waters of any inter-state river or river valley. The power of making law relating to adjudication of inter-state dispute is exclusively conferred upon the parliament. These powers are relating to the “use distribution or control” of water of any interstate river or river valley.

Further under Art. 262 (2) the parliament may also provide that ‘notwithstanding’ anything contained in the constitution, neither the supreme court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint. As earlier mentioned Art 131 provides for decision of inter-state

disputes by the supreme court. But Art. 262 provides therein may be excluded by the parliament from the purview of the Supreme Court.

Water is a state subject as per Entry 17, List II of the Constitution. The river Boards Act, 1956 was enacted by the parliament under entry 56, List I for establishing River boards for the purpose of regulation and development of Inter-state rivers and river valleys. The power and functions of such board are-

- a. To advise the governments – integrated on any matter relating to the regulation or development of a specified river or river valley.
- b. To advise them to resolve their dispute by co-ordination of their activities and so on.

Under Act 262 the parliament has also enacted, the interstate water dispute act 1956 for adjudication of dispute relating to the use distribution or control of water of inter-state rivers and river-valleys among concerned state governments. This act empowers the (intra) Government to setup a Tribunal for the adjudication of such disputes. The decision of tribunal shall be final and binding on the parties to the dispute. Neither the supreme court nor any other court shall have the jurisdiction in respect of any water dispute which may be returned to such a Tribunal under that Act.

The Tribunal submits its report to the central government which on publication becomes binding on the parties concerned. A matter referable to a river board is not to be referred to the Tribunal.

A lacuna in the scheme of Inter-state water Dispute Act. Is that it does not lay down principles or guidelines to be followed by the Tribunal. That is why several disputes concerning Inter-state river have remained pending for longtime river have remained pending for longtime among the various states. and surprisingly the machinery provided by the Acts has not been used effectively.

Further the centre has also recently created more bodies to promote river water development.

In the matter of –

Cauvery water Disputes Tribunal

This case constitutes an important judicial pronouncement in the area of Indian federalism. The matter came before the supreme court for an advisory opinion by the way of reference by the president under Art. 143 of the constitution. Facts- Tribunal was appointed by the central government to decide the question of waters of river Cauvery which flows through the states of Karnataka and Tamil Nadu. The Tribunal gave an interim order in June 1991 directing the state of Karnataka to release a particular quantity of water for the state of TamilNadu.

The Karnataka government- resented the decision of the Tribunal and promulgated an ordinance empowering the government not to honour an interim order of the Tribunal. The Tamil Nadu government protested against the action of the Karnataka Government. Hence the reference was made by the president to the Supreme Court.

Held – The court held that the Karnataka Ordinance was unconstitutional as it nullifies the decision of the Tribunal appointed under the central Act Viz the Inter-state water Dispute Act. 1956 which has been enacted under Art. 262 of the constitution. The ordinance is allow against the principles of the rule of law as it has assumed the role of a judge in its own cause. The Act also had an extra-territorial operation in as much as it interfered with the equitable rights of TamilNadu and Pondicherry to the cavery Waters. The supreme court criticized the Karnataka Act. as being against the basic tenets of the rule of law”

In the another case of State of Hariyana V/s State of Punjab

There was an agreement between the states of Punjab and Haryana to share the water of River Sutlej. The Punjab Government was to construct the Sutlej-Yamuna link canal to carry this water to the state of Haryana but it defaulted in doing so. The state of Haryana filed a suit against the state Punjab under Art. 131 of the constitution to pass a decree directing the Punjab Government to construct the canal. The Punjab Government objected to the suit pleading that it was barred by the Inter-state water Dispute-Act. The Supreme Court negated the contention arguing that there was no water-dispute between the States as they had already agreed to share the water. The question was regarding the obligation of Punjab Government to construct the canal as a part of the agreement between the two states. The court directed the Punjab Government to fulfill its obligation by completing the canal within a year.

1.2. 4. Rehabilitation of Internally displaced person.

Development projects such as irrigation power, mining etc. contribute to the economic growth and human well being these infrastructure projects create employment opportunities and trigger growth in agricultural, industrial and other allied sectors. But these projects also cause displacement of native population. The social costs of this displacement are often underestimated and paid least attention. In many projects, benefits are inflated and social costs are deleted in order to justify the viability. Proper resettlement and rehabilitation of these project affected people has been a grossly neglected aspects so far in India often, Rehabilitation aspects of these projects receive little attention in the mass media while the project construction and benefits, which are inflated and untrue receive the limelight.

Since 1950, 5 million of people have been displaced by various development projects in India. Out of this more than 40% are indigenous tribal population living in forest areas. While they form only 8% of the total population. Tribal

communities had carried unfair share or the burden for so called national development. Most of these tribal people were affected due to either construction of irrigation projects or due to mining in forest areas. Though they are the rightful owners of forest resources, are pushed out of forests shattering their life and livelihood.

Until 2004, there was no broad policy that could guide the rehabilitation efforts or state sponsored projects in irrigation, power mining etc. Different State Governments implemented resettlement and rehabilitation in their own way and on case to case basis. Past rehabilitation experiences in various projects reveal that they are far from satisfactory. In several cases, project displaced people have been living in poverty living without basic amenities even after 25 yrs. Of relocation to settlement areas. In spite of constitutional right to life, project affected people are often coerced forcibly displaced even before providing minimum resettlement and rehabilitation facilities.

There are three types of displacement and magnitude-

- a) Disaster Related Displacement
- b) Development Related Displacement's
- c) Conflict Induced Displacement

Let us discuss them one by one-

a) Disaster Related Displacement -

“India is vulnerable in varying degrees to a large number of natural as well as man-made disasters- 58.6% of the landmass is prone to earthquakes of moderate to very high intensity, over 40 million hectares (12% of land) is prone to floods and river erosion of the 7,516 Km. long coastline, close to 5,700 Km. is prone to

cyclones and tsunamis, 68% of the cultivable area is vulnerable to draught and avalanches.

Fire incidents, industrial accidents and other manmade disasters involving chemical, biological and radioactive materials are additional hazardous which have understood the need for strengthening mitigation preparedness and response measure” Disaster risks in India are further compounded by increasing vulnerabilities. These include the over-growing population, the vast disparities in income, rapid urbanization, increasing industrialization development within high-risk zones, environmental degradation, climate change etc. clearly, all these point to a future where disasters seriously, economy and its sustainable development natural disaster induced displacement has become a major H.R. (Human Right) issue in recent times. Such types of displacement precipitate the socio-economic problems or displaced persons and affect their shelter, livelihood lives tack etc.

Following are some of the important cases which National Human Right Commission received complaints of displacement are acted Sue-motto to readdress violations of H.R. –

- 1) Supreme cyclone that struck the coastal districts of Orissa in act 1988.
- 2) Gujarat earthquake that devastated large areas of Gujarat in January 2001.
- 3) Tsunami, which hit the coastal India in Dec. 2004
- 4) East Quack in Jammu and Kashmir in 2005

b) Development Related Displacement-

Mega development project like construction or domes, industries, highways and reads have resulted in forced displacement of the people. It has been found that usually it is the poor people who face the consequence of such projects wore because their livelihood, habitat and assets are affected. Where involuntary resettlement has received public attention, either through NGOs or media

intervention the state administration has responded. Otherwise in most of the cases, such displacements have resulted in less of livelihood and shelter. More than 1.4 million people have been displaced from their ancestral land and deprived of traditional livelihoods in just four states in India in the country's drive for economic growth, according to a study conducted by the NGOs Action Aid, the Indian Social Institute the study focused on the four states of Andhra Pradesh, Chhattisgarh, Jharkhand and Orissa, all rich in natural resources and with a large population of Indigenous tribal people.

c) Conflict Induced Displacement-

According to non-governmental organization, ' There are over 6,00,000 conflict induced internally displaced person in India. This includes '33,362 displaced persons in Kokrajhar dist. and 74,123 in Gosalgaon dist. Of Assam, 55,476 Kashmiri pundit families who were displaced due to the conflicts in Jammu and Kashmir since 1990 and about 35,000 Mizoram who were displaced in 1997 and took shelter in Tripura.

The commission (NHRC) intervened in cases relating to relief and rehabilitation of Kashmiri pandits and victims of Gujarat riots in 2002.

Existing Legal Framework-

National legislation/policies-

i) The disaster Management Act. 2005 A paradigm shift-

The government have enacted the disaster management Act. (DMA) 2005 on Dec. 26, 2005 to provide for institutional mechanism for drawing up and monitoring the implementation of the disaster management plans ensuring measures by various wings of government for prevention and mitigating effects of disasters and for undertaking a holistic, coordinated and prompt response to any disaster situation.

ii) Land Acquisition Act 1894 –

Is the primary legislation that provides for acquisition of land s3(7) define public purpose to include carrying out any educational, housing health or slum clearance scheme the provision of any premises or building for locating a public office, the provision of land for residential purposes to the poor or landless or to persons residing in areas affected by natural calamities and so on. It include provision for compensation (sec. II) and provides for recourse to legal remedies (sec.18)

iii) National Rehabilitation and Resettlement Policy 2007 –

In order to solve issues arising out of policies of economic liberalization, the National policy on Rehabilitation and Resettlement 2003 has been reviewed and revised. The revised policy of 2007 has comes into force from October, 2007.

The new policy is applicable to all affected persons and families whose land property or livelihood are adversely affected by land acquisition or by involuntary displacement of a permanent nature due to any other reason. The objective of policy is to minimize displacement of people and promote non-displacing or least-displacing alternatives.

1.2.5. Center's Responsibility and Internal Disturbance within States

A notable feature of the Indian Constitution is the way in which the normal peace-time federation can't be adopted to an emergency situation. The framers of constitution felt that, in an emergency, the centre should have overriding powers to control and direct all aspects of administration and legislation throughout the country.

The constitution envisages three types of emergencies:-

- i) Emergency arising from threat to the security of India.
- ii) Break down of constitutional Machinery in a state.
- iii) Financial Emergency.

Proclamation of emergency is serious matter as it disturbs the normal fabric of the constitution and adversely affects the rights of the people. So it should be issued only in exceptional circumstances. Art. 355 deals responsibility when there is internal disturbance within the state.

Center's Duty to protect the States-

Art. 355. imposes a twofold duty on the Center-

- i) To protect every state against external aggression and internal disturbance.
- ii) To ensure that the government of every state is carried on in accordance with the provisions of the constitution.

Such provisions are also found in other federal constitutions that are in American and Australian Constitution. But in America and Australian the centre acts only when the request made by states. While there is no such pre-condition under Art. 355. The center can thus interfere even armed without state's request.

Further if the Government state is not carried on in accordance with the provisions of constitution. Then center can take over the government of state under Art. 356 of the constitution on the ground of failure of constitutional Machinery in that state. In other federations. However, the center cannot do so.

The word 'aggression' has been constructed to be a word of very wide import. It is not limited to only war. There are many acts which cannot be termed as war. A bloodless aggression from a vast and incessant flow of millions of human beings forced to flee in to another state could constitute aggression under Art. 355.

Article 355 uses the term “Internal disturbance” while Art.352 uses term “armed rebellion”. The term “armed rebellion” is narrower in scope than “internal disturbance” which is very wider. This means that a mere “internal disturbance” short of armed rebellion cannot justify a proclamation. Under Art. 352.

Further, Art. 356 talks only of breakdown of constitutional government in the state. This means that mere ‘internal disturbance’ does not justify a proclamation under Art 356 unless it results in the constitutional breakdown in the state.

In India law and order is a state subject and therefore central intervention under Art. 355 would be justifiable only in case of aggravated form of disturbance, which the state finds beyond its means to control center can intervene Suo-motto or at the request of concerned State Government.

In order to deploy the Central Reserve Police Force. In a particular state. (without the permission of that state) 42nd amendment was made in the constitution and Art. 257A was inserted by which center is made enabled to do deploy any such force without the concurrence of the concerned state government. However Art. 257-A was repealed by 44th Amendment in the constitution. But however entry 2A in the Union list remained intact forces in state in aid of civil power.

The Indian federation has a strong ‘Unitary bias’ and the central government has powers to ‘supervise’ and even to supersede in certain circumstances a state government temporarily to restore normally or to inject honesty and integrity into the state administration. Whether these essentials of good government may be lacking.

This can be said that under Art. 355 center is under obligation to appoint commission of enquiry to ensure that state governments are carried on in accordance with the constitutional provisions. Certainly a corrupt government cannot be regarded as a government being carried on in accordance with the constitution. In the opinion of prof. M. P. Jain even Art. 356 emanates from Art. 355 and not vice versa

1.2.6. Direction of Centre to the State under Article 356 and 365

No chapter of the Constitution has been subject of more acrimonious attack by the critics than those dealing with the emergency provisions. The constituent Assembly witnessed one of its most agitated scenes during the discussion of these provisions. Many prominent members of the assembly opposed the inclusion of these provisions in the constitution as they thought they were inconsistent with the democratic provisions embodied elsewhere. The majority of members, however favored the inclusion of these provision, although reluctantly as a precautionary measure against possible disruptive forces destroying the newly established union.

The constitution provides for three different categories of emergency and in each case the president is empowered to declare the emergency.

A. National Emergency – due to war, external aggression or armed rebellion (Art 352)

B. State Emergency - due to the failure of constitutional Machinery in state (Art 356)

C. Financial Emergency (Art. 360)

Failure of constitutional Machinery in State- Article 356

Article 356 says that if the president, on receipt of report from the governor of a state or otherwise is satisfied that a situation has arisen in which the government of the state cannot be carried on in accordance with the provision of the constitution, he may issue a proclamation, by that proclamation –

- 1) The president may assume to himself all or any of the powers vested in or exercisable by the governor to anybody or authority in the state.
- 2) The president may declare that the powers of the legislature of the state shall be exercised by or under the authority of Parliament .
- 3) The president may make such incidental and constitutional provisions as may appear to him to be necessary or desirable for giving effect to the object of proclamation.

The president cannot, however assume to himself any of the powers vested in High court or suspend the operation of any provision of the constitution relating to the High court.

Article 365 of the Indian Constitution occurs in Part XIX provides that-

“where any state has failed to comply with, or to give effect to any directions given in the exercise of the executive powers of the union under any of the provisions of this constitution, it shall be lawful for the president to hold that a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of this constitution”

The crucial words in this regard are “any directions given in the exercise of the executive powers of the union under any of the provision of the union under any of the provision this constitution” In other words the meaning of the expression “any direction” Must be understand to mean that any directions issued

under any of the provision of this constitution in the exercise of the executive power of the union.

Thus this article can validly be invoked only if-

- 1) any direction is given by the union in the valid exercise of its power under any of the provision of the constitution and
- 2) such direction has not been complied with or given effect to by the state.

The word “ it shall be lawful for the ‘president to hold’ occurring in Article 365 do not impose an obligation. They only confer power the exercise of which is a matter of discretion with the president on every non compliance with the union direction, irrespective of its extent and significance, the president (in effect the council of Minister) is not bound to hold that a situation has arisen in which the government of the non-complying state cannot be carried on in accordance with the constitution. The president should exercise this drastic power in a reasonable manner with due care and circumspection and not Mechanically. He should give due consideration to all relevant circumstances, including the response, if any of the state government to the direction. In response to the directions the state government might satisfy the president that the direction had been issued wrong facts or misinformation or that the required correction has been effected.

The president should also keep in mind that every insignificant aberration from the constitutional path or a technical contravention of constitutional provisions by the functionaries of the state government would not necessarily and reason ably lead one to hold that the government in the state cannot be carried on in accordance with the constitution.

Thus Article 365 acts as screen to prevent any hasty resort to the drastic action under Article 356 in the event of failure on the part of a state government to

comply with or to give effect to any constitutional direction given in the exercise of the executive power of the union.

The meaning of Article 365, Sawant J. in S. R. Bommai V/s Union of India.

Observed that Article 365 is more in the nature of a deeming provision. He further stated that failure to comply with or to give effect to the directions given by the union under any of the provisions of the constitution is one of the situations contemplated by the expression “ Government of the state cannot be carried on in accordance with the provision of this constitution” occurring in Article 356.

Rejecting the contention that only situation in which the power under Article 356 can be invoked by the president is the failure of the state government to comply with or to give effect to the directions given in the exercise of the executive power of the union under any of the provisions of the constitution and not in any of the provisions of the constitution and not in any other case,

Jeevan Reddy J. observed that-

Article 360 is a “permissible” provision. It merely sets out one instance in which the president may hold that the Government of the state cannot be carried on in accordance with the provision of the constitution. It cannot be read as exhaustive of the situation where the president may form the said satisfaction. He reasoned that the expression “if shall be lawful for the president” occurring in Article 365 vests desolutionary power in the president which has to be exercised fairly. Each and every failure requisite situation contemplated by Article 356. The President has to judge in each case whether the requisite satisfaction has arisen or not.

Analysis- so, far, there have been four occasions when emergency was proclaimed by the president- 1962 (Chinese aggression), 1965 (Indo-Pakistan War), 1971

(Indo-Pakistan War before the emergence of Bangladesh) and 1975 (Internal emergency)

An analysis of these instances would indicate the purpose and the Manner in which, in actual practice, a proclamation of emergency in the states will be made by the president. These may be subbed up in the following terms.

- i) The essential condition for the intervention by the centre is the political instability of the state, that is the virtual breakdown of the parliamentary system of the Government.
- ii) The union will watch the situation of instability with utmost caution and provide every opportunity for the formation of an alternative Ministry.
- iii) The proclamation of emergency will only be the last resort when (i) the existing ministry does not have the confidence of the legislature; and (ii) no alternative ministry can be formed.
- iv) During the period of emergency, the legislative work of the state will be transferred to parliament delegation of such work to any administrative Body will be reduced to that Minimum.
- v) As soon as the political situation within the state becomes conducive to a responsible government, it will be restored.

In state of Rajasthan V/s Union of India.

The States filed suits challenging the validity of the directives issued by Home Minister to the Chief Ministers to dissolve their Assemblies and seek a fresh mandate . The latter disclosed the sole ground for the proclamation under Art. 356 and that such a proclamation and the dissolution of their legislative Assemblies upon the grounds given in the letter has outside the scope of Art. 356 of the Constitution.

It was argued that the questions which arose for gauging the existence of a situation calling for action under Article 356 was non-justifiable. More intimation of some facts did not justify prohibition to act in future on other facts. It could not be predicted non what other facts may arise in future.

A seven members constitution Bench of supreme court by an unanimous judgment rejected the petitioner's petition and uphold the centers action of dissolving there assemblies under Art. 356 as constitutionally valid the court held that the satisfaction of president under Art. 356 could not be questioned. The president does not act only on the report of the governor but on otherwise. This means that the satisfaction can be based on Material other than Governor's report.

The court observed that if the satisfaction is malafide or is based on wholly extraneous and irrelevant grounds the court would have jurisdiction to examine it because in that case there would be no satisfaction of the president.

S.R. Bommai v/s union of India – Judicial Guidelines for imposing president's Rule.

In a landmark judgment in S.R. Bommai v/s union of India hearing the appeal from the judgment of the Allahabad High court a nine member constitution Bench of the supreme court held that the dismissal of the BJP Government in Madhya Pradesh, Rajasthan and Himachal Pradesh in the wake of the Ayodhya incident of Dec.6,1992 was valid and imposition of the president's Rule in these states was constitutional. The court held that secularism is a basic feature of the constitution and any state government which acts against that ideal can be dismissed by the president.

It has held that in matters of religion the state has no place. No. political party can simultaneously be a religious party as well as political party.

Use of Article 356 –

The Sarkaria Commission on center state relation examined this issued in chapter six of its report it pointed out in the first instance that the use of article 356 has been rising with the passage of time where as between 1950 and 1954, it was invoked only on 03 occasions, it was invoked on 09 occasions during the period 1975 and 1969, it rose to 21 instances during the period 1975-1987.

In Kerala in July 1959 an instance of the exercise of the powers under Article 356 took place. Though the communist Government Commanded the confidence in the government Breakdown a law and order was visible evidence of this.

The central government advised the Ministry to ask the governor to dissolve the legislature. So that fresh elections may be held. However this advice was not taken. There upon, the president issued a proclamation taking over the administration of the state under Art. 356.

It was argued that a Ministry that has the majority support in the legislature, functions within the purview of what Art. 356 calls in accordance with the provisions of the constitution. However it was maintained that the action was justified by the breakdown of law and order assuming such proportions as was beyond the resources of state and warranted the intervention under Article 356(i), Besides it was also said that the word ‘provisions’ referred also to the preamble of the constitution which calls for constituting India as a sovereign democratic republic therefore the president could suspend a ministry for subversion of democratic values.

The Significance of Article 365-

The incorporation of Article 365 in the constitution is not without significance. The Constitution has not provided for separate federal laws. If the

union is to implement them through the state government by issuing direction to that the union must have necessary power to seek obedience from the state for the implementation of union directions to achieve this objective power is given to the president under Article 365 But inconsiderable use of these direction can upset the constitutional balance between the union-state relationship.

The Sarkaria Commission cited the following illustration as an indication of break down of the constitutional Machinery in a state due to non compliance with the directions issued by the union government.

- 1) Where a directions issued by the union in the exercise of its executive power under any of the provisions of the constitution, such as article 256, 257 and 339 (2) or during an emergency under Article 353 is not complied with by the state government in spite of adequate warning and opportunity and the president there upon hold under Article 365 that a situation such as that contemplated in Article 356 has arisen.
- 2) If public disorder of any Magnitude endangering the security of the state take place, it is the duty of the state government to keep the union government informed of such disorder and if the state fails to do so such failure may amount to impeding the exercise of the executive power of the union government and justify the latter giving appropriate directions under Art 257 (1) is not complied union executive under Art 257 (1) is not complied with in spite of adequate warning the president there upon may hold the situation such as contemplated in Article 356 has Arisen.

Article 365 is intended not only to supply an additional ground for the president's action under Article 365 but also to restrict and confine the scope of the word "otherwise" in Article 365 to the grounds Mention in Article 365.

Article 365 is a permissible provision under which president has disolutionary power to judge whether a particular situation falls within the campus of this article or not he has to exercise this disolutionary power fairly so as to limit the scope of Article 365 by taking into consideration the federal principle underlying the constitution.

1.2.7. Federal comity: Relationship of trust and faith between centre and state

As we know that federalism constitutes a complex governmental mechanism for governance of a country. The constitution of India establishes dual polity of the country. Consisting of union government and the regional administration units into which the country has been characterized as the union of states. The fabric of Indian federal systems stands on 3 pillars viz a strong central Government flexible federal system and co-operative federalism.

The strength of the centre lies on its large legislative powers financial powers and emergency powers. The flexibility Of Indian federalism lies in the scheme adopted in the constitution to mitigate the rigidity of the federal system of central increase temporarily the power of central governments if the contemporary situation so demands. The concept of social co-operative federalism has been worked out in a number of constitutional provisions as well as strengthened through legislative and administrative practices.

Relationship of trust and faith between the centre and state can be seen through different provisions situations when both under constitution either confer the power or helps during emergency etc.

In a federal state may it be legislative, financial, administrative relation or the situation during emergency period they work on principle of trust and faith. This can be seen from the following 3 factors.

- 1) The exigencies of war then national survival, national efforts takes precedence over fine-points of centre state division of power.
- 2) Technological advances means making of communication faster.
- 3) The emergence of concept of a social welfare state in response to public demand for various social services involving huge outlays which the governments of units could not meet by themselves out of their own resources.

The relationship of trust and faith promotes co-operation among the various constituent governments of the federal union so that they can pool their resources to achieve certain desired national goals.

The centre with its vast finance capacity is always in a position to help the units which always need it to meet the expanding demands on them for social services falling in them for legislative sphere and this brings 2 level of government closer and shows the relationship of trust in each other.

The frames of constitution realized that governments in a federation were arranged not hierarchically or vertically but horizontally that no line of commands runs from the centre to states and that the common policies among the various governments can be prompted not by dictation but by process of discussion, agreement and compromise.

Relationship of trust and faith can be seen from various provisions in the constitution for example – When the constitution empowers the parliament to legislate in the state area

On the request of 2 or more states, scheme of financial relations between the centre and states grants in aid under Art. 382, the scheme of centre state

administrative relationship alongwith the provisions for All India services are some of the instrument showing the trust and faith and co-operation between the also centre and state.

Art. 261 says that-

“full faith and credit” is to be given throughout the territory of India to public acts records and judicial proceedings of the union and states. Art. 263 provides that the president may by order appoint an Inter-state council if it appears to him that public interest would be served by its establishment.

Art. 258 says that-

President may with the consent of state government entrust any function on a matter in which centre is having the power to legislate either conditionally or unconditionally to the state government or to its officers.

Art. 258 A- a state government with the consent of government of India (Union of India) entrust functions in relation to any matter to which relation to any matter to which the state has executive power, either conditionally or unconditionally to the central government or to its officers.

