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INTRODUCTION TO THE CONSTITUTION OF INDIA

TWELFTH EDITION

by

DR. DURGA DAS BASU

Saraswati, Vidyavaridhi, Prajnabharati, Nyayaratnakara, Neelibhaskara, M.A., LL.D. (Cal.), D. Litt. (Burd.), D. Litt. (Rabindrabharati), National Research Professor of India; Honorary Professor, Banaras Hindu University; Retired Judge, High Court, Calcutta; Formerly, Member, Union Law Commission, Tagore Law Professor, Asutosh Lecturer, Calcutta University; Recipient, National Award 'Padmabhushan' (1985).

A book for everybody in India and abroad who wants to know anything about the Constitution of India during its first thirty-nine years; especially meets the requirements of the various universities of India for the B.A. and M.A. (Political Science); the LL.B. and LL.M. examinations (Constitutional Law); also an ideal handbook for the competitive examinations held by the Union and State Public Service Commissions; an indispensable guide for politicians, statesmen and administrative authorities, in particular.

While the author's 'Commentary on the Constitution of India' and the 'Shorter Constitution' and 'Constitutional Law of India' annotate the Constitution article by article, primarily from the legal standpoint, the present work presents a systematic exposition of the constitutional document in the form of a narrative, properly arranged under logical chapters and topical headings.

In the present Edition, the effects of all leading decisions have been incorporated, together with the Constitution Amendment Acts up to the 61st. The scheme of this book is such that the reader may have quick and clear grasp of the Constitution as it stands with the plethora of amendments and cross-amendments.

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BASU

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Eastern Economy Edition

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21. It should be mentioned, in this context, that the last vestiges of the princely order in India have been done away with by the repeal of Arts. 291 and 362, and the insertion of Art. 363A, by the Constitution (26th Amendment) Act, 1971 (w.e.f. 28-12-1971), which abolished the Privy Purse granted to the Rulers of the erstwhile Indian States and certain other personal privileges accorded to them under the Constitution—as a result of which the heads of these pre-Independence Indian States have now been brought down to a level of equality with other citizens of India.
22. *Golak Nath* v. *State of Punjab*, A.I.R. 1967 S.C. 1643.
23. *Keshavananda* v. *State of Kerala*, A.I.R. 1973 S.C. 1461.
24. The Janata Government's efforts to enshrine the 'basic features theory' in the Constitution itself, by requiring a *referendum* to amend four 'basic features', failed owing to Congress opposition to the relevant amendments of Art. 368 of the Constitution, as proposed by the 45th Amendment Bill, 1978. The four basic features mentioned in that Bill were—(i) Secular and democratic character of the Constitution; (ii) Fundamental Rights under Part III; (iii) Free and fair elections to the Legislatures; (iv) Independence of the Judiciary.
25. *Minerva Mills* v. *Union of India*, A.I.R. 1980 S.C. 1789 (paras. 21–26, 28, 91, 93–94).

5

NATURE OF THE FEDERAL SYST

India, a Union of States.

Art. 1(1) of *our* Constitution says—"Ind is Bharat, shall be a Union of States."

While submitting the Draft Constitution, Dr. Ambedkar, the man of the Drafting Committee, stated that "although its Constituti be federal in structure", the Committee had used the term "Union" b of certain advantages.[1] These advantages, he explained in the Cons Assembly,[2] were to indicate two things, viz., (a) that the Indian federa not the result of an agreement by the units, and (b) that the componer have no freedom to secede from it.

The word 'Union', of course, does not indicate any particular federation, inasmuch as it is used also in the Preamble of the Constitu the United States—the model of federation; in the Preamble of the North America Act (which, according to Lord Haldane, did not creat federation at all); in the Preamble to the Union of South Africa Act which patently set up a unitary Constitution; and even in the Constitu the U.S.S.R. (1977), which formally acknowledges a right of secessio 72] to each Republic, i.e., unit of the Union.[3]

We have, therefore, to examine the provisions of the Cons itself, apart from the label given to it by its draftsman, to determine it provides a federal system as claimed by Dr. Ambedkar, particularly of the criticisms (as will be presently seen) levelled againt its federal c some foreign scholars.

Different types of Federal Constitutions in the modern World.

The difficulty of any treatment of federalism is that there is no definition of a federal State. The other diffi that it is habitual with scholars on the subject with the model of the *United States*, the oldes of all federal Constitutions in the world, exclude any system that does not conform to that model fr nomenclature of 'federation'. But numerous countries in the worl since 1787, adopted Constitutions having federal features and, if th historical standard of the United States be applied to all these later C tions, few will stand the test of federalism save perhaps Switzerla Australia. Nothing is, however, gained by excluding so many recent tutions from the federal class, for, according to the traditional classi followed by political scientists, Constitutions are either unitary or

If, therefore, a Constitution partakes of some features of both types, the only alternative is to analyse those features and to ascertain whether it is *basically* unitary or federal, although it may have subsidiary variations. A liberal attitude towards the question of federalism is, therefore, inevitable particularly in view of the fact that recent experiments in the world of Constitution-making are departing more and more from the 'pure' type of either a unitary or a federal system. The Author's views on this subject, expressed in the previous Editions of this book as well as in the *Commentary on the Constitution of India,*[4] now find support from the categorical assertion of a research worker[5] on the subject of federalism (who happens to be an American himself), that the question whether a State is federal or unitary is one of degrees and the answer will depend upon "how many federal features it possesses." Another American scholar has, in the same strain,[6] observed that federation is more a 'functional' than an 'institutional' concept and that any theory which asserts that there are certain inflexible characteristics without which a political system cannot be federal ignores the fact "that institutions are not the same things in different social and cultural environments."

Indian Constitution basically Federal, with unitary features.

To anticipate the Author's conclusion, the constitutional system of India is *basically* federal, but, of course, with striking unitary features. In order to come to this conclusion, we have to formulate the essential minimal features of a federal system as to which there is common agreement amongst political scientists.

Essential features of a Federal polity.

Though there may be difference amongst scholars in matters of detail, the consensus of opinion is that a federal system involves the following essential features:

(i) *Dual Government.* While in a unitary State, there is only one Government, namely the national Government, in a federal State, there are two Governments, – the national or federal Government and the Government of each component State.

Though a unitary State may create local sub-divisions, such local authorities enjoy an autonomy of their own but exercise only such powers as are from time to time delegated to them by the national government and it is competent for the national Government to revoke the delegated powers or any of them at its will.

A federal State, on the other hand, is the fusion of several States into a single State in regard to matters affecting common interests, while each component State enjoys autonomy in regard to other matters. The component States are not mere delegates or agents of the federal Government but both the Federal and State Governments draw their authority from the same source, viz., the Constitution of the land. On the other hand, a component State has no right to secede from the federation at its will. This distinguishes a federation from a confederation.

(ii) *Distribution of Powers.* It follows that the very object for which

a federal State is formed involves a division of authority between the Fe Government and the States, though the method of distribution may n alike in the federal Constitutions.

(iii) *Supremacy of the Constitution.* A federal State derive existence from the Constitution, just as a corporation derives its exis from the grant of a statute by which it is created. Every power—exec legislative, or judicial—whether it belongs to the federation or t component States, is subordinate to and controlled by the Constitution.

(iv) *Authority of Courts.* In a federal State the legal supremacy Constitution is essential to the existence of the federal system. It is ess to maintain the division of powers not only between the coordinate bra of the government, but also between the Federal Government and the themselves. This is secured by vesting in the Courts a final power to int the Constitution and nullify any action on the part of the Federal and Governments or their different organs which violates the provisions Constitution.

Not much pains need to be taken to demonstrate that the political introduced by *our* Constitution possesses all the aforesaid essential federal polity. Thus, the Constitution is the supreme organic law of *ou* and both the Union and the State Governments as well as their res organs derive their authority from the Constitution, and it is not com for the States to secede from the Union. There is a division of legislat administrative powers between the Union and the State Governments Supreme Court stands at the head of *our* Judiciary to jealously gua distribution of powers and to invalidate any action which violates the tions imposed by the Constitution. This jurisdiction of the Supreme may be resorted to not only by a person[7] who has been affected by a U State law which, according to him, has violated the constitutional d tion of powers but also by the Union and the States themselves by br direct action against each other, before the Original Jurisdiction Supreme Court under Art. 131.[8] It is because of these basic federal that our Supreme Court has described the Constitution as 'federal'.[9]

But though *our* Constitution provides these essential features o ration, it differs from the typical federal systen world in certain fundamental respects:

Peculiar features of Indian Federalism.

(A) *The Mode of formation.* A federal the American type is formed by a voluntary agreement between a of sovereign and independent States, for the administration of certai of general concern.

But there is an alternative mode of the *Canadian* type (if C admitted into the family of federations), namely, that the provin unitary State may be transformed into a federal union to make th autonomous. The provinces of Canada had no separate or ind existence apart from the colonial Government of Canada, and the U not formed by any agreement between them, but was imposed by

statute, which withdrew from the Provinces all their former rights and then re-divided them between the Dominion and the Provinces.

As has been seen (pp. 7–9), *ante*), *India* had a thoroughly centralised unitary constitution until the Government of India Act, 1935. Though the vision of a 'United States of India' had been at the back of the mind of Indian nationalists since the Congress of 1904 and though the Montford Report had envisaged a federation of autonomous States of British India and the Indian States under the aegis of the Central Government, the Government of India Act, 1915–19 eventually offered only Provincial autonomy, as has been explained (pp. 6–7, *ante*). The Provincial Governments were virtually the agents of the Central Government, deriving powers by delegation from the latter.

To appreciate the mode of formation of federation in India, we must go back to the Government of India Act, 1935, which for the first time introduced the federal concept, and used the expression 'Federation of India' (s. 5) in a Constitution Act relating to India, since the Constitution has simply continued the federal system so introduced by the Act of 1935, so far as the Provinces of British India are concerned.

By the Act of 1935, the British Parliament set up a federal system in the same manner as it had done in the case of *Canada*, viz., "by creating autonomous units and combining them into a federation by one and the same Act." All powers hitherto exercised in India were resumed by the Crown and redistributed between the Federation and the Provinces by a direct grant. Under this system, the Provinces derived their authority directly from the Crown and exercised legislative and executive powers, broadly free from Central control, within a defined sphere. Nevertheless, the Centre retained control through 'the Governor's special responsibilities' and his obligation to exercise his individual judgement and discretion in certain matters, and the power of the Centre to give direction to the Provinces.[10]

Federation as envisaged by the Government of India Act, 1935.

The peculiarity of thus converting a unitary system into a federal one can be best explained in the words of the Joint Parliamentary Committee on Indian Reforms:

> "Of course in thus converting a unitary State into a federation we should be taking a step *for which there is no exact historical* precedent. Federations have commonly resulted from an agreement between independent or, at least, autonomous Governments, surrendering a defined part of their sovereignty or autonomy to a new central organism. At the present moment the British Indian Provinces are not even autonomous for they are subject to both administrative and legislative control of the Government and such authority as they exercise has been in the main devolved upon them under a statutory rule-making power by the Governor-General in Council. We are faced with the necessity of *creating autonomous units and combining them* into a federation by one and the same Act."

