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COMMISSION
ON
CENTRE-STATE RELATIONS
REPORT
VOLUME - II
CONSTITUTIONAL GOVERNANCE
AND THE MANAGEMENT OF
CENTRE-STATE RELATIONS

MARCH 2010



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REPORT

VOLUME II

**CONSTITUTIONAL GOVERNANCE
AND THE MANAGEMENT OF
CENTRE-STATE RELATIONS**

MARCH 2010

THE COMMISSION

CHAIRPERSON

Shri Justice Madan Mohan Punchhi (Retd.)

Former Chief Justice of India

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Shri Dharendra Singh

Former Secretary to the
Government of India

Shri Vinod Kumar Duggal

Former Secretary to the
Government of India

Dr. N.R. Madhava Menon

Former Director,
National Judicial Academy, Bhopal, and
National Law School of India, Bangalore

Shri Vijay Shanker

Former Director,
Central Bureau of Investigation,
Government of India

Dr. Amaresh Bagchi was a Member of the Commission from 04.07.2007 to 20.02.2008, the date he unfortunately passed away. The Commission expresses its deep gratitude to late Dr. Bagchi for his signal contribution during his tenure as a Member.

SECRETARIES

Shri Amitabha Pande

(17.07.2007 - 31.05.2008)

Shri Ravi Dhingra

(25.06.2008 - 31.03.2009)

Shri Mukul Joshi

(01.04.2009 - 31.03.2010)

The Commission on Centre-State Relations presents its Report to the Government of India.



Justice Madan Mohan Punchhi

Chairman



Dhirendra Singh
Member



Vinod Kumar Duggal
Member



Dr. N.R. Madhava Menon
Member



Vijay Shanker
Member

New Delhi
31 March, 2010

INDEX

Chapter No.	Subject	Page Nos.
1.	INTRODUCTION	1
2.	ISSUES AND CONCERNS IN INTERGOVERNMENTAL RELATIONS	9
3.	LEGISLATIVE RELATIONS BETWEEN THE UNION AND STATES	17
4.	ROLE OF GOVERNOR AND CENTRE-STATE RELATIONS	53
5.	EMERGENCY PROVISIONS AND CONSTITUTIONAL GOVERNANCE	89
6.	ADMINISTRATIVE RELATIONS AND CENTRE-STATE CO-ORDINATION	129
7.	SMALLER STATES AND BALANCE OF POWER IN FEDERAL GOVERNANCE	151
8.	DECENTRALIZED GOVERNANCE AND INTERGOVERNMENTAL RELATIONS	171
9.	OBLIGATIONS OF STATES AND UNION IN RESPECT OF SUBORDINATE COURTS	181
10.	INTERGOVERNMENTAL RELATIONS REVISITED : TOWARDS A FRESH BALANCE OF POWER	195
11.	SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS	215

CHAPTER 1
INTRODUCTION

CONTENTS

Sections/Headings	Para Nos.	Page Nos.
1.1 The Mandate	1.1.01-1.1.02	3
1.2 The Appraisal of the Existing Framework of Centre-State Relations	1.2.01-1.2.17	4-7
1.3 Concluding Remarks	1.3.01-1.3.04	7-8

1

INTRODUCTION

1.1 The Mandate

1.1.01 The broad mandate of the Commission is "to review the existing arrangements between the Union and States as per the Constitution of India in regard to powers, functions and responsibilities in all spheres including legislative relations, administrative relations, role of Governors, emergency provisions, financial relations, economic and social planning, Panchayati Raj institutions, sharing of resources, including inter-state river water and recommend such changes as may be appropriate keeping in view the practical difficulties". In doing so the Commission is asked to keep in view the social and economic developments that have taken place over the years and the need to address the growing challenges of ensuring good governance and of availing emerging opportunities for sustained and rapid economic growth. The recommendations are to be directed at promoting the welfare of the people and towards alleviating poverty and illiteracy whilst strengthening the unity and integrity of the country. In short, the mandate of the Commission is to recommend steps to promote good governance for improving the quality of life of the people within the broad framework of the Constitution and in the context of socio-political developments overtaking the country in quick succession.

1.1.02 Besides the above broad mandate, there are a dozen specific terms of reference on subjects which throw up continuing challenges in Centre-State relations and good governance. The Commission grouped those items into six convenient themes and have devoted independent volumes on each theme analyzing its concerns and making specific sectoral recommendations on them. In view of this approach, this volume will limit itself to looking at the original scheme of Centre-State relations, examine the friction points which arose in the working of the scheme and how they were addressed, study the issues which continue to disturb smooth relations between the Union and the States and finally review the adequacy or otherwise of the Constitutional arrangements for promoting social welfare and good governance.

1.2 An Appraisal of the Existing Framework of Centre-State Relations

1.2.01 The Constitutional scheme of governance at the Centre and in the States is provided in Part XI (Articles 245 to 263), and Part XII (Articles 264 to 298), with few related provisions on trade and Commerce in Part XIII and on All India Services in Part XIV. Broadly it deals with three types of relations namely (a) Legislative Relations (Articles 245-255); (b) Administrative Relations (Articles 256-263); and (c) Financial Relations (Articles 264-293). The Report is prepared following this scheme and analyzing the issues and challenges under each of the three types of Centre-State relations.

1.2.02 The Scheme on legislative relations is largely based on the federal principle of "subsidiarity" under which what can best be administered from the Centre are kept with the Union (Union List) and those which are more of regional or local interest are assigned to the Units (State List) with some items of common concern in what is called in the Concurrent List. Part XI distributes the legislative powers between the Union and the States. The subject-matter of legislation are listed rather exhaustively in the three Lists given in the Seventh Schedule. Constitution gives autonomy to Centre and States within their respective fields. Parliament may make laws for the whole or any part of the territory of India and the State Legislature for the whole or any part of that State. However, applying the doctrine of territorial nexus, State laws having extra-territorial operation have been held valid by the court. There are several judicial doctrines evolved by the Supreme Court to interpret possible overlapping of jurisdictions in the matter of legislative powers of Centre and States. By and large the scheme worked reasonably well, though States have complained about the Union transferring items from the State List to the Concurrent List without adequate consultation.

1.2.03 In the event of a conflict between a Union law or State law, Article 254 stipulates that the Union law will prevail irrespective of whether the Union law is enacted prior to the State law or subsequent to the State law. This means in effect that Parliament can repeal a State law at any time with respect to a matter in the Concurrent List, even if made with consent of President. Parliamentary supremacy in matters falling under List I and III is secured by the Constitution. Furthermore residuary powers of legislation is exclusively with the Union (Article 248).

1.2.04 The supremacy of the Union in legislative matters is further clear from the extent of powers the Union enjoys to legislate on subjects in the State List under certain circumstances. These include:

- (i) Power of Parliament to legislate in national interest under a Resolution of the Upper House (Article 249)
- (ii) Power of Parliament to legislate during operation of Emergency (Article 250)
- (iii) Parliament's power to legislate with the consent of States (Article 252)
- (iv) Legislation for giving effect to international treaties and agreements (Article 253)
- (v) Power to legislate in case of failure of Constitutional machinery in States (Article 356)

1.2.05 Again, another issue in respect of legislative relations which caused friction between Centre and States is the power of Governor to reserve any Bill passed by the State Assembly for consideration of the President, sometimes for an indefinite period! A law adopted, sometimes more than once, by the Assembly can therefore become a law in the State only if assented by the President (Articles 200, 201).

1.2.06 It is more in the sphere of administrative relations; the scheme was put to test on several occasions. The scheme is aimed to facilitate implementation of Union laws in States, achieving co-ordination for administrative efficiency, resolving disputes when they arise and to ensure that the Union intervenes whenever a State is threatened by external aggression or internal disturbance.

1.2.07 The division of executive power is co-extensive with the division of legislative power of both the Governments (Article 73 and 162).

1.2.08 The issue of Centre-State co-ordination in administrative matters has been a complex issue though the Constitution did provide some mechanisms. For example, by agreement or legislation (Article 258) delegation of administrative powers is provided for. Greater inter-state co-ordination is also sought to be achieved through All India Services the control on which vests jointly on Union and States.

1.2.09 Article 257(1) says that the executive power of the State shall be so exercised as not to impede or prejudice the exercise of executive power of the Union. The Centre is empowered to give directions to States in this regard. If directions are not complied, emergency provisions may be invoked by the Centre. The Constitution thus provides a coercive sanction against any disobedience of the Central directions by the States.

1.2.10 On conflict resolution outside courts, the Constitution envisaged some administrative and quasi-judicial arrangements which seem to have made little impact in smoothening relations. Article 263 provides for an Inter-State Council which was invoked only in 1990 after the Sarkaria Commission recommended the same. It is supposed to be a body for intergovernmental consultation and co-operation. It is to inquire and advise on disputes between States, investigate and discuss subjects of common interest and make recommendations on any subject for better co-ordination and action. It, however, meets rarely and has not been able to work to its full potential.

1.2.11 The other body for conflict management is what is provided for in Article 262 for the resolution of inter-state water disputes which also failed to contain many disputes which reached it despite repeated hearings and decisions.

1.2.12 In short, the survey of existing arrangements on administrative relations leaves one to wonder whether there are gaps and inadequacies in the matter of administrative co-ordination and conflict management. Informal methods outside the Constitutional scheme are often pressed into service to keep governance going despite the shortcomings.

1.2.13 Another issue which opened up a set of administrative problems is about the role of Centre in accomplishing effective decentralization under the 73rd and 74th Amendments to the Constitution. The States which are supposed to make law in this regard have been slow in the matter of empowering Panchayats with functions, funds and functionaries. Meanwhile through Court interventions and otherwise, Panchayats have elected representatives who are not able to organize governance at local levels as expected. There is a feeling that the existing arrangements need a fresh look to put the third level of governance back on rails to make democracy function.

1.2.14 The scheme of financial relations is another vexed issue which, in spite of the elaborate provisions on division of taxing powers and the intervention of the mechanism of the five-yearly Finance Commission, continue to be a friction point in Centre-State relations. The scheme contemplates complete separation of taxing powers between the Union and the States, mechanism for sharing of revenue, and a system of grants-in-aid to bridge gap between fiscal capacity for administration and for making intergovernmental financial adjustments.

1.2.15 While the taxes levied by the States are collected by them and entirely go to their Consolidated Fund, the taxes levied by the Centre are sharable with the States.

The distribution of revenues raised by Union is regulated through assignment, compulsory sharing, permissible sharing and grants-in-aid (Articles 268-281).

1.2.16 The method usually adopted to adjust the imbalances between the functions and financial resources of the two layers of governments in a federal system is the transfer of funds from Union to States. While safeguarding the autonomy and stability of State Governments, the scheme of financial devolution must bring about financial equalization with a sense of fiscal responsibility and promote the welfare of the country as a whole. A purely discretionary system is unacceptable in a federal framework. Therefore an independent agency like the Finance Commission is proposed to assess the changing needs of the States and imbalances between the richer and poorer States.

1.2.17 The borrowing powers of the Central and State Governments are regulated by Articles 292 and 293 under which States can borrow from sources outside India only with the prior consent of the Government of India.

1.2.18 In the division of taxing power, generally speaking, taxes that have an inter-state base are under the legislative jurisdiction of the Union, while those that have a local base (land, agricultural income etc.) fall under the legislative jurisdiction of the States.

1.3 Concluding Remarks

1.3.01 A remarkable feature of the Indian federal scheme is its capacity to give expression to regional, linguistic and other sub-national identities of vast sections of Indian humanity. Re-organization of states, breaking up of larger states and creation of more number of smaller ones, introduction of a third-tier of governance in the form of Panchayats and municipalities are examples of the deepening of the regional and local structures of democratic governance. Rule of law and guaranteed rights of individuals also helped to articulate and re-inforce the multiple identities that make the Republic of India.

1.3.02 However, the process of this massive social and political transformation has not been without hiccups and turmoil. Sub-national identities were strengthened by political parties floated around them and seeking to influence governmental decision-making. If in the first General Election India had only 14 national parties and two dozen regional parties, today the number of parties has grown to over 250 of which only half a dozen are named national parties. One of the direct consequences of this development is

the emergence of unholy coalitions in government formation and unprincipled divisions and defections affecting political stability and good governance. Local power elites, sometimes formed on caste and class considerations, have managed to capture power and influenced policies not always promotive of the Constitutional purpose. While democracy has taken deep roots, development has suffered in pace and direction. Economic liberalization however has led to some degree of integration of the market and a new cohesion cutting across political divisions and regional sentiments.

1.3.03 An interesting by-product of these political and economic developments is an increasingly stressful relationship between the Union and the States as well as states inter-se. The strong centre concept advanced by the Constitution makers came under challenge particularly *vis-à-vis* fiscal arrangements and financial devolution. Significant transfers taking place through channels and mechanisms designed by the Union and not envisaged by the Constitution angered the States. The way the Union exercised emergency provisions was successfully challenged in the Courts and powers got circumscribed. The role of the Governor and the process of implementation of decentralized governance came in for criticism and occasional conflicts. These could have been effectively mediated through political processes in the legislative assemblies and parliament. Unfortunately, the credibility of legislatures evolving compromises through consultations and debates has declined over the years and issues were taken to the streets or the courts straining Centre-State relations and weakening governance. Rule of law was disturbed on many occasions and the institutional mechanisms for conflict resolution outside the judiciary have been found wanting to smoothen relationships.

1.3.04 India today presents the picture of a functioning democracy performing reasonably well in economic development but unable to sustain good governance for the welfare of all people, particularly the weak and marginalized sections. The Union in theory continues to be strong in Constitutional terms; but in practice it is unable to deliver the way it could have done. The States have become strong not so much in governance but in politics and power play. The Panchayats remain weak despite all good intentions. In this milieu, Centre-State relations present a mixed picture of promise and performance far from its full potential.

CHAPTER 2

ISSUES AND CONCERNS IN INTERGOVERNMENTAL RELATIONS

CONTENTS

Sections/Headings	Para Nos.	Page Nos.
2.1 Key Concepts and Founding Principles	2.1.01-2.1.02	11
2.2 Federal, Quasi-Federal or Unitary with Federal Features	2.2.01-2.2.06	12-13
2.3 Friction Points in Federal Relations and their Management	2.3.01-2.3.05	14-15

2

ISSUES AND CONCERNS IN INTERGOVERNMENTAL RELATIONS

2.1 Key Concepts and Founding Principles:

2.1.01 Every Constitution has its own unique character reflecting the history and disposition of its people. It forms, as it were, the basic features which do not change even with the passage of time. Republicanism, rule of law, independent judiciary and guaranteed individual rights are inter-alia, inherent characteristics of the Indian Constitution. These features form part of the Founding Principles which keep together over a billion people of diverse faith, language, religion and race striving for a common destiny under the Constitutional framework. WE, THE PEOPLE have reiterated our aspirations as a nation in the form of a Preamble which talks about constituting India into a Sovereign Socialist Secular Democratic Republic and securing to all its citizens:

"Justice, social, economic and political;
Liberty of thought, expression, belief, faith and worship;
Equality of status and of opportunity;
And to promote among them all
Fraternity assuring the dignity of the individual and the unity and integrity
of the Nation". give to ourselves this Constitution".

2.1.02 These objectives, in short, contain the basic structure of our Constitution, which the Supreme Court declared cannot be amended in exercise of the power under Article 368 of the Constitution. (*Kesavananda Bharathi v. Union of India* AIR 1973 S.C. 1461). These objectives in essence consist of Unity in diversity, shared exercise of power between the Union and the States, respect for rule of law and individual rights and social transformation for a just, egalitarian social order. To achieve these objectives, parliamentary democracy and co-operative federalism have been adopted for structuring the Government.

2.2 Federal, Quasi-Federal or Unitary with Federal Features:

2.2.01 An issue often raised by commentators of the Indian Constitution is the federal nature of the Indian Union. Some say that it is a quasi-federal arrangement. Others call it more unitary in nature with many federal features. The Constitution does not expressly declare it as a federation. However, the very first Article stipulates that India shall be a Union of States, the fundamental feature of any federal set up. At the same time India avoided the tight mould of federalism existing in some other countries for valid historical reasons. The overriding concern at the time of drafting the Constitution was the "unity and integrity of India". This led to a number of factors that gave the Indian Constitution a decidedly unitary tilt with several provisions in favour of the Union which, in later period, unfortunately led to some distortions in Centre-State relations.

2.2.02 The Constitution makers were convinced that pluralism and diversity of such dimensions which are captured in the idea of India could not be sustained excepting through a federal arrangement. They felt that Indian federalism has to grow organically providing space for unity in diversity. The notable feature of Indian federalism is its accommodation of a vast array of ethnic, cultural and linguistic diversities, no matter how small and fragile the units might be. With smaller and weaker units co-existing with larger and stronger units, the responsibility of the Centre naturally increased in the matter of democratic governance and Constitution did make provisions accordingly. Naturally, the financial-fiscal aspects of Centre-State relations became the most important of all issues between the Centre and the States.

2.2.03 Federalism in its fundamentals is an outlook of a community in the accommodation of multiple identities. Democracy makes it possible in operational terms. The legal structure only reflects this outlook on peaceful co-existence and sharing of power in governance. As late as 1988 the first Commission on Centre-State Relations (Sarkaria Commission) reiterated the paramountcy of the Centre terming the structure to be more unitary than federal. Constitution is an instrument of governance and the structure has to be accepted as it is, rather than trying to equate it with federal structures elsewhere. The system of governance does divide power between the Union, States and Panchayats/ Municipalities which makes the federal scheme.

2.2.04 Given the degree of permanency of the federal structure, the questions which arise for consideration are (a) How does the scheme manage to resolve

intergovernmental conflicts and how effectively? (b) How satisfactory is the mechanism available to overcome backwardness in some regions towards a more equitable distribution of socio-economic goods and services? (c) What kind of relationship is built between village governments and the State Government and how it strengthened or weakened the federal scheme of governance?

2.2.05 States in India are not sovereign political entities. Though there is a clear-cut distribution of legislative and executive powers between the Union and the States, the powers of states *vis-à-vis* the Union are constrained. For example, Article 3 empowers Parliament to reduce the area of any State, alter its boundaries and change its name even if the state and its inhabitants oppose it. As observed by the Supreme Court (State of West Bengal v. Union of India AIR 1963 S.C. 1241) "Our Constitution adopted a federal structure with a strong bias towards the Centre, and that under such a structure, while the Centre remains strong to prevent the development of fissiparous tendencies, the States are made practically autonomous in ordinary times within the spheres allotted to them" (per Subba Rao J.). A leading commentator noted, "... No chronicler of the Supreme Court's decisions on Centre-State disputes can fail to notice that it has not decided a single major issue directly arising between the Centre and a State in favour of the State. Even where the claims have arisen indirectly, the occasions when power to the Centre has been denied *vis-à-vis* the States have been few". (Fali S. Nariman, *The Federal Way Forward*, in *India Today*, August 20, 2007).

2.2.06 In spite of the Centrist bias of the Constitution largely founded for preserving unity and integrity of the country, the Court had to concede in *S.R. Bommai V. Union of India* (AIR 1994 S.C. 1918) that federalism like secularism is a basic feature of the Constitution. With increasing emphasis on decentralization of powers to better address local needs and aspirations and with a large body of elected representatives (nearly a million at the village level) finding political space in governance, the federal aspects are likely to be strengthened in future. Globalisation and investment from abroad also tend to reduce the financial dependency of States on the Centre. There are other forces also in operation which make states more and more politically and financially independent. This may promote States becoming more strong along with strong Centre which truly will make India a Union of States as declared by Article 1 of the Constitution.

2.3 Friction Points in Federal Relations and their Management

2.3.01 The Indian Constitution has functioned without any serious impediment during the last 60 years and more, which shows the strength of its fundamentals. Of course, there were difficulties experienced which were overcome either through judicial interpretations or conventions or through Constitutional amendments. The need to quicken the pace of socio-economic transformation and the compulsions to preserve the unity and integrity of the Nation did throw up challenges to the harmonious development of Centre-State relations. The Parliamentary system of democracy could resolve some of those challenges and keep the country together on the path of economic progress and social well-being.

2.3.02 The first Commission on Centre-State Relations (Sarkaria Commission) appointed by the Government in 1983 to examine and review the working of the existing arrangements between the Union and the States made certain significant recommendations to address several points of friction having direct impact on Union-State relations. These include emergency provisions, the role of the Governor, deployment of Union Armed Forces in a State for public order duties, inter-state river water disputes, economic and social planning, All India Services etc. It is interesting to note that these are the very same items which continue to plague Centre-State relations and they form the terms of reference of the present Commission as well. In addition, the issues of control of prolonged communal conflicts, effective decentralization of powers through Panchayats/ Municipalities and the development of common market are the additional terms referred for examination. This is indicative of the fact, either of the inadequacy of the measures recommended (assuming that they have been honestly implemented) or that the circumstances have changed warranting fresh solutions to restore the balance in federal governance.

2.3.03 It is important to notice that between the two Commissions on Centre-State Relations (first one in 1983 and the present one in 2007) there has been another National Commission to Review the Working of the Constitution appointed in 2000 (Venkatachaliah Commission) which submitted its report in 2002 containing several recommendations to smoothen Union-State relations. The points of friction identified also broadly coincided with those referred to the Second Commission on Centre-State Relations. Given the continuing tensions around the same issues, it is necessary to think of some permanent solutions in the interest of the federal polity, good governance and

faster socio-economic transformation. It is in this perspective the Commission has approached the examination of the issues referred to us.

2.3.04 Before taking up the issues one by one, it is desirable to look at briefly the unprecedented changes which have taken place since the last Commission submitted its report. Politics changed its complexion with the advent of coalition governments at the Centre and in the States. Economy took a turn to liberalization, privatization and globalization under which markets started playing a dominant role in socio-economic planning and management. The 73rd and 74th Constitutional Amendments have brought about a massive democratic revolution under which over a million elected representatives took direct responsibility for local governance giving Union-State relations, a new dimension in the scheme of things. Terrorism, home grown as well as cross-border, took a heavy toll of the country's resources and put strains on the delicate balance between internal security and national security. Prolonged communal conflicts in certain regions led to tensions in other regions threatening the secular fabric of the country. The Union, perhaps for the first time since Independence found itself constrained in taking quick and effective decisions on matters of the Union which touch upon Centre-State Relations. The absence of an effective mechanism to address administrative problems outside Parliament was felt on many occasions in the recent past. Even for accelerating the pace of socio-economic development and addressing the issue of poverty, despite progressive legislative measures, the situation on the ground did not change as expected.

2.3.05 If the fundamentals of the Constitution are good and need to be retained, how do we go about responding to the structural imbalances in managing change keeping the fundamentals intact? Given the constraints of practical politics, what needs to be done to accommodate narrow sectarian and regional interests while serving the national purpose in governance of the country as a whole? If corruption gets institutionalized even under decentralized governance, can democracy offer alternate institutional arrangements to fight the menace? Can mechanisms like the Inter-State Council be strengthened not only to thrash out contentious issues but also to take constitutionally sustainable decisions in cases where consensus becomes difficult or elusive? There are many such questions which the Commission deliberated in its approach to the examination of the terms of reference. What we have aimed at are not the ideal solutions but the practical ones which will have greater acceptability of the stakeholders. In any federal system, the Union and the Units should always be willing to accommodate differences and work on compromises which may, at first sight, appear to be favourable to one side or

the other. In the long run, such compromises are bound to be favourable to all concerned. It is here statesmanship should lead politics. There is evidence of statesmanship overcoming party politics when Parliament unanimously adopted the amendments to the Unlawful Activities Prevention Act and voted the new National Investigation Agency Act, 2008 after the events of 26/11. The same spirit is now forthcoming in the centrally-sponsored strategy to fight the Naxal-Maoist violence in certain States. What is therefore required is to streamline and institutionalize the spirit of co-operative federalism for select causes which normally created political controversies and defied solutions through normal administrative processes. It is in this spirit we have examined the issues and recommended possible options for taking governance forward in the federal spirit.

CHAPTER 3

LEGISLATIVE RELATIONS BETWEEN THE UNION AND STATES

CONTENTS

Sections/Headings	Para Nos.	Page Nos
3.1 Evolution of Legislative Relations	3.1.01-3.1.03	19-20
3.2 Constitutional Scheme of Distribution of Legislative Powers	3.2.01	20
3.3 Views of States, Union and Political Parties on Legislative Relations	3.3.01-3.3.02	21-22
3.4 Transfer of Entries in the Lists from List II to List III	3.4.01-3.4.06	22-24
3.5 Representation of States & Panchayats/ Municipalities in the Council of States	3.5.01-3.5.03	24-25
3.6 Bills Reserved for President's Consideration	3.6.01-3.6.04	25-26
3.7 Treaty Making Power, International Law and Legislative Relations	3.7.01-3.7.29	26-49
3.8 Conclusions and Recommendations	3.8.01-3.8.05	49-52

3

LEGISLATIVE RELATIONS BETWEEN THE UNION AND STATES

3.1 Evolution of Legislative Relations

3.1.01 To be able to appreciate the background of the scheme of legislative relations under the Constitution, it is necessary to keep in mind how the British Colonial rulers established under the Government of India Act, 1919 a highly centralized power structure to keep effective control of the whole of British India. A more liberalized framework proposed under the Government of India Act, 1935 was never brought into force fully for a number of historical reasons. In the circumstances when the Union Powers Committee discussed the future set up of the Republic, it found that the "soundest framework for our Constitution is a Federation, with a strong Centre". A purely centralized unitary structure was decidedly abandoned. A strong Centre, however, was an imperative necessity to keep the country together and to co-ordinate policy and action between the Union and the States on basic issues of national concern¹.

3.1.02 Admittedly, the framers of the Constitution were not inclined to develop a design on the model of classical federation though they were clear that a federal system alone will suit to accommodate the plural and diverse regions of the country. The key element they felt, was to ensure healthy intergovernmental dependence and co-operation with shared responsibilities, transcending the formally demarcated frontiers. They acknowledged the fact that even in classical federations the trend has been towards centralization making a strong centre inevitable in a federal set-up. What is important is whether it is functional and inter-dependent in the pursuit of common goal - the Welfare of the People². In this context, the framers of the Constitution came to assign the Union a pre-eminent role in all spheres of governance.

3.1.03 Undoubtedly, distribution of legislative powers is the distinguishing feature of a federal polity. This can be done in several ways. The American Constitution specifically enumerates the powers of the Federal Government and leaves the rest to the States. The

¹ Sarkaria Commission, part 1, page 23.

² Ibid.

same approach is adopted by the Australian Constitution, which enumerates the powers of the Commonwealth and leaves the residue to the States. There is no Concurrent List in this model. However the Canadian Constitution adopted a three-fold enumeration of powers in the scheme of distribution between the Union and the Provinces. Following it, the Government of India Act, 1935, made a comprehensive enumeration of subjects in three Lists - Federal, Provincial and Concurrent, giving the residuary powers to the Governor General. For the Constitution makers the scheme provided by the 1935 Act appeared appropriate for distribution of legislative powers to achieve the national goal. A strong Union did not appear to them as inconsistent with a strong States. For the whole body to be strong, the parts have to be necessarily strong, was the logic.

3.2 Constitutional Scheme of Distribution of Legislative Power

3.2.01 Legislative jurisdiction is organized in Articles 245 and 246 under the principle of supremacy of the Union over States. The powers of legislation are identified in Seventh Schedule under the three Lists, namely, Union List (List I), State List (List II) and Concurrent List (List III). The Concurrent List containing subjects in which the Union and States can legislate reflect the key areas in which nation building, social welfare and good governance have to take place through the joint efforts of the Union and the States. Obviously, they could not be allocated to the exclusive jurisdiction of the States or the Union. For example, the subjects covered in Part IV of the Constitution which are addressed to the "State" for progressive implementation are meant to be the responsibility of all levels of Government. They directly relate to the welfare of people everywhere. A broad uniformity of approach in legislative policy is essential in the matter of education, health, employment, housing, nutrition etc. to be able to fulfil the care obligations of the Directives. At the same time the specific requirements of different states need to be separately addressed by the States themselves while relating them to national goals and standards. Hence the rationale of the Concurrent List.

3.3 Views of States, Union and Political Parties on Legislative Relations

3.3.01 Some States and their supporting political parties have expressed reservation to the existing system of division of legislative powers and sought a fresh look. Over a period of time, they felt, the Union has enriched its powers at the cost of the States. This has weakened the federal structure. They wanted the Commission to recommend steps for restoring the balance. It was their view that the case for centralization

which existed at the time of framing the Constitution does not exist anymore and what is needed now is a conscious policy for strengthening the States by enriching the State List and following the principle of "Subsidiarity". These type of criticisms were made by States even to the first Commission on Centre-State Relations (1988)³. On a closer look, the Sarkaria Commission found some merit on the grievance of States and recommended some changes not so much in the scheme but in the way the power is exercised.

- (i) In matters of concurrent or overlapping jurisdiction, a process of mutual consultation and co-operation has to be put in place to achieve co-ordination of policy and action. It must be evolved as a convention or rule of practice rather than a rigid Constitutional requirement.
- (ii) Ordinarily, the Union should occupy only that much field of a concurrent subject on which uniformity of policy and action is essential in the larger interest of the nation leaving the rest for State action within the broad framework of the policy laid down by the Union Law. Furthermore, whenever the Union proposes to legislate on a matter in the Concurrent List, there should be prior consultation. A resume of the views of the State Governments and the comments of the Inter-State Council should accompany the Bill when it is introduced in Parliament.
- (iii) Residuary powers (now exclusively with the Union) excepting matters relating to taxation, should be placed in the Concurrent List⁴.

3.3.02 By and large, the present Commission is supportive of the above findings. The Venkatachaliah Commission⁵ also found the scheme of division of powers justified. It however felt that the grievances of States are more directed at the manner in which the Union exercised its powers. The changed political reality of contemporary times has naturally resulted in reversing the centralization process which was pronounced in the initial period when the same party was in power at the Centre and in the States. Given the joint responsibility of the Centre and the States it is imperative that legislation on matters of concurrent jurisdiction generally and transferred items from the State List in particular, should be managed through consultative processes on a continuing basis. For cultivating better Centre-State relations and to facilitate effective implementation of the laws on List III subjects, it is necessary that some broad agreement is reached between the Union and States before introducing legislation in Parliament on matters in the Concurrent List. The existing arrangements in this regard require institutionalization through the Inter-

³ See Sarkaria Commission Report, Vol. I pp.24-25

⁴ Ibid pp. 89-90

⁵ National Commission to Review the Working of the Constitution (2002), Vol.I p.226

State Council by a continuing auditing role for the Inter-State Council in the management of matters in Concurrent or overlapping jurisdiction. The Council, if found necessary, may use an independent mechanism like a Committee of State Ministers to thrash out contentious issues in the Bill so that there is a measure of support among the States to the administrative and fiscal arrangements the Bill ultimately proposes to Parliament. It is important that the record of proceedings in the Council/Committee including views of States is made available to Parliament while introducing the Bill on Concurrent List subjects.

3.4 Transfer of Entries in the Lists, from List II to List III

3.4.01 Article 368(2) empowers Parliament to amend any provision of the Constitution in accordance with the procedure laid down therein. Should Parliament deplete or limit the legislative powers of the States through this process unilaterally or otherwise? In a federal system, the existence of the power in the Union does not by itself justify its exercise and it is the considered view of the Commission that the Union should be extremely restrained in asserting Parliamentary supremacy in matters assigned to the States. Greater flexibility to States in relation to subjects in the State List and "transferred items" in the Concurrent List is the key for better Centre-State relations.

3.4.02 In respect of transferring matters from the State List to the Concurrent List and thereby eroding the exclusive jurisdiction of States, the mechanism provided under Article 368 clause (2) is robust and sufficiently consultative that it does not pose any threat to Centre-State relations. It cannot happen unilaterally without the support and co-operation of states. Such a mechanism is desirable to afford flexibility while retaining the required rigidity in such matters of federalism in order to maintain the balance for good governance.

3.4.03 The Commission is not venturing to suggest any shifting of legislative items from one List to another excepting to say that adequate consultation among stakeholders and through Inter-State Council should precede introduction of such proposals in Parliament. In this context, it is worthwhile to examine through a joint institutional mechanism whether the administration of the relevant subject under the Central law (on the transferred subject) has achieved the objects and whether it is desirable to continue the arrangement as an occupied field limiting thereby the exclusive jurisdiction of the States. If the findings are not positive it may be worthwhile to consider restoration of the item to its original position in State List in the interest of better Centre-State relations. Such a step hopefully will encourage the States to devolve the powers and

functions on that subject to the Panchayats and Municipalities as stipulated in Parts IX and IX-A of the Constitution. In short, the Commission is of the opinion that the Union should occupy only that much of subjects in concurrent or overlapping jurisdiction which is absolutely necessary to achieve uniformity of policy in demonstrable national interest.

3.4.04 The Commission is of the view that States should have greater autonomy in respect of subjects in the State List and the Union should be extremely restrained in asserting Parliamentary supremacy over them. The complex and uncertain situation which prevailed at the time of drafting the Constitution no more exists. However, the Commission is not persuaded to recommend any Constitutional amendment in this regard. As a matter of convention, the Union should occupy only that much of matters in concurrent or overlapping jurisdiction which is absolutely necessary to achieve uniformity of policy and action in national interest. Furthermore, even this step should necessarily be preceded by consultation with all stakeholders and a resume of the views of State Governments should accompany the Bill when it is introduced in Parliament. The Inter-State Council should ensure that the consultation process is followed up invariably in all such matters. Such a step is essential for achieving co-operation and co-ordination in the implementation as well.