Further provisions of emergency National state and financial emergency also depicts the trust and faith of states in centre (arts. 352 to 360)

1.2.8. Special status of certain states

Article 370 deals with the temporary provisions with respect to the state of Jammu and Kashmir. It grants special status to the state of Jammu and Kashmir.

Under Art 370 of the constitution the State of Jammu and Kashmir enjoys a special status. This is because of certain commitments made by the government of India with the Ruler of state of Jammu and Kashmir at the time of its occasion to India. Like India the state of Jammu and Kashmir also become independent on

August 15, 1947 Maharaja Hari Singh initially did not like to become part of India and Pakistan. He thought of Independence. He offered to sign a stand still agreement with both India and Pakistan aimed at continuing the existing relationship pending his final decision regarding the future of the state.

However for variety of reasons the standstill agreement was not signed between Kashmir and India. When the people of the state saw that independence has come in India they raised their head and demanded the establishment of a responsible government. In the absence of “British help which he was hitherto getting to suppress the internal rebellion and external aggression”

In the absence of a formal agreement between India and Maharaja Pakistan interpreted it to mean that Kashmir would ultimately become part of Pakistan. In fact, Pakistan had started putting pressure on the Maharaja to join Pakistan.

The people of the state were tired of uncertainty and even there occurred the ‘Poonch revolt’ against the authority of the Maharaja the Maharaja now realized that he could no longer hold the Kashmiri people in subjugation through reliance on his army and police.

Sec 3 of the constitution of the Jammu Kashmir state says that “the state of Jammu and Kashmir is and shall be the integral Part of the union of India” Thus at the time of the commencement of the constitution, the position of the state of Jammu and Kashmir was different and therefore Art 370 was inserted in the Indian constitution under Article 370 the president is empowered to issue orders. The president thus acts as legislature in issuing orders under this Article.

Although the state of Jammu and Kashmir is a part of the Indian but its status is different than other states in the following respects –

a) The state of Jammu and Kashmir has its own constitution and its administration is carried on in accordance with the provision of that constitution.

- b) The provisions of Art 238 shall not apply to in relation the state of Jammu and Kashmir.
- c) The power of parliament to make laws for the state of Jammu and Kashmir is limited to-
 - i) Those Matters in the union list and the concurrent list, which in consultant of the government of the state are declared by the president to correspond to matters specified in the instrument of cession.
 - ii) Such other Matters in the union and concord lists only with the concurrence of the government of the state, the president may by order specify. This means that on such matters laws can be made only with the consent of the state of Jammu and Kashmir.
- d) The provisions of Article I and this article shally apply in relation to that.
- e) Such of the other provisions of the constitution shall apply to that state subject to such exceptions and Modifications as the president may by order specify. But no such order which relates to Matters specified in the instrument of Accession referred to in paragraph (i) Sub clause (b) shall be issued without the consultation of the state government and matters other than those specified in the Instrument of Accession shall be issued with the concurrence of the state government.

It has been had by the Supreme Court that the president may orders extend certain provisions of the constitutions to that state with such notifications and expectations as he thinks fit.

The president may subsequently make amendments and modifications in such orders.

Provisions extended to the state of Jammu and Kashmir by presidential order – under Article 370, the president from time to time has issued orders extending

several provisions of the constitution (Application to Jammu and Kashmir) order 1950 was issued on Jan.26, 1950. This was superseded by the order of 1954. By this order the legislative authority of the union was extended by the order of 1954.

By this order the legislative authority of the union was extended to Jammu and Kashmir regarding the union and the concurrent lists. This is the order which regulates the constitutional status of that state from time to time the order of 1954 has been amended and several provisions of the constitution have been extended to the state of Jammu and Kashmir. The Main provisions of the order of 1954 are the following-

- 1) The constitution of the state of Jammu and Kashmir shall continue to be operative
- 2) The High court of Jammu and Kashmir shall have all the powers enjoyed by the other High courts in India except that it cannot issue a writ for “any other purpose”
- 3) The jurisdiction of the supreme court extends to that state (except Arts 135 and 139)
- 4) The parliament can make law on all entries (except on Entries 8,9,34,60,79 and 97) in the union list and certain entries in the concurrent list.
- 5) The provision regarding emergency under Art. 352 can be applied to the state only with the concurrence (consent) of that state.
- 6) The provision for imposing the president rule under Art. 356 applies to that state. But Art. 360 relating to financial emergency does not apply.
- 7) The executive power of the union extends to the state of Jammu and Kashmir. The state shall exercise its executive power in accordance with the directions of the centre.

- 8) Provisions relating to the freedom of trade commerce and intercourse. Services and citizenship shall apply to the state.
- 9) Provisions relating to elections apply to the state. The election commission is responsible for holding elections in the state.
- 10) The directive principles of state do not apply to the state of Jammu and Kashmir.
- 11) Under Art. 368 an amendment to the constitution shall not apply to the state until the president by order applies it to the state.

There are six representatives of Jammu and Kashmir in the Lok Sabha. They are elected directly by the people. The state constitution of Jammu and Kashmir was adopted by the Kashmir Assembly on March 30, 1965 under which the head of the state will be known as the Governor and the Prime Minister as the Chief Minister.

Power to abolish the operation of Art. 370 –

Article 370 (3) provides that notwithstanding anything in the foregoing provisions of this article the president may by Public Notification, declare that the article shall cease to be operative. But the president cannot issue such a Notification without the recommendation of the constituent Assembly of that state.
Act – Constitution of India, 1950

1.2.9. Tribal Areas, Scheduled Areas

The provisions relating to the administration and control of the scheduled areas and scheduled tribes in any state, other than Assam, Meghalaya, Tripura and Mizoram are contained in the fifth schedule to the constitution. The fifth schedule provides that the executive power of the state extends to the scheduled Areas. But the Governor has a special responsibility regarding such areas. He is required to make a report to the president annually or whenever required by the president

annually or whenever required by the president regarding the administration of these areas. The executive power of the union shall extend to the giving of directions to the state regarding the administration of the said areas.

There is as Tribal Advisory Council in each state having scheduled areas, consisting or not more than 20 members as representatives of the scheduled tribes in legislative assembly. A similar council is established for the scheduled tribes in a state which has no scheduled council. The councils shall advice on matters pertaining to the welfare and advancement the scheduled tribes in the state referred to them by the Governor.

Article 244 (1) and 244 (20) of the constitution of Indian enables the government to enact separate laws for the governance and administration of the tribal areas. In pursuance of these articles, the president of India had asked each of the states in the country to identify tribal dominated areas. Areas these identified by the states were declared as fifth scheduled areas such areas have special rights and the governor of the respective states have powers to make regulations for better governance and for protecting the rights of the tribal community.

The Scheduled and Tribal Areas Part X

Article 244 – Administration of scheduled Areas and tribal areas –

1) The provision of the fifth schedule shall apply to the administration and control of the scheduled areas and scheduled tribes in any state other than the states of Assam, Meghalaya, Tripura and Mizoram.

Article 244 A – formation of and autonomous state comprising certain tribal areas in Assam and creation of local legislature or council of Minister of both there for.

1) Notwithstanding anything in this constitution, parliament May by law from within the state of Assam an autonomous state comprising (whether wholly or in

part) all or any of the tribal areas specified in part I of the table appended to paragraph 20 of the sixth schedule and create therefore-

- a) a body, whether elected or partly nominated and partly elected to function as legislature for the autonomous state or
- b) A council of Ministers or both with such constitution powers and functions in each case as may be specified in the law.

Any such law as is referred to in this article shall not be deemed to be an amendment of the constitution for the purpose of Art. 368 notwithstanding that it contains any provision which amends or has the effect of amending the constitution.

Administration and control –

- 1) There shall be established in each state having scheduled Areas in an if the president so directs, also in any state having scheduled tribes but not scheduled areas therein a tribes Advisory council consisting a not more than twenty members of whom, as nearly as may be, three fourths shall be the representatives of the scheduled tribes in the legislative Assembly of the state. Provided that if the number of representatives of the scheduled tribes in the legislative Assembly of the state is less than the number of seats in the tribes advisory council to be filled by such representatives the remaining seats shall be filled by other members of those tribes.
- 2) It shall be the duty of the tribes Advisory council to advise on such matters pertaining to the welfare and advancement of the scheduled tribes in the state as may be referred to them by the Governor.
- 3) The Governor May make rules prescribing or regulating as the case may be-

- a) The number of members of the council, the mode of their appointment and the appointment of the chairman of the council and of the officers and servants thereof.
- b) the conduct of its meetings and its procedure in general and
- c) all other incidental matters.

Law applicable to scheduled Areas –

- 1) Notwithstanding anything in this constitution, the Governor may by public notification direct that any particular Act of parliament or of the legislature of the state shall not apply to scheduled Area or any part thereof in the state or shall apply to scheduled Area or any part thereof in the state or shall apply to scheduled Area or any part thereof in the state subject to such expectations and modifications as he may specify in the notification and any direction given under this sub paragraph may be given so as to have retrospective effect.
- 2) The Governor may make regulations for the peace and good government of any area in a state which is for that time being a scheduled Area.
In particular and without prejudice to the generality of the foregoing power, such regulations may –
 - a) Prohibit or restrict the transfer of land by or among members of the scheduled tribes in such area.
 - b) regulate the allotment of land to members of the scheduled tribes in such area.
 - c) regulate the carrying on business as money lender by persons who lend money to members of the scheduled tribes in such area.
- 3) In making any such regulations as is referred to in sub paragraph (2) of this paragraph, the Governor may repeal or amend any act of parliament or of the

legislature of the state or any existing law which is for the time being applicable to the area in questions.

- 4) All regulations made under this paragraph shall be submitted forthwith to the president and until assented to by him shall have no effect.
- 5) No regulation shall be made under this paragraph unless the governor making the regulation has in the case where there is a tribes advisory council for the state, consulted such council.

Samatha V/s state of Andhra Pradesh, The Supreme court Judgment of 1997.

Samata first filled a case in the local courts and later in the high court in 1993 against the government of Andhra Pradesh for leasing tribal lands to private mining companies in the scheduled areas the High court dismissed case after which samata filled a special leave petition in the supreme court of India. A four year battle led to a historic judgment in July 1997 by three judge bench. The court in its final verdict declared that 'person' would include both natural persons as well as juristic persons and constitutional government and that all lands leased by the government or its agencies to private mining companies apart from its instrumentalities in the scheduled areas are null and void. In addition it also held that transfer of land to the government or its instrumentalities is entrustment of public property as the aim of public corporations is in public interest and hence such transfers stands upheld.

1.3. Questions for self learning

1. Explain the provisions of constitution relating to allocation and sharing of Resources with special mention to distribution of grants-in-aid.

2. What are the union taxes which though mentioned in the Union List are wholly or partially assigned to the states elucidate the answer in the light of well known authorities on the subject?
3. What are the provisions relating to inter-state dispute or resources of the federal state?
4. Examine in details the cases on inter-state water dispute.
5. What is the role of government for rehabilitation of internally displaced person?
6. How rehabilitation of internally displaced person can possible discuss?
7. Explain the centre's duty to protect the states against 'external aggression' and 'internal disturbance' under federalism.
8. Whether the central government can take cognizance of complaints made regarding corruption against state chief minister? Elucidate the answer in the light of well known authorities and duty to center towards state in federalism.
9. What powers does Article 356 provide?
10. Do you agree with that once a proclamation is issued it should not be permissible to withdraw it and issue another proclamation to the same effect with a view to circumvent the requirement in clause (3) of Article 356?
11. What is relationship between Article 356 and 365?
12. Explain the various situations where the relationship of trust and faith between the centre and state can be seen
13. Do the directive principles of the state apply to the state of Jammu and Kashmir? Why ?
14. Is there any need to give special powers to the tribal community?

15.If the system of tribal governance empowers the tribal then what are the possibilities or replicating this system in non-schedule areas as well.

1.4. Let us sum up:

Under Art.2 of the Constitution Parliament is empowered to enact a law to admit into the union or establish, new states on such terms and conditions as it thinks fit.

Under Art. 262 parliaments have passed the ‘River Board Act. 1956 and Inter State Water Dispute Act. 1956. Inter-state council is also under the duty to enquire and advice on any disputes between the states. Art 355 imposes a duty on the Union to protect every state against external aggression and internal disturbance and insure that the government of every state is carried on in accordance with the provisions of the constitution. Art. 355 thus imposes 2 obligation upon the center –

- 1) The duty to protect states from internal disturbance and external aggression such provisions are also found in other federal constitutions that is America and Australia.
- 2) The duty to see that Government of every state is carried on in accordance with the provisions of the constitution.

When the proclamation of Emergency is made under Article 356(1) the powers of the state legislature are to be exercised by parliament. Under Article 356 the president acts on a report of the Governor or otherwise. This means that the president can act even without the governor’s support. This is justified in view of the obligation of the center imposed by Art 355 to ensure the Government of the state is carried on in accordance with the provisions of the constitution. The Article 365 acts as a screen to prevent any hasty resort to the drastic action under Where as

Art. 370 of the Indian constitution special status have been given to the state of Jammu and Kashmir. Special powers are been given to the tribal community for their better governance and for protecting their rights.

1.5. Glossary:

Federal state: Powerful center and weak state

Quasi-federal State: center not so powerful power is distributed between state and centre

1.6. References :

1. M.P. Jain, Indian Constitutional Law, Wadhwa and Co. Nagpur, 2004
 2. P. M. Bakshi, The Constitution of India.
-

UNIT - 2

‘State’ Need for Widening the Definition in the Wake of Liberalization.

2.0. Objectives

2.1. Introduction

2.2. Subject Explanation

2.2.1. Definition of State – Article 12

2.2.2. Liberalization

2.2.3. Need for Widening the Definition of State in the Wake of Liberalization

2.3. Questions for self learning

2.4. Let us sum up

2.5. Glossary

2.6. References / Bibliography.

2.1 Objectives

- 1) To make the students aware of the role and functions of the state.
- 2) To understand the need for widening the scope of state in the wake of liberalization.

2.2 Introduction

At one time it was thought that the state was mainly concerned with the maintain of law and order and the protection of life, liberty and property of the subject. But today such restrictive concept is not valid today under constitution,

State under IV is bound to take certain directions in order to promote the welfare of the people and achieve economic democracy.

Liberalization rejects to relaxation of previous governmental restriction usually in the area of social or economic policy. In the area of special policy, it may refer to a relaxation of law restricting for example divorce, abortion or drugs and to the elimination of law. Whereas liberalization in trade that is in economic policy means removal of tariffs, subsidies and other restrictions on the flow of goods and services between the countries.

Thus it can be interned that due to liberalization the education, economy and various there industrial sectors are affected. The sphere of state control is reduced. In the light of above factors it is very much essential to consider the definition of 'State' what it is and in the wake of liberalization what it should be.

Before analyzing the definition of state also, it is very important to know about the fundamental rights.

As we know that part III of the constitution contains a long list of fundamental rights. The inclusive of fundamental rights in the Indian Constitution is in accordance with the trend of modern democratic thought to protect certain basic rights relating to life liberty speech, fault and so on. All these rights are given to the citizen under Part III of the constitution against the state. The aim is to protect the private action by ordinary law of the land.

Art. 12 gives an extended significance to the term 'state' occurring in art. 13(2) or any other provision concern fundamental rights, has an expansive meaning.¹

In P. D. shamdasani V/s Central Bank of India.²

Supreme court held that Art. 19(1) and Art.31(1) contains the rights which are available against the state not against the private individual.

2.3 Subject Explanation

2.2.1. Definition of State – Article 12

Article 12 defines the term ‘state’ it says that-Unless the context otherwise requires the term ‘state’ includes the following –

- 1) The Government and Parliament of India that is Executive and Legislature of the Union.
- 2) The Government and Legislature of each states.
- 3) All local or other authorities within the territory of India.
- 4) All local and other authorities under the control of the Government of India.

So it means the ‘state’ under art. 12 includes executive as well as legislative organ of union and states. It is therefore an action of these bodies that can be challenged before the courts as violating the fundamental rights.

a) Authorities –

It means a person or body exercising power to command in the context of Art. 12. word ‘authority’ means – the power to make laws. Orders, regulations, bye-laws, notification etc. which to enforce those laws.

b) Local Authorities-

Under section 3(31) of General clauses Act. it means authorities like Municipalities, District Board, Panchayats, Improvement Trust and Mining settlement Board.

Mohammad Yasin V/s Town Area Committee

The S.C. held that the bye-laws of Muncipal Committee charging a prescribed fee on the wholesale dealer was an order by a State Authority

contravened Art. 19(1). These bye-laws in effect and in substance have brought about a total stoppage of the wholesale dealer's business in the commercial sense.

c) Other Authorities-

In University of Madras V/s Santa Bai.

Madras H.C. held that 'other authorities' could not only indicate authorities of like nature that is ejusdem generic. So it could only mean authorities exercising governmental or sovereign functions. It cannot include authorities or person natural or juristic such as university unless it is maintained by the state.

But In *Ujjambai V/s State of U.P.*

Court rejected the restrictive, interpretation of expression 'other authorities' given by the Madras H.C. and held that ejusdem generic rule could not be resorted to in interpreting this expression.

In Art. 12 the bodies specially named are the Government of Union and States and the Legislature of Union and states and local authorities. There is no common genus running through these named bodies nor can these bodies so placed in one single category on any rational basis.

Electricity Board Rajasthan V/s Mohan Lal

In this case the decision given by Madras High Court in Santa bai's case was overruled and held university to be a 'state' further Patna High Court is in *Umesh singh v. V.N. Singh* following the decision of Supreme Court held that 'Patana University' is a 'state'.

Supreme Court in many decisions has given a broad and liberal interpretation to the expression other authorities in art. 12. As the role of state to a welfare state keeping in view this it has held that other authorities include all those bodies which are though not created by constitution or by a statute, are- Acting as agencies and instrumentalities of the government. The court in

Romana Dayaram Shetti V/s The International Airport Authorities of India.

The tests were laid down by P.N. Bhagwati, J. for determining whether a body is an agency of instrumentality of government –

- i) Financial resources of the state is the chief funding source that is if the entire share capital of the corporation is held by the government
- ii) Existence of deep and pervasive state control.
- iii) Functional character being governmental in essence.
- iv) If a department of government is transferred to a corporation.

In SM.Ilyar V/s ICAR it has been held that the Indian council of Agricultural research is a state within the meaning of Art. 12 of the constitution.

CSIR is state – 19 April 2002, it is an important case. In this supreme court by 7:5 majority overruled its old judgement delivered in 1975 and held that Council of Scientific and Industrial Research (CSIR) is a state within the meaning of Art. 12 of the constitution and therefore its employees can approach the High Courts or the Supreme Court to enforce their fundamental rights of equality.

State of Assam V/s Barak Upatyaka D.V. Karmchary Sansthan

The Supreme Court has held that the financial assistance provided by the state government in the form of grant-in to Assam co-operative society continuously for some years does not make a society a state within the definition state under Art. 12 of the constitution and therefore the state would not be responsible to bear and pay salaries and allowances of its employees by extending aid forever.

Need for widening the definition of State –

Mr. H. M. Seervai is of the opinion that the judiciary should be included in the definition of the state and a judge acting as a judge is subject to the unit jurisdiction of the Supreme Court. The courts like any other organ of the State are

limited by the mandatory provisions of the constitution and they can hardly be allowed to override the fundamental rights under shield that they have within their jurisdiction right to make erroneous decision.

In America it is well settled that the judiciary is within the prohibition of the 14th amendment.

The judiciary, it is said though not expressly mentioned in Art. 12, it should be included within the expression 'other authorities' Since the courts are setup by statute and exercise power conferred by law.

Therefore expression 'share' should include judiciary also. Although Supreme Court in –

A.R.Antulay V/s R.S. Nayak

Where it has been held that court cannot pass an order or issue a direction which would be violative of fundamental rights of citizens, it can be said that the expression 'state' as defined in Art. 12 of the constitution includes judiciary also.

2.2.2. Liberalization

States in the developing world play a vital role in promoting economic growth and in reducing inequalities and poverty. The Indian state is no exception. Over time the state in India has shifted from a reluctant pro-capitalist state with a socialist ideology to an enthusiastic pro-capitalist state with a neo-liberal ideology. This shift has significant implications for the possibility of development with redistribution in India².

Due to encouragement to capital has been accompanied by higher rates of economic growth. Since levels of inequality in India are not enormously skewed,

² Atul Kohli, *State and Redistributive Development in India* This paper is written under contract for a project on "Poverty Reduction and Policy Regimes" (case study of India) sponsored by the United Nations Research Institute for Social Development (UNRISD), Mumbai, India, July 12-13, 2007.

say, in comparison to Latin America, the recent growth acceleration is bound to be poverty reducing. On the other hand, however, the state-capital alliance for growth is leading to widening inequalities along a variety of dimensions: city vs. the village; across regions; and along class lines, especially within cities. Not only does rapid economic growth then not benefit as many of the poor as it could if inequalities were stable, but the balance of class power within India is shifting decisively towards business and other property owning classes. This creates the possibility of even more unequal development in the future. An important question then arises: can democracy and activism of the poor modify this dominant pattern of development?

In the changing nature of India's democratic developmental state, the struggles for more inclusive development are occurring at various levels of the body politic, eventual prospects for making India's growth process more inclusive are not encouraging. If rapid growth continues, some of this will necessarily "trickle down" and help the poor.

The sluggish growth rate in India between 1950 and 1980 was a product of a state-dominated economy in which the state pursued a variety of goals simultaneously, and none too effectively. The roots of this "soft state" lay in a multi-class social base, a not-too-well-organized ruling party, and a bureaucracy that was relatively professional at the apex but not in the periphery. By contrast, the improved economic performance since 1980 can be associated with a narrowing of the state and capital ruling alliance, the state's near-exclusive focus on growth promotion as a priority goal, and institutional insulation of key economic decisions from popular pressures³.

³ Ibid

As far as deliberate redistribution and poverty alleviation are concerned, the Indian state's capacity must be judged as fairly dismal. The attempts to redistribute land to the landless, to provide education and health to the poor, and to create employment via public works type of programs, have all been largely ineffective. The underlying causes include the absence of a real commitment among state elites, poor quality peripheral bureaucracy, but most of all, powerful vested interests who have often opposed or subverted such efforts. When viewed comparatively, however, most developing country states, especially those in Latin America and sub-Saharan Africa, have been even more ineffective than India in checking growing inequalities or in providing for their poor⁴

There was some success in India in eliminating the largest *zamindars* (landowners) but much less in ensuring that land was redistributed to the rural landless. *Zamindari* abolition was thus mainly a political phenomena (as distinct from a class phenomena), in the sense that many *zamindars* were allies of the British, lost power as the nationalists gained, and posed an obstacle to the Congress rulers to build political support in the periphery. Congress rulers thus pushed hard and succeeded in reducing the size of *zamindari* holdings. Those who gained were generally the "lower gentry," rather than the land tillers⁵.

In the context of post liberalization India, the legal infrastructure plays a number of important roles. First, it is the means through which the State can create a generalized environment of trust so that various economic entities can interact with each other.

2.2.3. Need for Widening the Definition of State in the Wake of Liberalization

⁴for some exceptions, see Sandbrook et. al., 2007.

⁵ Atul Kohli, *State and Redistributive Development in India*

Starting around 1980, Indian political system began moving in a new direction, especially in terms of developmental priorities and, related to that, in terms of the underlying state-class alliances. After 1980, there was increasingly prioritized economic growth, and put the rhetoric of socialism on the back burner. This complex political shift reflected several underlying political realities. Thus began a steady process which, over the next quarter of a century, propelled the power of capital in the Indian polity to near hegemonic proportions.

Indian moved “state” away from its socialist ambitions to a growth-promoting state that worked with the corporate sector. The policy shifts were not only of the liberalizing types that limited the state’s role in markets but went beyond, actively supporting the profitability of the corporate sector.

Liberalizing changes included removing a variety of restrictions on the activities of big indigenous business. More activist changes included tax breaks and subsidies to the corporate sector, continuing public investments, expansionist monetary and fiscal policies, a variety of supply side supports to some such favoured industries as computer and soft-ware, and limiting labour’s capacity to strike. The impact on growth was significant. As both public and private investments grew, industrial growth picked up. Since the composition of industrial investment shifted towards consumer goods, and since technology imports became possible, productivity of the economy also improved.

By 1991 a number of new forces emerged that facilitated “liberalization;” two of these, one external and the other domestic are especially notable. India’s external relations changed dramatically with the decline of the Soviet Union. Needing to shore up its relations with the United States, India increasingly opened its economy to American goods and investors. Within India the most important shift over the 1980s involved shifting policy preferences of big business in India.

Whereas Indian business opposed external liberalization in the 1980s, by the 1990s, this unified opposition dissolved.

The first generation of reforms was about liberalizing the system from the constraints of the inward-looking, public sector-dominated arrangement. At this stage “liberalization” and “reform” meant the same thing. Therefore, the first fifteen years of reform were about de-licensing the industrial sector, opening the country to foreign trade and investment and so on. Many commentators now argue that the next generation of reforms should follow up with changes such as full-fledged privatization and changes in labour laws. However, strictly speaking, privatization and labour laws are unfinished business from the first generation as they are still largely about liberalization.