It is well worth remembering this peculiarity of the origin of the federal system in India. Neither before nor under the Act of 1935, the Provinces were in any sense 'sovereign' States like the States of the American Union. The Constitution, too, has been framed by the 'people of India' assembled in the

Constituent Assembly, and the Union of India cannot be said to be the
of any *compact* or agreement between autonomous States.[2] So far a
Provinces are concerned, the progress had been from a unitary to a fe
organisation, but even then, this has happened not because the Pro
desired to become autonomous units under a federal union, as in Ca
The Provinces, as just seen, had been artificially made autonomous, wi
defined sphere, by the Government of India Act, 1935. What the mak
the Constitution did was to associate the Indian States with these au
mous Provinces into a federal union, which the Indian States had refu
accede to, in 1935.

Some amount of homogeneity of the federating units is a conditi
their desire to form a federal union. But in India, the position ha
different. From the earliest times, the Indian States had a separate p
entity, and there was little that was common between them and the Pro
which constituted the rest of India. Even under the federal scheme c
the Provinces and the Indian States were treated differently; the acces
the Indian States to the system was voluntary while it was compulsory
Provinces, and the powers exercisable by the Federation over the
States were also to be defined by the Instruments of Accession. It is be
was optional with the Rulers of the Indian States that they refused to
federal system of 1935. They lacked the 'federal sentiment' (*Dicey*),
the desire to form a federal union with the rest of India. But, as
pointed out (p. 44, *ante*), the political situation changed with the
paramountcy of the British Crown as a result of which most of the
States acceded to the Dominion of India on the eve of the Independ
India.

The credit of the makers of the Constitution, therefore, lie
much in bringing the Indian States under the federal system but in
them, as much as possible, on the same footing as the other uni
federation, under the same Constitution. In short, the survivors o
Indian States (States in Part B[11] of the First Schedule) were, wit
exceptions, placed under the same political system as the old P
(States in Part A[11]). The integration of the units of the two categ
eventually been completed by eliminating the separate entities of
Part A and States in Part B and replacing them by one category of S
the Constitution (7th Amendment) Act, 1956."

(B) *Position of the States in the Federation.* In the *Unite*
since the States had a sovereign and independent existence prior to t
tion of the federation, they were reluctant to give up that sovere
further than what was necessary for forming a national governme
purpose of conducting their common purposes. As a result, the Co
of the federation contains a number of safeguards for the protectio
rights', for which there was no need in *India*, as the States
'sovereign' entities before. These points of difference deserve
attention:

(i) While the *residuary* powers are reserved to the States by the American Constitution, these are assigned to the Union by *our* Constitution [Art. 248].

This alone, of course, is not sufficient to put an end to the federal character of our political system, because it only relates to the *mode* of distribution of powers. *Our* Constitution has simply followed the *Canadian* system in vesting the residuary power in the Union.

(ii) While the Constitution of the *United States of America* merely drew up the constitution of the national government, leaving it "in the main (to the State) to continue to preserve their original Constitution," the Constitution of *India* lays down the constitution for the States as well, and, no State, save Jammu and Kashmir (p. 32, *ante*), has a right to determine its own (State) constitution.

(iii) In the matter of amendment of the Constitution, again, the part assigned to the States is minor, as compared with that of the Union. The doctrine underlying a federation of the *American* type is that the union is the result of an agreement between the component units, so that no part of the Constitution which embodies the compact can be altered without the consent of the covenanting parties. This doctrine is adopted, with variations, by most of the federal systems.

But in *India,* except in a few specified matters affecting the federal structure (see Chap. 10, *post*), the States need not even be consulted in the matter of amendment of the bulk of the Constitution, which may be effected by a Bill in the Union Parliament, passed by a special majority.

(iv) Though there is a division of powers between the Union and the States, there is provision in *our* Constitution for the exercise of control by the Union both over the administration and legislation of the States. Legislation by a State shall be subject to disallowance by the President, when reserved by the Governor for his consideration [Art. 201]. Again, the Governor of a State shall be appointed by the President of the Union and shall hold office 'during the pleasure' of the President [Arts. 155–156]. These ideas are repugnant to the Constitution of the United States or of Australia, but are to be found in the *Canadian* Constitution.

(v) The *American* federation has been described by its Supreme Court as "an indestructible Union composed of indestructible States."[12]

It comprises two propositions—

(a) The Union cannot be destroyed by any State seceding from the Union at its will.[13]

(b) Conversely, it is not possible for the federal Government to redraw the map of the United States by forming new States or by altering the boundaries of the States as they existed at the time of the compact without the *consent* of the Legislatures of the States concerned. The same principle is adopted in the *Australian* Constitution to make the Commonwealth "indissoluble", with the further safeguard superadded that a popular referendum is required in the affected State to alter its boundaries.

(a) It has been already seen that the first proposition has been acc
by the makers of *our* Constitution (p. 49, *ante*),
No right to secede. is not possible for the States of the Union of Ind
exercise any right of secession. It should be noted in this context that b
16th Amendment of the Constitution in 1963, it has been made clear
even advocacy of secession will not have the protection of the freedo
expression.[14]

(b) But just the contrary of the second proposition has been emb
in *our* Constitution. Under *our* Constitution, it is
But consent of a State is not required for altering its boundaries by Parliament of the Union. sible for the Union Parliament to reorganise the S
or to alter their boundaries, by a simple majority
ordinary process of legislation [Art. 4 (2)]. The C
tution does not require that the *consent* of the Le
ture of the States is necessary for enabling Parliament to make such
only the President has to 'ascertain' the views of the Legislature o
affected States to recommend a Bill for this purpose to Parliament. Eve
obligation is not mandatory insofar as the President is competent to
time-limit within which a State must express its views, if at all [Prov
Art. 3, as amended]. In the Indian federation, thus, the States are not "
tructible' units as in the *U.S.A.* The ease with which the federal organi
may be reshaped by an ordinary legislation by the Union Parliament ha
demonstrated by the enactment of the States Reorganisation Act,
which reduced the number of States from 27 to 14 within a period of six
from the commencement of the Constitution. The same process of disin
tion of existing States, effected by unilateral legislation by Parliamen
led to the formation, subsequently, of several new States—Gujarat,
land, Haryana, Meghalaya, Himachal Pradesh, Manipur, Tripura, Miz

It is natural, therefore, that questioning might arise in foreign m
to the nature of federalism introduced by the Indian Constitution.

(vi) Not only does the Constitution offer no guarantee to the
against affecting their territorial integrity without their consent,—ther
theory of 'equality of State rights' underlying the federal scheme
Constitution, since it is not the result of any agreement between the Sta

One of the essential principles of *American* federalism is the equ
the component States under the Constitution, irrespective of their
population. This principle is reflected in the equality of representation
States in the upper House of the Federal Legislature (i.e., in the Se
which is supposed to safeguard the status and interests of the States
federal organisation. To this is superadded the guarantee that no Sta
without its consent, be deprived of its equal representation in the
[Art. V].

Under *our* Constitution, there is no equality of representation
States in the Council of States. As given in the
No equality of State representation. Schedule, the number of members for the
States varies from 1 to 34. In view of such com

of the Upper Chamber, the federal safeguard against the interests of the lesser States being overridden by the interests of the larger or more populated States is absent under *our* Constitution. Nor can *our* Council of States be correctly described as a federal Chamber insofar as it contains a nominated element of twelve members as against 238 representatives of the States and Union Territories.

(vii) Another novel feature introduced into the Indian federalism was the admission of Sikkim as an 'associate State', without being a *member* of the Union of India, as defined in Art. 1, which was made possible by the insertion of Art. 2A into the Constitution, by the Constitution (35th Amendment) Act, 1974.

Status of Sikkim.

This innovation was, however, shortlived and its legitimacy has lost all practical interest since all that was done by the 35th Amendment Act, 1974, has been undone by the 36th Amendment Act, 1975, by which Sikkim has been admitted into the Union of India, *as a full-fledged State* under the First Schedule. The original federal scheme of the Indian Constitution, comprising States and the Union Territories, has thus been left unimpaired. Of course, certain special provisions have been laid down in the new Art. 371F, as regards Sikkim, to meet the special circumstances of that State.

Art. 371G, inserted in 1986, makes certain special provisions relating to the newly formed State of Mizoram.

(C) *Nature of the Polity.* As a radical solution of the problem of reconciling national unity with 'State rights', the framers of the *American* Constitution made a logical division of everything essential to sovereignty and created a dual polity, with a dual citizenship, a double set of officials and a double system of Courts.

(i) An *American* is a citizen not only of the State in which he resides but also of the United States, i.e., of the federation, under different conditions; and both the federal and State Governments, each independent of the other, operate *directly* upon the citizen who is thus *subject to two Governments, and owes allegiance to both.* But the *Indian* Constitution, like the Canadian, does not introduce any double citizenship, but one citizenship, viz.,—the citizenship of India [Art. 5], and birth or residence in a particular State does not confer any separate status as a citizen of that State.

No double citizenship.

(ii) As regards officials, similarly, the federal and State Governments in the *United States,* have their own officials to administer their respective laws and functions. But there is no such division amongst the public officials in India. The majority of the public servants are employed by the States, but they administer both the Union and the State laws as are applicable to their respective States by which they are employed. *Our* Constitution provides for the creation of All-India Services, but they are to be common to the Union and the States [Art. 312]. Members of the Indian Administrative Service, appointed by the Union, may be employed either under some Union Department (say, Home or Defence) or under a State Government, and their

No division of public services

services are transferable, and even when they are employed under a U Department, they have to administer both the Union and State laws a applicable to the matter in question. But even while serving under a Stat the time being, a member of an all-India Service can be dismissed or ren only by the Union Government, even though the State Governme competent to initiate disciplinary proceedings for that purpose.

(iii) In the *U.S.A.*, there is a bifurcation of the Judiciary as be the Federal and State Governments. Cases arisir of the federal Constitution and federal laws are by the federal Courts, while State Courts deal with cases arising out State Constitution and State laws. But in *India,* the same system of C headed by the Supreme Court, will administer both the Union and Stat as are applicable to the cases coming up for adjudication.

or of the Judiciary.

(iv) The machinery for election, accounts and audit is also sin integrated.

(v) The Constitution of India empowers the Union to entru executive functions to a State, by its consent [Art. 258], and a State to e its executive functions to the Union, similarly [Art. 258A]. No questi 'surrender of sovereignty' by one Government to the other stands in th of this smooth co-operative arrangement.

(vi) While the federal system is prescribed for normal time Indian Constitution enables the federal government to acquire the stren a unitary system in *emergencies.* While in normal times the Union Exe is entitled to give directions to the State Governments in respect of spe matters, when a Proclamation of Emergency is made, the power t directions extends to *all* matters and the legislative power of the extends to State subjects [Arts. 353, 354, 357]. The wisdom of these gency provisions (relating to *external* aggression, as distinguished 'internal disturbance') has been demonstrated by the fact that duri Chinese aggression of 1962 or the Pakistan aggression of 1965, India stand as one man, pooling all the resources of the States, notwithstand federal organisation.

(vii) Even in its normal working, the federal system is giv strength of a unitary system—

(a) By endowing the Union with as much exclusive powers of l tion as has been found necessary in other count meet the ever-growing national exigencies, anc and above that, by enabling the Union Legisla take up some subject of State competence, if required 'in the na interest'. Thus, even apart from emergencies, the Union Parliamer assume legislative power (though temporarily) over any subject inclu the State List, if the Council of States (Second Chamber of the Parliament) resolves, by a two-thirds vote, that such legislation is ne in the 'national interest' [Art. 249]. There is, of course, a federal ele this provision inasmuch as such expansion of the power of the Unic the State sphere is possible only with the consent of the Council of

Unitary control in normal times.

where the States are represented. But, in actual practice, it will mean an additional weapon in the hands of the Union *vis a vis* the States so long as the same party has a solid majority in both the Houses of the Union Parliament.