3.4.05 A typical example illustrative of the importance of continuing consultation with states in formulating unified policy and action is the subject of primary education where the Inter-State Council could have been used more effectively. The conferences of Chief Ministers and Education Ministers have been found to be an inadequate mechanism to evaluate experience in policy formulation and to adopt ideal policies and standards to achieve the goals. Even the National Development Council is not able to work out a cohesive policy acceptable to all states who alone can ultimately implement the scheme. The strategy of an Empowered Committee of States Ministers to thrash out the issues was not invoked in this case. The result is continued impasse on settling the relative roles and responsibilities of States and the Centre in the implementation of such a vital subject which was long neglected by the Union. The issue is not confined to sharing the financial burden alone, though that remains the most vexed issue. Though the principal actors are to be the State Governments to which the subject is assigned under the scheme of distribution of powers, the way the process is perceived in political circles gives the impression that it is the Union's baby and the Union has to find the entire resources needed. Parliament adopted the Constitutional amendment making the right to education a fundamental right and followed it up with the Right to Education Act. Now

the Union and States are awaiting the formula that the Finance Commission might propose to resolve the issue of sharing of responsibilities. Even then several issues of implementation have to be addressed which require an appropriate forum which, in the present situation appears to be the Inter-State Council and an empowered committee of State Education Ministers. The Commission would strongly recommend a larger role for the Inter-State Council in management of matters in the concurrent or overlapping jurisdiction of the Union and States.

3.4.06 There was a view expressed in favour of drawing up a fourth List to be called the Panchayat List. The Commission is of the view that it is too early to consider such a proposal and there are practical difficulties in adopting such a course however desirable it be. The Panchayat governance is yet to get stabilized throughout the country to be able to take legislative functions even in respect of matters relevant to the locality. Capacities have to be built up and resource mobilization at all three levels should bear reasonable relation to functional responsibilities.

3.5 Representation of States and Panchayats/Municipalities in the Council of States (Rajya Sabha)

3.5.01 Two propositions advanced by some states and public institutions in the matter of representation of the second and third-tier of governance at the highest legislative forum (Parliament) deserve consideration. They relate to the desirability of having equal representation of States in the Rajya Sabha and the idea of giving representation to the third-tier of government introduced by the 73th and 74th Constitutional Amendments (Panchayats and Municipalities) in the Rajya Sabha.

3.5.02 In the Constituent Assembly when it was decided to distribute the seats of Rajya Sabha among the States, the formula adopted was in proportion to their population. Accordingly, the number of members of the individual States varied from just one for some states and over two dozen for some other states. This made Rajya Sabha disproportionately representative of larger States marginalizing the smaller ones. This is in striking contrast to USA where each state has two representatives each in the Senate. As pointed out by the Sarkaria Commission⁶, a Resolution under Article 249 which lacks the support of almost two-thirds of the total number of states can possibly get passed with the support of nominated members if it is pushed by the larger states who together can muster support of the majority of the House. This is obviously unfair to the smaller states. Equal representation of states is therefore canvassed by some of the stakeholders

⁶ Ibid p.68.

which, no doubt, has merit if Rajya Sabha has to be an instrument for the effective expression at the Parliamentary level of view of the states, large and small.

3.5.03 The Sarkaria Commission which examined the issue at length was not in favour of changing the structure of Rajya Sabha in favour of equal representation of States as it found the Upper House not exclusively representing the federal principle excepting in relation to the special powers under Articles 249 and 312. Equal representation of States was discussed and rejected by the Constitution makers and Sarkaria Commission found the reasons valid in the present situation as well. On the other hand, Sarkaria Commission was in favour of strengthening the special role of the Rajya Sabha as an instrument for effective representation of the view points of the States. It is a matter of re-designing procedures of the House rather than its composition.

3.6 Bills Reserved for President's Consideration

3.6.01 Another point of friction in the matter of legislative relations, is in respect of the process of assent to Bills passed by State Legislatures. Normally, the procedure contemplates Bills being assented to by the Governor. Under Article 200, there are four courses open to a Governor to whom a Bill passed by the State Legislature is presented for assent. The Governor assents, or withholds assent, or reserves the Bill for the consideration of the President, or returns the Bill (if not a Money Bill) for reconsideration, with his message. He is supposed to act "as soon as possible after the presentation" of the Bill. The Governor's action in this regard has been held to be non-justifiable (**Hoechst Pharmaceuticals Ltd. and Ors. Vs. State of Bihar and Ors.** [AIR 1983 S.C. 1019]; **Bharat Sevashram Sangh and Ors. Vs. State of Gujarat and Ors.** [AIR 1987 S.C. 494]).

3.6.02 The problem raised by some of the respondents is in respect of Bills reserved for consideration of the President. The President under Article 201 shall either assent to the Bill or withhold his assent. There is no compulsion that the President should "act as soon as possible after presentation" as is provided in Article 200 with the result the President may kill the Bill by not taking a decision sometimes for the entire duration of the State Legislature! This naturally generates a lot of friction in Centre-State relations. Interestingly, Article 201 puts a time limit on the State Legislature (limit of six months) to reconsider a Bill returned by the President, if the President refers back the Bill with his message for the House to again pass it with or without amendment. In the absence of any time limit for the President to make a decision on reserved Bills, it is contended that there

is scope for abuse of discretion based on political considerations particularly when the ruling party in the State concerned is different from that ruling the Union. This is said to be an unwarranted invasion of legislative power of the State by the Union Executive.

3.6.03 States have expressed concern that Bills so submitted sometimes are indefinitely retained at the Central level even beyond the life of the State Legislature. Allowing the democratic will of the State Legislature to be thwarted by Executive fiat is questionable in the context of 'basic features' of the Constitution. Therefore the President should be able to decide consenting or withholding consent in reasonable time to be communicated to the State. In the Commission's view, the period of six months prescribed in Article 201 for State Legislature to act when the Bill is returned by the President can be made applicable for the President also to decide on assenting or withholding assent to a Bill reserved for consideration of the President.

3.6.04 If the President, for any reason, is unable to give his assent, it may be desirable for the President to make a reference to the Supreme Court under Article 143 for an opinion before finally making up his mind on the issue. This will avoid allegations of bias while securing the dignity and authority of the House. Again this can be accomplished as a matter of practice or convention rather than through amendment of the Constitution.

3.7 Treaty Making Power, International Law and Legislative Relations

Introduction

3.7.01 An issue which has caused concern among the States in recent times is the impact of the Union executing international treaties and agreements involving matters in the State List. A new dimension to the problem has been added by the Supreme Court declaring [*Visakha v. State of Rajasthan* (1997) 6 SCC 241] that citizens can seek relief in courts on the basis of international conventions or treaties if the country has ratified them and they are not inconsistent with the law and Constitutional provisions. Some States in this context have approached the Supreme Court complaining that the area of legislative competence of States is being eroded indirectly by the Union Government entering into treaties with other countries. They would therefore seek effective consultation with states before adopting an international convention in respect of matters in the State List. Given the importance of the subject in a globalizing world and the possibility of conflicts arising between the Union and the units on a matter of legislative competence,

the Commission felt that the issue must be examined in detail in the context of practice existing in other federations to find an appropriate solution.

3.7.02 Before India gained Independence, the power to enter into treaties was a prerogative one, exercisable by the British monarch. In 1935, in accordance with the Government of India Act, this power was transferred to the Governor-General of India. Article 73 of the Indian Constitution requires that the entry into, and implementation of, treaties and other international agreements with other countries is to be carried out in the name of the President.

3.7.03 Articles 73⁷ and 246(1), read in conjunction with the relevant items on the Union List, gives the Union Executive all the powers necessary to negotiate, enter into, and ratify, treaties. Entries 13, 14, 15 and 16 in the Union List are relevant in this regard, particularly Entry 14. They read as follows:

13. Participation in international conferences, Associations and other bodies and implementing of decisions made thereat.
14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.
15. War and peace.
16. Foreign jurisdiction.

3.7.04 Article 253 of the Constitution provides that notwithstanding any distribution of legislative power under Article 246, the Parliament has the power to enact legislations to give effect to treaties and international agreements⁸.

3.7.05 Treaty making power is an aspect of external sovereignty and the Preamble declares India as a sovereign country. The power to enter into treaties and implement them is comprehensive and unqualified, but given the fact that the Constitution provides for a federal structure and guaranteed rights, Courts can impose restrictions on this power. A treaty, for instance, cannot make provisions which would, in effect, amend the basic

⁷ Article 73 of the Constitution reads: “Extent of executive power of the Union – (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend – (a) to all matters with respect to which Parliament has the power to make laws; and (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement...”

⁸ Article 253 of the Constitution reads: “Legislation for giving effect to international agreements – Notwithstanding anything in the foregoing provisions of the Chapter, Parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or any other body.”

features of the Constitution, for it could not have been intended that a power conferred by the Constitution would, without an amendment to the Constitution, alter or destroy the Constitution⁹.

3.7.06 In the early case of *Ram Jawaya Kapur*¹⁰, the Supreme Court made it clear that the Indian Constitution permits the executive to negotiate treaties. Subsequently, the law is best noted by Justice Shah in the important case of *Maganbhai Ishwarbhai Patel v. Union of India*:¹¹

"The effect of Article 253 is that if a treaty, agreement or convention with a foreign State deals with a subject within the competence of the State Legislature, the Parliament alone has, notwithstanding Article 246(3), the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body. In terms, the Article deals with legislative power; thereby power is conferred upon the Parliament which it may not otherwise possess. But it does not seek to circumscribe the extent of the power conferred by Article 73. If, in consequence of the exercise of executive power, rights of the citizen or others are restricted or infringed, or laws are modified, the exercise of power must be supported by legislation: where there is no such restriction, infringement of the right or modification of the laws, the executive is competent to exercise the power."

3.7.07 This was not a case in which the power to enter into treaties was directly in question. Yet the aforesaid observation of Justice Shah proved crucial in *P.B.Samant v. Union of India*¹², where a Division Bench was called upon to adjudicate the validity of the Union entering into the WTO framework without consulting the states. The Court dismissed the petition by holding that the power under Article 73 was expansive enough to enable the Union to negotiate treaties in support of Article 253. It held:

"It is difficult to accede to the contention that though the Parliament has power to enact laws in respect of matters covered by the State list in pursuance of treaty or the agreement entered into with foreign countries, the executive power cannot be exercised by entering into treaty as it is likely to affect the matters in the State list."

3.7.08 The Division Bench noted the submission of the learned counsel for the Union of India that the treaty in question was not a self-executing treaty and that the provisions of the treaty can be given effect to only by making a law in terms of the agreement/treaty. The Court finally observed: "The issue as to whether the Government

⁹ HM Seervai, Constitutional Law, Page 112

¹⁰ AIR 1955 SC 549.

¹¹ (1970) 3 SCC 400

¹² AIR 1994 Bom 323.

should enter into a treaty or agreement is a policy decision and it is not appropriate for the courts in exercise of jurisdiction under Article 226 of the Constitution of India to disturb such decisions."

3.7.09 In *Union of India v. Azadi Bachao Andolan*¹³, the Supreme Court held that power of entering into a treaty is an inherent power of the State. Moreover, the Constitution makes no provision making legislation a condition for entry into a treaty in times of war or peace.

3.7.10 Though the Parliament is vested with the power to enact laws in relation to the entering into and negotiation of treaties, no law in this regard has been enacted till date. Therefore, Parliamentary approval for every treaty is not the norm. The States can however consult with the federal government through the Inter-State Council on all issues including treaties. Established in 1992, the Inter-State Council has a broad charter, including:

...investigating and discussing subjects in which some or all of the States or the Union and one or more of the States, have a common interest ...making recommendations upon any subject and, in particular, recommendations for the better coordination of policy and action with respect to the subject.

3.7.11 Aside from the Council, there do not appear to be any other formal mechanisms for consultation between the States and the federal government with respect to treaty making¹⁴.

3.7.12 Article 51 (c)¹⁵ of the Constitution of India provides for the application of international law for interpretation and better enforcement of domestic law¹⁶. Courts

¹³ (2004) 10 SCC 1

¹⁴ C. Subramaniam, "A Fresh Look at the Federal Structure", in C.K. Jain (ed), CONSTITUTION OF INDIA: IN PRECEPT AND PRACTICE (195) 1992.

¹⁵ Article 51 of the Constitution reads: The State shall endeavour to... (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another.

¹⁶ The Application of international law principles in matters of interpretation of Domestic law has been raised and the opinion in, *Minister for Immigration and Ethnic Affairs v. Teoh*, (1995) 69 Australian Law Journal 423, was quoted with approval in, *Peoples Union for Civil Liberties v. Union of India*, AIR 1997 SC 1203. There have also been numerous instances where the Supreme Court had looked towards international law principles while dealing with domestic law issues, namely, *In Re: The Berubari Union v. Union of India*, AIR 1960 SC 845; *The Chairman, Railway Board & Ors. v. Mrs. Chandrima Das & Ors*, AIR 2000 SC 988; *Liverpool and London S.P. and I Asson. Ltd.v. M.V. Sea Success I and Anr*, (2004) 9 SCC 512; *Narmada Bachao Andolan v. Union of India and Others*, AIR 2000 SC 3715; *A.P. Pollution Control Board v. Prof. M.V. Nayadu (Retd.) & Others*, AIR 1999 SC 812; *People's Union of Civil Liberties (PUCL) v. Union of India and another*, AIR 1997 SC 568; *People's Union for Civil Liberties v. Union of India (UOI) and Anr*, (2005) 2 SCC 436; *Research Foundation for Science Technology and Natural Resources Policy v. Union of India (UOI) and Anr*, 2005 (1) CTC 609; *Vellore Citizens Welfare Forum v. Union of India and others*, AIR 1996 SC 2715.

may rely upon provisions of international law that further the understanding of domestic law, in estimating the level of their application. In the absence of a conflict with domestic laws, the courts are free to incorporate such principles of international law¹⁷.

3.7.13 In the event that there is a conflict between the municipal law and international law, then the question arises as to whether the municipal law will stand in view of Article 51(c). The answer to this is in the affirmative.

3.7.14 Hence, as per the position in Indian law, only those rules of international law which are not contrary to municipal law will be used for the purposes of construction and interpretation¹⁸.

Parliamentary Proposals for Change

3.7.15 There have been some attempts by Members of Parliament to seek clarification and also to amend the law relating to negotiation and entering into treaties. The first such attempt was on March 5, 1993, when Shri George Fernandes, Member of Parliament, Lok Sabha gave notice of intention to introduce the Constitution (Amendment) Bill, 1993 for amending Article 253 to provide that treaties and conventions be ratified by each House of Parliament by not less than one half of the membership of each House and by a majority of the legislatures of not less than half the States. The Bill was not listed for consideration during the life of that Lok Sabha.

3.7.16 Shri Satyaprakash Malviya, Member, Rajya Sabha tabled a question (No.6856) enquiring whether the Government proposes to introduce any legislation to amend the Constitution to provide for parliamentary approval of international treaties. The question was answered on May 12, 1994 in the negative.

3.7.17 In February, 1992, Shri M.A. Baby, Member of Parliament, Rajya Sabha gave a notice of his intention to introduce the Constitution (Amendment) Bill, 1992 to amend Article 77 of the Constitution of India providing that "every agreement, treaty, memorandum of understanding contract or deal entered into by the Government of India including borrowing under Article 292 of the Constitution with any foreign country or international organization of social, economic, political, financial or cultural nature and settlements relating to trade, tariff and patents shall be laid before each House of Parliament

¹⁷ Also stated in *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011 (para 14) per Verma C.J, "It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them."

¹⁸ *PUCL v. Union of India*, (1997) 1 SCC 301, at 312; *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241, at 249.

prior to the implementation of such agreement, treaty, memorandum of understanding, contract or deal and shall operate only after it has been approved by resolutions of both Houses of Parliament".

3.7.18 On July 17, 1994, Shri Chitta Basu, Member of Parliament, Lok Sabha gave notice of his intention to introduce a Constitution (Amendment) Bill, 1994 on the same lines as suggested by Shri M.A. Baby. This Bill, however, had not been taken up for consideration during the life of that Lok Sabha.

3.7.19 The Private Member's Bill to amend the Constitution introduced by Shri M.A. Baby, M.P. in February 1992 came up for discussion in the Rajya Sabha only in March, 1997. Shri Baby spoke passionately in support of the said Bill pointing out in particular the adverse consequences flowing from the several WTO Agreements signed and ratified by the Government in 1994 [Uruguay Round of GATT Negotiations] without reference to the Parliament. Shri Pranab Mukherjee, M.P., spoke at length on the said Bill. He pointed out that there are two sides of the picture. He pointed out that where parliamentary approval is required, it has led to certain complications. He gave the example of the United States' Senate refusing to ratify the treaty of Versailles concluded at the end of the World War in spite of the fact that President Wilson had played a crucial role in bringing about the said treaty. The Senate yet rejected the treaty. He then referred to the two treaties signed between India and Nepal on harnessing water resources of Mahakali and other rivers and the other with Bangladesh on sharing of the Ganga waters. He submitted that had these agreements been submitted to Parliament for ratification/approval - particularly the treaty with Bangladesh - it would have been extremely difficult to obtain such approval or ratification in the prevailing circumstances. At the same time, he agreed that his intention was not to say that the Parliament should be kept in dark or that the authority of the Parliament in this behalf should be denied. He pointed out that any GATT/WTO Agreements, signed and ratified by the Government of India, can be implemented only by Parliament by making a law in terms of the agreement as provided by Entry 14 of List I of the Seventh Schedule to the Constitution read with Article 253. He pointed out further that the Parliament is not so constituted as to discuss the international treaties and agreements in an effective manner. In such a situation, he pointed out, entrusting the Parliament with the power to oversee any and every treaty, agreement and convention being entered into or signed by the Government of India would not be practicable and would also not lead to desirable consequences. He also pointed out that one of the reasons for the success of European Union and ASEAN as 'economic blocs' is

that the decision makers of the constituent countries, i.e. their executive, is by and large free to take decisions in matters of common interest.

3.7.20 Ultimately, he suggested that there should be an informed debate and discussion on the issue and that one should not rush with Constitutional amendments on the matter. He also pointed out that under our present system of Parliamentary Government, executive has to render continuous accountability to Parliament and that the Parliament can always question the acts and steps taken by the Government. He finally opined that more debate should go into the matter before effecting such an amendment.

Recommendations of the National Commission to Review the Working of the Constitution (2001)

3.7. 21 The Commission was of the view that the first thing that should be done by Parliament is to make a law on the subject of "entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries" as contemplated by Entry 14 of List I of the Seventh Schedule to the constitution. The law should regulate the 'treaty-making power' (which expression shall, for the purpose of this discussion, include the power to enter into agreements and the implementation of treaties, agreements and conventions). There is an urgent and real need to democratise the process of treaty making. Under our constitutional system, it is not the prerogative of the Executive. It is a matter within the competence of Parliament and it should exercise that power in the interest of the State and its citizens. In a democracy like ours, there is no room for non-accountability. The power of treaty-making is so important and has such far-reaching consequences to the people and to our polity that the element of democratic accountability should be introduced into the process¹⁹.

3.7. 22 According to the Commission, besides accountability, the exercise of power must be open and transparent (except where secrecy is called for in national interest). We may have already suffered enough by entrusting that power exclusively to the Executive. They do not appear to have been vigilant in safeguarding our interests, at least in some instances. The said power can no doubt be given only to the Union Executive and none else but then the law must clearly delineate the exercise of the power. In particular, it must provide for clear and meaningful involvement of Parliament in treaty-making. As has been done in some countries, there must be constituted a committee of Parliament to whom every treaty/agreement/convention proposed to be signed and/or proposed to be

¹⁹ Report of the NCRWC, Consultation Paper on 'Treaty Making Power under Our Constitution', Paragraph 51, available at <http://lawmin.nic.in/ncrwc/finalreport/v2b2-3.htm>

ratified shall be referred. While placing the draft/signed treaty before such committee, a statement setting out the important features of the treaty/agreement, reasons for which such treaty/agreement is proposed to be entered into, the impact of the treaty/agreement upon our country and upon our citizens, should be clearly and fully set out. The committee must decide within four weeks of such reference whether the treaty should be allowed to be signed by the Union Executive without referring the matter for consideration to Parliament or whether it should be referred to Parliament for consideration. It is obvious that such a decision shall have to be taken having regard to the nature of the particular treaty/agreement and its impact upon our country or on the rights of our citizens. The committee should not have too many members. About 10 to 15 would be adequate but they must be drawn from all political parties in Parliament. They must be elected by both the Houses separately, or jointly, as the case may be. The members once elected shall continue in the committee for the duration of the life of the House or the cessation of their membership, as the case may be. The committee would be a statutory committee clothed, of course, with all the powers of a Parliamentary Committee²⁰.

3.7. 23 The Commission went on to say that it would equally be desirable if the law made by the Parliament categorises the treaties/agreements/ conventions/ covenants viz., (a) those that the executive can negotiate and conclude on its own and then place the same before both Houses of Parliament by way of information. In this category may be included simple bilateral treaties and agreements which do not affect the economy or the rights of the citizens; (b) those treaties etc. which the executive can negotiate and sign but shall not ratify until they are approved by the Parliament. Here again, a sub-categorisation can be attempted: Some treaties may be made subject to approval by default (laying on the table of the House for a particular period) and others which must be made subject to a positive approval by way of a resolution; (c) important, multi-lateral treaties concerning trade, services, investment, etc. (e.g. recent Uruguay round of treaties/agreements signed in 1994 at Marrakesh), where the Parliament must be involved even at the stage of negotiation. Of course, where a treaty etc. calls for secrecy, or has to be concluded urgently, a special procedure may be provided, subject to subsequent Parliamentary approval consistent with the requirements of secrecy. The law made by Parliament must also provide for consultation with affected group of persons, organizations and stake-holders, in general. This would go to democratize further the process of treaty making²¹.

²⁰ Ibid

²¹ Ibid, paragraphs 52 and 53.

3.7. 24 In a Statement issued by Justice V.R. Krishna Iyer and Justice P.B. Sawant, former judges of the Supreme Court of India, and Justice H. Suresh, former judge of the Bombay High Court, on the occasion of the Indo-US Nuclear Deal (2007), the subject was argued in the following terms:

"...Articles 73 and 253 and Entries 6, 13 & 14 in the Union List of the Constitution refer to the powers of the Executive. Article 73, among other things, states that, '---the executive power of the Union shall extend (a) to the matters with respect to which Parliament has powers to make laws, and (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.' This means that the matters on which Parliament has no powers to make laws are also matters on which the Union Government cannot exercise its executive power. It also means, conversely, that the Union Government cannot exercise its executive powers beyond the legislative powers of the Union. Both these propositions have an underlying assumption that, before the Union Government exercises its executive power, there is a law enacted by Parliament on the subject concerned. Some argue that the provisions of Article 73(1)(a) give power to the Executive to act on subjects within the jurisdiction of Parliament, even if Parliament does not make a law on those subjects. This is both a distortion and a perversion of the said provision and a subversion of Parliament's supreme control over the Executive. If this interpretation is accepted then the Union Executive can act on all subjects on which Parliament has to make law, without there being any law made by Parliament. You can thus do away with Parliament and Parliament's duties to make laws. We will then have a lawless government. Democracy presumes there should be a rule of law and all Executive actions will be supported by law and that there shall be no arbitrary action by any authority, including the Union Executive. It may also be necessary in that connection to remember that it is for this very reason that when Parliament is not in session and, therefore, unable to enact a law, the power is given to the President to issue an ordinance (which is a law), so that the Executive may act according to its provisions. These ordinances are to be placed before Parliament within six weeks of its reassembly, and if Parliament approves they become

law. The Constitution-makers were, therefore, clear in their mind that the Executive cannot act without the authority of law and it has no power independent of law made by Parliament."²²

3.7. 25 Treaty Making in Other Federal Systems

(i) Argentina

Argentina is a federation with a bicameral Parliament, known as the National Congress. The Executive is comprised of the President, Vice-President and the Cabinet. The President is elected by an electoral college, which is itself elected by the direct vote of the people. The President appoints the Cabinet.

Paragraph 14 of Article 86 of the Constitution of Argentina provides that the President has the power to conclude and sign treaties. The Congress has no power to initiate treaty negotiations, nor can it interfere with such negotiations.

Paragraph 19 of Article 67 of the Argentinean Constitution provides that the Congress shall have power to approve or reject treaties concluded with other nations. The Constitution does not specify the method of approval. In practice, the Congress has approved treaties by passing a law. It uses the same procedure as for any other law, except that it deals with the treaty as a whole, rather than by clauses. The treaty is not ratified until the law has been promulgated and published in the Official Bulletin.

It is not abundantly clear from the Argentinean Constitution whether treaties are intended to be self-executing. However, it appears that it is generally accepted that Article 31 of the Constitution gives ratified treaties the force of national law. Nevertheless, the Parliament usually amends or enacts legislation, to ensure that legislation is in conformity with ratified treaties, so that there are no problems of interpretation²³.

There is a debate amongst constitutional scholars as to whether the Congress can modify the treaty before it gives approval. Some argue that it must approve or reject the treaty in the form in which it is submitted to the Congress, and that to do otherwise would require the consent of the other parties to the treaty. On the other hand, some argue that if the Congress seeks to modify the terms of the treaty, then renegotiation is required, or the modifications should be treated as reservations to the treaty²⁴.

²² 'Executive Cannot Act Independently Of Parliament On Nuclear Deal', *Opinion, The Hindu, September 13, 2007*.

²³ Jose Maria Ruda, "The Role of the Argentine Congress in the Treaty-Making Process", in S. Riesenfeld and F. Abbott, (eds) *PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES - A COMPARATIVE STUDY* 180 (1994).

²⁴ *Ibid.*

The Argentinean Constitution provides that treaties prevail over provincial laws and constitutions. However, it does not specifically state whether a subsequent federal law could override a treaty obligation in domestic law. This question was considered by the Argentinean Supreme Court in 1963, which decided that treaties and federal law have equal status, and that a subsequent federal law will prevail over an earlier treaty²⁵.

Although the Provinces have limited power to enter into treaties, under Article 107 of the Constitution, treaties are primarily negotiated and ratified at the federal level. The Provinces are involved in this process by means of the representatives of the Provinces in the Senate of the Parliament. As both Houses of Parliament are required to approve of a treaty before it is ratified, and the Senate is comprised of people appointed by the legislatures of the Provinces, the Provinces have an indirect involvement in the ratification of treaties.

(ii) Belgium

Belgium is a parliamentary democracy under a constitutional monarch. It has a bicameral Parliament, consisting of a Chamber of Representatives and a Senate. The people directly elect the Chamber of Representatives. The members of the Senate are chosen in different ways. The Prime Minister is the head of government, and holds office as long as he or she maintains the confidence of the Parliament²⁶.

Article 167 of the Belgian Constitution provides that the King has the power to conclude treaties, except for those treaties, which pertain to matters within the competence of the Communities and Regions. A treaty made by the King will have effect only after it has received the approval of the two Chambers of the Parliament.

Although parliamentary approval was only necessary to give a treaty internal effect, and wasn't required as a condition to ratification of a treaty, it became usual practice for the King to wait for parliamentary approval in those cases where parliamentary approval was needed, before ratifying a treaty²⁷.

The Constitution is not clear on the question of whether the treaty provisions prevail over domestic law. The Cour de Cassation of Belgium held in 1971 that where a rule of domestic law conflicts with a treaty provision, which has direct effect, the treaty provision

²⁵ *Martin & Cia, Ltda. S.A. c. Administracion General de Puertos Fallos de la Corte Suprema* 257: 99, 6 November 1963, cited in: V. Leary, *INTERNATIONAL LABOUR CONVENTIONS AND NATIONAL LAW* 119 (1982).

²⁶ For further details see Article 67 and 72 of the Constitution of Belgium.

²⁷ Maresceau, M., 'Belgium', in F. Jacobs and S. Roberts, *The Effect of Treaties in Domestic Law*, London, Sweet & Maxwell, 1987: p. 8.

has primacy²⁸. Hence, treaty provisions of direct effect will prevail over any prior or subsequent legislation. Since 1993, the Community and Regional Councils have independent powers to enter into treaties on subjects within their jurisdiction. They also have indirect power in relation to treaties entered into by the Federal Government, through their representation in the Senate²⁹.

(iii) Canada

Canada is a federal parliamentary democracy, formed under the Crown, which has a bicameral Parliament based on the Westminster system. The Constitution grants certain legislative powers to the Federal Parliament and certain exclusive legislative powers to the provincial Parliaments. In 1867 when the Canadian Constitution was enacted, the power to enter into treaties was a royal prerogative, which was exercised by the British monarch, on the advice of the British Government. As Canada became independent, the royal prerogative was transferred to the Governor-General by Letters Patent. The Canadian Governor-General, on the advice of the Executive, now exercises the treaty making power. The Canadian Provinces have the power to enter into international agreements, which do not have treaty status, and therefore are not considered binding in international law³⁰.

There is no legal requirement for the Parliament to give its approval before a treaty is ratified. Nevertheless, it has been the practice of Canadian Governments to seek parliamentary approval of important treaties. Parliamentary approval is given by way of a resolution of both Houses, rather than the passage of legislation³¹.

Treaties are not self-executing in Canada. Legislation is required if any change to the law is necessary to implement a treaty. Section 132 of the Canadian Constitution provides that the Parliament and Government of Canada shall have all the powers necessary or proper for performing the obligations of Canada or of any Province thereof, towards foreign countries, arising under treaties between Canada and such foreign countries. In the *Labour Conventions* case³², the Privy Council held that Section 132 did not give the Federal Parliament power to enact legislation implementing a treaty, where that legislation covers matters otherwise within the exclusive jurisdiction of the Provinces. Accordingly,

²⁸ *Fromagerie Franco-Suisse "Le Ski" v Belgian State*, discussed in M. Maresceau, "Belgium", in F. Jacobs and S. Roberts, *THE EFFECT OF TREATIES IN DOMESTIC LAW* 14 (1987).

²⁹ See, 'Trick or Treaty? Commonwealth Power to Make and Implement Treaties', Chapter 10, 'Practices in Other Federations', 10.33, Belgium available at http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/pre1996/treaty/report/c10.htm#Belgium.

³⁰ *Ibid*, 'Canada', paragraphs, 10.34 and 10.37.

³¹ *Ibid*, 10.39.

³² *Attorney-General (Canada) v Attorney-General (Ontario)* [1937] A.C. 326.

in some cases where the Federal Government enters into a treaty, it can only be implemented by legislation enacted by the provincial legislatures. The Labour Conventions case has been subject to a great deal of criticism, and it is uncertain that the principle would be applied in the same manner today³³.

As noted above, the Government may choose to seek parliamentary approval of important treaties before ratification. In such cases, parliamentary committees may be involved in considering the treaty³⁴. The role of the Provinces in the treaty making process is largely derived from the fact that where a treaty covers subjects within the exclusive legislative jurisdiction of the Provinces, then implementing legislation can only be enacted by the Provinces. This leads to greater consultation with the Provinces concerning those treaties, which will need to be implemented by them³⁵.

(iv) Federal Republic of Germany

Germany is a federal republic with a bicameral Parliament. The Upper House, called the Bundesrat, is comprised of members of the government of the Lnder (the German States). Each of the Lnder is allocated a number of representatives, according to its population. The Bundesrat can reject any bill which affects the powers of the Lnder. The Lower House, called the Bundestag, is directly elected by the people. It elects the Chancellor, who is the head of government. The head of State is the President. The federal Executive consists of the President, the Chancellor and the Ministry. Article 59 of the Basic Law (the German Constitution) provides that the Federal President represents the Federation in its international relations and concludes treaties on its behalf. Paragraph 3 of Article 32 of the German Basic Law states that the Lnder may, with the consent of the Federation, enter into treaties with countries, concerning matters which are within their legislative powers. This power covers little more than cultural agreements³⁶.

Prior to 1957, there was disagreement as to whether the Lnder had exclusive jurisdiction to enter into treaties on subjects within their legislative jurisdiction, or whether the Federation could also enter into treaties on such subjects. The Lnder and the Federation reached an agreement, known as the Lindau Agreement, on 14 November 1957, under which the Lnder agreed that the Federation would negotiate agreements with countries on subjects within the legislative power of the Lnder, on the condition that it obtains the consent of the Lnder before the parliamentary procedure begins³⁷.

³³ Supra Fn. 31, paragraphs 10.40 to 10.43.

³⁴ Ibid, paragraph 10.47.

³⁵ Ibid, paragraph 10.48.

³⁶ Ibid, paragraphs 10.49 to 10.53.

³⁷ Ibid, paragraph 10.54.

This Agreement resulted in the creation of a Permanent Treaty Commission, comprised of representatives of the Lnder. Where a treaty involves a subject within the legislative jurisdiction of the Lnder, the Permanent Treaty Commission must give its consent before the ratification procedure may proceed³⁸. The Bundesrat and the Lnder claim that the Lindau Agreement gives them the right to participate in the conclusion of all treaties which will affect the domestic laws of the Lnder, even if they are not on subjects within the exclusive jurisdiction of the Lnder. In the case of the *Convention on the Rights of the Child*, and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ratification was delayed and several interpretative declarations were made, to satisfy the demands of the Lnder³⁹.

Paragraph 2 of Article 59 of the Basic Law provides that treaties that regulate the political relations of the Federation or relate to matters of federal legislation require the enactment of a federal law by the bodies competent to pass such federal legislation.