The second generation reforms are a fundamentally different set of changes. They are about adjusting existing institutional arrangements in order to support the new “market-based” economic system that has emerged as a result of liberalization. In essence, this is about building a healthy new relationship between the State and civil society in general and the economic system in particular. The first generation of reforms was about reducing the role of State so that the private sector could expand. This has been achieved to a large extent despite various remaining anomalies. The next generation of reform is about reforming the State itself and helping it to play its rightful role in the new India. There are a wide array of necessary changes ranging from administrative reform to improvements in provision of public goods and services.

Perhaps the most important service that the State fills is the provision of general governance. The term “general governance” is difficult to define formally although most people would agree on what it means. One can say that general governance is

the systemic order that needs to be maintained so that people can engage in economic and social interaction. Virtually all economic and social ventures require collaboration that would not be possible without “trust” that each party would carry out their end of the bargain.

2.3 Questions for self learning

- 1) What is state under Art. 12 of the constitution?
- 2) Whether the definition of state is needed to be changed in the wake of liberalization.

2.4. Let us sum up

The definition of state under article 12 is needed to be changed due to liberalization which is restricting the sphere of governmental cannot over social and economical policies. The economic liberalization has started in India on 24.07.1990. Liberaisation has affected various sectors ranging from education to trade and commerce etc. so it is the need of hour that as various fundamental rights are available against the might of the state which in turn is limiting or withdrawing itself from various activities and introducing the private persons in I’s place so the concept of state needs to be broaden and must include various others private authorities or persons which are performing the functions and rendering the services to the citizen.

The legal system is the main mechanism through with Justice is administered. As argued earlier, the administration of Justice is an important service in itself and will always remain a key role of the State. In my view, policy-makers should push

for change in this area because it will directly improve the lives of the people and will disproportionately benefit the poor. Besides, unlike other areas of economic reform, there is unlikely to be any major political opposition to reform of the legal infrastructure. One could even argue that visible improvements in this area would go far in garnering popular support for other changes. It is virtually impossible for the executive and legislative arms of the State to keep up with all the rules governing a vast and rapidly changing country like India. Even if all existing possibilities are taken into account by formal legislation, there will always be unforeseen circumstances that will emerge. Thus, what is needed is a system that endogenously renews itself. India's common-law based judicial system can potentially fill this role but it must be made capable of doing this quickly and consistently.

2.5 Glossary

Liberalization – relaxation of previous governmental restriction

2.6. References / Bibliography.

- 1) M.P. Jain 'Indian Constitutional Law'
- 2) Dr. J. N. Pandey – Constitutional Law of India, 4th ed.
- 3) P. M. Bakshi, The Constitution of India.

Case laws from AIR Mannuals

- 1) AIR 1959 SC 59
- 2) AIR 1954 Mad. 67
- 3) AIR 1962 SC 1621
- 4) The Hindustan Times, April 19, 2002
- 5) AIR 2009 SC 2249

UNIT 3

Right to equality: Privatization and its impact on affirmative action.

3.0. Objectives

3.1. Introduction

3.2 Subject Explanation

3.2.1. Equality before law

3.3 Question for practice.

3.4 Let us sum up

3.5. Glossary

3.6. References / Bibliography.

3.0 Objectives

- 1) To analyse the constitutional provisions relating to equality.
- 2) To enable to the students to know the impact of privatization on affirmative action of the state.

3.1. Introduction

Article 14 to 18 of the constitution guarantee the right to equality to every citizen of India. Article 14 embodies the general principles of equality before law and prohibits unreasonable discrimination between persons which is also one of the objects enshrined in the preamble of objects enshrined in the preamble of the constitution. The succeeding articles 15,16,17, 18 lays down specific application of the general rules laid down in Article 14. Article 15 relates to prohibition of discrimination on the grounds of race religion etc. Article 16 guarantees equality of

opportunity in the matters of public employment. Article 17 abolishes untouchability. Article 18 abolishes title. Thus in short the constitution of India promotes equality in various respects. As we know that the state today is a welfare state and as such it has to promote the prosperity and well-being of the people for that under part IV of the constitution from Art. 36-51 certain directions are given to the states to perform affirmative action's so that welfare of the people can be secured and economic democracy can be achieved.

But however the state is gradually destroying the concept of welfare state by withdrawing itself from various affirmative actions.¹ under the grab of liberalization and globalization and thereby ultimately affecting objective of equality in various ways of dimensions.

3.2. Subject Explanation

3.2.1. Equality before law

Article 14 declares that- 'state shall not deny to any person equality before law and the equal protection of laws within the territory of India.' Thus article 14 uses and expression. 'equality before law' and 'equal protection of laws'. Thus it means among the equals the law should be equal and should be equally administered that like should be treated alike. But however this guarantee of equality is not and absolute one state can impose reasonable restrictions on the basis of intelligible differentia.

The state by liberalization is allowing the privatization in various sectors of public viz education, trade and commerce and proposed import export control and thereby denying the valuable rights given under the constitution relating to equality. By privatization the socially and economically weaker section is affected badly due to denial of reservation policy, subsidies and various other benefits.

In the case of BALCO Employees Union (Regd.) V/s Union of India

In this case the employees had challenged the decision of the central government to disinvest Majority of shares of Bharat Aluminium co. Ltd. (BALCO) to private party which is public sector undertaking. The government had taken a decision to disinvest majority of shares BALCO after detailed discussion and had complied with all procedural requirements. The workmen contended that they had been adversely affected by this decision to disinvest 51% of share in the favor of private party by. Which they have lost their rights and protections under Arts. 14 and 16 of the constitution.

A five judge Bench of S.C. unanimously held that process of disinvestment is a policy decision involving complex economic factors and thereby- restrained from interfering in economic decision of the government.

So this decision can be criticized in the ground of privatizing the public Industry and thereby loosing it's control and causing negation of the rights quaranted under Art. 14 and 16 of the constitution.

As we know that on India due to intense discrimination and inequalities which were associated with the caste system and untouchability⁶. The Indian state has made explicit use of affirmative and positive action in the form of reservation policy in employment, reservation in education and other spheres with respect to discriminated groups such as schedule caste. Scheduled Tribes and other backward class. All these provisions are rightly made under article 16(4) and Art. 15 (3), 15(4) etc. of constitution but all seems to be going in vein due to privatization.

State of Haryana V/s Rajpal Sharma Teachers employed in privately managed aided schools in the state of Haryana are entitled to the same salary and dearness allowance as is paid to teachers employed in Government schools.

⁶ Sukhdeo Thorat, chairman of U.G.C. An article on 'Affirmative Action in Private Sector : Why and how'

In B.C.P.P. Mazdoor Saungh V/s N.T.P.C.

The appellants who were employees of NTPC a public sector undertaking transferred to BALCO, a Private Company under the policy of dis-investment from retrospective effects challenged the validity of the agreement as illegal arbitrary and violative of Art.14 of the constitution. The employees were recruited and appointed by PSU (NTPC) and governed by service terms and conditions as applicable to NTPC employees.

The court held that the contract of service cannot be changed retrospectively without tri-partite agreement and pre-decision hearing to employees. The court held that it amounted of the constitution of India.

Before the 93rd Amendment Act of 2006, there was no provision providing for the reservation in private education institutions.

In T.M. Pai foundation and P. A. Inamdar Cases- It has been held that the state cannot make reservation of seats in admissions in privately run educational institutions.

But however after the amendment the effect is that now the state can make special provisions. Providing reservation to certain categories of persons in admission to private educational institution. This amendment is severely criticized as the politicians who claim to take the country to 21st century for which higher education based on merits is essential is taking retroactive step in providing reservation to less meritorious students to private educational institutions. This appeasements policy of the present UPA Government may get some benefits in elections but would be harmful to the Nation. It would damage the Hindu-Muslim unity which was the aim of the framer of the constitution towards making a united society in the country.

The Government of Indian cannot absolve itself from the responsibility of providing access to higher education to its citizen. The government must also try and improve the quality of higher education in India. Providing education to one and all has been constant endeavor and one of the prime duties of the Government.

As we know that providing free and compulsory primary education is one of the prime duties of the Government as enunciated in the constitution that is why government has been concentration more on primary education than on the higher education and accordingly has delegated it to the private sector During the 1990's with the gradual privatization of higher education, the budgetary allocation for higher education declared.

3.3 Question for practice.

- 1) Discuss the provision of constitution relating to equality and whether privatization is permissible of denial of law relating to equality.
- 2) What is effect of the privatization on the affirmative action of the state which guarantees equality?

3.5 Activities

The students must study the plight of marginalized group (that is disadvantaged section.) affected due to privatization by analyzing the case laws and visiting the institution providing higher education, its rules etc.

3.4 Let us sum up

Duet to privatization and the general trend towards the withdrawal of the state under the impact of liberalization of Indian economy. Serious concern has

been expressed affirmative policy. As a result of this de-reservation there is a growing demand for some sort of affirmative action policy in the private sector. So that the guarantee of equality enumerated in the constitution will be promoted if the disadvantaged group will be kept on par with the socially and economically advanced group of the society.

3.5. Glossary

Intelligible differentia – it means the rational relation between the classification and object sought to be achieved.

3.8 Bibliography

- 1) Dr. J. N. Pandey, ‘The Constitutional law of India’
- 2) Sukhdeo Thorat, An Article on ‘Affirmative Action in Private sector’ why and how?
- 3) M. P. Jain Constitutional Law of India.
- 4) H. M. Seervai – Constitutional Law of India

.....

UNIT 4

Empowerment of women.

4.0 Objectives

4.1. Introduction

4.2 Topic Explanation

4.2.1. Empowerment: meaning and importance

4.2.2. Empowerment of women in India:

4.2.1.1. Status of Woman in ancient India.

4.2.2.2. Movement of Empowerment of women in India

4.2.2.3. Constitutional Provisions for upliftment of women:

4.2.2.4. International commitments of India

4.2.2.5. Amendment in the existing laws after acceding of CEDAW

4.2.2.6. Machinery for redressal

4.2.2.7. Various Schemes for empowerment of women

4.2.3. Initiatives by the Judiciary

4.3 Questions for Self learning

4.4. Let us sum up

4.5. Glossary

4.6. References

“When we empower women, we empower communities, nations and the entire human family.

—UN Secretary-General Ban Ki-Moon

4.0 Objectives

After studying this unit the student will be able to understand the

1. the status of woman in ancient India
2. the movements initiated for empowerment of women in India
3. the Constitutional provisions for upliftment of women
4. international commitments of India with respect to empowerment of women
5. the amendment in the existing laws after acceding of CEDAW
6. the redressal machinery available for the deprived women
7. the activism of Judiciary in case of empowerment of women

4.1. Introduction:

Although its forms differ significantly across societies and cultures, the phenomenon of women's subordination is found worldwide. Throughout the world women are economically, socially, politically, legally and culturally disadvantaged compared to their so called better halves. These disadvantages operate on various levels, international, regional, national, local, communal and familial.

Women in many countries are discriminated against by the national legal rights, including ownership and management of, access to and enjoyment of matrimonial and commercial property, inheritance, marriage, divorce and custody of children, enjoyment of fundamental civil and political rights, lack of participation in and access to law and policy-making, courts and legal remedies and access to certain types of employment and government benefits. Women in India are subject to discrimination not just on the basis of gender but on numerous other factors such as caste, community, religion etc. Women cannot enjoy the full range of rights while being repressed through violence and while sections of the

administration and the criminal justice system reflect and perpetuate discriminatory practices prevalent in society⁷.

As a vast democracy with many regional variations and a "developing" economy, India has an enormous amount to achieve and an enormous amount of commitments to fulfill to all its citizens, including women. Recognizing its international commitments towards the rights of women and urged on by a dynamic women's movement, successive governments have unveiled policies of empowerment for women which have sought to address the full range of women's human rights. As a result, there are many positive aspects of women's empowerment which have taken place in recent years in India.

Women constitute half of the country's population and it is abundantly clear that there can't be any development unless their needs and interests are fully taken into account to protect and safeguard the rights of women to give the much needed impetus to the holistic development of women and children.

Along with men Woman is equal partners in national development thus women empowerments in economically, politically, culturally, physically, mentally and socially is essential. Therefore the Government of India declared 2001 as the Year of Women's Empowerment. Access to resources and service, is the first level of empowerment, since women improve their own status, related to men by their own work and organization arising from increased access to resource and services. Mobilization is the action level of empowerment. Control is also one of the levels of empowerment.

⁷ Violence against women does not only have a physical impact but also an impact on their ability to enjoy the full range of rights including social, economic and political: the right of women to enjoy the full range of rights is indivisible.

Thus when women are get access to resources, when they get appropriate employment, they organise, are mobilized and ultimately get control of the work they are doing is called empowerment.

4.2 Topic Explanation

4.2.1. Empowerment: meaning and importance

According to U.N, Women's empowerment has five components,

- 1.women's sense of self-worth;
- 2.their right to have and to determine choices;
- 3.their right to have access to opportunities and resources;
- 4.their right to have the power to control their own lives, both within and outside the home; and
- 5.their ability to influence the direction of social change to create a more just social and economic orders, nationally and internationally.

The male-female ratio, if examined from one state to the other in India, will shed interesting light on different aspects of gender relations. Even within different communities notwithstanding adequate public policy, ratio of female to male child mortality varies from state to state and community to community.

1. Lack of economic independence for a woman has been the main reason for her continuous subjugation.
2. Number of women and the large majority who are illiterate, ignorant and poor. But the common problems faced by all are:
3. Inequality of power sharing with men and in particular in the decision making at all levels.

4. Lack of awareness of and commitment to internationally and nationally recognized women's rights, even amongst the elite.
5. Insufficient machinery at all levels to promote advancement of women.
6. Poverty, discrimination and marginalization of women from .Cradle to grave..
7. Inequality in women's access to and participation in the definitions of economic structures and policies and the productive process itself; unequal access to education, health, employment, credit facilities and other means of maximizing awareness of women's rights and the use of their capacities.
8. Violence against women. (It is ever on the rise)
9. Effects on women of continuing local, national, international armed or other kinds of conflict. (Indian women are the worst sufferers of the cross-border Terrorism)
10. Marginalization in the decision making process, with women generally remaining invisible at most levels in public structures. For example, India, considering its vastness, has less than minimum female representation both in Parliament and in legislatures.
11. Lack of on the job training to elected women members of the Panchayat, legislatures and Parliament.
12. Patriarchy interfering and eroding the work of the women Sarpanchas and panchas.
13. In spite of the strong women's movement in the country, the NGOs are too dispersed and isolated in deciding the national and local priorities in action.

14. Inactive executive and monitoring mechanisms to oversee the implementation of national/state plans and programmes. There is total lack of a Feedback mechanism amongst them.

4.2.2. Empowerment of women in India:

4.2.2.1. Status of Woman in ancient India.

The ancient concept of women being inferior to men continued even after independence. Women were enjoined to be of service to their husbands. There are very few texts specifically dealing with the role of women. According to MANU, a woman is never fit for Independence, because her father protects her in childhood, her husband in youth, and her sons in old age.

The constituents of patriarchy corresponding to ideology and institutional practices were as follows (Kosambi, 1991)

1. The most important goal of life of woman is to act as vehicle for procreation of sons. The seed (male) has primacy over soil (female)
2. The religious sacraments lead to spiritual excellence but woman is entitled to only one of them i.e. marriage.
3. Women could be owners of property but they could not dispose of it, not even their Stridhan (bridal wealth).
4. Woman was also excluded from public life as she was alleged to have uncontrolled sexuality.
5. Man is the insider in kinship relations whereas woman is the outsider having loyalty only to her husband.

The current gender discrimination and sexual assault finds its roots in these patriarchal values.

4.2.2.2. Movement of Empowerment of women in India:

During the British Raj, many reformers such as Ram Mohan Roy, Ishwar Chandra Vidyasagar, Jyotiba Phule and his wife Savitribai Phule, and many others struggled for the upliftment of women. Raja Rammohan Roy's efforts led to the abolition of the Sati practice under Governor-General William Cavendish-Bentinck in 1829. Ishwar Chandra Vidyasagar's crusade for the improvement in condition of widows led to the Widow Remarriage Act of 1856. Many women reformers such as Pandita Ramabai also helped the cause of women upliftment.

4.2.2.3. Constitutional Provisions for upliftment of women:

India's Constitution sets out fundamental rights made available to all its citizens which it explicitly states are to be realised without discrimination. The Constitution upholds the right to equality before the law (Article 14) and prohibits discrimination on the grounds of religion, race, caste, sex or place of birth. Various laws reinforce safeguards against discrimination and provide for positive discrimination for certain groups identified as vulnerable within society. These include scheduled castes and scheduled tribes and women. There have been several government initiatives to empower women economically and politically. Political representation of women has increased at the local level. The 73rd Constitutional Amendment Act, 1992 (Panchayati Raj), included a provision for statutory minimum reservation of 33% seats for women in Panchayati Raj Institutions⁸. This

⁸ This Amendment came into force on 24 April 1993.

has allowed a number of women to participate in community decision-making processes, including those from marginalised communities given that there are also reservations for scheduled caste, scheduled tribe and backward caste categories⁹. The National Commission for Women was established in January 1992 under the 1990 National Commission for Women Act. The National Human Rights Commission was established in 1993 under the Protection of Human Rights Act, 1993.

4.2.2.4. International commitments of India:

Following the Fourth UN World Conference on Women in Beijing in 1995, the Government of India promised several measures to ensure the advancement of women's rights in India, in line with the general recommendation 19¹⁰ of the Committee on the Elimination of Discrimination Against Women (CEDAW). 2001 was declared the Women's Empowerment Year.

The 'fundamental rights' serving as the *basic structure* of the Constitution of India imbibed the principles in the Universal Declaration on Human Rights¹¹. However not much has been achieved and hence there is need to give effect to international obligations which came into existence as the Convention on the Elimination of All Kinds of Discrimination against Women (CEDAW)¹². Thus guided by the principle "...a State which has contracted valid international obligations is bound to make in its legislations such modification as may be necessary to ensure the

⁹ Political reservation for women at the central level has however proved more problematic and successive parliamentary sessions have failed to reach a consensus on the Constitutional (85th Amendment) Bill 1999 which would provide 33% reservation for women in the national parliament and state legislatures.

¹⁰ General recommendation 19 relates to gender-based violence and recommends amongst other things that states should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence including effective legal measures (including penal sanctions), preventive measures (including public information and education programs) and protective measures (including refuges).

¹¹ UDHR adopted on December 10 1948.

¹² As of 2 Nov 2006, 185 countries - over ninety percent of the members of the United Nations - are party to the Convention

fulfillment of the obligations undertaken.”¹³ India signed the convention on 30 July 1980¹⁴ and obliged by enacting various laws at par with the international convention i.e. CEDAW.

4.2.2.5. Amendment in the existing laws after acceding of CEDAW

The recent 86th Constitutional Amendment¹⁵ makes free and compulsory education a fundamental right for all children in the age group of 6 to 14 years.

The Government has so far not enacted a separate Act, i.e., the Anti Discrimination Act. However, many of the existing laws do ensure prohibition of discrimination. The private sector too is implementing these laws. The Minimum Wages Act, 1926, ensures minimum rates of wages to the unskilled and semi skilled workers and other categories of employees employed in scheduled employment including the construction workers, workers engaged in laying of electricity lines, cables and water supply and sewerage pipelines, etc. The Equal Remuneration Act, 1976, ensures equal wages for equal work including women. Besides, the various labour laws, like the Factories Act, 1948, the Plantation Labour Act, 1951, the Contract Labour (Regulation and Abolition) Act, 1970,

¹³ Advisory opinion of International Permanent Court of Justice, in *Exchange of Greek and Turkish Populations case*, P.C.I.J.Rep., ser. B, No. 10,p.6(1925)

¹⁴ Certain Declarations and reservations made upon signature and confirmed upon ratification:

Declarations:

"i) With regard to articles 5 (a) and 16 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.

"ii) With regard to article 16 (2) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy."

but had certain reservations. India

Reservation: "With regard to article 29 of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it does not consider itself bound by paragraph 1 of this article."

¹⁵ Article 21 A. By the year 2010, Sarva Shiksha Abhyan, a scheme formulated to achieve Universal Primary Education, will provide elementary education to all children in the 6-14 years age group. To encourage girl children to go beyond primary schooling, many States have made education completely free for girls up to higher secondary stage.

Maternity Benefit Act, 1964, Beedi and Cigar Workers (Condition of Employment) Act, 1966 providing special measures for women workers are also applicable to the private sector. The Industrial Employment (Standing Orders) Act, 1946, which is applicable to the private sector provides that sexual harassment at work place constitutes a misconduct for which the worker is liable for disciplinary action. The Employees State Insurance Act, 1948 providing for health and welfare of employees drawing wages less than certain fixed ceiling limits and Employees Provident Funds Act, 1952 extends to the private sector also.

The Marriage Law (Amendment) Act, 2001 amended the Hindu Marriage Act, Special Marriage Act, Parsi Marriage and Divorce Act, and the Code of Criminal Procedure, providing for the speedy disposal of applications for maintenance. The ceiling that was provided in the Code of Criminal Procedure of Rs. 500/- for claiming maintenance by a woman has been deleted and a wide discretion has been given to the Magistrate to award appropriate maintenance. In the Indian Divorce Act, discriminatory provision that required women seeking divorce to prove adultery coupled with cruelty/desertion, (whereas a man could seek divorce on one ground only) was amended. This amendment provided uniform provisions to men and women with regard to divorce. This amendment has also deleted the archaic provision of the necessity of obtaining confirmation decree from the High Court on the decree granted by the Family Court, which was applicable only for Christians. The Indian Succession Act was amended in the year 2002 which enabled Christian widows to get a share in the property. The Marriage Act (Amendment) 2003 amended the Hindu Marriage Act and Special Marriage Act thus enabling women to file cases in the district where they reside, thereby giving a go by to the general law of jurisdiction based on place where the cause of action arose.

Concerned about the declining sex ratio and sex selective abortions, the Medical Termination of Pregnancy Act, 1971 (MTP) and the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PNDT) were amended in the years 2002 and 2003 respectively. The Medical Termination of Pregnancy Act (MTP) has been amended specifying the place and persons authorized to perform abortion and provides for penal actions against those unauthorized persons performing abortion. The PNDT Act prohibits misuse of pre-natal diagnostic techniques for determination of sex of fetus leading to female foeticide. It provides for regulation of clinics conducting ultra sound investigation, enforcement of machinery and stringent punishment for undertaking sex selective tests and abortions. A new law on domestic violence, The Protection of Women from Domestic Violence Act, 2005 has been enacted.

The existing provision in the Indian Penal Code was found inadequate to address all forms of sexual abuse and harassment that range from teasing, gestures, and molestation to violent sexual abuse. The Supreme Court in *Vishaka's case*¹⁶ has defined sexual harassment, which is in accordance with the definition in General Recommendation 19 of the Convention, and has laid down certain guidelines as preventive measures against sexual harassment at work place and has directed employers to put in mechanisms at the work place. Pursuant to the above judgment, Government has taken many steps to ensure compliance with the law laid down by the Supreme Court.

Demanding and taking dowry is treated as a crime and the Dowry Prohibition Act has been amended in the years 1984 and 1986 and the Criminal Law also has been amended correspondingly. There has been a slight decrease in the incidence of harassment for dowry and dowry deaths in the year 2002-2003.

¹⁶ AIR 1997 SC 3011

The practice of dowry continues despite the law, as it continues to enjoy social sanction. Unemployment and greed for materialistic gains and overemphasis on marriage for women are making them more vulnerable to dowry harassment.

There are specific legislations to prohibit and prevent practices like the *Devadasi* (dedication of women to a deity) and *Sati* (immolation of a woman on the death pyre of her deceased husband). The Devadasi practice is peculiar to only the States of Karnataka, Tamil Nadu, Andhra Pradesh, Maharashtra, Orissa and Goa. This practice, based on religious belief is often misused and is one of the causes of inducting women into prostitution. These States have enacted separate laws prohibiting dedication of women/girls as Devadasi and penalize such dedications. The Karnataka Devadasi (Prohibition of Dedication) Act, 1982, for example, prohibits dedication of women/girls as Devadasi and holds such acts unlawful. This enactment further encourages the Devadasi woman's entry into mainstream and declares that a marriage covenant entered into by a Devadasi shall not be invalid and no issues of such marriages shall be illegitimate by reasons of such woman being a Devadasi. The Commission of Sati Prevention Act, 1987 was enacted to prevent commission of Sati by anyone and penalizes any person who abets the commission of Sati, either directly or indirectly and glorifies Sati. The DWCD has proposed amendments to this Bill to make it more stringent.

The Marriage Laws (Amendment) Act, 2001 has amended the Indian Divorce Act, 1869, the Parsi Marriage and Divorce Act, 1936, the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955 which stipulates that the application for alimony pendente lite (pending litigation) or maintenance and education of minor children shall be disposed of within 60 days from the date of service of notice on the respondent. The Code of Civil Procedure (Amendment)

Acts, 1999 and 2002 also provide for speedy justice for all, including women, in civil cases.

