The Units of the Federation.

As it has been seen, the scheme of an All-India Federation comprising the Provinces of British India and the Princely States under the Government of India Act, 1935 did not materialise because of the continuing clash of different interests. With the partition of India, the Constitution makers of the Country became definite that the future form of government for India should be federal. Even before the partition of the Country, the acceptance of the federal principle is to be found in the Objectives Resolution of the Constituent Assembly of India wherein it was said:

"The said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the Law of the Constitution, shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom." ¹

The proposal for vesting the residuary powers in the units is to be understood in the context of making concession to the Muslim demand. With the partition of India that requirement became obsolete. The problem of resistance of the Rulers of the Indian States also was no longer there. But that did not mean that the problem of bringing the Indian States into the same constitutional framework with the

former British Indian Provinces was fully solved, as the Indian Independence Act, as shown before, did not attempt to provide a solution to the problem.

The British Government, as we have seen in the previous chapter, terminated Paramountcy of the British Crown over the Indian States and legally the States became independent after the passing of the Indian Independence Act. But though the goal of coming to a settlement with the Indian States was left for the Dominion Government to achieve, it was not considered either desirable or practicable by the British Government that the States should remain completely independent entities, severing all constitutional relationship with India. This was evident from the discussions held in the House of Commons on the Indian Independence Bill. Lord Mountbatten also, in the address he delivered to the Chamber of Princes as the Viceroy and Governor-General of India on July 25, 1947, advised the Princes to surrender three subjects - Defence, External affairs and Communications to the Central Government, as these subjects were to be handled by a larger organisation for the convenience of States themselves. This would not involve 'any intolerable sacrifice of either internal autonomy or independence' on the part of a State. The Viceroy emphasised this point, adding: "My scheme leaves you with all the practical independence that you can possibly use and makes you free of all those subjects which you cannot possibly manage or your own."

Immediately before this, on July 5, 1947, Sardar Patel, on assuming charge of the States' Ministry, made an appeal to the States that had not till then joined the Constituent Assembly exhorting them to join the said Assembly. He further appealed to the

3. Ibid., P.775.
States to accede on the three subjects mentioned above, i.e., Defence, Foreign Affairs and communications in which the common interests of the Country were involved. "In other matters," he assured, "we would scrupulously respect their autonomous existence." A Draft Instrument of Accession was prepared and most of the States acceded to India, although the process of getting Instruments of Accession signed involved considerable persuasion, strain and anxiety.

Thus one of the formidable problems—the problem of fitting so many independent States geographically linked up with British India into one constitutional framework with India—was solved, even if partially.

But this accession of the States on three subjects only was only the beginning of an end. Progress, both economic and political—required a closer union of the States with India. As it has been truly observed in the White Paper on Indian States: "The accession of the Indian States to the Dominion of India was the first phase of the process of fitting them into the Constitutional structure of India. The second phase which rapidly followed, involved, a process of twofold integration, the consolidation of States into sizeable administrative units and their democratization."

So there did remain in the forefront a twofold problem. Some of the States were of extremely small size and were not in a position to provide for full economic development. Moreover, even in the larger States the popular urge for responsible government was growing irresistible. "So far as the larger units were concerned," runs the White Paper on Indian States, "the democratization of administration could be a satisfactory solution of their
constitutional problem; however, in the case of small States, responsible Government would have proved a farce. The Rulers of the smaller States were in no position to meet the demand for equating the position of their people with that of their countrymen in the Provinces. Sardar Patel also, in his statement of Dec. 16, 1947, thus explained the problem of small states: "It should be obvious to everyone, however, that even democracy and democratic institutions can function efficiently only where the unit to which these are applied can subsist in a fairly autonomous existence. Where, on account of the smallness of its size, isolation of its situation, the inseparable link with a neighbouring autonomous territory, be it a Province or a bigger State, in practically all economic matters of everyday life, the inadequacy of resources to open up its economic potentialities, the backwardness of its people and the sheer incapacity to shoulder a self-contained administration, a State is unable to afford a modern system of government; both democratization and integration are clearly and unmistakably indicated."

The integration of the States took three forms:

a) Merger of small States in the Provinces;
b) Conversion of certain States into Centrally administered areas; and
c) Consolidation of States into viable units through formation of States Unions.

The States, which merged in the Provinces, became part of those Provinces and Provincial Governmental machineries began to function there. In the case of the Unions of States, it was contemplated at the time of integration that the respective constituent assemblies of

7. White Paper on Indian States - Para-92,
9. Ibid., Para - 94.
the unions would frame their constitutions 'within the framework of the Covenants and the Constitution of India.'

But it became very soon clear that this would cause unnecessary complications and a further discussion by the Minister of States with the Premiers of the Unions followed, as a result of which it was decided that the Constituent Assembly of India should frame the Constitution of the States within the framework of the Indian Constitution.

As a result of integration, when the Constitution of India came into force its component parts were classified into four categories.

In the first category were included the former Governors' Provinces with their size increased by the merger of small States. These were called Part A States.

In the next category were placed five unions of States and the three large States which survived integration, i.e., Hyderabad, Jammu and Kashmir and Mysore.

Part C States were composed of some of the former Chief Commissioners' Provinces and several Indian States.

The last category comprised Andaman and Nicobar islands which were to be directly administered by the Centre.

For our purposes, we might exclude the fourth category from consideration as it comprised fully centrally administered areas and the question of federal relationship could not arise in this case. But among the three categories there were differences in status and organisation and this disparity in the status of the constituent units made the Indian Constitution peculiar. There was hardly

any fundamental difference between the first two categories of States, i.e., States specified in Parts A and B of the First Schedule to the Constitution. As Mr. Menon has truly remarked, "A great achievement of the new Constitution is the assimilation of the position of the former Indian States and Unions with that of the former Governor's Provinces." There was no differentiation in the legislative relationship between the Centre and these two types of States. "Apart from the institution of Rajpravesh," observed the States Reorganisation Commission, "the main feature that distinguishes Part B States from Part B States is the central executive supervisory authority over the government of these States for a specified period." It was provided in Art.371 of the Indian Constitution that Part B States were to remain under the general control of the Centre and were to comply with the directions from the President of India for a period of 10 years. The President of India could exempt any State from this requirement by order. The provision was incorporated because the administrative organisation in most of the States was not capable of shouldering full responsibility for carrying on administration. So for the transitional period such a provision was immensely beneficial. Sardar Patel, at the time of inclusion of this Article provided this assurance to the States in the Constituent Assembly:

"The provision involves no censure of any Government. It merely provides for contingencies which, in view of the present conditions, are more likely to arise in Part III of the Constitution."

14. Originally, the plan of the Draft Constitution of India was to divide the units of the Indian federation into four parts and to place the Indian States in the third part.
States than in the States of other categories. We do not wish to interfere with the day-to-day administration of any of the State. We are ourselves most anxious that the people of the States should learn by experience. This Article is essentially in the nature of a safety-valve to obviate recourse to drastic remedies such as provision for the breakdown of the constitutional machinery. It is quite obvious that in this matter the States, e.g., Mysore and Travancore and Cochin Union where democratic institutions have been functioning for a long time and where Governments responsible to legislatures are in office, have to be treated differently from the States not conforming to these standards. In all these cases our control will be exercised in varying degrees according to the requirements of each case."

This statement was justified, as the application of this Article was withdrawn in the case of Mysore in 1952 and became a dead letter regarding other States also.

There was thus no basic difference regarding Centre-State relationship in the case of the first two types of units. But Part C States were administered on a different basis. These States were to be administered by the President either through a Chief Commissioner or a Lieutenant-Governor or through the Government of a neighbouring State. In the last case the President was to consult the Government of the State concerned as well as the views of the people of the State in Part C concerned. Parliament was empowered to create for such a State a legislature and a council of advisers or ministers. This legislature might be nominated or elected or partly nominated or partly elected. Under

16. V.P. Menon, Op.Cit., P.471(Foot-Note)
the Part C States Act of 1952 some of these States were allowed to have legislative assemblies and responsible ministries. But that did not detract from the legislative authority of the Union Parliament over these States or from the responsibility of the Union Government to Parliament for their administration.  

The existence of such disparate units in a federation is, indeed, anomalous. That a change would be necessary was anticipated by the framers of the Constitution and provision was made under Articles 3 and 4 of the Constitution. Under Art. 3 of the Constitution which is largely based upon § 290(1) of the Government of India Act, 1935 the Indian Parliament has been empowered to form a new State by adopting any of the following methods:

a) by separation of territory from any State or,  
b) by uniting two or more States or parts of States; or  
c) by uniting any territory to a part of any State.  

The Indian Parliament can also diminish or increase the area of any State or can alter their names and boundaries. But before introducing such a bill in either House of Parliament recommendation of the President is to be obtained. In the case of a bill affecting the boundaries of any of the State or States the President, before he makes any recommendation, is to ascertain the views of the Legislature of each of the States concerned. (Formerly, before reorganisation of the States, ascertainment of views of the Legislatures of States was necessary in the case of Part A and Part B States only.) But it is clear that the consent of the affected State is not necessary and the President is not bound to act according to the wishes of the  

majority in the Legislature. Any Act of Parliament for such territorial readjustment of the States is not to be deemed an amendment of the Constitution, for the purposes of Art. 366, though it contains such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the Act or any other consequential changes. Such an Act, therefore, requires only the usual course of ordinary legislation.

We may note in this connection that such provisions are absent in other federal constitutions. In the U.S.A., Art. 4, S. (III) of the constitution expressly provides that such territorial readjustments as formation of new States by the 'junction of two or more States or parts of States' is not possible by Congress alone, without the consent of the legislatures of states concerned. The Commonwealth of Australia Constitution Act also incorporates similar provisions. Sections 123-4 provide that the Australian Parliament can alter the boundaries of a State with the consent of the legislature of that state and the approval of the majority of electors of that State. In the case of formation of new States by separation of territory from a State, or by the union of two or more States or parts of States, the consent of the affected States is necessary. Under S.111 of the said constitution the legislature of a state may surrender part of its territory to the Commonwealth, which will then become subject to the exclusive jurisdiction of the Commonwealth.

Articles 3 and 4 of the Indian Constitution, (to be referred to simply as the Constitution) on the other hand, vest extraordinary powers in the hands of Parliament in the matter of changes and adjustments in the area of the States.

Art. 4 of the Constitution.
Formation of units in our case was partly the result of the British conquest and partly a by-product of the integration of the Indian States. Thus it was not planned scientifically. From early times the demand for redistribution of Provinces on linguistic basis was felt. The Indian National Congress, in its resolution passed in the session of 1920, accepted this demand as a just one. At the time of making the Constitution this problem had to be shelved; because it would unfold various difficulties and would impede the consolidation of the Country which was the prime need of the hour. But the disparity in the status of the Units and problem of Linguistic States required the incorporation in the constitution of a provision for speedy reorganisation when time would become ripe for such a change. This was evident at the time of the creation of Andhra State. The transfer of territory necessary to create Andhra State was effected by an Act of Parliament and no Constitutional amendment was necessary.

The problem of reorganisation of the States came to the forefront after the creation of Andhra State. The Government of India appointed on the 29th of December, 1953 the States Reorganisation Commission to examine the question of reorganisation of the States of the Indian Union, 'objectively and dispassionately', so that the welfare of the people of the each constituent unit as well as the nation as a whole was promoted. The Commission after a full consideration of the problem came to the conclusion that it was not possible or desirable 'to reorganise States on the

20. Ibid., Para - 52.
basis of the single test of either language or culture, but a balanced approach to the whole problem is necessary in the interests of national unity. All these things, such as preservation and strengthening of the unity and security of India, linguistic and cultural homogeneity, financial, economic and administrative considerations and successful working of the Five Year plans were regarded as worth considering. Moreover, the disparity between the States was to be abolished and all the States should possess equal status and a uniform relationship with the Centre. Accepting Part A States as the standard all the units should be raised to that status and Part B and Part C States were to disappear. Part C States, as they did not provide any adequate recompense for all the financial, administrative and constitutional difficulties which they created, were to be merged with the adjoining States and where such merger was not possible were to be administered by the Centre.

The States Reorganisation Commission recommended the maintenance of two types of units in the Indian Union: a) States, having a constitutional relationship with the Centre on a federal basis and b) Centrally administered areas, which for strategic or other considerations could not be joined to any of the States. The existence of a few Centrally administered territories is not inconsistent

23. Ibid., Para 93.
24. Ibid., Para 237.
25. Ibid., Para 263.
with federalism. Examples of other federal countries containing centrally administered areas may be furnished. Firstly, the seats of federal government such as Washington in the U. S. A. and Canberra in Australia and secondly, other sparsely populated and geographically isolated areas are administered ordinarily by the Centre.27

The proposals of the States Reorganisation Commission have been incorporated in the States Reorganisation Act, 1956 according to which the units of the Union were classified into thirteen Part A States, one Part B State (Jammu and Kashmir) and five Part C States.28 But this classification was meaningless, as the Constitution Seventh Amendment Act, 1956 in which changes in the constitutional system connected with the reorganisation of States were embodied, distinguished two types of units only, i.e., the States and the Union territories. According to the provisions of the States Reorganisation Act, read together with the provisions of the Constitution Seventh Amendment Act, the Union of India comprised fourteen States29A and six Union territories.29B The distinction between the different categories of the States of the Union has been abolished. All the States with the exception of Jammu and Kashmir30 to which special provisions are applicable, are to be governed

29A. India now consists of 16 States.
The former State of Bombay has been bifurcated into two parts, i.e., States of Maharashtra and Gujarat in 1960 and a new State—the State of Nagaland has been created in 1962. (Vide Schedule 1 to the Constitution of India as modified upto 1st March, 1963).

29B. In 1961 the territories of Dadra and Nagar Haveli and Goa, Daman and Diu and in 1962 that of Pondicherry have been incorporated in the territory of India. The number of Union Territories has thus been raised from six to nine. (Vide Schedule 1 to the Constitution).

According to Part VI of the Constitution. The system of administration of the States is thus the same as it was in the case of Part A States and the institution of Rajpravash has come to an end. Art 371 of the Constitution has been replaced by a new one which has made some special provision with respect to the States of Andhra Pradesh, Punjab and Maharashtra and Gujarat (i.e., the former State of Bombay). The President may, by order, provide for the constitution and function of regional committees of Legislative Assemblies of the States of Andhra and Punjab and provide for any special responsibility of the Governor in order to secure the proper functioning of the regional committees. In the case of the States of Maharashtra and Gujarat, the President may provide for any special responsibility of the Governor for the establishment of separate development boards for Viderbha, Marathwada, the rest of Maharashtra or as the case may be, Saurashtra, Kutch and the rest of Gujarat with the provision that a report on the working of each of those boards is to be placed before the State Legislative Assembly each year. The President may extend the responsibility of the Governor further to the equitable allocation of funds for developmental expenditure over the said areas, subject to the requirement of the State as a whole; and this to an equitable arrangement providing adequate facilities for technical education and vocational training and adequate opportunities for employment in services under the control of State Government in these areas. If 'special responsibility of the Governor' means that the Governor is entitled to act in his discretion in the above-mentioned cases, he will no doubt be subject to supervision then by the Central Government. However, the

question here is not one of great importance as it is one of the temporary and transitional provisions of the Constitution.

Units of the second category - the Union territories - are governed according to the provisions of Part VIII of the Constitution. Except as otherwise provided by Parliament, the Union territories are to be governed by the President, acting through an administrator appointed by him. Thus in their case the question of federal relationship does not arise.

II. Distribution of Legislative Powers between the Union and the States.

The scheme of distribution of legislative powers between the Union and the States under the new Constitution is fundamentally the same as under the Government of India Act, 1935. Where there is any deviation from the scheme of distribution under the Act of 1935, "it is invariably in the direction of strengthening the Government of the Union." There are writers and constitutionalists who denounce this tendency of centralization. In the Constituent Assembly, when Dr. Ambedkar, the Chairman of the Drafting Committee, introduced the Draft Constitution for India, there were virulent attacks on the constitutional proposals on this basis. One after another, members of the Constituent Assembly expressed the opinion that the Centre had been made strong at the expense of the units. As for example, Shri Lokanath Misra said "this Draft Constitution, by whatever name it may be

called, federal or unitary, parliamentary or presidential, is laying the foundation more for a formidable unitary constitution than a federal one. But there were others who regarded this centralization as inevitable. Shri Alladi Krishnaswami Ayyar, another member of the Drafting Committee, while discussing the criticisms levelled against the Draft Constitution, said: "In view of the complexity of industrial, trade and financial conditions in the modern world and the need for large-scale defence programmes, there is an inevitable tendency in every federation in the direction of strengthening the federal government. The Draft Constitution in several of its provisions has taken note of these tendencies instead of leaving it to the Supreme Court to strengthen the Centre by a process of judicial interpretation." Dr. Ambedkar also stressed the same point when he said that under modern conditions centralization of powers was inevitable. He cited the example of the U.S.A., where the federal government, notwithstanding the very limited powers given to it by the Constitution, had outgrown its former self and had overshadowed and eclipsed the State governments. Moreover, some members pointed out the necessity of centralization in the context of historical development of India. Pandit Laksminaraya Maitra observed: "we want a strong Centre by all means, it we want to preserve or maintain our new-born freedom, and if we want the solidarity of this country. We have had enough experience of Provincial Autonomy of which we had been enamoured in the past and now we have seen its effects!" His feelings were echoed in the speech

3. Ibid., P.335, 8th Nov., 1942.
4. Ibid., P.42, 4th Nov., 1942.
5. Ibid., P.247, 5th Nov., 1942.
of another member of the Constituent Assembly when he emphasised the same point in these terms: "Now there is no foreign power in the land and there should be no conflict between the provinces and the Centre, and as between the provinces themselves, possibilities of conflict can best be lessened by the Centre being given power to intervene effectively whenever and wherever provincial jealousies may threaten the unity, or impede the progress of the country as a whole." In spite of serious opposition, this point of view gained ground and the scheme of distribution of powers which finally emerged was heavily loaded on the side of the Centre.

The scheme of distribution of legislative powers under the Act of 1935, as it has been previously indicated, did not follow the American method. Though unique in many respects it was more akin to the Canadian scheme of distribution of legislative powers. The Constitution of India follows the same scheme.

Art. 243 of the Constitution shows the extent of Union and State legislation. The Union Parliament can make laws for the whole or any part of the territory of India, while a State Legislature can make laws for the whole or any part of the territory of that State subject to the provisions of the Constitution.

Subjects of legislation have been enumerated in the Seventh Schedule of our Constitution and have been classified into three lists, viz., the Union List, the State List and the Concurrent List. Matters which are of common concern to the entire Union and which require uniformity of legislative and executive action have been included in the Union List. This List comprises 97 items as against 33 entries under the Act of 1935.

The State List contains 66 entries, while the Act of 1935 contained 54 entries in the Provincial List. These entries consist of subjects which are chiefly of local interest.

We have pointed out in Chapter I that a concurrent list is regarded as incompatible with a good federal government by such an eminent authority as Prof. Woolf. The Constitution, however, followed the Act of 1935 in this matter also and added a Concurrent List which is even wider in scope than that to be found under the Act of 1935. This provision raised serious criticisms in the Constituent Assembly. Shri K. Santhanam in the Constituent Assembly gave vent to this feeling when he observed: "It tends to blur the distinction between the Centre and the Provinces. In the course of time it is an inevitable political tendency of all Federal Constitutions that the Federal List grows and the Concurrent List fades out, because when once the Central Legislature takes jurisdiction over a particular field of legislation, the jurisdiction of the Provincial legislature goes out." On the other hand Shri Alladi Krishnaswami Ayyar rightly answered that the existence of a Concurrent List in no way detracted from the federal character of the Constitution as there was an independent list of subjects for the units. The Concurrent List under the Constitution included 47 items. These are matters in which though State legislation is often desirable, central legislation is sometimes necessary in order to secure uniformity throughout the Country or to provide guidance to the units or to provide remedies for mischief arising in one particular unit but extending beyond its boundaries.

8. Ibid., p.336, 8th Nov., 1942.
According to Art. 246 of the Constitution, the Indian Parliament has been given exclusive powers to make laws with respect to matters included in the Union List. Similarly, the matters included in the State List are within the exclusive legislative competence of the States. And both the Union Parliament and the State Legislatures have concurrent powers of legislation with regard to the 47 items enumerated in the Concurrent List. But here also, as under the Act of 1935, the predominance of the Central Legislature is clear. Art. 246(1) gives exclusive powers of legislation to the Union Parliament regarding matters included in the Union List notwithstanding anything in the Constitution. But the State Legislatures have exclusive powers of legislation in the State List, subject to clauses (1) and (11) of Art. 246. In the concurrent field also the powers of the State Legislatures are to be exercised subject to clause (1) of the above-mentioned Article, i.e., subject to the powers of legislation of the Union Parliament. Thus the wordings of Art. 246 clearly 'secure the predominance or supremacy of the Union legislature in case of overlapping as between Lists I, II and III'.

But although Union supremacy is to be maintained in the case of overlapping of powers mentioned in the different lists, legislative powers given to the units in clear and unambiguous terms should not be denied to them on extraneous considerations. This principle was accepted by the Federal Court of India and has been followed by its successor, the Supreme Court of India. In the words of Patanjali Sastri J. of the Federal Court of India, "It is now well settled that if an enactment according to its true nature, its pith and substance, clearly falls within one of the matters assigned to the Provincial Legislature, it is valid notwithstanding its incidental encroachment on a

Federal Subject." It has been held by the Supreme Court of India also that one of the accepted principles of interpretation of legislative powers is this that 'where there is a seeming conflict between an entry in List II and an entry in List I an attempt should be made to see whether the 2 entries cannot be reconciled so as to avoid a conflict of jurisdiction.' S. R. Das J. of the Supreme Court observed that "in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon words so that the same may have effect in their widest amplitude." But the Court will not permit any transgression of the constitutional powers either 'manifest or direct' or 'disguised, covert or indirect' by any legislature. In such cases it is "the substance of the Act that is material and not merely the form or outward appearance, and if the subject matter in substance is something which is beyond the legislature to legislate upon, the form in which the law is clothed would not save it from condemnation."

One thing, however, should be noted in connection with the exclusive powers of legislation to be exercised by a State. As under S.75 of the Act of 1935, under Article 200 of the Constitution the Governor of a State may reserve a bill, presented before him after its passage by the State Legislature, for the consideration of the President. Proviso (2) to Article 200 makes such reservation compulsory if the law in question would so derogate from the powers of the High Court as to endanger its position under the Constitution. Under the succeeding Article, i.e., Art.331 of the Constitution, the President may give his assent to

12. Miss Kishori Shetti v. the King, A.I.R., 1960, F.C.69 (71)
the bill so reserved or withheld his assent therefrom. The propriety of assent or refusal to a State bill by the President is not to be questioned by the Courts. So even within the exclusive field of legislation of the States there is scope for Union intervention. As we have pointed out while dealing with the analogous provision under the Government of India Act, 1935, this provision is similar to 3.90 of the Canadian Constitution. The presence of this provision in the Canadian Constitution is one of the reasons for its being branded as 'Quasi-federal' by Prof. Shearer; because in the case of a strictly federal Constitution there is no scope for federal executive to veto measures passed by the State legislatures. It is expected, however, that this power of disallowance of State legislation should be used sparingly only in the extreme cases. In the case of Canada also, the Royal Commission in their Report on the Dominion-Provincial Relations observed that the whole trend indicated a 'lessening use' of this power and further pointed out that it had been recognised from the very beginning that it should be used with circumspection and in accordance with some guiding principles.

In the next place, according to Art.255 of the Constitution, if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to any of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2) the law made by Parliament whether

before or after the State law or the existing law as the case may be, will prevail and the State law will become void to the extent of repugnancy. This Article deals with the question of inconsistency between a State law and two other kinds of laws, namely, laws made by Parliament and existing laws. It has been held that the question of repugnancy can arise if the laws in question relate to a matter enumerated in the Concurrent List. But doubts have been expressed by some authorities and it has been observed, that although the question of repugnancy is likely to arise generally in the concurrent sphere where both the Union and the State Legislatures may make laws, in some cases a State law dealing with a matter included in the State List may be inconsistent with a Union Law relating to a subject-matter in the Union List. The provision may, it has been added, apply in the latter case also. Moreover, as regards laws made by Parliament the words ‘competent to enact’ are wide enough to include matters outside the Concurrent List. And the construction ‘a law made by Parliament which Parliament is competent to enact with respect to one of the matters enumerated in the Concurrent List’ is somewhat anomalous as it may imply that Parliament is competent to enact laws with respect to some of the matters included in the Concurrent List, while Parliament is competent to enact laws with respect to all matters enumerated in the Concurrent List. Sir Ivor Jennings, while assessing Indian Federalism, remarks: “some authorities consider that this Article applies

only to subjects in the Concurrent List, but it is not so phrased." 21

However, Art. 254(1) is a virtual reproduction of S.107(1) of the Government of India Act, 1935. It has been settled by the decision of the Judicial Committee of the Privy Council in Meghraj V. Alla Rakhia that when the Province acted solely within the powers under Provincial List without relying on any power conferred by the Concurrent List no question of repugnancy under S.107, Government of India Act, 1935 would arise. In the said case Lord Wright, while delivering the judgement, said: "Thus both parties rightly construed S. 107 as having no application in a case where the Province could show that it was acting wholly within its powers under the Provincial List and was not relying on any power conferred on it by the Concurrent List." 22 The Supreme Court of India reiterated this point of view in a number of cases. In a recent case Venkatarama Aiyyar J. observed that in order to apply S. 107 of the Act of 1935 two conditions must be fulfilled: 1) The provisions of the Provincial law and those of the central legislation must both be in respect of a matter which is enumerated in the Concurrent List and 2) they must be repugnant to each other." 23

Clause (2) of Article 254, however, mentions an exception. If the law made by the State Legislature has been reserved for the consideration of the President and has received his assent then it would become valid, notwithstanding

its repugnance to a law made by Parliament or an existing law relating to matters in the Concurrent List. As for example, it has been held that "Bombay Act 65 of 1954, since it was reserved for the consideration of the President and has received his assent will prevail over S.33 Industrial Disputes (Appellate Tribunal) Act." But proviso to the said clause empowers Parliament to enact, at any time, a law repealing or amending such a State law. This is a new insertion as there was no corresponding provision in the Government of India Act, 1935. Now by this proviso, the Constitution has enlarged the powers of Parliament as the Parliament can do what the Central Legislature could not under S.107 (2) of the Government of India Act, 1935.26

The most important departure from the Act of 1935 is to be found in the case of allocation of residuary powers. The said Act introduced a novel method of allocation of residuary powers which was neither American nor Canadian. It was vested, as we have seen in a previous chapter, in the Governor-General who could empower either the Federal Legislature or the Provincial Legislature, as the case might be, to enact laws with respect to any of the matters not included in any of the legislative lists in his discretion.