Treaties that regulate the 'political relations' of the Federation, include peace treaties, military pacts, non-aggression pacts, and treaties concerning such issues as disarmament, neutrality and political co-operation. Treaties, which 'relate to matters of Federal legislation' include all those treaties where legislation would otherwise be required to change the law in the manner required by the treaty. Hence, if the executive could implement a treaty without legislation, then it is not bound to seek the consent of the legislature to enter into that treaty. If, however, the law must be changed, or a law would otherwise need to be enacted to implement the treaty, then it is necessary to seek legislative approval. This is a consequence of the fact that treaties are self-executing in Germany⁴⁰.

In cases where legislative approval is necessary, the treaty is laid before both Houses of the Parliament. While the consent of the Bundestag is necessary in all such cases, the Bundesrat only obtains a right to veto a treaty where the treaty falls within the legislative jurisdiction of the Lnder or affects the administrative procedures of the Lnder. In other cases, the Bundesrat may state its opinion, but this may be overridden by the Bundestag⁴¹. The parliamentary act of approving the ratification of a treaty, has the additional effect of determining the treaty's effect and status in domestic law. In giving its consent to the

³⁸ Ibid, Paragraph 10.55, cited from J. Williamson, A Comparison of Treaty Making Practices in Australia, the United States, the United Kingdom and Germany, A Report for the Law Internship Program at Australian National University, October 1994: p 13.

³⁹ Ibid, paragraph 10.56. cited from J.A. Frowein and M.J. Hahn, "The Treaty Process in the Federal Republic of Germany" in S.A. Riesenfeld and F.M. Abbott, (eds) PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES - A COMPARATIVE STUDY 63 (1994).

⁴⁰ Ibid at paragraph 10.58.

⁴¹ Ibid at paragraph 10.60.

ratification of a treaty, the Parliament can determine whether the treaty should be directly applicable, or whether further legislation is necessary before the treaty is to be implemented. In cases where legislation would be within the exclusive power of the Lnder, then only the Lnder can implement the treaty⁴².

The legislation which gives parliamentary approval to the ratification of a treaty also has the effect of incorporating it in domestic law, to the extent that it is self-executing. Accordingly, the status of the treaty provisions is normally the same as that of any other federal legislation, and will override prior legislation. This also means that treaty provisions will prevail over laws of the Lnder. However, if the treaty provisions are implemented by the laws of the Lnder, because they relate to the exclusive jurisdiction of the Lnder, then the treaty provisions will be subordinate to Federal laws⁴³.

The Parliament may also legislate to give treaty provisions precedence over ordinary legislation. One example is the German Tax Code, where Section 2 provides that the provisions of tax treaties shall take precedence over tax laws, once the treaties have become part of municipal law. Although the Parliament has the power to legislate in a manner, which is incompatible with treaty obligations, the courts have developed an interpretative rule which presumes that legislation is not intended to be inconsistent with treaty obligations unless it is clearly expressed to override the treaty⁴⁴.

The Lnder have a limited ability to enter into treaties in their own right, in the areas over which they have legislative power. Under the Lindau agreement, the Lnder allow the Federal Government to negotiate treaties on their behalf, but only after their consent has been obtained. Paragraph 2 of Article 32 of the Basic Law provides that before the conclusion of a treaty affecting the special circumstances of a Lnder, that Lnder must be consulted in sufficient time. Only the Lnder can implement treaties that deal with subjects within their exclusive legislative jurisdiction⁴⁵.

(v) Switzerland

Switzerland is a federal republic with a bicameral parliament, called the Federal Assembly. The Upper House, the Council of States, consists of representatives of the Cantons (the Swiss States). Two members are elected from each Canton. The Lower House, the National

⁴² Ibid at paragraph 10.61.

⁴³ Ibid at paragraph 10.64, cited from, J.A. Frowein, "Federal Republic of Germany" in F.G. Jacobs and S. Roberts, *THE EFFECT OF TREATIES IN DOMESTIC LAW*, 67 (1987).

⁴⁴ Ibid, paragraph 10.65 cited from J.A. Frowein and M.J. Hahn, 'The Treaty Process in the Federal Republic of Germany' in S.A. Riesenfeld and F.M. Abbott, (eds) *Parliamentary Participation in the Making and Operation of Treaties - A Comparative Study*, Martinus Nijhoff, 1994: p 69

⁴⁵ Ibid paragraphs 10.68 to 10.71 cited from J.A. Frowein, 'Federal Republic of Germany' in F.G. Jacobs and S. Roberts,

The Effect of Treaties in Domestic Law, London, Sweet & Maxwell, 1987: pp 66-67.

Council, is elected directly by the people, according to population. Executive power is exercised by the Federal Council, which is headed by the President⁴⁶.

Article 8 of the Swiss Constitution provides that the Confederation has the sole right to declare war and conclude peace, to make alliances and treaties, particularly customs and commercial treaties with foreign states. This power has been interpreted as being an independent source of power, so the Confederation can enter into treaties even if the treaty deals with an area within the exclusive legislative jurisdiction of the Cantons (Provinces)⁴⁷. Paragraph 8 of Article 102 of the Swiss Constitution states that the Federal Council has the right and obligation to preserve the external interests of the Confederation, in particular its international relations, and is generally in charge of external affairs. It is the Federal Council that negotiates and signs treaties.

Article 9 of the Swiss Constitution provides that 'exceptionally', the Cantons retain the right to conclude international 'agreements' on matters of public economy, neighbourhood and police relations, provided they contain nothing repugnant to the rights of the Confederation or the other Cantons. This Article has been interpreted as a concurrent power, and is therefore subject to the plenary power of the Confederation to enter into such treaties⁴⁸.

Paragraph 5 of Article 85 of the Swiss Constitution provides that both Houses of the Federal Assembly have powers to deal with alliances and treaties with foreign states, as well as the approval of agreements of the Cantons with each other or with foreign states. This provision does not clearly state the role of the Federal Assembly in the treaty making procedure.

In addition to parliamentary approval, certain categories of treaties may, or must, be put to the people in a referendum. Article 89 of the Swiss Constitution provides that if 50,000 Swiss citizens who are entitled to vote, or eight Cantons, so demand, then a referendum shall be held to approve or reject international treaties, which fall within the following four categories:

- ▶ treaties concluded for an indefinite period and without possibility of denunciation;
- ▶ treaties which provide for adherence to an international organisation;

⁴⁶ Ibid, paragraph 10.87.

⁴⁷ Ibid, paragraph 10.87, cited from L. Wildhaber, "Parliamentary Participation in Treaty-Making, Report on Swiss Law", in S.A. Riesenfeld and F.M. Abbott, (eds) PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES - A COMPARATIVE STUDY 132 (1994).

⁴⁸ Ibid paragraphs 10.91 to 10.92.

- ▶ treaties which imply a multilateral unification of law; and
- ▶ treaties which are nominated by both Federal Chambers.

There is a fifth category of treaty, which it is obligatory to put to a referendum. It comprises treaties of adherence to supranational organisations (such as the United Nations) or organisations for collective security.

Upon ratification and official publication of the treaty, it becomes part of Swiss domestic law without the need for further legislation⁴⁹.

The Federal Assembly must approve of, or reject, the treaty as a whole. It cannot modify the terms of the treaty. The Federal Assembly can, however, make its approval subject to a qualification that requires the Federal Council to make specific reservations or declarations at the time the treaty is ratified. This qualification must be contained in the decree which the Federal Assembly passes⁵⁰.

The Swiss Federal Assembly uses its system of preparatory commissions to keep a check on important treaties during their negotiation and finalisation, and to subject important treaties to scrutiny⁵¹.

The Cantons have a limited power, under Article 9 of the Swiss Constitution, to enter into international agreements. Otherwise, the only manner in which the Cantons are involved in the treaty making process is through their representatives in the Upper House of the Swiss Federal Assembly. Under Article 89 of the Constitution, the Cantons can also initiate a referendum in relation to certain treaties, if eight of them propose it⁵².

(vi) United Kingdom

The position of law has been clarified by the House of Lords in *JH Rayner v. Dept of Trade and Industry*⁵³ as thus:

"The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation in order to enforce a treaty."

⁴⁹ Ibid, paragraphs 10.95 to 10.98 cited from V. Leary, INTERNATIONAL LABOUR CONVENTIONS AND NATIONAL LAW 49 (1982).

⁵⁰ Ibid, paragraphs 10.100 to 10.101.

⁵¹ Ibid, paragraph 10.104

⁵² Ibid, paragraph 10.106.

⁵³ 1990(2) AC 418.

So far as the effect of concluded treaties on the domestic law is concerned, the English law is at variance with the law in the United States. The generally accepted principle in English law is that in case of conflict between the British statutes and the provisions of a treaty, the former prevails. This is supposed to be a principle of constitutional law. Where, however, the Parliament undertakes legislation to give effect to an international convention, it has been held that the courts must presume that the Parliament intended to fulfill the international obligations undertaken by the States.

(vii) United States of America

The United States of America is a Federal Republic with a bicameral Parliament. The Congress consists of an Upper House, the Senate, which comprises two members elected from each State, and a House of Representatives, which is directly elected according to population. The Executive is made up of the President and the Cabinet, which is appointed by the President⁵⁴. Clause 2 of Article II, Section 2 of the United States Constitution provides that the President shall have power, by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur. Clause 1 of Article I, Section 10 provides that no State shall enter into any treaty, alliance or confederation. Clause 3 provides that no State shall, without the consent of Congress, enter into any agreement or compact with a foreign power⁵⁵.

Article II, Section 2, Clause 2 of the Constitution requires approval by two-thirds of the Senate, before the President can ratify a treaty. There is no requirement to consult the House of Representatives. In practice, a treaty is negotiated by the Executive, and is only sent to the Senate for approval once it is finalised. President Washington once consulted the Senate during the negotiation phase of a treaty, and no President has undertaken this course since⁵⁶. Nevertheless, members of the Senate are often personally consulted during the negotiation stage, and sometimes act as advisers to the negotiation delegations of the Government⁵⁷.

Once a treaty is sent to the Senate for its consideration, it is usually referred to the Foreign Relations Committee. The Committee conducts an inquiry, holds public hearings, and recommends whether the Senate should approve the treaty, conditionally approve it or reject it. The treaty is then referred back to the Senate, where the Committee of the

⁵⁴ Supra, Fn 53, paragraph, 10.107.

⁵⁵ Ibid, paragraphs 10.108 to 10.109.

⁵⁶ Ibid, paragraphs, 10.110 to 10.111 cited from, *Hansard*, SLCRC, 14 June 1995, p 748, per Mr Gulson.

⁵⁷ Ibid, paragraph, 10.112 cited from S.A. Riesenfeld, and F.M. Abbott, 'The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties' in S.A. Riesenfeld and F.M. Abbott, (eds), *Parliamentary Participation in the Making and Operation of Treaties - A Comparative Study*, Martinus Nijhoff, 1994: p 266.

Whole may consider it, article by article. Votes are taken on the treaty and any proposed amendments or conditions to ratification. These votes can be passed by an ordinary majority. It is only the final vote on the treaty which requires a two-thirds majority before the President may ratify the treaty⁵⁸.

The Article II procedure is not the exclusive means of entering into international legal agreements in the United States. The President also has power, under the general executive power, to enter into "executive agreements" without the consent of the Senate. Such agreements usually relate to foreign relations or military matters, and do not tend to directly affect the rights and obligations of citizens⁵⁹.

A third means of entering into international legal agreements is through the Congressional-Executive agreement process⁶⁰. Under this process the Congress passes a joint resolution of both Houses, or passes legislation, authorising or approving the conclusion of an international agreement by the President. The main difference with the Article II procedure is that there is no requirement to obtain two-thirds approval of the Senate. There need only be a simple majority in approval in each House in order to authorise the ratification of the treaty. This process is often used for trade agreements, as the Congress has constitutional authority to regulate commerce with foreign nations under Article I of the Constitution⁶¹.

Article VI, Section 2 of the Constitution provides that all treaties made under the authority of the United States shall be the supreme law of the land, and the judges in every State shall be bound by them, notwithstanding anything to the contrary in the Constitution or laws of any State. Nevertheless, there is still a debate over when a treaty is capable of being self-executing, and when legislation is necessary to fulfil the principles set out in a treaty⁶². In some cases the Senate will qualify its consent to the ratification of a treaty with a declaration that the treaty shall not be self-executing⁶³. The Senate cannot compel the President to modify a treaty, but it can give its consent subject to conditions that require the making of reservations at the time of ratification. The Senate may also give

⁵⁸ Ibid, paragraph 10.113

⁵⁹ Ibid at 301.

⁶⁰ The constitutionality of this process is discussed in B. Ackerman and D. Golove, "Is NAFTA Constitutional?" (1995) 108 Harvard Law Review 801.

⁶¹ Supra Fn. 59, paragraph 10.115.

⁶² Ibid, paragraph 10.118, cited from J.H. Jackson, "United States" in F.G. Jacobs and S. Roberts, (eds) THE EFFECT OF TREATIES IN DOMESTIC LAW 141 (1987).

⁶³ Ibid, paragraph 10.118, cited from L.F. Damrosch, "The Role of the United States Senate Concerning "Self-Executing".

its consent subject to an 'understanding' or 'declaration' as to the interpretation of certain treaty provisions, or subject to a proviso concerning the internal implementation of the treaty⁶⁴.

Article VI of the Constitution provides that treaties shall form part of the supreme law of the land. Hence a treaty is superior to inconsistent State laws and State Constitutions. It also prevails over prior inconsistent federal laws. The more difficult question is whether a treaty prevails over subsequent inconsistent federal laws. The Supreme Court has developed the 'last-in-time' doctrine, which means that federal legislation can override treaty obligations, if the legislation comes into effect after the treaty obligation comes into effect. The Constitution does not state whether Congress must be involved in the denunciation of a treaty. However, it is generally accepted that the power to denounce a treaty is held by the President, as part of his or her power in relation to foreign affairs, and that Congressional or Senate approval is not required⁶⁵.

Where Senate approval is necessary for the ratification of a treaty, as a matter of practice, both the Senate Foreign Relations Committee and individual senators are frequently consulted during the negotiation process. As discussed above, the Foreign Relations Committee usually conducts an inquiry into a treaty, and then recommends to the Senate whether the treaty should be approved or rejected, or approved subject to conditions⁶⁶.

Apart from a very limited power to enter into international agreements, with the approval of the Congress, the only involvement of the States in the treaty making process is through State representatives in the Senate. There have been, however, recent proposals raised by intergovernmental relations bodies, to increase State and local government involvement in the treaty making process⁶⁷.

⁶⁴ Ibid, paragraphs 10.119 to 10.120 cited from "Non-Self-Executing" Treaties" in S.A. Riesenfeld and F.M. Abbott, (eds), *PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES - A COMPARATIVE STUDY* 205 (1994). This was done in the case of the *International Covenant on Civil and Political Rights*.

⁶⁵ Ibid, paragraphs 10.121 to 10.122 cited from L. Levy, K. Karst, and D. Mahoney, (eds), *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 1911.

⁶⁶ Ibid, paragraphs 10.123 to 10.124, cited from J. Williamson, 'A Comparison of Treaty Making Practices in Australia, the United States, the United Kingdom and Germany', A Report for the Law Internship Program at Australian National University, October 1994: pp 6-7

⁶⁷ Ibid, paragraphs 10.125 to 10.126, cited from, J. Kline, "Managing intergovernmental tensions: shaping a state and local role in US foreign relations" in B. Hocking, (ed.), *FOREIGN RELATIONS AND FEDERAL STATES* 118 (1993).

View of the States, Central Ministries and Major Political Parties

3.7.26 The Commission had solicited the view of the States, Central Ministries, Political Parties and National Institutions with regard to this issue. The following are some of the salient points highlighted:

- ▶ It is necessary to consult States before entering into the process of treaty making with other countries or international agencies.
- ▶ With regard to WTO negotiations, presently the Department of Commerce does have periodic meetings with state governments both to sensitize them on the progress of the negotiations and the issues under consideration as also to take on board their suggestions. These meetings have to be made more explicit and formal.
- ▶ Important international treaties should get the approval of both the Houses of Parliament before they come into effect. If necessary, a time frame could be prescribed for Parliament to take a decision on the treaties, failing which it would be deemed to have been ratified.
- ▶ Some states have pointed out that under Entries 13 and 14 of List I and Article 253 it is within the exclusive domain of the Union Government to enter into treaties and agreements and to implement them even if the subject matter of a treaty is within a State List and that this amounts to an usurpation of power by the Union Government. Therefore, if the subject matter of a treaty falls within List II or III, then the Union government should mandatorily consult the state governments before entering into treaties.
- ▶ If a treaty entered into by the Union Government casts obligations on the State Government, then under such circumstances, the Union Government has to provide the necessary funds and other assistance to implement the treaty.
- ▶ One State has suggested that the Constitution should be amended to make State legislative approval mandatory for any international treaty particularly when the treaty has a bearing on the States.
- ▶ A political party has recommend that all international treaties should require Parliamentary approval. Consultation should be with states and the consent of the Inter-State Council must also be made mandatory. It is also proposed that any international treaty should be ratified by both Houses of Parliament by two-thirds majority.

Drafting a Central Legislation for Treaty Making

3.7.27 As noted above, according to Article 253 of the Constitution, Parliament has the power to enact legislations to give effect to treaties and international agreements. However, unlike Article II, Section 2 of the United States Constitution, the Indian Constitution contains no provision for a ratification of treaties by Parliament. This has meant that the Union executive has wide powers with respect to treaty making powers. As Dhavan and Saxena noted⁶⁸:

"The treaty-making power encompasses any agreements with other nations. Theoretically, no treaty is legally effective unless incorporated into the domestic law by legislation. In fact, however, self-fulfilling multilateral treaties, like the World Trade Organization (WTO) agreements, have transformed Indian governance...Anxiety about federal domination through this power remains... especially within a contemporary global context in which so much is ordained through multilateral treaties."

3.7.28 The Sarkaria Commission did not consider this issue in detail as treaties played a minimal role in law making at that time. Subsequently, however, with the advent of the World Trade Organization, and recent controversies such as the Indo-US Nuclear Deal⁶⁹, questions arise as to whether the power to enter into treaties and create international law should vest entirely with the Union without any necessary approval from either Parliament or the States. The comparative analysis above illustrates several doctrinal approaches to treaty formulations and international law making. Even if approval from States may not be a practically conceivable alternative in India, it may be worth exploring other possibilities such as a mandatory consultative process with the States.

3.7.29 In view of the vastness and plenary nature of the treaty making powers with the Union Government notwithstanding the scheme of legislative relations between the Union and States (Article 253), the Commission recommends that Parliament should make a law on the subject of Entry 14 of List I (treaty making and implementing it through Parliamentary legislation) to streamline the procedures involved. The exercise of the power obviously cannot be absolute or unchartered in view of the federal structure of legislative and executive powers. Several states have expressed concern and wanted

⁶⁸ Rajeev Dhavan & Rekha Saxena, "Republic of India", in Katy Le Roy & Cheryl Saunders (eds) *LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES* 178 (2006). See also Rajeev Dhavan, "Treaties and People: Indian Reflections", 39 *Journal of the Indian Law Institute* 1 (1997).

⁶⁹ For a detailed analysis of the Indo-US Nuclear Agreement, see Kate Heinzelman, "Towards Common Interests and Responsibilities: The U.S.-India Civil Nuclear Deal and the International Nonproliferation Regime", 33 *Yale Journal of International Law* 447 (2008).

the Commission to recommend appropriate measures to protect States' interests in this regard. The Commission recommends that the following aspects may be incorporated in the Central law proposed on the subject of Entry 14 of List I:

- (a) In view of the fact that treaties, conventions or agreements may relate to all types of issues within or outside the States' concern, there cannot be a uniform procedure for exercise of the power. Furthermore, since treaty making involves complex, prolonged, multi-level negotiations wherein adjustments, compromises and give and take arrangements constitute the essence, it is not possible to bind down the negotiating team with all the details that should go into it. Nonetheless, the Constitutional mandates on federal governance cannot be ignored; nor the rights of persons living in different regions or involved in different occupations compromised. Therefore there is need for a legislation to regulate the treaty making powers of the Union Executive.
- (b) Agreements which largely relate to defense, foreign relations etc. which have no bearing on individual rights or rights of States of the Indian Union can be put in a separate category on which the Union may act on its own volition independent of prior discussion in Parliament. However, it is prudent to refer such agreements to a Parliamentary Committee concerned with the particular Ministry of the Union Government before it is ratified.
- (c) Other treaties which affect the rights and obligations of citizens as well as those which directly impinge on subjects in State List should be negotiated with greater involvement of States and representatives in Parliament. This can assume a two-fold procedure. Firstly, a note on the subject of the proposed treaty and the national interests involved may be prepared by the concerned Union Ministry and circulated to States for their views and suggestions to brief the negotiating team. Secondly, an "Empowered Committee" of concerned Ministers of States and the Centre be asked to study the provisions of the agreement and recommend to Government to ratify the treaty in whole or conditionally with reservations on certain provisions.
- (d) There may be treaties or agreements which, when implemented, put obligations on particular States affecting its financial and administrative capacities. In such situations, in principle, the Centre should underwrite the additional liability of concerned States according to an agreed formula between the Centre and States.
- (e) The Commission is also of the view that financial obligations and its implications on State finances arising out of treaties and agreements should be a permanent

term of reference to the Finance Commissions constituted from time to time. The Commission may be asked to recommend compensatory formulae to neutralize the additional financial burden that might arise on States while implementing the treaty/agreement.

3.8 Conclusions and Recommendations

3.8.01 Consultation with States while legislating on matters in Concurrent List

List III includes subjects on which the Union and the States can both legislate. For cultivating better Centre-State relations and to facilitate effective implementation of the laws on List III subjects, it is necessary that some broad agreement is reached between the Union and States before introducing legislation in Parliament on matters in the Concurrent List. The existing arrangements in this regard require institutionalization through the Inter-State Council. The Council, if found necessary, may use an independent mechanism like a Committee of State Ministers to thrash out contentious issues in the Bill so that there is a measure of support among the States to the administrative and fiscal arrangements the Bill ultimately proposes to Parliament. It is important that the record of proceedings in the Council/Committee including views of States are made available to Parliament while introducing the Bill on Concurrent List subjects.

3.8.02 Transfer of Entries in the Lists, from List II to List III

Article 368(2) empowers Parliament to amend any provision of the Constitution in accordance with the procedure laid down therein. Should Parliament deplete or limit the legislative powers of the States through this process unilaterally or otherwise? In a federal system, the existence of the power in the Union does not by itself justify its exercise and it is the considered view of the Commission that the Union should be extremely restrained in asserting Parliamentary supremacy in matters assigned to the States. Greater flexibility to States in relation to subjects in the State List and "transferred items" in the Concurrent List is the key for better Centre-State relations.

In this context, it is worthwhile to examine through a joint institutional mechanism whether the administration of the relevant subject under the Central law (on the transferred subject) has achieved the objects and whether it is desirable to continue the arrangement as an occupied field limiting thereby the exclusive jurisdiction of the States. If the findings are not positive it may be worthwhile to consider restoration of the item to its original

position in State List in the interest of better Centre-State relations. Such a step hopefully will encourage the States to devolve the powers and functions on that subject to the Panchayats and Municipalities as stipulated in Parts IX and IX-A of the Constitution. In short, the Commission is of the opinion that the Union should occupy only that much of subjects in concurrent or overlapping jurisdiction which is absolutely necessary to achieve uniformity of policy in demonstrable national interest.

3.8.03 Management of matters in concurrent jurisdiction

Given the joint responsibility of the Centre and the States it is imperative that legislation on matters of concurrent jurisdiction generally and transferred items from the State List in particular, should be managed through consultative processes on a continuing basis. The Commission recommends a continuing auditing role for the Inter-State Council in the management of matters in Concurrent or overlapping jurisdiction.

3.8.04 Bills reserved for consideration of the President:

Article 201 empowers the President to assent or withhold assent to a Bill reserved by a Governor for the President's consideration. If the President returns the Bill with any message, the State Legislature shall reconsider the Bill accordingly within a period of six months for presentation again to the President for his consideration.

States have expressed concern that Bills so submitted sometimes are indefinitely retained at the Central level even beyond the life of the State Legislature. Allowing the democratic will of the State Legislature to be thwarted by Executive fiat is questionable in the context of 'basic features' of the Constitution. Therefore the President should be able to decide consenting or withholding consent in reasonable time to be communicated to the State. In the Commission's view, the period of six months prescribed in Article 201 for State Legislature to act when the Bill is returned by the President can be made applicable for the President also to decide on assenting or withholding assent to a Bill reserved for consideration of the President.

3.8.05 Treaty making powers of the Union Executive and Centre-State Relations

Entering into treaties and agreements with foreign countries and implementation of treaties, agreements and conventions with foreign countries are items left to the Union Government (Entry 14 of List I). Article 253 confers exclusive power on Parliament to

make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

In view of the vastness and plenary nature of the treaty making powers with the Union Government notwithstanding the scheme of legislative relations between the Union and States (Article 253), the Commission recommends that Parliament should make a law on the subject of Entry 14 of List I (treaty making and implementing it through Parliamentary legislation) to streamline the procedures involved. The exercise of the power obviously cannot be absolute or unchartered in view of the federal structure of legislative and executive powers. Several states have expressed concern and wanted the Commission to recommend appropriate measures to protect States' interests in this regard. The Commission recommends that the following aspects may be incorporated in the Central law proposed on the subject of Entry 14 of List I:

- a) In view of the fact that treaties, conventions or agreements may relate to all types of issues within or outside the States' concern, there cannot be a uniform procedure for exercise of the power. Furthermore, since treaty making involves complex, prolonged, multi-level negotiations wherein adjustments, compromises and give and take arrangements constitute the essence, it is not possible to bind down the negotiating team with all the details that should go into it. Nonetheless, the Constitutional mandates on federal governance cannot be ignored; nor the rights of persons living in different regions or involved in different occupations compromised. Therefore there is need for a legislation to regulate the treaty making powers of the Union Executive.
- b) Agreements which largely relate to defense, foreign relations etc. which have no bearing on individual rights or rights of States of the Indian Union can be put in a separate category on which the Union may act on its own volition independent of prior discussion in Parliament. However, it is prudent to refer such agreements to a Parliamentary Committee concerned with the particular Ministry of the Union Government before it is ratified.
- c) Other treaties which affect the rights and obligations of citizens as well as those which directly impinge on subjects in State List should be negotiated with greater involvement of States and representatives in Parliament. This can assume a two-fold procedure. Firstly, a note on the subject of the proposed treaty and the national interests involved may be prepared by the concerned

Union Ministry and circulated to States for their views and suggestions to brief the negotiating team.

- d) There may be treaties or agreements which, when implemented, put obligations on particular States affecting its financial and administrative capacities. In such situations, in principle, the Centre should underwrite the additional liability of concerned States according to an agreed formula between the Centre and States.
- e) The Commission is also of the view that financial obligations and its implications on State finances arising out of treaties and agreements should be a permanent term of reference to the Finance Commissions constituted from time to time. The Commission may be asked to recommend compensatory formulae to neutralize the additional financial burden that might arise on States while implementing the treaty/agreement.

CHAPTER 4
ROLE OF GOVERNOR AND CENTRE-STATE RELATIONS

CONTENTS

Sections/Headings	Para Nos.	Page Nos.
4.1 Introduction	4.1.01-4.1.04	55-57
4.2 The Role of Governor under the Constitution	4.2.01-4.2.15	57-61
4.3 Role of Governor in Management of Centre-State Relations	4.3.01-4.3.03	61-62
4.4 Appointment and Removal of Governors	4.4.01-4.4.19	62-68
4.5 Powers of the Governor in the Context of Harmonious Centre-State Relations	4.5.01-4.5.13	68-84
4.6 Conclusions and Recommendations	4.6.01-4.6.03	85-88

4

ROLE OF GOVERNOR AND CENTRE-STATE RELATIONS

4.1 Introduction

4.1.01 In the first two decades after Independence, there was supremacy of the Congress Party both at the Centre and the State level. Consequently, the role of the Governor was more symbolic and devoid of much controversy. There was very limited role of the Governor in terms of utilising his discretionary powers. However, this position changed after the 1967 elections, where even though the Congress retained power in the Centre, it lost in eight states. Between 1967 and 1972 there was a downfall of more than two dozen ministries giving rise to opportunistic alliances and political defections. As a result, the Governor's role became important as he had to balance the political considerations between the Centre and State and be as impartial as possible. When the Chief Ministers belonged to the Opposition, the Governor was considered the Centre's agent and when there was a coalition government, the Chief Minister's position was rendered rather ineffectual *vis-à-vis* the Governor. As a result, the Governor started playing a stubborn role, which gave birth to debatable issues concerning the constitutional powers of the Governor.⁷⁰

4.1.02 The Governor's role thereafter became increasingly controversial with allegations of partiality and lack of objectivity in exercise of the discretionary powers. The part played by some Governors, particularly in recommending President's rule and in reserving State Bills for the consideration of the President, had evoked strong resentment. Frequent removals and transfers of Governors before the end of their tenure have also lowered the prestige of this office. Criticism has also been leveled that the Union Government utilises the Governors for its own political ends. Many Governors, looking forward to further office under the Union or active role in politics after their tenure, came to regard themselves as agents of the Union⁷¹. The Governor thus became a major issue affecting the equation between the Centre and the States.

⁷⁰ Role of the Governor and multiparty System by Indrajeet Singh Mainstream, Vol XLVI No 11. available at <http://www.mainstreamweekly.net/article553.html>

⁷¹ Sarkaria Commission, Para 4.1.02

4.1.03 Dr. B.R. Ambedkar, highlighted the Constitutional role of the Governor⁷² in following terms:

"The Governor under the Constitution has no functions which he can discharge by himself; no functions at all. While he has no functions, he has certain duties to perform, and I think the House will do well to bear in mind this distinction. This Article (Article 167) certainly, it should be borne in mind, does not confer upon the Governor the power to overrule the Ministry on any particular matter. Even under this Article, the Governor is bound to accept the advice of the Ministry... This Article, nowhere, either in clause (a) or clause (b) or clause (c), says that the Governor in any particular circumstances may overrule the Ministry. Therefore, the criticism that has been made that this Article somehow enables the Governor to interfere or to upset the decision of the Cabinet is entirely beside the point, and completely mistaken.

A distinction has been made between the functions of the Governor and the duties which the Governor has to perform. My submission is that although the Governor has no functions still, even the Constitutional Governor, that he is, has certain duties to perform. His duties according to me, may be classified in two parts. One is, that he has to retain the Ministry in office. Because, the Ministry is to hold office during his pleasure, he has to see whether and when he should exercise his pleasure against the Ministry. The second duty which the Governor has, and must have, is to advise the Ministry, to warn the Ministry, to suggest to the Ministry an alternative and to ask for a reconsideration. I do not think that anybody in this House will question the fact that the Governor should have this duty cast upon him; otherwise, he would be an absolutely unnecessary functionary: no good at all. He is the representative not of a party; he is the representative of the people as a whole of the State. It is in the name of the people that he carries on the administration. He must see that the administration is carried on at a level which may be regarded as good, efficient, honest administration. I submit that he cannot discharge the constitutional functions of a Governor which I have just referred to unless he is in a position to obtain the information... It is to enable the Governor to discharge his functions in respect of a good and pure administration that we propose to give the Governor the power to call for any information..."

4.1.04 The Constituent Assembly also discussed the extent of discretionary powers to be allowed to the Governor. Following the decision to have a nominated Governor, references in the various Articles of the Draft Constitution relating to the exercise of specified functions by the Governor 'in his discretion' were deleted. The only explicit provisions retained were those relating to Tribal Areas in Assam where the administration

⁷² Constituent Assembly Debates, 2nd July 1949.

was made a Central responsibility. The Governor as agent of the Central Government during the transitional period could act independently of his Council of Ministers. Nonetheless, no change was made in Draft Article 143, which referred to the discretionary powers of the Governor. This provision in Draft Article 143 (now Article 163) generated considerable discussion. Replying to it, Dr. Ambedkar maintained that vesting the Governor with certain discretionary powers was not contrary to responsible Government.⁷³

4.2 The Role of the Governor under the Constitution

4.2.01 Article 153 of the Constitution requires that there shall be a Governor for each State and states that one person can be appointed as Governor for two or more States. Article 154 vests the executive power of the State in the Governor who exercises it either directly or through officers subordinate to him in accordance with the Constitution. In terms of Article 155 the Governor of a State shall be appointed by the President by warrant under his hand and seal and Article 156 prescribes that the Governor shall hold office during the pleasure of the President. The term of the Governor is prescribed as five years.

4.2.02 The only qualifications for appointment as Governor are that he should be a citizen of India and must have completed the age of thirty-five years. Article 158 lays down certain conditions of the Governor's office including that the Governor shall not be a member of either House of Parliament or of a House of the Legislature of any State and that the Governor shall not hold any other office of profit. It also lays down certain conditions pertaining to the emoluments and allowances due to the Governor. Article 159 prescribes the oath, which a Governor has to take before entering upon his office. Article 161 lays down the power of the Governor to grant pardons, reprieves etc.

4.2.03 Article 164(1) says "The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister and shall hold office during the pleasure of the Governor".

4.2.04 Under Article 163(1), he exercises almost all his executive and legislative functions with the aid and advice of his Council of Ministers. Thus, the executive power vests theoretically in the Governor but is really exercised by his Council of Ministers, except in the limited sphere of his discretionary action.