One of the important special measures adopted by the State was the 73rd and 74th Amendments to the Constitution, which provides for reservation of seats and the posts of chairpersons for women in institutions of local governance. To ensure effective participation of tribal women in the process of planning and decision-making, these amendments have been extended to the Scheduled areas through the Panchayats (Extension to the Scheduled Areas) Act, 1996. Government has taken affirmative action to increase women's participation in local self-governing institutions and decision-making bodies by enacting the 73rd and 74th Constitutional Amendments, 1993. These legislations provide for reservation of not only 1/3rd of all seats at all levels of local Government, but also reserved 1/3rd of all posts of chairpersons in these bodies for women, both in rural and urban areas. Further, there is reservation of not less than one-third of the total number of seats reserved for SCs and STs for SC and ST women. Over a million women have entered public office across the country due to this initiative.

4.2.2.6. Machinery for redressal

The High Court established in every State and the Supreme Court functions as guardians of public rights to check state excesses or violations of fundamental rights. The Supreme Court and the High Courts have been empowered to issue appropriate directions/orders/writs including mandamus, habeas corpus, prohibition, quo warranto and certiorari against arbitrary or unlawful administrative action. The law declared by the Supreme Court is the law of the land and its decisions are binding on all courts and authorities. The decisions rendered by the Supreme Court are enforceable and all authorities, civil and

judicial are enjoined to act in aid of the Supreme Court by virtue of Article 144 of the Constitution.

Some laws have been amended to provide speedier justice to women. Special Courts have been set up to deal with offences against women and Fast Track Courts have been established to ensure speedy trial of undertrials. Specialised courts, viz., Family Courts, about 84 in number, have been established in 18 States and Union Territories, since the year 1984, to deal with the issues pertaining to family matters, like marriage, divorce, child custody, guardianship, maintenance, etc. However, in most of the courts, a large number of cases pertain to the claim of maintenance from the husband. The functioning and efficacy of these courts had engaged the attention of the Parliamentary Committee on Empowerment of Women. The Government is considering the suggestions made by the Committee. The Government has taken note to ensure appointment of more number of women judges to the Family Courts as stipulated in the Family Court Act, 1984.

Article 51 of the Constitution imposes an obligation on the State to foster respect for international law and treaty. However, the treaty provisions cannot be invoked without the same being incorporated through enabling legislation.

4.2.2.7. Various Schemes for empowerment of women

Implementation of the standard of the CEDAW Convention at the domestic/private sphere is still a challenge to be addressed. The Government is strengthening the existing legislation and developing institutional machinery. The Government has initiated the Sarva Shiksha Abhiyan (SSA), a national programme for universal primary education. There are several schemes of the government such

as ‘Swayamsidha’¹⁷, the Support to Training and Empowerment Programme (STEP)¹⁸. The Rashtriya Mahila Kosh (RMK)¹⁹, the Swarnajayanti Gram Swarozgar Yojana (SGSY)²⁰ The Sampoorna Grameen Rozgar Yojana (SGRY)²¹ Under the Urban Self-employment Programme (USEP) of Swarna Jayanti Shahari Rozgar Yojana (SJSRY) assistance is provided to the urban poor, especially women, living below the urban poverty line. Mahatma Gandhi National Rural Employment Guarantee Scheme (MNREGA) etc.

4.2.3. Initiatives by the Judiciary

The judiciary through its proactive role has applied the principles of the treaty in many judgments.

The judiciary in a number of decisions has struck down the discriminatory provisions of law and rules, such as, in *C.B.Muthamma v. Union of India*²² wherein the service rules requiring a female employee to obtain permission of the Government in writing before her marriage and denying her right to be appointed on the ground that the candidate is a married woman was held to be discriminatory against women. In *Air India v. Nargeesh Meerza*²³ the service condition that terminated the services of an Airhostess on becoming pregnant was struck down as

¹⁷ launched in the year 2001, is an integrated program for the empowerment of women through the net work of self help groups of women by ensuring their direct access to and control over resources

¹⁸ This programme provides updated skills and knowledge to poor and asset-less women in traditional sector, such as dairying, animal husbandry, sericulture, handlooms, social forestry, etc.

¹⁹ since its registration in 1993, has established its credentials as the premier micro-credit agency with its focus on women and their economic empowerment through the provisions of credit to poor and asset- less women in the informal sector.

²⁰ Aims at bringing beneficiary families above the poverty line by providing them with income-generating assets through a mix of bank credit and Government subsidy.

²¹ Endeavour to create 30 per cent of the employment opportunities for women. The National Maternity Benefit Scheme aims at assisting the expectant mother by providing Rs. 500 each for the first two live births. This has recently been revamped as the **Janani Suraksha Yojana**. The Rural Sanitation Programme ensures construction of village sanitary complexes exclusively for women, where individual latrines are not feasible.

²² AIR 1979 SC 1868

²³ AIR 1981 SC 1829

being discriminatory. In *Vasantha v. Union of India*²⁴ Section 66 of the Factories Act which prohibited night shift work for women was held to be discriminatory.

In *Madhu Kishwar v. Union of India*²⁵ and in *C.Masilamani Mudliar and others v. The idol of Swaminathaswami Thirukoil and others*²⁶ property rights for women were upheld. In *M/s Mackinnon Mackenzie and Co Ltd v. Audrey D'Cost*²⁷ provided for equal wages. *Delhi Domestic Working Women's Forum v. Union of India*²⁸ and *BodhiSattwa Gautam v. Subhra Chakroborthy*²⁹ and *Chairman Railway Board v. Chandrima Das*³⁰ provided for compensation in rape cases.

*Municipal Corporation of Delhi v. female workers (Muster Roll case)*³¹ ensured maternity benefit for contract workers. And in *Gita Hariharan*³² case regarding guardianship rights interpreted the provisions in favour of women dealing with the rights of woman to be a guardian for the minor child, the principles of the Convention have been applied to hold the provisions of the Hindu Guardianship and Minority Act, 1956, as being discriminatory. The *Daniel Latiff's*³³ case enabled Muslim woman to seek maintenance from divorced husband.

4.3 Questions for Self learning:

Q.1. Write in brief.

1. What was the status of woman in ancient India?

²⁴ 2001 (ii) LLJ 843

²⁵ AIR 1996 SC page 1864

²⁶ AIR 1996 SC 1697

²⁷ AIR 1987 SC 1281

²⁸ (1995) 1 SCC 14

²⁹ AIR 1996 SC 922

³⁰ AIR 2000 Sc 988

³¹ AIR 2000 SC 1274

³² AIR 1999 SC 1149

³³ 2001 (7) SCC 740

2. Who initiated movement of empowerment of women in India?

Q.2. Write broad answers

1. What are Constitutional provisions for upliftment of women?

2. What are international commitments of India with respect to empowerment of women?

3. Was the amendment in the existing laws after acceding of CEDAW necessary? why?

4. What is the redressal machinery available for the deprived women?

5. Do you think that our Judiciary is active in case of empowerment of women?

Q. 3. Write an essay on Empowerment of women in India

4.4. Let us sum up :

The Constitution not only grants equality to women, but also empowers the State to adopt measures of positive discrimination in favour of women. It underscores girl rights, health, women education, gender equality, decision making, poverty eradication and violence against women.

Empowerment of women, also called gender empowerment. The empowerment of women occurs in reality when women achieve increased control and participation in decision making that leads to their better access to resources and improve socio-economic status. Today, Indian women have made their presence felt virtually in every field. Empowerment refers to increasing the spiritual, political, social or economic strength of individuals and communities. It often involves the empowered developing confidence in their own capacities.

Empowerment is probably the totality of the following or similar capabilities:

- 1 Having decision-making power of their own.
- 2 Having access to information and resources for taking proper decision
- 3 Having a range of options from which you can make choices (not just yes/no, either/or.)
- 4 Ability to exercise assertiveness in collective decision making
- 5 Having positive thinking on the ability to make change
- 6 Ability to learn skills for improving one's personal or group power.
- 7 Ability to change others' perceptions by democratic means.
- 8 Involving in the growth process and changes that is never ending and self-initiated
- 9 Increasing one's positive self-image and overcoming stigma.

Indian women have not to struggle for Constitutional and legal rights which stands given to them. Since the days of Independence struggle, the achievements in the area of women's rights are many. Education has become a Fundamental right of every child. Health infrastructure and gender budgeting and allocations for better family health have improved. There is no discrimination in competitive examinations, recruitment and employment. There is no taboo for women to contest and occupy the highest echelons of power. The Judicial decisions have improved women's lot here and there. Changes in the laws to prosecute and punish with stringent punishments are available. There is now a wide base developing where women are getting a hold in the Indian political arena.

4.5. Glossary

Empowerment of women: Empowerment means to inspire women with the courage to break free from the chains of limiting beliefs, patterns and societal or

religious conditions that have traditionally kept women suppressed and unable to realize their true beauty and power.

4.6. References :

1. J. P. Bhatnagar, *Law Relating to Women and Their Rights*, (2nd edition), Ashoka Law House, New Delhi. (1998)
2. P. Ishwara Bhat, *Law and Social Transformation*, Eastern Book Co. Lucknow, (2009)
3. Malik and Raval, *Law and Social Transformation*, Allahabad Law agency, Delhi, (2007)
4. www.undp.org
5. www.mospi.gov.in

Acts Referred:

1. The Immoral Traffic (Prevention) Act, 1956
2. The Dowry Prohibition Act, 1961 (28 of 1961) (Amended in 1986)
3. The Indecent Representation of Women (Prohibition) Act, 1986
4. The Commission of Sati (Prevention) Act, 1987 (3 of 1988)
5. Protection of Women from Domestic Violence Act, 2005
6. Protection of Women from Domestic Violence Act, 2005
7. The Muslim women Protection of Rights on Dowry Act 1986
8. The Married Women's Property Act, 1874 (3 of 1874)
9. The Hindu Succession Act, 1956
10. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of misuse) Act 1994

UNIT 5.

Freedom of press and challenges of new scientific development

5.0 Objectives

5.1. Introduction

5.2 Topic Explanation

5.2.1. Freedom of speech and right to broadcast and telecast.

5.2.1.1. Constitution and freedom of speech and expression

5.2.1.2. Freedom of speech: Print Media, broadcasting and telecasting.

5.2.1.2.1. Freedom of speech and Print Media

5.2.1.2.2. Freedom of speech and broadcasting

5.2.1.2.3. Freedom of speech and telecasting.

5.2.1.3. Reasonable Restrictions

5.2.2. Right to strikes, *hartal* and *bandh*.

5.2.2.1. Right to Strike

5.2.2.2.1. Right to strike and Constitution of India

5.2.2.2.2. Provision of strike under the Industrial Dispute Act.

5.2.2.2. *Hartal* and *Bandh*

5.3 Questions for Self learning

5.4. Let us sum up

5.5. Glossary

5.6. References

5.0 Objectives:

After studying this unit the student will be able to understand.....

- 1 importance Freedom of speech and right to broadcast and telecast.
- 2 the provisions in the Constitution related to freedom of speech and expression
- 3 the relation of Freedom of speech and Print Media, broadcasting and telecasting.
- 4 Reasonable Restrictions imposed by the constitution on media
- 5 The right to strikes, *hartal* and *bandh*.

5.1. Introduction

5.2 Topic Explanation

5.2.1. Freedom of speech and right to broadcast and telecast.

5.2.1.1. Constitution and freedom of speech and expression -

Freedom of speech and expression is guaranteed by Indian constitution under article 19(1) (a). The people of India have given themselves the constitution of India which secure to all its citizen liberty of thought and expression. Preamble is reflected in art 19 (1) (a) given in the Part III of the constitution which deals with the fundamental rights. Fundamental rights are those rights which cannot be curtail by the government except due procedure of law. In case of violation of these rights an aggrieved person can approach directly to the Supreme Court under Article 32 or to the High court under Article 226 for the restoration of these rights and remedies as required for justice.

Extensive scope of this right is as much as Article 21 of the constitution i.e. Right to life and liberty because a right to life and liberty cannot be fully exercisable without exercise of right to speech and expression. The right as per Article 21 without the right under Article 19 (1) (a) makes a human being as a slave. Who does not have a right to speech or express himself. Hence right to speech and

expression is essential as equal to right to life and liberty to express him fully. Nevertheless, this right has limited scope as it is available to citizens only. Only Citizens can exercise this right. This right is not available to foreigner, idol, corporation, legal entity etc, only a natural born person can exercise this right. This non natural entity can exercise this right under the veil of manager or owners of a company those who are citizen of India. When one citizen exercise his Right to speech and expression, it shall not violet the others right to speech and expressions means his exercise of this right shall not extend to cause harm to another's right to speech and expression a since civilization and other fundamental rights.

In a landmark judgment, the Supreme Court in *Maneka Gandhi v. Union of India*³⁴ held that the freedom of speech and expression has no geographical limitation and it carries with it the right of a citizen to gather information and to exchange thought with others not only in India but abroad also.

Article 19(2) have provided restriction on article 19(1) (a). It is not absolute right. Article 19(2) have provided restrictions on freedom of speech and expression. The right to freedom of speech and expression is subject to limitations imposed under Article 19(2) i.e. morality obscenity etc. these can be imposed only by making legislation and not by judicially. This is regarding healthy survival of democracy that one should not encroach over the others right.

Freedom of speech and expression means and includes express ones views, opinions, ideas timely by words of mouth, Privilege pictures signs gestures etc. or through any communicable medium audio or visual i.e. radio television broadcasting or by way of publication and circulation i.e. news paper, magazines ,

³⁴ AIR1978 SC 597

articles, book etc. press is one of the way propagation of ideas and hence coming under art.19.(1) (a).i.e. Press broadcasting, right to protest, right to criticize, film, advertisement, etc.

5.2.1.2. Freedom of speech: Print Media, broadcasting and telecasting.

It is necessary to mention here that, this freedom under Article 19(1) (a) is not only confined to newspapers and periodicals but also includes pamphlets, leaflets, handbills, circulars and every sort of publication which affords a vehicle of information and opinion. Forms of free speech include the use of symbols, orderly public demonstrations, and radio and television broadcasts. Freedom of speech is an essential characteristic of a constitutional democracy because by exercising this right, individuals can communicate opinions both to other citizens and to their representatives in the government. Through this free exchange of ideas, government officials may become responsive to the people they are supposed to represent.

5.2.1.2.1. Freedom of speech and Print Media

Although Article 19 of the constitution of India does not express provision for freedom of press but the fundamental right of the freedom of press implicit in the right the freedom of speech and expression. In the famous case *Express Newspapers (Bombay) (P) Ltd. v. Union of India*³⁵, court observed the importance of press very aptly. Court held in this case that “*In today’s free world freedom of press is the heart of social and political intercourse. The press has now assumed the role of the public educator making formal and non-formal education possible*

³⁵ (1985) 1 SCC 641

in a large scale particularly in the developing world, where television and other kinds of modern communication are not still available for all sections of society. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate [Government] cannot make responsible judgments. Newspapers being purveyors of news and views having a bearing on public administration very often carry material which would not be palatable to Governments and other authorities.”

The Freedom of Press and the Freedom of Expression can be regarded as the very basis of a democratic form of government. Every business enterprise is involved in the laws of the nation, the state and the community in which it operates.

Where as In *RomeshThapar v. State of Madras*³⁶, entry and circulation of the English journal “Cross Road”, printed and published in Bombay, was banned by the Government of Madras. The same was held to be violative of the freedom of speech and expression, as “without liberty of circulation, publication would be of little value”.

Freedom of Speech and expression means the right to express one’s own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode. It thus includes the expression of one’s idea through any communicable medium or visible representation, such as gesture, signs, and the like. This expression connotes also publication and thus the freedom of press is included in this category. Free propagation of ideas is the necessary objective and this may be done on the platform or through the press. This propagation of ideas is secured by freedom of circulation. Liberty of circulation is essential to that freedom as the liberty of publication. Indeed, without circulation the publication

³⁶ (1950) S.C.R. 594

would be of little value. The freedom of speech and expression includes liberty to propagate not one's views only. It also includes the right to propagate or publish the views of other people; otherwise this freedom would not include the freedom of press.

The media derives its rights from the Fundamental Right to free speech and expression guaranteed to every citizen under Article 19(1) (a) of the Constitution. There are two facets to the legal rights involved. One is media's own rights under Article 19 (1) (a) which it enjoys like any other citizen. The Supreme Court has held in successive judgments on press freedom that the media has no special rights, no higher than that of any citizen. If it enjoys any special position, it is in the nature of a public trustee, entrusted with the duty of facilitating the right to information guaranteed to the citizens. The second facet of media rights is, therefore, the right to collect and transmit to the citizen information of public importance.

5.2.1.2.2. Freedom of speech and broadcasting

This right also coming under the purview of right to freedom of speech and expression .with the advent of satellite technology broadcasting is the way to disseminate the views, opinions information via television, internet news channel etc. this right cannot be fully exercise without dissemination of information though broadcasting. Supreme Court has held that this right is a fundamental right subject to article 19(2). Explaining the scope of freedom of speech and expression Supreme Court has said that the words "freedom of speech and expression" must be broadly constructed to include the freedom to circulate one's views by words of mouth or in writing or through audiovisual instrumentalities. It therefore includes the right to propagate one's views through the print media or through any other communication channel e.g. the radio and the television. Every citizen of this

country therefore has the right to air his or their views through the printing and or the electronic media subject of course to permissible restrictions imposed under Article 19(2) of the Constitution.

5.2.1.2.3. Freedom of speech and telecasting.

There are hundreds of Television (hence forth T.V.) channel in Indian. They are playing a great role to educate people and generate the public opinion. T.V news channels has a great impact an minds of people and may help change his view are after watching certain programme on T.V channels. Most of the T.V channels are operated from foreign land; with the help of satellite they are telecasting the news and T.V serials. The satellite communication boosted the Radio and Television broadcasting.

After the *Hero cup*³⁷ judgment in 1994 India is marked as top most market for telecasting. With the advent of satellite world became a Global village. In India more than 500 T.V channels are available to Indian viewer from domestic as well as foreign private broadcasters. Today television is not limited to urban area, we can easily find out it in rural area also i.e. telecasting in T.V set, video conferencing can join any two part in the world or country within a minute and we are more nearer to each other by using of internet facility. Broadcasting is one of the medium to exercise the right to speech and expression. Without adopting the technology of broadcasting no nation can make progress in the present era.

Right to freedom of speech and expression include publication, printing, circulation etc. broadcasting is play a role to circulate, disseminate information to large number of masses which is sine que none to exercise the right to freedom of

³⁷ Zee Telefilms Ltd. And Ors. V. Union Of India And Ors. on 4 June, 1999

speech and expression. Broadcasting is a way to disseminate the views opinion information via television, internet, and news channel etc. i.e. we can see a live telecast of cricket match or news from England it is possible only through broadcasting. This communication mode also play very important role by creating awareness of social issues or by education notes.

Every citizen have right to air his views ,opinion through the printing or electronic media subject to reasonable restriction provided under art 19(2) case laws.(Hero cup case)

If we want to give a message to larger population then we can do it easily through radio or television. It is possible only because of broadcasting of message through satellite. It shows that how broadcasting is very much important to disseminate information and exercise the right to speech and expression.

Broadcasting help to provide a message to larger population and it is left to people what to do with them, now the replay system is developed by which people can answer the question with the use of internet or 3G systems.

Right to broadcast is a fundamental right coming under the umbrella of right to speech and expression u/Art 19(1) (a). (*Sakal paper*³⁸ case)Hence the entire constitutional safeguard provided to other fundamental right are also provided to this right also. There can be no doubt that the freedom of speech and expression includes freedom of propagation of ideas and that freedom is ensured by freedom of circulation it has also given liberal contention to fulfill the object behind art 19(1)(a) hence broadcast also coming under the purview of Art.19(1)(a). (*Ramesh thapper*³⁹ case.)

³⁸ AIR 1961SC 305

³⁹ (1950) S.C.R. 594

Right to speech and expression includes publication dissemination writing circulation etc, and broadcasting is way to exercise these things hence it is essential to exercise this right.

Broadcasting is the distribution of audio and video content to a dispersed audience via any audio visual medium. Receiving parties may include the general public or a relatively large subset of thereof. It could also be for purposes of private recreation, non-commercial exchange of messages, experimentation, self-training, and emergency communication such as amateur (ham) radio and amateur television (ATV Broadcasting is the distribution of audio and video content to a dispersed audience via any audio visual mode degum. Receiving parties may include the general public or relatively large subject of there of it could also be for the purpose of private recreation, noncommercial exchange of massages.

This right has wide scope subject to article 19(2) which provides a reasonable restriction on right to speech and expression regarding morality decency security etc, broadcasting at presently coming under the ministry of information and broadcasting govt. of India. There is Prasar Bharati Act 1990 which are also formed a rules and regulation for broadcasting. the new draft bill 2007 is still pending which envisage to make changes in present system and policy related to broadcasting no one can broadcast or telecast any news or film etc. which is a against any of the provision mention u/art 19(2).

Definition of Broadcasting under section 2 (c) of the Prasar Bharati (Broadcasting Corporation Of India) Act, 1990 -"broadcasting means the dissemination of any form of the communication like sign, signals, writings, pictures, images sound of all kinds by transmission of electromagnetic waves through space or through cables intended to be received by general public either

directly or indirectly through the medium of relay, stations and all its grammatical variation and cogent expression shall be construed accordingly.”

Broadcasting is the process of sending information to distant places is called broadcasting but whereas telecasting refers to broadcast the programs on television i.e. the broadcasted information.

The term ‘broadcast media’ covers a wide spectrum of different communication methods such as television, radio, newspapers, magazines and any other materials supplied by the media and press. Definition of broadcasting is wide enough to cover not only traditional broadcasting but also internet broadcasting as well as mobile broadcasting. However, the broadcasting services listed in the Bill are traditionally under the administrative and regulatory.

5.2.1.3. Reasonable Restrictions

The freedom of speech and of the press does not confer an absolute right to express without any responsibility. Lord Denning, in his famous book Road to Justice, observed that press is the watchdog to see that every trial is conducted fairly, openly and above board, but the watchdog may sometimes break loose and has to be punished for misbehavior. With the same token Clause (2) of Article 19 of the Indian constitution enables the legislature to impose reasonable restrictions on free speech under following heads:

1. security of the State,
2. friendly relations with foreign States,
3. public order,
4. decency and morality,
5. contempt of court,
6. defamation,

7. incitement to an offence, and
8. Sovereignty and integrity of India.

Reasonable restrictions on these grounds can be imposed only by a duly enacted laws and not by executive action. The restriction must be reasonable. In other words, it must not be extreme or disproportionate. The procedure and the manner of imposition of the restriction also must be just, fair and reasonable.

5.2.2. Right to strikes, *hartal* and *bandh*.

Today, in each country of world whether it is democratic, capitalist, socialist, give right to strike to the workers. But this right must be the weapon of last resort because if this right is misused, it will create a problem in the production and financial profit of the industry. This would ultimately affect the economy of the country. Every right comes with its own duties. Today, most of the countries, especially India, are dependent upon foreign investment and under these circumstances it is necessary that countries who seeks foreign investment must keep some safeguard in their respective industrial laws so that there will be no misuse of right of strike.

5.2.2.1. Right to Strike

In India, right to protest is a fundamental right under Article 19 (1) (a) of the Constitution of India. Though strike is a way to show protest but right to strike is not a fundamental right. It is held in the case of *Kameswar Prasad vs. State of Bihar*⁴⁰.

40

5.2.2.2. Right to strike and Constitution of India

The right to strike is organically linked with the right to collective bargaining and will continue to remain an inalienable part of various modes of retort or expression by the working people, wherever the employer-employee relationship exists, whether recognized or not. Article 19(1) (a) provides freedom of speech and expression and strike is a way to express some kind of negation, protest toward industry until the industry accept the demands of worker-it flow from the fundamental right to form union. As every other fundamental right is subject to reasonable restrictions, the same is also the case to form trade unions to give a call to the workers to go on strike and the state can impose reasonable restrictions.

The right to strike is not fundamental in India. It is a legal right, available after certain pre-condition are fulfilled. The right to strike is a relative right which can be exercised with due regard to the rights of others. The strike as a weapon has to be used sparingly for redressed of urgent and pressing grievances when no means are available or when available means have failed to resolve it. It has to be resorted to, to compel the other party to the dispute to see the justness of the demand. It is not to be utilized to work hardship to the society at large so as to strengthen the bargaining power. Every dispute between an employer and employee or Government and his servants or any other bodies like Advocates, lawyers etc. has to take into consideration the third dimension, viz. the interest of the society as whole.