The authors of the Constitution have followed the Canadian method in this matter. Residuary powers of legislation have been vested exclusively in Parliament by

Art. 248 and Entry 97 of List I, Schedule VII of the Constitution. Some members of the Constituent Assembly wanted to vest the residuary powers in the units. And as has been already shown, in the first resolution - the Objectives Resolution of the Constituent Assembly - the decision was taken to leave the residue to the States. This was made partly as a concession to the Muslim demand, partly from the inspiration provided by the American Constitution. But as this resolution was taken before the partition of the country, the problem had to be considered again when the perspective of the country changed. With the partition of India the necessity of a strong centre became unassailable. So it was settled finally, that these powers should be vested in the Centre. Shri T. T. Krishnamachari in the course of debates in the Constituent Assembly observed: "I think more than one honourable Member mentioned that the fact that the residuary power is vested in the Centre in our Constitution makes it a unitary Constitution ....... I would like to tell honourable Members that it is not a very important matter in assessing whether a particular Constitution is based on a federal system from the point of view whether the residuary power is vested in the States or in the Central Government."

We have seen that the Government of India Act, 1935 made an exhaustive enumeration of powers in three different lists in order to limit the necessity of using residuary powers. Not to speak of the constitutions of the U.S.A. and Australia, even in the Canadian constitution the enumeration of the items of legislation is less detailed.

than in the Act of 1935. The Indian Constitution, again, is even more elaborate on this point than the Act of 1935. Shri T. T. Krishnamachari was accurate in his statement when he observed: "we have dealt very carefully with the possibility of a vacuum in Governmental power." So the chances of exercising a residuary power will be limited and, therefore, the problem is not as important as it is in the case of other Countries.

Next, there follow a few articles the purpose of which is, it is evident, to strengthen the Central Government as far as possible. Articles 249 to 253 create opportunities for Parliament to make laws on matters in the State List in certain circumstances.

Though the State Legislatures have exclusive powers to make laws in the State List, if the Council of States has declared by resolution supported by not less than two thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force. Such a resolution will remain in force for such period (not exceeding one year) as may be specified therein. This period of one year may be extended to another year by a further resolution of the Council of States. A law passed by Parliament under this provision will cease to have effect on

the expiration of period of six months after the resolution has ceased to be in force.

The States retain their concurrent rights of legislation regarding these matters. But if any provision of a State law is repugnant to any provision of a law made by Parliament, it will become void to the extent of the repugnancy so long as the law made by Parliament continues to have effect.

Needless to say that this provision modifies the federal principle, because without amendment the Concurrent List is enlarged by the unilateral action of the Upper House of Parliament. There was no corresponding provision in the Government of India Act, 1935. Analogous provisions are likewise absent in other federal constitutions. The reason furnished in the Constituent Assembly for including such a provision was this: "When our national economy is in the incipient stage of development, we cannot make a watertight or rigid distinction between central and provincial subjects." From the working of other federal systems it has been clear that owing to the necessity of planned development of economic life, matters included in the State List may assume national importance. But the Central Legislature cannot legislate on such matters except after amending the Constitution. But here, when 'the people at the Centre realize that it is no longer feasible and proper to keep a subject under the Provincial List they can make it a Central subject without undergoing the cumbersome

procedure of a Constitutional amendment.\textsuperscript{31} However, the relieving feature is this that the laws passed by Parliament in such cases are of a temporary nature. In the words of Shri T. T. Krishnamachari, "The mischief, if at all there is any, is restricted to a very limited period; and the very fact that it is limited to a very short period itself offers no temptation for the Centre using it as a means of augmenting its own power; and if it is used at all, it will be used for a valid and definitely useful purpose to which by and large the Component States are not likely to object."\textsuperscript{32}

It may be mentioned here that although there is no analogous provision in the Constitution of the U. S. A., Australia or Canada, the decision in a case\textsuperscript{33} under the Canadian Constitution is noteworthy. Earlier while analysing the distribution of legislative powers under the Government of India Act, 1935 we have noted that during emergencies or grave national crises judicial decisions everywhere are in favour of giving an extremely liberal interpretation of the federal jurisdiction. In Canada the judicial decision has run to the effect that an emergency like a war may impart to a matter falling within the jurisdiction of the Provinces a character which takes it out of merely local concern and enables the Dominion Parliament to legislate upon it.\textsuperscript{34} But from the decision of the above-mentioned case it is evident that powers of the Dominion Parliament to legislate on matters which prima facie are Provincial Subjects may depend not merely upon the existence of national emergency but upon the nature of the subject-matter of

\textsuperscript{31} C.A.D., 13th June, 1949, Vol. VIII, P. 806
\textsuperscript{32} Ibid., P. 805.
\textsuperscript{33} A.C. of Ontario V. The Canada Temperance Federation, 50, C.W.Tf. 1946, P. 535.
\textsuperscript{34} Fort Frances Pulp and Power Coy. v. Manitoba Free Press Coy. Ltd., 1923, A.C. 695(704)
legislation, viz., whether it is of national or of merely local importance. It has been observed by the Privy Council: "The true test must be found in the real subject-matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as for example in the Aeronautics case and the Radio case) then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial legislatures." This, however, is to be noted that it is left to the Courts to determine whether the subject matter of legislation is of national importance or not. The scheme of distribution of powers cannot be changed by the Dominion Parliament.

The exclusiveness of the State List is further qualified by the insertion of the provision which gives Parliament power to legislate for two or more States by consent and adoption of such legislation by other States. If it appears to be desirable to the Legislatures of two or more States that any matter in the State List should be regulated in such States by a law made by Parliament and if resolutions to that effect are passed by their Legislatures, then it will become lawful for Parliament to make laws with respect to such matters. Other States may also adopt such laws after passing resolutions in like manner. This provision was praised in the Constituent Assembly as a very healthy one by which several

35. JUG of Ontario V. the Canada Temperance Federation - 50 C.W.N. 1946, 535 (538).
States can co-operate and carry out schemes for the benefit of all of them jointly. The provision has been taken virtually from 5.103 of the Government of India Act, 1935, but it differs from that section in one important respect. Under the present Article it will not be possible for the State Legislatures to amend or repeal any such Act of Parliament while under the Act of 1935 the Provinces could amend or repeal similar legislation passed by the Federal Legislature. Such laws can be amended or repealed by an Act of Parliament only, passed in the same manner in which the law itself has been passed.

The power of Parliament regarding treaties also constitutes an important modification of the distribution of powers as between the Union and the States. Parliament has the power to make any law for implementing any treaty, agreement or conventions with foreign countries or any decision made at any international conference, association or other body, notwithstanding anything contained in the foregoing provisions of the Constitution. Here the provision of the Constitution follows that of the U. S. A. Under the Indian Constitution no consent of the States is necessary for making laws in order to implement obligations arising out of a treaty in matters under the exclusive jurisdiction of the States. Under the Government of India Act, 1935 the Federal Legislature could make laws for any Province or a Federated State as the case might be, only with the respective consent of the Governor concerned or the Ruler.

38. Art. 252(2) of the Constitution.
The scope for making laws under this Article under the Constitution is even wider than that under the Act of 1955, as it relates not only to the implementation of treaties and agreements but also conventions made or decisions taken at any international Conference. "It does not specifically refer to conferences, associations and other bodies representing Governments, and on its face it would seem to apply to any international organisation ...." So this provision has been criticised as giving a handle to the Union Government to enter any field reserved for State legislation; for perhaps there is no subject of any importance within the competence of the States which is not covered by an international agreement or convention. The same view was expressed by Sardar K.M. Panikkar in the Constituent Assembly. According to him this provision is 'dangerous' because what is meant by international association is not mentioned in the Constitution and, as it is not limited to Federal or Concurrent List it may 'nullify' State Constitution.

But the most conspicuous encroachment upon the powers of the State by Parliament can be effected under the provisions of Art. 250 of the Constitution according to which Parliament has been vested with the power of making any law with respect to a matter in the State List if a Proclamation of Emergency as provided under Art. 352 of the Constitution (which we shall discuss in detail later) is in operation.

Among other powers of Parliament yet to be mentioned there is one to this effect that although the powers of

constitutions and organisation of all Courts other than the Supreme Court and High Courts belong to the Legislatures of States, Parliament has been empowered to establish certain additional courts for the administration of laws made by Parliament and existing laws with respect to any matter included in the Union List.

It may be mentioned, however, that the scheme of distribution of powers discussed above is applicable only with reference to the Union-State relationship in the legislative field. As regards territories not included in a State, i.e., the Union territories, the legislative power in its entirety is vested in Parliament.

The scheme of distribution of legislative powers under the Constitution, as we have stated in the opening of this section, is based largely upon that of the Government of India Act, 1935. There are a few new insertions and some additions and alterations here and there in order to suit the altered conditions and circumstances of the Country. Drawing upon the experience of working of the other federal governments of the world, the Constitution-makers tried to provide for every conceivable contingency. The respective legislative fields of the Centre and the Units were mapped out with every possible care so as to meet the needs of a modern State - a State which should cater to the political as well as economic and social needs of its people. For this reason the enumeration of powers has become more exhaustive than it had been even under the Act of 1935. On the whole, the tendency towards centralisation is marked and the provisions for special powers of legislation make it nearly as effective as it is under a unitary constitution.

43. Art. 247 of the Constitution.
44. Art. 246(4) of the Constitution.
III. Administrative Relations between the Union and the States.

Following the Government of India Act, 1935 the Constitution lays down several articles regarding the mutual relationship between the Union and the States in the administrative sphere as well. Such provisions regulating administrative relations so elaborately we do not come across in other federal constitutions.

The Government of India Act, 1935 made a division of legislative and executive powers between the Central and Provincial Governments with meticulous care; but separation between their administrative systems was not effected completely. Even after the adoption of the new Constitution the structure of administration has been left almost undisturbed.

Under Article 73 of the Constitution the executive Power of the Union extends a) to matters with respect to which Parliament has power to make laws; and b) to the exercise of its treaty rights. Art. 162 lays down that the executive power of the States extends to all matters with respect to which the State Legislature has power to make laws. Proviso to Art. 162 lays down that the executive power of a State as regards the Concurrent List shall be exercised, subject to the limitations proposed by the Constitution or by any law made by Parliament. Execution of policies in regard to matters in the Concurrent List ordinarily belongs to the States. But according to the proviso to Art. 73, Parliament may provide by law that the executive power of the Union shall also extend to such cases. Here the Constitution goes farther than the Government of India Act, 1935. Under the Act of 1935 the
concurrent matters were generally administered by the Provinces. The said Act empowered the Centre to give directions to the Provinces as to the carrying into execution therein of a Central law relating to a Concurrent subject. Under the Constitution the Union can take up the executive power regarding a matter included in the Concurrent List, if it deems it necessary. Under the Government of India Act, 1935 the Centre had no such power to take up the administration of a Concurrent subject.

The Government of India Act, 1935 did not, as pointed out earlier, follow the American usage of administering the federal laws by a separate set of courts and officers. The Constitution also retains the same system and in most important cases the Union possesses no exclusive agency for administering its own laws. As a corollary to federalism there is a dual civil service—the State Civil Service and the Central Civil Service; but in the administration of State laws and Federal laws there is no clear-cut bifurcation of duty. And as a legacy to the centralised form of government of the past there is provision for All-India Services 'Common to the Union and the States.'

Under the Constitution it is obligatory on the part of a State to exercise its executive power in such a way as to ensure due compliance with all Union laws and existing laws that may apply in the State. Enforcement of Central laws by the governments of the units, however, is not a feature peculiar to the Indian Constitution alone. In Switzerland, in many matters, the federal authority

1. Art 256 of the Constitution.
legislates and the execution of the laws is left with the Cantons. Federal administration in Switzerland is still of limited size and consequently the obligation to execute federal laws frequently devolves upon the Cantons. For example, execution of military laws, enforcement of civil and criminal procedure, the carrying out of laws regarding weights and measures are the businesses of the Cantons under federal supervision. In earlier times, in the Imperial Federation of Germany, the executive functions of the Federal Government were limited for the most part to the laying down of general regulations and a supervision of their execution by several states. Now in the Federal Republic of West Germany also, the States, unless the constitution otherwise requires, 'execute the federal laws as their own concern' under federal supervision.

The succeeding Article of the Constitution lays down the duty of the States to exercise their executive powers in such a way as not to impede or prejudice the executive power of the Union. In both cases the Central Government is empowered to issue such directions to the State Government as are necessary to secure the purposes.

In addition to this the Central Government can issue directions to the state as to the construction and maintenance of means of communication declared in the direction to be of national or military importance, though communication is a State subject (Entry 13, List II). This will not affect the power of Parliament to declare highways or waterways (Entries 23-24, List 1) or the power of the

3. Articles 20, 40, 64, 64A of the Swiss Constitution.
5. Art. 83 of the Constitution of West Germany.
6. Art. 84(3) Ibid.
Union to construct and maintain means of communication as part of its functions with respect to naval, military or airforce works. The Union Government is also entitled to issue directions to a State for the protection of railways within the State. The extra costs incurred by a State in carrying out the directions regarding the construction and maintenance of any means of communication or for the protection of railways are to be paid by the Union Government.

In such a federal country as the U.S.A., the idea of the federal government giving directions to the States is 'foreign and repugnant'\(^7\) to the Constitution. In including such a provision in the Constitution our Constitution-makers have followed the Government of India Act, 1935. But for making the power of giving directions an effective weapon of 'control of the Union over States,' the Constitution goes even beyond the Act of 1935 which sought to secure sanction through Governor's special responsibilities. Under the Constitution a direct sanction has been attached for non-compliance with the directions issued by the Centre. In case of failure to give effect to directions issued by the Union, the President will be competent to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution. Such a situation entitles the President to supersede the State Government and exercise his powers under Art. 356.

There is also provision for the delegation of functions to a State Government. With the consent of the State Government concerned, the President can delegate

functions to a State Government in relation to any matter to which the executive power of the Union extends. However, as such functions can be conferred only with the consent of the State Government concerned, it is not derogatory to the federal principle. But apart from this power of the Union Executive to delegate its functions to the State executive, the Constitution authorises Parliament to confer powers and impose duties on State authorities by law, notwithstanding that it relates to a matter with respect to which the legislature of a State has no power to make laws. The financial burden involved in the process is to be borne by the Government of India. The Constitution Seventh Amendment Act also gives identical powers to the States to entrust functions to the Union Government with its consent in relation to a matter to which the executive power of a State extends.

The rest of the provisions of this chapter of the Constitution seek to ensure co-ordination and cohesion between the Centre and the States following the Government of India Act, 1935 excepting Art. 261 which is a new insertion regarding inter-state comity. Under the said provision full faith and credit must be given throughout India to Public acts, records, judicial proceedings of the Union and of every State. The manner in which, and the conditions under which these acts, records, etc., are to be proved and the effect thereof, is to be laid down by Parliament by law. Moreover, final civil judgement or order of any Court in India are executable anywhere in India.

8. Art. 258(1) of the Constitution.
9. Art. 258(2) of the Constitution.
10. Art. 258(3) of the Constitution.
11. Art. 258(A) of the Constitution.
The insertion of this provision in the Constitution was considered necessary because India is now a Union of States and its members are distinct Political entities. As it has been held in Vazed v. Gopalbai, "In a federation for all national purposes embraced by the federal constitution, the State is of course one united under the same authority and governed by the same laws. But in other respects the States are necessarily foreign to and independent of each other and a foreign judgement for purposes of private international law need not necessarily be of a State owing different allegiance." But it is not desirable or useful to remain in isolation from each other. So following Art. IV Sec. 1 of the Constitution of the U.S.A. and Sec. 118 of the Australian Constitution the framers of the Constitution adopted this provision.

There are many inter-State rivers in India and disputes relating to those rivers may very well arise. But though only the Supreme Court of India possesses jurisdiction regarding inter-State disputes, as regards disputes relating to waters of inter-State rivers or river-valleys, a special provision has been attached to the Constitution. Parliament may, by law, provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in any inter-State river or river-valley. Parliament has also been empowered to take away completely by law the jurisdiction of the Supreme Court in such cases, if it so likes.

Under Art. 262 Parliament has passed two laws:

According to Inter-State Water Disputes Act, any State Government may make a complaint to the Central Government as to 'water-dispute.' The water-dispute means dispute with respect to the use, distribution or control of waters of any inter-State river or river-valley, or any dispute relating to the interpretation of the terms of any agreement or levy of any water-rate prohibited by S.7 of the Inter-State Water Disputes Act. Any State may make such a complaint and request the Central Government to refer the dispute for adjudication. On such request the Central Government may constitute a tribunal, the decision of which is to be final and binding on the parties.

The River Boards Act makes a different approach to solving the problems of such rivers and river valleys. It makes provision for the establishment of Boards for the development of inter-State rivers and river-valleys. Conflicts arising out of any programme offered by the board or out of question of the sharing of financial liability are to be referred by any of the affected parties to a tribunal and the decision of the tribunal is to be binding upon all the parties.

Art. 263, which is a virtual reproduction of S. 135, Government of India Act, 1935, contains another provision to iron out differences, to remove tensions and to secure harmony between the Union Government and the States and between the States themselves whenever occasion arises. The President is empowered by the above-mentioned Article to appoint an Inter-State Council, if he thinks it necessary to do so in public interest. The Council will be charged

15. S. 3 of Inter-State Water Disputes Act. 1956.
with the duty of a) inquiring into and advising upon disputes which may have arisen between States; b) investigating and discussing subjects in which some or all of the States have a common-interest; and c) making recommendations on any subject for better co-ordination of policy and action.

This provision is included mainly for ensuring co-ordination and obviating litigation, although it does not exclude the jurisdiction of the Supreme Court in such cases.

We would mention in this connection another provision made in the States Reorganisation Act, 1956 which on the face of it seems to be a feature of a Unifying nature. This is for the formation of Zones and Zonal Councils. The Act provides for five Zones, (i.e., the Northern Zone, the Central Zone, the Eastern Zone, the Western Zone, the Southern Zone) and a Zonal Council, for each of the five zones.

The Zonal Council consists of a Union Minister to be nominated by the President, the Chief Minister and two other Ministers of each of the States included in the Zone. When a Union territory is a part of the Zone, not more than two members are to be nominated by the President. Besides these, there are advisers to the Zonal Councils who have the right to take part in the discussions of the Council or of any Committee thereof but who cannot vote at a meeting of the Council or of any such committee. Among the advisers one person is to be nominated by the Planning Commission. The Chief Secretaries to the States concerned and the development commissioner or any other officer nominated by

the Government of each of the States are also advisers to the Zonal Council. The Union minister is the Chairman of the Council and the Chief Ministers of the States become its Vice-Chairman by rotation.

Each Zonal Council is an advisory body and may discuss any matter in which the Union and one or more States or some or all of the States represented in the Council have a common interest and in particular, without prejudice to the generality of the provisions, matters connected with economic and social planning, border disputes, linguistic minorities, inter-State transport and any matter connected with the reorganisation of the States. These Councils advise the Central Government and the Governments of the States concerned as to the course of action to be taken in any such matter.

All these decisions are to be taken by a majority of votes of members present and voting and meetings are to be held in the States included in the Zone by rotation.

In many federations an outstanding usage for securing uniformity and co-ordination between the central and regional governments or among regional governments themselves, is the meeting of the chief executives of both the Centre and the units in periodic conferences. Such for example are, the Governors’ Conference in the U.S.A., the Premiers’ Conference in Australia and Dominion-Provincial Conference in Canada and these have achieved co-operation in different spheres in varying degrees. In India Zonal Councils have been made a permanent feature; but the fears as to the impact of Zonal Council on local or State autonomy are groundless, as

it is obvious that their functions are purely advisory aiming at securing better co-ordination within the different zones. On the other hand these have been regarded as 'merely dignified debating societies' with no effective constitutional or legislative powers. This viewpoint is also echoed in the Presidential address of the 66th session of the Indian National Congress. The Congress President has observed in the said address that as a solution for the separatist tendencies of the Country, it is necessary to activise the Zonal Councils and clothe them with necessary statutory powers to decide matters after discussion and implement them. As these Councils are at present merely advisory bodies they are not very effective. Although this view seems to be reasonable, it cannot be denied that the acceptance of this proposal will have an adverse effect on the autonomy of the States.

Even in normal times, from these provisions, there results a unique co-ordination between the federal government and State Governments. But during an emergency the powers of the Centre take unusual dimensions which we shall have an occasion to see later on.

The cumulative effect of all these provisions of the Constitution referred to above is a unique integration of Federal and State administrative machineries even in normal times, not to speak of the emergency times. Dr. Ambedkar mentioned in the Constituent Assembly that the Constitution, while securing the advantages of a federal system, had sought to provide means for procuring uniformity in all basic

matters which were regarded as essential in securing the unity of the Country. These means were a single judiciary, a common All-India Civil Service and uniform civil and criminal laws. Thus there is enough scope for securing uniformity and co-ordination and an effective administrative nexus has also been established between the Union and the States. Moreover, co-operation and co-ordination can be easily achieved in matters of common interest and the procedure for settling inevitable inter-State disputes is also simple. But the administrative system may also indicate some defects of its merits which have been pointed out by an expert in the matter. It has been observed: "The nation is crucially dependent on the States for actual achievement of the chief programmatic objectives of the Nation. The arrangement works now because operating through a historically derived administrative system of real competence in earlier terms, extraordinary leadership and an extraordinary dominance of an effectively one-Party system, that one-Party notably disciplined and led, it is possible to secure considerable consistency and cohesion. What about the future under more ordinary leadership, division of the control of States among different parties and a growing sentiment for autonomous status?" The problem may become all the more serious because, for the maintenance of internal peace and security also, as it has been shown by an eminent personality, the Centre is dependent on State machineries. No serious difficulty has, indeed, yet been felt and that for the obvious reason that the Centre and State Governments, with minor exceptions, have been under the same Political Party. "When, as is likely

sometimes, there is a difference in political approach between a major State Government and the Centre, the issue may assume serious proportions ....... 25 In such cases, it seems, the Centre will have to resort to the emergency powers under Art. 356 (which is to be discussed in detail subsequently). But it is true that frequent application of such an abnormal provision is not at all desirable.

In conclusion, however, it must be admitted that in spite of this possible danger, if the system is worked with the proper spirit of co-operation, unique results may easily be achieved.

IV. Financial Relations between the Union and the States.

The Government of India Act, 1935 tried to avoid the pitfalls of other federal financial systems. It had sharply demarcated the tax jurisdictions of different layers of government so that conflicting tax jurisdictions might not arise. The scheme of division of the sources of revenue and powers of taxation embodied in the Constitution of India is substantially the same as in the Act of 1935, 1 though there have been made some changes. The scheme for the allocation of resources, the system of sharing the taxes, the provision for general and specific grants, the methods of borrowing - all these items are almost similar to the corresponding ones of the Act of 1935.

25. K.M. Panikkar - 'India's Administrative Problem.' (Article in the Spirit of Our Times - P. 169).

First of all, as it was in the Act of 1935, a clear division of resources between the Union and the States has been made. The simple dichotomy of direct and indirect taxes between the units and the Centre, adopted in some other federations has not been followed here and both types of taxes have been allotted to each authority. In general, taxes having an inter-State base are within the jurisdiction of the Union, while those taxes that have a local base are within the jurisdiction of the States. But though the Central tax jurisdiction is wide the Centre does not enjoy all the revenues accruing from it. Thus there are four categories of taxes under the Union jurisdiction, the net proceeds of which are to be, or may be allocated wholly or partially to the States.

In the first place, under Art. 268 of the Constitution stamp duties and duties of excise on medicinal and toilet preparations mentioned in the Union List are to be imposed by the Union, but are to be collected and appropriated by the States within their territories. In the case of Union territories, it will be collected by the Government of India.

Secondly, there are a number of taxes, which though levied and collected by the Union, are wholly assigned to the States. These are:

1) duties in respect of succession to property other than agricultural land;

II) estate duties on property other than agricultural land;

III) terminal taxes on goods and passengers carried by railway, sea, or air;

IV) taxes on railway fares and freights;

V) taxes other than stamp duties on transactions in stock exchanges and futures markets;

VI) taxes on the sale or purchase of newspapers and on advertisements published therein; and a new item, inserted by the Constitution Sixth Amendment Act on the basis of the recommendations of the Taxation Enquiry Commission, 1953-54, namely:

VII) taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.

This new insertion was necessary because, though sales tax is a State source of revenue, under Art. 286(1) of the Constitution a State cannot impose a tax on sale or purchase of goods where such sale or purchase takes place outside the State or in the course of the import of goods into or export of goods out of the territory of India. The matter came up for consideration before the Supreme Court in a number of cases. In Bengal Immunity Coy. V. State of Bihar the Supreme Court, departing from its previous decision (delivered in the State of Bombay V. United Motors) held: "until Parliament by law provides otherwise, the State of Bihar do forbear and abstain from imposing Sales Tax on out of State dealers in respect of Sales or purchases that have taken place in the course of inter-State trade or commerce even though the goods have been delivered as a direct result of such sales or purchases for consumption in Bihar." The Taxation Enquiry Commission,


1953-54 also recommended that legislation should be made by the Union in respect of sales tax on Inter-State transactions. 7 By the Constitution 6th Amendment Act a new clause, i.e., clause (3), has been added to Art. 269 which empowers Parliament to formulate by law principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce.

In the next place are mentioned taxes on income, other than agricultural income, which are levied and collected by the Union but are shared between the Union and the States. 8 Corporation taxes are, however, not included in 'taxes on income.'

The Union Government may levy surcharges on the items referred to in Articles 269 and 270 for its exclusive use and thus a provision for the increasing financial needs of the Centre has been made.

It may be mentioned in this connection that Art. 276 authorises the States to levy taxes on professions, trades or callings and employments for their own benefit or for the benefit of a municipality, district board, or other local authority within the limits of Rs. 250 per annum as the maximum amount on any one person. Such a tax will not be invalid on the ground that it relates to a tax on income, but clause (3) of the said article lays down that this power on the part of the States shall not be construed as limiting in any way the powers of Parliament to impose taxes on income arising out of professions, trades, callings, and employments.

Lastly, the Government of India is empowered to levy and collect excise duties other than those on medicinal and

These taxes may be shared between the Union and the States in such manner as Parliament may by law provide.

In no federal system the financial relation between the Centre and the units can be settled once for all and some machinery for adjustment is a necessity of federal finance. As Prof. Wheare has very aptly explained: "It is not easy to distribute functions, and when once they are distributed, it is even harder to allot resources with any confidence that future experience will show that resources and functions expand and contract together, each adjusting itself harmoniously to the other." The working of public finance in federal governments has made it clear that allocation of resources between the general and regional governments in the Constitution generally does not correspond to functions. The Indian Constitution, for co-ordinating the fiscal relation between the Union and the states, provides for the creation of a Finance Commission. The Royal Commission on Dominion-Provincial Relations in 1939 recommended the establishment of such a Finance Commission for the consideration of the problem of grants in Canada. But barring Australia in no other federal system any permanent machinery for adjustment has been created.

Australian Loan Council, which regulate the borrowing of the Commonwealth and State governments and the Commonwealth Grants Commission, an independent expert body to consider the application of the states for grants from the Commonwealth, may be cited as bodies which have been able to adjust the financial relation between the Commonwealth and the states.

11. Ibid., P. 123.
Under the Constitution a Finance Commission is to consist of a Chairman and four other members to be appointed by the President. The requisite qualifications for membership of the Commission have been specified by Parliament. The Constitution lays down the duty of the Commission to make recommendations\(^1\) to the President as to

a) the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be divided between the States and the allocation between the States of the respective shares of such proceeds;

b) the principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India; and

c) any other matter referred to the Finance Commission by the President in the interests of sound finance.