⁷³ Quoted in Report of Sarkaria Commission, Para 4.2.07

4.2.05 Article 167 of the Constitution imposes duties on the Chief Minister to communicate to the Governor all decisions of the Council of Ministers and proposals for legislation and such other information relating to the administration of the affairs of the State and proposals for legislation as the Governor may call for; and "if the Governor so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council". The information which the Governor is entitled to receive under clause (b) of the Article 167 must not only be related to the affairs of the State administration, but also have a nexus with the discharge of his Constitutional responsibilities

4.2.06 According to Article 168, the Legislature of a State shall consist of the Governor and the Legislative Assembly. Where, however, the Legislature consists of two Houses, the Upper House too is naturally a part of the Legislature

4.2.07 The nature and scope of the duties of the Chief Minister and the corresponding rights and powers of the Governor are to be understood in the context of their respective roles and responsibilities under a Cabinet system of government as adopted in our Constitution. Under this system, the Governor as Constitutional head of the State has "a right to be consulted, to warn and encourage" and his role is overwhelmingly that of "a friend, philosopher and guide" to his Council of Ministers. Harmoniously with this role, the Governor also functions as a sentinel of the Constitution and a live link with the Union. The rationale of Article 167 is that by affording access to necessary information relating to the administration of the affairs of the State and the legislative proposals, it enables the Governor to discharge effectively this multi-faceted role.⁷⁴

4.2.08 The options available to the Governor under Article 167 give him persuasive and not dictatorial powers to override or veto the decisions or proposals of his Council of Ministers relating to the administration of the affairs of the State. At best, "they are powers of giving advice or counselling reflection or the need for caution and they are powers which may be used to build bridges between the Government and opposition". The efficacy of this advisory role of the Governor depends, in no small measure, on the respect which the incumbent of the office inspires for his wisdom and integrity in the mind of his Chief Minister and Ministers, in particular, and the legislature and the public, in general.⁷⁵

⁷⁴ Ibid, paragraph 4.3.03

⁷⁵ Ibid paragraph 4.3.04

4.2.09 The Governor does not exercise the executive functions individually or personally. The State Government at various levels takes executive action in the name of the Governor in accordance with the rules of business framed under Article 166(3). Hence, it is the State Government and not the Governor who may sue or be sued in respect of any action taken in the exercise and performance of the powers and duties of his office [Articles 361, 299(2) and 300].⁷⁶

4.2.10 The Governor enjoys the same privileges as the President does under Article 361 and he stands, in this respect, on the same footing. Article 361 states that neither the President nor the Governor can be sued for executive actions of the Government. The reason is that neither the President nor the Governor exercises the executive functions individually or personally.⁷⁷

4.2.11 The Governor is not answerable to any court for the exercise and the performance of the powers and duties of his office, or for 'any act done or purporting to be done by him' in the exercise and performance of those duties. The words 'purporting to be done by him' are of very wide import, and even though, the act is outside the scope of his powers, so long it is professed to be done in pursuance of the Constitution, the Governor will be protected.⁷⁸

4.2.12 Lack of bona-fide vitiates executive action, but due to the operation of Article 361 the Governor is not personally responsible.⁷⁹ Even where the Governor's bonafide is in question while exercising his discretionary powers, such as appointment and dismissal of Chief Minister, he cannot be called to enter upon defense.⁸⁰ The Madras High Court had held that a combined reading of Articles 154, 163 and 361 would show that the immunity against answerability to any Court is regarding functions exercised by the Governor qua Governor and those functions in respect of which he acts on the advice of the Council of Ministers or in his discretion.⁸¹

4.2.13 In the recent case of Rameshwar Prasad, Chief Justice Sabharwal, while stating the majority opinion held:

- The immunity granted to the Governor under Article 361(1) does not affect the power of the Court to judicially scrutinize the attack made to the

⁷⁶ Ibid paragraph 4.3.005.

⁷⁷ Samsher Singh v. State of Punjab, (1974) 2 SCC 831

⁷⁸ Biran Bose v. H C Mookerjee, 56 CWN 651. See also Satwant v. State of Punjab, AIR 1960 SC 266; Dhananjay v. Mohan, AIR 1960 SC 745 and Prabhakar v. Shankar, AIR 1969 SC 686.

⁷⁹ See Madhav Rao Scindia v. Union of India, (1971) 1 SCC 530.; KA Mathialagam v. The Governor, AIR 1973 Mad 198.

⁸⁰ Pratap Singh Rane v. State of Goa, AIR 1999 Bom 53.

proclamation issued under Article 361(1) of the Constitution of India on the ground of mala fides or it being ultra vires. It would be for the Government to satisfy the court and adequately meet such ground of challenge. A mala fide act is wholly outside the scope of the power and has no existence in the eyes of law. Even, the expression "purporting to be done" in Article 361(1) does not cover acts which are mala fide or ultra vires and, thus, the Government supporting the proclamation under Article 361(1) shall have to meet the challenge.⁸²

- The personal immunity from answerability provided in Article 361(1) does not bar the challenge that may be made to their actions. Under law, such actions including those actions where the challenge may be based on the allegations of mala fides are required to be defended by Union of India or the State, as the case may be. Even in cases where the personal mala fides are alleged and established, it would not be open to the Governments to urge that the same cannot be satisfactorily answered because of the immunity granted. In such an eventuality, it is for the respondent defending the action to satisfy the Court either on the basis of the material on record or even filing the affidavit of the person against whom such allegation of personal mala fides are made. Article 361(1) does not bar filing of an affidavit if one wants to file on his own. The bar is only against the power of the Court to issue notice or making the President or the Governor answerable. In view of the bar, the Court cannot issue direction to President or Governor for even filing of affidavit to assist the Court.⁸³

4.2.14 In a very limited field, however, the Governor may exercise certain functions in his discretion, as provided in Article 163(1). The first part of Article 163(1) requires the Governor to act on the advice of his Council of Ministers. There is, however, an exception in the latter part of the clause in regard to matters where he is by or under the Constitution required to function in his discretion. The expression "required" signifies that the Governor can exercise his discretionary powers only if there is a compelling necessity to do so. It has been held that the expression "by or under the Constitution" means that the necessity to exercise such powers may arise from any express provision of the Constitution or by necessary implication. We would like to add that such necessity may also arise from rules and orders made "under" the Constitution."⁸⁴

⁸² *Rameshwar Prasad v. Union of India*, AIR 2006 SC 980 (Y.K. Sabharwal, C.J., at para 19).

⁸³ *Rameshwar Prasad v. Union of India*, AIR 2006 SC 980 (Y.K. Sabharwal, C.J., at para 166).

⁸⁴ *Supra* Fn. 77, at paragraphs 4.3.06 and 4.3.07

4.2.15 Thus, the scope of discretionary powers as provided in the exception in clause (1) and in clause (2) of Article 163 has been limited by the clear language of the two clauses. It is an accepted principle that in a parliamentary democracy with a responsible form of government, the powers of the Governor as Constitutional or formal head of the State should not be enlarged at the cost of the real executive, viz. the Council of Ministers. The scope of discretionary powers has to be strictly construed, effectively dispelling the apprehension, if any, that the area for the exercise of discretion covers all or any of the functions to be exercised by the Governor under the Constitution. In other words, Article 163 does not give the Governor a general discretionary power to act against or without the advice of his Council of Ministers. The area for the exercise of his discretion is limited. Even this limited area, his choice of action should not be arbitrary or fanciful. It must be a choice dictated by reason, actuated by good faith and tempered by caution.⁸⁵

4.3 Role of Governor in Management of Centre-State Relations

4.3.01 The role of the Governor has been a key issue in the matters of Central-State relations. The Constitution of India envisages three tiers of Government - the Union, State and the Local Self-Government. In the light of a volatile Political system prevailing today, it is pertinent to recognize the crucial role played by the Governors in the working of the democratic framework. Addressing the Conference of Governors in June 2005, the President of India, Dr. A.P.J. Abdul Kalam stressed the relevance of recommendations of the Sarkaria Commission and observed that "*While there are many checks and balances provided by the Constitution, the office of the Governor has been bestowed with the independence to rise above the day-to-day politics and override compulsions either emanating from the central system or the state system.*"⁸⁶ "The Prime Minister, Dr. Manmohan Singh on the same occasion noted that "*you are the representatives of the centre in states and hence, you bring a national perspective to state level actions and activities*".⁸⁷ The then Vice-President of India, Shri G.S. Pathak, had remarked in 1970 that "*in the sphere which is bound by the advice of the Council of Ministers, for obvious reasons, the Governor must be independent of the center*" as there may be cases "*where the advice of the Center may clash with advice of the State Council of Ministers*" and that "*in such cases the Governor must ignore the Centre's "advice" and act on the advice of his Council of Ministers.*"⁸⁸

⁸⁵ Ibid paragraph 4.3.08.

⁸⁶ The Hindu, 'Go by Constitution, Governors told', June 15, 2005

⁸⁷ Ibid

⁸⁸ Ibid.

4.3.02 One highly significant role which he (Governor) has to play under the Constitution is of making a report where he finds that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The Governor is not amenable to the directions of the Government of India, nor is he accountable to them for the manner in which he carries out his functions and duties. He is an independent constitutional office which is not subject to the control of the Government of India.

4.3.03 The Court in *Rameshwar Prasad* case affirmed the following views of the Sarkaria Commission that the Governor needs to discharge "dual responsibility" to the Union and the State. Further, most of the safeguards as regards the working of the Governor will be such as cannot be reduced to a set of precise rules of procedure or practice. This is so because of the very nature of the office and the role of the Governor. The safeguards have mostly to be in the nature of conventions and practices, to be understood in their proper perspective and faithfully adhered to, not only by the Union and the State Governments but also by the political parties.⁸⁹

4.4 Appointment and Removal of Governors

4.4.01 The subject of the appointment and removal of Governors was extensively discussed in the Constituent Assembly. The Founding Fathers did not favour the appointment of a Governor by the process of election. The main reason was that under our constitutional scheme, the Governor in discharge of almost all his functions, is required to act according to ministerial advice. Jawaharlal Nehru apprehended that an elected Governor could encourage separatist provincial tendencies. Ultimately, it was decided that the Governor be appointed by the president for a term of five years but holding office during the pleasure of the President.⁹⁰

4.4.02 Speaking in the Constituent Assembly on the choice of Governors, Jawaharlal Nehru observed:

"I think it would be infinitely better if he was not so intimately connected with the local politics of the province...And would it not be better to have a more detached figure, obviously a figure that...must be acceptable to the Government of the province and yet he must not be known to be a part of the party machine of that province...But on the whole it probably would be desirable to have people from outside - eminent people, sometimes people who have not taken too great a part in politics. Politicians would probably like a

⁸⁹ Supra Fn. 86 at paragraph 4.5.07.

⁹⁰ See 'Governors and Founding Fathers', Soli Sorabjee. Indian Express, available at <http://www.indianexpress.com/oldStory/50629/>

*more active domain for their activities but there may be an eminent educationist or persons eminent in other walks of life, who would naturally while cooperating fully with the Government and carrying out the policy of the Government, at any rate helping in every way so that that policy might be carried out, be would nevertheless represent before the public someone slightly above the party and thereby, in fact, help that government more than if he was considered as part of the party machine."*⁹¹

4.4.03 The Sarkaria Commission recommended that a person to be appointed as a Governor should satisfy the following criteria:-

- (i) He should be eminent in some walk of life.
- (ii) He should be a person from outside the State.
- (iii) He should be a detached figure and not too intimately connected with the local politics of the State; and
- (iv) He should be a person who has not taken too great a part in politics generally and particularly in the recent past.⁹²

These recommendations were also reiterated by the Supreme Court in the *Rameshwar Prasad*⁹³ case.

4.4.04 The words and phrases like "eminent", "detached figure", "not taken active part in politics" are susceptible to varying interpretations and parties in power at the Centre seem to have given scant attention to such criteria. The result has been politicization of Governorship and sometimes people unworthy of holding such high Constitutional positions are getting appointed. This has led to some parties demanding the abolition of the office itself and public demonstration against some Governors in some States. This trend not only undermines Constitutional governance but also leads to unhealthy developments in Centre-State relations.

4.4.05 The Commission is of the view that the Central Government should adopt strict guidelines as recommended in the Sarkaria report and follow its mandate in letter and spirit lest appointments to the high Constitutional office should become a constant irritant in Centre-State relations and sometimes embarrassment to the Government itself.

4.4.06 Governors should be given a fixed tenure of five years and their removal should not be at the sweet will of the Government at the Centre. The phrase "during the

⁹¹ Sarkaria Commission, Para 4.6.03

⁹² Sarkaria Commission, Para 4.6.09

⁹³ (2006) 2 SCC 1

pleasure of the President" in Article 156(i) should be substituted by an appropriate procedure under which a Governor who is to be reprimanded or removed for whatever reasons is given an opportunity to defend his position and the decision is taken in a fair and dignified manner befitting a Constitutional office.

4.4.07 It might be pertinent to recall here that the Sarkaria Commission had called for a consultation process while appointing the Governor.⁹⁴ This included consultation with the Chief Minister of the concerned state and the Commission recommended amending Article 155 for giving effect to this recommendation.⁹⁵

4.4.08 Various stakeholders in their comments on this issue to the Centre State Commission have stressed on the need to prescribe qualifications for the appointment of the Governor in terms of the Sarkaria Commission and we are of the view that this would be an important and essential improvement to the existing situation.

4.4.09 The National Commission to Review the Working of the Constitution (NCRWC), in its consultation paper, went beyond the Sarkaria Commission's recommendations and suggested that Article 155 and 156 be amended and the appointment of the Governor should be entrusted to a committee comprising the Prime Minister of India, Union Minister for Home Affairs, Speaker of the Lok Sabha and the Chief Minister of the concerned State. It also suggested that the Vice-President also could be involved in the process. It opined that the composition of the committee is a matter of detail, which can always be settled once the principal idea is accepted. It observed that this would make the entire process a transparent and unambiguous one.⁹⁶ The NCRWC had noted :

"We agree that Article 155 of the Constitution requires to be amended. The Sarkaria Commission recommends that Article 155 should be amended to include consultation with the Chief Minister of the State for which the Governor is to be selected and appointed. But so far as consultation with the Vice-President of India and Speaker of the Lok Sabha is concerned, the Sarkaria Commission does not say that such consultation should be provided for expressly in amended Article 155. On the contrary, it says that such consultation should be "confidential and informal and should not be a matter of constitutional obligation". It is suggested that this consultation may be made by the Prime Minister while selecting a Governor. We, however, think that the experience gained over the last 14 years since the Sarkaria Commission Report may call for a more specific amendment in Article 155. It would be appropriate to suggest a committee comprising the

⁹⁴ Sarkaria Commission, Para 4.6.10

⁹⁵ Sarkaria Commission, Para 4.6.25

⁹⁶ See Report of the NCRWC, CONSULTATION PAPER ON THE INSTITUTION OF GOVERNOR UNDER THE CONSTITUTION, May 2001.

Prime Minister of India, the Home Minister of India, the Speaker of the Lok Sabha and the Chief Minister of the State concerned to select a Governor. (This committee may also include the Vice President of India if it is thought appropriate.) Instead of 'confidential and informal consultations', it is better that the process of selection is transparent and unambiguous."

4.4.10 In *Rameshwar Prasad (VI) v. Union of India*⁹⁷, it was observed that there is a need to formulate a national policy with some common minimum parameters for appointment of Governor, which are applicable and acceptable to all political parties. The Supreme Court also held that the unfortunate situation of allegations of mala fide at the time of appointment of Governors could be avoided if the recommendations of the Sarkaria Commission and the National Commission to Review the Working of the Constitution are implemented.

4.4.11 The present Commission reiterates the qualifications criteria which each Governor must possess. It is however essential to ensure enforceability of such qualification criteria and this could be achieved by a suitable amendment to Article 157 of the Constitution. The Commission would recommend the following amendments to Article 157 of the Constitution to ensure the independence and dignity of the office:

- (i) The Governor should, in the opinion of the President, be an eminent person;
- (ii) The Governor must be a person from outside the concerned State;
- (iii) The Governor should be a detached person and not too intimately connected with the local politics of the State. Accordingly, the Governor must not have participated in active politics at the Centre or State or local level for at least a couple of years before his appointment.

4.4.12 The basic rule regarding tenure is that the Governor holds office during the pleasure of the President⁹⁸ and due to the operation of Article 74, as long as the Council of Ministers at the Centre wants him in that office. Subject to this, he holds office for a term of 5 years or until his successor takes charge⁹⁹. He may resign anytime by writing to the President. In contrast to the office of the President, there is no provision for the impeachment of the Governor.

4.4.13 The Sarkaria Commission recommended that the Governors' tenure of office of five years in a State should not be disturbed except very rarely and that too for

⁹⁷ (2006) 2 SCC 1

⁹⁸ Article 156 of the Constitution.

⁹⁹ See Article 156(2) and *K Ballabh v. Commisison of Inquiry*, AIR 1969 SC 261.

some extremely compelling reason. A Governor who does not belong to that State takes time to get acquainted with the problems and aspirations of the people. The ever-present possibility of the tenure being terminated before the full term of 5 years, can create considerable insecurity in the mind of the Governor and impair his capacity to withstand pressures, resist extraneous influences and act impartially in the discharge of his discretionary functions.¹⁰⁰ However, the Sarkaria Commission declined to prescribe a procedure for removal of the Governor which is akin to impeachment of a Supreme Court judge reasoning that :

"Because of the Governor's multi-dimensional role and functions which have a heavy political content, it is not possible to lay down a set of concrete standards and norms with reference to which a specific charge against a Governor may be examined. The grounds for removal may not, therefore, be susceptible of investigation and proof by judicial standards. This is particularly true of a charge of being partisan which, according to one view, should be a sufficient ground for the Governor's removal. In our view, it would be neither advisable nor realistic to adopt, for the removal of a Governor, a procedure similar to that laid down for the removal of Judges"

4.4.14 Courts have held that the Governor holds no security of tenure or fixed term¹⁰¹. The Governor's tenure depends on the pleasure of the President and the exercise of the Presidential discretion in this regard is not justiciable¹⁰², and therefore, the President has to give no reasons. The Governor also could be shifted from one State to another during the term.

4.4.15 The National Commission to Review the Working of the Constitution, has, on the lines of the Sarkaria Commission, recommended that the Governor's tenure of office must be guaranteed and should not be disturbed except for extremely compelling reasons and if any action is to be taken against him he must be given a reasonable opportunity for showing cause against the grounds on which he is sought to be removed. In case of such termination or resignation by the Governor, the Government should lay before both the Houses of Parliament a statement explaining the circumstances leading to such removal or resignation, as the case may be.

4.4.16 A five judge Constitution Bench of the Supreme Court of India is presently seized of the issue of arbitrary removal of the Governor when a new party comes into power at the Centre and judgment is awaited in the case. In the said case, it has been

¹⁰⁰ Sarkaria Commission, Para 4.7.08

¹⁰¹ Surya Narain v. Union of India, AIR 1982 Raj 1.

¹⁰² IUML v. Union of India, AIR 1998 Pat. 156.

argued that the practice of treating Governors as "political footballs" must cease. The Union Government's stand however is that if a party came to power with a social and economic agenda and if it was found that the Governor was not in sync with it but would rather be antithetical to its policies, then the Governor could be removed. This is the basis of the 'pleasure doctrine' and this also constitutes good reason for exercise of the pleasure.¹⁰³

4.4.17 This Commission is of the view that politicization of the office of Governor to an extent where his appointment is based on whims and fancies of the Central Government is not in keeping with the spirit of the Constitution. Accordingly, the following recommendations are made:

- (i) The tenure of office of the Governor must be fixed, say for a period of 5 years;
- (ii) The phrase "during the pleasure of the President" may be deleted from Article 156 of the Constitution. Even if the Governor is denied a fixed tenure of five years, his removal cannot be at the sweet will of the Central government. It must be for a reason which has relation to the discharge of functions of the office of a Governor;
- (iii) A provision may be made for the impeachment of the Governor by the State Legislature on the same lines as the impeachment of the President by the Parliament. (See Article 61 of the Constitution.) Such impeachment can be only in relation to the discharge of functions of the office of a Governor or violations of the principles laid down in the Constitution. Where there is no Upper House of Legislature in any State, appropriate changes may have to be made in the proposed Article since Article 61 is premised upon the existence of two Houses of Parliament.

4.4.18 Some State Governments have categorically stated that after completing a tenure as Governor there must be limitations imposed on the individual from accepting other offices of profit or offices below the constitutional post. It has been pointed out that active lobbying goes on to secure certain posts and this lowers the esteem of the post of Governor. Even the Sarkaria Commission had noted that it is difficult for a Governor with such propensity to function, specially in his discretionary sphere, in an independent

¹⁰³ See Times of India, 'Governors should not be made political footballs: Soli', 17th September, 2009, available at <http://timesofindia.indiatimes.com/india/Governors-should-not-be-made-political-footballs-Soli/articleshow/5019440.cms>.

and impartial manner if he looks forward to being given other public office or to resuming his political career at the end of his term as Governor.¹⁰⁴

4.4.19 This Commission agrees with the broad view that certain parameters must be put in place for those who have held the post of Governor. The Sarkaria Commission had recommended that as a matter of convention, the Governor, on demitting his office, should not be eligible for any other appointment or office of profit under the Union or a State Government except for a second term as Governor, or election as Vice-President or President of India. Such a convention should also require that after quitting or laying down his office, the Governor shall not return to active partisan politics. This recommendation is reiterated and must be brought into effect by way of a constitutional amendment.

4.5 Powers of the Governor in the Context of Harmonious Centre-State Relations

Article 163 of the Constitution, unlike Article 74, carves out two ways in which the power of the Governor must be exercised. One, in which the Governor has to act in accordance with the aid and advice of the Council of Ministers and two, where he exercises his personal discretion. The concept of the Governor acting in his discretion or exercising independent judgment is not alien to the Constitution. The normal rule is that the Governor acts on the aid and advice of the Council of Ministers, but there are exceptions under which the Governor can act in his own discretion.¹⁰⁵ The powers in exercise of which the Governor has to use his personal discretion have now been settled through judicial pronouncements. In relation to other powers, even though the Constitution uses phrases like "he thinks fit" and "in exercise of his discretion", the Governor must act on the aid and advise of the Council of Ministers.¹⁰⁶

Article 163(2) gives an impression that the Governor has a wide, undefined area of discretionary powers even outside situations where the Constitution has expressly provided for it. Such an impression needs to be dispelled. The Commission is of the view that the scope of discretionary powers under Article 163(2) has to be narrowly construed, effectively dispelling the apprehension, if any, that the so-called discretionary powers extends to all the functions that the Governor is empowered under the Constitution. Article 163 does not give the Governor a general discretionary power to act against or without the advice of his Council of Ministers. In fact, the area for the exercise of discretion is limited and even in this limited area, his choice of action should not be nor appear to be

¹⁰⁴ Sarkaria Commission, Para 4.9.01

¹⁰⁵ *M.P. Special Police Establishment v. State of M.P.*, (2004) 8 SCC 788

¹⁰⁶ *Samsher Singh v. State of Punjab*, (1974) 2 SCC 831.

arbitrary or fanciful. It must be a choice dictated by reason, activated by good faith and tempered by caution.

The Governor's discretionary powers are the following: to give assent or withhold or refer a Bill for Presidential assent under Article 200; the appointment of the Chief Minister under Article 164; dismissal of a Government which has lost confidence but refuses to quit, since the Chief Minister holds office during the pleasure of the Governor; dissolution of the House under Article 174; Governor's report under Article 356; Governor's responsibility for certain regions under Article 371-A, 371-C, 371-E, 371-H etc. These aspects are now considered below:

4.5.01 Consideration of a Bill

According to Article 200, when a Bill passed by the Legislature of a State is presented to the Governor, he has four options, namely, (a) he assents to the Bill; (b) he withholds assent; (c) he reserves the Bill for the consideration of the President; or (d) he returns the Bill to the Legislature for reconsideration. The first proviso says that as soon as the Bill is presented to him, he may return the Bill to the Legislature (if it is not a Money Bill) together with a message requesting the Legislature to reconsider the Bill. He can also suggest the desirability of introducing such amendments or changes as he thinks appropriate. If, on such reconsideration, the Bill is passed again, with or without amendments, and is presented to the Governor for assent, he has to accord his assent. The second proviso says that if the Bill presented to him derogates, in the opinion of Governor, from the powers of the High Court so as to endanger the position which the High court is designed to fill by the Constitution, he is bound to reserve the Bill for the consideration of the President.¹⁰⁷

It has been held in *Pursbothaman v. State of Kerala*¹⁰⁸ that there is no time limit for granting the assent. It also held that a Bill pending in the Legislature (either House) does not lapse on proroguing of Assembly and that a Bill pending before the Governor or the President for his assent does not lapse on dissolution of the Assembly. It must be noted that the Constitution does not give any guidelines as to when the Governor must withhold assent. Though, it can be inferred from the oath he takes, that he could withhold assent to protect and defend the Constitution.¹⁰⁹ Therefore, even if the legislature passes the Bill for a second time the Governor may refer the Bill to the President who may not give assent.¹¹⁰

¹⁰⁷ See *Hoescht Pharmaceuticals v. State of Bihar*, AIR 1983 SC 1019.

¹⁰⁸ AIR 1962 SC 694.

¹⁰⁹ For example, in 1982 the Governor of Jammu and Kashmir refused to give assent to the Resettlement Bill, noting that it would be possess grave threat to the security and integrity of the country.

¹¹⁰ See Article 201 of the Constitution.

After considering the suggestions given by the Sarkaria Commission, the National Commission to Review the Working of the Constitution gave the following recommendations:

- (a) Prescribe a time-limit - say a period of four months - within which the Governor should take a decision whether to grant assent or to reserve it for the consideration of the President;
- (b) Delete the words "or that he withholds assent therefrom". In other words, the power to withhold assent, conferred upon the Governor, by Article 200 should be done away with;
- (c) If the Bill is reserved for the consideration of the President, there should be a time-limit, say of three months, within which the President should take a decision whether to accord his assent or to direct the Governor to return it to the State Legislature or to seek the opinion of the Supreme Court regarding the constitutionality of the Act under Article 143 (as it happened in the case of Kerala Education Bill in 1958);
- (d) When the State Legislature reconsiders and passes the Bill (with or without amendments) after it is returned by the Governor pursuant to the direction of the President, the President should be bound to grant his assent;
- (e) To provide that a "Money Bill" cannot be reserved by the Governor for the consideration of the President;
- (f) In the alternative it may be more advisable to delete altogether the words in Article 200 empowering the Governor to reserve a Bill for the consideration of the President except in the case contemplated by the second proviso to Article 200 and in cases where the Constitution requires him to do so. Such a course would not only strengthen the federal principle but would also do away with the anomalous situation, whereunder a Bill passed by the State Legislature can be 'killed' by the Union Council of Ministers by advising the President to withhold his assent thereto or just by cold-storing it.

The present Commission is of the considered view that the recommendations of the National Commission to Review the Working of the Constitution [NCRWC] require immediate implementation and should be brought in by way of a Constitutional Amendment.

In respect of Bills passed by the Legislative Assembly of a State, the Governor is expected to declare that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President. He has the discretion also to return the Bill (except Money Bill) for re-consideration of the House together with the message he might convey for the purpose. If on such reconsideration the Bill is passed again, with or without amendments, the Governor is obliged to give his assent. Furthermore, it is necessary to prescribe a time limit within which the Governor should take the decision whether to grant assent or to reserve it for consideration of the President. The Commission had earlier recommended that the time limit of six months prescribed for the State Legislature to act on the President's message on a reserved Bill should be the time limit for the President also to decide on assenting or withholding of assent. The Governor accordingly should make his decision on the Bill within a maximum period of six months after submission to him.

4.5.02 Appointment of the Chief Minister

As a rule, the leader of the party who gets an absolute majority in the legislature is called upon by the Governor to form the Government. However, a problem arises when no party has a clear majority in the house.

The Sarkaria Commission recommended that in choosing a Chief Minister, the Governor should be guided by the following principles, viz.-

- (i) The party or combination of parties which commands the widest support in the Legislative Assembly should be called upon to form the Government.
- (ii) The Governor's task is to see that a Government is formed and not to try to form a Government which will pursue policies which he approves.¹¹¹

In case no party has a clear majority, the Sarkaria Commission recommended that the Governor should select a Chief Minister from among the following parties or group of parties by sounding them, in turn, in the order of preference indicated below:

1. An alliance of parties that was formed prior to the Elections. ;
2. The largest single party staking a claim to form the government with the support of others, including "independents.";
3. A post-electoral coalition of parties, with all the partners in the coalition joining the Government.;

¹¹¹ Sarkaria Commission, Para 4.11.03

4. A post-electoral alliance of parties, with some of the parties in the alliance forming a Government and the remaining parties, including "independents" supporting the Government from outside.¹¹²

Therefore the Governor's subjective judgment plays a major role as he has to decide as to who is most likely to command a majority in the Assembly. The Governor should also ensure that the Chief Minister so selected must prove his majority on the floor of the house within 30 days of taking over.¹¹³

The Sarkaria Commission at para 4.11.07 also expressed its view that when a number of Members of the Legislative Assembly approach the Governor and contest the claim of the incumbent Chief Minister to continued majority support in the Assembly, the Governor should not risk a determination of this issue, on his own outside the Assembly. The prudent course for him will be to cause the rival claims to be tested on the floor of the House. Such a procedure will be not only be fair but also seen to be fair. It will also save the Governor from embarrassment consequent upon any error of judgement on his part.

The NCRWC recommended that where a pre-election coalition enters the general elections' fray as such, it should be treated as one political party/grouping and if one such coalition/grouping obtains a majority, the leader of such coalition/grouping (elected or indicated, as the case may be) shall be called to form the Ministry. Such pre-poll alliance/coalition should be treated as one political party for the purpose of the Tenth Schedule to the Constitution of India (law relating to defections).¹¹⁴

It must be noted that the Governor does not have complete discretion in appointing the Chief Minister. If the Governor appoints a person who is otherwise not qualified under the Constitution to become the Chief Minister, the authority of the appointee can be challenged in quo warranto proceedings. That the Governor had made the appointment does not give the appointee any higher right to hold the appointment. If the appointment is contrary to constitutional provisions it will be struck down.¹¹⁵

Even though the President and Governor are immune under Article 361 of the Constitution, the second proviso of Article 361 read with Article 300 makes it possible to sue the Government on whose advice the Governor acts.¹¹⁶ However, it has been

¹¹² Sarkaria Commission, Para 4.11.04

¹¹³ Sarkaria Commission, Para 4.11.05 and 4.11.06

¹¹⁴ Report of the NCRWC, CONSULTATION PAPER ON THE INSTITUTION OF GOVERNOR UNDER THE CONSTITUTION, May 2001

¹¹⁵ B.R.Kapur v. State of Tamil Nadu, (2001) 7 SCC 231

¹¹⁶ Kumar Padma Prasad v. Union of India, (1992) 2 SCC 428

categorically held that under no circumstances can the Governor be held answerable for his decision in the *Rameshwar Prasad Case (Supra)*.

On the question of Governor's role in appointment of Chief Minister in the case of a hung assembly there have been judicial opinions and recommendations of expert commissions in the past. Having examined those materials and having taken cognizance of the changing political scenario in the country, the Commission is of the view that it is necessary to lay down certain clear guidelines to be followed as Constitutional conventions in this regard. These guidelines may be as follows:

- (a) The party or combination of parties which commands the widest support in the Legislative Assembly should be called upon to form the Government.
- (b) If there is a pre-poll alliance or coalition, it should be treated as one political party and if such coalition obtains a majority, the leader of such coalition shall be called by the Governor to form the Government.
- (c) In case no party or pre-poll coalition has a clear majority, the Governor should select the Chief Minister in the order of preference indicated below:
 - a. the group of parties which had pre-poll alliance commanding the largest number;
 - b. the largest single party staking a claim to form the government with the support of others;
 - c. a post-electoral coalition with all partners joining the government; and
 - d. a post-electoral alliance with some parties joining the government and the remaining including independents supporting the government from outside;

In light of the increased dependence on party alliances, clarity with regard to the role of the Governor in his invitation to form a government assumes great significance. If specific guidelines are not laid down with regard to determining the claims of a post-poll alliance, it would result in ambiguity and the Governor would follow the established convention of inviting the single largest party to form the Government. In cases of narrow majorities, there are no uniformly accepted conventions and this can be remedied by adopting constitutional amendments, which lay down specific guidelines and approaches which ought to be followed by the Governor. This would result in greater clarity and certainty.

4.5.03 Dismissal of the Chief Minister

It has already been stated that the Council of Ministers occupy office upon the pleasure of the Governor. Further, Article 164 states that Council of Ministers shall be collectively responsible to the Legislative Assembly of the State. So the question arose as to whether the discretion of the Governor or his pleasure is curtailed by the fact that the Ministers no longer enjoy the confidence of the House. Courts have time and again clarified that the discretion of the Governor is not fettered by any condition or restriction.¹¹⁷ It was held that the Assembly could only express want of confidence in the Ministry; it can go no further. The power to dismiss solely and entirely rests with the Governor.¹¹⁸ However, the fact that the Ministry has lost confidence is a major consideration for its dismissal.