In *Harish Uppals* case⁴¹ the Supreme Court held that advocates have no right to strike. However the court also opined “in the rarest of rare cases where the dignity, integrity and independence of the Bar and/or the Bench are at stake, Courts

⁴¹ 1973 AIR 258, 1973 SCR (2)1025

may ignore (turn a blind eye) to a protest abstention from work for not more than one day”. The court, therefore, acknowledges that the right to strike exists and which can be exercised if a rare situation demands so. The apex court has only tried to restrict the right to strike of advocates with regards to the significant role they play in the administration of justice. For all others’ this sacred right holds good force. The judgment especially recognizes the right with regard to industrial workers where it states that advocates do not have a right to strike as “strike was a weapon used for getting justice by downtrodden, poor persons or industrial employees who were not having any other method of redressing their grievances.

In the *All India Bank Employees Association v. The national industrial tribunal*⁴², Supreme Court held that, “the right to strike or right to declare lock out may be controlled or restricted by appropriate industrial legislation and the validity of such legislation would have to be tested not with reference to the criteria laid down in clause (4) of article 19 but by totally different considerations.”

Thus, there is a guaranteed fundamental right to form association or Labour unions but there is no fundamental right to go on strike. Under the Industrial Dispute Act, 1947 the ground and condition are laid down for the legal strike and if those provisions and conditions are not fulfilled then the strike will be illegal.

The Trade Union Act, 1926 for the first time provided limited right to strike by legalizing certain activities of a registered trade union in furtherance of a trade dispute which otherwise breach of common economic law. Now days a right to strike is recognized only to limited extent permissible under the limits laid down by the law itself, as a legitimate weapon of Trade Unions.

5.2.2.3. Provision of strike under the Industrial Dispute Act, 1947

⁴² [1962] 3 SCR 269

Section 2(q) of said Act defines the term strike, that “strike” means a cassation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal, under a common understanding of any number of persons who are or have been so employed to continue to work or accept employment. Whenever employees want to go on strike they have to follow the procedure provided by the Act otherwise there strike deemed to be an illegal strike. Section 22(1) of the Industrial Dispute Act, 1947 put certain prohibitions on the right to strike. It provides that no person employed in public utility service shall go on strike in breach of contract:

- (a) Without giving to employer notice of strike within six weeks before striking; or
- (b) Within fourteen days of giving such notice; or
- (c) Before the expiry of the date of strike specified in any such notice as aforesaid; or
- (d) During the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings.

It is to be noted that these provisions do not prohibit the workmen from going on strike but require them to fulfill the condition before going on strike. Further these provisions apply to a public utility service only. The Industrial Dispute Act, 1947 does not specifically mention as to who goes on strike. However, the definition of strike itself suggests that the strikers must be persons, employed in any industry to do work.

Besides the Industrial Disputes Act, 1947, the Trade Unions Act, 1926 also recognizes the right to strike. Sections 18 (xiii) and 19 (xiv) of the Act confer immunity upon trade unions on strike from civil liability.

Strike prohibited on some grounds

The provisions of section 23 are general in nature. It imposes general restrictions on declaring strike in breach of contract in the both public as well as non- public utility services in the following circumstances mainly: -

- (a) During the pendency of conciliation proceedings before a board and till the expiry of 7 days after the conclusion of such proceedings;
- (b) During the pendency and 2 months after the conclusion of proceedings before a Labour court, Tribunal or National Tribunal;
- (c) During the pendency and 2 months after the conclusion of arbitrator, when a notification has been issued under sub- section 3 (a) of section 10 A;
- (d) During any period in which a settlement or award is in operation in respect of any of the matter covered by the settlement or award.

5.2.2.2. *Hartal and Bandh*

Strike, Bandh and hartal are Indian versions of mass strikes. They were powerful expressions of popular discontent during the independence movement. ***Hartal*** was M K Gandhi's adaptation of an existing weapon to his unique idea of non-violent protest against colonial rule. It involved the closing of schools and shops, offices, courts of law and other work. Hartal was essentially a powerful moral argument against imperial rule.

A ***bandh*** in independent India, however, is a subversion of the original idea of hartal. The action is seldom voluntary. Political parties who call for a bandh enforce it ruthlessly. Forced shutdown of social and economic activity backed by the implicit threat of violence is how bandhs are claimed to be 'successful'

In 2004, the Supreme Court of India fined two political parties, BharatiyaJanata Party (BJP) and Shiv Sena for organizing a bandh in Mumbai as a protest against bomb blasts in the city. The state with the maximum Bandhs in India is Communist Party of India (Marxist) controlled West Bengal where the average number of bandhs per year is 40-50 (ranging from a couple of hours to a maximum of 2 days per bandh).A bandh is not the same as a Hartal, which simply means a strike: during a bandh, any business activity (and sometimes even traffic) in the area affected will be forcibly prevented by the strikers. However, in states where bandhs are banned, Hartals may be identical to bandhs except for the name.

The main affected are shopkeepers who are expected to keep their shops closed and the public transport operators of buses and cars are supposed to stay off the road and not carry any passengers. There have been instances of large metro cities coming to a standstill. Bandhs are powerful means for civil disobedience. Because of the huge impact that a bandh has on the local community, it is much feared as a tool of protest. The Supreme Court of India tried to ‘ban’ bandhs in 1998, but political parties still organize them.”

Everything is supposed to be closed on a day when a bandh is ‘called’ for. In college terms it’s similar to mass-bunking the class due to a problem with a lecturer.

5.3. Questions for Self learning

Q.1. Answer in brief

1. What is the provision in Constitution for freedom of speech and expression?
2. Is the freedom of speech and expression without any restriction?
3. Is there any Right to strike under the Constitution of India?
4. What is difference between right to strikes, *hartal* and *bandh*?

Q.2. Answer in broad

1. What do you understand by freedom of speech and right to broadcast and telecast?

2. Discuss the Provision of strike under the Industrial Dispute Act.

Q.3. Write short notes on

1. Freedom of speech and Print Media

2. Freedom of speech and broadcasting

3. Freedom of speech and telecasting.

4. Reasonable Restrictions

5. Right to Strike

6. *Hartal* and *Bandh*

5.4. Let us sum up

The people of India declared in the Preamble of the Constitution, which they gave unto themselves their resolve to secure to all the citizens liberty of thought and expression. This resolve is reflected in Article 19(1) (a) which is one of the Articles found in Part III of the Constitution, which enumerates the Fundamental Rights.

Article 19(1) (a) of Indian Constitution says that all citizens have the right to freedom of speech and expression. This includes everything from newspapers to blogs. A citizen has fundamental right to use the best means of imparting and receiving communication and as such have an access to telecasting for the purpose. However there will be reasonable restriction as imposed in Article 19 (2).

Strike has both sides like a coin. Strike is essential for collective bargaining against the exploitation of employers. A strike is nothing else but a cry of exasperation at the working conditions. On the other side sometimes strike create

problem to the government and the people at large which not only put people to inconvenience but also throw the workers at risk of starvation. The loss cause by the stoppage of work is not acceptable.

5.5. Glossary :

Expression: to express ones feelings such as joy, sorrow or opinion, or art, such as dance, music, painting etc. This expression of feeling uses a medium such as laughing, crying, speaking, writing, screaming etc.

5.6. References

1. Dr. S.R. Myneni, *Media Law*, Asia Law House, Hyderabad, (2013)
2. D.D. Basu, *Law of Press in India*,(1980)
3. Dr. Madabhushi Sridhar, *The Law of Expression*, Asia Law House, Hyderabad, 2007
4. M.P. Jain, *Indian Constitutional Law*, Wadhwa and Co. Nagpur, 2004
5. Pandey J.N., *Constitutional Law of India*, (Central Law Agency, Allahabad, 1997)

UNIT 6.

Democratic process

6.0 Objectives

6.1. Introduction

6.2 Topic Explanation

6.2.1. Nexus of politics with criminals and the business.

6.2.2. Election

6.2.2.1. Election of Lok Sabha and Rajya Sabha

6.2.2.2. Election of President and vice-President

6.2.2.3. Election of State Assemblies

6.2.2.4. Elections of Local Bodies

6.2.2.4.1. Election of Panchayat

6.2.2.4.2. Elections of Municipal Corporation and Municipalities.

6.2.3. Election commission: status.

6.2.6. Electoral Reforms

6.3 Questions for Self learning

6.4. Let us sum up

6.5. Glossary

6.6. References

6.0 Objectives

After studying this unit, you will be able to

- 1 **know process of conduction of the election of Lok Sabha and Rajya Sabha**
- 2 describe the composition of the Election Commission of India;
- 3 enumerate the functions the Election Commission and explain its role;
- 4 mention various stages in the electoral process;
- 5 identify the drawbacks and need for electoral reforms;
- 6 suggest the electoral reforms and those already carried on

6.1. Introduction

India is a constitutional democracy with a parliamentary system of government, and at the heart of the system is a commitment to hold regular, free and fair

elections. These elections determine the composition of the government, the membership of the two houses of parliament, the Rajya Sabha also known as the Upper House or The Council of States and the Lok Sabha the Lower House or House of People, the state and union territory legislative assemblies, as well as legislative councils, the Presidency and vice-presidency.

Elections are conducted according to the constitutional provisions, supplemented by laws made by Parliament. The major laws are Representation of the People Act, 1950, which mainly deals with the preparation and revision of electoral rolls, the Representation of the People Act, 1951 which deals, in detail, with all aspects of conduct of elections and post election disputes⁴³.

The country has been divided into 543 Parliamentary Constituencies, each of which sends one MP to the Lok Sabha, the lower house of the Parliament. The size and shape of the parliamentary constituencies are determined by an independent Delimitation Commission⁴⁴, which aims to create constituencies which have roughly the same population, subject to geographical considerations and the boundaries of the states and administrative areas.

The Constitution puts a limit on the size of the Lok Sabha of 550 elected members, apart from two members who can be nominated by the President to represent the Anglo-Indian community⁴⁵. There are also provisions to ensure the representation

⁴³ The Supreme Court of India has held that where the enacted laws are silent or make insufficient provision to deal with a given situation in the conduct of elections, the Election Commission has the residuary powers under the Constitution to act in an appropriate manner.

⁴⁴ Delimitation is the redrawing of the boundaries of parliamentary or assembly constituencies to make sure that there are, as near as practicable, the same number of people in each constituency. In India boundaries are meant to be examined after the ten-yearly census to reflect changes in population, for which Parliament by law establishes an independent Delimitation Commission, made up of the Chief Election Commissioner and two judges or ex-judges from the Supreme Court or High Court. However, under a constitutional amendment of 1976, delimitation was suspended until after the census of 2001, ostensibly so that states' family-planning programs would not affect their political representation in the Lok Sabha and Vidhan Sabhas. This has led to wide discrepancies in the size of constituencies, with the largest having over 25,00,000 electors, and the smallest less than 50,000. Delimitation exercise, with 2001 census data released on 31st December 2003, is now under process.

⁴⁵ Article 331, in Lok Sabha and Article 333 Legislative Assemblies of the States

of scheduled castes and scheduled tribes⁴⁶, with reserved constituencies where only candidates from these communities can stand for election.

Elections enable every adult citizen of the country to participate in the process of government formation. You must have observed that elections are held in our country frequently. These include elections to elect members of the Lok Sabha, Rajya Sabha, State Legislative Assemblies (Vidhan Sabhas) Legislative Councils (Vidhan Parishad) and of, President and Vice-President of India. Elections are also held for local bodies such as municipalities, municipal corporations and Panchayati Raj institutions. These elections are held on the basis of universal adult franchise, which means all Indians of 18 years of age and above have the right to vote, irrespective of their caste, colour, religion, sex or place of birth. Election is a complex exercise. It involves schedules rules and machinery. This lesson will give you a clear picture of the voting procedure, as also about filing of nominations, their scrutiny and the campaigns carried out by the parties and the candidates before actual polling. In this lesson you will read about the Election Commission, electoral system in India and also some suggestions for electoral reforms.

6.2 Topic Explanation

6.2.1. Nexus of politics with criminals and the business.

According to Dr. John C. Maxwell, a leader is one who knows the way, goes the way and shows the way. He is the guide and philosopher to those below him. A leader is the personification of trust to his followers. He is their hope and future. It is sin to let them down to seek own ends. “*A leader is a dealer in hope*” said Napoleon Bonaparte. W.H. Auden says, “*No person can be a great*

⁴⁶ Article 330, in Lok Sabha and Article 332 in Legislative Assemblies of the States, There are currently 79 seats reserved for the scheduled castes and 41 reserved for the scheduled tribes in the Lok Sabha.

leader unless he takes genuine joy in the success of those under him.” Right leadership is integrity, conviction, sacrifice, commitment to people and values, and ability to blend with their dreams. Right leadership is ability to guide and lead people in right path. Leaders are models to others. Self-seekers and criminals have no place in its scheme. Commercial angle has nothing to do with it. Sensationalism, claptrap and partisan approach never feed leadership qualities. Leadership qualities flourish in right values, right decisions and right actions. Concern to those below is its main mantra. All these key factors of the right leadership are thrown to winds in India after independence. The celebrated Chinese Philosopher of the 6th century BC, Lao Tzu opines, “A leader is best when people barely know he exists, not so good when people obey and acclaim him, worse when they despise him.” Leadership is service au fond and exposure comes only as a derivative. It is just the opposite in the extant Indian leadership where service is a front and tool for exposures, self-aggrandizement, further boost upwards and attainment of selfish ends. It is neither right leadership nor is it even leadership. It is a travesty of leadership. It is making fun of leadership. Indian leadership has degenerated to that at all fronts. It no way fit in to the frame laid down by Harold J.Seymour for a true leader when he says, “Leaders are the ones who keep faith with the past, keep step with the present, and keep the promise to prosperity.” Extant variety of Indian leadership has neither a past nor a future and only has a greedy present.

Leadership in India appeared like an endless summit of opportunities to rob and grab. Those who had the muscle and mental toughness to exploit jumped to the wagon in streams and created a new set of leadership for India at the cost of the ancient regime inspired by lofty ideals and guided by the motto of service. Corrupt

and ruthless to the core, the new leadership easily cornered the scrupulous old order in opportunistic political games of money, power and muscle gained in the process. Leadership in the milieu became nothing more than a daring massive investment for multifold returns, a pure commercial venture. Crime paid. Deception and flamboyancy became sine qua non for leadership. That is why leadership became a dirty word in India. And Indians as they are, accepted the reality to the extent that they now think twice before accepting anybody without the merit of a criminal past as their leader. It is more so in the leader of the leaders segment of the politics. Criminals constitute the spine of the political leadership in states like Bihar and Uttara Pradesh⁴⁷. Parveen kumar further adds[e]verything is forgotten in the pursuit of power, and governance became subservient to this end. With the fall in the ideals of the governance and the Government system, that in the people was not far away. Instinct for survival preceded everything else. The trend corroded confidence in higher nuances of the value system. Greedy politicians, self-seeking media, demoralized bureaucracy and hapless hoi polloi, all added to the mix.

Though sparks of freedom and true leadership surfaced from time to time in all these fields in the last six decades, they are far in-between to a country of India's size and diversity and mere isolated initiatives like fishes out of water and soon died down literally and figuratively. The fallacy lies in apostasy, either for greed, or poor leadership material going for sensationalism in selfish or commercial pursuit, or more accurately both reinforcing each other as models from one generation to the other. However, true attempts at right leadership do exist here

⁴⁷ Praveen Kumar *INSIDE INDIA* - Ensemble of articles on governance and public affairs Publish America Baltimore,US,2009

and there in all fields and they are succeeding. This is important. This gives the hope of regeneration in the future.

6.2.2. Election

6.2.2.1. Election of Lok Sabha and Rajya Sabha

Parliament

The Parliament of the Union consists of the President, the Lok Sabha (House of the People) and the Rajya Sabha (Council of States). The President is the head of state, and he appoints the Prime Minister, who runs the government, according to the political composition of the Lok Sabha. Although the government is headed by a Prime Minister, the Cabinet is the central decision making body of the government. Members of more than one party can make up a government, and although the governing parties may be a minority in the Lok Sabha, they can only govern as long as they have the confidence of a majority of MPs, the members of the Lok Sabha. As well as being the body, which determines whom, makes up the government, the Lok Sabha is the main legislative body, along with the Rajya Sabha.

The Lok Sabha

Elections to the Lok Sabha are carried out using a first-past-the-post electoral system. The country is split up into separate geographical areas, known as constituencies, and the electors can cast one vote each for a candidate (although most candidates stand as independents, most successful candidates stand as members of political parties), the winner being the candidate who gets the maximum votes.

Who can vote?

The democratic system in India is based on the principle of universal adult suffrage; that any citizen over the age of 18 can vote in an election (before 1989 the age limit was 21). The right to vote is irrespective of caste, creed, religion or gender. Those who are deemed unsound of mind, and people convicted of certain criminal offences are not allowed to vote.

Elections for the Lok Sabha and every State Legislative Assembly have to take place every five years, unless called earlier. The President can dissolve Lok Sabha and call a general election before five years is up, if the government can no longer command the confidence of the Lok Sabha, and if there is no alternative government available to take over.

Governments have found it increasingly difficult to stay in power for the full term of a Lok Sabha in recent times, and so elections have often been held before the five-year limit has been reached. A constitutional amendment passed in 1975, as part of the government declared emergency, postponed the election due to be held in 1976. This amendment was later rescinded, and regular elections resumed in 1977.

Holding of regular elections can only be stopped by means of a constitutional amendment and in consultation with the Election Commission.

Any Indian citizen who is registered as a voter and is over 25 years of age is allowed to contest elections to the Lok Sabha. Every candidate has to make a deposit of Rs. 10,000/- for Lok Sabha election, except for candidates from the Scheduled Castes and Scheduled Tribes who pay half of these amounts. The deposit is returned if the candidate receives more than one-sixth of the total number of valid votes polled in the constituency. Nominations must be supported at least by one registered elector of the constituency, in the case of a candidate

sponsored by a registered Party and by ten registered electors from the constituency in the case of other candidates. Returning Officers, appointed by the Election Commission, are put in charge to receive nominations of candidates in each constituency, and oversee the formalities of the election.

Rajya Sabha - The Council of States

The members of the Rajya Sabha are elected indirectly, rather than by the citizens at large. Rajya Sabha members are elected by each state Vidhan Sabha using the single transferable vote system. Unlike most federal systems, the number of members returned by each state is roughly in proportion to their population. At present there are 233 members of the Rajya Sabha elected by the Vidhan Sabhas, and there are also twelve members nominated by the President as representatives of literature, science, art and social services. Rajya Sabha members can serve for six years, and elections are staggered, with one third of the assembly being elected every 2 years.

Nominated members

The president can nominate 2 members of the Lok Sabha if it is felt that the representation of the Anglo-Indian community is inadequate and 12 members of the Rajya Sabha, to represent literature, science, art and the social services.

Any Indian citizen who is registered as a voter and is over 30 years can contest For the Rajya Sabha. Every candidate has to make a deposit of Rs. 5,000/- for Rajya Sabha, except for candidates from the Scheduled Castes and Scheduled Tribes who pay half of these amounts. The deposit is returned if the candidate receives more than one-sixth of the total number of valid votes polled in the constituency. Nominations must be supported at least by one registered elector of the constituency, in the case of a candidate sponsored by a registered Party and by ten registered electors from the constituency in the case of other candidates. Returning

Officers, appointed by the Election Commission, are put in charge to receive nominations of candidates in each constituency, and oversee the formalities of the election.

6.2.2.2. Election of President and vice-President

The President is elected by the elected members of the Vidhan Sabhas, Lok Sabha, and Rajya Sabha, and serves for a period of 5 years (although they can stand for re-election). A formula is used to allocate votes so there is a balance between the population of each state and the number of votes assembly members from a state can cast, and to give an equal balance between State Assembly members and National Parliament members. If no candidate receives a majority of votes there is a system by which losing candidates are eliminated from the contest and votes for them transferred to other candidates, until one gain a majority. The Vice President is elected by a direct vote of all members elected and nominated, of the Lok Sabha and Rajya Sabha.

6.2.2.3. Election of State Assemblies

India is a federal country, and the Constitution gives the States and Union Territories significant control over their own government. The Vidhan Sabhas (Legislative Assemblies) are directly elected bodies set up to carrying out the administration of the government in the 28 States of India. In five States, there is a bicameral organisation of legislatures, with both an Upper and Lower House [Vidhan Parishad (Legislative Council) and Vidhan Sabha (Legislative Assembly)]. Two of the seven Union Territories, viz., the National Capital Territory of Delhi (now a State) and Pondicherry, have also Legislative Assemblies.

Elections to the Vidhan Sabhas are carried out in the same manner as for the Lok Sabha election, with the States and Union Territories divided into single-member Assembly constituencies, and the first-past-the-post electoral system used. The Assemblies range in size, according to population. The largest Vidhan Sabha is for Uttar Pradesh, the smallest Pondicherry.

Vidhan Parishads consist of representatives chosen by the members of the Vidhan Sabhas and local authorities, and also by graduates and teachers in the State having such Parishad. The Governor of the State also nominates certain members to give representation to art, science, literature, social service and co-operative movement. The elections to these Parishads are held under the system of proportional representation by means of a single transferable vote.

Any Indian citizen who is registered as a voter and is over 25 years of age is allowed to contest elections to the State Legislative Assemblies. Every candidate has to make a deposit of Rs. 5,000/- for State Legislative Assemblies election, except for candidates from the Scheduled Castes and Scheduled Tribes who pay half of these amounts. The deposit is returned if the candidate receives more than one-sixth of the total number of valid votes polled in the constituency. Nominations must be supported at least by one registered elector of the constituency, in the case of a candidate sponsored by a registered Party and by ten registered electors from the constituency in the case of other candidates. Returning Officers, appointed by the Election Commission, are put in charge to receive nominations of candidates in each constituency, and oversee the formalities of the election.

Who can vote for Lok Sabha or Vidhan Sabha Elections?

The democratic system in India is based on the principle of universal adult suffrage; that is to say, any citizen over the age of 18 can vote in an election to Lok Sabha or Vidhan Sabha (before 1989 the age limit was 21). The right to vote is irrespective of caste, creed, religion or gender. Those who are deemed unsound of mind, and people convicted of certain criminal offences are not allowed to vote. There has been a general increase in the number of people voting in Indian elections. There have been even more rapid increases in the turnout of women and members of the scheduled castes and scheduled tribes, who had tended in the past to be far less likely to participate in elections, and voting for these groups has now moved closer to the national average.

6.2.2.4. Elections of Local Bodies

74th Constitutional Amendment Act 1992

In order to provide the common framework for urban local bodies and help to strengthen the functioning of the local bodies as effective democratic units of self government, Parliament amended the constitution (74th Amendment Act 1992) and provided constitutional status to “municipalities” which are of 3 types:

- a. Nagar Panchayat-for transitional area (an area which is being transformed from rural to urban area),
- b. Municipal Council for a smaller urban area,
- c. Municipal Corporation for a larger urban area.

Through this amendment Part IX A has been added to the constitution along with a schedule (12th schedule). This means that now constitution of India sets out clear guideline on the following:

- 1 Composition of municipalities

- 2 Composition and constitution of Ward Committees, District planning committees and Metropolitan Planning committee,
- 3 Reservation of seats for SCs/ST and Women,
- 4 Power, authority, duration, dissolution and elections of the municipalities,
- 5 Constitution of State Finance Commission

Besides, Schedule 12 lists down 18 subjects on which it can formulate its policies and execute it. However, as mentioned earlier Local government is the “**State Subject**” therefore based on these constitutional guidelines states were required to make a law for the functioning of the municipalities in their respective states. All the states (except the 4 North East states where the act does not apply- Arunachal Pradesh, Meghalaya, Mizoram and Nagaland) have constituted Municipalities in their states and they conduct regular elections.

Changes after 74th Constitution Amendment Act 1992.

The question arises that municipalities have been in existent in several cities of India before 1992 as well so what exactly have changed after this Act? The difference between the previous and present bodies is as follows:

- 1 The Municipalities in Pre-1992 era did not have the Constitutional status and the state governments were free to extend or control the functional sphere through executive decisions which they cannot do now.
- 2 The state government could control the municipalities by controlling the funds. However, now the State government is mandated to transfer the funds in accordance with the recommendations of the State Finance Commission.
- 3 The subject of jurisdiction is clearly defined now with Municipalities having exclusive control over 18 listed subjects.
- 4 Representation of SCs/ST and women is laid down in the Act itself making the municipalities a more representative body.

6.2.2.4.1. Election of Panchayat

Panchayati Raj system is a three-tier system in the state with elected bodies at the Village, Taluka and District levels. It ensures greater participation of people and more effective implementation of rural development programmes. There will be a Grama Panchayat for a village or group of villages, a Taluka level and the Zilla Panchayat at the district level.

India has a chequered history of panchayati raj starting from a self-sufficient and self-governing village communities that survived the rise and fall of empires in the past to the modern institutions of governance at the third tier provided with Constitutional support.