The report of the Finance Commission is to be laid before both houses of Parliament.\(^2\)

How the question may be raised how far are these recommendations binding upon the President? If the ministry wants to override the Commission what would be done by the President?\(^3\) As a matter of strict law the recommendations cannot be binding on the President and although as far as possible the views of the Commission

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\(^1\) Art. 280 of the Constitution
\(^2\) Art. 281, ibid.
\(^3\) C. R. Alexandrovičz - Constitutional Developments in India - P. 199
should be respected, in cases of conflict the President, it is evident, would act on the advice of the ministry. Ordinarily, however, as a renowned jurist explains it, "no ministry should advise the President to depart from the recommendations of the Finance Commission, a quasi-arbitral body whose function is to do justice as between the Centre and the States. Of course, if there are patent errors such as arithmetical mistakes, the position would be different. Even then, the best course would be for the President to return the recommendations to the Commission, if possible for reconsideration and re-submission after rectifying proved errors." Since the inauguration of the Constitution, it may be mentioned, three Finance Commissions have submitted their reports. The recommendations of the first two Commissions were accepted in toto. In the case of the Third Finance Commission, the Government of India, while accepting all its unanimous decisions, has turned down one of the two recommendations to which there is a minute of dissent.

As regards taxes on income other than agricultural land, as mentioned earlier, the Constitution makes it mandatory to divide the net proceeds between the Union and the States. It is also mandatory that the Finance Commission should make recommendations regarding the percentage of the net proceeds of the income tax which should be assigned to the States and also regarding the manner in which the sphere so assigned shall be distributed among the States.

Income tax is a very important source of revenue in modern times. In the federal systems of Canada, Australia

17. B. N. Rau - India's Constitution in the Making, pp. 384 – 5
and the U.S.A., it was originally a state source of revenue. The Central Government in all the three federations had to take this lucrative source of revenue either through Constitutional Amendment as in the U.S.A., or through agreements as in Canada and Australia. In both Canada and Australia the uniform taxation on income was an outcome of the Second World War.\(^\text{18}\) While the central control over income has come to stay in Australia, in Canada the Royal Commission of enquiry on constitutional problems, known as the Tremlalay Commission is understood to have suggested to transfer back from the federation to the Provinces the right to levy taxes in the fields which are now rented.\(^\text{19}\)

After the passing of the Government of India Act, 1935, Sir Otto Niemeyer, we have seen, awarded 50% of the income tax to the Provinces and the distribution of the proceeds among them was based partly on residence and partly on population. Under the Constitution in the interim period pending the appointment of a Finance Commission, the readjustment in the distribution of income tax between the Centre and the States was decided according to what is known as 'Deshmukh Award'. Under this Award only the question of re-allocation of the percentages of income tax released as a result of partition was determined.\(^\text{20}\) The share of the income tax to be allocated to the States was distributed on the basis of population with minor adjustments in favour of the weaker States.\(^\text{21}\)

\(^{19}\) Report of the Finance Commission, 1957, p.18
\(^{21}\) Ibid., pp. 24 - 5.
The States' share of the income tax is increasing gradually. When the First Finance Commission was appointed, practically all the States claimed an increase in the percentage of the income tax to be assigned to them and placed before the Commission a variety of suggestions in regard to the principles of distribution of the income tax proceeds as between the Union and the States. The Commission, after considering the claims, recommended an increase in the States' share of the net proceeds of income tax (excluding the proceeds attributable to Union territories or to taxes on Union emoluments) from 50 to 55%. As regards its distribution between the various States two principles—principles of population and collection were taken into consideration. The Commission recommended that twenty percent of the States' share of income tax proceeds should be distributed among the States on the basis of relative collections of tax and eighty percent on the basis of their relative population according to the census of 1951.

The Second Finance Commission, being faced with almost the same types of claims put in by the States, as mentioned above, recommended an increase in the percentage of the States' share of the divisible pool from 55 to 60. The Commission did, however, observe that as the basis of distribution the principle of collection should be completely eliminated in favour of that of population.

23. Ibid., p. 76
25. Ibid., p. 40
As this would create a sudden break in the continuity, the Commission proposed that 10% share of income tax proceeds should be distributed on the basis of collection and 90% on the basis of population.

The Third Finance Commission has recommended a further increase in the share of the States of the divisible amount of income tax proceeds from 60% to 66.25%.26 This has been specially necessary in view of the shrinkage of the divisible pool caused by the exclusion from it of income tax paid by the Companies.27 The Commission has, however, restored the method of distribution adopted by the First Finance Commission viz. distribution of twenty percent of the States' share on the basis of collection and eighty percent on the basis of population. This has been done partly because the industrial States with larger collections have special problems of their own and partly because with the exclusion of income tax paid by the Companies, a higher percentage of income tax than before is derived from incomes of local origin.28

Another important source of revenue is the Union excise duties. Though the Government of India Act, 1935 had contained a provision for transfer of a portion of Central excise duties to the units, the provision was not availed of.29 The Finance Commission, 1952, for the first time, selected three articles, viz., tobacco, matches and vegetable products, as the duties on these things were most suitable for transfer. The Commission

27. Ibid., p. 18
28. Ibid.
recommended the transfer of 40% of the net proceeds of these duties to the States. Since then, the schedule of shared excise duties has been continuously expanding. The Second Finance Commission, being faced with the demand of a number of States that all excise duties should be shared, recommended that in addition to the excise duties on the three articles recommended by the First Finance Commission, duties on sugar, tea, coffee, paper and vegetable non-essential oils should also be shared between the Union and the States. But they reduced the share to be allocated to the States to 25%, as the reduction in the share allocated to the States by the First Finance Commission was to be more than compensated for by the widening of the range of divisible duties. The Third Finance Commission has expanded the list of shared excise duties to thirty-five commodities. But there has been made a further reduction in States' share from 25% to 20%. Even then the States' share of revenues will be increased.

As regards additional duties of excise which practically replace sales tax, both inter-State and intra-State, on the commodities on which these are imposed, the Second Finance Commission recommended that one percent of the net proceeds should be retained for the Union territories and one and one quarter percent were to be paid to the State of Jammu and Kashmir. The remainder should be distributed in such a way as to give the States their income from the Sales tax and appropriate percentages of extra earnings. The Third Finance Commission

Commission also has accepted these principles with a minor increase (from 1 ½ to 1 ¾) in respect of Jammu and Kashmir’s share.

The Second Finance Commission recommended also the principles of distribution of Estate duty and taxes on Railway fares and freights, levied under Art. 269. For the Union territories, out of the net proceeds one percent should be retained in the case of Estate duty while one quarter percent should be deducted in the case of taxes on Railway fares. The balance of Estate duty is to be given to the States. It should first of all be divided between immovable property and other property. As regards immovable property, location of property should be the basis of distribution of the divisible amount, while as regards other properties the basis of apportionment should be the percentage of population. In the case of taxes on Railway fares, the principle of distribution among the States should be such as to secure for each State, as nearly as possible, the share of the net proceeds on account of the actual passenger travel on railways within its limits.

The Third Finance Commission recommended the continuance of the principles enunciated by the Second Finance Commission for apportioning Estate duty among the States. Allocation of the ad hoc grant in lieu of the taxes on Railway fares (which have been repealed) has been made in such a way as to place the States broadly on the same footing as before.32

Let us now turn to the problem of grants-in-aid which is one of the chief methods of financial adjustment in a federal government. The two main problems of federal finance are: a) proper correlation of functions and resources at the various levels of government and b) lessening of inequalities among the different units. Grants-in-aid have come to be used as a solution to these problems; and in the U.S.A., Canada and Australia federal payments give a disproportionate aid to the poorer states. Both general or unconditional and specific or conditional grants have been used in different federations with comparative success. In the U.S.A. virtually the only method of rendering assistance by the centre to the states is that provided by conditional grants. In Canada and Australia unconditional grants exist side by side with conditional. Conditional grants are useful means for introducing elasticity in the distribution of powers although under such grants the federal government can easily increase its control over the units. The Royal Commission on Dominion-Provincial Relations condemned conditional grants for permanent purposes as it worked under Canadian conditions as 'an inherently unsatisfactory device' and recommended the use of it in some special cases and for some limited purposes only.

In India besides the scheme of assistance to the States through shared taxes, provision has been made for both types of grants, with a preponderance of the unconditional, based on the lines indicated by the Government of India Act, 1935.

33. A. H. Birch, op. cit., p. 289
35. Ibid.
36. R. N. Bhargava, op. cit., p. 92
Under Art. 275 of the Constitution, the Union may make allotment of such sums as Parliament may by law determine as grants-in-aid of the revenue of such States which Parliament deem to be in need of financial assistance. Different sums may be allotted to different States, as 'grants to financially weak states cannot but be discriminatory in nature'. Besides the general power of making grants, grants for two specific purposes are mentioned in the proviso to the said Article. Grants-in-aid for meeting the cost of schemes of development by a State with the approval of the Government of India for the purpose of promoting the welfare of the scheduled tribes or for raising the level of administration of scheduled areas in that State are to be paid out of the Consolidated Fund of India. Lastly, compulsory grants are to be made by the Union to Assam to cover the excess of expenditure needed in respect of the administration of tribal areas and for meeting the costs of any scheme of development or those incurred for raising the level of administration in those areas. These grants may be determined by Parliamentary enactment, but until such a law is made, the grants are to be effected by an order made by the President, based on the recommendations of the Finance Commission. And it has become customary to refer the matter to the Finance Commission.

Besides these, under Art. 282 the Union or a State may make grants for any public purpose, notwithstanding that it does not fall within its own field of legislative competence. In this case no Parliamentary legislation is required. Grants, it may be mentioned, are made to the States under this article in order to meet the requirements of the Five Year Plans.

It may be mentioned that there was also a provision for making grants-in-aid in lieu of jute export duty to the jute-growing States. Under Art. 273 of the Constitution the President, after considering the recommendations of the Finance Commission, would prescribe fixed sums and these fixed sums were to be paid to the States of Assam, Orissa and West Bengal, until any export duty on jute ceased to be levied, or until the expiration of ten years from the commencement of the Constitution, whichever was earlier. The Second Finance Commission held that this grant should disappear with the prescribed time limit and this disappearance should not entitle the States to any compensation. The Commission, however, assured that due provision had been made for meeting the dislocation that would be created in the finances of such States with this disappearance.39

The First Finance Commission held that 'both the methods of conditional and unconditional grants should have their part to play in the scheme of assistance by the Centre.40

The Commission formulated several principles for giving Grants-in-aid.41 Besides the principle of budgetary need, which should be the starting point for determining the eligibility of a State for a grant-in-aid as well as for the assessment of the amount of grants-in-aid, tax-effort, economy in expenditure, standard of social services, special obligations - all these things should be taken into account. Independently of the budgetary criterion grants, the Commission had held, might be made to further broad purposes of national importance. With these principles kept

41. Ibid., pages 96 - 8.
in view the Commission put forward its recommendations.

The Second Finance Commission had to work in somewhat changed economic conditions. Subsequent developments such as the reorganisation of States, financial integration of Jammu and Kashmir, requirements of the Second Five Year Plan influenced the decision of the Second Finance Commission. Though there was no basic change in the approach of the said Commission, such principles as tax efforts, inequalities in standards of basic social services were not given much emphasis. It recommended that firstly the eligibility of a State to grants-in-aid should depend upon its fiscal need in a comprehensive sense. In a Union where the Centre and the States co-operate for planned development, grants-in-aid should subserve this end. Secondly, the gap between the ordinary revenue of a State and its normal expenditure should, as far as possible, be met by the sharing of taxes. Grants-in-aid should be largely a residuary form of assistance, given in the form of general and unconditional grants. Thirdly, grants may be made for broad purposes subject to the condition that the whole amount should be spent in furtherance of the broad purposes indicated.

According to a majority of the members of the Third Finance Commission it is not sufficient merely to cover the budgetary needs of the States through grants-in-aid. It is also very necessary that their fiscal needs of the Five-Year Plans should also be taken into consideration. In view of this it has been recommended that the total amount of grants-in-aid should be such as would not only
cover the budgetary gaps of the States but also 75% of the revenue component of their Plans. This would secure, it has been held, the observance of the priorities of the Plan and would enable the States to place their Plans on a sound financial basis, thus discouraging the demoralisation which dependence essentially breeds. The portion of the grant needed to cover the 75% of the revenue component of the Plan has been shown separately. The Government, however, while accepting the proposal for covering the revenue gaps has rejected the proposal to confer grants for meeting the revenue component of the plan.

Although the Commission has not recommended any special purpose grant, it has been proposed to convert the 20% share of the States of the excise duty on Motor Spirits into a grant, to be apportioned among 10 States in accordance with their needs for the improvement of communications.

Articles 285 and 289 provide for mutual exemption from taxation of Union and State properties. Under Art. 285 Union properties are exempt from State taxation save in so far as Parliament may by law otherwise provide, while Art. 289 imposes similar restrictions upon the power of the Union. Such restrictions upon the different layers of government are incidental to a federal form of government which requires a considerable amount of adjustment between the Centre and the Units.

There are other limitations upon the power of

45. Ibid.
taxation to be exercised by the States. A State should not, save as Parliament may by law otherwise provide, levy a tax on the consumption or sale of electricity consumed by the Government of India or consumed in the construction, maintenance or operation of any railway by the Government of India.\(^4\) Secondly, subject to the order of the President to the contrary, water or electricity generated or consumed, distributed or stored or sold by any authority established for regulating or developing any inter-State river or river valley is exempted from State taxation law, existing at the commencement of the Constitution.\(^5\) Future legislation regarding this matter is also subject to President's assent.

In order to prevent any serious dislocation in the finances of the States, Art. 277 provides that, unless Parliament legislates to the contrary, any taxes, duties, cesses or fees which at the time of the commencement of the Constitution were being lawfully levied by any State or municipality or local body for their own purpose will continue to be so levied and enjoyed by them notwithstanding their inclusion in the Union List.

Now the provisions regarding borrowing is to be considered, as in meeting the needs of a welfare state, borrowing is an important instrument in the hands of a government. Borrowing is a sign of fiscal autonomy and so in most of the federal governments it is used both by the centre and the units. But in order to avoid competition in the money market some amount of co-ordination in the borrowing policies of different units is necessary.\(^6\) Moreover, in the case of foreign loans, co-ordination by the federal Government is necessary, as it would affect the

\(^{47}\) Art. 287 of the Constitution.  
\(^{78}\) Art. 288 of the Constitution.  
\(^{49}\) R. N. Bhargava. op. cit., P.139.
international trade of the country. 50

Though there may be some variations, the provisions regarding borrowing are largely based upon similar provisions of the Government of India Act, 1935. The Union Government is entitled to borrow upon the security of the Consolidated Fund of India and to give guarantees to loans within the limits prescribed from time to time by Parliamentary legislation, 51 while a State Government is entitled to borrow within the territory of India upon the security of the Consolidated Fund of the State and to give guarantees to loans within the limits prescribed by the Legislature of the State. 52

The States then, under the Constitution, cannot borrow outside India, while under the Act of 1935 the Provinces could raise such loans even though with the consent of the Central Government.

Under Art. 293 (2) of the Constitution the Union Executive can give guarantees to loans borrowed by a State Government or may make loans to a State Government. But this power of giving guarantees or making loans to a State is subject to limits laid down by Parliament. And if any part of a loan that has been made by the Union to a State remains outstanding, a State must obtain the consent of the Union before raising any fresh loan. 53 Such consent may be subject to such limitations as the Government of India may have thought fit to impose. 54

Thus we see that large extent of controlling powers as regards borrowing has been vested in the hands of the Union Government. Regarding loans from foreign countries the Union Government has exclusive jurisdiction, which is a desirable restriction on the power of the States. 55 In the

52. Art. 293 (1) of the Constitution
53. Art. 293 (3) of the Constitution.
54. Art. 293 (4) of the Constitution.
internal market also, the Union can control the borrowings of the States as all the States are indebted to the Union and must secure its consent before raising any loan. The Union can thus get an over-all picture of the position of the public debt of the States and fix the order of priority and timing of the loans. But in that case it would be better if the task of allocation of loans is entrusted to some organisation for effective functioning. The matter may be decided by the Finance Commission. It may be mentioned in this connection that the question of modification, if any, in the rates of interest and terms of repayment of the loans made to various States between the 15th of August, 1947 to 31st March, 1956, was referred to the Second Finance Commission. It recommended the consolidation of all loans at rationalised rates of interest and terms of repayment and in this connection recorded its objections to giving loans interest-free or at concessional rates as that would mean granting indirect subsidies.

The Constitution makes statutory provisions for the distribution of property, contract, liabilities, obligations and suits between the Union and the States, on the lines adopted in the Government of India Act, 1935. All property and assets and all rights, liabilities and obligations of the Dominion of India and the Provinces before the commencement of the Constitution are to be the respective properties, assets, rights, liabilities, etc., of the Government of India and the Government of the corresponding States. As regards property, assets, liabilities, etc., of the Indian States which were termed Part B States after the commencement of the Constitution, the principle of the Constitution was that

58. Ibid., P. 54.
where the assets, liabilities, etc., related to the purposes of the Union they were to pass to the Government of the Union and in other cases they were to pass on to the corresponding Part B State.  

Besides these provisions which govern the Union-State financial relationship normally, the Union may assume extraordinary powers of financial control over the States during periods of both political and financial emergency. The discussion on this topic is to be held in the next section.

In other federal countries such elaborate provisions for regulating financial relations are rare. Though the States possess minimum of financial autonomy necessary in a federal set-up, the system is highly integrated. Even in the case of some taxes which are meant for use by the States exclusively their share is determined by the Centre. The object of the Constitution-makers were to prevent a double levy on the citizens from two different sources. It has been observed; "It is characteristic of the relatively unified constitution of the Indian Federation that Central Finances are in contact with State finances in a variety of directions." A common system of audit and accounts also helps integration of inter-governmental finances. The comparatively elastic and lucrative sources of revenue belong to the Centre while the large number of social services which have been described as both expansive and expensive have been entrusted to the States. As Shri Ramaswami Mudaliar in the Constituent Assembly explained it:  

60. Art. 295 of the Constitution.  
activity which makes for the happiness of the individual man lies with the Province or the unit of administration and not with the Central administration..... It is because of the weight of that responsibility that the administrators of units feel that in the separation of powers and particularly in the sphere of taxation they have not got enough resources to satisfy those responsibilities. Thus the allocation of resources has not corresponded to the allocation of functions.

Moreover, there is a difference in the fiscal strength of the States which compels the States to seek Federal aid or to allow their services to stagnate or decline. Here is the federal dilemma.

The financial position of the States vis-à-vis the Centre is relatively weak. There is no doubt about it. But there is wide scope for adjustment under the Constitution. "The basic idea of the scheme is that the States would require Central assistance, mainly in the form of subventions and grants, to balance their revenue budgets," as Taxation Enquiry Commission has rightly remarked, "Central and State revenues really coalesce for purposes of the public finance of State Governments and the old antagonism between Central revenues and State revenues has, therefore, disappeared." The system of division of powers is based upon the principles of suitability and efficiency and has shown possibly more practical rationalism than is to be found in any other federal system. As regards the machinery for adjustment the role of the Finance Commission is perhaps

68. Ibid., P. 267
unique, though it is true that the Commission has no opportunity of dealing comprehensively with the entire financial relations of the country and the emergence of the Planning Commission has somewhat reduced its original importance.

The First Finance Commission accepted that there was an imperative necessity of augmenting the revenues available to the States. But at the same time it emphasized that the prosperity of the States must rest on the solid foundation of a reasonably strong and financially stable Centre. The additional transfer of revenues from the Centre to the Units must be such as not to impose any undue strain on the Centre, taking into account its responsibility in such vital matters as the defence of the Country and the stability of the economy. The Commission held that the principles of the distribution of revenues and the determination of grants-in-aid must be uniformly applied to all the States and the scheme of distribution should attempt to lessen the inequalities among the States. So the First Finance Commission proceeded cautiously and although it used both the methods of devolution of revenue and grants-in-aid it placed substantial reliance upon transfer of revenues.

The scope of task of the Second Finance Commission was somewhat wider because the problem of the sharing of newly imposed taxes came within its purview and also because it had to consider the requirements of the Second Five Year Plan. As regards planning, the scope of consideration on the part of a Finance Commission is, however, narrow. There is, as rightly pointed out by the Second Finance Commission, also the necessity of co-ordination between the Planning Commission.

and the Finance Commission as there is, in some cases, the possibility of overlapping. However, although in the approach of the Second Finance Commission to the problem of devolution of resources upon the States, there is no basic difference from that of the First Finance Commission, the former has shown a considerable imagination and sympathy for the States and, within its narrow scope, has endeavoured to make possible amends for the inconveniences encountered by them.

The Third Finance Commission also, on the whole shows much anxiety to grant as much of financial autonomy to the States as is possible. Specially, the widening of the range of excise duties to be shared between the Centre and the States has imparted a degree of elasticity to the revenues of the States. This Commission has properly emphasised also the necessity of co-ordinating the work of the Planning Commission and of the Finance Commission. The Commission has suggested two alternatives in this regard. According to it either the functions of the Finance Commission should be so enlarged as to embrace the total financial assistance necessary to meet both budgetary and planning requirements; or the Planning Commission should be transformed into a Finance Commission at an appropriate time. The acceptance of one of these two alternatives alone, the Commission thinks, would remove the anomalous position.

However, the majority recommendation to give fixed and statutory grants-in-aid to meet the fiscal needs of the Plan really admits of divergence of opinion. Moreover, even while accepting the need for meting favourable treatment to weaker States one cannot deny that a heavier weightage has been given to backwardness than is probably warranted.

The system of periodic consideration of the problems, however, makes adjustment in accordance with the needs of the time easy. The whole system of federal finance has been invested with a remarkable degree of flexibility and this seems to be its chief merit.


In the three preceding sections we have described the scheme of distribution of powers between the Union and the States as it obtains in normal times. Now we shall deal with what has been referred to as the "Emergency Provisions of the Constitution." Probably no other part of the Constitution evoked such trenchant criticisms, both before and after its adoption in the Constitution, as Part XVIII which contains the provisions for dealing with different types of emergency situations. A considerable portion of the time at the disposal of the Constituent Assembly was spent on the discussion of these provisions, because the whole system of distribution of powers changes when the emergency provisions operate.

These provisions were included in the Constitution because federalism implies a division of authority and division always leads to some amount of weakness. It is the experience of other federations of the world that an emergency requires strong and speedy action; so there must be some provisions in the constitution for coping with emergencies and this is to be found in each and every constitutional system. For instance, as we shall see presently, in the cases of the U.S.A., Australia and Switzerland, where the autonomy of the states is scrupulously maintained, the Centre has been vested with the duty of protecting the constitutions of the states and in performing the duty, it may exercise extraordinary powers if the situation so demands. But nowhere, nor even in Canada, the constitution contains such elaborate provisions for dealing with emergencies as are to be found in the Constitution of India. In other federal countries, as pointed out earlier, in times of emergency, it is mainly
the judiciary which comes to the rescue, by giving liberal interpretation to such powers as relate to 'peace, order and good government,' 'defence,' 'war,' etc. But in our country the constitution does not place the Centre at the mercy of the courts. This was pointed out by Shri T.T. Krishnamachari in the Constituent Assembly on the 2nd of August, 1949. He cited the case of the U.S.A., where by giving extremely wide interpretation to the powers of the President as Commander-in-chief, the Presidents had been enabled to cope with the emergencies on various occasions. So he argued: "Why should we, with all that experience before us, omit to put in explicit terms such safeguard in the Constitution that will protect the Constitution in times of grave danger?" He observed further: "Surely, the framers of any Constitution at the present day would be failing in their duty if they do not take note, in times like this, of the difficulties that abound around every country. Not merely are there threats of wars and undeclared wars and internecine disturbances, but there are also other calamities which are likely to arise partly because of economic conditions that exist within the countries and economic maladjustments which demand immediate settlement and partly because there are forces in the World that wish to make the economic mal-distribution the basis for subversive political action and in the result making these worse than what they actually are."

The result was that, following s. 102 of the Government of India Act, 1935, the Constitution-makers armed the Centre with full equipment to face different types of emergency.

First of all, under Art. 352, if the President is satisfied that a grave emergency exists whereby the security of India is threatened, whether by war or external aggression

or internal disturbance, he may, by proclamation, make a declaration to that effect. The original words in the Draft Constitution were 'war or domestic violence.' But it was thought later that it was better to use the words, 'war or external aggression or internal disturbance,' because now-a-days there might be external aggression which was not actually war or less than war. Such a Proclamation of emergency may be issued even before the actual occurrence of war or of any aggression or disturbance if the President is satisfied that there is an imminent danger thereof. This provision goes even beyond the Government of India Act, 1935, because, under it, there was no explicit provision for declaring a Proclamation of Emergency in anticipation of emergency. In the Constituent Assembly objection was raised against this provision. According to Prof. K. T. Shah this insertion was a 'serious' one, as a mere apprehension of a possible danger in the minds of the executive could be made a good ground for a Proclamation of this kind to be issued.

It may be recalled, however, that in the Adapted Government of India Act, 1935 (the Act according to which the Government of India was carried on during the interim period - the period from the commencement of Independence until the introduction of the new Constitution) such a provision for issuing a Proclamation of Emergency even before the actual outbreak of war or internal disturbance was included.

A Proclamation of Emergency may be revoked by a subsequent Proclamation. It is to be placed before each house of Parliament and will cease to operate at the expiration of

3. Art. 275(1) of the Draft Constitution of India prepared by the Drafting Committee, Constituent Assembly of India.
5. Art. 352(3).
two months, unless approved before the expiration of that period by resolutions of both Houses of Parliament. If the House of the People has been dissolved during this period of two months and in the meanwhile the Council of States has approved the Proclamation, the Proclamation will cease to operate within thirty days of the newly elected House of the People, unless a resolution approving it has been passed in the meantime. So the ordinary duration of a Proclamation is two months unless revoked earlier by the President. The Draft Constitution fixed the life of the Proclamation to six months following S. 102 of the Act of 1935. But it was considered afterwards that six months would be too long a time and so the period was reduced to two months. Its tenure may be extended by Parliament alone. But here there is one ambiguity. How long a Proclamation will remain in operation if it is approved by Parliament is not clear. Can Parliament fix the duration of a Proclamation? Or if the two Houses of Parliament cannot agree to fix identical time-limit, what will be the remedy? The questions remain to be answered.

The effects of a Proclamation of Emergency are of two types. First of all it changes the Union-State relationship in every sphere, thus reducing the States to mere administrative units and secondly by suspending Fundamental Rights it may seriously encroach upon individual liberty.

Let us see its effects on the autonomy of the States. We have seen earlier that under Art. 250 a Proclamation of Emergency vests in the Union Parliament concurrent powers of legislation in the State List. Parliament may then make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List. These laws will remain valid up to a period of six months after the expiration of the period of emergency. If any

provision of a State law is repugnant to such a law made by Parliament, the law made by the Legislature of a State is, to the extent of repugnancy, be void.