The Sarkaria Commission recommended that if a Government loses its majority, it should be given a chance to prove whether it has a majority or not on the floor of the House. The Governor should not dismiss a Council of Ministers, unless the Legislative Assembly has expressed on the floor of the House its want of confidence in it. He should advise the Chief Minister to summon the Assembly as early as possible. If the Chief Minister does not accept the Governor's advice, the Governor may, summon the Assembly for the specific purpose of testing the majority of the Ministry.¹¹⁹ The Assembly should be summoned to meet early within a reasonable time. What is "reasonable" will depend on the circumstances of each case. Generally, a period of 30 days will be reasonable, unless there is very urgent business to be transacted, such as passing the Budget, in which case, a shorter period may be indicated.¹²⁰

On the question of dismissal of a Chief Minister, the Governor should invariably insist on the Chief Minister proving his majority on the floor of the House for which he should prescribe a time limit. This view of the Sarkaria Commission ought to be considered in the form of a Constitutional Amendment

4.5.04 Summoning, proroguing and dissolution of the legislative assembly

Article 174 of the Constitution empowers the Governor to summon, prorogue or dissolve the House. It is a well-recognised principle that, so long as the Council of Ministers

¹¹⁷ *Karpoori Thakur v. Abdul Gafoor*, AIR 1975 Pat 1.

¹¹⁸ *Mahabir Prasad v. PC Gosh*, AIR 1969 Cal 1998. For a comment on the case see 12 JILI 127(1970). See also MP Singh, GOVERNOR'S POWER TO DISMISS MINISTERS OR COUNCIL OF MINISTERS- AN EMPIRICAL STUDY, 13 JILI 612 (1971). See *Jogendranth Hazarika v. State of Assam*, AIR 1982 Gau. 25 and *Pratap Singh Rane*(supra).

¹¹⁹ Sarkaria Commission, Para 4.11.11

¹²⁰ *Ibid*, paragraph 4.11.13

enjoys the confidence of the Assembly, its advice in these matters, unless *patently unconstitutional* must be deemed as binding on the Governor. It is only where such advice, if acted upon, would lead to an *infringement of a constitutional* provision, or where the Council of Ministers has ceased to enjoy the confidence of the Assembly, that the question arises whether the Governor may act in the exercise of his discretion.

The Sarkaria Commission recommended that, if the Chief Minister neglects or refuses to summon the Assembly for holding a "Floor Test", the Governor should summon the Assembly for the purpose.¹²¹ As regards proroguing a House of Legislature, the Governor should normally act on the advice of the Chief Minister. But where the latter advises prorogation when a notice of no-confidence motion against the Ministry is pending, the Governor should not straightaway accept the advice. If he finds that the no-confidence motion represents a legitimate challenge from the Opposition, he should advise the Chief Minister to postpone prorogation and face the motion.¹²² As far as dissolution of the House is concerned, the Governor is bound by the decision taken by the Chief Minister who has majority. However, if the advice is rendered by a Chief Minister who doesn't have majority, then the Governor can try to see if an alternate government can be formed and only if that isn't possible, should the house be dissolved.¹²³

This Commission reiterates the recommendations of the Sarkaria Commission in this regard.

4.5.05 Judicial Power of the Governor

Under Article 192 of the Constitution the power to determine whether any member of the legislative assembly has become subject to any of the disqualifications mentioned in Article 191 (1) has been conferred on the Governor and his decision is final.

The Governor, in consultation with the High Court, is also given the power to frame rules in relation to the recruitment of the subordinate judiciary as well appointing the members of the subordinate judiciary.¹²⁴

4.5.06 Power of Pardon

Article 161 of the Constitution empowers the Governor to grant pardon, reprieves, respites or remissions of punishment, or to suspend, remit or commute the sentence of

¹²¹ Sarkaria Commission, Para 4.11.20

¹²² Sarkaria Commission, Para 4.11.22

¹²³ Sarkaria Commission, Para 4.11.25

¹²⁴ See Article 233-237 of the Constitution.

any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. This power of the Governor is, to an extent, concurrent with the power of the President to grant pardon under Article 72 of the Constitution.¹²⁵ As is in the case of the President, the Governor too, under Article 161, acts under the aid and advice of the Council of Ministers.¹²⁶

The power of pardon is not a private act of grace, but is part of a constitutional scheme, to be exercised when occasion arises in accordance with the discretion contemplated by the context¹²⁷. This power is constitutionally conferred and cannot be fettered by any legislative provision or statutory means.¹²⁸ The power of pardon has been considered as an Executive power rather than legislative power for two reasons. Firstly, there is no inherent right in the petitioner to claim oral hearing. Secondly, the power is exercised on the advice of the Council of Ministers.¹²⁹ The power to grant pardon may be exercised either before conviction by amnesty to the accused or under-trial prisoner or after conviction.¹³⁰ This exercise of Executive prerogative of mercy has also been justified by the Law Commission of India, which has also observed that it would not recommend any change in the scope of these powers.¹³¹

However, being a power which is constitutionally conferred, the power of pardon too is subject to limitations.¹³² The decision taken by the Governor under Article 161 is subject to judicial review.¹³³ It has been held that a decision taken under Article 161 can be quashed if it has been exercised without following a fair and just procedure, in the

¹²⁵ Article 72 (3) of the Constitution of India. See also *DIG of Police v. Raja Ram*, AIR 1969 AP 259.

¹²⁶ Article 163 of the Constitution. In *Maru Ram v. Union of India*, (1981) 1 SCC 107, the Supreme Court clarified that it is not open to the President to take an independent decision or to direct release or refuse release of any person of his choice. It held that President was to be advised by the Council of Ministers in this regard.

¹²⁷ Per Pathak, CJ in *Kehar Singh v. Union of India*, (1989) 1 SCC 204. See also the comparison the Court drew with the system prevailing in the United States. It cited the observation of Mr. Justice Holmes in *WI Biddie v. Vuco Perovich*, 71 L Ed 1161.

¹²⁸ See *State of Punjab v. Joginder Singh*, (1990) 2 SCC 661.

¹²⁹ See *Kehar Singh* (supra). The view that it is an executive power also entitles the Governor to take those considerations which may not or could not have been considered by the Courts.

¹³⁰ See Balakrishna, *PRESIDENTIAL POWER OF PARDON*, 13 JILI 103.

¹³¹ The Law Commission of India has observed that there are many matters which may not have been considered by the Courts. It further stated that the decision of courts, especially in relation to a death sentence, may require reconsideration because of certain facts not placed before the Courts, certain facts not placed in the proper manner before the Courts, facts discovered after the passing of the sentence and other special features. See the *LAW COMMISSION OF INDIA – REPORT ON CAPITAL PUNISHMENT*, 317-18 (1967).

¹³² *Kehar Singh* (supra).

¹³³ *Swaran Singh v. State of UP* (1998) 4 SCC 75.

absence of material considerations, mechanically and without application of mind, arbitrarily or mala fide.¹³⁴ This view was confirmed by the Supreme Court in the recent decision of *Epuru Sudhakar v. Andhra Pradesh*.¹³⁵ These were decisions in which either the Governor granted pardon on the basis of political or ideological affiliations or cases in which the Governor was not completely informed of the applicant's track record. However, the Supreme Court in a number of cases has held that it is not prudent to lay down strict guidelines for the exercise of discretion under Article 161 and that it is best left to the Executive within Constitutional limits.¹³⁶

4.5.07 Power to make Rules

The Constitution also confers certain rule making powers on the Governor. This includes the power to make rules regarding the authentication of orders and other instruments¹³⁷; conditions of service of the members of the State Public Service Commission¹³⁸ as well as the Civil Servants¹³⁹; convenient transaction of Government business¹⁴⁰; procedure in respect of communications between the Houses of the State Legislature¹⁴¹; recruitment of officers to the High Court¹⁴² and recruitment of secretarial staff of the Legislature¹⁴³

4.5.08 Power to Promulgate Ordinances

Article 213 empowers the Governor to promulgate ordinances when (1) either the State Assembly is not in session or where there are two Houses, when one of them is not in session, and (2) the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action. The provision also provides that the Governor cannot, without instruction from the President, promulgate any ordinance if, firstly, a Bill to that effect would, under the Constitution, have required Presidential assent for its introduction; secondly, if the Governor would have deemed it necessary to reserve the Bill to that effect for the President's consideration and lastly,

¹³⁴ Swaran Singh, Ibid. Also see *Satpal v. State of Haryana*, (2000) 5 SCC 170.

¹³⁵ (2006)8SCC161

¹³⁶ *Satpal* (supra).

¹³⁷ Article 166(2).

¹³⁸ Article 318.

¹³⁹ Article 309.

¹⁴⁰ Article 166(3).

¹⁴¹ Article 208

¹⁴² Article 229.

¹⁴³ Article 187(3).

where an Act of the State Legislature to that effect would have been invalid under the Constitution without receiving the President's assent. An ordinance may be withdrawn at any time by the Governor.¹⁴⁴ An ordinance is to be laid before the State Legislature and ceases to operate at the expiration of six weeks from the reassembly of the State Legislature.

It has been held that ordinance making power is coextensive with the legislative power of the State.¹⁴⁵ Even though the ordinance if promulgated in the name of the Governor and in a constitutional sense is his satisfaction, in reality it is promulgated on the aid and advice of the Council of Ministers.¹⁴⁶

The question of justiciability of the ordinance making power of the Governor has been addressed by the Apex Court on a number of occasions. It has consistently held that the necessity of immediate action and of the promulgation of an ordinance is a matter purely for the subjective satisfaction of the Governor. The Governor is the sole judge as to the existence of such circumstances and his satisfaction is not a justiciable matter. It cannot be questioned on the ground of error of judgment or non application of mind or mala fide.¹⁴⁷ The Court opined that when similar grounds are available for invalidating legislation, they cannot operate to invalidate ordinances. However, the Supreme Court has viewed the misuse of the ordinance making power quite seriously. In *DC Wadhwa v. State of Bihar*¹⁴⁸, the Court frowned upon the practice of repeatedly re-promulgating ordinances for years. It observed that the power to promulgate ordinances has to be exercised sparingly and only in emergency. The law making power, it observed, is essentially legislative, and for the executive to usurp it, would amount to a fraud on the Constitution. It stated that ordinary life of an ordinance is seven and a half months (six weeks for introduction in the House once it is in session and 6 months difference between two sessions of the House) and to keep extending it would be improper and invalid. In fact, on this ground alone the Court in *Krishna Kumar Singh v. State of Bihar*¹⁴⁹, invalidated repeatedly promulgated ordinances except the first one.

The Court has also refuted the argument that when an ordinance is not replaced by an Act, as required by Article 213, the ordinance is deemed to be void *ab initio*. It

¹⁴⁴ Article 213 (2) (b).

¹⁴⁵ *State of Punjab v. Satpal Dunge*, AIR 1969 SC 903.

¹⁴⁶ *T Venkata Reddy v. State of AP*, AIR 1985 SC 724. See also *RC Cooper v. Union of India*, (1970) 1 SCC 248.

¹⁴⁷ *K Nagaraj v. State of AP*, (1985) 1 SCC 523; *Gurudevadatta v. State of Maharashtra*, (2001) 4 SCC 534 and *SKG Sugar v. State of Bihar*, AIR 1974 SC 1533.

¹⁴⁸ (1989) 1 SCC 378.

¹⁴⁹ (1998) 5 SCC 643.

observed that Article 213 merely states that ordinance shall become inoperative; therefore, completed transactions under the ordinance do not get revived.¹⁵⁰

4.5.09 Governor and Article 356

Following the decision in *S.R. Bommai*, the Supreme Court held that it is necessary to affirm that the proclamation under Article 356(1) is not immune from judicial review, though the parameters thereof may vary from an ordinary case of subjective satisfaction. The scope of judicial review was expanded in *Bommai's* case, and it was held that Article 74(2) is not a bar against scrutiny of the material on the basis of which the President issues a proclamation under Article 356. It was held that although Article 74(2) bars judicial review so far as the advice given by the Ministers is concerned, it does not bar scrutiny of the material on the basis of which the advice is given. It was held that courts are justified in probing as to whether there was any material on the basis of which the advice was given, and whether it was relevant for such advice and the President could have acted on it.¹⁵¹

Recommendations of the Commission in this regard have been dealt with in the next Chapter of the Report on the subject of "Emergency Provisions".

4.5.10 Special Powers of Governors of North-East States

As per Schedule VI to the Indian Constitution, read with Articles 244(2) and 275(1) of the Constitution, the Governors of the States of Assam, Meghalaya, Tripura and Mizoram have certain special powers. In particular, as per paragraph 5 of Schedule VI, the Governor may, in certain specified cases, confer on the District Council or the Regional Council, such powers under the Code of Criminal Procedure, 1973. The Governor also has the power to entrust to the District Council or its officers, functions in relation to agriculture, community projects etc. The scope of this power is wide and the Governor can entrust functions in relation to any matter to which the executive power of the State extends.¹⁵² The Governor also has the power to make rules with respect to the management of the District Fund and the Regional Fund.¹⁵³ Arguably, the most important powers of the Governor (and in some cases the President) under Schedule VI are provided in paragraphs 12, 12A, 12AA and 12B which deal with the application of Acts of Parliament

¹⁵⁰ State of Orissa v. Bhupendra Kumar Bose, AIR 1962 SC 945. See also Venkata Reddy (supra).

¹⁵¹ S.R. Bommai v. Union of India, AIR1994 SC1999 (Sawant J., at para 86).

¹⁵² Paragraph 6 of Schedule 6 to the Constitution.

¹⁵³ Paragraph 7 of Schedule 7 to the Constitution.

and of the Legislatures of the States of Assam, Meghalaya, Tripura and Mizoram respectively.

The final decision in all the cases has to be taken by the Governor. He is not bound to seek or accept the advice of his Council of Ministers. Also, the functions relate entirely to State administration for which the Council of Ministers in each of these States is ultimately accountable to the Legislative Assembly. In contrast, the Governors of States other than these are expected to exercise the corresponding functions, to the extent applicable, only on the aid and advice of their Council of Ministers.¹⁵⁴

4.5.11 Governor as Chancellor of Universities

An important question which arises with respect to the Governor is whether he should have any role in the administration of education in a State. This question arises because Governors are routinely appointed as Chancellors in State universities. Although there have been no judicial pronouncements that deal with the implications of vesting this sort of power with the Governor, there have been cases that posit that in his capacity as a Chancellor of a university, the Governor acts in his discretion and not on the aid and advice of the Council of Ministers.

State University Acts generally provide that the Governor by virtue of his office, shall be the Chancellor or head of the University concerned and endowed with various powers such as appointment of vice-Chancellor. The question is whether the Governor's functions as Chancellor of a University fall within the purview of Article 163(1). This would imply that a Governor is bound to act on the aid and advice of his Council of Ministers in the discharge of his functions as Chancellor except in so far as he is required by the statute to exercise any of the functions in his discretion. There have been instances where, in selecting Vice-Chancellors, Governors as Chancellors have acted in their discretion, over-ruling the advice of the Council of Ministers.

*In Bhuri Nath v. State of J&K*¹⁵⁵, the Supreme Court interpreted a J&K statute constituting a board of management for the Vaishno Devi Shrine with the Governor as the ex-officio chairman. The Court held that the Act had entrusted powers to the Governor in his official capacity and that he was not to act on the aid and advice of the Council of Ministers. In *Hardwari Lal v. G.D. Tapase*¹⁵⁶ it was similarly held that if the Governor was appointed as the Chancellor of a University, then the State Government could not give advice to the Governor and that the Governor was to act entirely in his discretion.

¹⁵⁴ Sarkaria Commission, Para 4.14.02

¹⁵⁵ AIR 1997 SC 1711.

¹⁵⁶ AIR 1982 P&H 439.

Although there is no obligation on the Governor always to act on ministerial advice under Article 163(1), there is an obvious advantage in the Governor consulting the Chief Minister or other Ministers concerned, but he would have to form his own individual judgement. The Governor, in his capacity as Chancellor of a University, may possibly be required by the University's statute (e.g. the Calcutta and the Burdwan University Acts) to consult a Minister mentioned in such statute on specified matters. In such cases, the Governor may be well advised to consult the Minister on other important matters also. In either case, there is no legal obligation for him to necessarily act on any advice received by him.¹⁵⁷

To be able to discharge the Constitutional obligations fairly and impartially, the Governor should not be burdened with positions and powers which are not envisaged by the Constitution and which may expose the office to controversies or public criticism. Conferring statutory powers on the Governor by State Legislatures have that potential and should be avoided. Making the Governor the Chancellor of the Universities and thereby conferring powers on him which may have had some relevance historically has ceased to be so with change of times and circumstances. The Council of Ministers will naturally be interested in regulating University education and there is no need to perpetuate a situation where there would be a clash of functions and powers.

The Commission is also of the view that Governor should not be assigned functions casually under any Statute. His role should be confined to the Constitutional provisions only.

4.5.12 Sanction of the Governor for Prosecution of Ministers

In terms of Section 197 of the Criminal Procedure Code, only with the accord and consent of the Governor can criminal prosecution be commenced against a Minister of a State. The question which arises is whether a Governor can act in his discretion and against the aid and advice of the Council of Ministers in a matter of grant of sanction for prosecution of Ministers for offences under the Prevention of Corruption Act and/or under the Indian Penal Code. The recent controversy surrounding the Lavlin case in Kerala where the Governor accorded sanction to proceed with prosecution despite advice to the contrary by the council of ministers is a case in question.

¹⁵⁷ Sarkaria Commission, Para 4.11.39

Article 163 of the Constitution of India reads as follows:

- "163. Council of Ministers to Aid and Advise Governor.-** (1) There shall be a Council of Ministers with the Chief Minister as the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.
- (2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.
- (3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court."

The law in this regard was laid down in the case of *Samsber Singh v. State of Punjab*, [1975] 1 SCR 814, where it was held that

"We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various articles shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well-known exceptional situations. Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House, (b) the dismissal of a Government which has lost its majority in the House; but refuses to quit office; (c) the dissolution of the House where an appeal to the country is necessitous, although in this area the head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step. We do not examine in detail the constitutional proprieties in these predicaments except to utter the caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory. "

Thus, a seven Judges' Bench of the Supreme Court has already held that the normal rule is that the Governor acts on the aid and advice of the Council of Ministers and not independently or contrary to it. However, in the case of *Madhya Pradesh Special Police Establishment v. State of Madhya Pradesh & Ors.*, (2004) 8SCC 788, it has been clearly

held by 5 judges of the Supreme Court the exceptions carved out in the decision of Samsher Singh, are not exhaustive. The Hon'ble Court held that there may be situations where by reason of peril to democracy or democratic principles, an action may be compelled which from its very nature is not amenable to Ministerial advice. One such situation may be where bias is inherent and/or manifest in the advice of the Council of Ministers. The Supreme Court finally concluded that:

"If on these facts and circumstances, the Governor cannot act in his own discretion there would be a complete breakdown of the rule of law inasmuch as it would then be open for Governments to refuse sanction in spite of overwhelming material showing that a prima-facie case is made out. If, in cases where prima-facie case is clearly made out, sanction to prosecute high functionaries is refused or withheld democracy itself will be at stake. It would then lead to a situation where people in power may break the law with impunity safe in the knowledge that they will not be prosecuted as the requisite sanction will not be granted."

The position propounded by the Supreme Court is the law of the land and deserves to be reaffirmed. However, the Commission is of the view, that this approach ought to be followed by way of principle and no constitutional amendments are necessary to this end. Therefore, if the decisions of the council of ministers to not prosecute is one that is motivated by bias in the face of overwhelming material, the Governor would be within his rights to disregard such advice and grant sanction for prosecution.

Despite such an authoritative exposition by the Supreme Court on this subject, there seems to be some doubt with regard to this power of the Governor as is evinced through the recent controversy concerning the *Lavlin* Case in Kerala.

The Commission would endorse the interpretation given by the Supreme Court in *Madhya Pradesh Special Police Establishment v. State of Madhya Pradesh & Ors.*, (2004) 8 SCC 788 to the effect that "if the Cabinet decision appears to the Governor to be motivated by bias in the face of overwhelming material, the Governor would be within his rights to disregard the advice and grant sanction for prosecution". The Commission recommends that Section 197 Criminal Procedure Code may be suitably amended to reflect the position of law in this regard.

4.5.13 Ad Hoc Reports from the Governor to the President

Each Governor sends to the President every fortnight a report on important developments that have taken place in the administration of the State. The practice generally followed is to send a copy of this report to the Chief Minister.

The reports enable the Chief Minister to correct any wrong policies that may have been pursued. These reports should create mutual trust between the Governor and the Chief Minister. It should therefore be made obligatory for the Governor to make a copy of the fortnightly report available to the Chief Minister.

The Sarkaria Commission did not recommend a change in the well-established practice of Governors sending fortnightly reports to the President, with copies thereof to the Chief Minister. The Sarkaria Commission however stated that :

*"...we are of the view that it would not be constitutionally proper to make it obligatory for the Governor to send a copy of the report to the Chief Minister. As explained earlier in paras 4.3.11(d) and 4.3.13, the Governor may be obliged to report to the President some important developments together with his own assessment of them. He may consider it inadvisable to endorse a copy of such a report to the Chief Minister. Normally, such a report should not be included in the fortnightly letter but sent as a separate ad hoc report. However, in principle, it is the Governor's right and duty to make a report, whether it is fortnightly or ad hoc, without the obligation of informing the Chief Minister. Even so, what is legally permissible may not always be politically proper. We would, therefore, reiterate the recommendation of the Administrative Reforms Commission that while sending these ab-hoc or fortnightly reports the Governor should normally take his Chief Minister into confidence, unless there are over-riding reasons to the contrary."*¹⁵⁸

The present Commission is inclined to reiterate the view of the Sarkaria Commission on the reporting issue, as it promotes greater transparency in administration and better relations between the two administrative units. However, it does not warrant any Constitutional amendment and is to be followed as a matter of convention for good governance.

¹⁵⁸ Sarkaria Commission, Para 4.12.06

4.6 Conclusions and Recommendations

4.6.01 Appointment and Removal of Governors

Given the status and importance conferred by the Constitution on the office of the Governor and taking into account his key role in maintaining Constitutional governance in the State, it is important that the Constitution lays down explicitly the qualifications or eligibility for being considered for appointment. Presently Article 157 only says that the person should be a citizen of India and has completed 35 years of age.

The Sarkaria Commission approvingly quoted the eligibility criteria that Jawaharlal Nehru advocated and recommended its adoption in selecting Governors. These criteria are:

- (i) He should be eminent in some walk of life;
- (ii) He should be a person from outside the State;
- (iii) He should be a detached figure and not too intimately connected with the local politics of the States; and
- (iv) He should be a person who has not taken too great a part in politics generally and particularly in the recent past.

The words and phrases like "eminent", "detached figure", "not taken active part in politics" are susceptible to varying interpretations and parties in power at the Centre seem to have given scant attention to such criteria. The result has been politicization of Governorship and sometimes people unworthy of holding such high Constitutional positions getting appointed. This has led to some parties demanding the abolition of the office itself and public demonstration against some Governors in some States. This trend not only undermines Constitutional governance but also leads to unhealthy developments in Centre-State relations.

The Commission is of the view that the Central Government should adopt strict guidelines as recommended in the Sarkaria report and follow its mandate in letter and spirit lest appointments to the high Constitutional office should become a constant irritant in Centre-State relations and sometimes embarrassment to the Government itself.

Governors should be given a fixed tenure of five years and their removal should not be at the sweet will of the Government at the Centre. The phrase "during the pleasure

of the President" in Article 156(i) should be substituted by an appropriate procedure under which a Governor who is to be reprimanded or removed for whatever reasons is given an opportunity to defend his position and the decision is taken in a fair and dignified manner befitting a Constitutional office.

It is necessary to provide for impeachment of the Governor on the same lines as provided for impeachment of the President in Article 61 of the Constitution. The dignity and independence of the office warrants such a procedure. The "pleasure doctrine" coupled with the lack of an appropriate procedure for the removal of Governors is inimical to the idea of Constitutionalism and fairness. Given the politics of the day, the situation can lead to unsavory situations and arbitrariness in the exercise of power. Of course, such impeachment can only be in relation to the discharge of functions of the office of a Governor or violations of Constitutional values and principles. The procedure laid down for impeachment of President, *mutatis mutandis* can be made applicable for impeachment of Governors as well.

4.6.02 Governors' discretionary powers

Article 163(2) gives an impression that the Governor has a wide, undefined area of discretionary powers even outside situations where the Constitution has expressly provided for it. Such an impression needs to be dispelled. The Commission is of the view that the scope of discretionary powers under Article 163(2) has to be narrowly construed, effectively dispelling the apprehension, if any, that the so-called discretionary powers extends to all the functions that the Governor is empowered under the Constitution. Article 163 does not give the Governor a general discretionary power to act against or without the advice of his Council of Ministers. In fact, the area for the exercise of discretion is limited and even in this limited area, his choice of action should not be nor appear to be arbitrary or fanciful. It must be a choice dictated by reason, activated by good faith and tempered by caution.

In respect of Bills passed by the Legislative Assembly of a State, the Governor is expected to declare that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President. He has the discretion also to return the Bill (except Money Bill) for re-consideration of the House together with the message he might convey for the purpose. If on such reconsideration the Bill is passed

again, with or without amendments, the Governor is obliged to give his assent. Furthermore, it is necessary to prescribe a time limit within which the Governor should take the decision whether to grant assent or to reserve it for consideration of the President. The Commission had earlier recommended that the time limit of six months prescribed for the State Legislature to act on the President's message on a reserved Bill should be the time limit for the President also to decide on assenting or withholding of assent. The Governor accordingly should make his decision on the Bill within a maximum period of six months after submission to him.

On the question of Governor's role in appointment of Chief Minister in the case of an hung assembly there have been judicial opinions and recommendations of expert commissions in the past. Having examined those materials and having taken cognizance of the changing political scenario in the country, the Commission is of the view that it is necessary to lay down certain clear guidelines to be followed as Constitutional conventions in this regard. These guidelines may be as follows:

1. The party or combination of parties which commands the widest support in the Legislative Assembly should be called upon to form the Government.
2. If there is a pre-poll alliance or coalition, it should be treated as one political party and if such coalition obtains a majority, the leader of such coalition shall be called by the Governor to form the Government.
3. In case no party or pre-poll coalition has a clear majority, the Governor should select the Chief Minister in the order of preference indicated below:
 - a. *The group of parties which had pre-poll alliance commanding the largest number;*
 - b. *The largest single party staking a claim to form the government with the support of others;*
 - c. *A post-electoral coalition with all partners joining the government;*
 - d. *A post-electoral alliance with some parties joining the government and the remaining including independents supporting the government from outside;*

On the question of dismissal of a Chief Minister, the Governor should invariably insist on the Chief Minister proving his majority on the floor of the House for which he should prescribe a time limit.

On the question of granting sanction for prosecution of a State Minister in situations where the Council of Ministers advised to the contrary, the Commission would endorse the interpretation given by the Supreme Court to the effect that "if the Cabinet

decision appears to the Governor to be motivated by bias in the face of overwhelming material, the Governor would be within his rights to disregard the advice and grant sanction for prosecution". The Commission recommends that Section 197 Criminal Procedure Code may be suitably amended to reflect the position of law in this regard.

4.6.03 Governors as Chancellors of Universities and holding other Statutory Positions

To be able to discharge the Constitutional obligations fairly and impartially, the Governor should not be burdened with positions and powers which are not envisaged by the Constitution and which may expose the office to controversies or public criticism. Conferring statutory powers on the Governor by State Legislatures have that potential and should be avoided. Making the Governor the Chancellor of the Universities and thereby conferring powers on him which may have had some relevance historically has ceased to be so with change of times and circumstances. The Council of Ministers will naturally be interested in regulating University education and there is no need to perpetuate a situation where there would be a clash of functions and powers.

The Commission is also of the view that Governor should not be assigned functions casually under any Statute. His role should be confined to the Constitutional provisions only.

CHAPTER 5

EMERGENCY PROVISIONS AND CONSTITUTIONAL GOVERNANCE

CONTENTS

Sections/Headings	Para Nos.	Page Nos.
5.1 Introduction	5.1.01-5.1.13	91-95
5.2 Articles 355 and 356 - Parallel Provisions in other Federations	5.2.01-5.2.04	95-100
5.3 Scope and Effect of Articles 355 and 356	5.3.01-5.3.04	100-115
5.4 Power to Impose Localised Emergency under Articles 355/356	5.4.01-5.4.22	115-121
5.5 A Framework Law for Exercise of Power under Article 355	5.5.01	122-125
5.6 Conclusions and Recommendations	5.6.01-5.6.03	126-128

5

EMERGENCY PROVISIONS AND CONSTITUTIONAL GOVERNANCE

5.1 Introduction

5.1.01 Part XVIII of the Constitution deals with emergency provisions. The emergency provisions can be classified into three categories: (a) Articles 352, 353, 354, 358 and 359 which relate to emergency proper¹⁵⁹ ; (b) Articles 355, 356 and 357 which deal with imposition of President's rule in States in a certain situation and (c) Article 360 which speaks of financial emergency.

5.1.02 The present chapter does not seek to deal with the kind of emergency contemplated in Article 352 which is characterized as "emergency proper". This is a provision which has no relevance in the ordinary course of Constitutional governance. It is to be used as a safety valve during really emergent times which rarely comes in the life of a Nation for preserving and protecting the Constitution. Post 1977, no such emergency has been pronounced and the 44th Amendment to the Constitution introduced its own safeguards with regard to the said provision. Similarly, the provisions of Article 360, which deal with financial emergency are also not being dealt with as no significant constitutional challenges flowing from the same have been thus far highlighted. Accordingly, this chapter shall focus on the Power of the President to impose President Rule in the States as provided for in Article 356 and also the scope and effect of the duty cast on the Union under Article 355.

5.1.03 Article 355 imposes an obligation upon the Union "*to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution*". The Constitution does not further elaborate on how this duty of the Union to protect a State against external aggression and internal disturbance is to be operationalised. This is left to the discretion and judgment of the Union.

5.1.04 Article 356 on the other hand, provides an elaborate procedure as to the powers vested in the Union to ensure that the government of every State is carried on in

¹⁵⁹ The term "emergency proper" has been utilized in a Consultation Paper prepared by the Advisory Panel on Union-State Relations of the National Commission to Review the Working of the Constitution.

accordance with the provisions of the Constitution. As has been noted by the Advisory Panel on Union-State Relations to the National Commission to Review the Working of the Constitution (hereinafter the "NCRWC Advisory Panel"), Article 356 carries the marginal heading "Provisions in case of failure of constitutional machinery in States". But neither clause (1) nor for that matter any other clause in the Article employs the expression "failure of constitutional machinery". On the other hand, the words used are similar to those occurring in Article 355, namely, "a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution". If the President is satisfied that such a situation has arisen, whether on the basis of a report received from the Governor of the State or otherwise, he may, by proclamation, take any or all of the three steps mentioned in sub-clauses (a), (b) and (c)¹⁶⁰.

5.1.05 The Sarkaria Commission Report as well as the Report by the National Commission to Review the Working of the Constitution have elaborately dealt with the problems arising in implementation of Article 356, the *S.R. Bommai* judgment and have recommended various measures to utilise Article 356 in preserving the balance between the Union and the States. This Report recommends and reiterates these suggestions. In addition to these suggestions, this Report intends to focus on the powers which can be utilised by the Union in respect of Article 355 and how Article 356 must only be utilised as a last resort. The Report seeks to provide for a legal structure, constitutional or otherwise, which empowers the Centre to impose "local emergency" within the territory of a state in cases of widespread violence within such territory which could be communal, separatist, terrorism related etc., or a large scale natural disaster and which, in the opinion of the Union, a) is beyond the means of the State to control and/or; b) the State is unwilling to control or react to. Safeguards against abuse of such a framework would necessarily have to be provided.

5.1.06 Historically, the proximate origin of these 'emergency' powers can be traced back to the Government of India Act, 1935. Section 93 of the Act provided that if the Governor of a Province was satisfied that a situation has arisen in which the government of the Province cannot be carried out in accordance with the provisions of this Act, he may by proclamation assume to himself all or any of the powers vested in or exercisable by a Provincial body or authority, including the Ministry and the Legislature, and to discharge the functions thus assumed in his discretion. The only exception was that he could not encroach upon the powers of the High Court. Similar powers were conferred

¹⁶⁰ See, National Commission to Review the working of the constitution, A Consultation Paper on Article 356 of the Constitution, paragraph 1.4, available at <http://lawmin.nic.in/ncrwc/finalreport/v2b2-5.htm>

on the Governor-General under Section 45, which was a part of the Federal Scheme. Further, the Act provided that in the event of the security of India or of any part of the country being threatened by war or internal disturbance, provincial autonomy as envisaged in the Constitution would be subordinated to the requirement of the emergency situation: and the Federal Legislature was armed with the power to make laws on all matters, even those in the Provincial list where in normal times exclusive power would vest in the Provincial Legislatures.¹⁶¹ In such an emergency, the Central Government had also the power to control the exercise of executive authority in the Provinces by issuing directions, and where, necessary, the Centre would itself assume executive power even in Provincial matters.¹⁶²

5.1.07 The Constitution framers were deeply concerned with the need for ensuring peace and tranquillity throughout the country. External aggression in Jammu and Kashmir, the emergence of disruptive forces and wide-spread violent disturbances in the wake of partition of the country, demonstrated to them the imperative necessity of making special provisions for effectively and swiftly dealing with grave situations of law and order. The need for conferring special powers on the Union Government was therefore accepted. It was agreed that the President would be given the powers of superseding the State Legislature and Government. Initially, it was also envisaged that the Governor could issue a proclamation that a state of emergency had arisen in which peace and tranquillity could not be maintained and the Government of the State carried on in accordance with the Constitution.¹⁶³

5.1.08 An important issue for consideration before the framers was, whether the President and the Governor, or either of them, should be vested with special responsibilities to be discharged by them in the exercise of their discretion, for such purposes as maintenance of peace and tranquillity. It was decided at a very early stage of constitution-framing that the President should have no such special powers and that he would exercise all his functions on the advice of his Council of Ministers. However, the question of vesting the Governors with discretionary powers remained under prolonged consideration. It will be sufficient to say here that at a later stage, the Constituent Assembly decided that the Governor should not be an elected, but be a nominated functionary. Consequent upon this decision, the Constituent Assembly, departing from the provisions of the Government of India Act, 1935, limited the Governor's powers to merely furnishing a report to the President of the circumstances showing that a situation has arisen in which

¹⁶¹ See, Government of India Act, 1935, s. 102.