Even though there is a distribution of powers between the Union and the States as under a federal system, the distribution has a strong Central bias and the powers of the States are hedged in with various restrictions which impede their sovereignty even within the sphere limited to them by the distribution of powers basically provided by the Constitution.

(b) By empowering the Union Government to issue directions upon the State Governments to ensure due compliance with the legislative and administrative action of the Union [Arts. 256-257], and to supersede a State Government which refuses to comply with such directions [Art. 365].

(c) By empowering the President to withdraw to the Union the executive and legislative powers of a State under the Constitution if he is, *at any time,* satisfied that the administration of the State cannot be carried on in the normal manner in accordance with the provisions of Constitution, owing to political or other reasons [Art. 356]. From the federal standpoint, this seems to be anomalous inasmuch as the Constitution-makers did not consider it necessary to provide for any remedy whatever for a similar breakdown of the constitutional machinery at the Centre. Hence, *Panikkar* is justified in observing—"The Constitution itself has created a kind of paramountcy for the Centre by providing for the suspension of State Governments and the imposition of President's rule under certain conditions such as the breakdown of the administration". *Secondly,* the power to suspend the constitutional machinery may be exercised by the President, not only on the report of the Governor of the State concerned but also *suo motu,* whenever he is satisfied that a situation calling for the exercise of this power has arisen. It is thus a *coercive* power available to the Union against the units of the federation.

But though the above scheme seeks to avoid the demerits of the federal system, there is perhaps such an emphasis on the strength of the Union government as affects the federal principle as it is commonly understood. Thus, a foreign critic (Prof. *Wheare*)[16] was led to observe that the Indian Constitution provides—

A critique of the Federal System.

"a system of Government which is quasi-federal. . . . a *Unitary State* with *subsidiary federal features rather than a Federal State with subsidiary unitary features.*"

In his later work in Modern Constitutions[17] he puts it, generically, thus—

"In the class of quasi-federal Constitutions it is *probably proper* to include the Indian Constitution of 1950. . . ."

Prof. Alexandrowicz[18] has taken great pains to combat the view that the Indian federation is 'quasi-federation'. He seems to agree with this Author,[19] when he says that "India is a case *sui generis.*" This is in accord with the Author's observation that—

"the Constitution of India is neither purely federal nor purely unitary but is a comb of both. It is a Union or composite State of a novel type. It enshrines the principle that in federalism the national interest ought to be paramount."[19]

In fact, anybody who impartially studies the Indian Constitution close quarters and acknowledges that Political Science today admits of rent variations of the federal system cannot but observe that the system is 'extremely federal',[20] or that it is a 'federation with strong cen ing tendency'.[21]

Strictly speaking, any deviation from the American model o federation would make a system quasi-federal, and, if so, the Ca system, too, can hardly escape being branded as quasi-federal. The dif between the *Canadian* and the *Indian* system lies in the degree and ex the unitary emphasis. The real test of the federal character of a p structure is, as Prof. Wheare has himself observed[16]—

"That, however, is what appears on paper only. It remains to be seen whether *practice* the federal features entrench or strengthen themselves as they have in Ca whether the strong trend towards centralisation which is a feature of most Western Gov in a world of crises, will compel these federal aspects of the Constitution to wither away

A survey of the actual working of *our* Constitution for the last 2 would hardly justify the conclusion that, even though the unitary bon in some respects been further tightened, the federal features have alt 'withered away'.

Some scholars in India[22] have urged that the unitary bias of *our* tution has been accentuated, in its actual working, by two factors so that very little is left of federalism. These two factors are—(a) th whelming financial power of the Union and the utter dependenc States upon Union grants for discharging their functions; (b) the com sive sweep of the Union Planning Commission, set up under the co power over planning. The criticism may be justified in point of deg not in principle, for two reasons—

(i) Both these controls are aimed at securing a uniform deve of the country as a whole. It is true that the bigger States are not al appropriate all their resources and the system of assignment and dis of tax resources by the Union [Arts. 269, 270, 272] means the depen the States upon the Union to a large extent. But, left alone, the stro bigger States might have left the smaller ones lagging behind, to t ment of our national strength.

(ii) Even in a country like the United States, such factors practice, strengthened the national Government to a degree which have been dreamt of by the fathers of the Constitution. Curiously the same complaint, as in India, has been raised in the United Stat of the centralising power of federal grants, an American wri observed—

"Here is an attack on federalism, so subtle that it is scarcely realised. . . .Contr mic life and of these social services (viz., unemployment, old-age, maternity and ch

were the two major functions of a State and local governments. The first has largely passed into national hands; the second seems to be passing. If these both go, what we shall have left of State autonomy will be a hollow shell, a symbol."

In fact, the traditional theory of mutual independence of the two governments,—federal and States, has given way to 'co-operative federalism' in most of the federal countries today.[24]

An American scholar explains the concept of 'co-operative federalism' in these words[24]—

". . . .the practice of administrative co-operation between general and regional governments, the partial *dependence* of the regional governments *upon payments* from the general governments, and the fact that the general governments, by the use of *conditional* grants, frequently promote developments in matters which are *constitutionally assigned* to the regions."

Hence, the system of federal co-operation existing under the Indian Constitution, through allocation by the Union of the taxes collected, or direct grants or allocation of plan funds do not necessarily militate against the concept of federalism and that is why Granville Austin[25] prefers to call Indian federalism as 'co-operative federalism' which "produces a strong central. . . .government, yet it does not necessarily result in weak provincial governments that are largely administrative agencies for central policies."

In fact, the federal system in the Indian Constitution is a compromise between two apparently conflicting considerations:

(i) There is a normal division of powers under which the States enjoy autonomy within thier own spheres, with the power to raise revenue;
(ii) The need for national integrity and a strong Union government, which the saner section of the people still consider necessary after 26 years of working of the Constitution.

The interplay of the foregoing two forces has been acknowledged even by the Supreme Court in interpreting various provisions of the Constitution, e.g., in explaining the significance of Art. 301[26] thus—

"The evolution of a federal structure or a quasi-federal structure necessarily involved, in the context of the conditions then prevailing, a distribution of powers and a basic part of our Constitution relates to that distribution with the three legislative lists in the Seventh Schedule. The Constitution itself says by Art. 1 that India is a Union of States and in interpreting the Constitution one must keep in the view *the essential structure* of a federal or quasi-federal Constitution, namely, that *the units of the Union have also certain powers as has the Union itself.* . . .

In evolving an integrated policy on this subject our Constitution-makers seem to have kept in mind three main considerations. . . .first in the larger interest of India there must be free flow of trade, commerce and intercourse, both inter-State and intra-State; second, *the regional interests must not be ignored altogether;* and third, there must be a power of intervention by the Union in case of crisis to deal with particular problems that may arise in any part of India. . . . Therefore, in interpreting the relevant articles in Part XIII we must have regard to the *general scheme* of the Constitution of India with special reference to Part III. Part XII. . . . and their inter-relation to Part XIII *in the context of a federal or quasi-federal Constitution* in which the States have certain powers including the power to raise revenues for their purposes by taxation."

At the same time, there is no denying the fact that the States have occasionally smarted[27] against 'Central dominion' over the States in their exclusive sphere, even in normal times, through the Planning Commission

(which itself was not recognised by the Constitution like the F Commission, the Public Service Commission or the like). But this because the Constitution is not federal in structure[28] or that its pro envisage unitary control; the defect is *political,* namely, that it is th Party which dominates both the Union and State Governments an naturally, complaints of discrimination or interference with State aut are more common in those States which happen to be, for the time under the rule of a Party different from that of the Union Governme remedy, however, lies through the ballot box. It is through political again, that the Union Government may be prevented from so exerci constitutional powers as to assume an 'unhealthy paternalism'[29]; but beyond the ken of the present work. The remedy for a too frequent us power to impose President's rule in a State, under Art. 356, is also poli

The strong Central bias has, however, been a boon to keep together when we find the separatist forces of communalism, linguis scramble for power, playing havoc notwithstand the devices of Central control, even after mo two decades of the working of the Constitution.

Survival of Federation in India.

shows that the States are not really functioning as agents of the Government or under the directions of the latter, for then, events lik in Assam (over the language problem) could not have taken place at all

That the federal system has not withered away owing to the inc impact of Central bias would be evidenced by a number of circum which cannot be overlooked [see, further, Chap. XXXI, *post*]:

(a) The most conclusive evidence of the survival of the federal in India is the co-existence, occasionally, of the Communist Governm the State of Kerala or the United Front Government in West Bengal D.M.K. Ministry in Tamil Nadu or the Janata Front Ministry in Gujar a Congress-dominated Government at the Centre. Of course, the refer the Kerala Education Bill by the President for the advisory opinion Supreme Court instead of giving his assent to the Bill in the usual cou been criticised in Kerala as an undue interference with the constit rights of the State, but thanks to the wisdom and impartiality of the S Court, the opinion delivered by the Court[29] was prompted by a purely tic outlook free from any political consideration so that the federal may reasonably be expected to remain unimpaired notwithstanding c in the party situation so long as the Supreme Court discharges its dut guardian of the Constitution.

(b) That federalism is not dead in India is also evidenced by t that new regions are constantly demanding Statehood and that alre Union had to yield to such demand in the cases of Meghalaya, Na Manipur, Tripura and Mizoram.

(c) Another evidence is the strong agitation for greater financia for the States. The case for greater autonomy for the States in *all* respe

first launched by Tamil Nadu, as a lone crusader, but in October, 1983, it was joined by the States ruled by non-Congress Parties, forming an 'Opposition Conclave', though all the Parties were not prepared to go to the same extent. The enlargement of State powers at the cost of the Union, in the *political* sphere is not, however, shared by other States, on the ground that a weaker Union will be a danger to external security and even internal cohesion, in present-day circumstances. But there is consensus amongst the States, in general, that they should have larger financial powers than those conferred by the existing Constitution, if they are to efficiently discharge their development programmes within the State sphere under List II of the 7th Schedule. The then Desai Government sought to pacify the States by conceding substantial grants by way of 'Plan assistance', by what has been called the 'Desai award'.[31]

It is doubtful, however, whether the agitation for larger constitutional powers in respect of finance will be set at rest by such *ad hoc* palliatives. It is interesting to note that the suggestion, at p. 61 of the previous edition of this book, that the remedy perhaps lay in setting up a Commission for the revision of the Constitution, so that the question of finance may be taken up along with the responsibilities of the Union and the States, on a more comprehensive perspective, has borne fruit in the appointment, in March, 1983, of a one-man Commission, headed by an ex-Supreme Court Judge, Sarkaria, J., which is now (1986) at work. Its terms, as revised in June, 1983, empower it to recommend changes 'in the Centre-State relations' in view of the various developments which have taken place since the commencement of the Constitution.

The proper assessment of the federal scheme introduced by *our* Constitution is that it introduces a system which is to *normally* work as a federal system, but there are provisions for converting it into a unitary or quasi-federal system under specified exceptional circumstances.[32] But the exceptions cannot be held to have overshadowed the basic and normal structure. The exceptions are, no doubt, unique and numerous; but in cases where the exceptions are not attracted, federal provisions are to be applied without being influenced by the existence of the exceptions. Thus, it will not be possible either for the Union or a State to assume powers which are assigned by the Constitution to the other Government, unless such assumption is sanctioned by some provisions of the Constitution itself. Nor would such usurpation or encroachment be valid by consent of the other party, for the Constitution itself provides the cases in which this is permissible by consent [e.g., Arts. 252, 258 (1), 258A]; hence, apart from these exceptional cases, the Constitution would not permit any of the units of the federation to subvert the federal structure set up by the Constitution, even by consent. Nor would this be possible by delegation of powers by one Legislature in favour of another.