Secondly, during such periods the executive power of the Union is to extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised. We have seen previously that even in normal times the Centre possesses the power of giving directions to the States under Articles 256 and 257 for the purpose of ensuring proper harmony between the Union Executive and the State Executive. But during an emergency the State Executive comes under the complete control of the Union Executive, although it is allowed to function. Again Parliament may, by law, confer powers and impose duties upon the Union or its officers during such periods with respect to a matter not included in the Union List.

Thirdly, the Union during such periods may assure extraordinary powers of control over finance also. When a Proclamation of Emergency is in currency, the President may, by order, direct that all or any of the provisions relating to the distribution of revenues between the Union and the States may be modified to such an extent as he thinks fit, for a period not extending in any case beyond the expiration of the financial year in which such Proclamation ceases to operate. In the Constituent Assembly the insertion of the provision evoked serious criticisms. Shri Shibbanlal Saksena described this Article as a 'vital' one and asserted that as under it budgets framed by the States might be upset by an order of the

9. Art. 353(A)
10. Art. 353(B)
President it was not proper to include it in the Constitution. But Shri A.K. Ayyar answered that during such periods 'everybody must be ready to support the security of the country, to see that the State which is the basis for individual liberty does not fall to the ground.' He also showed that normally it was not expected that the President would abrogate the entire financial scheme, but would only make such modifications as he would think fit, and so, he argued, there was nothing drastic in the provisions. Ultimately this view was accepted and the provision was inserted in the Constitution.

Having discussed the effects of a Proclamation of Emergency on the autonomy of the States we may now consider its effects on Fundamental Rights guaranteed by the Constitution to the citizens. Under Art. 358, while a Proclamation of Emergency is in operation, the State (which in this case mean all legislative and executive authorities including even local bodies) may make any law or take any executive action infringing the rights conferred on the citizens under Art. 19 of the Constitution. Any law so made will cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law ceases to have effect. The succeeding Article enables the President to pass an order by means of which he suspends the right to move any Court for the enforcement of such Fundamental Rights as are mentioned in the order during the operation of Emergency or for such shorter period as may be specified in the order itself.

13. Ibid.
Thus Art. 358 will have an automatic application in the case of emergency while Art. 359 will come into picture if the President thinks it necessary and the combined actions of these two provisions will lead to a temporary abrogation of Fundamental Rights. It is true that the necessity of abridgement of Fundamental Rights arises almost in all countries in an emergency. But Art. 252 of the Indian Constitution may operate not only in times of such a grave national crisis as war or rebellion but in cases of internal disturbance also and even before their actual occurrence, if the President is satisfied that such danger is imminent. In the case of the U.S.A. only the privilege of the writ of Habeas Corpus may be suspended when in the circumstance of invasion or rebellion the suspension is needed in the interest of public safety.¹⁵ Thus the encroachment upon Fundamental Rights during an emergency is more far-reaching in India than in other countries.

Now we may turn to the second category of emergency which vests in the Union Executive a more formidable power of intervention in the affairs of the States. Art. 355 lays down the duty of the Union to protect the States against internal disturbance and external aggression and ensure that the government of every State is carried on in accordance with the provisions of the Constitution. This Article did not occur in the Draft Constitution and was incorporated later in the Constitution. It was introduced as an excuse for entrusting to the Federal Government, under Art. 356, the tremendous power of interference in regional matters in difficult times. Dr. Ambedkar also provided this explanation in the Constituent Assembly for including

¹⁵ Art. 1. S. 9(2) of the Constitution of the U.S.A.
this provision in the Constitution. He argued that we have a Federal Constitution. That being so, if the Centre is to interfere in the administration of provincial affairs, as we propose to authorise the Centre, it must be by and under some obligation which the Constitution imposes upon the Centre. The invasion must not be an invasion which is wanton, arbitrary and unauthorised by law. 16

Under Article 356 of the Constitution, which has been borrowed mainly from S. 93 of the Government of India Act 1935, if the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the government of a State cannot be carried on in accordance with the provisions of the Constitution, he may issue a Proclamation. By this Proclamation he may assume any or all the functions of the State Government himself, excepting the legislative powers, (which will then be exercisable under the authority of Parliament) and may make any necessary and incidental provision for giving effect to the objects of the Proclamation, including provisions for suspending wholly or in part the operation of any provision of this Constitution relating to any body or authority in the State, excepting the High Courts. Any Proclamation issued on the breakdown of Constitutional machinery must be laid before both Houses of Parliament and must obtain their approval. The procedure is almost the same as is to be followed in the case of a Proclamation of Emergency. It may be revoked by a subsequent Proclamation and without the approval of Parliament may remain in operation for two months. Though a Proclamation of Emergency may have an endless duration so to say, if approved by Parliament, a Proclamation under Art. 356 may operate up to a maximum period of three years only.

It is true that in other federal constitutions also explicit provisions regarding the duty of the federal government to protect the States against invasion and domestic violence are not rare. Art. IV, § (IV) of the Constitution of the U.S. lays down the duty of the federal government to guarantee to every State in the Union a republican form of government and to give protection against invasion and on application of legislature or of the executive against domestic violence. In the case of Australia §119 of the Australian Constitution also enjoins similar duties upon the Central Government. In Switzerland according to Art. 5 of the Swiss constitution the Confederation guarantees to the cantons, the territory, sovereignty, (so far as their sovereignty is not limited by the federal constitution) their constitutions, the liberty and rights of their people, etc. According to Art. 16 of the Swiss constitution, in case of internal troubles or in case of danger from another canton, the canton so affected must immediately notify the Federal Council in order that the latter may take necessary measures. But in none of these constitutions such a provision for complete supersession of the state government by the federal government is to be found as is provided under Art. 356 of the Indian Constitution. Moreover, in all these countries the centre can intervene in the case of domestic violence only on the request of the state government concerned. But in the case of India, it is not imperative that the Centre should intervene only on the receipt of a report from the State Executive. That is fully secured by the word 'otherwise' in Art. 356. Dr. Ambedkar in the Constituent Assembly regarded this as a necessary consequence of the duty of the Union to protect the States. 17

To understand properly the magnitude of powers vested in the Union by this Article, we must bear in mind that the expression the 'Government cannot be carried on in accordance with the provisions of the Constitution' has a very wide scope. It means the failure of the State Government to work according to the Constitution, which has no necessary connection with external aggression and internal violence, but any political breakdown, 'gross misgovernment,' etc., and as has been seen before read along with Art. 365 even any failure on the part of the State Government to comply with the directives issued by the Central Government. The explanation provided by Dr. Ambedkar in the Constituent Assembly shows that the Centre cannot intervene in the affairs of the State for the sake of good government nor can it do so in cases of such misgovernment as to endanger Public peace, unless the Government is not carried on in accordance with the provisions of the Constitution. But evidently, this statement does not provide a positive explanation of the expression 'in accordance with the provisions of the Constitution.' In fact, actions under Art. 356 are likely to be more frequent in cases of political breakdown than in cases of external aggression and internal violence. Because in these two cases action may be taken under Art. 352 and 353 first and, then if necessary, i.e., in case of any failure on the part of the State Government to carry out any direction of the Union Government, a Proclamation may be issued by the Union Government by the combined effects of Articles 365 and 356.

It is now necessary to recapitulate those provisions of the Constitution under which the Centre can give directions to a State. Because under Art. 365 the failure of the State

Government to carry out these directions will be a valid ground of bringing Art. 356 into operation. The Union Government can give directions to the States in order to ensure due compliance with Union laws; and to secure this the powers of the State Executive are to be so exercised as not to impede or prejudice the exercise of the executive powers of the Union. It can also give directions for the construction and maintenance of means of communication of national or military importance and for the protection of railways (Arts. 256-257). Besides these in normal times, when a Proclamation of Emergency under Art. 352 is in operation and under financial emergency, the Union may give directions to the States.

Thus Art. 356 vests in the federal Government enormous coercive powers to exercise against recalcitrant States both in normal and abnormal times. So it raised a storm of protest in the Constituent Assembly. Pandit H.N. Kunzru observed that though it would be the duty of the Provinces to carry out the Central instructions, it was going too far to say that the failure on part of the Provincial Executive to carry out in every respect the instructions of the Central Government would be a fit ground for the declaration that the Government cannot be carried on in accordance with the provisions of the Constitution. Dr. Ambedkar on the other hand showed the necessity of this Article with these words: "...once there is power given to the Union Government to issue directions to the States that in certain matters they must act in a certain way, it seems to

20. Ibid., P.516.
me that not to give the Centre the power to take action when there is failure to carry out those directions is Practically negativing the directions which the Constitution proposes to give to the Centre.\textsuperscript{21} He pointed to the difficulty, which the Central Government had to face, during the days of the Second World War when 'the Punjab Government would not carry out the food policy of the Government of India,' and thus the mere power of giving directions turned out to be infructuous.\textsuperscript{22} This argument finally gained ground and Art. 365 became a part of the Constitution,

One thing may be noticed also. Though it is true, as we have mentioned previously, the idea of the Central Government giving directions to the States is foreign to such federal countries as the U.S.A., there are some over­riding powers in the hands of the federal government there to ensure due compliance with federal laws. Art. I Sec. (VIII) of the Constitution of the U.S.A. gives the centre the power of calling forth the militia, if necessary, to execute the laws of the Union. As Sir Fredrick Whyte said, "If a State were to attempt to resist the legitimate actions of federal officers in the course of their duty the President must sustain his agents, if necessary by force of arms."\textsuperscript{23} Art. 37 of the Federal Republic of West Germany also provides, "If a State fails to fulfil its obligations towards the Federation under the Basic Law or any other Federal law, the Federal Government may, with the approval of the Bundesrat, take the necessary measures to force the State by way of federal compulsion to fulfil its duties." However, it must be admitted that in comparison with India these powers are far less striking as nowhere the federal government is authorized

\textsuperscript{22} Ibid., P. 509.
\textsuperscript{23} Sir Fredrick Whyte - India A Federation, P. 54.
to suspend the state constitution in ensuring compliance with its laws.

So Art. 356 vests extensive powers of control over the States, to be comparable, as has been said repeatedly, to S. 93 of the Government of India Act, 1935. But there are some differences between these two provisions which are also to be noted. First of all, under S. 93 the executive and legislative powers of the Province could be assumed by the Governor in his discretion and required no legislative sanction. Secondly, though during this period the Governor had to work under the supervision and control of the Governor-General and no Proclamation could be issued without the concurrence of the Governor-General in his discretion, it was the Provincial Executive head who could assume all the powers and not the Central Executive head. Thus, as has been truly remarked, the 'object of the Act of 1935 was simply to withdraw power from popular control and not federal coercion.'

Originally, the scheme furnished by Art. 188 of the Draft Constitution, however, was that the Governor, by issuing a Proclamation might assume to himself all powers (excepting the powers of the High Court) to be exercised in his discretion for two weeks. The Proclamation was to be communicated by the Governor to the President who was to be empowered either to revoke such Proclamation or take up powers himself by issuing a Proclamation under Art. 276 of the Draft Constitution. But in the Constituent Assembly it was shown later that no useful purpose would be served by bringing the Governor in the first instance; for ultimately, it would be matter of the President's responsibility. And so it was thought better to let the President come into the

field from the very beginning. So Art. 188 was not incorporated in the Constitution and under the Constitution only the President has been vested with the power to issue such a Proclamation and make necessary arrangements for implementing it.

Now there remains to be considered the last category of emergency provisions with effects no less striking on the autonomy of the States than the other two discussed above. Under Art. 360, a financial emergency may be proclaimed by the President, if he is satisfied that the financial stability or credit of India or any part of it is threatened. When such financial emergency is in force, the Union Government may issue directions to any State to observe such canons of financial propriety as may be specified in the directions considered necessary for the purpose. Such directions may include provisions for a) the reduction of salaries of all or any class of public servants, or, b) reservation of all money bills passed by the State Legislature for the consideration of the President and c) reduction of salaries of any class of persons serving the Union including the judges of the Supreme Court and the High Courts.

The rules regarding the duration and revocation of a Proclamation of financial emergency are the same as are to be observed in the case of Proclamation of Emergency issued under Art. 352.

The members of the Drafting Committee did not include the provisions under Art. 360 in the Draft Constitution. This Article was introduced at a very later stage in view of the economic situation of the country which suddenly took a serious turn at the time. This is evident from the speech

made by Dr. Ambedkar while introducing the Article in the Constituent Assembly. He expressed his belief that it was redundant to provide a justification for the Article, having regard to the economic and financial situation prevailing at the time. He pointed to the difficulty which the American President had to face in tiding over the economic depression in the U.S.A. The National Recovery Act, he added, which was designed to enable the President to face the depression in the U.S.A., was declared ultra vires by the Supreme Court there. So in order to prevent any such difficulty in the case of India it was thought much better to make an express provision in the Constitution itself. 26

But many other members of the Constituent Assembly could not see eye to eye with Dr. Ambedkar about the necessity of the Article. According to Pandit B. R. Ambedkar, by regarding the Article as self-explanatory Dr. Ambedkar only got rid of the responsibility to provide an explanation. 27 Moreover, these powers are to be exercised whenever the financial stability or credit of India is threatened. Deterioration of financial stability is an elastic term. It may not mean in all cases an economic disaster as serious as depression for combating which the National Recovery Act was passed in the U.S.A. This was explained clearly by Shri Kamath in the Constituent Assembly when he said, "I agree, I admit freely, that this course must be adopted if there is imminent danger of a financial breakdown - that is certainly a much worse situation than economic instability. Economic stability may mean nothing to anybody or all things to all men." 28

Thus, by giving effective powers of control in all financial matters of the States including the power of controlling the budget to the President, this Article seriously curtails the autonomy of the States. The parallel to this provision is to be found only in the Constitution of the U.S.S.R., with the important distinction that there the Union controls the budget of the States in normal times also. In addition to this it may lead to another harmful effect pointed out by Dr. Kunzru in the Constituent Assembly. This provision may breed irresponsibility in the States, because they know that the Centre is there, ready to step in, if anything injurious to the States or to India as a whole is done. Another difficulty, pointed out by a learned writer is also worth considering. Such a declaration might create a 'panic' and lower our credit both outside and inside India.

Thus, the makers of the Constitution sought to provide India with a Constitution strong enough to meet almost all possible emergencies. These provisions, as we have said in the beginning, evoked strongest criticisms. These criticisms were made mainly from three standpoints: I) that they vest excessive powers in the hands of the Union Executive; II) that they destroy individual liberty by suspending the Fundamental Rights; and III) that by vesting extraordinary powers in the hands of the Union, they change the federal character of the Union and turn it into a virtually unitary State.

As regards the first line of criticism, it is true, that it is the Union Executive which has been made the repository of all powers regarding emergency, and the
judiciary cannot question the propriety of exercising such powers. Because the 'satisfaction' of the President is enough basis for proclamation of a state of emergency. Many members of the Constituent Assembly regarded this as undesirable because the power to declare an emergency in most other countries belongs to the legislature. As for example, Shri H. V. Kamath urged to make all the three organs of the Central Government strong - but not one of them at the expense of the other two. 32

But one thing must be kept in mind. It is implied under our Constitution that the President must act on the advice of the ministers responsible to Parliament. As Shri A. K. Ayyar put in the Constituent Assembly: "the President means the Central Cabinet responsible to the whole Parliament ......." 33 On the point raised by Shri Kamath that it should have been included in this provision that the President should act only on the advice of the ministers, Shri T. T. Krishnamachari very pertinently answered: "The whole scheme of this Constitution has been envisaged on the basis that the President is a constitutional head, even though we have not put it in so many words within the Constitution. ......... The President can only exercise his powers on the advice of his ministers and if we here put in a provision which explicitly says so then by implication it would mean that in reference to other provisions in this Constitution the President can act on his own, merely because of the fact we have put in here a specific provision that the President should act on the advice of his ministers. 34

33. Ibid., p.150, 3rd August, 1949.
34. Ibid., p.124, 2nd August, 1949.
That the President should act on the advice of his ministers only, has been also affirmed by the Supreme Court of India in Rai Sahib Ram Jawaya Kapur v. The State of Punjab. And Prof. B. N. Banerjee has observed that the Supreme Court has taken a correct view of the relationship between the President of India and his Council of Ministers.

Moreover, all these Proclamations of Emergency must be placed before Parliament for its approval and without its approval it cannot remain in operation except for two months. Thus, it remains uncontrolled by Parliament, if it is so argued, for a period of two months only. But that does not mean really that in a parliamentary democracy the executive will remain totally uninfluenced by the legislature.

Secondly, the criticism that the emergency provisions encroach seriously upon the liberty of the individual by suspending the Fundamental Rights of the citizens is unassailable. It is true that during such emergencies as war, these rights everywhere become curtailed or abridged. But as we have seen earlier, in India, not only in times of war but also in times of peace, emergency provisions may operate, consequently impairing the Fundamental Rights of the citizens. The only justification—if it is to be regarded as a justification at all—is that it is a temporary feature.

As regards the third line of criticism it must be admitted that these provisions constitute a negation of the federal system, even though temporarily. Those who seek to justify these provisions, as we have seen, have this argument in common that these provisions are indispensable for saving the country from disintegration that may well be caused by the

operation of many centrifugal forces and we must learn from the experience of other federal countries and seek to avoid the difficulties experienced there. "Could we avoid giving overriding powers to the Centre?" asked Dr. Ambedkar in the Constituent Assembly, "when an emergency has arisen?" 37

According to him it is the merit of the Indian Constitution that while the other federal systems including the American are placed in a tight mould of federation, it has been made possible for the Indian Constitution to become both unitary as well as federal according to the requirements of time and circumstances. These are, doubtless, weighty arguments. But apart from the question whether the emergency provisions are good or bad, or whether these were avoidable or unavoidable, we cannot escape from the conclusion that such provisions do tell upon the federal feature of the Constitution. Whatever may be the nature of emergency remaining in operation, the system of distribution of powers in all the fields between the Union and the States is seriously affected and the States become parts of a decentralised Unitary State although the provision to deal with the breakdown of Constitutional machinery in a State crowns them all. As an erudite scholar has remarked that it is true that 'devices of self-protection' are found in almost all the constitutions of the world and in India these provisions have become so conspicuous because nowhere else the provisions are to be found in such a concentrated form. 38 But it must also be admitted that nowhere in a federal system the federal government has been given such powers to exercise in peace-time emergencies and, especially the power to suspend the whole constitutional machinery of a State on such grounds as non-compliance with

Thus we are confronted with the inevitable conclusion that whatever might be the necessity for the inclusion of these emergency provisions in the Constitution, during the period of their operation the whole Constitutional set-up changes and the Union works as if it is a Unitary State and the provisions for demarcation of jurisdiction whether in the legislative sphere or in the administrative or in the financial, become inoperative.

VI. The System of Amendment under the Constitution.

A constitution everywhere is the fundamental law of the land. In addition to this, in a federation it is the supreme document regulating the spheres of activity of the two sets of government. So countries with a federal government prescribe a rigid procedure for effecting amendments in their Constitution. Specially any provision relating to the federal structure of a country must be made rigid and this rigidity ordinarily means concurrence of both federal and regional governments in any proposal for amendment of the constitution. Other provisions may be made flexible, though generally, the same procedure is adopted for changing all the provisions of the Constitution.

As in many other spheres, the framers of the Indian Constitution, drawing upon the experience of many other federations sought to avoid the difficulties faced by them in amending their constitutions. The Constitution differentiates between different kinds of Constitutional provisions for purposes of amendment. Article 368 deals with the process of amendment. According to this Article, all amendment proposals are to be presented in the form of a bill before either House of Parliament and except in certain cases specially mentioned in the said Article, it is enough if the bill, being passed by a majority of total membership of the House and by a majority of not less than two-thirds of the members present and voting, receives the assent of the President. On receiving the assent of the President, the Constitution stands amended in accordance with the terms of the bill. But if the bill seeks to amend any of the provisions mentioned below, it must be ratified by resolutions passed by not less than one half of the States, in addition to the requirements of special majority mentioned above, before it is presented to the President for his assent. These matters comprise the following:

I) The manner of election of the President (Arts. 54 & 55)

II) The extent of executive powers of the Union and the States (Arts. 73 & 162)

III) Provisions regarding the Supreme Court and the High Courts (Ch. IV of Part V, Ch. V of Part VI & Art. 241)

IV) Distribution of legislative powers between the Union and States (Ch. I of Part XII (The 7th Schedule))

V) the representation of States in Parliament and

VI) the process of amendment itself. (Art. 368)

But there are certain provisions in the Constitution to which, changes are allowed to be made by a simple majority vote in Parliament by an ordinary law-making procedure. This has been done by saying in some cases that alteration of these
provisions will not be deemed to be an amendment of the Constitution for the purposes of Art. 368; and in some other cases this has been done by giving Parliament the power to change those provisions, 'notwithstanding anything in the Constitution' and in still other cases, following the Australian model, by making the provisions expressly temporary, i.e., existing only so long as any legislation is not made by Parliament regarding the matter. For example, creation and reconstitution of states\(^1\) and creation and abolition of upper chambers of legislature in the states\(^2\) are not to be regarded as amendments of the Constitution for the purposes of Art. 368.

There are many other matters which also do not come within the purview of Art. 368 and which can be amended by the ordinary process of legislation. For instance, the constitutions of centrally administered areas\(^3\) and provisions for the administration of scheduled areas and scheduled tribes and provisions as regards the tribal areas in Assam\(^4\) may be amended in this manner.

Moreover Art. XI which gives Parliament the right to make any provision with respect to the acquisition and termination of citizenship and any matter relating to it, practically enables it to amend any of the provisions dealing with citizenship.

Several other minor matters also are alterable in the same manner by Parliament. Provisions regarding the official language of the Union,\(^5\) language to be used in the Supreme Court and in the High Courts;\(^6\) matters included in the Second Schedule, i.e., salaries and allowances of the President, the Speaker of the House of the people, the Chairman of the Council of States, Ministers and members of Parliament; determination of the

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1. Articles 3 and 4 of the Constitution.
2. Art. 169 (3), Ibid.
3. Art. 239, Ibid.
4. Fifth and Sixth Schedules to the Constitution.
5. Art. 343 of the Constitution.
6. Art. 348, Ibid.
strength of the Supreme Court and jurisdiction of the
Supreme Court in certain instances; 7 fixation of quorums for
the meetings of Parliament; 8 regulation of recruitment and
conditions of services of the secretarial staff of
Parliament; these may be cited in this connection. It may
be noted that the State Legislatures also may determine their
regional languages, 10 fix the salaries and allowances of their
ministers, regulate the recruitment and conditions of service
of their secretarial staff by ordinary legislation.

Thus it is true, as the Supreme Court in Sankarl
Prasad V. Union of India has observed, 'the Constitution
provides for three classes of amendment of its provisions'.
The provisions of the Constitution have been classified into
three groups and the process of amendment becomes difficult
in the ascending order of importance of the provisions. In
the first group belong a few and relatively unimportant
provisions which may be changed by a bare majority of
Parliament. Barring such matters as the creation or reconsti-
tution of States or the abolition or establishment of Second
Chambers in the States or the acquisition and termination of
citizenship, all other provisions included in this group are
of minor importance. The second group contains the largest
portion of the Constitution which requires a special majority
in Parliament in order to be amended. The third group includes
those provisions which are vital to the federal form of the
Constitution. It is for this group of provisions that the
principle of ratification by the States has been adopted.

Thus excepting the case of the third group of Articles,
Parliament is the sole authority in effecting amendment. In

7. Art. 124(1), Art. 133(2) and Art. 135 of the
Constitution.
8. Art. 100 (3), ibid.
10. Art. 345, ibid.
12. ibid.
the matter of initiating bills of amendment also, Parliament has got exclusive authority. No amendment can be proposed by the Governments or the Legislatures of the States. As for example, in the U.S.A., any amendment to the Constitution may be proposed in each house of Congress when two thirds of the members of both houses deem it necessary, or by a convention called by Congress for this purpose on the application of the legislatures of two thirds of the States. But in the case of India, the solitary instance where a State can propose an amendment is in the case of creation or abolition of the upper chamber of legislature in that State.

It will not also be out of place to mention here another thing. We have previously seen that the Council of States, by adopting a resolution by a two thirds majority vote, can make it possible for the Union Parliament to assume concurrent legislative authority on any subject mentioned in the State List, for a period of one year, if it seems necessary in the national interest. This also constitutes a temporary amendment of the State List, without undergoing the process of amendment. This has been bitterly criticised as 'undermining federal idea and federal structure'. Similarly two or more States may also give Parliament legislative authority to be exercised within their territory voluntarily over such matters included in the State List as they consider necessary. This also constitutes a virtual amendment of the State List though there is no necessity of undertaking the ordinary process of amendment. In the words

16. D. R. Gadgil, OP. cit., p-96
Dr. Ambedkar these methods have 'added new ways of over-
ning rigidity and legalism inherent in federalism.' From the above discussion it is evident that although
ecessary requirements of rigidity in a federal constitution
n been maintained the process of amendment is not at all
difficult. In view of this, such criticism offered against the
rocure in the Constituent Assembly as the Constitution
ould not become so hard as to acquire brittleness, because in
at case in would break was not justified. Dr. Ambedkar
ightly pointed to this fact when he said in the Constituent
sembly, "To know how simple are the Provisions of the Draft
stitution in respect of amending the Constitution one bas
ly to study the provisions for amendment contained in the
ican and Australian constitutions. Compared to them those
ained in the Draft Constitution will be found to be the
plest. The Draft Constitution has eliminated the elaborate
d difficult procedures such as a decision by a convention or
ferendum. The powers of amendment are left with the
islatures-Central and Provincial. It is only for the amend-
ts of specific matters-and they are only few- that the
ification of the State Legislatures is required. All
her Articles of the Constitution are left to be amended by
liment. The only limitation is that it shall be done by
majority of not less than two-thirds of the members of each
se present and voting and a majority of the total membership
ch house. It is difficult to conceive a simpler method
mending the Constitution." Mr. Alan Gledhill, a distinguished
list, expressed the same view. He wrote: "The Indian founding
thers were less determined than were their American predeces-
s to impose rigidity on their Constitution." He rightly
erved further: "The Indian Constitution assigns

It is surprising that such an eminent authority as Sir Ivor Jennings has expressed that the Indian Constitution is excessively rigid. According to him, the Constitution is a long and complicated document which cannot be easily amended. Sir Ivor Jennings regards that flexibility is a great merit and rigidity is a defect. He contends that in addition to the complicated process of amendment the fact that it is so detailed has aggravated its rigidity. But none of these charges can hold good against the Indian Constitution. Because, though a certain measure of flexibility may in some cases be necessary, it is not in itself an unmixed blessing. Moreover, it must be admitted that constitutional rigidity is one of the requisites of a federal constitution and there was no valid cause why the Constitution makers in India were to depart from this principle. Again, in comparison with other federal countries, the degree of rigidity in India is certainly less. As for example, in the U.S.A., it is not enough that any amendment proposal has been passed by a two-thirds majority vote in each house of Congress; it must be ratified by the legislatures of three-fourths of the states. In Australia, any law for the purpose of alteration of the Constitution, after its passage by an absolute majority in each house of Parliament, is to be submitted to the electors in each state qualified to vote for the election of members to the lower house. But in India, only as regards those matters which relate to the federal structure, ratification by the States is necessary; and that is also by half of the

23. Ibid., P. 14.
25. S. 128 of the Australian Constitution.
States only and not compulsorily by three-fourths of the States as in the case of the U.S.A. The fact that within fourteen years of its working, the Constitution has been amended sixteen times testifies to the fact that it is not 'needlessly rigid'. According to a learned writer however, "If the present domination of the Congress were to cease and a multiplicity of parties were to appear in the country and Parliament, the near unanimity that is needed for an amendment of the Constitution would be almost impossible to obtain. If different parties were to be in control at the Union Centre and in the States the amending process can hardly be made use of". 26 There is doubtless some truth in these arguments but it is to be admitted that there must be a certain amount of stability in the Constitution and the merits of flexibility should not be over emphasised.