¹⁶² See, Id, Sections 126 and 126-AA. See also, Subhash C. Kashyap, *The Framing Of India's Constitution, A Study*, 802-803, (Universal Law Publishing Co.).

the Government of the State cannot be carried on in accordance with the provisions of the Constitution.¹⁶⁴

5.1.09 Thus, finally, the Constituent Assembly decided that the responsibility of intervention in the administration of a State, when it was faced with a threatened or actual break-down of the Constitutional arrangements, would be exclusively that of the President, in effect, of the Union Government, and the Governor would have no authority in such a situation to assume, in his discretion, the powers of the State Government even for a short period. The provisions so finalised, it was considered, would be broadly in accord with the basic principle of Parliamentary democracy, the Union Government being accountable for all its actions to Parliament.¹⁶⁵

5.1.10 The underlying principle and purpose of introducing Article 355 was explained by the Chairman of the Drafting Committee in the Constituent Assembly. It was stressed that our Constitution, notwithstanding that many of its provisions bestow overriding powers on the Centre, nonetheless gives, on the federal principle, plenary authority to the Provinces to make laws and administer the same in the field assigned to them. That being so, if the Centre is to interfere in the administration of provincial affairs, it must be, by and under some obligation which the Constitution imposes upon the Centre. It was emphasised that the 'invasion' by the Centre of the Provincial field "must not be an invasion which is wanton, arbitrary and unauthorised by law".¹⁶⁶

5.1.11 The introduction of a provision casting a duty on the Union to protect the States against 'external aggression' and 'internal disturbance' and 'to ensure that the government of every State is carried on in accordance with the provisions of this Constitution' was therefore, considered essential to prevent such an unprincipled invasion.¹⁶⁷

5.1.12 Dr. B.R. Ambedkar, Chairman of the Drafting Committee, explained the purpose and nature of these provisions. Emphasising the need for caution and restraint in their application, he observed:-

"I do not altogether deny that there is a possibility of these articles being abused or employed for political purposes. But that objection applies to every part of the Constitution which gives power to the Centre to override the Provinces. In fact I share the sentiments.....that such articles will never be called into operation and that they would

¹⁶⁴ Ibid, paragraph 6.2.03

¹⁶⁵ Ibid, paragraph 6.2.04.

¹⁶⁶ Ibid, paragraph 6.2.05.

¹⁶⁷ Ibid, paragraph 6.2.06.

*remain a dead letter. If at all they are brought into operation, I hope the President, who is endowed with these powers, will take proper precautions before actually suspending the administration of the provinces. I hope the first thing he will do would be to issue a mere warning to a province that has erred, that things were not happening in the way in which they were intended to happen in the Constitution. If that warning fails, the second thing for him to do will be to order an election allowing the people of the province to settle matters by themselves. It is only when these two remedies fail that he would resort to this article".*¹⁶⁸

5.1.13 As noted by the Sarkaria Commission "*the Constitution-framers conceived these provisions as more than a mere grant of over-riding powers to the Union over the States. They regarded them as a bulwark of the Constitution, an ultimate assurance of maintaining or restoring representative government in States responsible to the people. They expected that these extraordinary provisions would be called into operation rarely, in extreme cases, as a last resort when all alternative correctives fail.*"¹⁶⁹ Despite the hopes and expectations so emphatically expressed by the framers, the Sarkaria Commission noted that, Article 356 has been brought into action not less than seventy five times. As of 2009, this figure has swelled to one hundred and three times.

5.2 Articles 355 and 356 - Parallel Provisions in other Federations

Article 355 of India's Constitution is similar to Article 4 Section 4 of the US constitution and Section 119 of the Australian Constitution. Article 352 and 356 are unique to the Indian Constitution.

Dr. Ambedkar in the Constituent Assembly Debates said "*Article 4 of US Constitution is treated as the precedent for Art. 355. It is clear that in respect of internal disturbances the request of the State is not necessary. The requirement of a request from a State has lost its importance even in the US and Australia.*"¹⁷⁰ Speaking upon this Article in the Constituent Assembly Debates, Sri Alladi said: "*Therefore, it is the duty of the Union Government to protect States against external aggression, internal disturbance and domestic chaos and to see that the Constitution is worked in a proper manner both in the States and in the Union.*"¹⁷¹

¹⁶⁸ Ibid, paragraph 6.2.13.

¹⁶⁹ Ibid, paragraph 6.2.14.

¹⁷⁰ C.A.D, Vol. 9, p.175

¹⁷¹ C.A.D. Vol.IX.P.150

Article 355 creates a duty on the Union to protect the states against large-scale violence and aggression. However, unlike Article 352 and 356, it does not provide any mechanism as to how the Union has to fulfil this duty.

5.2.01 Article 4 (4) - US Constitution

Article 4 Section 4 of the US Constitution states that:

"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

Article 4 (4) imposes an obligation on United States to ensure that each State has a Republican form of Government. If a State were to adopt a non-republican form of government, the United States would be under an obligation to intervene, and to restore by force, if necessary, a republican form of government to the State. And for this purpose, it must act on its own initiative, for it is unlikely that the people who had destroyed the republican form of government would ask the Centre to restore it.¹⁷²

Article 4 (4) also obliges the United States to protect each State against domestic violence. Earlier this could be done only on application by the legislature or the executive of the State. However after the Debs Case, the request of the State is not necessary for the United States to enforce its own rights, and therefore the importance of observing the formalities required by Article 4(4) has declined.¹⁷³

5.2.02 U.S. Insurrection Act and Local Emergency Management

Apart from these constitutional provisions, the Insurrection Act specifically deals with a local emergency. The power undoubtedly flows from Article 4(4) of the United States Constitution. The Insurrection Act empowers the President to declare a form of martial law. When the Act is invoked, the military can carry out law enforcement functions without the consent of a Governor. The Act can be invoked by the President during violent situations where the states or local communities were resisting lawful orders. The intent of the law, as the title suggests, was to deal with insurrection from individuals or groups. The law was not designed to address other situations, including natural disasters, or attacks from outside the country. This was changed by the 2006 amendment. These

¹⁷² R v Burah (1878) 3 App Cas 889

¹⁷³ Corwin, The President: Office and Powers, pp. 135-6

amendments were added after events of Hurricane Katrina. The original wording of the Act required the conditions to be met as the result of "*insurrection, domestic violence, unlawful combination, or conspiracy*". The new wording of the Act, as amended, still requires the same conditions, but those conditions could, after the changes, also be a result of "*natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition*".

Under the new language, the President can invoke the Act and declare martial law in cases where public order breaks down as a result of a natural disaster, epidemic, terrorist attack, or under the nebulous term of "other conditions." Also known as the "John Warner Defence Authorization Act of 2007", signed on October 17, 2006, it allows the President to declare a "public emergency" and station troops anywhere in America and take control of state-based National Guard units *without the consent of the Governor or local authorities*, in order to "suppress public disorder."

For military forces to be used under the provisions of the revised Insurrection Act, the following conditions must be met:

- (1) The President may employ the armed forces, including the National Guard in Federal service, to--
 - (A) restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States, the President determines that--
 - (i) domestic violence has occurred to such an extent that the constituted authorities of the State are incapable of maintaining public order; and
 - (ii) such violence results in a condition described in paragraph (2); or
 - (B) suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy if such insurrection, violation, combination, or conspiracy results in a condition described in paragraph (2).
- (2) A condition described in this paragraph is a condition that--
 - (A) so hinders the execution of the laws of a State or possession, as applicable, and of the United States within that State or possession, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that

State or possession are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

- (B) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

This change makes it easier for the President to invoke the Insurrection Act in cases beyond an insurrection - cases which were not intended under the initial objects of the said Act. With these changes, the President now does not have to contact or collaborate with any state agency in taking control of the situation and injecting federal military forces, to carry out patrols or make arrests. The President has to notify but not explain to Congress that he or she believes that states cannot handle the situation.

The salient features of the amended Insurrection Act can be summarised as follows:

1. The Act empowers the President to interfere **without the consent** of the Governor of the State.
2. After the 2006 amendment, it covers a **wide range of issues** like natural disasters, terror strikes, health emergencies etc.
3. There is an inherent safeguard in the Act to prevent misuse as the President has to notify Congress 'as soon as practicable after the determination and every 14 days thereafter during the duration of the exercise of the authority.' This will prevent the President from acting arbitrarily. However the word used in the Act is only to 'notify' Congress and not seek its permission.
4. At the same time, prior notice to Congress is not needed - as expressed by the words 'after the determination'. The President has to notify them only after the action has been taken.
5. The President can intervene only 'to restore public order and enforce the laws of the United States' and that too only when the concerned State refuses or fails i.e. 'incapable' to maintain public order.¹⁷⁴

¹⁷⁴ It is important to note here that the said amendments have since been repealed in their entirety. The objections against the amendments were primarily based on the large powers provided to the President which would make it easier to impose martial law without the consent of the Governors of the respective States. However, as a historical interest, this part has been elaborated herein.

5.2.03 Section 119 of the Australian Constitution

Section 119 of the Constitution provides that the Commonwealth '*shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence*'. While this language suggests that the Commonwealth is obliged to respond to requests by the States for assistance, the Commonwealth may have a *discretion* based on its assessment as to whether or not a state of 'domestic violence' exists.

Alternatively, the Commonwealth may call out the forces to protect its own interests. While there is no specific constitutional or legislative provision dealing with the issue, it is widely accepted that the Commonwealth can use the military forces to enforce its laws and to protect its interests and property and thereby suppress domestic violence in a State. Thus, while it is acknowledged that '*it is not within the province of the Commonwealth to protect a State against domestic violence [in the absence of a request]*', it has been said that where domestic violence '*is of such a character as to interfere with the operations of the Federal government, or with the rights and privileges of Federal citizenship, the Federal government may clearly, without a summons from the State, interfere to restore order*'.¹⁷⁵

The authority for affirming the right of the Commonwealth to intervene, or interfere, within State jurisdiction is discussed in the case of *R v Sharkey* where it was held that: '*[is] of such a character as to interfere with the operations of the Federal Government, or with the rights and privileges of federal citizenship, the Federal Government may clearly, without summons from the State, interfere to restore order. Thus if a riot in a State interfered with the carriage of the federal mails, or with interstate commerce, or with the right of an elector to record his vote at a federal election, the Federal Government could use all of the force at its disposal, not to protect the States, but to protect itself. Were it otherwise, the Federal Government would be dependent on the Governments of the States for the effective exercise of its powers*'.¹⁷⁶

5.2.04 Australian Defence Amendment Act, 2000

The amendments were enacted to establish a regime for the use of Defence Forces to protect the States and self-governing Territories and Commonwealth interests from 'domestic violence', expanding upon a more limited existing regime in the Defence Act, 1903.

Clause 51A provides for orders relating to the protection of Commonwealth interests, in the absence of any request from a State or Territory. Where the authorising

¹⁷⁵ Dixon J cited Quick and Garran's annotated Constitution of the Australian Commonwealth in *R v Sharkey* (1949) 79 CLR 121 in these terms.

¹⁷⁶ *Ibid.*

Ministers (the Prime Minister, the Defence Minister and the Attorney-General) are satisfied that:

- domestic violence is occurring or is likely to occur, and
- a State or Territory is not, or is unlikely to be, able to protect Commonwealth interests; and
- the ADF should be called out to do so and should be given certain powers

This new section will allow a military call out where the three Ministers are satisfied that domestic violence is occurring "or is likely to occur" that will affect "Commonwealth interests" regardless of whether there is a request by any state or territory government.

Thus Clause 51A clearly empowers the Commonwealth to handle the 'domestic violence' occurring in the State, which the State is unable or unwilling to handle.

These amendments to the Defence Act, 1903 were aimed at assisting the civilian services, ensuring that there was a cooperative and collective structure in the event of serious civil disturbances or terrorist attack and ensuring that there was a unified agreement from both Houses of Parliament on what the amendment meant when they were used 'on the ground'.¹⁷⁷

5.3. SCOPE AND EFFECT OF ARTICLES 355 AND 356

5.3.01 Article 355: Scope and Effect

As identified by the Sarkaria Commission, the obligations of the Union under Article 355 arise with respect to three situations existing in a State, namely, (i) external aggression; and; (ii) internal disturbance; and (iii) where the government of the State cannot be carried on in accordance with the Constitution.

The framers of the Constitution have used the word "and" to connect all the three segments of the Article specifying these situations. The word "and", as explained by the Chairman of the Drafting Committee in the Constituent Assembly, can be interpreted both conjunctively and disjunctively, as the occasion may require. This implies that, on some occasions, these situations may arise severally, while, on others, in combination with one another. It is not possible to define precisely the expression 'external

¹⁷⁷ NORMAN CHARLES LAING, "Call-out the Guards - Why Australia Should No Longer Fear the Deployment of Australian Troops on Home Soil" [2005] UNSWLawJl 34

aggression'. This expression has also been used in Article 352 in the context of 'grave emergency'. Hence it is necessary to distinguish the contextual connotation and scope of this expression in Article 352 from its use in Article 355. 'External aggression' is a valid ground for action under Article 352(1), only if, in a *grave emergency*, it *threatens* the security of India or any part thereof. If the 'external aggression' is not of a gravity calling for action under Article 352 or does not involve a situation of failure of the Constitution, then the Union will be competent to take all appropriate steps, other than action under Articles 352 and 356, that it may consider necessary in fulfilment of its duty under Article 355.¹⁷⁸

The 44th Constitutional Amendment substituted "armed rebellion" for "internal disturbance" in Article 352. "Internal disturbance" is, therefore, no longer a ground for taking action under that Article. Further, it cannot, by itself, be a ground for imposing President's rule under Article 356(1), if it is not intertwined with a situation where the government of a State cannot be carried on in accordance with the provisions of the Constitution.¹⁷⁹

It is difficult to define precisely the concept of 'internal disturbance'. The framers of the Constitution by using this phrase intended to cover not only domestic violence, but something more. As noted by the Sarkaria Commission, the scope of the term 'internal disturbance' is wider than 'domestic violence'. It conveys the sense of 'domestic chaos', which takes the colour of a security threat from its associate expression, 'external aggression'. Such a chaos could be due to various causes. Large-scale public disorder which throws out of gear the even tempo of administration and endangers the security of the State, is ordinarily, one such cause. Such an internal disturbance is normally man-made. But it can be nature-made, also natural calamities of unprecedented magnitude, such as flood, cyclone, earth-quake, epidemic, etc. may paralyse the government of the State and put its security in jeopardy.¹⁸⁰

Article 355 not only imposes a duty on the Union but also grants it, by necessary implication, the power of doing all such acts and employing such means as are essentially and reasonably necessary for the effective performance of that duty. However, it may be noted that the Constitution does not, under Article 355, permit suspension of fundamental rights or change in the scheme of distribution of mutually exclusive powers with respect to matters in List I and List II. Except to the extent of the use of the forces of the Union in a situation of violent upheaval or disturbance in a State, the other constitutional

¹⁷⁸ Supra Fn. 170, paragraph 6.3.02

¹⁷⁹ Ibid, paragraph 6.3.03.

¹⁸⁰ Ibid, paragraph 6.3.04.

provisions governing Union-State relationships continue as before. Unless a National Emergency is proclaimed under Article 352, or powers of the State Government are suspended under Article 356, the Union Government cannot assume sole responsibility for quelling such an internal disturbance in a State to the exclusion of the State authorities charged with the maintenance of public order.¹⁸¹

Where, in a situation of internal disturbance in a State, action under Article 356(1) is considered unnecessary or inexpedient, the Union Government has the power to deploy its forces, *suo motu*, under its control, to put it down and restore peace. Exclusive control of the Union over its armed forces and their deployment in aid of the civil power in a State, even before the insertion of Entry 2A in List I by the 42nd Amendment, was relatable to Entry 2 of List I read with Article 73. Maintenance of public order, by the use of the armed forces of the Union, has always been outside the purview of Entry I of List II.¹⁸²

The phrase "in aid of the civil power" in Entry 2A of List I is of wide import. In the context of public disorder or violent internal disturbances, these words mean 'in aid of the instrumentalities of the State charged with the maintenance of public order'. In such a case, the Union may use its armed forces to help the law-enforcing authorities of the State. These words do not *necessarily* imply that the Union can deploy its forces only at the request of the State. It may happen that a State is unwilling or unable to suppress a serious break-down of law and order or refuses to seek the aid of the armed forces of the Union. In such a situation, fast drifting towards anarchy or physical break-down of the State administration, the Union may, of its own motion, deploy its forces under its control and take whatever other steps are considered reasonably necessary for suppressing the disturbance in discharge of its duty under Article 355. This will also be consistent with its power under Entries 2 and 2A of the Union List read with Article 73.¹⁸³

It is important to distinguish 'internal disturbance' from ordinary problems relating to law and order. Maintenance of public order, excepting where it requires the use of the armed forces of the Union, is a responsibility of the States (Entry 1, List II). That being the case, 'internal disturbance' within the contemplation of Article 355 cannot be equated with mere breaches of public peace. In terms of gravity and magnitude, it is intended to connote a far more serious situation. The difference between a situation of public disorder and 'internal disturbance' is not only one of degree but also of kind. While the latter is an

¹⁸¹ Ibid, paragraph 6.3.10.

¹⁸² Ibid, paragraph 6.3.11

¹⁸³ Ibid, paragraph 6.3.12

aggravated form of public disorder which *endangers the security* of the State, the former involves relatively minor breaches of the peace of purely local significance. When does a situation of public disorder aggravate into an 'internal disturbance' justifying Union intervention, is a matter that has been left by the Constitution to the judgement and good sense of the Union Government.¹⁸⁴

Under Article 355, a whole range of action on the part of the Union is possible depending on the circumstances of the case, the nature, the timing and the gravity of the internal disturbance. In some cases, advisory assistance by the Union to the State for the most appropriate deployment of its resources may suffice. In more serious situations, augmentation of the State's own efforts by rendering Union assistance in men, material and finance may be necessary. If it is a violent upheaval or a situation of external aggression (not amounting to a grave emergency under Article 352), deployment of the Union forces in aid of the police and magistracy of the State may be sufficient to deal with the problem.¹⁸⁵

Normally, a State would actively seek assistance of the Union to meet such a crisis. However, as already noted above, the scope of Article 355 is wide enough to enable the Union to render all assistance including deployment of its armed forces, notwithstanding the fact that the State Government has made specific request. The Union will be entitled to do it on its own motion, in discharge of its paramount liability under Article 355. Action to be taken may include measures to prevent recurring crisis.¹⁸⁶

This, in short, is the legal position as we appreciate it. Nevertheless, it must be remembered that what is legally permissible may not be politically proper. Situations of internal disturbance can effectively be tackled only through concerted and coordinated action of the Union Forces and the State instrumentalities concerned. In practice, before deploying its Forces in a State, the Union should sound the State Government and seek its cooperation.¹⁸⁷

Concern for the unity and integrity of India is the rationale for the obligation put on the Union to protect States even against internal disturbances which ordinarily is a matter for the states to handle. This obligation is coupled with the power to enforce that duty, if necessary without any request coming from the State. This is consistent with the federal scheme of the Constitution. Having examined similar provisions in other federal Constitutions and looking at socio-political developments in the country, the Commission

¹⁸⁴ Ibid, paragraph 6.3.13

¹⁸⁵ Ibid, paragraph 6.3.14

¹⁸⁶ Ibid, paragraph 6.3.15

¹⁸⁷ Ibid, paragraph 6.3.16

is of the view that a whole range of action on the part of the Union is possible under this power depending on the circumstances of the case as well as the nature, timing and the gravity of the internal disturbance. The Union can advise the State on the most appropriate deployment of its resources to contain the problem. In more serious situations, augmentation of the States' own efforts by rendering Union assistance in men, material and finance may become necessary. If it is a violent or prolonged upheaval (not amounting to a grave emergency under Art. 352), deployment of the Union forces in aid of the police and magistracy of the State may be adopted to deal with the problem. Action to be taken may include measures to prevent recurring crisis.

When does a situation of public disorder aggravate into an internal disturbance as envisaged in Art. 355 justifying Union intervention is a matter that has been left by the Constitution to the judgement and good sense of the Union Government. Though this is the legal position, in practice, it is advisable for the Union Government to sound the State Government and seek its cooperation before deploying its Forces in a State.

The Commission is also of the view that when an external aggression or internal disturbance paralyses the State administration creating a situation of a potential break down of the Constitutional machinery of the State, all alternative courses available to the Union for discharging its paramount responsibility under Article 355 should be exhausted to contain the situation and the exercise of the power under Art. 356 should be limited strictly to rectifying a "failure of the Constitutional machinery in the State".

5.3.02 Article 356-Scope and Effect

Article 356 provides for a Proclamation by the President if he is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution. This satisfaction of the President is a condition precedent to the exercise of this power. Such a Proclamation may declare that the powers of the State Legislature shall be exercisable by or under the authority of Parliament. By virtue of Article 357, Parliament may confer that legislative power on the President and authorise him to further delegate it to any other authority. By the Proclamation, the President may assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State. In the result, the executive power of the State which is normally exercisable by the Governor with the aid and advice of his Council

of Ministers, becomes exercisable by the Union Government, and the legislative power of the State by or under the authority of Parliament. The Proclamation may make consequential provisions including suspension of the operation of Constitutional provisions relating to any body or authority of the State. The administration of the State, for all practical purposes, is taken over by the Union Government.¹⁸⁸

Clause (3) of the Article requires the Proclamation to be laid before each House of Parliament, and unless approved by them, it ceases to operate at the expiration of two months. If the Proclamation is approved by resolutions of both the Houses, it will remain operative for a period of six months from the date of its issue. This period can be extended for another six months if it is further approved by both the Houses. But, no such approval may be given continuing the operation of a Proclamation beyond one year from the date of its issue, except as provided in clause (5) of the Article. If, however, both the conditions laid down in clause (5) of the Article are satisfied, the Proclamation can be continued for a further period not exceeding three years in all. These conditions are : (i) a Proclamation of Emergency is in operation in the State, and (ii) the Election Commission has certified that the continuance in force of the Proclamation is necessary on account of difficulties in holding general elections.¹⁸⁹

There is, however, no provision in Article 356 similar to that in clauses (7) and (8) of Article 352, which enables the House of the People to disapprove by resolution the continuance in force of such a Proclamation.¹⁹⁰ Imposition of President's Rule thus brings to an end, for the time being, a government in the State responsible to the State Legislature. This is without doubt a very drastic power. Exercised correctly, it may operate as a safety mechanism for the system. Abused or misused, it can destroy the constitutional equilibrium between the Union and the States.¹⁹¹

In Article 356, the expression, "the government of the State cannot be carried on in accordance with the provisions of the Constitution", is couched in wide terms. It is, therefore, necessary to understand its true import and ambit. In the day-to-day administration of the State, its various functionaries in the discharge of their multifarious responsibilities take decisions or actions which may not, in some particular or the other, be strictly in accord with all the provisions of the Constitution. It is not advisable nor constitutionally proper for every such breach or infraction of a constitutional provision, irrespective of its significance, extent and effect, be taken to constitute a "failure of the

¹⁸⁸ Ibid, paragraph 6.3.19

¹⁸⁹ Ibid, paragraph 6.3.20

¹⁹⁰ Ibid, paragraph 6.3.21

¹⁹¹ Ibid, paragraph 6.3.22

constitutional machinery" within the contemplation of Article 356. As noted above, by virtue of Article 355 it is the duty of the Union to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution. Article 356, on the other hand, provides the remedy when there has been an actual break-down of the constitutional machinery of the State. Any abuse or misuse of this drastic power damages the fabric of the Constitution whereas the object of this Article is to enable the Union to take remedial action consequent upon break-down of the constitutional machinery, so that governance of the State in accordance with the provisions of the Constitution, is restored. A wide literal construction of Article 356 (1), will reduce the constitutional distribution of the powers between the Union and the States to a licence dependent on the pleasure of the Union Executive. Further, it will enable the Union Executive to cut at the root of the democratic Parliamentary form of government in the State. It must, therefore, be rejected in favour of a construction which will preserve that form of government. Hence, the exercise of the power under Article 356 must be limited to rectifying a 'failure of the constitutional machinery in the State'. The marginal heading of Article 356 also points to the same construction.¹⁹²

Another point for consideration is, whether 'external aggression' or 'internal disturbance' is to be read as an indispensable element of the situation of failure of the constitutional machinery in a State, the existence of which is a pre-requisite for the exercise of the power under Article 356. The Sarkaria Commission considered this issue and concluded that the answer to this question should be in the negative. On the one hand, 'external aggression' or 'internal disturbance' may not necessarily create a situation where government of the State cannot be carried on in accordance with the Constitution. On the other, a failure of the constitutional machinery in the State may occur, without there being a situation of 'external aggression' or 'internal disturbance'.¹⁹³

After the Supreme Court's judgment in the *S. R. Bommai case*¹⁹⁴, it is well settled that Article 356 is an extreme power and is to be used as a last resort in cases where it is manifest that there is an impasse and the constitutional machinery in a State has collapsed. The salient points laid down by the judgment, are as follows:

- (1) *Article 356 of the Constitution confers a power upon the President to be exercised only where he is satisfied that a situation has arisen where the Government of a State cannot be carried on in accordance with the provisions of the Constitution. Under our Constitution, the power is really that of the Union Council of Ministers with the Prime Minister at its head. The satisfaction contemplated by the article is subjective in nature.*

¹⁹² Ibid, paragraph 6.3.23

¹⁹³ Ibid, paragraph 6.3.24

¹⁹⁴ (1994) 3 SCC 1, 296-297

- (2) *The power conferred by Article 356 upon the President is a conditioned power. It is not an absolute power. The existence of material - which may comprise of or include the report(s) of the Governor - is a pre-condition. The satisfaction must be formed on relevant material. The recommendations of the Sarkaria Commission with respect to the exercise of power under Article 356 do merit serious consideration at the hands of all concerned.*
- (3) *Though the power of dissolving of the Legislative Assembly can be said to be implicit in clause (1) of Article 356, it must be held, having regard to the overall constitutional scheme that the President shall exercise it only after the Proclamation is approved by both Houses of Parliament under clause (3) and not before. Until such approval, the President can only suspend the Legislative Assembly by suspending the provisions of Constitution relating to the Legislative Assembly under sub-clause (c) of clause (1). The dissolution of Legislative Assembly is not a matter of course. It should be resorted to only where it is found necessary for achieving the purposes of the Proclamation.*
- (4) *The Proclamation under clause (1) can be issued only where the situation contemplated by the clause arises. In such a situation, the Government has to go. There is no room for holding that the President can take over some of the functions and powers of the State Government while keeping the State Government in office. There cannot be two Governments in one sphere.*
- (5) *(a) Clause (3) of Article 356 is conceived as a check on the power of the President and also as a safeguard against abuse. In case both Houses of Parliament disapprove or do not approve the Proclamation, the Proclamation lapses at the end of the two-month period. In such a case, Government which was dismissed revives. The Legislative Assembly, which may have been kept in suspended animation gets reactivated. Since the Proclamation lapses -- and is not retrospectively invalidated - the acts done, orders made and laws passed during the period of two months do not become illegal or void. They are, however, subject to review, repeal or modification by the Government/Legislative Assembly or other competent authority.*
(b) However, if the Proclamation is approved by both the Houses within two months, the Government (which was dismissed) does not revive on the expiry of period of the proclamation or on its revocation. Similarly, if the Legislative Assembly has been dissolved after the approval under clause (3), the Legislative Assembly does not revive on the expiry of the period of Proclamation or on its revocation.

- (6) *Article 74(2) merely bars an enquiry into the question whether any, and if so, what advice was tendered by the Ministers to the President. It does not bar the Court from calling upon the Union Council of Ministers (Union of India) to disclose to the Court the material upon which the President had formed the requisite satisfaction. The material on the basis of which advice was tendered does not become part of the advice. Even if the material is looked into by or shown to the President, it does not partake the character of advice. Article 74(2) and Section 123 of the Evidence Act cover different fields. It may happen that while defending the Proclamation, the Minister or the official concerned may claim the privilege under Section 123. If and when such privilege is claimed, it will be decided on its own merits in accordance with the provisions of Section 123.*
- (7) *The Proclamation under Article 356(1) is not immune from judicial review. The Supreme Court or the High Court can strike down the Proclamation if it is found to be mala fide or based on wholly irrelevant or extraneous grounds. The deletion of clause (5) [which was introduced by the 38th (Amendment) Act] by the 44th Constitution (Amendment) Act, removes the cloud on the reviewability of the action. When called upon, the Union of India has to produce the material on the basis of which action was taken. It cannot refuse to do so, if it seeks to defend the action. The court will not go into the correctness of the material or its adequacy. Its enquiry is limited to see whether the material was relevant to the action. Even if part of the material is irrelevant, the court cannot interfere so long as there is some material which is relevant to the action taken.*
- (8) *If the Court strikes down the proclamation, it has the power to restore the dismissed Government to office and revive and reactivate the Legislative Assembly wherever it may have been dissolved or kept under suspension. In such a case, the Court has the power to declare that acts done, orders passed and laws made during the period the Proclamation was in force shall remain unaffected and be treated as valid. Such declaration, however, shall not preclude the Government/Legislative Assembly or other competent authority to review, repeal or modify such acts, orders and laws.*

The Supreme Court has thus created safeguards with regard to the utilisation of Article 356. The Commission would recommend such safeguards to be adopted through constitutional amendments to ensure smooth Centre-State relations and effective Constitutional governance. Ultimately, the proper use of Article 356 can only be governed by the inherent decency and honesty of the political process. However, introducing

safeguards would provide parameters which would reduce the chances of misuse of Article 356 particularly in an atmosphere of increasing political rivalry.

In this regard, safeguards suggested by the NCRWC relying on various suggestions of the Sarkaria Commission may be considered. These suggestions were also applauded by the Supreme Court in the *S.R. Bommai* case, and it can be argued that the same are already part of the law of the land. This should form an even more pressing case for amending Article 356.

The recommendations of the Advisory Panel on Union-State Relations to the NCRWC can be summarised as follows:

1. *It should be provided that until both Houses of Parliament approve the proclamation issued under clause (1) of Article 356, the Legislative Assembly cannot be dissolved. If necessary it can be kept only under animated suspension.*
2. *Before issuing the proclamation under clause (1), the President/the Central Government should indicate to the State Government the matters wherein the State Government is not acting in accordance with the provisions of the Constitution and give it a reasonable opportunity of redressing the situation - unless the situation is such that following the above course would not be in the interest of security of State or defence of the country.*
3. *Once a proclamation is issued, it should not be permissible to withdraw it and issue another proclamation to the same effect with a view to circumvent the requirement in clause (3). Even if a proclamation is substituted by another proclamation, the period prescribed in clause (3) should be calculated from the date of the first proclamation.*
4. *The proclamation must contain (by way of annexure) the circumstances and the grounds upon which the President is satisfied that a situation has arisen where the government of the State cannot be carried on in accordance with the provisions of the Constitution. Further, if the Legislative Assembly is sought to be kept under animated suspension or dissolved, reasons for such course of action should also be stated in the appropriate proclamation.*
5. *Whether the Ministry in a State has lost the confidence of the Legislative Assembly or not, should be decided only on the floor of the Assembly and nowhere else. If necessary, the Central Government should take necessary steps to enable the Legislative Assembly to meet and freely transact its business. The Governors should not be allowed to dismiss the*

Ministry so long as it enjoys the confidence of the House. Only where a Chief Minister of the Ministry refuses to resign after his Ministry is defeated on a motion of no-confidence, should the Governor dismiss the State Government.

The recommendations of the Sarkaria Commission which were reiterated by the Advisory Panel to the NCRWC are to the following effect:

- 6.8.01 *"Article 356 should be used very sparingly, in extreme cases, as a measure of last resort, when all available alternatives fail to prevent or rectify a breakdown of constitutional machinery in the State. All attempts should be made to resolve the crisis at the State level before taking recourse to the provisions of Article 356. The availability and choice of these alternatives will depend on the nature of the constitutional crisis, its causes and exigencies of the situation. These alternatives may be dispensed with only in cases of extreme urgency where failure on the part of the Union to take immediate action under Article 356 will lead to disastrous consequences.*
- 6.8.02 *A warning should be issued to the errant State, in specific terms, that it is not carrying on the government of the State in accordance with the Constitution. Before taking action under Article 356, any explanation received from the State should be taken into account. However, this may not be possible in a situation when not taking immediate action would lead to disastrous consequences.*
- 6.8.03 *When an 'external aggression' or 'internal disturbance' paralyses the State administration creating a situation drifting towards a potential breakdown of the constitutional machinery of the State, all alternative courses available to the Union for discharging its paramount responsibility under Article 355 should be exhausted to contain the situation.*
- 6.8.04
- (a) *In a situation of political breakdown, the Governor should explore all possibilities of having a government enjoying majority support in the Assembly. If it is not possible for such a government to be installed and if fresh elections can be held without avoidable delay, he should ask the outgoing Ministry, if there is one, to continue as a caretaker government, provided the Ministry was defeated solely on a major policy issue, unconnected with any allegations of maladministration or corruption and is agreeable to continue. The Governor should then dissolve the Legislative Assembly, leaving the resolution of the constitutional crisis to the electorate. During the interim period, the caretaker government should be allowed to function. As a matter of convention, the*

caretaker government should merely carry on the day-to-day government and desist from taking any major policy decision.