In fine, it may be reiterated that the Constitution of India is *neither purely federal nor purely unitary but is a combination of both. It is a Union or composite State of a novel type.*[33] It enshrines the principle that "in spite

REFERENCES

1. Draft Constitution, 21-2-1948, p. iv. [The word 'Union', in fact, had been us Cripps proposals and the Cabinet Mission Plan (see pp. 14–15, *ante*), and in Resolution of Pandit Nehru in 1947 (p. 20, *ante*), according to which residuar to be reserved to the units].
2. C.A.D., Vol. VII, p. 43.
3. See Author's *Select Constitutions of the World*, 1984 Ed., p. 188.
4. Author's *Commentary on the Constitution of India*, 6th (Silver Jublee) Ed., *et seq.*
5. Prof. W.T. Wagner, *Federal States and their Judiciary* (Moulton and Co. 196
6. Livingstone, *Federation and Constitutional Change*, 1956, pp. 6–7.
7. Cf. *Gujarat University* v. *Sri Krishna*, A.I.R. 1963 S.C. 703 (*715–16*); *W Rayman & Co.*, A.I.R. 1963 S.C. 90 (*95*).
8. Cf. *State of West Bengal* v. *Union of India*, A.I.R. 1963 S.C. 1241.
9. Cf. *Atiabari Tea Co.* v. *State of Assam*, (1961) 1 S.C.R. 809 (*860*); *Automob State of Rajasthan*, A.I.R. 1962 S.C. 1406 (*1416*); *Ref. under Art. 143*, A.I.R (para. 39).
10. Though the federal system as envisaged by the Government of India Act, 1 fully come into being owing to the failure of the Indian States to join it, relating to the Central Government and the Provinces were given effect to a [see p. 7, *ante*].
11. Vide Table III, col. (A).
12. *Texas* v. *White*, (1869) 7 Wall. 700.
13. A contrary instance is to be found in the Constitution of the *U.S.S.R.* w provides that "each Union Republic shall *retain* the right freely to sec U.S.S.R." [Art. 72 of the Constituton of 1977; see Author's *Select Const World*, 1984 Ed., p. 188].
14. Author's *Constitutional Law of India* (4th Ed., 1977, P.H.I., p. 41).
15. Each of the 50 States of the U.S.A. has two representatives in the Senate.
16. K.C. Wheare, *Federal Government*, 1951, p. 28. He relaxes this view in the 4 pp. 26, 77.
17. Wheare, *Modern Constitutions*, 2nd Ed. (1966), p. 21.
18. C.H. Alexandrowicz, *Constitutional Developments in India*, 195[illegible], pp. 15[illegible]
19. Vide Author's *Commentary on the Constitution of India*, 6th Ed., Vol. A, p.
20. Appleby, *Public Administration in India* (1953), p. 51.
21. Jennings, *Some Characteristics of the Indian Constitution*, p. 1.
22. E.g. Santhanam, *Union-State Relations in India*, 1960, pp. vii; 51, 59, 63 learned Author observes—
    "India has practically functioned as a Unitary State though the Union have *tried* to function formally and legally as a Federation."
23. Griffith, *The Impasse of Democracy*, 1939, p. 196, quoted in Godshall, *Go United States*, p. 114.
24. Cf. Birch, *Federalism*, pp. 305–06.
25. Granville Austin, *The Indian Constitution* (1966), pp. 187 *et seq.*
26. *Automobile Transport* v. *State of Rajasthan*, A.I.R. 1962 S.C. 1406 (*1415* – *nanda* v. *Union of India*, A.I.R. 1973 S.C. 1461, some of the judges (paras. considered federalism to be one of the 'basic features' of *our* Constitution.
27. Vide Report of the Centre-State Relations Committee (Rajamannar Comm 1971, pp. 7–9).
28. It is interesting to note that even the Rajamannar Committee characterises th the Constitution of India as 'federal' (para. 5, p. 16., *ibid.*), but suggests some of its features which have a unitary trend (para. 6, p. 16).
29. Re. Kerala Education Bill, A.I.R. 1958 S.C. 956.
30. It is unfortunate that even the Janata Government which was determin

mischief alleged to have been caused by the long Congress rule, was not convinced of the need to effectively control the frequent use of the drastic power conferred by Art. 356, and that the amendments effected by the 44th Amendment, 1978, in respect of this Article, are not good enough from this standpoint.

31. *Statesman*, Calcutta, dated 26-2-1979, p. 1.
32. As Dr. Ambedkar explained in the Constituent Assembly (VII C.A.D. 33–34), the political system adopted in the Constitution could be "both unitary as well as federal according to the requirements of time and circumstances."
33. Granville Austin [The Indian Constitution (1966), p. 186] agrees with this view when he describes the Indian federations as 'a *new* kind of federalism to meet India's peculiar needs'.
34. Jennings, *Some Characteristics of the Indian Constitution*, p. 55.
35. For an elaborate treatment of Federalism in all its aspects read Author's authoritative work—*Comparative Federalism* (P.H.I., 1987).

6

TERRITORY OF THE UNIO

As has been already stated, the political structure prescri Constitution is a federal Union. The name of the Union is India

Name of the Union.

[Art. 1 (1)] and the members of this Union are the 23 States of Andhra Pradesh, Assa Gujarat, Haryana, *Karnataka*,[3] Kerala, Madhya Pradesh, *'Tan* Maharashtra, Nagaland, Orissa, Punjab, Rajasthan, Uttar Pra Bengal, Jammu & Kashmir, Himachal Pradesh, Manipur, Tripu laya,[2] Sikkim[1], and Mizoram.[5] Barring Jammu & Kashmir, whicl special position under the Constitution (see *post*), the provisi Constitution relating to the States now apply to all these 23 Sta same footing.[1]

The expression 'Union of India' should be distinguished fr pression 'territory of India'. While the 'Union' includes only the S

Territory of India.

enjoy the status of being members of system and share a distribution of powe Union, the "territory of India" includes the entire territory ove sovereignty of India, for the time being, extends.

Thus, beside the States, there are two other classes of territ are included in the 'territory of India', viz.: (i) 'Union Territori Such other territories as may be acquired by India.

(i) The Union Territories are, since 1966 *eight*[5-6] in numb the Andaman & Nicobar Island; *Lakshadweep*;[7] Dadra & Nag Goa, Daman & Diu; Pondicherry; Chandigarh; and Arunachal Pr

The Union territories are Centrally administered areas, to b by the President, acting through an 'Administrator' appointed b issuing Regulations for their good government [Arts. 239–240].

(ii) Any territory which may, at any time, be acquired b purchase, treaty, cession or conquest, will obviously form p territory of India. These will be administered by the Governme subject to legislation by Parliament [Art. 246 (4)].

Thus, the French Settlement of Pondicherry (together wit Mahe and Yanam), which was ceded to India by the French Gov 1954, was being administered as an 'acquired territory' until 1962 as the Treaty of Cession had not yet been ratified by the French I After such ratification, the territory of these French Settle constituted a 'Union Territory', in December, 1962.

2. When a person establishes that he had acquired the citizenship of India but Government contends that he has subsequently lost that citizenship by reason of having voluntarily acquired the citizenship of a foreign State, e.g., by obtaining a Pakistani passport, that question must be determined by the Central Government under s. 9 (2) of the Citizenship Act before any action can be taken against such person as a foreigner. The Central Government is vested with exclusive jurisdiction to determine the foregoing question, namely, whether a person, who was a citizen of India, has lost that citizenship by having voluntarily acquired the citizenship of a foreign State, and this question cannot be determined by the State Government or by any Court, either by suit or in a proceeding under Art. 226 or under Art. 32. (*Govt. of A.P.* v. *Syed Md.*, A.I.R. 1962 S.C. 1778; *State of M.P.* v. *Peer Md.*, A.I.R 1963 S.C. 645 (*647*).
3. *Pandurangrao* v. *A.P.P.S.C.*, A.I.R. 1963 S.C. 268 (*272*).

   So far as Andhra Pradesh is concerned, separate provisions have since been made in Art. 371D, which has been inserted in the Constitution, by the Constitution (32nd Amendment) Act, 1973. Art. 371D empowers the President to provide, by an order, equal opportunities, in the matter of public employment and education, for "the people belonging to different parts of the State," and to set up an Administrative Tribunal, with final powers, to adjudicate upon matters of employment as may be specified in the order.
4. *Joshi* v. *State of Bombay*, (1955) 1 S.C.R. 1215.
5. By Art. 35A, inserted in the Constitution of India, by the Constitution (Application to Jammu & Kashmir) Order, 1954, made by the President in exercise of his power under Art. 370.

8

FUNDAMENTAL RIGHTS AND FUNDAMENTAL DUTIES

The Constitution of *England* is *unwritten*. Hence, there is, in Eng

Individual Rights and Fundamental Rights.

no code of Fundamental Rights as exists in the C tution of the United States or in other written C tutions of the world. This does not mean, how that in England there is no recognition of those basic rights of the indiv without which democracy becomes meaningless. The object, in fa

The position in England.

secured here in a different way. The foundatic individual rights in England may be said t negative, in the sense that an individual has the and freedom to take whatever action he likes, so long as he does not vi any rule of the ordinary law of the land. Individual liberty is secure judicial decisions determining the rights of individuals in particular brought before the Courts.

The Judiciary is the guardian of individual rights in *England* as where; but there is a fundamental difference. While in England, the C have the fullest power to protect the individual against executive tyranny Courts are powerless as against legislative aggression upon individual ri In short, there are no fundamental rights binding upon the Legislatu England. The English *Legislature* being theoretically 'omnipotent', the no law which it cannot change. As has been already said, the individua rights, but they are founded on the ordinary law of the land which ca changed by a Parliament like other laws. So, there is no right which ma said to be 'fundamental' in the strict sense of the term. Another vital co quence of the supremacy of Parliament is that the English Court ha power of judicial review over legislation at all. It cannot declare any la unconstitutional on the ground of contravention of any supposed fu mental or natural right.

The fundamental difference in approach to the question of indivi

Bill of Rights in the U.S.A.

rights between England and the *United States* is while the English were anxious to protect indivi rights from the abuses of executive power, the fra of the American Constitution were apprehensive of tyranny not only f

the Executive but also from the Legislature,—i.e., a body of men who for the time being form the majority in the Legislature.

So, the American Bill of Rights (contained in the first Ten Amendments of the Constitution of the U.S.A.) is equally binding upon the Legislature as upon the Executive. The result has been the establishment in the United States of a 'judicial supremacy', as opposed to the 'Parliamentary supremacy' in England. The Courts in the United States are competent to declare an Act of Congress as unconstitutional on the ground of contravention of any provision of the Bill of Rights. Further, it is beyond the competence of the Legislature to modify or adjust any of the fundamental rights in view of any emergency or danger to the State. That power has been assumed by the Judiciary in the United States.

History of the demand for Fundamental Rights in India.

In *India,* the Simon Commission and the Joint Parliamentary Committee which were responsible for the Government of India Act, 1935, had rejected the idea of enacting declarations of fundamental rights on the ground that "abstract declarations are useless, unless there exist the will and the means to make them effective." But nationalist opinion, since the time of the Nehru Report,[1] was definitely in favour of a Bill of Rights, because the experience gathered from the British regime was that a subservient Legislature might serve as a handmaid to the Executive in committing inroads upon individual liberty.