The idea which produced the 73rd Amendment was not a response to pressure from the grassroots, but to an increasing recognition that the institutional initiatives of the preceding decade had not delivered, that the extent of rural poverty was still much too large and thus the existing structure of government needed to be reformed. It is interesting to note that this idea evolved from the Centre and the state governments. It was a political drive to see PRIs as a solution to the governmental crises that India was experiencing. The Constitutional (73rd Amendment) Act, passed in 1992, came into force on April 24, 1993. It was meant to provide constitutional sanction to establish "democracy at the grassroots level as it is at the state level or national level". Its main features are as follows

- 1 The Gram Sabha or village assembly as a deliberative body to decentralised governance has been envisaged as the foundation of the Panchayati Raj System.
- 2 A uniform three-tier structure of Panchayats at village (Gram Panchayat), intermediate or block (Panchayat Samiti) and district (Zilla Parishad) levels.

- 3 All the seats in a panchayat at every level are to be filled by elections from respective territorial constituencies.
- 4 Not less than one-third of the total seats for membership as well as office of chairpersons of each tier has to be reserved for women.
- 5 Reservation for weaker castes and tribes (SCs and STs) have to be provided at all levels in proportion to their population in the Panchayats.
- 6 To supervise, direct and control the regular and smooth elections to Panchayats, a State Election Commission has to be constituted in every State and UT.
- 7 The Act has ensured constitution of a State Finance Commission in every State/UT, for every five years, to suggest measures to strengthen finances of panchayati raj institutions.
- 8 To promote bottom-up-planning, the District Planning Committee (DPC) in every district has been accorded constitutional status.
- 9 An indicative list of 29 items has been given in Eleventh Schedule of the Constitution. Panchayats are expected to play an effective role in planning and implementation of works related to these 29 items.

6.2.2.4.2. Elections of Municipal Corporation and Municipalities.

Municipal Governance in India has been in existence since the year 1687 with the formation of Madras Municipal Corporation and then Calcutta and Bombay Municipal Corporation in 1726. In early part of the nineteenth century almost all towns in India had experienced some form of municipal governance. In 1882 the then Viceroy of India, Lord Ripon's resolution of local self-government laid the democratic forms of municipal governance in India.

In 1919, a Government of India act incorporated the need of the resolution and the powers of democratically elected government were formulated. In 1935 another Government of India act brought local government under the purview of the state or provincial government and specific powers were given.

According to Census of India, 1991, there are 3255 Urban Local Bodies (ULB)s in the country; classified into four major categories of

1. Municipal Corporation
2. Municipalities (*Municipal Council, Municipal Board, Municipal Committee*)
3. Town Area Committee
4. Notified Area Committee

The municipal corporations and municipalities are fully representative bodies, while the notified area committees and town area committees are either fully or partially nominated bodies.

As per the Indian Constitution, 74th Amendment Act of 1992, the latter two categories of towns are to be designated as municipalities or nagar panchayats with elected bodies. Until the amendments in state municipal legislations, which were mostly made in 1994, municipal authorities were organised on an Latin: *ultra vires* (beyond the authority) basis and the state governments were free to extend or control the functional sphere through executive decisions without an amendment to the legislative provisions.

After the 74th Amendment was enacted there are only three categories of urban local bodies:

Mahanagar Nigam (*Municipal Corporation*)

Nagar Palika (*Municipality*)

Nagar Panchayat (*Notified Area Council, City Council*)

Article 243Q of the 74th Amendment requires that municipal areas shall be declared having regard to the population of the area, the density of population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factors as may be specified by the state government by public notification for this purpose.

Among all urban local governments, municipal corporations enjoy a greater degree of fiscal autonomy and functions although the specific fiscal and functional powers vary across the states, these local governments have larger populations, a more diversified economic base, and deal with the state governments directly. On the other hand, municipalities have less autonomy, smaller jurisdictions and have to deal with the state governments through the Directorate of Municipalities or through the collector of a district. These local bodies are subject to detailed supervisory control and guidance by the state governments.

Mahanagar Nigam a.k.a. (*Municipal Corporation*) in India are state government formed departments that works for the development of a Metropolitan city, which has a population of more than 1 Million. The growing population and urbanisation in various cities of India were in need of a local governing body that can work for providing necessary community services like health centres, educational institutes and housing and property tax.

In India, a Nagar Palika or Municipality or Nagar Nigam is an urban local body that administers a city of population 100,000 or more. However, there are exceptions to that, as previously nagar palikas were constituted in urban centers with population over 20,000 so all the urban bodies which were previously classified as Nagar palika were reclassified as Nagar palika even if their population was under 100,000. Under the Panchayati Raj system, it interacts directly with the

state government, though it is administratively part of the district it is located in. Generally smaller district cities and bigger towns have a Nagar palika. Nagar palikas are also a form of local self-government, entrusted with some duties and responsibilities, as enshrined and guided upon by the Constitutional (74th Amendment) Act,1992.

The members of the Nagar palika are elected representatives for a term of five years. The town is divided into wards according to its population, and representatives are elected from each ward. The members elect a president among themselves to preside over and conduct meetings. A chief officer, along with officers like an engineer, sanitary inspector, health officer and education officer who come from the state public service are appointed by the state government to control the administrative affairs of the Nagar Palika.

6.2.3. Election commission: status.



Election Commission - a Constitutional Body⁴⁸

Election Commission of India is a permanent Constitutional Body. The Election Commission was established in accordance with the Constitution on 25th January 1950. Originally, the commission had only a Chief Election Commissioner. From 1st October, 1993, the Election Commission is a three- member body, consisting of Chief Election Commissioner and two Election Commissioners.

⁴⁸ DR. M.S. Gill, Chief Election Commissioner of India, THE ELECTORAL SYSTEM IN India, Election Commission of India. Retrieved from www.eci.nic.in visited on 16th November 2013 at 13:45 pm.

Appointment and Tenure of Commissioners

The President appoints Chief Election Commissioner and Election Commissioners. They have tenure of six years, or up to the age of 65 years, whichever is earlier. They enjoy the same status and service conditions as are enjoyed by the Judges of the Supreme Court of India. The Chief Election Commissioner can be removed from office only through impeachment by Parliament.

Transaction of Business

The Commission transacts its business by holding regular meetings and also by circulation of papers. All Election Commissioners have equal say in the decision making of the Commission. The Commission, from time to time, delegates some of its executive functions to its officers in its Secretariat.

Commission Secretariat and Election Machinery

The Commission has a separate Secretariat at New Delhi, consisting of about 300 officials, in a hierarchical set up. Two Deputy Election Commissioners who are the senior most officers in the Secretariat assist the Commission. They are generally appointed from the national civil service of the country, and are selected and appointed by the Commission with tenure. Directors, Principal Secretaries, and Secretaries, Under Secretaries and Deputy Directors support the Deputy Election Commissioners in turn. There is functional and territorial distribution of work in the Commission. The work is organised in Divisions, Branches and sections; each of the last mentioned units is in charge of a Section Officer. The main functional divisions are Planning, Judicial, Administration, Information Systems, Media and Secretariat Co-ordination.

At the State level, the election work is supervised, subject to overall superintendence, direction and control of the Commission, by the Chief Electoral Officer of the State, who is appointed by the Commission from amongst senior civil servants proposed by the concerned State Government. He is, in most of the States, a full time officer and has a team of supporting staff. Field administration at the District and Sub-Divisional levels in India is run by the District Magistrates (Deputy Commissions/Collectors), Sub-Divisional Magistrates, Revenue Divisional Officers, Tahisldars etc. They are senior officers of the State Governments, belonging to the national and State civil services. The Election Commission utilises the same State Governments officers, for election work, by designating them as District Election Officers, Electoral Registration Officers, Returning Officers, Assistant Electoral Registration Officers, Assistant Returning Officers, etc. They all perform their functions relating to elections in addition to their other responsibilities. During election time, however, they are available to the Commission, more or less, on a full time basis.

The gigantic task force for conducting a countrywide general election consists of nearly five million polling personnel, besides civil police forces. This huge election machinery is deemed to be on deputation to the Election Commission and is subject to its control, superintendence and discipline during the election period, extending over a period of one and a half to two months.

No Executive Interference in function of the commission.

In the performance of its functions, the Election Commission is insulated from executive interference. It is the Commission which decides the election schedules for the conduct of elections, whether general elections or bye-elections. Again, it is the Commission, which decides on the location of polling stations, assignment of

voters to the polling stations, location of counting centres, arrangements to be made in and around polling stations and counting centres and all allied matters.

Advisory Jurisdiction & Quasi-Judicial Functions

Under the Constitution, the Commission also has advisory jurisdiction in the matter of post election disqualification of sitting members of Parliament and State Legislatures. Further, the cases of persons found guilty of corrupt practices at elections which are decided by the Supreme Court and High Courts are also referred to the Commission for its opinion on the question as to whether such persons shall be disqualified for contesting future elections and, if so, for what period. The opinion of the Commission in all such matters is binding on the President or, as the case may be, the Governor to whom such opinion is tendered. The Commission has the power to disqualify a candidate who has failed to lodge an account of his election expenses within the time and in the manner prescribed by law. The Commission has also the power for removing or reducing the period of such disqualification as also other disqualifications under the law.

Judicial Review

The decisions of the Commission can be challenged in the High Courts and the Supreme Court of India by appropriate petitions. But, by a constitutional embargo and long standing convention and a catena of judicial pronouncements, once the actual process of elections has started, the judiciary does not intervene in the actual conduct of the polls. Once the polls are completed and result declared, the Commission cannot review any result on its own. This can only be reviewed through the process of an election petition, which can be filed before the High Court of the State concerned, in respect of elections to Parliament and State

Legislatures. In respect of elections for the offices of the President and Vice-President of India, such petitions can only be filed before the Supreme Court.

6.2.6. Electoral Reforms



In order to restore the confidence of the public in the democratic electoral system, many electoral reforms have been recommended from time to time by Tarkunde Committee and Goswami Committee which were particularly appointed to study and report on the scheme for Electoral Reforms in the year 1974 and 1990 respectively. Out of these recommendations some have been implemented. In fact, it was under the chairmanship of the then Chief Election Commissioner, T.N. Seshan, that Election Commission initiated many more measures to ensure free and fair elections. Some of the reforms which have been implemented so far are as follows:

1. The voting age has been lowered from 21 years to 18 years. This has helped increase the number of voters and response confidence in the youth of the country.
2. Another landmark change has been the increase in the amount of security deposit by the candidate to prevent many nonserious candidates from contesting elections with a ulterior motive.

3. The photo identity cards have been introduced to eradicate bogus voting or impersonation.
4. With the introduction of Electronic Voting Machine (EVM) the voting capturing, rigging, and bogus voting may not be possible. The use of EVM will in the long run result in reducing the cost of holding elections and also the incidence of tampering during counting of votes.
5. If a discrepancy is found between the number of votes polled and number of total votes counted, the Returning officer may report the matter forthwith to Election Commission. Election Commission on such report may either declare the poll at the particular polling station as void and give a date for fresh poll or countermand election in that constituency.

None of the Above' (NOTA) in EVMs

Hon'ble Supreme Court, in its judgment dated 27th September 2013 in WP (C) No. 161 of 2004, (People's Union for Civil Liberties and another Vs. the Union of India and another) has directed the Election Commission to make necessary provision in the ballot papers/EVMs and provide a button for 'None of the Above' (NOTA) in EVMs so that the voters who come to the polling booth and decide not to vote for any of the candidates in the fray, are able to exercise their right not to vote while maintaining their right of secrecy. In accordance with the order of the Supreme Court "None of the Above" shall be printed in a separate panel on the ballot paper below the name of the last contesting candidate. This ballot paper shall be affixed on the Ballot Unit of the EVM. If the voter presses the button next to "None of the Above" his desire not to vote for any of the candidates in the fray will get recorded in the EVM in secrecy. Commission shall also make appropriate changes in Part-2 of Form 17C used during counting and the result sheet in Form 20 to separately

*compile the number of persons who used the option not to vote for any of the candidates in the fray.*⁴⁹

It seems that this will not function in India the Election Commission came up with another press note that though the electorate may vote for none of above the candidate having maximum votes must be declared elected.

The direction in the judgment dated 27th September, 2013 of the Hon'ble Supreme Court is to provide a NOTA option on the EVM and ballot papers so that the electors who do not want to vote for any of the candidates can exercise their option in secrecy. The Supreme Court held that the provisions of Rule 49-O under which an elector not wishing to vote for any candidate had to inform the Presiding Officer about his decision, are ultra vires Article 19 of the Constitution and Section 128 of the Representation of the People Act, 1951. As per the provisions of clause (a) of Rule 64 of Conduct of Elections Rules, 1961, read with Section 65 of the Representation of the People Act, 1951, the candidate who has polled the largest number of valid votes is to be declared elected by the Returning Officer. Therefore, even if the number of electors opting for NOTA option is more than the number of votes polled by any of the candidates, the candidate who secures the largest number of votes has to be declared elected.

Under the provisions of Section 53(2) of RP Act, 51, if the number of contesting candidates is equal to the number of seats to be filled, the Returning Officer has to declare all the contesting candidates to be duly elected. In the case of elections to the Lok Sabha and Legislative Assemblies, in cases where there is only one contesting candidate in the fray, the Returning Officer has to, in accordance with the provisions of the said Section 53(2), declare the sole contesting candidates as

⁴⁹ **Press Note**, No.ECI/PN/41/2013 Dated: 27th September 2013, **Election Commission of India**, Nirvachan Sadan, Ashoka Road, New Delhi

*elected. The provision of NOTA option which is an expression of decision not to vote for the contesting candidates is not relevant in such cases.*⁵⁰

There is no doubt that India needs drastic poll reforms but still the fact remains that Indian elections have been largely free and fair and successfully conducted. It gives the country the proud distinction of being the largest democracy in the world.

6.3 Questions for Self learning

- 1 Describe the composition of the Election Commission of India.
- 2 What are the functions of Election Commission of India?
- 3 Discuss various stages in the electoral process.
- 4 Explain briefly the electoral process followed during Lok Sabha or Assembly Elections.
- 5 Write in brief the shortcomings of electoral system in India. Suggest reforms for improving the system.

6.4. Let us sum up

In order to conduct free and fair elections in India, Election Commission as an impartial body has been established by the Constitution itself. It is a three-member body. The main functions of the Election Commission are to delimit the constituencies, recognise the political parties, allot the symbols, and appoint officials to conduct and supervise the elections, The electoral process begins with the issue of notification by the President. The Election Commission releases the schedule for election and, issues model code of conduct to be followed during elections. The contesting candidates file their nomination papers. Their papers are scrutinised by the concerned Returning Officers after which they are either accepted or rejected. The candidates can also withdraw their nominations. During

⁵⁰ **Press Note**, Subject - Supreme Court's judgement for "None of the Above" option on EVM- clarification, No. ECI/PN/48/2013 Dated: 28th October, 2013

the election campaign, political parties and their candidate release their respective Election Manifestos. A large number of public meetings, and door-to-door campaign are organised and the electronic media, TV and Radio etc. are used to win the people's confidence. On the polling day the Election Commission ensures that voters cast their votes in free and fair manner. The candidate who secures highest number of votes in a constituency is declared elected.

Recently Electronic Voting Machine has been introduced, it has replaced the use of ballot papers and ballot boxes. This change has yielded positive outcomes, as no bogus voting, rigging or booth capturing can happen now, and the counting can be completed in no time.

Though Election Commission tries its best to conduct free and fair elections our electoral system is faced with the problems like use of money and muscle powers, and other corrupt practices. To avoid all this certain electoral reforms have been introduced from time to time.

6.5. Glossary :

1. EMV: Electronic Voting Machine

6.6. References

1. Basu D.D; *Introduction to the Constitution of India*, Prentice-Hall India,1997
2. Bakshi P.M; *The constitution of India*, Universal Law Publishing Co. Pvt Ltd, 2002
3. DR. M.S. Gill, Chief Election Commissioner of India, *The Electoral System In India*, Election Commission of India. Retrieved from www.eci.nic.in visited on 16th November 2013 at 13:45 pm.
4. **Press Note**, Subject - Supreme Court's judgement for "None of the Above" option on EVM- clarification, No. ECI/PN/48/2013 Dated: 28th October, 2013, **Election Commission of India**, Nirvachan Sadan, Ashoka Road, New Delhi
5. **Press Note**, No.ECI/PN/41/2013 Dated: 27th September 2013, **Election Commission of India**, Nirvachan Sadan, Ashoka Road, New Delhi

UNIT 7.
**Right Of Minorities To Establish And Administer Educational Institutions
And State Control.**

7.0 Objectives

7.1. Introduction

7.2 Topic Explanation

7.2.1 Minority

7.2.1.1 Concept of Minority

7.2.2. Minority under Indian Constitution

7.2.2.1 Freedom of religion in India

7.2.2.2 Freedom of Religion and Minority

7.2.2.3 State acting social welfare and social reforms.

7.2.2.4 Right to manage religious affairs

7.2.2.5 Right not to be taxed to promote a religion

7.2.2.6 Restriction on religious instructions in educational institution

7.2.2.7. Cultural and Educational Rights

7.3. Questions for self learning

7.4. Let us sum up

7.5. Glossary

7.6. References / Bibliography.

7.0. Objectives - To enable pupil to understand the meaning of.....

1. Freedom of religion in India

2. Freedom of Religion and Minority

3. The role of State for social welfare and social reforms.
4. Cultural and Educational Rights of minority and right to manage religious affairs
5. Right of minority not to be taxed to promote a religion
6. Restriction on religious instructions in educational institution

7.1. Introduction -

Since time immemorial people from distance land came to India and made it their home, be it Aryans, the Moguls and so on making India is a habitat for many religions. Religion is a social phenomenon, unique of its kind. This gives rise to specific collective identity and basis for group cohesion. The character and right of religious observance depends upon the membership of particular social group. Transformations within the religion occur in the course of social development due to reformative movements, emergence of alternative faiths, rise of new leadership, impact of other cultures and efforts of modification.

State is also as an initiator of modernization and enforcer of values of human rights and welfare. It puts forward a distinct power center that indirectly influences the patterns of religious life. By ensuring communal harmony and by facilitating religious acts as well as educational facilities, state plays crucial paternal role in the society. Since education wield overwhelming influence on the social and individual life, religions endowments ought to come forward for the development of the said community. Hence it is necessary to give a free hand in development of the said society in the field of education and subsequently contributing the growth and development of the nation.

7.2 Topic Explanation

7.2.1 Minority

The Constitution does not define the terms ‘minority’, nor does it lay down any scheme to the test for determination of minority. Though the members of the Constituent Assembly made no attempt to define the term, we ponder into some reports of commission setup for the minority welfare, but they also fail to define minority. The Motilal Nehru Report (1928) showed a prominent desire to afford protection to minorities, but did not define the expression. The Sapru Report (1945) also proposed, inter alia, a Minorities Commission but did not define Minority.

However, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities has defined minority as under:

- 1) The term ‘minority’ includes only those non-documents group of the population which possesses and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population;
- 2) Such minorities should properly include the number of persons sufficient by themselves to preserve such traditions or characteristics; and
- 3) Such minorities should be loyal to the state of which they are nationals.

7.2.1.1 Concept of Minority:

In re Education Bill⁵¹ the Supreme Court, through S.R. Das C.J. held that the minority means a “community, which is numerically less than 50 percent” of the total population. This statistical criterion prevails with the Kerala High Court.

⁵¹ Re. Kerala Education Bill, 1957, [1959] S.C.R. 995

Thus, considering ‘minority’, a numerically smaller group, as against the majority in a definite area. In this sense the term cover “racial, religious or linguistic sections of the population within a State which differ in these respects from the majority of the population.”

Dr. Ambedkar sought to explain the reason the reason for substitution in the Draft Constitution of the word minority by the words “any section” observing:

It will be noted that the term minority was used therein not in the technical sense of the word ‘minority’ as we have been accustomed to use it for the purpose of certain political safeguards, such as representation in the Legislature, representation in the service and so on. The word is used not merely to indicate the minority in the technical sense of the word, it is also used to cover minorities which are not minorities in the technical sense, but which are nonetheless minorities in the culture and linguistic sense. That is the reason why we dropped the word “minority” because we felt that the word might be interpreted in the narrow sense of the term when the intention of this House... .was to use the word ‘Minority’ in a much wider sense so as to give cultural protection to those who were technically not minorities but minorities nonetheless.

Ambedkar’s explanation that the right was available not only to minorities in the ‘technical sense’ but also to minorities in the ‘wider sense’ has an obvious reference only to that part of Draft article 23 which now forms part of article 29(1) and not to that which is now clause (1) of article 30. His expiation, therefore, may be taken to be an attempt to broaden the scope of clause (1) of article 29 only so as to include within the term ‘minority’ other minority groups also, as contemplated and illustrated by him, and thus to confine article 30(1) to those minorities which he described as minorities in the technical sense, were politically recognized and

the most prominent amongst them were represented in the Constituent Assembly also.

The whole problem, as far as this part of constitution is concerned, that engaged considerable time and efforts of the framers was to achieve a consensus on a constitutional arrangement, between the numerically dominant majority considered the rights now forming part of article 30(1) was proposed, made a reference on the term “national minorities” as such on the national scene and the minorities referred to above- a solution which could give the minorities a feeling of security against discrimination, and security against interference with those characteristics which had divided them apart from the majority. And, it is too obvious to be noted that, at no stage was any section of this majority ever treated as ‘minority’

If these assumptions as accepted as truly reflecting the intention of those who drafted and incorporate these provision in the constitutional document, with a wishful hope that they were rendering a constitutional solution to the problem of Indian minorities, it may be argued that where a minority is the historical or national context and its claim is based on religion it must be defined and ascertain in terms of the population of the whole country, irrespective of its being in numerical majority in any particular state; and, where a group is not a minority considered as such in the national context, but is still definable as ‘minority’ under

Ambedkar’s stretched meaning of the term, it may be ascertained with reference to the population of the state concerned. The argument is correct, it is submitted, if the provision in the question are viewed against the historical prospective in which they were adopted, and are construed to carry into effect the true spirit and intention of the constitution.

7.2.2. Minority under Indian Constitution

Though the constitution avoided to define minority as such it has made specific provisions in Article 29 of the Constitution of India defines the protection of interest of minorities: -

- 1) Any section of the citizen residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have right to conserve the same.
- 2) No citizen shall be denied admission into any educational institution maintained by the State receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Clause (1)

Clause (1) gives protection to every section of the citizens having distinct language, script or culture by guaranteeing their right to conserve the same. If such section desires to preserve their own language and culture, the state would not stand in their way. A minority community can effectively conserve its language, script or culture by and through educational institutions and therefore necessary concomitant to the right to conserve its distinctive language, script or culture and that is what is conferred on all minorities by article 30(1). But article 29(1), neither controls the scope of article 30(1) nor is controlled by that article. The scope of the two is different. Article 29(1) is not confined to minorities but extends to all sections of citizens. Similarly article 30(1) is not confined to those minorities, which have 'distinct language, script or culture' but extends to all religious and linguistic minorities. Further, article 30(1) gives only the right to establish and administer educational institutions of minorities' choice while article 29(1) gives a

very general right 'to conserve' the language, script or culture. Thus, the right under article 30(1) need not be exercised for conserving language, script or culture.

Clause (2)

Clause (2) relates to admission into educational institutions, which are maintained or aided by state funds. No citizen shall be denied admission in such institutions on grounds only of religion, race, caste, language or any of them. Article 15 prohibits discrimination against citizen on ground of religion, etc. but the scope of two articles is different. Firstly, article 15(1) protects all citizens against the state where as the protection of article 29(2) extends to the state or anybody who denies the right conferred by it.

Secondly, article 15 protects all citizens against discrimination generally but article 29(2) is a protection against a particular species of wrong, namely, denial of admission into educational institutions maintained or aided by the state . Finally, the specific grounds on which discrimination is prohibited are not the same in two articles. 'Place of birth' and 'sex' do not occur in article 29(2), while 'language' is not mentioned in article 15.

The right to admission into an educational institution is a right, which is an individual citizen, has as a citizen and not as a member of a community or class of citizen. Hence a school run by a minority, if it is aided by state funds, cannot refuse admission to children belonging to other communities. But the minority community may reserve up to 50 percent of the seats for the members of its own community in an educational institution established and administered by it even if the institution is getting aid from the State. The state, however, cannot direct minority educational institutions to restrict admission to the members of their own communities. Article 29(2), however, does not confer a legal right on the members belonging to other communities to freely profess, practice and propagate their

religion within the precincts of a college run by a minority community. Article 29(2) cannot be invoked where refusal of admission to a student is on the ground of his not possessing requisite qualifications or where a student is expelled from an institution for acts of indiscipline.

To overcome the conflict with article 15 as well as article 29 the Constitution (First Amendment) Act, 1951, added clause (4) to article 15 to the effect that nothing in article 15 and article 29(2) shall prevent state from making any special provision for the advancement of any socially and educationally backward classes of citizen or for the schedule caste and the schedule tribes. The state is empowered to reserve seats in state colleges for socially and educationally backward classes of citizen or for SC and ST.