Lastly, the charge that the detailed provisions make the Constitution rigid is also not very strong. Because the detailed provisions may in many cases save the necessity of amendment. 27

The process of amendment, it may be admitted in conclusion, is somewhat peculiar in prescribing different procedures for amending its different parts; but this has made possible to impart a certain degree of flexibility to the Constitution without violating the federal principle.

VII. The Supreme Court of India.

At the top of the judicial hierarchy stands the Supreme Court of India to act as the highest tribunal of the Country and also to act as the guardian and interpreter of the Constitution. The Constitution has set up an integrated system of judiciary for the whole of India and there is no duality of courts in our constitutional system. The same system of Courts administer the Federal as well as the State laws. Parliament, it may be noted, has been empowered to provide for the establishment of certain additional courts for the administration of laws relating to a matter enumerated in the Union List. Even if such courts are established, the judicial system will remain as integrated as before. So in the words of the Supreme Court itself, the Supreme Court 'has general powers of judicial superintendence over all courts in India and is the ultimate interpreter and guardian of the Constitution.'

It is essential that the judges of such an important Court must possess complete independence. As it has been truly observed: "The importance of an able, pure, impartial and independent judiciary in a State - particularly in a State with a federal or even a quasi-federal form of Government - can hardly be exaggerated." In the Constituent Assembly also this duty of maintaining the independence of the judiciary was emphasised and considerable care was taken regarding the matter.

The independence of the judiciary depends primarily upon the mode of appointment of the judges, the method of their

removal and the tenure of their office. Other factors such as the terms and conditions of their service, adequacy or inadequacy of their salary, allowances and pension and possibility of receiving favour after their retirement are also important.

The judges of the Supreme Court of India are to be appointed by the President of India in consultation with such of the judges of the Supreme Court and of the State High Courts as he deems necessary. If it is the case of appointment of a judge other than the Chief Justice of India, the Chief Justice should always be consulted. Thus the matter of appointment is not left in the hands of the executive alone; and this serves as a check upon making appointments on political considerations. Again the competence of the personnel of the Supreme Court is ensured as the President is to consult such persons who can give expert opinion in the matter. The Constitution has also laid down the requisite qualification of the judges, although the President has been empowered to appoint a person, who is, in the opinion of the President a 'distinguished jurist', thus leaving a scope for exercise of discretion on the part of the executive. The judges of the Supreme Court are to hold office until they attain the age of sixty-five. If any of them is to be removed before the expiry of his term, an address must be presented to the President by each house of Parliament on the ground of his proved misbehavior or incapacity. The President, on receiving such an address, may issue order for the removal of the judge.

Thus as regards choice, tenure and removal of the judges scrupulous care has been taken to secure their independence. Because, as regards the mode of appointment,

5. Art. 124(2) of the Constitution.
appointment by the executive is almost universally regarded as the less defective method. Provision for taking the advice of the members of the judiciary, as shown above, further mitigates its defects. As regards the tenure of the judges, though service during good behaviour principle has not been enforced, the age of retirement, as it has been fixed is not unreasonable. It has been observed by Prof. D. N. Banerjee that though it is essential to judicial independence that a judge should hold office during good behaviour, regard being had to climatic factors a maximum age of retirement may be fixed by law. This, indeed, is very true. The Law Commission, 1958 also pointed out that barring exceptional cases, the conditions as to the expectation of life and age up to which persons can retain unimpaired their mental capacity in our country are different from those obtaining in the U.S.A. or the U.K. So the Commission has held: 'the raising of the age limit of retirement of the Supreme Court Judges beyond sixty-five will be an experiment fraught with hazards'. The procedure of removal of the judges is not very easy and secures the independence of the judges.

In the next place, the salary of the judges is fixed by the Constitution itself in its Second Schedule. Though Parliament may from time to time determine the salaries, privileges, allowances and rights in respect of leave of absence and pensions of the judges, neither of them can be varied to the disadvantage of a judge after his appointment. (Only in a financial emergency the President may impose a temporary cut in the salary of a judge along with other government officials.) The salaries, allowances and pensions


of the judges and all the administrative expenses of the Supreme Court including the salaries etc. of its staff are charged on the Consolidated Fund of India and are not subject to the vote of Parliament.

But in spite of all these provisions the judges of the Supreme Court are not totally immune from executive favours; because their promotion and the problem of employment after retirement are not beyond executive patronage. Every puisne judge of the Supreme Court, during his tenure of office will aspire after the promotion to the post of the Chief Justice which not only brings greater honours but also higher emoluments and this depends to some extent on the favours of the executive.

Again, it is true that the Constitution lays down that a Supreme Court Judge after retirement will not be able to plead or act in any court in India. But the Constitution does not prohibit the judges from accepting other lucrative posts such as the post of the Governor of a State or of the Chairman of a special tribunal or Commission. The Constitution itself provides for the attendance of retired judges at the sittings of the Supreme Court if the President thinks it necessary, with such allowances as the President may determine. It would have been better if the suggestion offered by Prof. E.T. Shah in the Constituent Assembly were accepted. It was suggested that there should be a constitutional prohibition against employment of a judge in any executive office so that no temptation should be available to him for greater emoluments or higher prestige whether during the tenure of office or on retirement. The Law Commission, 1958 also has recommended that the retired judges of the Supreme Court should be barred from accepting further employment under Government except that provided under Art. 128

10. Art. 124(7) of the Constitution.
of the Constitution. Moreover, the Commission has observed that it is not consistent with the dignity of the judges of the Supreme Court to start chamber practice after retirement.\textsuperscript{13}

The Constitutional position of the Supreme Court is reflected in the various types of jurisdiction possessed by it. First of all, as a federal court, it has exclusive original jurisdiction in any justiciable dispute between the Union and any of the States and between the States themselves. Thus according to the terms of the Constitution the exclusive original jurisdiction of the Supreme Court\textsuperscript{14} covers cases between either of the following sets of parties:

- a) The Government of India and one or more States;
- b) The Government of India and any State or States on the one side and one or more States on the other;
- c) between two or more States

But even when the condition as to the Parties is satisfied the Supreme Court will not exercise jurisdiction unless the dispute involves a question of law or fact on which the existence or extent of a legal right depends. The term legal right, as defined by the Federal Court of India, means a right recognized by law and capable of being enforced by the power of the State and not necessarily in a court of law.\textsuperscript{15} So as it was in the case of its predecessor - the Federal Court of India - the original jurisdiction of the Supreme Court does not cover cases between the residents of different States or between a State and a resident of another State. Nor does the Supreme Court possess any jurisdiction to try cases involving Ambassadors, Consuls, or Public Ministers as it is possessed by the Supreme Court in the U.S.A. Only under Art.32 any citizen can move the

\begin{itemize}
  \item \textsuperscript{13} Report of the Law Commission, 1958, Paras – 28-29.
  \item \textsuperscript{14} Art. 131 of the Constitution.
  \item \textsuperscript{15} U.P. v. Governor-General in Council, A.I.R. 1939, F.C. 58 (66).
\end{itemize}
Supreme Court by appropriate proceedings for the enforcement of Fundamental rights. The right of the Supreme Court to exercise original jurisdiction in such cases, however, is not exclusive but concurrent as the High Courts of the States can also exercise similar jurisdiction. The Supreme Court, for the enforcement of Fundamental Rights, can issue directions or writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari.

The original jurisdiction of the Supreme Court, however, is expressly restricted by the Constitution in certain cases. Proviso to Art. 131 lays down that such jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement or Sanad or other similar instrument which having been entered into or executed before the commencement of the Constitution continues in operation after such commencement or which provides that the said jurisdiction shall not extend to such a dispute. Besides this, under Art. 262, adjudication of disputes relating to waters of inter-State rivers or river-alleys may be excluded from the scope of original jurisdiction of the Supreme Court by Parliamentary legislation. As mentioned in a previous chapter, under the Inter-State Water disputes Act passed by Parliament in 1956, on the request of any State the Central Government is to provide for the adjudication of an Inter-state Water Dispute by constituting an ad hoc tribunal for the purpose. The Supreme Court is barred from exercising jurisdiction in respect of any Water-Dispute which may be referred to such a tribunal.

Now we may consider the appellate jurisdiction of the Supreme Court which is of an extremely wide nature. The Federal court of India under the Government of India Act, 1935 did possess only constitutional appellate jurisdiction. But the

16. Art 32(2) of the Constitution.
17. Inter State Water Disputes Act, 1956, Sec. II.
Supreme Court is supreme in every sense of the term and, as the head of an integrated judicial system, is not only the final authority in constitutional matters but also in all types of proceedings - civil and criminal - even when these may not involve any question relating to the interpretation of the Constitution.

The scope of the right to appeal in Constitutional matters has been laid down in Art. 132 of the Constitution. Under the said Article an appeal lies to the Supreme Court from any judgement, decree or final order of a High Court in the territory of India, whether in a civil or criminal or other proceeding if the case in question involves a substantial question of law as to the interpretation of the Constitution and if the High Court certifies to that effect. Thus, as has been properly held by Patanjali Sastri C. J. of the Supreme Court: "The whole scheme of appellate jurisdiction of the Supreme Court clearly indicates that questions relating to the interpretation of the Constitution are placed in a special category irrespective of the nature of the proceedings in which they may arise, and a right of appeal of the widest amplitude is allowed in cases involving such questions."18

The provision under 132 reminds one of the corresponding provision of the Government of India Act, 1935 excepting one important improvement effected upon it. Clause (2) of Article 132 invests the Supreme Court with the power of granting special leave of appeal on the aforesaid ground where the High Court has refused to grant such a certificate. But the Federal Court of India under the Act of 1935 did not possess the power of granting a special leave itself. It is worth noting that though this Article specially deals with the right to appeal in cases involving Constitutional questions, once the right of appeal is admitted the appellant may raise other grounds of appeal also.

As we have mentioned previously, the Supreme Court is the final appellate authority not only in Constitutional matters, but also in matters, civil and criminal. Art. 133 deals with the appellate jurisdiction of the Supreme Court in respect of civil cases. Under this Article an appeal lies to the Supreme Court from any decree, judgement or final order in a civil proceeding of a High Court in the territory of India, if the High Court certifies that the amount or value of the subject matter of dispute is not less than 20000 Rupees or that such order or judgement or decree involves the claim of the parties respecting property of the like amount or value. But if the judgement or decree affirms the decision of the Court immediately below, the High Court must further certify that the appeal involves some substantial question of law. The High Court may also certify the leave of appeal if it holds the view that the case is a fit one for appeal to the Supreme Court. Thus this clause vests discretionary powers in the High Court to grant leave of appeal. But as it has been observed in Narasingh v. U.P., the discretion is a judicial one and must be judicially exercised along the well established lines which govern these matters and the mere grant of certificate would not preclude the Supreme Court from determining whether it has been rightly granted and whether conditions prerequisite to the grant are satisfied. So, "If it is properly exercised on well established and proper lines, then, as in all questions where the exercise of discretion is involved, there would be no interference except on very strong grounds... But if, on the face of the order, it is apparent that the court has misdirected itself and considered that its discretion was fettered when it was not, or that it had none, then the Supreme Court must either remit the case or

Besides the grounds on which appeal lies to the Supreme Court, any party appealing under Art. 133 may also urge as one of the grounds in such appeal, notwithstanding anything in Art. 132, that some substantial question of law concerning the interpretation of the Constitution has been wrongly decided. It is to be noted, however, that no right of appeal lies against the decision of a single judge of a High Court under this Article.

In the next place, the Supreme Court may also act as the highest court of criminal appeal in certain types of cases. Its predecessor, the Federal Court, did not possess this power. In the Draft Constitution presented before the Constituent Assembly there was no provision for vesting in the Supreme Court the right of hearing appeal in criminal cases. There had been a considerable amount of discussion in the Constituent Assembly regarding the matter, which was admirably summed up by Pandit Lakshmikanta Maitra. He observed: "It has been held by one section that this right need not be conferred by the Constitution itself, but that Parliament should be left in future to legislate and confer such powers as it may think necessary in criminal matters. But Members like us are firmly of the view that, whereas provision was being made in the Constitution itself for appeals in civil matters, there was absolutely no justification for not embodying the same right of appeal in criminal matters. We feel that we should not give the country the impression that we allow to property more sanctity than to human life." Consequently, the provision for hearing criminal appeals was embodied in the Constitution.

The appellate jurisdiction of the Supreme Court in criminal matters may be invoked in three different types of cases. In the first place an appeal lies to the Supreme Court from any judgement, final order or sentence in a criminal proceeding of a High Court, if the High Court, on appeal has reversed an order of acquittal by a lower court and has sentenced the accused to death. Secondly, an appeal also lies to the Supreme Court, if the Supreme Court has withdrawn for trial before itself, any case from any Court subordinate to its authority and has convicted the accused person and sentenced him to death. In these two cases appeal lies as of right, but in other cases an appeal lies only if the High Court certifies that the case is a fit one for appeal to the Supreme Court, subject to the rules, as may be made by the Supreme Court, under Cl. (1) of Art. 145 and to such conditions as the High Courts may impose. Here also, (as it is the case in civil matters) the discretion of the High Court must be exercised on 'well-established and proper lines' and does not preclude the Supreme Court from determining whether the certificate has been rightly granted or not.

Besides these, Art. 136 of the Constitution grants an extraordinary appellate jurisdiction to the Supreme Court. Under it, the Supreme Court may, in its discretion grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any Court or Tribunal in the territory of India, subject to the limitation that no appeal shall lie from any judgement, determination or sentence, etc., passed by any Court constituted by or under any law relating to Armed Forces.

22. Art. 134 of the Constitution
It is to be noted, as it has been pointed out in Bengal Chemical Works V. Their Employees, this Article does not confer a right of appeal to any party from the decision of a court or tribunal, but it confers a discretionary power on the Supreme Court to grant special leave to appeal in any type of cases.24 This, however, "being an exceptional and overriding power naturally it has to be exercised sparingly and with caution and only in special and extraordinary situations."25 So, the Supreme Court has held that it is necessary for the Supreme Court to exercise this jurisdiction "only in cases where awards are made in violation of the principles of natural justice, causing substantial and grave injustice to parties or the case raises an important principle of industrial law requiring elucidation and final decision by this Court or discloses such other exceptional or special circumstances which merit the consideration of this court."26

The Supreme Court, therefore, accepts that this power should be used only occasionally. The Law Commission, 1958 has recommended a more restricted use of this power,27 because in criminal cases the practice has a tendency to affect the prestige of the High Courts and in labour matters the file of the Supreme Court is being clogged with such appeals'. However, on the whole, this provision may help to prevent injustice.

We have seen earlier, that the Federal Court of India was vested with advisory or consultative functions. Almost the same provision has been made under this Constitution also.

Recommendation Nos. 13 and 14.
The Constitution, under Art. 143(1) empowers the President to consult the Supreme Court if it appears to him at any time that a question of law or fact has arisen which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon the subject. If the President refers such a question to the Supreme Court for its consideration, the Court may, after such hearing as it thinks fit, report to the President its opinion on the matter. Clause (2) of Art. 143 further enables the President to refer to the Supreme Court for its opinion a dispute arising out of any treaty or agreement or covenant, etc., entered into before the commencement of the Constitution, notwithstanding that such disputes are excluded from the original jurisdiction of the Supreme Court. The Supreme Court then, after such hearing as it thinks fit, shall report its opinion on the matter to the President. It is worthy of note, in view of the difference in the language used in clause (1) and clause (2), that while under clause (2) it is obligatory on the Supreme Court to entertain a reference and to report to the President its opinion thereon, under clause (1) the Supreme Court has a discretion in the matter and may in a proper case and for good reasons decline to express any opinion on the question submitted to it.28

The only usefulness of the exercise of such advisory function is to enable the Government to secure an expert opinion regarding the validity of any legislative measure to be introduced in the legislature. But jurists in many countries have registered their opinion against the function of giving advisory opinion. There is no such provision in the Constitutions of the U.S.A. or Australia and the Supreme Court in the U.S.A. and the High Court in Australia have declined to give advisory opinion either to the executive or to the legislature. In the case of Canada, where the Supreme

Court is bound to give such decisions, the danger of giving such advisory opinion had been emphasised more than once. The Lord Chancellor of Britain in A.G. of Canada V. A.G. of Ontario observed: "the advisability of propounding for the consideration of the Court abstract question or questions involving considerations of debatable fact is, to say the least, doubtful ...." Lord Haldane also expressed the difficulty of using such a power. He said: "Not only may the question of future litigants be prejudiced by the Court by laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertaining of exact facts to which it is to be applied."

In India, the Federal Court, established under the Government of India Act, 1935, did not decline to use this advisory power. Gwyer C.J. of the Federal Court though showing the disadvantages which might follow from the exercise of this power said: "The terms of that section do not impose an obligation on the Court, though we should always be unwilling to decline to accept a reference, except for good reason ...." Moreover, any advisory opinion given by the Federal Court was capable of being reconsidered at any time, in any case coming before it and a contrary decision might be given. As clause (1) of Art. 143 is a reproduction of S.213 of the Government of India Act, 1935 these considerations apply to Art. 143 also. Moreover, it is superfluous to add that these decisions are not binding upon the Courts in India.

31. In the matter of allocation of Lands and Buildings situate in a Chief Commissioners' Province A.I.R. 1943, P.C. 13 (14)
But nonetheless, such opinions carry great weight and, as Prof. D.N. Banerjee has very clearly put it, on principle the highest court in a country should not have or exercise any power of giving any advisory opinion on any question either to the Executive or to the Legislature.

We have considered the various types of jurisdiction and functions possessed by the Supreme Court. It should be pointed out that Parliament may by law confer further jurisdictions and powers upon the Supreme Court with respect to any of the matters in the Union List. Moreover, the power of the Supreme Court to issue writs in the nature of habeas corpus and mandamus, etc., for the enforcement of Fundamental Rights, may be enlarged by Parliament by making legislation to the effect of empowering the Supreme Court to issue such writs for purposes other than the enforcement of Fundamental Rights.

Lastly, the Supreme Court possesses the power of reviewing any judgement pronounced by it.

Taking into account all these things, one should not certainly hesitate to agree with Shri Alladi Krishnaswami Ayyar when he says that the Supreme Court possesses 'wider powers than probably the highest court in any Federal state, wider certainly than those of the Supreme Court of the United States of America, the Supreme Court of Canada and the High Court of Australia and wider than the powers of the Federal Tribunal in Switzerland'. In fact, none of these federal courts possess all the various sorts of jurisdiction possessed by the Supreme Court of India. One thing may, however, be noted. We have seen that regarding all constitutional questions the

34. Art. 136 of the Constitution.
Supreme Court is the final authority. Even then as regards the power of judicial review, i.e., the power of the courts 'to pass upon the constitutionality of legislative acts which fall within their normal jurisdiction to enforce and the power to refuse to enforce such as they find to be unconstitutional and hence void', there is a certain amount of difference between the Supreme Court of the U.S.A. and the Supreme Court of India. The necessity of judicial review in India is evident, as all the organs of government derive their powers from the Constitution and the legislatures also must act within the limits set by the Constitution. In this regard it has been pointed out, the position of the judiciary in India is somewhere in between the courts in England and the United States. In England Parliament is regarded as sovereign and any law passed by Parliament is to be enforced by the court. But in the U.S.A. the powers of any legislature, whether it is a state legislature or Congress, have been defined by the Constitution and any law, which is not in conformity with the provisions of the Constitution, may be declared by the Supreme Court as unconstitutional and consequently void. Moreover, the Supreme Court of the United States, under the leadership of Chief Justice Marshall, assumed the power to declare any law unconstitutional on the ground of its not being in "due process of law", an expression to be found in the Fifth Amendment (1791) of the United States Constitution and the Fourteenth Amendment (1868) which related to that State Constitutions.

38. Encyclopaedia of Social Sciences, Vol. VIII; Article on Judicial Review by E.S. Corwin; P.457.
In India, the powers of the Supreme Court to review any legislation is deducible from several provisions of the Constitution. In the first place, as stated above, the Constitution determines the legislative competence of all legislatures in our Country. Secondly, Art. 13 lays down that any law, passed before or after the commencement of the Constitution, in contravention of any of the provisions of the Part on Fundamental Rights is to be void to the extent of such contravention. Thirdly, by virtue of Art. 141, the law declared by the Supreme Court shall be binding on all courts in India. So, the Supreme Court is to examine whether a law is within the legislative competence of a particular legislature or not or whether it is in conflict with the Fundamental Rights guaranteed by the Constitution. And if a law is declared as transgressing any of these two limits by the Supreme Court it will not be enforceable in any court in India. But apart from that the Supreme Court cannot consider the 'reasonableness' of any law according to its sense of natural justice because of the absence of such a phrase in the Constitution as 'due process of law.' As the Supreme Court itself has observed: "outside the limitations imposed on the legislative powers, our Parliament and the State Legislatures are supreme in their respective legislative fields and the Court has no authority to question the wisdom or policy of the law duly made by the appropriate Legislature." Only in such cases where the Constitution itself expressly makes provision for exercising such power, as for instance, in the case of Art. 19 where none of the rights guaranteed are absolute but the State can impose 'reasonable' restrictions on such rights on various grounds, the Supreme Court can determine the reasonableness of such restrictions. As the Supreme Court has

observed: "The determination by the Legislature of what constitutes a reasonable restriction is not final or conclusive; it is subject to the supervision by this Court." But here again, in many cases, the grounds of imposing such reasonable restrictions are mentioned in the Constitution and so, in such cases, the function of the Supreme Court is to consider whether the restrictions are really within such limits or not.

So, although taken together, the extent of jurisdiction (covering the different types) possessed by the Supreme Court is certainly wider than that of any other federal court of the world, as regards the jurisdiction to review the acts of the legislatures the power of the Supreme Court in India is somewhat limited in comparison with that of the Supreme Court in the U. S. A. However, the system of judicial review in the U.S.A. has been subjected to many serious criticisms; it has been regarded as standing in the way of progressive legislations. So whether it would have been better, if the Supreme Court in India could judge whether a law is based on natural justice or not, is difficult to state. Still then, it is to be admitted, in the evolution of the constitutional system of the Country the Supreme Court has got an important role to play.

VIII. Tendency towards greater centralisation than under the Act of 1935; Reasons behind it.

Consideration of the provisions of the Constitution relating to its federal structure shows that, under it, centralism is far more accentuated than under the Act of 1935. We may now try to seek its reasons.

To begin with, the Government of India Act, 1935 which is a very elaborately and ably composed piece of constitutional legislation was before the framers of our Constitution. Obviously, this Act influenced them and many provisions have been taken from it almost verbatim. The objections raised against the strong centre under the Act of 1935 melted away with the altered perspective of the country and the experiences of working of the Act of 1935, even within its limited sphere, showed the necessity and inevitability of a strong centre.

The federal portion of the Act of 1935 did, we have seen, never come into being. But the Provincial part was inaugurated in 1937. The relationship between the Centre and the Provinces, therefore, got changed from that time and became of a federal nature.

Although the Central Government under the Act of 1935 was very powerful as regards its relationship with the British Indian Provinces, some allowances in the said Act had to be made in order to satisfy the Muslim minorities. This, for instance, is evident in the peculiar allocation of residuary powers under it. (For this reason we find the proposal for vesting residuary powers in the units even in the Objectives Resolution of the Constituent Assembly
which was taken before partition). But it became manifest from the working of the Act of 1935 that concession of powers brought in its trail an ever-increasing demand for larger and larger concession of powers and introduced disintegrating tendencies in the country.

As shown before in an earlier chapter, federation was advocated by the Muslim Community in order to seize power in the Muslim majority areas. Therefore, the creation of strong provinces was their aim. This was the reason behind their demand for the separation of Sind from Bombay and for the granting of fully responsible government to the North-West Frontier Province. It was in deference to their wishes that, under the Act of 1935, Sind and N.W.F.P. were given the status of Governor's Provinces. Because of this desire of getting hold of power the federal part of the Act of 1935, purporting to create a strong centre, was denounced unhesitatingly by the Muslim League while the provincial scheme under the Act was sought to be worked by it for whatever it was worth.

But in the elections held before the inauguration of the Act of 1935 the Muslim League failed to secure majority in any of the Muslim majority Provinces of Punjab, N.W.F.P. Sind and Bengal. In the Provinces where the Congress was in a majority it refused to form coalition ministries with the Muslim League. Moreover, the Congress, it was feared, was winning away the Muslim masses through the 'Muslim-mass-contact movement'. So apprehending that

it would be difficult to capture power from the Congress remaining within the same state the idea of creating a separate state for the Muslim community comprising the Muslim-majority areas, was given a serious thinking. It may be said that the idea was first referred to by Dr. Muhammad Iqbal in 1930 when in his presidential speech delivered in the annual session of the Muslim League he said that the final destiny of the Muslims, at least of North-West India, would be "the formation of a consolidated North-West Indian Muslim state". But the idea gained ground only after the introduction of Provincial Autonomy in 1937 and three years later - in 1940 - the Muslim League adopted the Pakistan resolution. So Provincial Autonomy may itself be regarded as a disintegrating factor which culminated in the partition of the country. This consideration was before the makers of the Constitution and as we have referred to before, it found an able expression in the words of Pandit Laksikanta Maitra who said: "We have had enough experience of Provincial Autonomy of which we had been enamoured in the past and now we have seen its effects......If we want to hold together all the component units there must be a Centre which would be able to bring them into cohesion, and that Centre must have ample powers for the purpose."

So with the creation of Pakistan the necessity of appeasing the Muslims was absent and one of the reasons for making the Centre unusually strong was to avert any further disintegration of the country.

2. Goyer and Appadorai, op. cit., Vol. II P.437
The purpose of instituting the centralising provisions in the Constitution is two-fold. One is to provide Centre with enough strength to work with success and the other is to provide for the necessary co-operation and co-ordination between the Union and the units. The Chairman of the Constitution drafting Committee, who was associated with the working of the Act of 1935, sought to remove all the difficulties experienced in the process of such working.

Among the provisions of the Constitution that are conspicuous for their greatly centralizing effect and that have no corresponding provisions in the Act of 1935 mention is to be made at least of Arts. 249, 360 and 365.