Regardless of the British opinion, therefore, the makers of our Constitution adopted Fundamental Rights to safeguard individual liberty and also for ensuring, together with the Directive Principles, social, economic and political justice for every member of the community. That they have succeeded in this venture is the testimony of an ardent observer of the Indian Constitution:[2]

> "In India it appears that the Fundamental Rights have both created a new equality . . . .and have helped to preserve individual liberty. . . .The number of rights cases brought before High Courts and the Supreme Court attest to the value of the Rights, and the frequent use of prerogative writs testifies to their popular acceptance as well. *The classic arguments against the inclusion of written rights in a Constitution have not been borne out in India.* In fact, the reverse may have been the case".[3]

Courts have the power to declare as void laws contravening Fundamental Rights.

So, the Constitution of India has embodied a number of Fundamental Rights in Part III of the Constitution, which are (subject to exceptions, to be mentioned hereafter) to act as limitations not only upon the powers of the Executive but also upon the powers of the Legislature. But though the model has been taken from the Constitution of the United States, the Indian Constitution does not go so far, and rather effects a compromise between the doctrines of Parliamentary sovereignty and judicial supremacy. On the one hand, the Parliament of India cannot be said to be sovereign in the English sense of legal omnipotence,—for, the very fact that the Parliament is created and limited

by a written Constitution enables *our* Parliament to legislate only s
the limitations and prohibitions imposed by the Constitution, suc
Fundamental Rights, the distribution of legislative powers, etc. In ca
these limitations are transgressed, the Supreme Court and the Hig
are competent to declare a law as unconstitutional and void. So f
contravention of Fundamental Rights is concerned, this duty is
enjoined upon the Courts by the Constitution [Art. 13], by way of a
caution. Cl. (2) of Art. 13 says—

> "The State shall not make any law which takes away or abridges the rights co
> this Part and any law made in contravention of this clause shall, to the ext
> contravention, be void."

To this extent, *our* Constitution follows the *American* mod
than the English.

But the powers of the Judiciary *vis-a-vis* the Legislature are w
India than in the United States in two respects:

Firstly, while the declarations in the American Bill of Rights a

Fundamental Rights under Indian Constitution distinguished from American Bill of Rights.

lute and the power of the State to impose res
upon the fundamental rights of the individu
collective interests had to be evolved by t
ciary,—in India, this power has been expressly
red upon the Legislatures by the Constitution
the case of the major fundamental rights, of course, leaving a p
judicial review in the hands of the Judiciary to determine the reason
of the restrictions imposed by the Legislature.

Secondly, by a somewhat hasty step, the Janata Government, he

44th Amendment, 1978. The right to property.

Mr. Desai, has taken out an important fund
right, namely, the right of Property, by omitti
19(1)(f) and 31, by the 44th Amendment Act, 1
course, the provision in Art. 31(1) has, by t
amendment, been transposed to a new article,—Art. 300A, which is
Part III of the Constitution and has been labelled as 'Chap. IV' of P
(which deals with 'Finance, Property, Contracts and Suits'),—but tha
a 'fundamental right'.

While under the Congress rule for 30 years, the ambit of the
mental Rights embodied in Part III of the original Constitution ha
circumscribed by multiple amendments, bit by bit, the deathblow to
the Fundamental Rights has come from the Janata Government. Cur
from the standpoint of constitutional development, it has come as a s
inasmuch as the Janata Party professed to 'undo the mischiefs' b
about by the autocratic measures involved in the 42nd Amendment
under the Indira-regime. In omitting Arts. 19(1)(f) and 31, they
transgressed that objective and have ushered in consequences which
fully realised only in the years to come.

The net result of the foregoing amendments inflicted upon the r
property are—

(i) The right not to be deprived of one's property save by autho

law is no longer a 'fundamental right'. Hence, if anybody's property is taken away by executive fiat without the authority of law or in contravention of a law, the aggrieved individual shall have no right to move the Supreme Court under Art. 32.

(ii) If a Legislature makes a law depriving a person of his property, he cannot challenge the reasonableness of the restrictions imposed by such law, invoking Art. 19 (1) (f), because that provision has *ceased to exist.*[3]

(iii) Since Cl. (2) of Art. 31 has vanished, the individual's right to property is no longer a guarantee against the Legislature in respect of any compensation for loss of such property. Art. 31(2) [in the original Constitution] embodied the principle that if the State makes a compulsory acquisition or requisitioning of private property, it must (a) make a law; (b) such law must be for a public purpose; and (c) some compensation must be paid to the expropriated owner.

Of course, by the 25th Amendment of 1971, during the regime of Mrs. Gandhi, the requirement of 'compensation' was replaced by 'an amount', the adequacy of which could no longer be challenged before the Courts. Nevertheless, the Supreme Court held, the aggrieved individual might complain if the 'amount' so offered was *illusory* or amounted to 'confiscation'.[4] But even such an innocuous possibility has been foreclosed by the 44th Amendment.

The short argument advanced in the Statement of Objects and Reasons of the 45th Amendment Bill for deleting the fundamental right to property is that it was only being converted into a *legal* right. What is meant is that while Arts. 19 (1) (f) and 31(2) of the *original* Constitution operated as limitations on the Legislature itself, the 45th Amendment Bill instals the Legislature as the guardian of the individual's right to property, without any fetter on its goodwill and wisdom. But if the Legislature could be presumed to be so infallible and innocent, this would be a good argument for omitting *all* the fundamental rights from Part III. As it has been pointed out earlier, the very justification of putting limitations on the Legislature by adopting a guarantee of Fundamental Rights is that history has proved that the group of human beings constituting, for the time being, the majority in a Legislative body, are not always infallible and that is why constitutional safeguards are necessary to permanently protect the individual from legislative tyranny.

During the discussion on the 45th Amendment Bill, some people said that when by successive amendments, the right to compensation under Art. 31(2) had been brought down to the bare chance of the Courts interfering on the ground that the amount provided by the Legislature was illusory or confiscatory, it could be effaced altogether without any risk. This Author is, however, unable to appreciate the pretended equation, that .01 = 0. The guarantee of a right to compensation in case of expropriation by the State is needed not to protect the capitalist, but the poor,—not the 'haves' but the 'have-nots', for, the little that the poor has, his humble cottage or his cottage-industry, may be more valuable than the belongings of a political leader. The very possibility that the Courts might interfere would serve as a

check on confiscation at the instance of a political party blinded cular philosophy. Curiously, even the other day, the Supreme Co annul an innocently-looking Life Insurance Act, which de workmen of their bonus, *without any solatium.*[5] After the 44th A Act comes into force, the Courts shall have to stand by as mute even in such cases.

(iv) The condition of 'public purpose' having been lifte deleting Art. 31(2), it will now be competent for the Legislature to A's property to give it to B. Of course, under the *original* Constit words 'public purpose' did not exist in Art. 31(2), but then the C that it was an implied condition for the exercise of the power of domain' which had been codified in Art. 31(2). Now that Art. 31(2 bodily taken out by a positive act of repeal, it is highly doubtful w aggrieved private owner would be heard to contend that the pov Legislature under Entry 42 of List III of the 7th Schedule,—with 'acquisition and requisitioning of property'—represents the con principle of 'eminent domain' with its concomitants of public pu just compensation which the Indian Parliament has now taken eliminate, by way of repeal. Perversion of the legal machinery acquisition for *political* or *party* purposes is thus not an improbab the 44th Amendment. If anything like this happens, the aggrieved i may have to rely on the slender thread of Art. 14 (i.e., discriminatio

From all standpoints, thus, the elimination of Arts. 19 (1) (f) from the Constitution has been a hasty and ill-considered step, how meaning it might have been.

Thirdly, by subsequent amendments, the arena of Fundamen has been narrowed down by introducing certain exceptions to the op fundamental rights, namely, Arts. 31A, 31B, 31C, 31D.[6]

Exceptions to Fundamental Rights.

(a) Of these, Arts. 31A, 31C are e to the fundamental rights enumerated in Art and 19; this means that any law falling under t of Art. 31A (e.g., a law for agrarian reform), or Art. 31C (a law implementation of any of the Directive Principles contained in Part Constitution), cannot be invalidated by any Court on the groun contravenes any of the fundamental rights guaranteed by Art. 14 before law); Art. 19 (freedom of expression, assembly, etc.).

(b) Art. 31B, however, offers a complete exception to all th mental rights enumerated in Part III. If any enactment is included i Schedule, which is to be read along with Art. 31B, then such enactm be altogether immune from constitutional invalidity on the gr contravention of any of the fundamental rights.[7]

Fourthly, by the *42nd Amendment* Act, 1976, a countervailin has been introduced, namely, the Fundamenta

Fundamental Duties.

mentioned in Art. 51A. Though these Duties themselves enforceable in the Courts nor thei

tion, as such, punishable, nevertheless, if a Court, before which a fundamental right is sought to be enforced, has to read all parts of the Constitution, it may refuse to enforce a fundamental right at the instance of an individual who has patently violated any of the Duties specified in Art. 51A.[8] If so, the emphasis of the original Constitution on fundamental rights has been minimised.

Fifthly, the category of 'fundamental rights' under our Constitution is exhaustively enumerated in Part III of the Constitution. The *American* Constitution (9th Amendment) expressly says that *the enumeration of certain rights* in the Bill of Rights ("shall not be construed to deny or disparage others *retained* by the people."). This rests on the theory of inalienable natural rights which can by no means be lost to the individual in a free society; the guarantee of some of them in the written Constitution cannot, therefore, render obsolete any right which inhered in the individual from before the Constitution, e.g., the right to engage in political activity. But there is no such unenumerated right under *our* Constitution.

Enumeration of Fundamental Rights in Part III, exhaustive.

As was observed in the early case of *Gopalan* v. *State of Madras,*[9] the Legislatures under *our* Constitution being sovereign except insofar as their sovereignty has been limited by the Constitution either expressly or by necessary implication, the Courts cannot impose any limitation upon that sovereignty either on the theory of the 'spirit of the Constitution' or of that of 'natural rights', i.e., rights other than those which are enumerated in Part III of the Constitution.[10] Any expansion of the Fundamental Rights under the Indian Constitution must, therefore, rest on judicial interpretation and recent decisions of the Supreme Court do, indeed, show a trend in this direction.[11]

It should not be supposed, however, that there is no other justiciable right provided by *our* Constitution outside Part III. Limitations upon the State are imposed by other provisions of the Constitution and these limitations give rise to a corresponding right to the individual to enforce them in a Court of law if the Executive or the Legislature violates any of them. Thus, Art. 265 says that "no tax shall be levied or collected except by authority of law." This provision confers a right upon an individual not to be subjected to arbitrary taxation by the Executive, and if the Executive seeks to levy a tax without legislative sanction, the aggrieved individual may have his remedy from the Courts.[12] The new provision in Art. 300A belongs to this category.[12a] Similarly, Art. 301 says that "subject to the provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free." If the Legislature or the Executive imposes any restriction upon the freedom of trade or intercourse which is not justified by the other provisions of Part XIII of the Constitution, the individual who is affected by such restriction may challenge the action by appropriate legal proceedings.[13]

Rights following from other provisions of the Constitution.