7.2.2.1 Freedom of religion in India

“ WE THE PEOPLE OF INDIA, have decided that we will create India as a secular state. It is our solemn resolution to constitute India into a SOVERIGN, SOCIALIST, SECULAR, DEMOCRATIC, REPUBLIC and to secure to all its citizens...”. The only other place where the word secular appears in our Constitution is in Article 25 (2) (a) while discussing the “Right to freedom of religion”.

7.2.2.2. Freedom of religion and Minority

Article 25 of the Constitution of India guarantees to every citizen the right to profess, practice and propagate religion. Article 25 reads as follows:

Freedom of conscience and free profession, practice and propagation of religion.—

- (1) Subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.
- (2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law—
- (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
 - (b) providing for social welfare and reforms or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I: The wearing and carrying of Kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II: In sub-clause (b) of the clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.”

Accordingly Article 25 protects two freedoms:

- (a) freedom of conscience,
- (b) freedom to profess, practice and propagate religion.

The freedom of conscience is absolute inner freedom of the citizen to mould his own relation with God in whatever manner he likes. When this freedom becomes articulate and expressed in outward form it is to profess and practice religion. To profess religion means to declare freely and openly one's faith and belief. To practice religion is to perform the prescribed religious duties, rites and

rules. To propagate means to spread and practice his view for enlightening others. The right to propagate one's religion is not a right to convert other to one's own religion.

Article therefore postulates that there is no fundamental right to convert another person one's own religion, 'because if a person purposefully undertakes the conversion of another person to his religion as distinguished from his effort to transmit or spread the tenets of his religion that would impugn on the freedom of conscience guaranteed to all citizens of the country alike'; as decided in *Rev. Stainialaus v. St. of Madhya Pradesh*

The Supreme court in *Punjab Rao v. D. P. Meshram*, expresses that, the right is not only to entertain such religious belief as may be approved by his judgment or conscience but also to exhibit his sentiments in overt acts as are enjoyed by religion. In the words of the Article, he may "profess a religion means the right to declare freely and openly one's *faith*." And in *Ratilal Panachand Gandhi v. State of Bombay*, (AIR 1954 SC 377) declares that he may freely practice his religion; "Religious practices or performance of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines".

Rituals and observances, ceremonies and modes of worship considered by a religion to be integrals and essentials part are also secured. What is integral and essential part of a religion religious practice has to be decided by the Courts with references to the doctrine of a particular religion include practice regarded by the community as part of its religion as put forth by the honourable Supreme Court in *Seshammal v. state of Tamil Nadu*,. Again in *Ratilal*, the SC states that, he may propagate freely his religious views for the edification of others. It is immaterial

also whether a person makes the propagation in his individual capacity or on behalf of some church institution.

If one makes an attempt to look at the secular aura in our Constitution, the only point reach is Article 25, which refers “Right to freedom of religion”. It reads thus— “Freedom conscience and free profession, practice and propagation of religion — (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion”.

In *Boe Emmanuel v. State of Kerala*¹ also known as National Anthem case, the Supreme Court has upheld the religious belief of the Jehovahs witness, a Christian community not to praise anybody but for his or her own embodiment of God. In case the children of Jehovahs witness were expelled from the school for refusing to sing National Anthem. The Supreme Court held their religious practice was protected under Article 25. Chinnappa Reddy, J., observed “that the question is not whether a particular religious belief or practice appeals to our reason of sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. Our personal views and reactions are irrelevant. If the belief is genuinely and conscientiously attracts the protection of Article 25 but subject, of course, to the limitations contained therein”.

The Indian constitution provides for the individual as well as collective freedom of religion. The basic guarantee of this right of individual freedom is in Art. 25 (1). This freedom extends to all persons including aliens underlined by Supreme Court in *Ratilal Panchand vs. of Bombay*. The Indian Constitution makes freedom of conscience as well as right to profess, practice and propagate religion subject to state control in the interest of public morality and health.

But Supreme Court has made it clear that state can have no power over the conscience individual — this right is absolute. The Indian Penal Code (sections 295-7) makes it a crime injure or defile a place of worship or to disturb a religious assembly etc. even though these actions might be sanctioned by offender's own religion. Practices like *devadasi*, *sati* may have religious sanctions but the state still has constitutional power to ban them. Art. 25(2) grants to state broad, sweeping powers to interfere in religious matters. This reflects peculiar needs Indian society. The extensive modification of Hindu personal law has been by legislation based on this provision. Art. 25(2) thus authorizes the state to regulate any secular activity associated with religion, to legislate social reforms.

Article 25 gives freedom for all to practice any religion they want. This is a basic right guaranteed in the Constitution. Article 26 (Freedom to manage religious affairs), Article 27 (Freedom as to payment of taxes for promotion of any particular religion) and Article 27 (Freedom as to attendance at religious instruction or religious worship in certain educational institutions) can be considered as the interpretations of the principle of secularism in the constitution. Art. 26 deals with the freedom to manage religious affairs. Accordingly any religious denomination is given right to establish religious institutions, acquire properties (movable and immovable) and manage affairs regarding the religion. Art. 27 is also very important which reads — “Freedom as to payment of taxes for promotion of any particular religion. — No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.”

7.2.2.3. State acting towards Social Welfare and Social reforms:

Under clause (2)(b) of Article 25, the State is empowered to make laws for social welfare and social reforms. Under this the State can eradicate those evil practices, which are under the guise and name of the religion. Example, the devadasi system, the Sati system *etc.*

The State can throw open Hindu religious institutions of public character to all Hindus. Article 25(2)(b) enables the State to take steps to remove the untouchability from amongst Hindus. But this does not mean the right is absolute and be unlimited. The Supreme Court in *Shastri Yagnapurushdasji v Muldas Bhundardas Vaishya* makes it clear that the State cannot regulate the manner in which the worship of the deity is performed.

Whereas it justifies banning of polygamy amongst Hindu in *State of Bombay v Narasu*. What the Courts have tried to do is to separate ‘religious’ activities and ‘social and secular’ activities, the former are protected under Article 25 the latter are not.

In *Ismail Farooqi v Union of India*¹, the Supreme Court has tried to differentiate between “essential parts” of religious practice. It has held that offer of prayer or worship is a religious practice; its offering at every location where such prayers can be offered would not be essential religious practice. What is protected under Articles 25 and 26 is a religious practice, which forms an essential part of religious practice. Thus, a place of worship may be acquired by the State in exercise of its supreme power. Thus places of worship be it temples, mosques or churches can be acquired.

7.2.2.4. Right to manage religious affairs -

Article 26 says that: Subject to public order, morality and health, every religious denomination of any section have the following rights:

- (a) to establish and maintain institutions for religious and charitable purposes;
- (b) to manage its own affairs in the matters of religion;
- (c) to own and acquire moveable and immoveable property;
- (d) to administer such property in accordance with law.

The right guaranteed by Article 26 is the right of an ‘organized body or entity’ like the *religious denomination* or any section thereof. The word ‘denomination’ can be understood as a collection of individuals, classed together under the same name; generally religious sect or body having a common faith and organization and designated by a distinctive value.

In *S.P. Mittal* case the SC states that, the words ‘religious denomination’ in Article 26 must take colour from the word ‘religion’ and therefore as described in the case of *Acharya Jagdishwaranand Avadhuta v Commissioner of Police, Calcutta*¹ it must also satisfy three conditions:

- (1) It must be collection of individual who have a system of beliefs, which they regard as conducive to their spiritual well being, that is common faith;
- (2) It must have a common organization; and
- (3) it must have distinctive name.

Thus in the large sense ‘Hinduism’ is a denomination and to some extent various philosophies governing the Hindu Society, such as *Advaitas, Dwaitas, Visishtadwiyatas and Shaivites* can also be termed as denomination. On this base the SC held that “Anand Marg” is a religious denomination within the Hindu religion in *Shastri Yagnapurushdasji v Muldas Bhandardas Vaishya*.² Clause (a) of Article 26 talks about right to establish and maintain institutions for religious

and charitable purpose — “Every religious denomination has right to establish and maintain institutions for the religious and charitable purposes”. The words “establish and maintain” in Article 26(a) must be read together and therefore it is only those institutions, which a religious denomination establishes, which it can claim to maintain it. Thus in *S. Azeez Basha v. Union of India*,³ the Supreme Court held that the “Aligarh University was not established by the Muslim minority and therefore it could not claim the right to maintain it”. It was established under the Statute passed by the Parliament.

Clause (b) of Article 26 says about right to manage ‘matters of religion’-a religious denomination or organization is free to manage its own affairs in matters of religion. The State cannot interfere in the exercise of this right unless they run counter to public order, health or morality. Accordingly every religious denomination or organization enjoys complete freedom in the matter of dealing what rites and ceremonies are essential according to the tenet of the religion they hold.

The Court has the right to determine whether a particular rite or ceremony is regarded as essential by the tenet of the particular religion. The “matters of religion” means that secular activities connected with religious institution can be regulated by State. The places of worship like temples, mosques, Gurudwaras cannot be used for hiding criminals or carrying on anti-national activities. They cannot be used for political purpose. The State has power under Article 25(1) and clause (2) to prohibit their activities in the places of worship.

In *Athiest Society of India, Nalgonda District Branch v Government of Andhra Pradesh*,¹ the petitioner, Atheist Society of India, prayed for issuing a writ of *mandamus* directing the State Government to prohibit breaking of coconuts for performing of Pooja, chanting of mantras or sutras of different religions in

religious functions organised by the State. The Andhra Pradesh High Court rejected their prayer and held that these activities have been a part of the Indian tradition and are meant to invoke the blessings of almighty for the success of the project undertaken. Such noble thought cannot be found fault with as offensive to anyone. May be that the petitioner Society who claim to be atheist do not appreciate invocation of Gods as they do not believe in God.

There is no constitutional guarantee to the faith of the atheist who worships barren reason that there is no God. It is not the object of Constitution to turn the country into irreligious place. A secular State does not prohibit the practices of religion. If that is parented it will infringe the rights of millions of Indians, which are guaranteed to them under Article 25 and will run directly contrary to the secular objectives of preamble to the Constitution, which is one of the basic structures. It would deprive them of their right of thought, expression, belief, faith and would amount to abolition of Indian tradition and religious practices.

Clauses (c) and (d) of Article 26 says that right to administer property owned by denomination. It is to be noted that the rights under clauses (c) and (d) of Article 26 are confined to the existing rights to administer its property by a religious denomination cannot be destroyed or taken away completely. It can only be regulated by law with a view to improve the administration of property. Thus the law must leave the right of administration of property to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. Thus in *Ratilal 's* case, a law which took away the right of administration altogether from religious denomination and vested it in other secular authority was held to be violative of right guaranteed by Article 26(d).

However, if the right to administer property had never vested in the denomination or had been validly surrendered by it or had otherwise been lost, Article 26 will not create any such right in religious denomination.

7.2.2.5. Right not to be taxed to promote a religion:

Individual freedom of religion is further strengthened by Article 27 prohibiting religious taxation.

Article 27: No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

To maintain the “secular” character, the Constitution guarantees freedom of religion to individuals and groups, but it is ‘against the general policy of the Constitution that any money being paid out of public funds for promoting or maintaining any particular religion’ as stated in *Commissioner HRE v. L.T. Swamiar*. Therefore Article 27 lays down that no person “shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.”

The Supreme Court in various decisions has tried to differentiate between tax and fee. Tax is in nature of compulsory exaction of money by public authority for public purposes the payments of which are imposed by law. Tax is imposed for public purposes to meet general expenses of State. Tax is collected and merged with the general revenue of the State. Tax is a common burden. Fees on the other hand is payments primarily in public interest lent for some special work done for the benefit of those from whom payments are demanded. Article 27 prohibits imposition of the tax and not fee.

Thus fee can be levied as decided in *Jagannath Ramanuj Das v State of Orissa*, the Government's imposition of fee on temples whose annual income exceeds Rs. 250 for meeting the expenses of Commissioner and Officers and Servants was held valid. As decided by SC in *Bira Kishore v State of Orissa*, the Grant of money by State for renovating water tanks belonging to Lord Jagannath was held to be valid under Article 27, for these tanks were used by the general public for bathing and drinking purposes. As a result in *K. Raghunath v State of Kerala*, after the communal riots some places of worship were destroyed, the Government agreed to meet the cost of restoring these places. It was also held valid.

7.2.2.6 Restriction on religious instruments in educational institution:

The right to religion guaranteed under Article 25 is not an absolute right, like other rights this right too can be restricted for the purpose of maintaining public order, morality and health. In addition Article 25 further exceptions are engrafted by clause (2) of the Article. Sub- clause (a) of clause (2) saves the power of State to make laws regulating or restricting any economic, financial, political or secular activity which may be associated with religious practice and sub-clause (b) reserves the State's power to make laws for providing for social welfare and social reform even though they might interfere with religious practices.

Article 27. (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

Art. 27(3) which forbids compulsory religious instruction or worship in state aided institutions strengthens Art. 25 (1). According to Article 27(1) no religious instruction is to be provided in any educational institution, which is wholly maintained out of State funds. Under Article 27(2) this restriction would not apply to educational institutions, which though administered by the State, has been established under an ‘endowment’ or ‘trust’ requiring that religious instruction should be imparted in such institutions.

According to Article 27(3) no person attending any educational institution recognized by the State or receiving aids out of State funds shall be required to take part in any religious instruction imparted in the institution, or to attend any religious worship conducted in the institution thereto, unless he consents to do voluntarily or, if a minor, his guardian gives consent for the same

In *S.F. Mittal v Union of India* the Government enacted the Auroville (Emergency Provision) Act, to take away the management of Aurobindo Society property on the ground of mismanagement of affairs. The petitioners challenged the validity of the said Act on the ground that it violates Articles 25 and 26 of the Constitution. The Court held that teachings of Aurobindo did not constitute ‘religion’ and therefore taking of Aurobindo Ashram did not infringe the Society’s right under Articles 25 and 26. It further held, even if it was assumed that the Society were a religious denomination, the Act did not infringe its rights under Articles 25 and 26.

The Act has taken only the right of management of property of Auroville, in respect of secular matters, which can be regulated by law.

7.2.2.7. Cultural and Educational Rights-

The constitution keeps the spirit of secularism by making a space to all the religious protecting the interest of minorities respecting their right to development. Art 29 and 30 guarantee certain cultural and educational rights to cultural, religious and linguistic minorities.

Article 29. (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Article 30. (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

7.3. Questions for self learning

Write briefly:

1. What do you understand by minority?
2. Why should the minority Cultural and Educational Rights?
3. Should there be restriction on religious instructions in educational institution? Why?

7.4. Let us sum up

The State does not extend patronage to any religion; State is neither pro-any particular religion nor anti-any particular religion. It stands aloof, in other words, it maintains neutrality in matters of religion and provides equal protection to all religions subject to regulation and actively act on secular part. The basic feature of the Constitution is secularism, which was answered in the affirmative in the decision arrived at by the judges in the *S.R. Bommai 's* case and *Ismail Faruqul 's* case. The intention of the constitutional guarantee on minority rights, as we understand it is to promote and to protect the distinctiveness of religious and linguistic minorities in the country.

7.5. Glossary:

minority: population which is less than 50% of the given population can be understood as minority.

7.6. References / Bibliography.

1. Donald Eugene Smith, *India as a Secular State* (Princeton University Press, Princeton 1963)
2. *Fifth Annual Report of Minorities Commission of India, 1972-73;*

3. M.P. Jain, Indian Constitutional Law, Wadhwa and Co. Nagpur, 2004
4. Pandey J.N., *Constitutional Law of India*, (Central Law Agency, Allahabad, 1997)

Cases cited

1. Dr. M. Ismail Faruqui v. Union of India, (1994) 6 SCC 360
2. *IsmailFarooqi v. Union of India*, ((1994)6 SCC 360)
3. S.R. Bommai v. Union of India AIR 1994 SC 1917 also see 1994(3) SCC 1.
4. *Shastri Yagnapurushdasji v Muldas Bhundardas Vaishya*. AIR 1966 Sc 1119
5. Jagannath Ramanuj Das v State of Orissa, AIR 1975 On. 8.
6. Raghunath v State of Kerala, AIR 1974 ker.48
7. *S.F. Mittal v. Union of India* AIR 1983 SC 1.

UNIT 8

Secularism and Religious Fanaticism.

8.0 Objectives

8.1. Introduction

8.2 Topic Explanation

8.2.1 Secularism

8.2.1.1 Concept of Secularism

8.2.1.2 Definition of Secularism

8.2.1.3 Universal acceptance of Secularism

8.2.2. Secularism under Indian Constitution

8.2.2.1 Preamble

8.2.2.2 Freedom of religion under Article 25

8.2.2.3 Restriction on the freedom of Religion

8.2.3 Right to religion

8.2.3.1 The universal declaration of Human Rights.

8.2.3.2 Civil and Political discrimination 1966

8.2.3.3 Declaration on religious discrimination 1981

8.2.4 Religious Fanaticism

8.2.4.1 Religious Fanatics

8.2.4.2 Religion and Terrorism

8.3. Questions for self learning

8.4. Let us sum up

8.5. Glossary

8.6. References / Bibliography.

8.0. Objectives -

1. To enable pupil to understand the meaning and importance of secularism.
2. To enable pupil to understand the policy of founding members of the Constitution with respect to secularism
3. To enable pupil to learn secular practices in India.
4. To enable pupil to understand the effect of religious intolerance and its consequences.

8.1. Introduction -

India is a habitat for many religions. Since time immemorial people from distance land came to India and made it their home, be it Aryans, the Moguls and so on. They came as invaders and stayed back in India making it a habitat for many religions. Religion is a social phenomenon, unique of its kind and each has its own community. The character and right of religious observance depends upon the membership of particular social group. This gives rise to specific collective identity and basis for group cohesion. Transformations within the religion occur in the course of social development due to reformative movements, emergence of alternative faiths, rise of new leadership, impact of other cultures and efforts of modification.

State is also as an initiator of modernization and enforcer of values of human rights and welfare. It puts forward a distinct power center that indirectly influences the patterns of religious life. By resolving inter-religious conflicts, by ensuring communal harmony and by facilitating religious acts, state plays crucial paternal role in the society. Since religions wield overwhelming influence on the social and individual life in traditional societies as that of India, and often over emphasize customary beliefs, thereby retarding or hindering modernisation, the question of

bringing or concretizing social transformation with the help of law faces practical difficulties.

Religious issues often become sites of social tension because of competing religious sentiments. Society as a common hinterland for both religion and state has to prepare itself for an orderly development by respecting paramount human values. A principled distancing from all religions and an approach of impartiality in treatment provide a safe walk, soberness and legitimacy for state action. Being a component of the policy of multiculturalism, this approach sets ways and limits to law's regulative task, and inculcates an attitude and mindset for co-existence amidst different religious communities.

Basically religion is for spiritual guidance of the people and hence can be a major resource for peace and social justice. It can become, as liberation theology indicates, a powerful option for the weaker sections of society. Instead religion has more often been used by powerful vested interests of which religious functionaries become apart. Worse, religious functionaries and priests themselves create powerful establishments and join hands with politicians to protect their establishments.

Secularism is one of the important national goals. Though secularism has been an official Government policy, bulk of people in India still remain non secular. Communalism and Terrorism are big threat to secularism. Search for viable parameters for the appropriate triangular relations among state, religion, and individual become an imperative in shaping the legal policies in the task of social transformation. Hence it was felt that India be declared as secular State.

8.2 Topic Explanation

8.2.1 Secularism:

During the ancient period religion was a dominant factor in the human society. Religion controlled the politics. Religious had control over politics. Pope controlled all Christian countries and Sultan of Turkey had political control over the Muslim rulers for a period. Then there was a struggle between the authority of the pope and the power of the gradually politics had been liberated from religion. At last politics emerged successful superior. Revolutions that broke out in various parts of the world resulted in the formation democratic and constitutional Governments in many countries. Some countries have religion as base for their Government. For example Islam is the official religion of Pakistan. Hinduism is an official religion of Nepal. Some countries follow Christianity and Buddhism their official religions. Countries like India follow secularism

It is necessary to have an idea of the nature and meaning of the term ‘secularism’. It is interesting to note that there is no agreed and precise meaning of ‘secularism’ in our country. Jawaharlal Nehru wrote in his autobiography... *“no word perhaps in any language is more to be interpreted in different ways by the people as the word ‘religion’. That being the ‘secularism’ which is a concept evolved in relation to religion can also not have the connotation for all”*.

8.2.1.1 Concept of Secularism

The English word “secular is derived from the Latin word SAECULUM”. Earlier in Monarchical countries secularists were described as republicans. The French Revolution of 1789 popularised the idea of secularism. The French constitution of 1791 introduced the idea of secular state. Great Indians like, the Mughal king Akbar, social and religious reformers like Raja Ram Mohan Roy and

Swamy Vivekananda respected the people of all religions. Particularly Indian king Maharaja Ranjith Singh officially announced secularism as the policy of his Government. He was successful in this regard. Ranjith Singh is considered as a forerunner in implementing the idea of Secularism through Government means. In the year 1888 the Indian National Congress opened a debate on secularism and proposed secular nationalism for India. The idea of secularism began in Indian politics in 1920 when Mahathma Gandhi organised Khilafat movement in support of the Sultan of Turkey.

There are two possible models of secularism. In the first one, there is a complete separation of religion and state to the extent that there is an 'impassable wall' between religion and secular spheres. In such a model, there is no state intervention of religious matters and vice versa. In the other model, all religions are to be treated equally by the state; other words, the state is equi-distant from all religions. This model is also referred to as 'non-discriminatory' and is particularly relevant for multi-religious societies. In contrast to former model, the latter allows for state intervention on grounds of public order and social justice.

The Sanskrit phrase '*Sarva Dharma Sambhava*' is the most appropriate Indian vision secular state and society. But it should not be forgotten that the word 'Secular' has not been defined or explained under the constitution either in 1950 or in 1976 when it was made part of preamble.

Secularism as a modern political and constitutional principle involves two basic propositions. The first is that people belonging to different faiths and sects are equal before law, the constitution and the government policy. The second requirement is that there can be no mixing up of religion and politics. It follows that there can be no discrimination against any one on the basis of religion or faith

nor is there room for the hegemony of one religion or religion of majority sentiments and aspirations. It is in this double sense — *no discrimination against any one on grounds of faith and separation of religion from politics* — that our constitution safeguards secularism.

8.2.1.2 Definition of Secularism

There is no specific definition of the concept of secularism, however eminent scholars, judges and great thinkers have explained it time to time.

Chief Justice of India A.M. Ahmedi opined in a case that *“the term secular has advisedly not been defined presumably because it is a very elastic term not capable of a precise definition but perhaps best left undefined There are several features of the Constitution which are strongly suggestive of secularism. The prevalent cultural indicators are supportive of secularism. Some other judges have delivered separate but concurring judgments on secularism as basic structure. Secularism is, therefore, part of the fundamental law and basic structure of the Indian political system to secure to its people socio-economic needs essential for man’s excellence with material, moral prosperity. Some other judgments read as “secularism is thus more than a passive attitude of religious tolerance.”*

The Fifth Minorities Commission (1982-83) clarified that secularism in India did not crusade for anti-religious faith. It said: *“Our broad type of secularism too/cs upon traditional religion, of every label, with benevolent neutrality. It would like to see the end of exploitation or of use of religion for political and economic purposes and to purge it of superstition and harmful predatory practice The impact of our secularism operating as a new social, economic, ethical and moral force resulting from modern knowledge, science and enlightenment can elevate traditional religion by purging it of noxious elements”.*

According to D.E. Smith, a secular state is, “*which guarantees individual and corporate freedom of religion, deals with the individual as a citizen irrespective of his religion, is not constitutionally connected to a particular religion nor does it seek either to promote or interfere with religion*”.

Pointing out non-discrimination by state in the matter of religion as the essential feature of secularism, it was observed by Lakshmi Kant Maitra in the Constituent Assembly:

“By secular State, as I understand it, is meant that the State is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular form of religious faith... The State is not going to establish, patronise or endow any particular religion to the exclusion of or in preference to others and that no citizen in the State shall have any preferential treatment or will be discriminated against simply on the ground that he professed a particular form of religion.”

It was viewed by Ananthasayanam Ayyangar that secularism did not mean irreligion. said, “*I do not, by the word ‘secular’ mean that we do not believe in any religion, and that have nothing to do in our day-to-day life. It only means that the State or Government cannot aid one religion or give preference to one religion as against another. Therefore it is obliged to be absolutely secular in character, not that it has lost faith in all religions*”.

8.2.1.3 Universal acceptance of Secularism

Indian secularism is religion affirming and not religion negating. The necessary corollary to the absence of state patronage to any religion is the freedom of religion to all. The Constitution permits practicing and propagating religion. But the right to propagate one’s religion does not give right to convert any person to

one's own religion. The practices of conversions from Hinduism to Christianity, Islam and Buddhism are against the secular provisions of the Constitution. Furthermore unlike in India, the constitutions of many countries in the world that provide freedom to religion do not guarantee the right to propagate a fundamental right. The Swiss Constitution simply declares through Article 49 "freedom of creed and conscience is inviolable". The Constitution of Ireland and Japan says that the freedom of religion is guaranteed to all and so is the case of China but it is the hitch that nowhere religious propaganda is a fundamental right. (Art. 20 and Art. 44). The spirit of this right available in our country is in consonance with the provisions of the Universal Declaration of Human Rights.