(b) *If the important ingredients described above are absent, it would not be proper for the Governor to dissolve the Assembly and install a caretaker government. The Governor should recommend proclamation of President's rule without dissolving the Assembly.*

6.8.05 *Every proclamation should be placed before each House of Parliament at the earliest, in any case before the expiry of the two months period contemplated in clause (3) of Article 356.*

6.8.06 *The State Legislative Assembly should not be dissolved either by the Governor or the President before the proclamation issued under article 356(1) has been laid before Parliament and it has had an opportunity to consider it. Article 356 should be suitably amended to ensure this.*

6.8.07 *Safeguards corresponding, in principle, to clauses (7) and (8) of Article 352 should be incorporated in Article 356 to enable Parliament to review continuance in force of a proclamation.*

6.8.08 *To make the remedy of judicial review on the ground of mala fides a little more meaningful, it should be provided, through an appropriate amendment, that, notwithstanding anything in clause (2) of article 74 of the Constitution, the material facts and grounds on which Article 356(1) is invoked should be made an integral part of the proclamation issued under that article. This will also make the control of Parliament over the exercise of this power by the Union Executive, more effective.*

6.8.09 *Normally, the President is moved to action under article 356 on the report of the Governor. The report of the Governor is placed before each House of Parliament. Such a report should be a "speaking document" containing a precise and clear statement of all material facts and grounds on the basis of which the President may satisfy himself as to the existence or otherwise of the situation contemplated in Article 356.*

6.8.10 *The Governor's report, on the basis of which a proclamation under Article 356(1) is issued, should be given wide publicity in all the media and in full.*

6.8.11 *Normally, President's rule in a State should be proclaimed on the basis of the Governor's report under Article 356(1).*

6.8.12 *In clause (5) of Article 356, the word 'and' occurring between sub-clauses (a) and (b) should be substituted by 'or'.*”

5.3.03 Illustrative List of Proper Use of Article 356

In addition, to the above suggestions, the Commission would like to recommend the inclusion of an illustrative list of situations which would tantamount to being a breakdown of the constitutional machinery and situations which would not. Such an illustrative list in the form of an addition to Article 356 would be an instructive guide to the Centre, States as also the judiciary.

Some of the situations in which invocation of Article 356 could be deemed as proper are as follows:

1. Where the party having a majority in the Assembly declines to form a Ministry and the Governor's attempts to find a coalition Ministry able to command a majority have failed.¹⁹⁵
2. Rampant corruption on the part of the State Government.¹⁹⁶
3. State Government creating disunity or disaffection among the people to disintegrate the democratic social fabric.¹⁹⁷
4. Where a State Government fails to comply with the directions issued by the Union under Articles 257(2), (3), 353A, 360(3), 339(2), even after warnings.¹⁹⁸
5. Where the State Government fails to meet an extraordinary situation, e.g. an outbreak of unprecedented violence, great natural calamity, etc., which failure would amount to an abdication of its governmental power.¹⁹⁹
6. Danger to national integration or security of the State or aiding or abetting national disintegration or a claim for independent sovereign status.²⁰⁰

The aforesaid list is only illustrative. The Sarkaria Commission breaks down such cases under four broad headings (a) political crisis; (b) internal subversion; (c) physical break down and (d) non-compliance with constitutional directions of the Union Executive.²⁰¹ With regard to these categories, the Supreme Court in the *S.R. Bommai* case

¹⁹⁵ D.D. Basu, *Shorter Constitution of India*, pg. 1596, (13th ed.)

¹⁹⁶ *S.R. Bommai v. Union of India*, (1994) 3 SCC 1

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ D.D. Basu, *supra* note 3.

²⁰⁰ *S.R. Bommai*, *supra* note 4.

²⁰¹ See Sarkaria Commission Report, Chapter VI, Recommendation 6.4.01

concluded that *"the report then goes on to discuss the various occasions on which the political crisis, internal subversion, physical break-down and non-compliance with constitutional directions of the Union Executive may or can be said to, occur. It is not necessary here to refer to the said elaborate discussion. Suffice it to say that we are in broad agreement with the above interpretation given in the Report, of the expression "the government of the State cannot be carried on in accordance with the provisions of this Constitution", and are of the view that except in such and similar other circumstances, the provisions of Article 356 cannot be pressed into service"*.

In this regard, this Report would also like to reiterate the suggestion of the Sarkaria Commission that in a situation of potential political break-down, the Governor should explore all possibilities of having a government enjoying majority support in the Assembly. If it is not possible for such a government to be installed and if fresh elections can be held without avoidable delay, the possibility of the outgoing Ministry acting as a "caretaker government" may be considered, provided of course the Ministry was defeated solely on a major policy issue, unconnected with any allegations of maladministration or corruption and is agreeable to continue. The Governor should then dissolve the Legislative Assembly, leaving the resolution of the constitutional crisis to the electorate. During the interim period, the caretaker government should be allowed to function. As a matter of convention and as already regulated by the Election Commission in the time period before an election, the caretaker government should merely carry on the day-to-day government and desist from taking any major policy decision.

5.3.04 Illustrative List of Improper Use of Article 356

The Supreme Court in *S.R. Bommai* also relies on parts of the Sarkaria Commission Report which deal with improper use of Article 356. The report provides the following instances as improper use of Article 356:²⁰²

1. A situation of maladministration in a State where a duly constituted Ministry enjoying majority support in the Assembly is in office. Imposition of President's rule in such a situation will be extraneous to the purpose for which the power under Article 356 has been conferred. It was made indubitably clear by the Constitution framers that this power is not meant to be exercised for the purpose of securing good government.
2. Where a Ministry resigns or is dismissed on losing its majority support in the Assembly and the Governor recommends, imposition of President's rule without exploring the possibility of installing an alternative government enjoying such support or ordering fresh elections.

²⁰² See *Id*, Recommendation 6.5.01.

3. Where, despite the advice of a duly constituted Ministry which has not been defeated on the floor of the House, the Governor declines to dissolve the Assembly and without giving the Ministry an opportunity to demonstrate its majority support through the 'floor test', recommends its supersession and imposition of President's rule merely on his subjective assessment that the Ministry no longer commands the confidence of the Assembly.
4. Where Article 356 is sought to be invoked for superseding the duly constituted Ministry and dissolving the State Legislative Assembly on the sole ground that, in the General Elections to the Lok Sabha, the ruling party in the State, has suffered a massive defeat.
5. Where in a situation of 'internal disturbance', not amounting to or verging on abdication of its governmental powers by the State Government, all possible measures to contain the situation by the Union in the discharge of its duty, under Article 355, have not been exhausted.
6. The use of the power under Article 356 will be improper if, in the illustrations given in the preceding paragraphs 6.4.10, 6.4.11 and 6.4.12, the President gives no prior warning or opportunity to the State Government to correct itself. Such a warning can be dispensed with only in cases of extreme urgency where failure on the part of the Union to take immediate action, under Article 356, will lead to disastrous consequences.
7. Where in response to the prior warning or notice or to an informal or formal direction under Articles 356, 257, etc., the State Government either applies the corrective and thus complies with the direction, or satisfies the Union Executive that the warning or direction was based on incorrect facts, it shall not be proper for the President to hold that "a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution". Hence, in such a situation, also, Article 356 cannot be properly invoked.
8. The use of this power to sort out internal difference or intra-party problems of the ruling party would not be constitutionally correct.
9. This power cannot be legitimately exercised on the sole ground of stringent financial exigencies of the State.
10. This power cannot be invoked, merely on the ground that there are serious allegations of corruption against the Ministry.

11. The exercise of this power, for a purpose extraneous or irrelevant to the one for which it has been conferred by the Constitution, would be vitiated by legal mala fides.

The Supreme Court in *S.R. Bommai* concluded that "*We have no hesitation in concurring broadly with the above illustrative occasions where the exercise of power under Article 356[1] would be improper and uncalled for*".

Considering the observations of the Supreme Court, it is suggested that amendments to Article 356 in order to introduce the aforesaid illustrations may be considered.

5.4 Power to Impose Localised Emergency under Articles 355 and 356

5.4.01 Presently, there exists no explicit provision in the Constitution which would permit the imposition of Presidents Rule or Emergency within a part of the territory of the State as opposed to the entire State.

5.4.02 Time and again, various Commissions as also the Supreme Court have stated that the emergency provisions in Article 352 and 356 must be used only as the "last resort". However, as pointed out earlier in this report, some federal systems like America and Australia do provide in their Constitutions the duty of the Union to protect the States. From this duty, various legislations have emerged which provide the framework for the exercise of this duty. It is the endeavour of this Report to provide for a similar framework which deals with exceptional situations which require intervention of the Centre but do not go so far as to invoking the provisions of Article 352 or Article 356.

5.4.03 Providing the framework for "localised emergency" would ensure that the State Government can continue to function and the Legislative Assembly would not have to be dissolved and would also provide a mechanism by which the response of the Central Government would be issue specific and the Central Government would have to exit the moment the situation is back under control. Such a provision would also reduce the temptation of the Centre to misuse the emergency provisions in Article 352 and Article 356 as the State Government would continue to function in other parts of the State and the imposition of a local emergency could only be done when there exists a crisis situation decided on objective standards. Therefore, the possibility of gaining political mileage through misuse is significantly reduced.

5.4.04 The unfolding of events at Lalgarh and the inability exhibited by the concerned State to counter the Maoist surge makes one ask whether the Constitutional and legislative framework needs to provide a more robust system which can promptly address such situations. In the light of proved inability of the State to protect the citizens, the Union Government is duty bound, under Article 355, to take measures under the Constitution to effectively respond to the situation. Further, past instances of prolonged communal violence in Gujarat and natural disasters like the shifting of the Kosi River in Bihar are clear examples of situations where effective and timely interventions by the Central Government within a particular territory of a State would have perhaps minimised the loss of lives and avoided wanton destruction of property. While technically it would be possible to invoke Article 352 (Article 352 can also apply to "such part of the territory of India as may be specified...") or Article 356 in these cases, it is submitted that perhaps a less drastic and localised response would have brought about the desired objective of restoring rule of law without upsetting democratic governance and Centre-State balance of power.

5.4.05 Various suggestions in this regard have been considered, including amending Article 355 to provide for a more robust system which would ensure timely interventions by the Union in limited circumstances. However, this Report is recommending separate legislations, under the umbrella of Article 355 which would govern the interaction between the Union's duty under Article 355 and the States' duty to preserve "public order". It is pertinent to note, that at the end of the day, such frameworks can be effective only with statesmanship and Constitutionalism from both sides i.e. of the Union and the State involved.

5.4.06 An examination of legal machinery available to the State to control law and order is appropriate on this occasion. If a State faces a situation where the ordinary civil police is not able to maintain law and order, there are supporting legislations to seek the support of the armed forces to assist the civil police. The problem, arises when the state authorities for whatever reason are not inclined to invoke such available provisions and let the situation deteriorate and result in a situation which the Union is duty bound to prevent under Article 355.

5.4.07 In normal times, a State Government has the sole responsibility for maintaining public order except where the use of the armed forces of the Union is called for (Entry 1 of List II). The Criminal Procedure Code also contemplates that an unlawful assembly should normally be dispersed by an Executive Magistrate or, in his absence, a

Police officer by commanding the persons forming the assembly to disperse. If this fails, he should disperse them by use of civil force, i.e., by using the State police with the assistance, if required, of other persons who do not belong to an armed force of the Union. If these efforts too do not succeed, the Executive Magistrate of the highest rank who is present, may require an officer of the armed forces of the Union to disperse the assembly with the help of the forces under his command and to arrest and confine members of the assembly. The officer of the armed forces so called upon, has to obey the requisition "in such manner as he thinks fit". (Sections 129 & 130 of the Cr. P.C.). Further, in terms of Section 144 of the Criminal Procedure Code, the Magistrate is empowered to place restrictions on the personal liberties of individuals, whether in a specific locality or in a town itself, where the situation has the potential to cause unrest or danger to peace and tranquillity. Again, the framework envisaged under the Criminal Procedure Code is not an effective measure to deal with widespread violence or other crisis especially when the State Government is unable or unwilling to react efficiently.

5.4.08 The Armed Forces (Special Powers) Act, 1958 and the Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983 are Union enactments which primarily relate to Entries 2 and 2A of List I, and incidentally to Entry 2, List III also. The former Act applies in the seven States in the north-eastern region and the latter in Punjab and Chandigarh. The Acts confer on certain authorities, viz., the Governor or the Administrator, within the respective State or, as the case may be, the Union Territory and also on the President, the power to declare an area in any of these States or Union Territory as a "disturbed area" if, in the opinion of that authority, the area is in such a disturbed or dangerous condition that it is necessary to use the armed forces of the union in aid of the civil power. Specified categories of officers in the Union armed forces who are deployed in an area declared as 'disturbed can exercise, by virtue of the provisions of these Acts, certain enhanced powers, e.g., to fire or otherwise use force even to the extent of causing death, to destroy arms dumps, etc.

5.4.09 The power to declare an area as "disturbed area" has been used by the Union Government in a State troubled by insurgency or violent public disturbances. Because of its responsibility to protect a State against such internal disturbance, the Union Government is competent to assess the situation and decide what special measures including powers for its armed forces are necessary for dealing with it. As pointed out above, the State Government also has been given this power.

5.4.10 It is however possible that under certain situations, provisions of the Criminal Procedure Code would not be sufficient to remedy the situation. Further, the provisions of the Armed Forces Special Powers Act in as much as it applies to the deployment of armed forces and not with regard to taking over the actual administration of a "disturbed area" may not prove to be expedient. Also, in terms of the Disturbed Areas Act, it is the State that has the power to declare a particular area as disturbed. These provisions may not suffice especially in a scenario where the State Government is unwilling or unable to effectively respond to the situation.

5.4.11 In a situation where the measures described above are neither feasible nor appropriate, the State Government may request the Union Government to make available Union Armed Forces to help restore public order. Even where the public disorder is not so serious as to fall in the category of an "internal disturbance" as contemplated in Article 355 of the Constitution, the Union Government may accede to the request, unless it finds that the State Government's police force should, on its own, be able to deal with the disorder and restore normalcy. There is no obligation on the Union Government to provide the forces so requested by the State.

5.4.12 As identified by the Sarkaria Commission, the obligations of the Union under Article 355 arise with respect to three situations existing in a State, namely, (i) external aggression; and; (ii) internal disturbance; and (iii) where the government of the State cannot be carried on in accordance with the Constitution.

5.4.13 The framers of the Constitution by using the phrase "internal disturbance" intended to cover not just domestic violence, but something more. As noted by the Sarkaria Commission, the scope of the term 'internal disturbance' is wider than 'domestic violence'. It conveys the sense of 'domestic chaos', which takes the colour of a security threat from its associate expression, 'external aggression'. Clearly, this envisages something which endangers the security of the State in a manner where the normal administration of the State is unable to respond effectively. Such situations clearly intend to cover widespread communal violence, other violence which the State cannot control and which is not an external aggression, for e.g. violence with regard to natural resources and can even include natural calamities of unprecedented magnitude. An "internal disturbance", is far more serious than "public disorder" and differs from it in degree as well as kind. The former has the characteristics of domestic chaos and inter alia endangers the security of the State. It may be man-made (e.g. a wide-spread and violent agitation or a communal flare-up) or

nature-made (e.g. a natural calamity that paralyses administration in a large area of a State).²⁰³ Article 355 imposes a duty in such circumstances on the Union Government to protect a State against such an internal disturbance.

5.4.14 Article 355 not only imposes a duty on the Union but also grants it, by necessary implication, the power of doing all such acts and employing such means as are essentially and reasonably necessary for the effective performance of that duty. It is submitted, that under this umbrella of Article 355, the objective of providing a framework for "local emergency" can be identified and justified.

5.4.15 In the event of an internal disturbance, the Union Government may discharge its obligation by providing assistance to a State Government in a number of ways. As past and present events have shown, the Union may advise the State Government on how best the situation might be brought under control. It may provide assistance to it in the shape of men, materials and finance. It may deploy its armed forces in aid of the State police and magistracy (Entry 2A of List I). The Union Government may also suggest or initiate measures to prevent the recurrence of the disturbance.

5.4.16 It is however conceivable that a State Government is unable or unwilling to suppress an internal disturbance and may even refuse to seek the aid of the armed forces of the Union in the matter. As noted by the Sarkaria Commission "*the Union Government, in view of its constitutional obligation, cannot be a silent spectator when it finds the situation fast drifting towards anarchy or a physical breakdown of the State administration. In such an unusual, yet not entirely an improbable event, the Union Government may deploy its armed forces suo motu to deal with the disturbance and restore public order*". The phrase "in aid of the civil power" in Entry 2A of List I and Entry 1 in List II signifies that the deployment is in aid of the instrumentalities of the State charged with the maintenance of public order. It does not necessarily imply that such deployment should take place only at the request of the State Government.²⁰⁴

5.4.17 While the Union Government has, under Article 355 read with Entry 2A of List I and Entry 1 in List II, all the powers that it may need to deal with an internal disturbance and external aggression, it is also the view of this Commission, that the Union cannot assume the sole responsibility for dealing with an internal disturbance by superseding or excluding the State police and other authorities responsible for maintaining public order. Neither can the Union Government deploy, in contravention of the wishes of a State Government, its armed forces to deal with a relatively less serious public order

²⁰³ Ibid, paragraph 6.3.04

²⁰⁴ Ibid, paragraph 6.3.12

problem which is unlikely to escalate and which the State Government is confident of tackling. It would not be constitutionally proper for the Union Government to take such measures except when a national emergency under Article 352 or President's rule under Article 356 has been proclaimed.

5.4.18 Normally, a State would actively seek assistance of the Union to meet a grave crisis. However, as already noted, the scope of Article 355 is wide enough to enable the Union to render all assistance including deployment of its armed forces, notwithstanding the fact that the State Government has not made any specific request. The Union will be entitled to do so on its own motion, in discharge of its paramount liability under Article 355.

5.4.19 In the *Bommai* Case, Justice Sawant concluded that "*it is clear from Article 355 that it is not an independent source of power for interference with the functioning of the State Government but is in the nature of justification for the measures to be adopted under Articles 356 and 357*". This statement has also been echoed in the Rajya Sabha when the Hon'ble M.P. Mr. Kapil Sibal, during a discussion in the Rajya Sabha on the Gujarat riots, said "*Article 355 is not a source of power. The source of power is article 352 and Article 356*".²⁰⁵ The argument which seems to flow therefore is that Article 355 enshrines the obligation of the Union whereas Article 356 provides for the mechanism for implementing such an obligation. This argument is also reflected in an obiter in the S.R. Bommai Case, where the Hon'ble Supreme Court concludes that "*...by virtue of Article 355 it is the duty of the Union to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution. Article 356, on the other hand, provides the remedy when there has been an actual break-down of the constitutional machinery of the State.*"

5.4.20 The aforesaid line of arguments however, may not be in consonance with what the framers of the constitution have intended. Article 355 is indeed a distinct provision from Article 352 and 356 and operates within its own sphere. Under Article 355, a whole range of action on the part of the Union is possible depending on the circumstances of the case, the nature, the timing and the gravity of the internal disturbance. In some cases, advisory assistance by the Union to the State for the most appropriate deployment of its resources may suffice. In more serious situations, augmentation of the State's own efforts by rendering Union assistance in men, material and finance may be necessary. If it is a violent upheaval or a situation of external aggression (not amounting to a grave emergency under Article 352), deployment of the Union forces in aid of the police and magistracy of the State may be sufficient to deal with the problem.²⁰⁶

²⁰⁵ Dated 2nd may, 2002, available at http://164.100.47.5/newdebate/deb_ndx/195/02052002/6to7.htm

²⁰⁶ Ibid, paragraph 6.3.14

5.4.21 Given the strict parameters now set for invoking the emergency provisions under Articles 352 and 356 to be used only as a measure of "last resort", and the duty of the Union to protect States under Article 355, it is necessary to provide a Constitutional or legal framework to deal with situations which require Central intervention but do not warrant invoking the extreme steps under Articles 352 and 356. Providing the framework for "localized emergency" would ensure that the State Government can continue to function and the Assembly would not have to be dissolved while providing a mechanism to let the Central Government respond to the issue specifically and locally. The imposition of local emergency, it is submitted, is fully justified under the mandate of Article 355 read with Entry 2A of List I and Entry 1 of List II of the Seventh Schedule. It is submitted that Art. 355 not only imposes a duty on the Union but also grants it, by necessary implication, the power of doing all such acts and employing such means as are reasonably necessary for the effective performance of that duty.

5.4.22 It is however necessary that a legal framework for exercising the power of "localized emergency" is provided by an independent Statute borrowing the model of the Disaster Management Act, 2005 and the Prevention of Communal Violence and Rehabilitation Bill, 2006. Only exceptional situations which fall within the scope of "external aggression" or "internal disturbance" should be considered for the purposes of separate legislation under the mandate of Article 355. Such situations include (a) separatist and such other violence which threatens the sovereignty and integrity of India, (b) communal or sectarian violence of a nature which threatens the secular fabric of the country, and (c) natural or man-made disasters of such dimensions which are beyond the capacity of the State to cope with. With regard to item (c) a Statute is already in place (Disaster Management Act, 2005) and in respect of situations contemplated in item (b), it is learnt that a revised Bill is being proposed. What is therefore required is a legislation to provide for Central role in case of separatist and related violence in a State which participates the nature of "external aggression" or "internal disturbance" contemplated in Article 355. The Commission has provided a detailed list of specific conditions to be considered for such a framework legislation enabling invocation of "localized emergency". It is important that the legislation provides for appropriate administrative co-ordination between the Union and the State concerned. It may also need consequent amendments to certain sections of the Criminal Procedure Code as well. The subject is discussed in greater detail in Volume V of the Commission's report on the subject of Criminal Justice, National Security and Centre-State Co-operation.

5.5 A Framework Law for Exercise of Power Under Article 355

5.5.01 Some of the salient features of the proposed legislation providing a framework for exercise of the power under Article 355 are given below:

1. Paramount Responsibility with the State

The paramount responsibility of tackling any such activity must be with the State Government. In all cases, whether it be separatist violence, communal violence, or natural or man-made disasters, the first response is and must continue to be the prerogative of the State. Thus, in terms of the Communal Violence Bill of 2005 the primary power of declaring an area as "communally disturbed" falls upon the State Government. Once an area is so declared, the State Government has certain extraordinary powers to deal with the situation. This structure must be adopted for all other legislations wherein the primary obligation is expressly placed upon the state to quell any external aggression or internal disturbance.

2. Situations in which the Union can Intervene

The Union can intervene in the case of the defined "external aggression" or "internal disturbance" only when this has occurred or is occurring to an extent that the constituted authorities of the State are incapable or unable to quell such situation or respond effectively to such a situation. Further, each legislation dealing with such an "external aggression" or "internal disturbance" must provide in objective terms the duty of the State or a State authority constituted under such legislation, as for example, the State Disaster Management Authority. Only when the State or such State authority are unable, fail, or refuse to fulfill such duty or obligation as prescribed under such legislation, would the Union be permitted to intervene.

3. Necessity to Provide Written Intimation to the State

The Union must, before intervening, provide a written intimation to the State Government expressly stating the nature of the "external aggression" or "internal disturbance" and ask the State details of the measures taken. The written intimation must also request the States as to the steps which the State must take to repel the circumstances and the preferred time limit within which such actions must be taken. Such intimation must also ask the State

whether it requires the intervention of the Union in order to quell the situation. Reasonable time must be provided to the State to address such situation.

4. Inability of State to Effectively Respond

Despite receiving the aforesaid communication, in the event the State is unable or unwilling to effectively address the "external aggression" or the "internal disturbance" then the powers vested in the State to take actions and responsive measures under the respective legislation would vest in the Union. Once such conditions are fulfilled, the Union should be empowered to deploy its armed forces and other forces within a State in aid of the local administration either on a request from the State Government or in cases where the State Government is unable or unwilling to handle the crisis and refuses the aid of the Union Government, the Union Government may do so suo motu.

5. Objectivity

Each legislation dealing with the respective "external aggression" or "internal disturbance" must strive to provide objective parameters defining the circumstances which would constitute such "external aggression" or "internal disturbance". This could be achieved by providing for death or injury tolls or destruction of property and also a time limit within which the State should be able to control the crisis.

6. Territory

As far as possible, any intervention by the Union should be confined only to the area within the State which is affected by the "external aggression" or the "internal disturbance". The Union Government should not take over the administration of the entire State as long as the State Government has not acted in an arbitrary or capricious manner. As long as there is no "failure of constitutional machinery" the Union Government's response must necessarily be confined to the affected territory. The respective legislations must provide mechanisms to ensure this.

7. Withdrawal of Union Intervention

As soon as the exigency for which the Union has intervened within a particular area of a State is quelled or resolved, the Union Government must withdraw

its presence and must make way for the State Government to take over normal administration of the said area.

8. Requests by the State

In the event States make a written request to the Union Government for deployment of Union Armed Forces or other forces to respond to a crisis being faced by the State, the Union Government would be under an obligation to provide the State with the required resources in a time bound manner. Presently, the Union is under no obligation to provide its forces upon the request of a State. However, towards fulfilling its duty in terms of Article 355, provisions must be made within the respective legislations which make it mandatory for the Union Government to provide its forces upon the request of the State. Once such forces enter the territory of the State, they would necessarily be under the command and supervision of the Union Government.

9. Situations Requiring Immediate and Urgent Interventions

Before the Union Government deploys its forces in a State in aid of the civil power otherwise than on a request from the State Government, it is desirable that the State Government should be consulted, wherever feasible, and its cooperation sought. However, there may arise certain circumstances which require immediate responses, and in such circumstances, which can be defined and outlined in the Act, the intervention of the Union Government without consultation or without giving the State Government an opportunity to address the situation may be permitted. For example, a sudden surge in separatist violence which puts the sovereignty and integrity of India under immediate threat or a large scale natural disaster like a devastating earthquake which cripples the infrastructure of the State and makes the State unable to effectively respond.

10. Presence of Forces Across the State

For every legislation which seeks to act against "external aggression" or "internal disturbance" each legislation may consider providing for a specific section of the armed forces to be present across the State with the specific mandate for responding to such a situation. For example again, under the Disaster Management Act the constitution of a Specialist Response Force

has been mandated to respond to a threatening disaster situation. This Force is under the control of the National Disaster Management Authority ("NDMA") which has been vested with its control, direction and general superintendence. This will be a multi-disciplinary, multi-skilled, high-tech force for all types of disasters capable of insertion by air, sea and land.

Such a response mechanism may be considered for the other legislations which deal with communal violence and separatist violence as well. The States may also be permitted to request the Union to utilize these resources which the Union would be under an obligation to provide. Each legislation must necessarily provide, that in cases where such specialist forces are to be utilized, their role would be solely confined to responding to the particular exigency and nothing more. The moment the exigency comes to an end, the forces would immediately withdraw.

11. Obligation to Respond under the Respective Legislation

If the internal disturbance or threat of external aggression is prevalent within a State, the Union Government must in all circumstances consider acting in terms of Article 355 and the respective legislation. Only if this option is not available or practically feasible, should the Union Government resort to Article 356. Therefore, the Union Government must first consider imposing "local emergency" and confine its response only to the area within a State which has been affected in accordance with the other recommendations given in this chapter.

12. Requirements to place before Parliament

Intervention of the Union Government must be done by way of a notification which must be placed before each House of Parliament. The notification should provide the time limit for which the intervention will exist. The legislation must provide how long the time limit should be in the first instance, for example 30 days. If on the expiry of such time limit, it is felt that the intervention is required for a longer time, such request for extension shall again be placed before both Houses of Parliament.

5.6 Conclusions and Recommendations

5.6.01 Obligation of the Union to protect States from external aggression and internal disturbance

Concern for the unity and integrity of India is the rationale for the obligation put on the Union to protect States even against internal disturbances which ordinarily is a matter for the states to handle. This obligation is coupled with the power to enforce that duty, if necessary without any request coming from the State. This is consistent with the federal scheme of the Constitution. Having examined similar provisions in other federal Constitutions and looking at socio-political developments in the country, the Commission is of the view that a whole range of action on the part of the Union is possible under this power depending on the circumstances of the case as well as the nature, timing and the gravity of the internal disturbance. The Union can advise the State on the most appropriate deployment of its resources to contain the problem. In more serious situations, augmentation of the States' own efforts by rendering Union assistance in men, material and finance may become necessary. If it is a violent or prolonged upheaval (not amounting to a grave emergency under Art. 352), deployment of the Union forces in aid of the police and magistracy of the State may be adopted to deal with the problem. Action to be taken may include measures to prevent recurring crisis.

When does a situation of public disorder aggravate into an internal disturbance as envisaged in Art. 355 justifying Union intervention is a matter that has been left by the Constitution to the judgement and good sense of the Union Government. Though this is the legal position, in practice, it is advisable for the Union Government to sound the State Government and seek its co-operation before deploying its forces in a State.

The Commission is also of the view that when an external aggression or internal disturbance paralyses the State administration creating a situation of a potential break down of the Constitutional machinery of the State, all alternative courses available to the Union for discharging its paramount responsibility under Article 355 should be exhausted to contain the situation and the exercise of the power under Art. 356 should be limited strictly to rectifying a "failure of the Constitutional machinery in the State".

5.6.02 Conditions for exercise of power under Article 356

On the question of invoking Article 356 in case of failure of Constitutional machinery in States, the Commission would recommend suitable amendments to incorporate the guidelines set forth in the landmark judgement of the Supreme Court in

S.R. Bommai V. Union of India (1994) 3 SCC). This would remove possible misgivings in this regard on the part of States and help smoothen Center-State relations. Of course, the proper use of Article 356 can ultimately be governed by the inherent decency and honesty of the political process.

5.6.03 "Local emergency" under Article 355 and 356

Given the strict parameters now set for invoking the emergency provisions under Articles 352 and 356 to be used only as a measure of "last resort", and the duty of the Union to protect States under Article 355, it is necessary to provide a Constitutional or legal framework to deal with situations which require Central intervention but do not warrant invoking the extreme steps under Articles 352 and 356. Providing the framework for "localized emergency" would ensure that the State Government can continue to function and the Assembly would not have to be dissolved while providing a mechanism to let the Central Government respond to the issue specifically and locally. The imposition of local emergency, it is submitted, is fully justified under the mandate of Article 355 read with Entry 2A of List I and Entry 1 of List II of the Seventh Schedule. It is submitted that Art. 355 not only imposes a duty on the Union but also grants it, by necessary implication, the power of doing all such acts and employing such means as are reasonably necessary for the effective performance of that duty.

It is however necessary that a legal framework for exercising the power of "localized emergency" is provided by an independent Statute borrowing the model of the Disaster Management Act, 2005 and the Prevention of Communal Violence and Rehabilitation Bill, 2006. Only exceptional situations which fall within the scope of "external aggression" or "internal disturbance" should be considered for the purposes of separate legislation under the mandate of Article 355. Such situations include (a) separatist and such other violence which threatens the sovereignty and integrity of India, (b) communal or sectarian violence of a nature which threatens the secular fabric of the country, and (c) natural or man-made disasters of such dimensions which are beyond the capacity of the State to cope with. With regard to item (c) a Statute is already in place (Disaster Management Act, 2005) and in respect of situations contemplated in item (b), it is learnt that a revised Bill is being proposed. What is therefore required is a legislation to provide for Central role in case of separatist and related violence in a State which participates the nature of "external aggression" or "internal disturbance" contemplated in Article 355. The Commission has provided a detailed list of specific conditions to be considered for such a framework

legislation enabling invocation of "localized emergency". It is important that the legislation provides for appropriate administrative co-ordination between the Union and the State concerned. It may also need consequent amendments to certain sections of the Criminal Procedure Code as well. The subject is discussed in greater detail in Volume V of the Commission's report on the subject of Criminal Justice, National Security and Centre-State Co-operation.

CHAPTER 6
ADMINISTRATIVE RELATIONS AND CENTRE-STATE
CO-ORDINATION
CONTENTS

Sections/Headings	Para Nos.	Page Nos.
6.1 Constitutional Scheme	6.1.01-6.1.03	131-132
6.2 Federal Structure and Exercise of Executive Powers	6.2.01-6.2.03	132-133
6.3 Power of Union to give Directions to States	6.3.01-6.3.07	134-136
6.4 Modalities for Centre-State Co-operation	6.4.01-6.4.02	136-142
6.5 Dispute Resolution Mechanism for Inter-State River Disputes	6.5.01	142
6.6 All India Services and Centre-State Relations	6.6.01-6.6.13	143-145
6.7 Zonal Councils and Empowered Committees of Ministers	6.7.01-6.7.03	145-146
6.8 Conclusions and Recommendations	6.8.01-6.8.05	146-150

6

ADMINISTRATIVE RELATIONS AND CENTRE-STATE CO-ORDINATION

6.1 Constitutional Scheme

6.1.01 The subject of Administrative Relations between the Union and the States is discussed in the Constitution in just eight Sections (Articles 256 to 263) though the subject appears obliquely in several other parts dealing with the powers of the three levels of government. For example, the provisions dealing with the Union and the State Executive, those relating to services under the Union and the States and several miscellaneous provisions have significant impact on administrative relation and on Centre-State co-operation and co-ordination.