What, then, is the distinction between the 'fundamental rights' inclu-

ded in Part III of the Constitution and those rights arising out of t
tions contained in the other Parts[14] which a
justiciable ? Though the rights of both these
equally justiciable, the constitutional remed
of an application direct to the Supreme Co
Art. 32, which is itself included in Part
'fundamental right', is available only in th
fundamental rights. If the right follows from some *other* provision of
titution, say, Art. 265 or Art. 301, the aggrieved person may have hi
an ordinary suit or, by an application under Art. 226 to the High Cou
application under Art. 32 shall not lie, unless the invasion of the nc
mental right involves the violation of some fundamental right as well

Difference between Fundamental Rights and Rights secured by other provisions of Constitution.

As the word 'fundamental' suggests, under some Constitution
mental rights are immune from constitutional amendment; in othe
they are conferred a special sanctity as compared with other provisio
Constitution. But this principle has been rejected by the Indian Cons
as it stands interpreted by amendments of the Constitution themse
judicial decisions.

Of course, no part of the Constitution of India can be changed
nary legislation unless so authorised by the Constitution itself (e.g.,
but *all* parts of the Constitution can be amended by an Amendn
passed under Art. 368, including the fundamental rights. This pro
has been established after a history of its own:

A. Until the case of *Golak Nath,*[16] the Supreme Court h
holding that no part of our Constituti
unamendable and that Parliament might, by p
Constitution Amendment Act, in compliance
requirements of Art. 368, amend any provision of the Constitution, ir
the Fundamental Rights and Art. 368 itself.[17]

Amendability of Fundamental Rights.

According to this earlier view,[17] thus, the Courts could ac
guardian of fundamental rights only so long as they were not amende
Parliament of India by the required majority of votes. In fact, som
amendments of the Constitution so far made were effected with a
superseding judicial pronouncements which had invalidated so
economic legislation on the ground of contravention of fundamenta
Thus, the narrow interpretation of Cl. (2) of Art. 19 by the Supreme C
the cases of *Ramesh Thappar* v. *State of Madras*[18] and *Brij Bhushan*
of Delhi[19] was superseded by the Constitution (1st Amendment) Act
while the interpretation given to Art. 31 in the cases of *State of West*
v. *Gopal,*[20] *Dwarkadas* v. *Sholapur Spinning Co.,*[21] and *State of West*
v. *Bela Banerjee,*[21] was superseded by the Constitution (4th Amer
Act, 1955.

B. But the Supreme Court cried halt to the process of amend
Fundamental Rights through the amending procedure laid down in A
of the Constitution, by its much-debated decision in *Golak Nath* v. S

Punjab.[16] In this case,[16] overruling its two earlier decisions,[17] the Supreme Court held that the Fundamental Rights, embodied in Part III, had been given a 'transcendental position' by the Constitution, so that no authority functioning under the Constitution, including Parliament exercising the amending power under Art. 368, was competent to amend the Fundamental Rights.

C. But by the 24th Amendment Act, 1971, Arts. 13 and 368 were amended to make it clear that Fundamental Rights were amendable under the procedure laid down in Art. 368, thus *overriding* the majority decision of the Supreme Court in *Golak Nath* v. *State of Punjab.*[16]

The majority decision in *Kesavananda Bharati's case*[16] upheld the validity of these amendments and also *overruled Golak Nath's case,*[16] holding that *it is competent for Parliament* to amend Fundamental Rights under Art. 368, which does not make any exception in favour of fundamental rights; nor does Art. 13 comprehend Acts amending the Constitution itself. Hence, no fresh Constituent Assembly needs to be convened for amending the Fundamental Rights in Part III of the Constitution, nor can the validity of any amendment of the Constitution be questioned on the ground that it has abridged any of the fundamental rights.

42nd Amendment.

D. Eventually, by inserting Cls. (4) and (5) in Art. 368, the *42nd Amendment* Act, 1976 made it clear that "no amendment of this Constitution (*including the provisions of Part III,* i.e., the fundamental rights). . . .shall be called in question in any court on any ground".[22]

It should be pointed out in this context that the Janata Government sought to shield the Fundamental Rights from being amended at the mere will of the Legislatures, by the special majority prescribed by Art. 368, by providing that an amendment of a Fundamental Right in Part III shall not be made unless, apart from the vote in the Legislature, it was approved by the people at a *Referendum.* This additional requirement was sought to be inserted in Art. 368, by the 45th Amendment Bill, but the relevant clause of that Bill was defeated by the Congress Opposition in the Rajya Sabha,—the result being that Art. 368 remains where it was after the 42nd Amendment, and that any Fundamental Right can be repealed or amended by the special majority in Parliament as provided in the original Art. 368 (see p. 48, f.n. 27, *ante*).

The only obstacle that now stands in the way of Parliament, acting by a special majority, to introduce drastic changes in the Constitution, is the judicially innovated doctrine of 'basic features' which can be eliminated only if a Bench larger than the 13-Judge Bench in *Kesavananda's case*[16] be prepared to overturn the decision in that case.[16] In the meantime, applying *Kesavananda,*[16] the majority of the Constitution Bench has invalidated Cls. (4) and (5) of Art. 368 as violative of the basic features of the Constitution [*Minerva Mills* v. *Union of India,* A. 1980 S.C. 1789 (paras. 21, 28)].

The provisions of Part III of *our* Constitution which enumerate the

Classification of Fundamental Rights.

Fundamental Rights are more eleborate than th any other existing written constitution relating to mental rights, and cover a wide range of topics.

I. The Constitution itself classifies the Fundamental Rights seven groups as follows:

(a) Right to equality.
(b) Right to particular freedoms.
(c) Right against exploitation.
(d) Right to freedom of religion.
(e) Cultural and educational rights.
(f) Right to property.
(g) Right to constitutional remedies.

44th Amendment.

Of these the Right to Property has been e *ed* by the 44th Amendment Act, so that o freedoms now remain, in Art. 19(1) [see pp. 79ff., *ante*]

The rights falling under each of the six categories are shown in T

II. Another classification which is obvious is from the point of persons to whom they are available. Thus—

(a) Some of the fundamental rights are granted only to *citize* Protection from discrimination on grounds only of religion, race, ca or place of birth [Art. 15]; (ii) Equality of opportunity in matters of employment [Art. 16]; (iii) Freedoms of speech, assembly, asso movement, residence and profession [Art. 19]; (iv) Cultural and educ rights of minorities [Art. 30].

(b) Some of the fundamental rights, on the other hand, are avail *any person* on the soil of India—citizen or foreigner—(i) Equality bef law and equal protection of the Laws [Art. 14]; (ii) Protection in res conviction against *ex post facto* laws, double punishment and self-inc tion [Art. 20]; (iii) Protection of life and personal liberty against actio out authority of law [Art. 21]; (iv) Right against exploitation [Art. Freedom of religion [Art. 25]; (vi) Freedom as to payment of taxes promotion of any particular religion [Art. 27]; (vii) Freedom as to atte at religious instruction or worship in State educational institutions [Ar

III. Some of the Fundamental Rights are *negatively* worded, as bitions to the State (e.g., Art. 14 says—"The State *shall not* deny person equality before the law. . ." Similar are the provisions of Arts. 16(2); 18(1): 20, 22(1); 28(1). There are others, which *positively* some benefits upon the individual [e.g., the right to religious freedom Art. 25, and the cultural and educational rights, under Arts. 29 (1), 30

IV. Still another classification may be made from the standpoin extent of limitation imposed by the different fundamental right legislative power.

(i) On the one hand, we have some fundamental rights, such a Art. 21, which are addressed against the Executive but impose no lim upon the Legislature at all. Thus, Art. 21 simply says that—

"No person shall be deprived of his life or personal liberty except according to the procedure established by law."

It was early held by our Supreme Court[9] that a competent Legislature is entitled to lay down any procedure for the deprivation of personal liberty, and that the Courts cannot interfere with such law on the ground that it is unjust, unfair or unreasonable. In this view,[9] the object of Art. 21 is not to impose any limitation upon the legislative power but only to ensure that the Executive does not take away a man's liberty except under the authority of a valid law, and in strict conformity with the procedure laid down by such law.[23] In later cases, however, the Supreme Court has found it difficult to immunise laws made under Art. 21 from attack on the ground of 'unreasonableness' under a relevant clause of Art. 19 (1), or Art. 14, and recent Supreme Court decisions show an increasing inclination in that direction.[24]

(ii) To the other extreme are Fundamental Rights which are intended as absolute limitations upon the legislative power so that it is not open to the Legislature to regulate the exercise of such rights, e.g., the rights guaranteed by Arts. 15, 17, 18, 20, 24.

(iii) In between the two classes stand the rights guaranteed by Art. 19 which itself empowers the Legislature to impose reasonable restrictions upon the exercise of these rights, in the public interest. Though the individual rights guaranteed by Art. 19 are, in general, binding upon both the Executive and the Legislature, these 'authorities' are permitted by the Constitution to make valid exceptions to the rights within limits imposed by the Constitution. Such grounds, in brief, are security of the State, public order, public morality and the like.

All the above rights are available against the *State*. It is now settled that the rights which are guaranteed by Arts. 19[25] and 21[26] are guaranteed against State action as distinguished from violation of such rights by *private individuals*. In case of violation of such rights by individuals, the ordinary legal remedies may be available but not the constitutional remedies.

Fundamental Rights—a guarantee against State action.

'State action', in this context, must, however, be understood in a wider sense. For interpreting the word 'State' wherever it occurs in the Part on Fundamental Rights, a definition has been given in Art. 12 which says that, unless the context otherwise requires, 'the State' will include not only the Executive and Legislative organs of the Union and the States, but also local bodies (such as municipal authorities) as well as 'other authorities'.[26a] This latter expression refers to any authority or body of persons exercising the power to issue orders, rules, bye-laws or regulations having the force of law, e.g., a Board having the power to issue statutory rules, or exercising governmental powers. Even the act of a private individual may become an act of the State if it is *enforced* or *aided* by any of the authorities just referred to.[27]

It should be noted, however, that there are certain rights included in Part III which are available not only against the State but also against private

individuals, e.g., Art. 15(2) [equality in regard to access to and use of of public resort]; Art. 17 [prohibition of untouchability]; Art. 18 [prohibition of acceptance of foreign title]; Art. 23 [prohibition of tra human beings]; Art. 24 [prohibition of employment of children in haz employment]. But these provisions in Part III are not *self-executory*, to say, these articles are not directly enforceable; they would be inc enforceable only if some law is made to give effect to them, and such violated. It follows that the classification of fundamental right executory and self-executory is another possible mode of classification.

We may now proceed to a survey of the various fundamental rig particular.

Art. 14 of the Constitution provides—

"The State shall not deny to any person equality before the law or the equal prote the laws within the territory of India."

Art. 14: Equality before the Law and Equal Protection of the Laws.

Prima facie, the expression 'equality before the law' and 'equal p tion of the laws' may seem to be identical, but, i they mean different things. While equality befo law is a somewhat *negative* concept implyi absence of any special privilege in favour of any dual and the equal subjection of all classes to th nary law,—equal protection of the laws is a more *positive* concept, im equality of treatment in equal circumstances.

Equality before Law.

Equality before the law, as a student of English Constitution knows, is the second corollary from *Dicey's*[28] c of the Rule of law. It means that no man is abo law of the land and that every person, whatever be his rank or sta subject to the ordinary law and amenable to the jurisdiction of the or tribunals. Again, every citizen from the Prime Minister down to the hu peasant, is under the same responsibility for every act done by him w lawful justification and in this respect, there is no distinction be officials and private citizens. It follows that the position will be the sa India. But even in England, certain exceptions are recognised to the rule of equality in the public interests.