Art. 249, we may reiterate, gives Parliament the power to legislate on a matter, within the State List if the Council of States, by a special majority, adopts such a resolution. In this connection we should look into another provision of the Constitution. Art. 252, based on a similar provision under the Act of 1935 enables Parliament to legislate on a matter in the State List when Parliament is requested to this effect by two or more States. The usefulness of such a provision became evident more than once under the Act of 1935. In 1939 several Provinces passed resolutions empowering the Centre to enact drug control measures. In 1947 the Central Legislature was able to pass Damodar Valley Corporation Act when resolutions in that behalf were passed by the Legislatures of Bihar and West Bengal. But the provision, it has been
pointed out by T. T. Krishnamachari, takes a lot of time as the co-operation of the executive as well as of the legislature in the States is necessary. Moreover, in urgent matters the Centre is to be provided with some power to take action without involving the emergency provisions where they need not be involved. So the framers of the Constitution proceeded one step further and in addition to Art. 252 included Art 249 in the constitution. This, it was also stressed, was more than a mere formal necessity for fulfilling the economic objectives of the Constitution.

The powers of the Centre to declare a financial emergency in India as a whole or in any part of it and to exercise, consequentially, great controlling powers over the finances of the states have no counterpart in the Act of 1935. This provision, we have seen, raised a storm of protests in the Constituent Assembly. This Article, as pointed out earlier, was not incorporated by the members of the drafting committee and was conceived later in the background of economic and financial conditions prevailing in the country at the time. In September, 1949, the Government of India had to devalue the Rupee following the devaluation of pound sterling in England. After devaluation, inflationary tendencies became higher in India and the Central Government adopted a comprehensive anti-inflationary programme. The request of Government of India to take steps to curb inflation was not followed in some of the Provinces, specially in Madras and Bombay and under the then

existing constitutional system there was no provision for making the Central direction effective. On 16th Oct., 1949, Dr. Ambedkar emphasised in the Constituent Assembly the necessity of incorporating the provision in view of the economic and financial conditions of the country at the time. In the face of large oppositions the provision ultimately found its way into the Constitution.

Again, Art. 365, which vests in the Centre the powers of declaring a break down of constitutional machinery and consequent imposition of President's rule in a state on grounds of non-compliance with Central directives, has its origin in the difficulties experienced by the Central Government while working under the Act of 1935. Under the Act of 1935, the Centre could give directions to the Provinces but there were no direct sanctions behind them. Dr. Ambedkar argued, as we have seen previously, in the Constituent Assembly that if the Centre was to be vested with the power of giving directions to the States it should also be given the power to make the directions effective. If, in cases of failure to carry out the directions the Centre is powerless to take action then that means practically 'negativing the directions'. He recalled the experiences gathered in this regard in the days of the Second World War. "This provision", he proceeded, "if I may say so, is very necessary because we all know - those of us who were ministers during the time of war - how these mere powers of giving directions turned out to be infructuous when the Punjab Government would not carry out the food policy of the Government of India. The whole Government can be brought to a standstill by a Province not carrying out the directions and the Government of India not having any power to enforce those directions." 

Inspite of grave protests these arguments prevailed upon the Constitution-makers and the Article was included in the Constitution.

Over and above the experiences of working of the Act of 1935 some other factors were also taken into consideration. The disruption of national unity and territorial integrity created by the partition of the Country generated special problems of security of the State. The inclusion in the Constitutional system, of the Indian States mostly with different levels of administration, as compared to the British Indian Provinces also caused much anxiety to the Constitution-builders. This, they thought, might prove a disintegrating factor and hence necessitated a strong central government.

The economic problems of the Country were no less important than the political ones. Want of proper care in the economic field left the economy of the State in a most backward and underdeveloped condition at the time. To raise it from this status would require planned development of its resources. And planned development is only possible if the Centre is vested with the power of regulating the economic life of the Country as a whole.

Moreover, the framers of the constitution have drawn upon the experiences derived from working of the other federal constitutions of the world. Everywhere factors—both economic and political—are leading towards greater centralization of powers and greater Centre-state cooperation. But, while these have to be done in other countries mostly through judicial decisions and other extra-constitutional means, in our Constitution direct means have been
provided for dealing with these things.

Lastly, the lesson of history could not be ignored that whenever the Central Government in India became weak the solidarity of the country was impaired and foreign conquerors overpowered India. This was realised by the fathers of the Constitution and various members in the Constituent Assembly made reference to such possible danger. And all these considerations made out a clear case for an overwhelmingly strong centre - even stronger than that under the Act of 1935.

IX. A Note on the Working of Some provisions of the Constitution.
A) Working of the Emergency Provisions:

In a preceding section we have dealt with the scope of the emergency provisions. The provisions under Art 352 has been put into operation for the first time after the Chinese aggression. On Oct. 26, 1962 it was declared by the President of India that a grave emergency existed whereby the security of India was threatened by external aggression.¹ An ordinance, known as the Defence of India Ordinance (Ordinance IV of 1962), was also promulgated on the same date which subsequently formed the basis of the Defence of India Act, 1962. In exercise of the powers conferred by Sec. 3 of the Defence of India Ordinance the Central Government promulgated the Defence of India Rules on the 5th of November, 1962. Resolution on this Proclamation was moved in Parliament by the Prime Minister on 8th

Nov., 1962 and the Proclamation was approved by it on the
14th of November, 1962.

On 12th December, Parliament passed the Defence of
India Act, 1962. It is to remain in force until the expiry
of the period of emergency. Sec. 3 of the said Act, which
has been described by the Law Minister as 'the most impor-
tant provision', empowers the Central Government to make
rules by notification in the official gazette for securing
the defence of India and other allied matters specified
below. These are securing public safety, maintenance of
public order or efficient conduct of military operations,
or maintaining supplies and services essential to the life
of the community. The Central Government, as we have men-
tioned above, has already made such rules and these are
saved by 3.48 of the Defence of India Act. The provisions
of the Defence of India Act or any rules made under this
Act shall remain valid notwithstanding anything contained
in any other enactment. And no order made under this Act
shall be open to question in court and no legal proceedings
can be brought against a person for doing anything in
pursuance of this Act or of the rules framed thereunder.
The rules made under the Defence of India Act are to be
laid before both Houses of Parliament for a total period of
thirty days and Parliament may modify the rules or altoget-
ther reject them.

2. Synopsis of Lok Sabha Debates (Official Report) Nov. 21,
1962, P. 128.
4. Ss. 47 and 45, Ibid.
5. S. 41 of the Defence of India Act.
One of the chief impacts of the declaration of emergency has been upon the Fundamental Rights. Art. 19, we know, gets automatically suspended with the Proclamation of Emergency. Some restrictions on the freedoms guaranteed by Art. 19 are to be found in the Defence of India Rules. Rule 29 provides the Central Government with the power of regulating the movements of persons for securing the Defence of India or public safety, etc. Rule 46 empowers the Central Government or the State Government to impose censorship on any matter before publication for the purpose of securing the defence of India and such other purposes as the maintenance of public order and public safety, etc. The Governments may also prohibit or regulate the publication of any document or any matter relating to a particular class of subjects. Under Rule 83 the Central Government or the State Government may, by order, on the aforesaid grounds prohibit or restrict the holding of any meetings or taking part in public processions.

According to Rule 125 the Central Government or the State Government may, on certain specified grounds, such as securing the defence of India, maintenance and increase of supplies essential to the life of the community or preventing any corrupt practice, regulate or prohibit the production, supply, distribution and consumption of a commodity. And according to Rule 125 A the Central or State Government, for maintaining supplies and services essential to the community, may, by notified order, authorise any person or body to take over the management of an undertaking which is then to be carried on in accordance with the provisions of the order.
Besides the automatic suspension of rights under Art. 19, the right to move the courts for the violation of other Fundamental Rights may also be suspended by an order of the President under Art 359(1) of the Constitution. In exercise of this power the President issued an order suspending the right to move the courts for the enforcement of Fundamental Rights guaranteed by Arts. 21 and 22 in the First instance. It was followed by another order taking away the right to move the courts in case of violation of rights guaranteed under Art 14 also.

Sec. 3(2)(15) of the Defence of India Act enables an authority not lower in rank than that of a District Magistrate to restrict the movements of suspected persons or to detain them in custody in order to prevent them from doing something prejudicial to the defence of India and civil defence, the security of the State, the maintenance of public order and public safety, India's relations with foreign states, the maintenance of peaceful conditions in any part or any area in India or the efficient conduct of military operations. Rule 30(1) of the Defence of India Rules also entrusts to the Central Government or to the State Government the same powers regarding the restriction of movements and detention of the suspected persons on almost the same grounds. In addition to these, under Rule 30(1)(f) restrictions may be imposed on the employment or business of such a person or in respect of his association or communication with other persons and in relation to the dissemination of news and opinions by him.

The question of detention of persons under the Defence of India Rules has been considered by the Supreme Court fully. In April 1963, the Supreme Court dismissed on grounds of non-maintainability the petition for a writ of Habeas Corpus made by a person detained under the Defence of India Rules. It was contended by the petitioner that Art 359 did not authorise the suspension of the rights guaranteed under Art 32 of the Constitution. The Supreme Court rejected the contention and pointed out that according to the provision of Art 32 (4) itself the right so guaranteed could be suspended in accordance with the provisions of the Constitution. And as a result of the President's order, the petitioner's right to move the Court had been suspended during the emergency period. So the petitioner had no locus standi to enforce the right.

The question came before the supreme court time and again and in September, 1963 it gave its verdict regarding different aspects of the matter. Several persons detained in custody under S.3 of the Defence of India Act read with Rule 30(1)B of the Defence of India Rules first moved their respective High Courts and the move being rejected there, they preferred appeals to the Supreme Court. The appellants' principal contention was this that according to Art 13 of the Constitution the Defence of India Act and the Defence of India Rules were void, since they violated the Fundamental Rights guaranteed under Arts. 14, 21 and 22 of the

9. The proceedings of the case are not yet reported in any law journal. So I have had to make use of the reports regarding the matter published in the Statesman dt. 3rd Sept., 1963 and the Economic weekly dt. 7th Sept., 1963.
Constitution. So the appellants were entitled to be set free. Another contention was that although the rights to move the Supreme Court and the High Courts under Arts. 32 and 226 respectively had been suspended, the right of the affected person to move the Courts under S. 491 of the Criminal Procedure Code for getting the order of release against illegal detention remained unaffected. It was further alleged that the Defence of India Act suffered from excessive delegation of legislative powers to the executive.

The Supreme Court has held that no Court can be moved by persons detained under the Defence of India Act and Rules as the terms of Art. 359 are clear and unambiguous and the Order of the President specifically precludes the rights under Arts. 14, 21 and 22 from being enforced by the Courts. It has been also held by majority in the Supreme Court that proceedings under S. 491 of the CrP.C. are no exceptions, if those involve consideration of the validity of a law on account of its alleged contravention of Fundamental Rights. The contention that the Defence of India Act suffers from excessive delegation of powers has been rejected by the Supreme Court. Powers of delegation of the Indian Legislature to the Executive, it may be mentioned, have been accepted by the Supreme Court previously while rendering opinion regarding the Delhi Laws Act. There the point has been settled that the executive may impose necessary restrictions upon an enactment and insert in it necessary modifications. So the criticism of power of making rules, vested in the Central Government, even in contravention of any other enactment, as 'clothing the Government with totalitarian powers' is not fully justifiable. Apart from the
consideration that it is a purely emergency provision which will cease to have effect with the termination of the emergency the fact that the rules made under it are to be placed before Parliament which may provide necessary modifications or may reject them altogether makes it less prone to objections.

In the field of Union-State relationship although the Union may assume overwhelming powers the normal structure is being continued as far as possible. In the Defence of India Act we find that S.3(3)(IV) empowers the Central Government to confer powers and impose duties upon a) the Central Government as respects any matter within the State field and b) any State Government as respects any matter not within its jurisdiction. The Central Government, under S.40 (1)(b) of the said Act, may, by order, direct that any power or duty so conferred on it is to be exercised or discharged by any State Government whether or not it relates to a matter within State jurisdiction. For instance we may mention that powers conferred on the Central Government relating to sugar by Rule 125B\(^{10}\) are to be exercised by State Governments\(^{11}\) also according to the direction inserted by the 10th Amendment to the Defence of India Rules.

Under Rule 124, the Central Government can exercise such control over agriculture (which is a State subject) as prohibiting or restricting or regulating the cultivation of specified crops, bringing under cultivation waste or arable lands for growing specified crops, protecting crops

against pests, preventing plant diseases, etc. The State Governments can also use similar powers but for exercising control over the cultivation of specified crops it should secure previous approval of the Central Government.

In the sphere of finance, in spite of the growing expenditure on defence, the normal distribution of revenues between the Union and the States, which may be suspended by order by the President, has not been disturbed.

The impact of the emergency on the Fundamental Rights, however, is pronounced. According to Mr. Justice Subba Rao the Defence of India Act is a void act and although there is no legal remedy the detentions under it are illegal detentions. He suggested that the act could be amended in conformity with our Constitution without losing its effectiveness.

However, the security of India is the chief responsibility of the State and we hope that due emphasis will be laid upon the assurance given in 3.44 of the Defence of India Act that the ordinary avocations of life shall be interfered with under the Act as little as possible.

We may now pass on to the provisions under Art 356 of the Constitution. The occasions for issuing a Proclamation on the failure of constitutional machinery in a State have been comparatively frequent. Its first application was made in PUNJAB in 1951. In the lucid words of Late Dr. S.P. Mukherji, "This was one of those rare cases where perhaps the recommendation made by the Government seems to be inescapable and

12. The Economic Weekly, 7th Sept., 1963, P. 1500
at the same time the circumstances which have led to it are of a most unhappy nature." 13.

In June 1951 Dr. Gopichand Bhargava submitted to the Governor of Punjab the resignation of his ministry. The Legislative Assembly in Punjab at the time consisted of 77 members of whom 70 members were considered to belong to the Congress Party. 14 The Governor under the peculiar circumstances tried to ascertain whether any other Congressman was prepared to form a ministry. But in view of the directive issued by the Congress Parliamentary Board it was not possible for any member of the Congress to form a ministry. It was futile to call the members of any other party to form a ministry as almost the total strength of the house was captured by the Congress. The Government of Punjab sent a report to the President stating the facts and on the basis of that report the President issued a Proclamation on the 20th of June, 1951 which was approved by Parliament on the 9th of August following.

By virtue of this Proclamation the President took upon himself all the executive powers of the said State and declared that the legislative powers thereof were to be vested in Parliament and consequently suspended the operation of several provisions of the Constitution in that State. Mention may be made, for instance, of such provisions as relating to the laying down in the Legislature of reports of the Auditor and Comptroller general and of the Public Service Commission by the Governor, provisions relating to the determination of relationship between the

Governor and his Council of Ministers and provisions for summoning, proroguing and dissolving and carrying on the business of the State Legislature, provisions regarding the salaries and allowances of Speaker and Deputy Speaker, etc. By an order the President transferred all the executive powers assumed by him to the Governor of Punjab 'subject to the superintendence, direction and control' by him.

Under Art 357(1) the legislative powers vested in such a case in Parliament may be delegated by it to the President. By virtue of this power Parliament passed the Punjab State Legislature (Delegation of Powers) Act of 1951 and conferred on the President the powers of the Legislature of Punjab to make laws. Every Act, enacted by the President in pursuance of these powers was however to be laid before Parliament which could prescribe the necessary modifications in it.

Conflicts between the rival groups in the party led to this step. It was bitterly criticised in Parliament. Dr. S.P. Mukherjee suggested that after the dissolution of the Legislative Assembly, the Government could continue in office as a caretaker government instead of not allowing the provisions of the constitution to operate at all. However, as the General Elections were not very far off the step taken was not really so objectionable as it seemed. The Home Minister sought to justify the step with these words: "Obviously, the step taken by the President in issuing this Proclamation is a step which goes against the prestige of the Government and of the party to which the

Government belongs. It took that step because it felt that it was fair and necessary for the people of Punjab and for the people of India. 17

The state of emergency in Punjab lasted for about ten months. After the elections were over, it gave way to normal parliamentary government and so the Proclamation was revoked on 4th April, 1952.

The next instance of the exercise of this power was found in PEPSU. In the election to the State Legislature in Pepsu no single political party could capture a majority of seats, the party position being as shown in the table given below: 18

<table>
<thead>
<tr>
<th>Party</th>
<th>Seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Congress</td>
<td>26</td>
</tr>
<tr>
<td>K.M.P.P.</td>
<td>1</td>
</tr>
<tr>
<td>Communist Party</td>
<td>2</td>
</tr>
<tr>
<td>Jan. Sangh</td>
<td>2</td>
</tr>
<tr>
<td>Independent and others</td>
<td>29</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>60</strong></td>
</tr>
</tbody>
</table>

The Congress party, being the largest single party in the house, was called upon to form a ministry. A new coalition ministry came into being, consisting of the Chief Minister and three other ministers to which two weeks later another member was added. There were frequent alterations in the membership of the ministry and various complications hampered the normal functioning of the government. Election petitions were filed against thirty-one members of the legislature. By February, 1953, 17 election petitions were filed again disposed of; the election of nine members was

17. Ibid, Col. 248.
declared invalid and the invalidated cases included those of the Chief Minister and two other ministers. The ministry tendered resignation and the President's rule was invoked in the State on 4th March, 1953. The Legislative Assembly in Pepsu was dissolved and the President assumed all functions of the Government. The President directed that these functions would be exercised by the Rajpramukh on the advice of an Adviser appointed by him, subject to his superintendence, direction and control. It was also announced in the Proclamation that the general election to the Legislative Assembly would be held as soon as the necessary arrangements were completed.

The justification of taking this step as tendered by the Home Minister in the House of the People was this: Fourteen election petitions were still pending and from the perusal of the case-law it seemed certain that many of them would prove successful. So, in a house of sixty more than twenty bye-elections would have been necessary. Although an election commission was there to supervise elections the machinery used by them was the State machinery. "And the conditions," proceeded the Home Minister, "are so bad that it is absolutely impossible to inspire public confidence in any election whatsoever at the moment." There was no stable ministry, the legislature was not functioning properly. It was a truncated house and these nature of things were to affect the administrative services also. So in public interest it was deemed essential that the President should intervene.

20. Ibid.
The opposition parties in the House of the people contended that pending by-election for the invalidated seats the Government could have continued functioning. Again, the Chief Minister and the other ministers might have been asked to stand for re-election within a short time and thus given a chance to vindicate their position as representatives of the people.23

The second general elections to the unicameral Legislature in Pepsu was completed within the first week of March, 1954. Out of the 60 seats the Congress secured 37 seats and thus came back to power.24 On 7th March, 1954 the Proclamation was revoked.

It was in 1954, again, that the need arose of using this power in another State - the State of ANDHRA. Here, the Congress party, having failed to secure a majority, was functioning with the help of a few independents. On the issue of prohibition this ministry was defeated by the combined opposition parties. And this was by a narrow margin of one vote only. In a house of one hundred and forty members sixty nine voted for the motion expressing want of confidence while sixty-eight voted against it.25 The ministry communicated to the Governor that in the circumstances the Assembly should be dissolved and the ministry would make an appeal to the electorate. But it was made clear that it would not carry on as a care-taker government till the fresh elections were held. Among the opposition parties the P.S.P. expressed its unwillingness to co-operate with the communist Party and the Krishikar Lok Party observed that up to the time it had

23. Ibid, Col.1930.
not been able to make up its mind. The Communist Party, which held almost as many seats as the Congress, was not given a chance on the consideration that in the existing circumstances stable ministry would become impossible. On the basis of these facts the Governor sent a report to the President and on 15th November, 1954, the Presidency, by proclamation, assumed direct control of the State.

The action of the Governor in not calling upon the leader of the opposition was vehemently criticised by the opposition parties in Lok Sabha as running counter to the conventions of parliamentary government. Shri Ashok Mehta contended that according to parliamentary practice either the ministry should carry on while appealing to the electorate or on tendering its resignation the leader of opposition should be called upon to form a new ministry.* The Home Minister, however, replied that the opposition ministry would not provide the necessary stability and as within a few months elections would be held there was no necessity of worrying so much over this matter.** The Deputy Speaker held that under the parliamentary system of government the defeated ministry had every right to appeal to the electorate and fortunately, under the Constitution, provision had been made for the President's rule so that in such a case elections might be 'free, fair and wholly unfettered by any authority'. The precedent set by the ministry in not accepting the position of remaining as a caretaker government was a good one and ought to be followed. It was also shown by another

27. Ibid, Col. 24.
member that in countries like Britain on the defeat of a ministry the leader of opposition could be called in easily; because in such countries two or three organised parties could be found functioning and not 'splitter groups'.

The new elections took place in February, 1955. In these elections the communist strength was found to be considerably reduced. On 23rd March, 1955 the Proclamation was revoked. The Congress and its allies having secured a decisive victory formed Government.

The installation of President's rule in Travancore-Cochin had a long history behind it. An economically unstable State, with no clear-cut majority commanded by any political party in the Legislature, the Government of Travancore-Cochin had not been faring well since its very inception. The Congress party had secured forty-four seats out of a total of 108 in the unicameral legislature of Travancore-Cochin. With the support of T.T.N.C. it formed government. But in September, 1953 the T.T.N.C. joined the opposition and the ministry was refused confidence in the legislature. The Congress ministry decided to appeal to the electorate but agreed to stay on as a caretaker government. So the possibility of President's rule was averted for the time being. But the results of the elections of 1954 did not prove much helpful in providing a solution. Party positions in the legislature showed slight changes. Congress won only 45 seats in a legislature of 117 members. So quite rightly it came to decide that it should not form government. It threw its support to the P.S.P. which then

29. Lok Sabha Debates, 19th Nov. 1954, Col. 471.
assumed power. One year later it withdrew its support from the ministry, and the P.S.P. had to resign. Then the congress with the help of the T.N.C. and a few others formed government. But about a year later there were six resignations from the Congress Party. So losing the support of the house the ministry resigned and advised the Rajpramukh to explore the possibility of forming an alternative government. The Rajpramukh consulted the second big party, i.e., the Communist Party, which however, reported that it was not in a position to form a ministry. Then the chances of P.S.P. came. The P.S.P. leader got only 59 assurances of support but even out of those two subsequent withdrawals occurred.

As there was no prospect of stable government being provided by any party and as the necessity of passing the budget for the State was imminent the President proclaimed a State of Emergency in Travancore-Cochin. After the reorganization of the States in November, 1956 the State of Travancore-Cochin with slightly altered boundaries formed the new State of Kerala. The President's rule was extended by another Proclamation issued on the 1st of November, 1957. Following the results of the second general elections the Communist party was in a position to form a ministry in Kerala and the Proclamation was revoked on the 5th of April, 1957.

The provisions under Art 356 had so far been applied so as to meet ministerial crises in a State. But the next instance has been of a somewhat different character. In July, 1959 after a long period of growing
troubles the Government in KERALA was superseded by the President’s rule, although it did not lose the confidence of the Legislature in the State. The Home Minister in Lok Sabha stated\(^3\) that the circumstances left them with no other alternative than the taking of this step. Several suggestions to cope with the situation including the suggestions by the Prime Minister of holding a mid-term election were not acceptable to the Government in Kerala.

The members from the opposition bitterly criticised this step. Some of them contended that this provision could be used to tackle ministerial crises only. It may be pointed out that though ordinarily the necessity of its use arises in such cases these are not the only circumstances in which this power may be exercised. Because, Art 355 imposes the duty on the Union to protect every State against external aggression and internal disturbance and to ensure that the government is carried on in accordance with the provisions of the Constitution. So, not only in cases of ministerial crises but in any case where the government cannot be carried on in accordance with the constitutional provisions the Union Government can take actions under Art 356.

The Legislative Assembly in Kerala was dissolved and it was stated in the Proclamation that the General Election to the Legislative Assembly in Kerala would be held as soon as possible.\(^4\) The election was held in February, 1960 and the strength of the ruling party dwindled down to 29 only in a House of 126 members.\(^5\) The Proclamation was revoked on 22nd February, 1960. And the Congress Party which had won 63 seats formed government.

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34. *Gazette of India Extraordinary, Part II, 3 & 31st July 1959.*
The declaration of the third type of emergency, i.e., the financial emergency for the whole of India or any part thereof, has not, fortunately enough, so far been necessary.

The second type of emergency has been proclaimed five times within the first decade of the constitution. In the case of Punjab it was party exigencies which led to the use of this power. And there was no opposition party which could shoulder the responsibility of forming a government. In the next three cases (i.e. Pepsu, Andhra and Travancore-Cochin) some theoretical objections, as mentioned in the course of the foregoing discussion, could be raised. But from the practical point of view, it must be admitted that there was no political party in these States which, by itself, or with the help of others, could provide a stable government had it been given a chance. So it is the weakness of the political parties which necessitated the imposition of President's rule in these cases. And after the Presidential intervention arrangements were made for new elections except when general elections were forthcoming within a reasonable period of time. The longest continuance of the state of emergency was found in Pepsu where parliamentary government was reinstated after the expiry of one full year. During these periods, in the words of Myron Weiner, "there is time for parties to strengthen themselves, to merge, or to enter into agreements with other parties."36.

But theoretical objections are most forceful in the case of Kerala, because, on the face of it, it is an instance in which a democratic government was removed from power. And recalling Dr. Ambedkar's assurance given in the Constituent Assembly that the Centre cannot intervene under

the provisions of Art 356 in cases of such misgovernment as
to endanger public peace unless the government is not carried
on constitutionally one is constrained to observe that the
said assurance, in the instance of Kerala, has proved unavai-
ling. But, evidently, the system of law and order had been
violently shaken in Kerala and the dissension among the peo-
ple had been growing from more to more day by day. Immeresal
instances of lawlessness had been poured down by the members
in Lok Sabha and the elections which were held in Kerala
shortly afterwards proved that there were real grounds for
doubting the truly representative character of the government.

In all these cases, it may be mentioned, the President
intervened on receiving a report from the Governor although,
barring the case of Punjab, mention has been made in the
Proclamation of 'other informations' in addition to the
Governor's report. And the functions assumed by the Presi-
dent in these cases, were delegated by him to the Governor
subject to his supervision and control. In Pepsu, however,
an adviser was appointed to help the Rajpramulh.

Inspite of the fact that recourse to this provision up
to the present time cannot be seriously objected to, the
danger remains that precedents of frequent exercise of
this power may provide grounds to an unscrupulous Union
Government for abusing it in future for party purposes.

The different types of emergency provisions appear, on
the whole, to have been adequate to cope with different
types of contingencies. They have thus fulfilled the
expectation of the framers of the Constitution.
B) Working of the Provisions regarding the Amendment of the Constitution.

In a previous section we have dealt with the procedure of amendment prescribed by the Constitution and have shown there that the charge of rigidity levelled against the procedure cannot be justified. In a federal state it is difficult to conceive of a simpler method of amendment. And this contention is amply borne out by the actual working of the method. While in the U.S.A. in more than one hundred and seventy years there have been only twenty-two amendments to the Constitution, in India the Constitution has been amended sixteen times within fourteen years of its working; i.e., more than one amendment a year on an average has been made. A survey of these amendments will show that all types of Constitution-amending-ranging from important to minor ones and covering all types of procedure prescribed in the Constitution - have been made.

The necessity of passing an amending legislation was felt even before one year's completion of the working of the Constitution. The need was felt, especially, in view of certain judicial decisions which made it difficult to enforce several legislations. This constitutes one of the major amendments, though by far the Constitution Seventh Amendment Act is the bulkiest and, as it changes the whole mould of the federation, it may well be termed the most important.