The principle of 'secularism' as understood in the United States means that the state and the church co-exist in the same human society without having to do anything with each other. In Europe, the vision of secularism evolved as the negation of all things religious, particularly in political functioning. In India, it means the opposite, i.e., equal respect for all religions. A 'secular state' in the Indian context means one, which protects all religions equally and does not uphold any religion as the state religion.

8.2.2. Secularism under Indian Constitution

The constituent assembly which was constituted to frame a Constitution for India declared eight guiding principles of Indian Constitution. Among these eight basic and guiding principles of the Constitution—Secularism is placed in fifth position. To that extent the Constitutional pundits gave importance for secularism. The idea of secularism is essential to maintain unity in diversity. Secularism is a basic ideology for the effective functioning of a healthy Democracy. When the Indian Constitution was adopted in January 1950, it has got sufficient provisions to

promote secularism. The Constitution of India firmly believes in the principle of secularism.

The founding fathers of the Indian Constitution never hesitated to build India on secular foundations. They opposed and defeated the amendment of Mr. H. V. Kamath to invoke the name of god in the preamble of the Constitution. Pandit Kunjru said that we invoke the name of God, but I am bold to say that while we do so, we are showing a narrow, sectarian spirit, which is contrary to the spirit of the Constitution. The Indian Flag consists of Ashoka Chakra in its center. The wheel has many spokes but, all are of equal length. It indirectly refers to the Indian stand on the principle of equal treatment of all religions. (*Sarva Dharma Sambava*).

Although, the word ‘Secular’ was not there initially in the constitution, a mere perusal of the various articles of it would amply demonstrate that ‘Secularism’ is an integral part of the Indian constitution. At this juncture, it would not be inappropriate to have a glance at the relevant constitutional provisions pertaining to secularism. Article 14 of the constitution provides for equality before law for all people. Article 15, *inter alia*, lays down that the state shall not discriminate any citizen on the ground of religion. Article 16 provides for equality of opportunity in matters of employment under the state, irrespective of religion. Article 25 provides for freedom of conscience and the right to profess, practice and propagate the religion of one’s choice.

The constitution not only guarantees a person’s freedom of religion and conscience, but also ensures freedom for one who has no religion, and it scrupulously restrains the state from making any discrimination on grounds of religion. Article 26 provides freedom to manage religious affairs and Article 27 prohibits compulsion to pay taxes to benefit any religious denomination. The impact of Secularism can also be seen in Article 28, which states that no religious

instruction shall be provided in any educational institution wholly maintained out of state funds. The analysis of the above said constitutional provisions makes it amply clear that Indian secularism is unique and it treats all religions alike. In our country, judiciary is the guardian of the constitution and it has been held by the Supreme Court that secularism is a basic structure of the constitution and it cannot be altered by a constitutional amendment.

Before looking into the Articles in the Constitution that are supposed to interpret the idea of secularism, it will be worthwhile to look into one important judgment given by the Supreme Court of India viz. *Kesavananda Bharati vs. State of Kerala* case⁵² which was decided by a full Constitutional bench of judges on April 24, 1973. By a water-thin majority of 7-6, the Supreme Court held that the power to amend the Constitution under Article 368 couldn't be exercised in such a manner as to destroy or emasculate the fundamental features of the Constitution. In identifying the features, which are fundamental and thus non-amendable in the constitution was this statement - *A secular State, that is, a State in which there is no State religion (5(vii))*. This was (probably) the first time that the concept of secularism was interpreted by the Supreme Court. Here we get the first authorized interpretation of the word "secular" as mentioned in our Constitution. So our basic idea of being a secular state is that we do not have a '*State religion*'.

8.2.2.1. Preamble

“. . . THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVERIGN, SOCIALIST, SECULAR, DEMOCRATIC, REPUBLIC and to secure to all its citizens...”. So we have decided that we will create India as a secular state. The only other place where the word secular appears in our

⁵² Kesawananda Bharti's case (AIR 1973 SC 1461)

Constitution is in Article 25 (2) (a) while discussing the “Right to freedom of religion”.

What is problematic in this context is the absence of a proper definition of secularism. How can we interpret the term secularism? Do we interpret it as the complete detachment of state from religious activities or do we accept the original definition of Holyoake? What is the stand of the government regarding this? To find answers to these questions, we have to look at the related discussions in the Constituent Assembly. An important amendment (Amendment 566) was moved in the meeting dated December 03, 1948 by Prof. K.T. Shah. “The State in India being secular shall have no concern with any religion, creed or profession of faith; and shall observe an attitude of absolute neutrality in all matters relating to the religion of any class of its citizens or other persons in the Union.” It is now clear that this idea of making India a secular state was not there in the original draft. It was only on December 18, 1976 the word “SECULAR” was added in the preamble of our Constitution. The 42nd amendment Act reads — “In the Preamble to the Constitution, - (a) for the words “SOVEREIGN DEMOCRATIC REPUBLIC” the words “SOVERIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC” shall be substituted”. So the word secular entered our Constitution only almost 25 years after it had come into effect.

8.2.2.2. Freedom of religion under Article 25

Article 25 of the Constitution of India guarantees to every citizen the right to profess, practice and propagate religion. Article 25 reads as follows:

Freedom of conscience and free profession, practice and propagation of religion.—

- (1) Subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.
- (2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law—
- (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
 - (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I: The wearing and carrying of Kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II: In sub-clause (b) of the clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.”

Accordingly Article 25 protects two freedoms:

- (a) freedom of conscience,
- (b) freedom to profess, practice and propagate religion.

The freedom of conscience is absolute inner freedom of the citizen to mould his own relation with God in whatever manner he likes. When this freedom becomes articulate and expressed in outward form it is to profess and practice religion. To profess religion means to declare freely and openly one's faith and belief. To practice religion is to perform the prescribed religious duties, rites and

rules. To propagate means to spread and practice his view for enlightening others. The right to propagate one's religion is not a right to convert other to one's own religion.

Article therefore postulates that there is no fundamental right to convert another person one's own religion, 'because if a person purposefully undertakes the conversion of another person to his religion as distinguished from his effort to transmit or spread the tenets of his religion that would impugn on the freedom of conscience guaranteed to all citizens of the country alike'; as decided in *Rev. Stainialaus v. St. of Madhya Pradesh*⁵³

The Supreme Court in *Punjab Rao v. D. P. Meshram*⁵⁴, expresses that, the right is not only to entertain such religious belief as may be approved by his judgment or conscience but also to exhibit his sentiments in overt acts as are enjoyed by religion. In the words of the Article, he may "profess a religion means the right to declare freely and openly one's *faith*." And in *Ratilal Panachand Gandhi v. State of Bombay*⁵⁵, declares that he may freely practice his religion; "Religious practices or performance of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines".

Rituals and observances, ceremonies and modes of worship considered by a religion to be integrals and essentials part are also secured. What is integral and essential part of a religion religious practice has to be decided by the Courts with references to the doctrine of a particular religion include practice regarded by the community as part of its religion as put forth by the honourable Supreme Court in *Seshammal v. state of Tamil Nadu*⁵⁶. Again in *Ratilal*, the SC states that, he may

⁵³ AIR 1977 SC 908

⁵⁴ AIR 1966 SC 1179

⁵⁵ AIR 1954 SC 388

⁵⁶ (1972) 2 SCC 11

propagate freely his religious views for the edification of others. It is immaterial also whether a person makes the propagation in his individual capacity or on behalf of some church institution.

If one makes an attempt to look at the secular aura in our Constitution, the only point reach is Article 25, which refers “Right to freedom of religion”. It reads thus— “Freedom conscience and free profession, practice and propagation of religion — (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion”.

In *Boe Emmanuel v. State of Kerala*⁵⁷ also known as National Anthem case, the Supreme Court has upheld the religious belief of the Jehovahs witness, a Christian community not to praise anybody but for his or her own embodiment of God. In case the children of Jehovahs witness were expelled from the school for refusing to sing National Anthem. The Supreme Court held their religious practice was protected under Article 25. Chinnappa Reddy, J., observed “that the question is not whether a particular religious belief or practice appeals to our reason of sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. Our personal views and reactions are irrelevant. If the belief is genuinely and conscientiously attracts the protection of Article 25 but subject, of course, to the limitations contained therein”.

The Indian constitution provides for the individual as well as collective freedom of religion. The basic guarantee of this right of individual freedom is in Art. 25 (1). This freedom extends to all persons including aliens underlined by Supreme Court in *Ratilal Panchand vs. of Bombay*⁵⁸. The Indian Constitution

⁵⁷ AIR 1987 SC 748

⁵⁸ AIR 1954 SC 388

makes freedom of conscience as well as right to profess, practice and propagate religion subject to state control in the interest of public morality and health.

But Supreme Court has made it clear that state can have no power over the conscience individual — this right is absolute. The Indian Penal Code (sections 295-8) makes it a crime injure or defile a place of worship or to disturb a religious assembly etc. even though these actions might be sanctioned by offender's own religion. Practices like *devadasi*, *sati* may have religious sanctions but the state still has constitutional power to ban them. Art. 25(2) grants to state broad, sweeping powers to interfere in religious matters. This reflects peculiar needs Indian society. The extensive modification of Hindu personal law has been by legislation based on this provision. Art. 25(2) thus authorizes the state to regulate any secular activity associated with religion, to legislate social reforms.

Article 25 gives freedom for all to practice any religion they want. This is a basic right guaranteed in the Constitution. Article 26 (Freedom to manage religious affairs), Article 27 (Freedom as to payment of taxes for promotion of any particular religion) and Article 28 (Freedom as to attendance at religious instruction or religious worship in certain educational institutions) can be considered as the interpretations of the principle of secularism in the constitution. Art. 26 deals with the freedom to manage religious affairs. Accordingly any religious denomination is given right to establish religious institutions, acquire properties (movable and immovable) and manage affairs regarding the religion. Art. 27 is also very important which reads — “Freedom as to payment of taxes for promotion of any particular religion. — No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.”

8.2.2.3. Restrictions on the freedom of religion

Restrictions to the enjoyment of Right to Religion:

The right to religion guaranteed under Article 25 is not an absolute right, like other rights this right too can be restricted for the purpose of maintaining public order, morality and health.

In addition Article 25 further exceptions are engrafted by clause (2) of the Article. Sub- clause (a) of clause (2) saves the power of State to make laws regulating or restricting any economic, financial, political or secular activity which may be associated with religious practice and sub-clause (b) reserves the State's power to make laws for providing for social welfare and social reform even though they might interfere with religious practices.

In *S.P. Mittal v Union of India*⁵⁹ the Government enacted the Auroville (Emergency Provision) Act, to take away the management of Aurobindo Society property on the ground of mismanagement of affairs. The petitioners challenged the validity of the said Act on the ground that it violates Articles 25 and 26 of the Constitution. The Court held that teachings of Aurobindo did not constitute 'religion' and therefore taking of Aurobindo Ashram did not infringe the Society's right under Articles 25 and 26. It further held, even if it was assumed that the Society were a religious denomination, the Act did not infringe its rights under Articles 25 and 26. The Act has taken only the right of management of property of Auroville, in respect of secular matters, which can be regulated by law.

Also, in *Mohd. Hanf Quareshi v State of Bihar*⁶⁰ the petitioner claimed that the sacrifices of cows on the occasion of Bakr-Id was essential part of his religion and therefore the State law forbidding the slaughter of cows was violative of his

⁵⁹ AIR 1983 SC 1

⁶⁰ AIR 1958 SC 731

right to practice religion. Court rejecting the argument held that sacrifice of cow on Bakr-Id day was not essential part of the Mohamedan religion and hence could be prohibited by State under Clause 2(a) of Article 25.

In a another case *State of West Bengal v Ashutosh Lahiri*⁶¹ the Supreme Court held that slaughter of cows on Bakrid day is optional and not obligatory. It is not essential or required for religious purpose of Muslim. Article 25 deals with essential religious practices.

8.2.3. Right to religion -

8.2.3.1. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights, 1948 recognizes the right to religion in Art. 18 which say that “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief; and freedom, either alone or in community with others in public or private, to manifest his religion or belief in teaching, practice, worship and observance”. That makes it clear that an individual who is ‘born free’ also has freedom to manifest his religious beliefs as he is free to practice any religion, he is also free to change his religion. Either he automatically adopts the religion practiced by his parents after his birth or has freedom to choose his own. It is his absolute choice to profess his religion in private and if he wishes he may join any religious group.

8.2.3.2. Civil and Political Convention 1966

In the Civil and Political Covenant, 1966, the right to religion is discussed as follows: Article 18.

⁶¹ AIR 1995 SC 464

1. Every one shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardian to ensure the religious and moral education of their children in conformity with their own convictions.

8.2.3.3. Declaration on religious Discrimination, 1981

The Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion or Belief adopted by General Assembly of UN in 1982 states in Article 1,

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, freedom either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion, which would impair his freedom to have a religion or belief of his choice.

3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to public safety, order, health, or morals or the fundamental rights of freedoms of others.

8.2.4. Religious Fanaticism -

8.2.4.1. Religious fanatics-

Secularism in India is based on the rich heritage and culture steeped in its various religions. The secular fabric of the country is very well reflected in the phrase '*Vasudhaiv Kutumbakam*' which means that the whole world is one family. India has always been an inclusive society, which has welcomed people of all religions and faiths with open arms, never discriminating among religions and never considering any religion or faith to be a threat. But this secular fabric has not meant that there is no communalism in India.

In spite of a number of laws treating people of all religions at *par*, India has had a long history of communal riots, the worst of them being at the time of partition of the country when blood flowed as rivers. In a land where tolerance is byword for life, when did this hatred for fellow beings arise? The answer to this question lies in the British rule of the country, particularly post-1857. Prior to 1857, the British rulers restrained themselves from interfering in the social structure of the country. Post-1857, they realized the importance of dividing the people of the country in order to weaken them. This gave rise to the 'divide and rule' policy, which they used, on religious lines thus distancing Hindus and Muslims.

The persistence of this policy of the British is reflected in the painful partition of the country and the displacement of a large number of people from their hearths and homes. This has continued even after the independence of the

country in spite of the government being neutral as far as religion is concerned and the constitution ensuring that there is no discrimination on the basis of religion as far as employment, education etc. are concerned. This is apparently on account of minimal social interaction between various religious communities leading to a distorted view of other communities and its practitioners. Such a social interaction is especially important to heal the scars and pain of the partition. The delicate secular fabric could not withstand the body blow of the partition. This situation was sought to be remedied through the provisions of the constitution. The pain of the partition revisited the country in the form of communal violence riots from time to time, as if not to let people forget their wounds. The action or inaction of the political leaders and the administrative system at times also added to the communal frenzy. Some major events which changed the way world viewed India were based on communal frenzy viz. *Babri Masjid* demolition, the Gujarat riots, Delhi (Sikh) riots.

Babri Masjid located at *Ayodhya* in Uttar Pradesh was demolished on December 6, 1992 by *kar sevaks* under the guidance of some of our leaders who are facing trial in the case. The demolition of the *Babri Masjid* made the fabled respect for all religions that Indians have a thing of the past. The fact, that a religious shrine of any religion could be demolished, raises questions about the secularity of the people of the country as also the conviction of the state towards secularism.

The Gujarat violence in 2002 is a matter of great shame for the country. The fact, that people were massacred only on account of their belonging to a particular religion, is unacceptable in any secular nation. The fact, that the administration reacted late, also raises questions regarding the State's belief in secularism. A similar incident, which happened about two decades prior to the Gujarat violence,

was the riots of Delhi in 1984. Sikhs were brutally slaughtered on the streets of Delhi just because the person who assassinated the then Prime Minister of India, Smt. Indira Gandhi happened to be a Sikh. It is ironic that this killing happened to exact revenge for the death of the person who was instrumental in incorporating the word 'secular' in the Indian constitution.

Needless to say it is totally unfair comparison. In fact one cannot take values of one religion and compare it with history of other. Values must be compared with values and history must be compared with history. While values are divine, humanitarian and common to all religions, history is full of violence perpetrated by various vested interests, power struggle within or two or more faith communities and often represents worst side of human behaviour. It should not be blamed on religion.

Thus what happens in history should not be taken as representative of religious values or religious norms, much less its cause. These massacres and killings represent nothing but lust for power and wealth by some followers of that religion. It has nothing to do with the teachings of that religion. Every religion gives us certain norms and values to improve our conduct and to make us good or even perfect human beings. It is true religion is misused by all sorts of interests and more often than not. It is sought to be misused as it strongly appeals to our emotions and can easily create feeling of 'we' versus 'they' but nevertheless it is misused and for misuse we cannot blame religion.

As Asghar Ali Engineer rightly puts it, *"Let us be very clear on one thing that no religion would be acceptable to people just because it allows killing or conversion. A religion is acceptable only if it improves morality, controls basic instincts and brings about spiritual and moral change for better. It is extremely knave to believe that a religion would spread by sword"*.

8.2.4.2. Religion and Terrorism-

The supreme laws of the land, rightly described India as a secular country in which the State has no religion, nor does it seek to promote or discourage any religion or religious belief. It guarantees a complete religious freedom, with the absence of any compulsion whatsoever in religious matters. Thus, it is obvious that the Government and people of India are secular, that is, there is no official religion. The State is committed to a policy of noninterference in religious matters.

Religion is a matter of personal beliefs and convictions. But how far are “we the people of India” secular in thought, word and deed? Upon a close observation of the working of our political parties, we shall find that candidates for elections are often chosen on communal considerations—Hindu candidates for constituencies having maximum Hindu electorate, Muslim candidates for areas where the large number of the voters are Muslims. Also we find that the voting in elections is often on communal lines; Hindus voting for Hindu candidates, Muslims for Muslim candidates and Sikhs for Sikh. Although the political parties are not formed on a religious basis, we often find that there are some distinctly communal parties in this ‘secular country’. The emerging concepts like “vote banks,” augments ‘caste’ factor and plays a decisive role in leading the followers to exercise their franchise for a particular candidate in name of religion. Religion should have no connection whatever with politics. But is it really so in India today?

Instead of creating amicability amongst the public of all the religion the fundamentalist and politicians are hand in glove. The social fabric gets destroyed by religious controversies. Once the religious fanatics or fundamentalist come face to face they destroy the balance created by these aspects. Overt act of fanatic is to

cause injury to other in such a way that the enjoyment of human rights of the individual as well as the society at large is impaired. Thus leads to terrorism.

Terrorism is a global phenomenon. No doubt it has direct impact on human being, with shattering loss of right to life, liberty and physical integrity of victims. In addition to this individual loss, terrorism has destabilized Governments, weaken civil society, jeopardize peace and security, and threaten social and economic development.

The common understanding of the world ‘terrorism’ is: any organised programme of individual, social groups or political groups of using force to create fear or panic. It is belief in resorting to violence for the purpose of bringing pressure on the government and nongovernmental bodies and individual to agree to the view point of the perpetrators and compel all to concede to terror demands.

The United Nations General Assembly in the open sessions of their 531 meeting explained terrorism in the following words “In its wider sense, terrorism is the tactic of using an act or threat of violence against individuals or groups to change the outcome of some process of politics”

The basic question is why at all terrorism has grown so fast and steadily? Why is it a threat to the civil society? Who is responsible for the growth of terrorism is it the religious fanatics or fundamentalist or politicians or business class?

8.3. Questions for self learning

I. Write true or false:

1. Secularism is an official policy of India. ()
2. During the ancient period politics was a dominant factor in the human society ()

3. Some countries have religion as the base for their Government. ()
4. Unity in diversity is a base for Indian cultural nationalism. ()

II. Choose the correct answer:

1. Secularism is followed in
a) India b) Turkey c) Pakistan
2. The forty second amendment in Indian constitution was made in the year
a) 1976 b) 1977 c) 1978
3. Indian constitution was adopted in the year
a) 1935 b) 1950 c) 1947

III. Write briefly:

1. How can we promote secularism?
2. Write short notes on 42nd amendment.
3. write short note on Religious Fanaticism

IV. Write in detail:

1. Discuss the concept of Secularism as highlighted by the Constitution.
2. Explain how our Indian constitution is purely secular in character.
3. Discuss the effect of terrorism on the secular fabric of India

8.4. Let us sum up

The decision arrived at by the judges in the *S.R. Bommai* 's case and *Ismail Faruqui* 's case reemphasized the concept of secularism being the basic feature of the Constitution. The only issue relating to the basic feature was whether secularism is a basic feature of the Constitution, which was answered in the affirmative. It would be thus clear that Constitution made clear demarcation

between religious part personal to the individual and secular part thereof. The State does not extend patronage to any religion; State is neither pro-any particular religion nor anti-any particular religion. It stands aloof, in other words, it maintains neutrality in matters of religion and provides equal protection to all religions subject to regulation and actively act on secular part.

Acquisition of certain land under *Ayodhya Act*, 1993 was held to be negation of law and therefore invalid and the court held that the greatest religious tensions are not those between any one religion and another; they rather are the tensions between the fundamentalist and pluralist in each and every religious tradition. The intention of the constitutional guarantee on minority rights, as we understand it is to promote and to protect the distinctiveness of religious and linguistic minorities in the country.

Secularism may be defined as the “neutrality of the state in matters relating to religion or creed”. It may also be understood as ‘non-patronizing’ attitude of the state to any one religion. In a secular state, there is no state religion and every citizen is free to preach, practice and propagate any religion. Thus, secularism defines the way the people of a country carry on their individual affairs as also their behaviour towards others.

The hatred of statues in Islam emanate from Islam’s intense hatred of Idol-worship, over which Muslim never fail to point fingers at Hinduism. In reality, true Hinduism, the *Sanatan Dharma*, is monotheistic like Islam.

8.5. Glossary:

Secularism: Secularism as a means of liberation from prejudices and communal frenzies has inherent competence to enhance the worth of human rights and welfare

Fanaticism: dedication towards a particular religion, passion for religious obligations extremism of dedication and passion is fanaticism

Terrorism: threats created in society through violence is Terrorism

8.6. References / Bibliography.

1. Asghar Au Engineer: *Contemporary Challenges To Secularism And Democracy — A Religious Response* April 1-15, 2005
2. Constitutional Assembly Debate CAD, Vol. VII, 3-12-1948, at pp. 815-16.
3. Constitutional Assembly Debate CAD, Vol. VII, 6-12-1948, at p. 831.
4. Donald Eugene Smith, *India as a Secular State* (Princeton University Press, Princeton 1963)
5. *Fflh Annual Report of Minorities Commission of India*, 1982-83;
6. *Human Rights, Terrorism and Counter-terrorism Fact Sheet No. 32* Office of the United Nations High Commissioner for Human Rights, Geneva, Switzerland.
7. M.P. Jam, *Indian Constitutional Law*, Wadhwa and Co. Nagpur, 2004
8. Pandey J.N., *Constitutional Law of India*, (Central Law Agency, Allahabad, 1997) p. 137
9. *Secularism and the Law*: National Foundation for Communal Harmony New Delhi August 2002

Cases cited

1. *Athiest Society of India, Nalgonda District Branch v Government of Andhra Pradesh* AIR 1992 AP 310
2. *Azeez Basha v. Union of India* AIR 1968 SC 622
3. *Bijoe Emmanuel v. State of Kerala* (AIR 1987 SC 748)
4. *Bira Kishore v State of Orissa*, AIR 1975 Ori. 8.

5. *Commissioner HRE v. L.T. Swamiar* AIR 1961 SC 282
6. *Dr. M. Ismail Faruqui v. Union of India*, (1994) 6 SCC 360
7. *Ismail Farooqi v. Union of India*, ((1994) 6 SCC 360)
8. *Jagannath Ramanuj Das v State of Orissa*, AIR 1975 Ori. 8.
9. *K. Raghunath v State of Kerala*, AIR 1974 ker.48
10. *Mohd. Hanif Quareshi v. State of Bihar* AIR 1958 SC 731
11. *Punjab Rao v. D. P. Meshram*, (AIR 1966 SC 1179)
12. *Ratilal Panachand Gandhi v. State of Bombay*, (AIR 1954 SC 388)
13. *Rev. Stainialaus v. St. of Madhya Pradesh* (AIR 1977 SC 908)
14. *S.P. Mittal v. Union of India* AIR 1983 SC 1.
15. *S.R. Bommai v. Union of India* AIR
16. *Seshammal v. state of Tamil Nadu*, (1972) 2 SCC 11
17. *Shastri Yagnapurushdasji v Muldas Bhundardas Vaishya*. AIR 1966 SC
1119
18. *State of Bombay v Narasu*, AIR 1952 Bom. 84.
19. *State of West Bengal v. Ashutosh Lahiri* AIR 1995 SC 464