The exceptions allowed by the *Indian* Constitution are—

(1) The President or the Governor of a State shall not be answera any Court for the exercise and performance of the powers and duties office or for any act done or purporting to be done by him in the exerci performance of those powers and duties.

(2) No criminal proceeding whatsoever shall be instituted or con against the President or a Governor in any Court during his term of off

(3) No civil proceeding in which relief is claimed against the Pre or the Governor of a State shall be instituted during his term of office court in respect of any act done or purporting to be done by him personal capacity, whether before or after he entered upon his off President or Governor of such State, until the expiration of two month

after notice in writing has been delivered to the President or the Governor, as the case may be, or left at his office stating the nature of the proceedings, the cause of action therefor, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims [Art. 361].

The above immunities, however, shall not bar—(i) Impeachment proceedings against the President. (ii) Suits or other appropriate proceedings against the Government of India or the Government of a State.

Besides the above constitutional exceptions, there will, of course, remain the exceptions acknowledged by the comity of nations in every civilized country, e.g., in favour of foreign Sovereigns and ambassadors.

Equal Protection of the Laws.

Equal protection of the laws, on the other hand, would mean "that among equals, the law should be equal and equally administered, that like should be treated alike. . . ."

In other words, it means the right to equal treatment in *similar circumstances* both in the privileges conferred and in the liabilities imposed by the laws.[29] None should be favoured and none should be placed under any disadvantage, in circumstances that do not admit of any reasonable justification for a different treatment. Thus, it does not mean that every person shall be taxed equally, but that persons under the same character should be taxed by the same standard.

But if there is any *reasonable* basis for classification, the Legislature would be entitled to make a different treatment. Thus, it may (i) exempt certain classes of property from taxation at all, such as charities, libraries and the like; (ii) impose different specific taxes upon different trades and professions; (iii) tax real and personal property in different manner and so on.

The guarantee of 'equal protection', thus, is a guarantee of equal treatment of persons in equal circumstances, permitting differentiation in different circumstances. In other words—

> The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstance in the same position as the varying needs of different classes of persons often require separate treatment.[30]
>
> The principle does not take away from the State the power of classifying persons for legitimate purposes.[31]
>
> "A Legislature which has to deal with diverse problems arising out of an infinite variety of human relations must, of necessity, have the power of making special laws to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate."[31]

In order to be 'reasonable', a classification must not be arbitrary, but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the *object* of the legislation.[32] In order to pass the test, two conditions must be fulfilled, namely, that (1) the classification must be founded on an intelligible differentia which distinguishes those that are

grouped together from others, and (2) that differentia must have a rati relation to the object sought to be achieved by the Act.[29]

It is not possible to exhaust the circumstances or criteria which accord a reasonable basis for classification in all cases. It depends on object of the legislation in view and whatever has a reasonable relation to *object or purpose* of the legislation is a reasonable basis for classificatio the persons or things coming under the purview of that enactment. Thus—

(i) The basis of classification may be *geographical.*[30]

(ii) The classification may be according to difference in time.[30]

(iii) The classification may be based on the difference in the *natur* the trade, calling or occupation, which is sought to be regulated by legislation.[33]

Thus, it has been held that—

(a) In offences relating to women, e.g., adultery, women in India may be placed in a favourable position, having regard to their social status and need for protection.[34]

(b) In a law of prohibition, it would not be unconstitutional to differentiate between and military personnel, or between foreign visitors and Indian citizens,—for they are similarly circumstanced from the standpoint of need for prohibition of consumption of liqu

The guarantee of equal protection applies against substantive as wel procedural laws.[36] From the standpoint of the latter, it means that litigants, who are similarly situated, are able to avail themselves of the sa procedural rights for relief and for defence, without discrimination. course, if the differences are of a *minor* or *unsubstantial* character, wh have not prejudiced the interests of the person or persons affected, th would not be a denial of equal protection.[29] Again, a procedure different fr that laid down by the ordinary law can be prescribed for a particular clas persons if the discrimination is based upon a reasonable classification hav regard to the object which the legislation has in view and the policy underly it. Thus, in a law which provides for the externment of undesirable pers who are likely to jeopardize the peace of the locality, it is not an unreasona discrimination to provide that the suspected person shall have no right cross-examine the witnesses who depose against him, for the very object the legislation which is an extraordinary one would be defeated if such a ri were given to the suspected person.[37] In the Reference on the Special Cou Bill, 1978,[38] the Supreme Court has held that the setting up of a Special Co for the expeditious trial of offences committed during the Emergency per [from 25-6-1975 to 27-3-1977] by high public officials, in view of congestion of work in the ordinary Criminal Courts and in view of the n for a speedy termination of such prosecutions in the interests of the functi ing of democracy under the Constitution of India, is a reasona classification. But to include in the Bill any offence committed during a period prior to the Proclamation of Emergency in June, 1975, was unconsti tional inasmuch as such classification has no reasonable nexus with the obj of the Bill.

The guarantee of equal protection includes absence of any *arbitra*

(b) preventing any person from worshipping or offering prayers in any place of public worship;

(c) subjecting any person to any disability with regard to access to any shop, public restaurant, hotel or public entertainment or with regard to the use of any reservoir, tap or other source of water, road, cremation ground or any other place where 'services are rendered to the public'.

The sweep of the Act has been enlarged in 1976, by including within the offence of practising untouchability, the following—

(i) *insulting* a member of a Scheduled Caste on the ground of untouchability;

(ii) *preaching* untouchability, directly or indirectly;

(iii) justifying untouchability on historical, philosophical or *religious* grounds or on the ground of tradition of the caste system.

The penal sanction has been enhanced by providing that (a) in the case of subsequent convictions, the punishment may range from one to two years' imprisonment; (b) a person convicted of the offence of 'untouchability' shall be disqualified for *election* to the Union or a State Legislature.

If a member of a Scheduled Caste is subjected to any such disability or discrimination, the Court shall presume, unless the contrary is proved, that such act was committed on the ground of 'untouchability'. In other words, in such cases, there will be a statutory presumption of an offence having been committed under this Act.

The prohibition of untouchability in the Constitution has thus been given a realistic and effective shape by this Act.

Art. 18: Abolition of Titles.

'Title' is something that hangs to one's name, as an appendage. During the British rule, there was a complaint from the nationalists that the power to confer titles was being abused by the Government for imperialistic purposes and for corrupting public life. The Constitution seeks to prevent such abuse by prohibiting the State from conferring any title at all.

It is to be noted that—

(a) The ban operates only against the State. It does not prevent other public institutions, such as Universities, to confer titles or honours by way of honouring their leaders or men of merit.

(b) The State is not debarred from awarding military or academic distinctions, even though they may be used as titles.[48]

(c) The State is not prevented from conferring any distinction or award, say, for social service, *which cannot be used as a title, that is, as an appendage to one's name.* Thus, the award of *Bharat Ratna or Padma Vibhushan* cannot be used by the recipient *as a title* and does not, accordingly, come within the constitutional prohibition.

In 1954, the Government of India introduced decorations (in the form of medals) of four categories, namely, *Bharat Ratna, Padma Vibhushan, Padma Bhushan* and *Padma Shri.* While the Bharat Ratna was to be awarded for "exceptional services towards the advancement of Art, Literature and Science, and in recognition of *public service* of the higher order", the others

would be awarded for 'distinguished public service in any field, ir service rendered by Government servants", in order of the degree merit of their service.

Though the foregoing awards were mere *decorations* and not i to be used as appendage to the names of the persons to whom t awarded, there was a vehement criticism from some quarters t introduction of these awards violated Art. 18. The critics pointed even though they may not be used as titles, the decorations tend t distinctions according to rank, contrary to the Preamble which p 'equality of status'. The critics gained strength on this point from the the decorations are divided into several classes, superior and inferi that holders of the *Bharat Ratna* have been assigned a place in the 'V of Precedence' (9th place, i.e., just below the Cabinet Ministers Union), which is usually meant for indicating the rank of the d dignitaries and high officials of the State, in the interests of disciplin administration. The result was the creation of a rank of persons on th of Government recognition, in the same way as the conferment of r would have done.

Another criticism, which seems to be legitimate, is that there sanction, either in the Constitution or in any existing law, against a r of any such decoration appending it to his name and, thus, using it as Any such use is obviously inconsistent with the prohibition contained 18(1) but it is not made an offence either by the Constitution or by a The apprehensions of the critics on this point were unfortunately justi the fact that in describing the author on the Title of an issue of the H Lectures, the decoration *'Padma Vibhushan'* was, in fact, appende title.

The protest raised by Acharya Kripalani against the award o decorations, which went unheeded to during the regime of Mrs. Gandh honoured by the Janata regime,—by putting a stop to the prac awarding *Bharat Ratna,* etc. by the *Government.* But it was *resto* Mrs. Gandhi after her come-back.

In this context, it is to be noted that Art. 18(1) itself makes an tion in favour of granting by the State of any *military*[48] or *aca* distinction.

Apart from the rights flowing from the above prohibition, certai tive rights are conferred by the Constitution in order to promote the id liberty held out by the Preamble. The foremost amongst these are t fundamental rights in the nature of 'freedom' which are guaranteed citizens by the Constitution of India [Art. 19]. These are popularly kno

Art. 19: The Six Freedoms.

the 'seven freedoms' under our Constitution. already been pointed out [p. 85, *ante*] that in the nal Constitution, there were 7 freedoms in Art. but that one of them, namely, 'the right to ac

hold and dispose of property' has been *omitted* by the Constitution (44th Amendment) Act, 1978, leaving only 6 freedoms in that Article. They are—1. Freedom of speech and expression. 2. Freedom of assembly. 3. Freedom of association. 4. Freedom of movement. 5. Freedom of residence and settlement. 6. Freedom of profession, occupation, trade or business.

Since Art. 19 forms the core of *our* Chapter on Fundamental Rights, it is essential for the reader to be familiar with the text of this Article, as it stands amended:

"19. (1) All citizens shall have the right—
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; and. . . .
(g) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of *the sovereignty and integrity of India,* the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in subclause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of *the sovereignty and integrity of India* or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of *the sovereignty or integrity of India* or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clause (d)–(e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of an existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, *nothing in the said sub-clause, shall affect the operation* of any existing law in so far as it relates to, or to prevent the State from making any law relating to,—
(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

Absolute individual rights cannot be guaranteed by any modern State.

Limitations upon the Freedoms.

The guarantee of each of the above rights is, therefore limited by *our* Constitution itself by conferring upon the 'State' a power to impose by its laws reasonable restrictions as may be necessary in the larger interests of the community. This is what is meant by saying that the Indian Constitution attempts "to strike a balance between individual liberty and social control."[49] Since the goal of our constitutional system is to establish a 'welfare State', the makers of the Constitution did not rest with the enumeration of uncontrolled individual rights, in accordance with the philosophy of *laissez faire,* but ensure that where collective interests were concerned, individual lib yield to the common good; but, instead of leaving it to the determine the grounds and extent of permissible State regulation dual rights as the American Constitution does, the makers of our tion specified the permissible limitations in Cls. (2) to (6) of Art. 19 i

The 'State', in this context, includes not only the legislative a of the Union and the States but also other local or statutory[50] au e.g., municipalities, Union Boards, etc., within the territory of under the control of the Government of India. So, all of these a may impose restrictions upon the above freedoms, provided such re are reasonable and are relatable to any of the grounds of public i specified in Cls. (2)-(6) of Art. 19.