The Constitution First Amendment Act was passed mainly to make some important changes in some of the Fundamental Rights. Some other alterations of a minor nature in a few other spheres have also been made.
First of all, the First Amendment Act has added a clause to Art. 15 of the Constitution. Art 15 prohibits the State from making any discrimination against a citizen on any of the grounds of religion, race, caste, sex, place of birth. This newly inserted clause enables the State to make special provisions for socially and educationally backward classes of citizens and for scheduled castes and scheduled tribes. This was necessitated as the Supreme Court gave its verdict in favour of two Brahmin students when they complained that their Fundamental Right had been violated by the discrimination made against them on the ground of caste.

Again certain important changes to circumvent judicial decisions have been introduced in Art 19. The original provisions of Art. 19 (2), authorising certain restrictions on the freedom of speech and expression, would not cover restrictions on the ground of any ordinary breaches of public order. The original grounds of restriction were: libel, slander, defamation, contempt of court, or any matter which offended against decency or morality or which undermined the security of or tended to overthrow the State. So restricting freedom of speech and expression for maintenance of public safety and public order, until it did not undermine the security of the State or tended to overthrow the State, could not be effected under the original clause. The amended cl. (2) of Art. 19 lays down that the State may make laws imposing reasonable restrictions on the freedom of speech in the interests of 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. Thus it becomes much wider than the original clause. It applies with retrospective effect to existing laws in the matter. And in cl. (6) of Art. 19 it was considered desirable to insert a new ground of restriction on the freedom of carrying on trade or practising any profession. It authorises the State or a State-owned corporation to carry on a trade or business to the complete or partial exclusion of the citizens. Thus it eliminates the risk of any proposal for nationalization being declared void on the ground that it would unlawfully restrict the citizen's freedom of trade, etc.

The First Amendment has also affected another important Fundamental Right — the right to property. Art. 31 as originally enacted laid down that private property could not be acquired except by the authority of law. And if the State wanted to acquire private property it should be for public purpose and there should be provision for compensation. But difficulties began to crop up when the States, in pursuance of their objective to carry on agrarian reforms passed such legislations. These, in some cases became the subject matter of litigation. With a view to saving the laws providing for the acquisition of Estates from the operation of Part III of the Constitution and for validating certain Acts and regulations two Articles — Arts. 31A and 31B — have been added to the constitution. A new schedule, enumerating the different State laws on the subject which were validated according to Art. 31B, was inserted in the constitution. The First Amendment Act has also provided for certain changes in matters of the summary summoning and
proroguing and dissolution and addressing of Parliament by President. Changes of the same nature are to be found in the case of State Legislatures also. A few minor alterations have also been made in Arts. 341, 372 and 376.

Art. 81 of the Constitution as originally enacted provided that there should be not less than one member in the House of the People for every 7,50,000 of the population. But the increase in population might create difficulties in maintaining the upper limit of membership in the House of the people prescribed by the Constitution. So the Constitution Second Amendment Act drops the words and figures 'not less than one member for every 7,50,000 of the population.' As it related to the representation of States in Parliament it required ratification by the States before coming into being.

The Constitution Third Amendment Act was passed in 1954 in order to enable Parliament to retain its control over the production, supply and distribution of certain commodities. Art. 369 of the Constitution enabled Parliament to enjoy concurrent powers of legislation as regards matters specified in the said Article (although they were mentioned in the State List) for a period of five years from the commencement of the Constitution. Even after the expiry of the said period it was found desirable that the Centre should retain its control over most of the things mentioned in Art. 369. So entry 33 of the concurrent List has been replaced by a new one which includes:

3. Arts 85 and 37 of the Constitution
4. Arts 174 and 176, Ibid.
a) trade and commerce in and the production and distribution of the products of any industry where Union control is declared to be expedient in public interest by parliamentary legislation and imported goods of the same kind;

b) food stuffs including edible oil seeds and oils;

c) Cattle fodder;

d) raw cotton and raw jute.

This amendment also required ratification by the States as required by the proviso to Art. 368 for, it related to the distribution of power between the Union and the States.

The next amendment which came in 1955 has been described by some constitutional thinkers as the most far-reaching change adopted. This amendment also was necessary to meet the situation created by judicial decisions.

We have seen that Art. 31 as it originally stood, provided for the acquisition of property for public purpose under a law providing for compensation. And the law should either fix the amount of compensation or specify the principles regarding the determination and payment of compensation. But it became evident that the Supreme Court might question the adequacy of compensation and it interpreted the word compensation as the 'just equivalent' of what the owner has been deprived of. It is obvious that the fathers of the Constitution did not mean by compensation the 'just equivalent' of the property taken. Then they would have qualified the word compensation in Art. 31 with such a word as 'just' or 'adequate' as is to be found in the Constitution of

There were other difficulties too. The judges took a very wide view of the meaning of the expression 'acquisition or deprivation of property.' It was contended that if any provision of a prohibitory or regulatory legislation in any way curtailed the proprietary rights, even though not causing any transfer of property, such legislation came within the purview of Art. 31 (2) and became invalid if it did not provide for compensation.

So the Constitution Fourth Amendment Act has changed cl. (2) of Art 31 and has added another clause i.e., cl. 2(A) to it to obviate these difficulties. In the amended cl. (2) of Art. 31 it has been included that no law for compulsory acquisition of private property for public purpose should be called in question in any court of law on the ground of inadequacy of compensation cl. 2 (A) to Art. 31 on the other hand provides that when the proprietary rights are not transferred to the State no compensation is necessary even if restrictions or regulations placed on the use of any property in the public interest may amount to deprivation of property.

The constitution First Amendment Act saved the laws for acquisition of estates from the operation of part III of the Constitution. But there were difficulties in getting through welfare legislations in other spheres also. So the Fourth Amendment Act has enlarged the scope of Art. 31A of the Constitution. Now not only the laws making acquisition of any estate by the State or extinguishing any rights therein but also the taking over of the management of any property

6. The fifth amendment to the Constitution of the U.S.A. runs:

"Nor shall private property be taken for public use without just compensation."


for a limited period, amalgamation of two or more corporations or modification of the rights of managing agents or extinguishment or modification of any right accruing in virtue of any agreement for searching for or winning any mineral or mineral oils are saved from the operation of Arts 14, 19 and 31. It has also made some new entries (some of which are of the above-mentioned type) in the Ninth Schedule to the Constitution.

The amendment of Art. 31 and Art. 31A has been criticised in many quarters. Because as an eminent writer has shown that this has seriously affected the right to compensation for the acquisition of private property. But this was inevitable in order to ensure that socialistic measures were not obstructed by property-owners. This is quite in accord with the spirit of the Constitution.

On consideration of the discussions held in the Constituent Assembly at the time of framing the provision guaranteeing the right to property, one must fully concur with Prof. Alexandrowicz that 'it simply aims at restoring to some extent what was laid down by the Constituent Assembly but changed by judicial interpretations'. And the remarkable ease with which these changes have been effected in the Constitution reminds one of the difficulty with which President Roosevelt was confronted while enforcing his new deal legislation in the U.S.A. Insistent demands in the liberal circles there, to find out some way of eliminating the road blocks to President's legislative programme created by the judiciary, was futile. The difficulty in

the procedure of amendment prevented President Roosevelt from making use of it. But in our case whenever judicial decisions stood in the way of realisation of any policy the Constitution has been suitably amended.

Under Art. 3 of the Constitution before introducing a bill in Parliament containing any proposal for instituting any change regarding the area or name of a State, the bill is to be referred by the President to the related State Legislatures for expressing their views thereon. But the Article as originally enacted did not specify any time-limit for the States to express their views. When the problem of Reorganisation of States came to the forefront the necessity of fixing a time-limit was felt and the fifth Amendment empowers the President to specify a period within which the affected States are to send their views.

The sole purpose of the Constitution Sixth Amendment Act was to vest in Parliament the power of levying taxes on the sale or purchase of goods of inter-state trade or commerce in order to prevent multiple taxation by the States on such goods. Judicial decisions in the matter created complications. Taxation Enquiry Commission also recommended that this power should remain in the hands of the Union. The Sixth Amendment Act inserts a new entry, i.e., entry no. 92 A in the Union List which brings taxation on the sale or purchase of goods other than newspapers in the course of inter-State trade within the exclusive jurisdiction of the Union. Relevant entry in the State List, viz., entry no. 54, has also been amended. It also makes consequential changes in Arts 286 and 269 of the Constitution which enabled Parliament to formulate principles for determining when a sale or purchase takes place in the course of inter-State trade or commerce or outside a State.
or in the course of import of goods into or export of goods out
of India. This bill also received the required ratification
easily.

The constitution Seventh Amendment Act was enacted
in order to implement the recommendations of the States
Reorganisation Commission. This is by far the biggest
amendment and among the important changes introduced by it
the following may be noted. It has abolished, as we have
seen previously, the different categories of States and
placed them on a uniform level. Certain territories on the
other hand have been placed under Union Control. So a
total change has been effected in respect of the First Schedule
to the Constitution. It also makes some consequential changes
in the number of membership of the House of the People and
in the allocation among the States and Union Territories of
seats in the Council of States. Originally, the total member­ship of the House of the people was fixed at 500. Now the
House of the People is to consist of not more than five
hundred members from the States and not more than twenty
members from the Union Territories. Provision has also been
made to appoint the same person as Governor of two or more
States. In the case of State Legislatures it drops the require­ment of not more than one member per every 75000 of population
though it retains the same upper and lower limits of membership
(i.e., not more than 500 and not less than 60). The size of the
legislative councils has been enlarged from one-fourth of the
strength of the legislative assemblies in the respective
States to onethird of that. An important addition has been
made to the Union-State administrative relationship. Under
Art. 258 A the Governor of a State may, with the consent of
the Central Government, entrust any State functions to the
officers of the Central Government. This provision has been
criticised by a learned writer as the erosion of State autonomy through the back door. However, the provision does not seem so objectionable as the Governor will surely act in this matter according to the advice of the ministry and if they entrust any function out of their own accord autonomy of the States cannot be said to be prejudiced.

The Act has lifted partially the bar against practising by an ex High Court judge. A High Court Judge, according to the amended Art. 220, can plead or act in the Supreme court and in the High Courts other than that of which he formerly was a judge.

The power given to the Centre and the States under this amendment to carry on any trade or business even if it is not within their respective field of legislative jurisdiction is also worth noting. Provision of facilities for instruction in mother-tongue at the primary stage is another important addition. The President may issue directions to the States for provision of such facilities and, in such a case, he is to appoint a special officer to look after the safeguards provided in the Constitution for linguistic minorities.

The President, as we have stated in a preceding section, has been enabled to entrust special responsibilities to the Governor of Bombay for the establishment of development boards and development of technical education in that State. Here also there is scope for Union Control as special responsibility may mean that the Governor will act in his discretion and then he will be under the control of the President.

It also provides that until Parliament legislates to the contrary, the function of administering a Union Territory whether through an administrator or through the Governor of an adjoining State independently of his Council of Ministers is the responsibility of the President. This bill received ratification from the State Legislatures within shortest time possible.

After a three-year gap another amending legislation came into existence. Art. 334 of the Constitution, as originally enacted, provided for the reservation of seats for the Scheduled Castes and Scheduled Tribes and representation by nomination of the Anglo-Indian Community in Lok Sabha and State Legislative Assemblies for a period of ten years from the commencement of the Constitution. The Constitution Eighth Amendment Act has substituted 'twenty years' for ten years as it was thought that the status of these communities would require a longer time to change.

The Ninth Amendment, amending Schedule I to the Constitution, was necessary to implement the agreements entered into by the Governments of India and Pakistan. These agreements were made with a view to resolving some of the border questions by mutual transfer of certain portions of territories of these States. These agreements affected the States of Assam, Punjab, West Bengal and the Union Territory of Tripura. The Supreme Court, being referred to by the President for its advisory opinion in the case of the transfer of Barakari and some other Coochbehar enclaves in West Bengal, held that it constituted the cession of a portion of territory from India and consequently a change in the contents of Schedule I (where the description of the territory of India was to be found). So, before the transfer the First Schedule
should be amended accordingly. The Ninth Amendment has fulfilled this requirement.

The Tenth, Twelfth, and the Fourteenth Amendments have been made in order to incorporate several territories in India as Union Territories. Under these amendments the territories of Dadra And Nagar Haveli, Goa, Daman and Diu, and Pondicherry have been included in Schedule I of the Constitution. The Fourteenth Amendment also provides that Parliament may by legislation, create for any of the Union Territories a legislature and/or a Council of Ministers with necessary powers. After a legislature is thus created the President shall not make any regulation for peace order and good government in that territory.

The Constitution Eleventh Amendment Act sought to remove certain anomalies in the procedure of the Presidential and Vice-Presidential election. In the case of the election of the Vice-President the necessity of a joint sitting of both Houses of Parliament has been dispensed with and the validity of the election of President and Vice-President is not to be challenged on the ground of existence of any vacancy for whatever reason among the members of the electoral college.

Part XXI of the Constitution, as originally enacted, contained the Temporary and Transitional provisions of the Constitution. In it by the Thirteenth Amendment some special provisions regarding the administration of Nagaland have been incorporated. The heading of the chapter has accordingly been renamed Temporary Transitional and special provisions. Art. 371 A containing the details of these provisions has been newly inserted. Special responsibility with respect
to law and order in Nagaland so long as internal disturbances continue has been vested in the Governor of Nagaland. And it has been expressly provided that in this case the Governor, after consulting the Council of Ministers, is to exercise his individual judgment. It is expected that here he will remain under the control of the President. Some special provisions regarding the membership of the Legislative Assembly of Nagaland and its election have also been embodied. Art. 170 which is concerned with these things in general, should be construed in the case of Nagaland as provided in Art. 371 A.

In 1963 two other amending acts have been passed. The Law Commission in its fourteenth report recommended that the upper age limit for serving as a High Court Judge should be raised from sixty to sixty-five. The Constitution Fifteenth Amendment Act accepted the principle that the upper age limit should be increased, but it has provided that a High Court judge should hold office till he attains the age of sixty-two. Various members of the Joint Committee on the Constitution 15th Amendment Bill objected to this and held that it should have been sixty-five. In the next place according to Art. 226 the power of a High Court judge to issue writs or directions for enforcing Fundamental Rights or for any other purpose was limited to its own territorial jurisdiction only. Now such writs or directions can be issued to persons or government outside the territorial jurisdiction of a High Court if 'the cause of action wholly or in part' occurs within such jurisdiction. Some changes have also been introduced in Art 311 for protecting the interests of the members of the Union or...
State Civil Service. Excepting certain special cases, the
dismissal or removal or reduction in rank of a member of
the Civil Service can be made only after the holding of
an enquiry in which he has been informed of the charges
brought against him and has been given a reasonable
opportunity of being heard in respect of those charges.

The last amendment has been made in order to check
regionalism in India. The right of the State to impose
reasonable restrictions on the freedom of speech and
expression, freedom of peaceful assemblage and freedom
of forming associations and unions has been widened
by the inclusion of a new ground of restriction, viz.,
'the interests of the Sovereignty and integrity of India.'
The candidates for election to Parliament and the State
Legislatures and Ministers of the Union and Ministers of
States, Members of Parliament and Members of the State
Legislatures, Judges of the Supreme Court and High Courts,
auditor and Comptroller General are to affirm in their
oath of allegiance to the Constitution that they will
uphold the 'Sovereignty and territorial integrity of
India.'

The last two amendements also received the required
ratification without much delay.

We may safely conclude, then, that the Constitution
possesses adequate amount of flexibility necessary to cope
with the dynamic social and political forces. Both the
methods - amendments by a special majority and ratification
by the States in addition to that where considered necessary
- have been employed. It may also be mentioned that changes
which virtually constitute the amendements of the Constitution
although not for the purposes of Art. 368 (as for e.g.
the Citizenship Act of 1955) have also been made. The
position of the ruling party in Parliament makes it easy to secure a two-thirds majority and where ratification was required that was also easily available. Obviously, this has been so, because with one or two exceptions the same political party ruled in the Centre and in the States. One learned writer, while commenting on the process of ratification, goes so far as to say that ratification in the case of the Third Amendment came in as a 'Command performance'.

We have also noted that although the judiciary has been vested with the power of interpreting the Constitution the provisions regarding amendment do not leave us to the mercy of the court. On the other hand where court's findings do not seem to be in accord with the policy of the Government amendments to the Constitution have been passed to undo the consequences of the judicial decisions. It may be asked whether it would have been better to leave the development of the Constitution completely to the Court of law. But as it has been rightly contended 'if all matters are left to the ordinary judicial process they would take much longer time and immediately pressing problems may not be quickly solved.'

Some thinkers express concern over the quick pace of amendments and hold the view that the changes are to be effected only when there are impelling necessities. But we should keep in mind that in the opening years of a Constitution more changes are needed than in its later years.

15. In the First General Election the ruling party obtained 364 seats out of 479 in the House of the People. (Vide Election Commission's Report, Vol. II, P.7)

16. K.V. Rao, op.cit.,p.302 (Foot-note)

17. Editorial of the Journal of Indian Law Institute, op.cit.,p.160
Even in the USA the first ten amendments came within a little more than four years of the commencement of the Constitution. Moreover, some of the amendments are of a minor nature without purporting to make a change in the basic constitutional structure.

Some of the amending provisions, it may be mentioned, have strengthened the powers of the Centre as for example, the 3rd amendment, the 6th amendment and the 16th amendment, etc. However, they do not materially alter the federal set-up as originally laid down in the Constitution. And viewed as a whole, one may say very well that the provisions regarding amendment have worked in a commendable manner.

The Supreme Court and Article 32 of the Constitution.

The Supreme Court, as seen before, has been empowered by the Constitution to exercise jurisdiction in a very special type of cases. In addition to its normal scope of jurisdiction it has been given powers to entertain suits as regards the enforcement of Fundamental Rights. Any person whose Fundamental Rights have been injured may directly move the Supreme Court for the enforcement of such rights.¹ And the Supreme Court, for the enforcement of Fundamental Rights, possesses the power of issuing directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari.² It may be mentioned here that High Courts in India also possesses

¹ Art. 32(1) of the Constitution.
² Art. 32(2), ibid.
similar jurisdiction with the difference that they may issue writs not only for the enforcement of Fundamental Rights but for other purposes as well. The jurisdiction of High Courts in the matter, then, is wider than that of the Supreme Court.

Before proceeding further we may discuss briefly the nature of these writs.

Habeas Corpus - The writ of Habeas Corpus literally means direction for bringing the body. It is thus a command by a Court on an authority to bring before the Court a person who has been detained by that authority. The Court then can obtain knowledge of the grounds of his detention and may take proper course of action in this regard.

Mandamus - The writ of mandamus is an order by a Court of law commanding an individual person or body of persons to perform properly the duties appertaining to the office held by such a person or body of persons. It thus provides a remedy against illegal executive acts or omissions.

Prohibition - It is a judicial order issued to an inferior court preventing it from exceeding its power or from acting contrary to the principles of natural justice.

Quo Warranto - It is also a writ enquiring into the legality of the claims of a person to an office, franchise or liberty and to prevent him from exercising such an office, etc. if the claims are not well-founded. It may also declare such rights as forfeited in the case of a non-user or mis-user.

Certiorari - This is a writ, issued by a superior court to a subordinate one, calling for the record of the

3. Art. 226, of the Constitution.
proceedings of a case from such subordinate court for the
purpose of reviewing the case and quashing the proceedings
if such subordinate court has gone beyond its authority or
acted in contravention of the principles of natural justice.

Obviously, the basis of these writs mentioned in the
Constitution is the English Common Law writs known as the
'prerogative writs'. These writs in England are 'granted by
the Sovereign as fountain of justice, on the constitutional
ground of inadequacy of ordinary legal remedies'. But it
is clearly implied in the wording of Art. 32(2) that the
powers of the Supreme Court in the matter of issuing writs
are wide enough and not confined merely to prerogative writs.
The Supreme Court is also free to avoid the procedural tech­
nicalities of these writs and may improve upon them if this is
possible without violating the broad and fundamental princi­
ples that regulate the exercise of jurisdiction in the matter
of granting such writs.

In the very first year of the working of the Constitu­
tion petitions for issuing various types of writs came
before the Supreme Court. The principles governing the scope
of this jurisdiction were thus settled soon. The first case
decided by the Supreme Court under Art. 32 was that of A.K.
Gopalan v. the State of Madras. The facts of this well-known
case are as follows.

An application was made to the Supreme Court for a
writ of Habeas Corpus under Art 32(1) against the detention
of the applicant in the Madras jail. The order of detention
was challenged in the petition. Because the Preventive
Detention Act, under which the order had been made,

5. D. Basu - Introduction to the Constitution of India - P.128
6. Hashid Ahmed V. Municipal Board, Kairana, D. Basu, Cases on
the constitution of India (1950-51) P.63
on the Constitution of India - P.293.
construed, it was alleged, Arts. 13, 19, 21 and 22 of the Constitution. The Supreme Court pointed out that S. 14 of the Preventive Detention Act was void as it prevented the court from being informed either by a statement or by evidence, of the substance of the grounds conveyed to the detained person or of any representation made by him against such order. So this section contravened Art. 22(5) of the Constitution according to which the authority detaining a person should communicate to him the grounds of his detention and should afford him the earliest opportunity to make a representation against the order. The majority of the Supreme Court however held that as all other provisions of the Preventive Detention Act barring S. 14 were valid and as S. 14 was severable from the rest of the Act, the detention of the applicant was not illegal. Following the decision, S. 14 was omitted from the Preventive Detention Act, 1950.

The point thus settled in the above-mentioned case is that any law which infringes the right of the Court to exercise its power under Art. 32 is void. The full interpretation regarding the scope of the said Article is obtainable from the decisions rendered by the Supreme Court in several other cases at an early date of its working. The Supreme Court has given a wide interpretation of the Article and has emphasised the fact that the right to move the Supreme Court is itself a Fundamental Right. And the Supreme Court as the guarantor and protector of the Constitution should provide every possible opportunity for approaching the Court. It will not refuse relief under this Article on such considerations as that there is the existence of adequate legal remedy or that some other court might have been moved before. The decision of the Supreme Court in this connection in the

case of Romesh Thappar v. The State of Madras is to be noted. In this case the Advocate-General of Madras contended that the petitioner should, in the first resort, have gone to the High Court of Madras as a matter of orderly procedure. The Supreme Court rejecting the contention held: 11

"Art. 32 provides a "guaranteed" remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right by being included in Part III. This court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights."

The Supreme Court has further laid down that an application under Art. 32 cannot be thrown out simply on the ground that the proper writ or direction has not been prayed for as under Art. 32 the Supreme Court possesses wide jurisdiction in the matter of framing writs to suit the exigencies of particular cases.

In a comparatively recent case the Supreme Court has rejected the contention of non-maintainability of a petition simply because the decisions of the case involved a determination of disputed questions of fact. In the said case it has also been held (on a review of its previous decision) that where declaration and injunction are proper reliefs the Court's powers under Art. 32 are wide enough to do so.

14. In Chiranjitlal v. Union of India it was laid down that a declaration that an impugned Act is invalid and consequential relief by way of injunction are inappropriate for a petition under Art. 32.
As to the question whether a direct approach to the Supreme Court is possible as regards cases on Fundamental Rights which have been raised and lost in a High Court under Art. 226 the Supreme Court has not given any clear-cut opinion. In Aswini Kumar v. Arabinda Bose the Supreme Court declined to express any opinion on the point. In M.K. Gopalan v. The State of M.P. also the Supreme Court did not make any pronouncement upon the correctness of the procedure, although it has observed that it would not encourage, except for good reasons, the practice of direct approach to the Supreme Court in such cases. The Supreme Court, however, has not, so far, refused such a right.

It is clear from the wording of Art. 32 that this Article can be invoked only for the enforcement of Fundamental Rights. And excepting the relief sought under the Writ of Habeas Corpus the rights infringed should be of the petitioner himself and one should not seek to enforce the rights of another. Moreover Art. 32 is not directly concerned with the determination of constitutional validity of a legislative enactment. So in order to make out a case under this Article, it is not enough to show that a particular legislation is beyond the legislative competence of a legislature but that a particular Fundamental Right of the petitioner has been invalidated by the said Act.

The Supreme Court has, clearly enough, given a wide interpretation regarding the scope of Art. 32. It has even reviewed its previous decision in order to procure relief to

19. Ibid.
the aggrieved person as it has been seen in the case of K. Keshum V. The State of Madras, where a point settled in the case of Chiranjit Lal v. the Union of India, has been reversed. The readiness of the Supreme Court to entertain petitions under Art. 32 has become evident from the following opinion of S.R. Das C.J. where he states:

"We are not unmindful of the fact that the view that this Court is bound to entertain a petition under Art. 32 and decide the same on merits may encourage litigants to file many petitions under Art. 32 instead of proceeding by way of a suit. But that consideration cannot, by itself, be a cogent reason for denying the fundamental right of a person to approach this Court for the enforcement of his fundamental rights which may, prima facie, appear to have been infringed. This is corroborated by the large number of petitions entertained by the Supreme Court. During the first decade of the working of the Constitution out of 4069 petitions filed under Art. 32 as many as 3772 petitions were disposed of. Through the exercise of this jurisdiction the Supreme Court has thus provided redress to many people and has helped to fulfill the democratic ideals set forth in the Constitution.

D) The Supreme Court and Art. 143 of the Constitution.

The Supreme Court, we have seen in the section on it, may give advisory opinion on any question of law or fact of public importance submitted to it by the President of India under Art. 143. Opinion sought under Art. 143(1), it may be

21. The figures are provided in the Journal of the Indian Law Institute, op. cit., p. 160 XXV.
repeated, may be given at the discretion of the Supreme Court while references under Art. 143(2) are to be answered compulsorily. Since the inauguration of the Constitution reference under Art. 143(1) has been made three times by the President and the Supreme Court has expressed its opinion on the questions referred to on all the three cases.

The first reference to the Supreme Court by the President was made in 1951 and it was regarding the validity of a number of legislations (enacted by the Indian Legislature in three different periods of constitutional history). The following questions were put before the Supreme Court for its consideration:

"1) Was section 7 of the Delhi Laws Act, 1912, or any of the provisions thereof and in what particular or particulars or to what extent ultra vires the Legislature which passed the said Act?

"ii) Was the Ajmer - Marwar (Extension of Laws) Act 1947 or any of the provisions thereof and in what particular or particulars or to what extent ultra vires the Legislature which passed the said Act?

"iii) Is section 2 of the Part C states (Laws) Act, 1950, or any of the provisions thereof and in what particular or particulars or to what extent ultra vires the Parliament?"

1. Recently, on March 26, 1964, another reference has been made to the Supreme Court for its opinion by the President regarding the conflict of powers and jurisdictions of the State Legislature and High Court in Uttar Pradesh. This is now under the consideration of the Supreme Court. (vide Amrita Bazar Patrika, March 27, 1964).

The above-mentioned legislative provisions may now be explained.

Section 7 of the Delhi Laws Act, 1912 passed by the Governor-General in Council, conferred power on the Provincial Government to extend by notification to the then Province of Delhi or any part thereof, with such restriction and modification as it thought fit, any enactment which was in force in any part of British India at the date of such notification.