Thus—

(i) The Constitution guarantees freedom of *speech and ex* But this freedom is subject to reasonable restrictions imposed by relating to (a) defamation; (b) contempt of court; (c) decency or mo security of the State; (e) friendly relations with foreign States; (f) inc an offence; (g) public order; (h) maintenance of the sovereignty and of India.[51]

It is evident that freedom of speech and expression cannot co an individual a licence to commit illegal or immoral acts or to incite overthrow the established government by force or unlawful means.

(ii) Similarly, the freedom of *assembly* is subject to the qua that the assembly must be peaceable and without arms and subje reasonable restrictions as may be imposed by the 'State' in the in public order. In other words, the right of meeting or assembly sh liable to be abused so as to create public disorder or a breach of the to prejudice the sovereignty or integrity of India.

(iii) Again, all citizens have the right to *form associations* but subject to reasonable restrictions imposed by the State in the in public order or morality or the sovereignty or integrity of India. freedom will not entitle any group of individuals to enter into a conspiracy or to form any association dangerous to the public pe make illegal strikes or to commit a public disorder, or to unde sovereignty or integrity of India.

(iv) Similarly, though every citizen shall have the right to *m* throughout the territory of India or to *reside* and settle on any p country,—this right shall be subject to restrictions imposed by the S interests of the general public or for the protection of any Schedule

(v) Again, every citizen has the right to practise any profes carry on any *occupation, trade* or *business,* but subject to reasonab tions imposed by the State in the interests of the general public and any law laying down qualifications for carrying on any profession cal occupation, or enabling the State itself to carry on any trade o to the exclusion of the citizens.

Scope for Judicial Review.

As pointed out earlier (p. 96, *ante*), one of the striking features of the provisions relating to Fundamental Rights in *our* Constitution is that the very declaration of the major Fundamental Rights is attended with certain limitations specified by the Constitution itself. In the *United States* the Bill of Rights itself does not contain any such limitations to the rights of the individuals guaranteed thereby, but in the enforcement of those rights the courts had to invent doctrines like that of 'Police Power of the State' to impose limitations on the rights of the individual in the interests of the community at large. But, as explained above, in Art. 19 of *our* Constitution, there is a distinct clause attached to each of the rights declared, containing the limitations or restrictions which may be imposed by the State on the exercise of each of the rights so guaranteed. For example, while the freedom of speech and expression is guaranteed, an individual cannot use this freedom to defame another which constitutes an offence under the law. A law which may be made by the State under any of the specified grounds, such as public order, defamation, contempt of court, cannot be challenged as unconstitutional or inconsistent with the guarantee of freedom of expression except where the restrictions imposed by the law can be held to be "unreasonable" by a court of law.

That is how the competing interests of individual liberty and of public welfare have been sought to be reconciled by the framers of *our* Constitution. As Mukherjea, J. explained in the leading case of *Gopalan* v. *State of Madras*[49]—

> "There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint for that would lead to anarchy and disorder. The possession and enjoyment of all rights. . .are subject to such reasonable conditions as maybe deemed to the governing authority of the country to be essential to the safety, health, peace, general order and morals of the community. The question, therefore, arises in each case of *adjusting the conflicting interests* of the individual and of the society. . .Ordinarily every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by any other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers. What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social security. Article 19 of the Constitution gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law so that they may not conflict with public welfare or general morality."

It is by way of interpretation of the word 'reasonable' that the court comes into the field, and in each case when an individual complains to the court that his Fundamental Right has been infringed by the operation of a law, or an executive order issued under a law, the court has got to determine whether the restriction imposed by the law is reasonable and if it is held to be unreasonable in the opinion of the court, the court will declare the law (and the order, if any) to be unconstitutional and void.[52]

Tests of Reasonableness of a Restriction

The expression 'reasonable restriction' seeks to strike a balance between the freedom guaranteed by any of the sub-clauses of Art. 19(1) and the social control permitted by any

therefore, what criteria or tests have been laid down by the Supre for determining whether the restriction is reasonable or not. The Court has said[53-54] that a restriction is reasonable only when there is balance between the rights of the individual and those of the society.

The test of reasonableness should, therefore, be applied to ea dual statute impugned and no abstract or general pattern of reaso can be laid down as applicable to all cases. The *nature of the right* have been infringed, the underlying *purpose of the restrictions* imp *extent* and *urgency of the evil* sought to be remedied ther *disproportion* of the imposition, the *prevailing conditions* at the tim all enter into the judicial verdict.[55] Thus, the formula of s satisfaction of the Government and its officers with an advisory Bo view the materials on which the Government seeks to overrid freedom guaranteed to the citizen, may be viewed as reasonable on exceptional circumstances (e.g., in providing internment or extern the security of the State), and within the narrowest limits, and not to right such as the freedom of association, in the absence of any em extraordinary circumstances.[55] All the attendant circumstances must into consideration and one cannot dissociate the actual *conten* restrictions from the *manner of their imposition* or the *mode of put into practice.*[56]

It follows, therefore, that the question of reasonableness s determined from both the *substantive* and *procedural* standpoints. F

(a) In order to be reasonable, the restriction imposed mus reasonable relation to the collective object which the legislation achieve and must not go in excess of that object, or, in other w restriction must not be greater than the mischief to be prevented. tion which arbitrarily or excessively invades the right cannot b contain the quality of reasonableness.[54] Thus,—

> The object of an Act was "to provide measures for the supply of adequate lab cultural purposes in *bidi* manufacturing areas." But the order of the Deputy Co made thereunder forbade *all* persons residing in certain villages from engaging in th ture of *bidis* during the agricultural season. The Supreme Court invalidated the o ground that it imposed an unreasonable restriction upon the freedom of business [Ar of those engaged in the manufacture of *bidis* because –
>
> The object of the Act could be achieved by legislation restraining the emp *agricultural* labour in the manufacture of bidis *during the agricultural season* or by hours of work on the business of making *bidis*. A *total* prohibition of the manufact an unreasonable and *excessive* restriction on the lawful occupation of manufacturing

(b) While the foregoing aspect may be said to be the *substant* of reasonableness, there is another aspect, viz., the *procedural aspec* ing to the manner in which the restrictions have been imposed. That in order to be reasonable, not only the restriction must not be *exce* procedure or manner of imposition of the restriction must also be *just*. In order to determine whether the restrictions imposed by procedurally reasonable, the court must take into consideration all

dant circumstances such as the *manner* of its imposition, the mode of putting it into practice. Broadly speaking, a restriction is unreasonable if it is imposed in a manner which violates the principles of natural justice, for example, if it seeks to curtail the right of association or the freedom of business of a citizen without giving him *an opportunity to be heard.*[57] It has also been laid down that in the absence of extraordinary circumstances it would be unreasonable to make the exercise of a fundamental right depend on the subjective satisfaction of the Executive.[58]

Freedom of the Press.

There is no specific provision in our Constitution guaranteeing the freedom of the press because freedom of the press is included[58] in the wider freedom of 'expression' which is guaranteed by Art. 19(1)(a). Freedom of expression means the freedom to express not only one's *own* views but also the views of *others* and, by *any* means, including printing. But since the freedom of expression is not an absolute freedom and is subject to the limitations contained in Cl. (2) of Art. 19, laws may be passed by the State imposing reasonable restrictions on the freedom of the press in the interests of the security of the State, the sovereignty and integrity of India, friendly relations with foreign States, public order, decency or morality, or for the prevention of contempt of court, defamation or incitement to an offence.

On the other hand, the Press, as such, has no special privileges in India. From the fact that the measure of the freedom of the Press is the same as that of an ordinary citizen under Art. 19 (1) (a), several propositions emerge[58]—

I. The Press is not immune from—
   (a) the ordinary forms of taxation;
   (b) the application of the general laws relating to industrial relations;
   (c) the regulation of the conditions of service of the employees.

II. But in view of the guarantee of freedom of expression, it would not be legitimate for the State—

(a) to subject the Press to laws which take away or abridge the freedom of expression or which would curtail circulation[59] and thereby narrow the scope of dissemination of information or fetter its freedom to choose its means of exercising the right *or* would undermine its independence by driving it to seek Government aid;[59]

(b) to single out the Press for laying upon it excessive and prohibitive burdens which would restrict the circulation, impose a penalty on its right to choose the instruments for its exercise or to seek an alternative media;[59]

(c) to impose a specific tax upon the Press deliberately calculated to limit the circulation of information.[58]

When the constitutionality of an enactment specially directed against the Press is challenged, the Court has to test it by the standard of substantive and procedural reasonableness, as explained earlier (p. 99). An enactment of this nature, the Punjab Special Powers (Press) Act, 1956, came up before the Supreme Court in *Virendra* v. *State of Punjab,*[60] and the Court annulled one of its provisions, while upholding another, on the following grounds:

A law which empowers the Government to prohibit, for a *temporary* period, the e literature of a *specified class,* likely to cause communal disharmony would not be hel unreasonable, if it complies with the procedural requirements of natural justice. But it w unreasonable if it empowered the State Government to prohibit the bringing into the State newspaper, on its being satisfied that such action was necessary for the maintena communal harmony or public order, inasmuch as it placed the whole matter at the sul satisfaction of the State Government without even providing for a right of representatio party affected.

Since the expiry of the Press (Objectionable Matter) Act, 1951, in there was no all-India Act for the control of the Press in India. But in Parliament enacted the Prevention of Publication of Objectionable M Act, 1976, with more rigorous provisions, and in a *permanent* for should be pointed out that as early as April, 1977, the Janata Govern *repealed* this Act. Subsequently, however, this position has been buttr by inserting a new Article in the Constitution itself,—Art. 361A[61]—b Constitution (44th Amendment) Act, 1978.

Censorship.

Censorship of the press, again, is not specially prohibited by any p sion of the Constitution. Like other restrictions, t fore, its constitutionality has to be judged by th of 'reasonableness' within the meaning of Cl. (2).[60]

Soon after the commencement of the Constitution and prior t insertion of the word 'reasonable' in Cl. (2), the question of validi censorship came up before *our* Supreme Court, in the case of *Brij Bhu* v. *State of Delhi.*[62]

The facts of this case were as follows:

S. 7(1)(c) of the East Punjab Public Safety Act, 1949, provided that "the Pro Government. . . .if satisfied that such action is necessary for preventing or combatin activity prejudicial to the *public safety* or the maintenance of *public order may,* by or writing addressed to a printer, publisher, editor require that any matter relating to a part subject or class of subjects shall before publication be submitted for *scrutiny.*"

Similar provisions of the Madras Maintenance of Public Order Act, 1949, were chall in the allied case of *Ramesh Thappar* v. *State of Madras.*'[62]

The majority of the Supreme Court had no difficulty in holding that the imposition c censorship on a journal was an obvious restriction upon the freedom of speech and e sion guaranteed by clause (1) (a) of article 19, and, that 'public safety' or 'public order' w covered by the expression 'security of the State', and the impugned law was not, therefore, by clause (2) as it then stood.

Shortly after these decisions,[62] Cl. (2) was amended by the Constitu (1st Amendment) Act, 1951, inserting 'public order' in Cl. (2). Hence ground relied upon by the majority in the cases of *Ramesh Thappar*[62] *Brij Bhushan*[62] is no longer available. The word 'reasonable' was inserted in Cl. (2) by the same amendment. The result of this twofold am ment is that if censorship is imposed in the interests of public order, it ca at once be held to be unconstitutional as a fetter upon the freedor circulation but its 'reasonableness' has to be determined with reference t circumstances of its imposition. In this sense, the introduction of the v 'reasonable' has not been an unmixed blessing. For, censorship of the p