Section 2 of Ajmer-Merwara Act of 1947 passed by the Dominion Legislature gave the Indian Central Government same powers of extending a law in force at the date in any other Province to the Province of Ajmer-Merwara.

Section 2 of Part C States Act, passed by the Indian Parliament is of the same nature with one exception. Under this provision the Central Government was empowered to extend by notification to a Part C State with modifications and restrictions if necessary, any law which was in force at that time in any Part A State. In addition to that it was vested with the power of repealing or amending any corresponding law (other than a Central Act) which was for the time being applicable to that Part C State.

The points to be settled were, therefore, whether the Indian Legislature could delegate to the executive the power of extending a law to an extraneous area and of making necessary modifications and restrictions in it. And whether consequentially the power of repealing and amending any law in force at the time could be given to the executive.
The necessity of referring this question arose because the Federal Court of India (the predecessor of the Supreme Court) in their decision on Jatindra Nath Gupta v. the Province of Bihar declared that proviso to sub section (3) of section (1) of the Bihar Maintenance of Public Order was ultra vires of the Bihar Legislature. This was so because it constituted an invalid delegation of legislative power.

The Supreme Court was not unanimous in its opinion regarding the points. Although most of the judges agreed to the point that essential legislative powers could not be delegated there was difference of opinion as to what constituted such delegation. Again as to whether India should follow the British or American practice regarding the matter of delegation opinions differed. One of the dissenting judges observed that the American doctrine against the delegation of powers should be followed in India as the constitutional position of the Indian Legislature was akin to that of the American and not of the British. It was also contended that the Constitution expressly mentioned the cases where delegation might be made. As for instance, under the Constitution as originally enacted, Art. 243 empowered the President to make regulations for the peace, order and good government of territories enumerated in Part D of the First Schedule. Art. 140 of the Constitution likewise enables Parliament to confer ancillary powers on the Supreme Court. Under Art. 353(8) while an emergency under Art. 352 is in operation Parliament may make laws imposing duties and conferring powers upon the officers and authorities of the Union even as

4. Ibid.
respects matters not within the Union List. Also in the case of breakdown of the constitutional machinery in a State, under Art. 357(1)(A) Parliament may confer on the President the power of the Legislature of that State to make laws. So beyond the cases of express provision in the Constitution the delegation of powers by a legislature is not permissible. Moreover, it was admitted on all hands, a legislature could not efface itself. According to Kania C.J., permission by the Central Legislature to apply any law passed by the Provincial Legislatures constituted such an effacement. The Central Legislature abdicated its functions to that extent and therefore such an act was invalid.

The majority of the judges, on the other hand, contended that the Indian Constitution is based on the English system of 'fusion of legislative and executive powers and not on the American doctrine of separation of powers'. In the words of Das J., 'short of self-effacement, the legislative power may be as freely and widely delegated as the Dominion Legislature, like the British Parliament, may think fit and choose.' The Legislature should not abdicate or give up its control over the subordinate authority to whom it delegated its law-making powers. Within such limitation there could be no objection to delegation. The judgment of the Privy Council in Reen v. Bureh was referred to by the Supreme Court where the Privy Council accepted such powers as within the normal ambit of the Indian Legislature, although the term delegation was avoided and the term conditional legislation was used, the

6. Ibid., p. 370
8. Ibid., p. 362
latter having the meaning that ancillary powers are entrusted by the legislature to other authorities to provide details consistent with the parent act.

So as regards the delegation to the executive of powers of extension of laws with necessary restrictions and modifications, the Supreme Court by majority (consisting of Fazl Ali, Patanjali Sastri, Mukherjee, Das and Bose J.J.) held:

1) that section 7 of the Delhi Laws Act, 1912 and section 2 of the Ajmer Merwara (Extension of Laws) Act 1947 were wholly intravires; and

2) that the first portion of section 2 of the Part C States (Laws) Act, 1950 which empowered the Central Government to extend to any Part C State or to any part of such a State with such modifications and restrictions as it deemed fit, any enactment which was in force in Part A State was intravires.

As regards the second question also the Supreme Court, by another majority held that that portion of section 2 of Part C States (Laws) Act, 1950 which empowered the Central Government to make provision in any enactment extended to a Part C State for repeal or amendment of any law (other than a Central Act) which was for the time being applicable to that Part C State was ultra vires of the Indian Parliament which passed that Act.

The principle settled thus is that the Central Legislature in India can delegate legislative powers to the

10. In re the Delhi Laws Act, 1912, D. Basu, op. cit., p. 376
executive. The point raised by Kania C.J in this case that here, the Central Legislature affixed itself by delegating to the executive the power of adopting and modifying the laws made not by itself but by another legislature is of importance. But with due deference to his Lordship it may be submitted that this argument does not hold against the system of delegation of legislative powers in general.

These two majority views have been later followed in principle. And Parliament on the basis of this opinion, passed the Part C States (Miscellaneous Laws Repealing) bill.

The next case of reference to the Supreme Court for its advisory opinion arose out of the Kerala Education Bill. The said bill, after being passed by the Kerala Legislative Assembly, was presented to the Governor who reserved it under Art. 200 of the Constitution for the consideration of the President. The bill purported to impose considerable State Control over the management of educational institutions in the State. The bill was wholly within State jurisdiction; but the nature and extent of control to be exercised by the State under the proposed legislation was apprehended to invade the Fundamental Rights guaranteed by the Constitution to the minorities. So instead of giving an outright assent the President sought to remove the doubts as to the Constitutional validity of certain clauses of the bill. The following questions were referred to the Supreme Court by the President:

1) Does sub clause (5) of cl. 3 of the Kerala Education Bill read with cl. 36 thereof, or any of the provisions of the said sub clause offend Art. 14 of the Constitution in any particulars or to any extent?

ii) Does sub clause (5) of cl. 3, sub-cl. (3) of clause 8 and clauses 9 to 13 of the Kerala Education Bill or any provisions thereof, offend clause (1) of Art. 30 of the Constitution in any particulars or to any extent?

"iii) Does clause 15 of the Kerala Education Bill or any provisions thereof offend Art. 14 of the Constitution in any particulars or to any extent?

"iv) Does clause 33 of the Kerala Education Bill or any provision thereof offend Art. 226 of the Constitution in any particulars or to any extent?"

A consideration of the relevant provisions of the said bill and of the Constitution is now necessary. The bill, as its title showed, wanted to provide for the better organisation and development of educational institutions. The first question related to sub clause (5) of cl. 3 and clause 36 of the bill. Clause 3 of the bill dealt with the establishment and recognition of schools. Sub. cl. (5) of cl. 3 laid down that after the commencement of this Act the establishment of any new school or the opening of any higher class in a private school was to be governed in accordance with the provisions of the Act, otherwise they won't be recognised by the Government.

Clause 36 of the said bill empowered Government to exercise control in respect of many minute details of administration of educational institutions. It conferred powers on the Government to make rules for carrying into effect the provisions of the bill and, in particular, for the purpose of establishment and maintenance of schools, the giving of grants and aids to private schools, the grant of
recognition to private schools, the levy and collection of fees in aided schools, regulating rates of fees in recognised schools, prescribing the methods in which accounts registers and records were to be maintained, submission of reports, returns and accounts, fixing the standard of education and courses of study and determining some other specified matters.

The second question besides referring to sub clause (5) of cl. 3, related to sub cl. (3) of cl. 8 and clauses 9 to 13 of the bill. Clause 8(3) of the bill required that in aided schools all fees and dues collected from the students should be made over to the Government, while cl. 9 made it obligatory on the part of the Government to make all payments to the teaching and non-teaching staff of the aided schools. According to clause 10 Government was to prescribe qualifications to be possessed by persons for appointment as teachers in Government schools according to the procedure laid down in cl. 11. Cl. 12 specified the conditions of service for teachers of the aided schools. The scale of pay applicable to the teachers of the Government schools was also to apply to all teachers of the aided schools. No teacher of the aided school was to be dismissed, removed, reduced in rank or suspended by the manager without previous sanction of the authorised officer. Clauses 14 and 20, though not specially mentioned in the reference, are also notable in this connection. Under cl. 14, the Government could take over the management of an aided school for a maximum period of five years if the duties imposed by the bill were neglected by its manager. The Government might even acquire such an institution if it was thought necessary in the public interest. According to cl. 20 no fee was payable by any pupil for any tuition in the primary classes in any Government or private school.
Cl. 15, referred to in the third question, gave power to the Government to acquire any type of school if it was satisfied that for standardising general education in the State or for effectively managing aided educational institutions or for bringing education in its direct control in the public interest, such acquisition was necessary. However, no proposal for taking over of any school could be made unless supported by a resolution of the Legislative Assembly. Provision was to be made for compensation also.

In the last reference the validity of cl. 33 of the bill was questioned. According to it notwithstanding anything contained in the code of Civil Procedure 1908, or in any other law for the time being in force no court was to grant any temporary injunction or make any interim order restraining any proceedings which is being or about to be taken under the bill.

The Articles of the Constitution which were thought to have been affected by these provisions were 14, 30(1) and 226. We may also consider these.

Art. 14 of the Constitution lays down that the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India.

Art. 30(1) guarantees the rights of the minorities to 'establish and administer educational institutions of their choice.'

Art. 226 gives the High Courts the power of issuing writs or directions in the nature of habeas corpus or mandamus, prohibition, quo warranto or certiorari for the enforcement of Fundamental Rights or for any other purpose.
The Supreme Court considered question no. 1 and question no. 3 together as both these questions dealt with the same problem - the problem of violation of Art. 14 of the Constitution. The learned counsel appearing for the persons and institutions contesting the constitutional validity of the bill made the submission that cl. 3 (5) gave the government 'an unguided, uncontrolled and uncannised power' which might subject certain persons and institutions to discriminatory treatment. The Supreme Court held that if in fact any discrimination was to be found that would be against the policy and principle deducible from the bill. In such a case the Court would have to take action against the discriminatory action of the Government and not against the bill. As regards the acquisition by the Government of educational institutions the Bill fixed up certain principles as standardisation of education, etc. Moreover, this could not be carried into practice unless supported by a resolution of the Legislative Assembly of the State. This proviso, according to the Supreme Court, 'clearly indicates that power cannot be exercised by the Government at its whim or pleasure.'

So with regard to these two questions it was decided that these provisions of the Bill did not offend Art. 14 of the Constitution. As regards question no. 2 it was contended that the rights of the minorities to establish and administer their own institutions under Art. 30(1) were practically taken away by the bill. Because the rights of administration of an educational institution consisted in the powers of appointment, control and dismissal of teachers and other members of the staff.

13. Ibid, p.975
15. Ibid, p.981
In order to obtain aid from the State funds an educational institution was to submit to the conditions laid down in clauses 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15 and 20 of the bill.\textsuperscript{16}

The Anglo-Indian schools pointed out that they were entitled to grants for a period of ten years from the commencement of the Constitution under Art. 337 of the Constitution unconditionally, excepting that mentioned in proviso (2) to Art. 337.

The Supreme Court held\textsuperscript{17} that cl. 3(5) Cl. 8(3), clauses 9 to 13 did offend Art. 30(1) of the Constitution so far as the Anglo-Indian Community was concerned. As regards other minorities not entitled to such aid under any provision of the Constitution and the Anglo-Indian Community in so far as they were receiving aid in excess of their dues under Art. 337, clauses 8(3) and 9 to 13 might be regarded as permissible regulation and so not inconsistent with Art. 30(1) of the Constitution. But cl. 3(5) which made the new schools to be established after the commencement of the bill subject to cl. 20 was difficult to be treated as such. Because there was no provision for counter balancing the loss of fees which would be sustained by these institutions if cl. 20 of the bill came into force. The Supreme Court emphasised that the Constitution gave certain cherished rights to the minorities and it was the sacred duty of the Supreme Court to honour these Fundamental Rights of the minorities. So cl. 3(5) of the bill, in so far as it made the new schools subject to cl. 20, was held to offend Art. 30(1).

As regards the last question, i.e., whether cl. 33

17. Ibid, pp. 935-86
of the bill offended Art. 226 of the Constitution the Counsel for the State of Kerala contended that this clause could not refer to the provisions of the Constitution. It restricted the power of the Courts in the matter of granting any injunction or order restraining any proceedings to be taken under the bill 'notwithstanding any law for the time being in force.' This could not but refer to ordinary laws only as it would be inapt to speak of the Constitution as a "law for the time being in force." The Supreme Court agreed to this contention and observed that it was subject to Art. 226 of the Constitution.\(^\text{18}\)

The next reference made to the Supreme Court under Art. 143(1) was in respect of implementation of the Indo-Pak Agreement relating to the Berubari Union and certain enclaves of India and Pakistan.

Ever since the formation of Pakistan Berubari has formed part of the Indian territory. The question of Berubari Union was raised for the first time by the Pakistan Government in 1952 and the dispute remained alive till 1958. Again certain portions of the territory of the former State of Cooch Behar became after the partition enclaves in Pakistan. Similarly, certain Pakistani enclaves were in India and so the question of their exchange arose. In September, 1958 the Prime Ministers of India and Pakistan entered into an agreement for resolving Indo-Pakistan Border dispute in which among other things there was proposal for transferring certain portions of the Berubari Union to the State of Pakistan and the exchange of certain enclaves between India and

\(^\text{18}\) In re Kerala Education Bill, A.I.R. 1958, p.937
Pakistan. This agreement caused serious dissension and apart from moral and political grounds, the validity of cession of a portion of territory of the Indian Union was challenged on constitutional grounds. So the President thought it expedient to refer the matter to the Supreme Court and ascertain its opinion thereon. The following questions were put to the Supreme Court:19

"i) Is any legislative action necessary for the implementation of the Agreement relating to Berubari Onion?

"ii) If so, is a law of Parliament relatable to Art. 3 of the Constitution sufficient for the purpose or is an amendment of the Constitution in accordance with Art. 368 of the Constitution necessary, in addition or in the alternative?

"iii) Is a law of Parliament relatable to Art. 3 of the Constitution sufficient for the implementation of the Agreement relating to the exchange of enclaves or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary for the purpose, in addition or in the alternative?"

Before answering the questions the Supreme Court considered the validity of the cession of territory. Though fully conscious of 'great hardship' involved in such cession from the human point of view the Supreme Court observed: in international law two of the essential attributes of sovereignty are the power to acquire foreign territory as well as the power to cede national territory in favour.

19. In Re Berubari Union and Exchange of Enclaves - Supreme Court Reports, Oct. 1960, p. 250
of a foreign State. It was mentioned that this power
would have to be exercised in the manner contemplated by the
Constitution and subject to the limitations imposed by it.
So, whether the treaty made could be implemented by ordinary
legislation or by constitutional amendment would naturally
derpend on the provisions of the Constitution itself.

As regards the first question the Supreme Court answered
that a legislation was necessary to implement the agreement.

As regards the second and third questions the Supreme
Court held that it would not be competent for Parliament
to make a law relatable to Art. 3 of the Constitution for
the purpose of implementing the agreement. Art. 3, we may
recapitulate, empowers Parliament to pass laws in order to
form a new State by territorial adjustments; to increase
or diminish the area of a State; to alter the name and
boundary of a State and so on. The Attorney General for
India contended that in the power of diminishing the area of
a State was included the power of cession of a portion of
national territory in favour of a foreign country. But
the Supreme Court held that the diminution of territory of
a State did not mean that the detached area would cease to
be a part of the territory of India. "It would be unduly
straining," observed the Supreme Court, "the language of
Art. 3(c) to hold that by implication it provides for cases
of cession of a part of national territory." So it was

21. Ibid.
22. Ibid., p. 295
23. Ibid., pp. 295 - 96
24. Ibid., p. 291
25. Ibid., p. 291
concluded that as the agreement amounted to a cession of a portion of the territory of India it would involve the amendment of Art. 1 and of the relevant part of the First Schedule to the Constitution. It was however pointed out that Parliament might pass a law amending Art. 3 so as to cover cases of cession of the territory of India and thereafter a legislation under the amended Art. 3 would be possible to implement the agreement.26

Following the opinion rendered by the Supreme Court the Constitution Ninth Amendment Act was passed incorporating the necessary changes in the First Schedule.

Thus important legal questions have been settled by the Supreme Court from time to time with considerable restraint and ability. The reference of Kerala Education Bill caused much discontent in Kerala because it was felt that the President should have given to it an outright assent.

However, apart from the objections to the system of reservation of State bills in general, securing of the opinion of the Supreme Court is not open to any further objections. On the contrary it may serve as an important precedent. Because the President's power of consideration of State bills constitutes one of the avenues of stepping into the sphere of the State by the Centre, and it is the Supreme Court which is the impartial arbiter in case of any difference of opinion arising between the Union and the States. Admitting all these facts we should, however, reiterate the conclusion - the conclusion that has been arrived at earlier - that it is not desirable that the Supreme Court should perform the function of rendering advisory opinion. So it is heartening to note that the references under this section have not been very frequent.


In the foregoing sections we have made a survey of Indian Federalism in its various aspects. We may now sum up our conclusions regarding its true nature. This point, again, is not free from controversy. One group of political thinkers headed by Prof. Wheare regards the Indian Constitution as 'quasi-federal,' while there are others including Dr. Ambedkar who have unhesitatingly expressed the view that it is a federal Constitution. According to Prof. Wheare, the new Constitution has established 'a system of government which is at most quasi-federal, almost devolutionary in character, a unitary state with subsidiary federal features rather than a federal state with subsidiary unitary features.' On the other hand, Dr. Ambedkar has emphasised that the chief mark of federalism - the partition of the legislative and executive authority between the Centre and the Units by the Constitution itself - has been unmistakably incorporated in the body of the Indian Constitution.

On the face of it, the essential marks of federalism are present in the Constitution. The co-existence of two sets of government, their powers being clearly demarcated by a supreme and written Constitution which, again, is rigid in character, the presence of an independent judiciary

to enforce the Constitution—all these characteristics of the federal structure are to be found in the Indian Constitution. But applying these tests more closely, we have to admit that we do also come across various modifications of the federal principle. This has been noticed in the preceding sections of this chapter; and in whichever aspect the problem of Union-State relationship has been dealt with, deviations from the federal principle and introduction into the Constitution of centralism of a marked type (not only during the periods of emergency but also during ordinary times) have been evident.

To begin with, everybody agrees that when the emergency provisions operate India may be transformed virtually into a unitary state. Even Dr. Ambedkar, we have been, said that the Constitution was so designed as to make it work in normal times as a federal system while in times of war as if it was a unitary system. Usefulness or justification of incorporating these provisions is there, but that does not alter the fact that these provisions are derogatory to the federal principle.

It may, however, be contended that everywhere there is some amount of concentration of power in the hands of the centre during times of emergency and that the character of a constitution should not be judged by its abnormal features alone. Nevertheless, the fact remains that even in normal times, the Centre has been empowered in the Indian Constitution to encroach upon the States' sphere in various cases and these offend against the federal principle. These things such as a long list of powers given to the Centre or the vesting of residuary powers in the Centre do not indeed go against the federal principle although they do indicate
the existence of a strong Centre. Because the essence of federalism, as pointed out earlier, is this that each of the two sets of government should remain independent of the other within its own sphere. It does not matter whether the sphere allocated to either of the governments is large or small; that depends upon the peculiarities of the circumstances and environments in which the allocation is made. But, in the Indian Constitution even within the field reserved for the States, there is scope for Central intervention in normal times even. Whether these provisions are justified or not is a separate question; but it is undeniable that they hamper federalism.

We may now consider, at the risk of being reiterative, the scope of encroachment by the Centre upon the State field in certain important respects. First of all, there is no guarantee of the territorial integrity of a State as we come across in such constitutions as of the U.S.A. or Switzerland. On the other hand, the Constitution empowers Parliament to change the shape of or abolish a State or create a new one in its place even without the consent of the States. Perhaps this provision has facilitated the reorganisation of the States. And this was necessary in view of the original disparity in the status of our units which was a legacy of the British rule. But that is another matter. The provision, as such, is certainly against the federal principle.

In the next place, the existence of certain provisions in the legislative field marks definite deviations from the federal principle. These provisions relate to the power of the President to disallow State bills, the power of Parliament to legislate on a State subject if the Council of States
resolves it as necessary in the national interest and the
power of Parliament regarding implementation of treaties,
etc. Art. 252 may be left out of account because under it
the power of legislation in the State field is to be
exercised at the request of States themselves.

In the administrative sphere the most conspicuous
development from the federal principle is the power of the
Union Government to give directions to the States in
various cases non-compliance with which may result in the
application of the emergency provisions under Art. 356.
Provision of all India services also entails a measure
of Central control in this sphere.

Another thing is also worth noticing. The Governor,
who is the executive head of the State, is to be appointed
by the President and is to hold office during the pleasure
of the President. It may however, be contended that the
Governor is the nominal executive head and in a Parliamentary
democracy there is no possibility of his actual participa-
tion in the administration of the State. It is interesting
to note in this connection that even Hamilton, who was a
staunch 'federalist', in a paper communicated to James
Madison (about the constitution which he would have liked
for the U.S.), proposed that the Governor of each State
'shall be appointed under the authority of the United States'
and 'shall have a right to negative all laws about to be
passed in the State of which he shall be the Governor.'
Although these things were not incorporated in the Consti-
tution of the U.S. this paper shows that even Hamilton
did not consider that these things would go against the

federal idea. So it may be argued that it does not matter whether the appointment and removal of the Governors remain in the hands of the Centre or of the States. It is true that ordinarily the Governor is to act as the nominal executive head basing his actions on the advice of the ministers. And the Constitution mentions very few instances where the Governor can exercise his discretion. But still then in two important cases not explicitly stated in the Constitution, occasionally it may be possible for the Governor to exercise his discretion. For instance, while presenting a report to the President under Art. 356 that the Government cannot be carried on in accordance with the provisions of the Constitution the Governor may sometimes work against the wishes of the ministry and thus act in his discretion. It is, again, not at all improbable that his discretion will be similarly exercised in the case of reservation of a bill for the consideration of the President. As the Governor holds office during the pleasure of the President, it is obvious that while acting in his discretion the Governor will be under the control of the President.

To these things the strong financial position of the Centre is to be added. Although the Constitution itself makes provision for the allocation of resources between the Centre and the States and financial adjustments are to be made on the basis of recommendations of a Finance Commission, the whole scheme makes the States dependent upon the Centre for its resources.

So, there are many modifications of the federal principle in the Constitution of India. In view of these modifications it has been said that India is 'a unitary state with subsidiary federal features.' This seems a little exaggerated but the statement is not altogether
exceptionable. Prof. Alexandrowicz objects to the use
of the term 'quasifederation' since 'the word 'quasi' hints at
a deviation from the federal principle without indicating
what kind of special position a particular quasi-federation
occupies between a unitary state and a federation proper.

It is true that the term 'quasi-federal' is very elastic; it
is equally applicable to extremely weak federations and to
the countries where there are only minor departures from
the federal principle. But even if we hesitate to use the term
quasi-federal in the case of India the fact remains that
it is difficult to describe India as federal without adding
a 'qualifying phrase.' Even those who would assert that
India is a federation cannot altogether ignore this aspect of
the matter. As for instance, K. Santhanam who says that
India is a federation in which the status of the units
is to some extent equal to that of the Federation, would
term it a 'Paramount Federation' because in some other respects,
the units are definitely inferior to the Centre.

As it has been rightly observed that to say that
the Indian Constitution is not fully federal is not to
criticise it adversely. The nature of a particular federa-
tion can be properly adjudged if it is viewed in its historical
and political background. We should take into account the
long process of constitutional evolution through which a
highly centralised unitary state has been transformed into
a federal one in India. Besides the unitary traditions the
peculiar environment in which the Constitution was framed has
left its mark on it. As a learned writer puts it, "...... our
constitutionalists had perforce to evolve a Constitution which
though federal in general character had necessarily to have
also the strength of a unitary Government to control and
shape the diverse forces which may at any time disrupt the

5. K. Santhanam - Union-State Relations in India - Pages 8-12
6. Alan Gledhill, The Republic of India, p.91
unity of India. The worth of a constitution does not depend merely upon its rigid adherence to a particular norm but in its workability and adaptability to difficult circumstances. This has been admitted by Prof. Wheare also when he says: "The framers of the Indian Constitution may have done well in not following slavishly any existing federal Constitution. They have chosen rather to make use of such elements in federal Constitutions as they thought likely to be of value to them."

One thing however, is to be considered. The Constitution was drawn up at a time when a single political party commanded the confidence of almost the entire country. The possibility of the gradual growth of different political parties in the country was not fully taken into account. So long as the same political party is in power in the Centre and the States, strong centralised government will not be very difficult to work. But if different parties are in the Centre and the States, some amount of friction is bound to arise - especially so, if these parties are such as to hold fundamentally opposing viewpoints regarding basic principles. The Constitution in such cases enables the Centre to issue directives to the States and, in the event of non-compliance with such directives, to apply Art. 365. But frequent recourse to such a measure will not be a very healthy sign. Only the future working of the Constitution will show how this difficult problem will be solved. In view of all these things, probably it would have been better to provide the States with a slightly greater degree of autonomy as it would have minimised friction.

Actually, however, the rigours of constitutional provisions may be modified through constitutional practice and much depends upon the spirit of working of the Constitution. For instance the extra-ordinary powers under the emergency provisions have so far been used with restraint and up to the present moment Art. 365 has not been applied. But in the normal process of functioning both the centripetal and centrifugal forces have been in operation since the inauguration of the Constitution. Among the centripetal forces, besides the legacies of a unitary government, mention need be made, in the first place, of the absence of any stable opposition and the dominance of a single political party both in the Centre and in the States with a few exceptions. Secondly, the centralist tendencies to a great extent may be ascribed to the discipline and uniformity which a common plan has progressively imposed. The Planning Commission has been termed by a learned writer a new Leviathan which has pounced upon many spheres assigned exclusively to the States. And the role of financial assistance rendered to the States by the Centre (specially under the Five-Year Plans) as a major controlling instrument is no less important. A common system of audit and accounts in the Centre and in the States, single Election Commission for controlling all elections to Parliament and State Legislatures strengthen the Centre.

On the other side, the regional forces have been at the same time operating throughout this period although in these recent months because of the cementing influence of a national calamity like the Chinese Aggression they have become

less felt. "Regionalism in India", it has been well said, “takes on many aspects including religion, race, language, caste and political and economic power". The passionate outburst of these forces leading towards disintegration has induced many thinkers to conclude that India needs a strong unitary government in order to combat these forces. "The nationalist in a hurry", writes Selig S. Harrison, "more and more comes to believe that he cannot tolerate the political luxury of centrifugal stress and strain." But in view of the vastness of our Country and the diverse nature of interests of the communities inhabiting therein a unitary constitution will hardly prove to be a workable solution.

So, although the Constitution making has been completed in the year 1949, the actual ‘federation-making’, to use the expression of Prof. Alexandrowicz, is being still continued. And a reversion in future of the present tendency towards centralizing is not altogether unlikely. Only the dynamics of political forces will show which course will finally be taken—whether that of greater State autonomy or lesser.

12. Nehar Chand Mahajan - "A Plan for a Strong Centre" - Article in spirit of our Time, P. 33