6.1.02 As recorded by a Constitutional historian²⁰⁷ the subject of defining the administrative relations between the Union and Units received very little attention in the Drafting Committees where attention was merely drawn to the relevant provisions contained in Part IV (Sections 122-135) of the Government of India Act, 1935. The understanding was the legislative powers once settled, the scope of the administrative powers will naturally get defined. Broadly, the administrative relations were to follow certain principles agreed upon in the Constituent Assembly. Firstly, the duty of the Government of the unit to exercise its executive powers in such a way as to secure the full implementation of federal laws in that unit. In this regard, the Federal Government was to be empowered to give directions as might be necessary for the purpose to the provincial Governments. Secondly, prevent any clash of authority between the Centre and the Units by ensuring that the Units would so exercise their executive authority even in the sphere reserved for them as not to come into conflict with the exercise of the executive authority of the Centre²⁰⁸. Thirdly, if duties in relation to a Federal subject were imposed upon a Unit, the Federation would pay to the unit such sum as might be agreed, or in default of agreement, as might be determined by an arbitrator appointed by the Chief Justice of the Supreme Court, in respect of extra costs incurred by the Unit in connection with the exercise of those duties. Fourthly, the President was to be authorized to establish an inter-Unit Council with three-fold duties, namely, inquiring into and advising upon disputes between Units; investigating and discussing subjects of common concern

²⁰⁷ B. Shiva Rao, Framing of India's Constitution

²⁰⁸ Constituent Assembly Debates, Vol.IV pp.981-85

and making suitable recommendation on any such subject; in particular, recommendations for the better co-ordination of policy and action. All these principles owed their origin to the 1935 Act²⁰⁹.

6.1.03 The Drafting Committee adopted the Draft proposed based on the 1935 Act with some verbal alternations only. Regarding some provisions of administrative relations formulated by the Constitutional Adviser, the Committee resolved to transfer them to the Parts on "emergency provisions". The Committee in addition brought into administrative relations, the provision earlier kept with Fundamental Rights which laid down that full faith and credit would be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State and that the final judgements or orders delivered by civil courts in any part of the territory of India would be capable of execution anywhere within Indian territory according to law. Detailed provisions for dealing with complaints made by one Unit against another arising out of interference with water supplies were also included in administrative relations. Finally, provisions related to inter-State Commerce which was originally kept as part of administrative relations were separated as it was felt not quite forming Centre-State administrative relations. Although, emergency provisions are kept outside administrative relations, one has to acknowledge that Article 365, which is intended to ensure that the directions given by the Union to the States in exercise of its executive power are duly carried out by the latter is very much a part of administrative relations in as much as it would entitle the Union to supersede the State Government and assume to itself the powers of the State Government.

6.2 Federal Structure and Exercise of Executive Powers

6.2.01 What is the nature of "executive Power"? and what are the limits and-limitations of executive power at different levels of government in a federal system?

6.2.02 A federal system is supposed to guarantee not only division of powers but also autonomy to each level of government in its own sphere. Articles 73 and 162 defines the extent of executive power of the Union and of the States. Normally they are co-extensive with their respective legislative powers. However Clause(1) of Article 73 States that the Union will have authority and jurisdiction to exercise executive power in relation to any treaty or agreement. The clause further provides that in respect of matters in the Concurrent List, the States may have executive power only so long as Parliament

²⁰⁹ B. Shiva Rao, Framing of India's Constitution, p.644

by law has not expressly provided otherwise. As Sarkaria Commission had observed²¹⁰ though the authority to execute or administer the laws made by the Legislature is a primary component of "executive power", yet its exercise is not necessarily dependent on prior legislative sanction. "Executive Power" defies a precise definition. The Supreme Court observed in *Ram Jawaya V. State of Punjab*²¹¹ that "executive power" is that part of governmental functions that remain after legislative and judicial functions are taken away. In the Indian Constitutional Scheme the limits of executive powers defined by Articles 73 and 162 appears flexible and overlapping. For example, Article 282 provides that Union or a State may make any grants out of its revenue for any public purpose, irrespective of the fact that the public purpose relates to items within its legislative competence. Over a hundred Centrally-Sponsored schemes in States have come up ostensibly to promote programmes that help attain national goals. To some extent, this tended to dilute the distribution of powers in the Seventh Schedule about which many states have been complaining for long. Besides, there are several other Articles²¹² by which the executive power of the Union is allowed to interfere into the field assigned to States or the way the states exercise their executive powers²¹³. As such, Centre-State relations in the administrative sphere continues to generate lot of discomfort to both sides and affect the quality of governance even at the Panchayat/Municipality level as well.

6.2.03 Unlike some other federations that have parallel agencies for administration of their respective laws, India has only one set of courts to enforce Union and State laws. Excepting in few matters like Defense, Currency Foreign Affairs etc. the Union has to get its laws administered through the machinery of States for which the executive power of the Union is entrusted to State instrumentalities. In this context, the Constitution empowers the Centre to give directions to States. The Sarkaria Commission has found three different patterns in which the Union organizes enforcement of its laws in the Concurrent field²¹⁴. Firstly, it may leave administration entirely to the States. Secondly, it may reserve total responsibility for enforcement to itself. Thirdly, it may assume the executive power with respect to some aspects of the legislation leaving the administration bring in their own problems in administrative relations which are mostly sorted out through consultation, delegation and negotiation. However, they leave the States dissatisfied in terms of autonomy and accountability. As such, administrative relations have increasingly thrown up contentious issues which seek an appropriate forum for acceptable resolution to both sides.

²¹⁰ Report of Sarkaria Commission, Vol I p.101

²¹¹ 1955(2) SCR 225

²¹² See Articles 253, 356

²¹³ See Articles 256, 257

²¹⁴ Sarkaria Commission Report, Vol.I pp 101-102

6.3 Power of Union to give Direction to States

6.3.01 States in their responses have raised objections to the power exercisable by the Union under Articles 256 and 257 on the ground that they can be destructive of not only the autonomy of States but also the very foundation of a federal polity. Article 256 provides that the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose. The only limitation appears to be that there must be an existing law made by Parliament applicable to that State in order to issue directions. Article 257(1) gives the Union full control over the exercise of the executive power of every State to ensure that it does not impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose. On strict interpretation, this would mean that if the Union Government give directions in any field reserved for the State Executive, which power does not collide with or prejudice the exercise of the Union's executive power, such a direction would be invalid. In any case, this federal supremacy in administrative relations is irksome to many states and they wanted them to be changed or circumscribed. One of the States took an extreme position and stated as follows:

"Articles 256 and 257 are repugnant to the spirit of federalism. These provisions should be amended, and directives may be issued by the Central Government to the State Governments only after adequate consultations with the Inter-State Council."

6.3.02 Political Parties, on the other hand, have given mixed responses on this issue. One Party has largely echoed the views of the State quoted above. Another Party, though, offers a contrasting view in these terms:

"Article 256, 257 are wholesome provisions designed to secure coordination between the Union and the States for the effective implementation of Union laws and the national policies indicated therein. Nonetheless a direction under Articles 256 and 257 is a measure of last resort. Before issue of directions to a State utmost caution should be exercised and all possibilities explored for settling points of conflict by all other means."

Article 256 reads as follows:

"The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose."

Article 257(1) states as follows:

"The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose."

6.3.03 It is well-settled that the existence of a law sanctioning particular action is a pre-condition for the applicability of Article 256. It is also well-settled that the Article does not empower the Union to interfere in matters which, on a correct understanding of the constitutional separation of powers, fall within the exclusive domain of the States.

6.3.04 It is almost axiomatic that the power to enact legislation would be entirely meaningless without the power to enforce such valid law, and that is the mandate of Article 256. As such, it is difficult to accept the argument of several States, advanced before this Commission, that Article 256 is destructive of the principles of federalism. In this regard, it is instructive to note that States have not actually highlighted any particular instance where an invocation (or even the threat of invocation) of Article 256 has seriously prejudiced them, or pressurized them into yielding ground on matters that fall within their domain. In fact, no specific instance of the explicit invocation of Article 256 has been brought to attention.

6.3.05 Article 257 of the Constitution has also attracted severe criticism from many of the States. They have argued for Constitutional amendment to circumscribe the exercise of the Power by the Union under Art. 257 to ensure respect for autonomy of States.

6.3.06 The distinction between Article 256 and Article 257 is primarily that Article 256 comes into play when there exists valid legislation which has been enacted by

Parliament, whereas Article 257 would have application even in the context of purely executive action on the part of the Central Government. Nevertheless, the critical point is that even such executive action by the Central Government can only be in the domain within which the Centre is empowered to act. "Executive action" cannot but be understood to imply executive action in consonance with the constitutional scheme pertaining to the separation of powers. Hence, the directions envisaged under Article 257 can also only be understood, in a constitutional sense, as referring to directions given in pursuance of such lawful executive power of the Union. There can also be little doubt that an encroachment in the domain of the States, even in the guise of the issuance of directions issued under Article 257, would be subject to judicial review.

6.3.07 In this view of the matter, it is difficult to concur with the views of the States that Article 256 and Article 257 are destructive of federalism itself. In fact, these constitutional provisions actually appear to do little apart from explicitly laying down what might otherwise have been implicit, viz, that the States ought not to interfere in the domain of legislative and executive power exclusively earmarked to the Union. If it is sought to be contended that such division of legislative and executive powers is itself skewed, that is another debate altogether, and one which is concerned with the distribution of powers, and not with what follows from any existing distribution. In conclusion, therefore, it is felt that Articles 256 and 257 of the Constitution do not suffer from any material infirmity, and there is thus no case for amendment of these provisions. It must be clarified, though, that favouring the retention of these provisions is entirely different from advocating easy or quick resort to them. In this connection, we broadly endorse the view of the political party quoted above, which favoured retention of these constitutional provisions in their present form, but advocated use of these powers only as a last resort. Articles 256 and 257 may be viewed as a safety valve, one which may never come into play but which is nevertheless required to be retained.

6.4 Modalities for Centre-State Cooperation

This section considers the existing institutional mechanisms for *cooperation* and conflict resolution between the Union and States, as also between States inter se. It takes note of the criticisms about the present state of affairs, and analyses which suggestions for reform appear most promising for better relations between the Centre and the States.

A number of States have suggested that the bodies constituted with a view to promoting inter-State cooperation, viz, the Inter-State Council, the National Development

Council, the Planning Commission and other regulatory bodies such as the Reserve Bank of India have greater representation from the States, and also take greater account of the particular difficulties felt by States. It is stated that the Inter-State Council has failed to fulfil the expectations with which it was constituted.

6.4.01 Institutional Mechanisms and their Limitations

In this connection, one State has observed as follows:

"Many a times the consultation turns out to be only a formal consultation within the existing institutional arrangements. These existing institutional arrangements generally used only to the benefit of the Union Government as the views of State governments are not fully taken into consideration. Though Article 263 empowers the Union government in the public interest to establish a council, "the Union government has established an Inter-State Council in 1988, but it met for the first time in 1996". Many issues concerning the relations between the Union and State governments and between the States can be referred to the Inter-State Council for effective policy decision and implementation."

With regard to the National Development Council, another State has submitted as follows:

"National Development Council has to be developed as an effective instrument for Centre-State coordination on all financial and development issues. Frequent meetings of NDC are required to be held (at least two meetings in a year) for detailed consultations with the States. It has been noticed that at present the Members and Experts of the Planning Commission are all nominated by the Union Government. The representation needs to be given to each State/Union territory in the Planning Commission so that interests of all States are watched properly. Moreover, there is no provision of Planning Commission in Constitution of India. This provision needs to be made by way of amendment to the Constitution."

This same State further went on to note:

"The decisions of the inter-State Council therefore have to be made binding on the Union Government through appropriate Constitutional amendment. The schedule of the Council has to be made mandatory and all States should be adequately represented."

A political party has given the following recommendation. In view of the importance of the topic, its view is reproduced below in full.

"The institutional bodies through which the issues related to Centre-State relations are supposed to be discussed and resolved are the Inter-State Council, the National Integration Council, the National Development Council, the Planning Commission, the Finance Commission and the Boards of the Reserve Bank of India and other financial institutions.

However, the past record shows that neither have these bodies given effective representation to the State's views in terms of both composition and Terms of Reference/Agenda, nor have their decisions succeeded in providing a fair deal to the States. In fact, these bodies have functioned almost as an extension of the Union Government or its agencies, with an implied bias in favour of concentrating power at the Centre.

They are often created through an executive or administrative order of the Union Government and therefore perceive themselves as Union Government appointees and representatives. This needs to be changed and the institutional arrangements developed into representative and functional bodies with appropriate statutory backing.

Specifically with regard to the Inter-State Council, this Party has stated as follows:

"The functioning of the Inter-State Council, which had gathered some momentum in the earlier years, has once again lost steam. Despite the Council arriving at several decisions regarding implementation of the Sarkaria Commission's recommendations, the Union Government has not implemented them.

The decisions of the inter-State Council therefore have to be made binding on the Union Government, through appropriate Constitutional amendment.

All major non-financial issues involving Centre-State relations have to be discussed and decided by the inter-State Council.

The schedule of meetings of the Council as well as the Standing Committee of the Council has to be made mandatory.

The Secretariat of the Inter-State Council should have better representation from the States.

Suitable amendments should be made in Article 263 so that it becomes mandatory for the Central Government to constitute the Council with Chief Ministers of all the States and Union territories as members, and convene meetings at least twice a year. All administrative, executive, legislative and other non-financial matters should fall within the purview of the Council. All decisions of the Council should be binding on the Union and State Governments as far as they conform to the constitutional division of functions and powers."

With respect to the Planning Commission, this Party has observed as follows:

"The Planning Commission should act as an executive wing of the NDC with statutory and constitutional backing. Unlike the present composition of the Planning Commission where members and experts are all nominated by the Union Government, there should be adequate representation of the States - both as members as well as experts - with at least one from each region with periodic rotation among the States in a region. The restructured Planning Commission must not act primarily as a representative of the Union Government as it is now, but should also represent the interests of the States."

Many of the suggestions above have been broadly endorsed by some other States too, and are critically examined below.

6.4.02 Can the decisions of the Inter-State Council be made legally binding?

The most far-reaching suggestion appears to be that the recommendations of the Inter-State Council should be made binding on the Centre (and, evidently, on the States as well). This suggestion appears problematic in the context of the constitutional scheme of the separation of powers. Whatever powers are within the respective domains of the Centre and State Governments are - constitutionally speaking - theirs to exercise as they deem fit. It is certainly to be hoped that such powers will be exercised with circumspection, and taking due note of the interests of other States. Furthermore, one can certainly be hopeful that robust institutional mechanisms, and good faith consultations and negotiations between the various stakeholders, will go a long way in addressing conflicts and tensions. Nonetheless, the point remains that as a matter of constitutional law as well as pragmatism, the ultimate decision has to remain that of the government in question, whether Union or State. Any other conclusion would involve a serious distortion of the constitutional scheme.

Take for example the case of proposed legislation, in order to implement an important decision of the Inter-State Council. In accordance with the constitutional scheme, the Parliament (in the case of the Union) and State legislatures (in the case of State Governments) are the sovereign bodies entrusted with the constitutional powers to enact legislation. It is difficult to conceive of even a constitutional amendment that could bind legislatures to enact legislation in accordance with decisions of another body. Even if such an amendment were enacted, it is felt it could dangerously distort the constitutional scheme and prove counter-productive.

In response to what has been argued above, proponents of the proposal to invest the Inter-State Council with binding authority might concede that binding decisions would be problematic in the context of legislation, but assert that such decisions might at least be compulsorily adhered to in the context of executive action to be taken by the Centre or State Governments. However, the larger point remains the same even in the context of executive action by either the Union or the States. It must be highlighted again that the Centre and the States are sovereign within their respective areas of authority, as demarcated in the Constitution. Furthermore, both the Central Government as well as State Governments are elected democratically, and are ultimately responsible for their decisions through the electoral process. It would, hence, be rather anomalous for the government in question to abdicate the ultimate responsibility with respect to such difficult decisions to another body, not being a judicial body, that is not answerable, at least directly, to the people.

None of the above is intended to suggest that the recommendations or decisions of the Inter-State Council lack significance, or should be allowed to be disregarded with impunity. Rather, what is suggested is that the Council is an extremely useful mechanism for consensus-building and voluntary settlement of disputes, but not for the binding of governments, or curtailment of their sovereign authority.

Federalism is a living faith to manage diversities and it needs to be supported by institutional mechanisms to facilitate co-operation and co-ordination among the Units and between the Units and the Union. Co-operative federalism is easily endorsed but difficult to practice without adequate means of consultation at all levels of government.

The Constitution has provided only limited institutional arrangements for the purpose and regrettably they are not adequately utilized. In this context, the Commission strongly recommends the strengthening and mainstreaming of the Inter-State Council to make it a vibrant forum for all the tasks contemplated in Clauses (a) to (c) of Article 263.

Though the Article does not provide a dispute settlement function to the Council, it envisages the Council to inquire into and advise on disputes between States towards settlement of contested claims. The Commission is of the view that the Council should be vested with the powers and functions contemplated in Article 263(a) also as it would further enhance the capacity of the Council to discharge its functions in Clauses (b) and (c) more effectively and meaningfully. The Council can further have expert advisory bodies

or administrative tribunals with quasi-judicial authority to give recommendations to the Council if and when needed. In short, it is imperative to put the Inter-State Council as a specialized forum to deal with intergovernmental relations according to federal principles and Constitutional good practices.

The Commission is of the view that the Council is an extremely useful mechanism for consensus building and voluntary settlement of disputes if the body is staffed by technical and management experts and given the autonomy required for functioning as a Constitutional body independent of the Union and the States. It should have sufficient resources and authority to carry out its functions effectively and to engage civil society besides governments and other public bodies. It needs to meet regularly with adequate preparation of agenda and negotiating points and position papers from parties involved. The Secretariat of the Council may have joint staff of the Union and States to inspire confidence and enhance co-ordination. Negotiation, mediation and conciliation to find common points or agreement and narrowing of differences employed in international intercourse and in judicial proceedings can usefully be cultivated in the Council Secretariat for advancing the cause of harmonious intergovernmental relations. Towards this end, the Commission would recommend suitable amendments to Article 263 with a view to make the Inter-State Council a credible, powerful and fair mechanism for management of inter-state and Centre-State differences.

However, various other suggestions made above are certainly relevant towards ensuring that such consultative bodies - and the Inter-State Council in particular - function effectively, and are in a position to contribute fruitfully towards the reduction of tensions between the Union and States, or between States inter se. It is certainly desirable that the Inter-State Council meets more frequently, at least twice a year. Further, as pointed out above, the consultations between Centre and States should be meaningful and effective in nature, where the "consensus" is not pre-arranged in accordance with the wishes of the Centre.

Theoretically, these changes could be accomplished within the present legal framework. Nevertheless, in view of the recent history with respect to the working of the Council, one might be somewhat pessimistic about the prospects for radical reform without some external impetus. In this view of the matter, it is worthwhile considering affording the Inter-State Council constitutional status, which would certainly lend its action greater authority and respect.

It is felt that such a move would certainly be welcomed by a majority of States, if not all. Furthermore, in view of our discussion above with respect to the powers and functions of such a body, there is no need for the Union (or for that matter, any State) to be concerned that such a body would encroach upon its sovereign authority. The rationale for according it constitutional status would be to ensure that the Council meets regularly, is endowed with sufficient resources to carry out its functions effectively, is accorded greater deference by the Centre as well as State Governments, and also commands a certain space in the domain of civil society and public deliberation.

If it is felt, for any reason whatsoever, that a constitutional amendment is either unnecessary or impracticable, largely the same goals could be achieved through the enactment of a statute, regulating the powers of, and procedures relating to, the Inter-State Council, and also detailing the responsibilities of the Central and State Governments with respect to meaningful participation in the functioning of the Council. The primary reason a constitutional amendment might be preferable is simply the moral authority inevitably accruing to any constitutional body. Furthermore, any amendment along the lines suggested above would very much be in furtherance of the spirit underlying Article 263 of the Constitution, and hence should not attract much partisan controversy.

Additionally, another suggestion which appears to have merit is that the Secretariat of the Commission should be staffed with representatives of both the Central and State Governments. Further, the Secretariat should also have resources and infrastructure commensurate with the significance of the issues it is dealing with. Also, the agenda of the meeting should be prepared in consultation with the States, and such agenda should be circulated to all participants well in advance. Participants could then circulate detailed position papers/notes in order to elucidate their viewpoint, and in order to create a better appreciation of the similarities and differences in their respective views. This would help ensure that adequate preparation takes place before the meetings, and that there is consequently a greater likelihood of a meaningful and workable consensus emerging during the meetings.

6.5 Dispute Resolution mechanism for inter-State river disputes

6.5.01 The Commission has examined the issue in detail in a separate volume of the report. The present state of affairs is obviously unsatisfactory as it is dilatory, time-consuming and seldom gets settled. Therefore change in the law and procedure is warranted. The possible courses of action are dealt within volume VI of the Report.

6.6 All-India Services and Centre-State Relations

6.6.01 This section considers the issue of the All-India services, and their impact on federalism, in the context of the constitutional provisions. Article 312 of the Constitution states as follows:

- "(1) Notwithstanding anything in Chapter VI of Part VI or Part XI, 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 to do so, Parliament may by law provide for the creation of one or more All-India services (including an All-India judicial service) common to the Union and the States, and subject to the other provisions of this Chapter, regulate the recruitment, and the conditions of service of persons appointed to any such service."*
- (2) The services known at the commencement of this Constitution as Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under this Article."*

6.6.02 On the issue of the impact of All-India services on Centre-State relations, States and other stakeholders have revealed mixed views.

6.6.03 One State presents a nuanced view, in the following terms:

"The experience with the All-India services is of a mixed nature. There are certain advantages in having in the States serving officers who have a broad national outlook. At the same time, the fact that officers belonging to the All-India services generally tend to think of themselves as being under the discipline of the Central Government had led to complications. It should be ensured that the personnel belonging to the All-India services, when they serve in the States, would be under the supervision and disciplinary control of the State Governments."

6.6.04 Another State observes as follows:

"There should be regular consultations on management of All India Services between the Union and the State governments. For this purpose, an advisory Council for personnel administration of the All India services may be set up..."

More precise criteria have to be evolved for the encadrement of posts which will ensure fair promotional prospects for the other state services and the same time prevent under expansion and consequent dilution of quality of the All India Services."

6.6.05 Another State observed: "All India services are essential to preserve and promote unity and integrity of the country having so much diversity."

6.6.06 Thus, it transpires that while there may be concerns about specific issues in relation to the All India Services, States are not per se opposed to the concept. Rather, they appear to recognize the value of administrators who have the vision and the capacity to govern from the national perspective, and consequently have a broader understanding with respect to many issues of country-wide concern and relevance. Anecdotal evidence also suggests that many senior bureaucrats believe that their time in the Centre aids them in functioning effectively in the States, and vice versa.

6.6.07 For these reasons, it is not considered necessary to recommend any major changes with respect to the All India services that are already constituted. There are many issues relating to the administration of All India Services which are appropriately discussed in the report of the Administrative Reforms Commission and they are not discussed herein. However, the Commission would recommend proper integration of All India Services in the context of the introduction of the third tier of governance. The local bodies are in dire need of building capacities and strengthening the planning process for which the officers of All India Services can play a lead role.

6.6.08 Equally important is the system of encadrement of officers of State Governments and local bodies into the All India Services. Structural integration at all three levels requires clear demarcation of criteria for encadrement of posts, objective performance appraisal system, systematic career development and professionalisation plans and a rational system of postings and transfers. For this purpose, the Commission would suggest constitution of an Advisory Council under the Chairmanship of the Cabinet Secretary with the Secretary Personnel and the concerned Chief Secretaries of States.

6.6.09 However, in line with the observations of the Hon'ble Supreme Court on more than one occasion in the past, the constitution of an All India Judicial Service is strongly recommended. The reasons for this recommendation are as follows.

6.6.10 Firstly, India has a unified judiciary, unlike the U.S.A. or certain other countries. Central and State laws are enforced and interpreted by the same set of Courts. This makes the constitution of an All India Judicial Service, as envisaged under Article 312 itself, a very natural phenomenon.

6.6.11 Secondly, and related to the first aspect, the judicial responsibilities that would be performed by a Judge in one State would be substantially the same as in any other State. There would, evidently, be laws enacted in a given State that do not exist in other States, and it is possible that certain types of legal disputes tend to arise more in one State than another for historical, geographical or cultural reasons. Nevertheless, the bulk of the civil and criminal litigation that would be adjudicated would be very similar in any part of the country. For this reason, there is no real reason why a centralized judicial service would not adequately suit the special requirements of any particular State. One consideration that would have to be kept in mind would be the languages a particular Judge is conversant with, but this is hardly a major impediment. (It simply requires, for example, that a Hindi speaking Judge not be posted in a State where judicial work is exclusively carried out in the regional language. Certain commonsensical guidelines, and taking into account the preferences of the Judge, would resolve any such minor logistical hitches.) In fact, the reasons that lead some to stress the importance of State services in the realm of public administration, apply with less force in the realm of the Judiciary.

6.6.12 Thirdly, and most significant of all, the creation of such an All India judicial service, if accompanied by at least reasonably good remuneration being offered to recruits, would go at least some way towards attracting the best legal talent in the country to the Judiciary, at a young age. This has the potential of greatly enriching the quality of our Judiciary at all levels, and thereby making a significant contribution to ensuring access to justice for all.

6.6.13 For these reasons, it is recommended that an All India Judicial Service be created at the earliest, and it is felt that the creation of such a service does not run counter to any principle of federalism, or to harmonious Centre-State relations.

6.7 Zonal Councils and Empowered Committees of Ministers

6.7.01 The need for more consensus building bodies involving the Centre and the States has been canvassed before the Commission because of a wide spread perception that governance is getting over-centralised and states are losing their autonomy in their assigned areas. While legislative powers are clearly demarcated and the fiscal relations are subject to periodic review by the Finance Commission, the fear on the part of States is more on administrative relations and it is here the need for more forums for coordination is felt.

6.7.02 Under the States Re-organization Act, 1956 five Zonal Councils were created ostensibly for curbing the rising regional and sectarian feelings and to promote co-operation in resolving regional disputes. Later the North Eastern Council was created under the North Eastern Council Act, 1971. In each of these Zonal Councils, Union Home Minister is the Chairman and the Chief Ministers of the States in the Zones concerned are members. The Commission is of the view that the Zonal Councils should meet at least twice a year with an agenda proposed by States concerned to maximize co-ordination and promote harmonization of policies and action having inter-state ramification. The Secretariat of a strengthened Inter-State Council can function as the Secretariat of the Zonal Councils as well.

6.7.03 The Empowered Committee of Finance Ministers of States proved to be a successful experiment in inter-state co-ordination on fiscal matters. There is need to institutionalize similar models in other sectors as well. A Forum of Chief Ministers, Chaired by one of the Chief Ministers by rotation can be similarly thought about particularly to co-ordinate policies of sectors like energy, food, education, environment and health where there are common interests to advance and differentiated responsibilities to undertake. Implementation of Directive principles can be a standing agenda for the Forum of Chief Ministers which can make recommendations to the National Development Council, National Integration Council, Planning Commission etc. on these Directives which, incidentally constitute the Millennium Development Goals set by the United Nations as well. It is pertinent to note that other federations like USA, Australia and Canada do have similar forums to facilitate public policy development and good governance. This Forum of Chief Ministers can also be serviced by the Inter-State Council.

6.8 Conclusions and Recommendations

6.8.01 Power of Union to give directions to State

Though States have raised objections to the power exercisable by the Union under Articles 256 and 257 on the ground that they are destructive of not only the autonomy of States but also inimical to the very foundation of a federal arrangement, the Commission is of the considered view that there is no case for amendment of these provisions. It must, however, be clarified that favouring the retention of these provisions is entirely different from advocating easy or quick resort to them. Articles 256 and 257 may be viewed as a safety valve, one which may never come into play but which is nevertheless required to be retained.

The above view is substantiated by recent experiences where the Centre had to give directions on containing communal violence or insurgency in certain areas. The question that remains is about the consequence of non-compliance by a State of the Centres' directions in this regard. Though the Constitution has not provided any explicit course of action to such an eventuality, the obvious answer appears to be recourse available under Article 356 which indeed is an extreme step. In the existing scheme of things such a development is unlikely to happen which may explain why the Constitution makers avoided making remedial provision. The Commission is of the view that healthy conventions respecting the autonomy of states and restrained use of the power on behalf of the Union can go a long way to address the concern expressed by States in this regard.

Another related issue is about the term 'existing laws' used in Article 256 which are in addition to laws made by Parliament to which the executive power of State shall ensure compliance. The Commission is of the view that these relate to other laws including Presidential Ordinances and international treaties and customary international law applicable to the State concerned. Rule of Law demands executive compliance of all laws. Article 51 warrants it and there can be no exception unless a law specifically authorizes deviation.

A question is raised whether the scope of Article 257 Clause (3) should be widened besides railways to include other vital installations like major dams, space stations, nuclear installations, communication centres etc. The Commission is of the opinion that the executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection of Union property declared by the Union Government to be of national importance. Clause (3) of Art. 257 should accordingly be amended.

6.8.02 Co-ordination between States, Centre-State Relations and Inter-State Council

Federalism is a living faith to manage diversities and it needs to be supported by institutional mechanisms to facilitate co-operation and co-ordination among the Units and between the Units and the Union. Co-operative federalism is easily endorsed but difficult to practice without adequate means of consultation at all levels of government.

The Constitution has provided only limited institutional arrangements for the purpose and regrettably they are not adequately utilized. In this context, the Commission

strongly recommends the strengthening and mainstreaming of the Inter-State Council to make it a vibrant forum for all the tasks contemplated in Clauses (a) to (c) of Article 263.

Though the Article does not provide a dispute settlement function to the Council, it envisages the Council to inquire into and advise on disputes between States towards settlement of contested claims. The Commission is of the view that the Council should be vested with the powers and functions contemplated in Article 263(a) also as it would further enhance the capacity of the Council to discharge its functions in Clauses (b) and (c) more effectively and meaningfully. The Council can further have expert advisory bodies or administrative tribunals with quasi-judicial authority to give recommendations to the Council if and when needed. In short, it is imperative to put the Inter-State Council as a specialized forum to deal with intergovernmental relations according to federal principles and Constitutional good practices.

The Commission is of the view that the Council is an extremely useful mechanism for consensus building and voluntary settlement of disputes if the body is staffed by technical and management experts and given the autonomy required for functioning as a Constitutional body independent of the Union and the States. It should have sufficient resources and authority to carry out its functions effectively and to engage civil society besides governments and other public bodies. It needs to meet regularly with adequate preparation of agenda and negotiating points and position papers from parties involved. The Secretariat of the Council may have joint staff of the Union and States to inspire confidence and enhance co-ordination. Negotiation, mediation and conciliation to find common points or agreement and narrowing of differences employed in international intercourse and in judicial proceedings can usefully be cultivated in the Council Secretariat for advancing the cause of harmonious intergovernmental relations. Towards this end, the Commission would recommend suitable amendments to Article 263 with a view to make the Inter-State Council a credible, powerful and fair mechanism for management of inter-state and Centre-State differences.

6.8.03 Zonal Councils and Empowered Committees of Ministers

The need for more consensus building bodies involving the Centre and the States has been canvassed before the Commission because of a wide spread perception that governance is getting over-centralised and states are losing their autonomy in their assigned areas. While legislative powers are clearly demarcated and the fiscal relations are subject

to periodic review by the Finance Commission, the fear on the part of States is more on administrative relations and it is here the need for more forums for co-ordination is felt.

Under the States Re-organization Act, 1956 five Zonal Councils were created ostensibly for curbing the rising regional and sectarian feelings and to promote co-operation in resolving regional disputes. Later the North Eastern Council was created under the North Eastern Council Act, 1971. In each of these Zonal Councils, Union Home Minister is the Chairman and the Chief Ministers of the States in the Zones concerned are members. The Commission is of the view that the Zonal Councils should meet at least twice a year with an agenda proposed by States concerned to maximize co-ordination and promote harmonization of policies and action having inter-state ramification. The Secretariat of a strengthened Inter-State Council can function as the Secretariat of the Zonal Councils as well.

The Empowered Committee of Finance Ministers of States proved to be a successful experiment in inter-state co-ordination on fiscal matters. There is need to institutionalize similar models in other sectors as well. A Forum of Chief Ministers, Chaired by one of the Chief Minister by rotation can be similarly thought about particularly to co-ordinate policies of sectors like energy, food, education, environment and health where there are common interests to advance and differentiated responsibilities to undertake. Implementation of Directive principles can be a standing agenda for the Forum of Chief Ministers which can make recommendations to the National Development Council, National Integration Council, Planning Commission etc. on these Directives which, incidentally constitute the Millennium Development Goals set by the United Nations as well. It is pertinent to note that other federations like USA, Australia and Canada do have similar forums to facilitate public policy development and good governance. This Forum of Chief Ministers can also be serviced by the Inter-State Council.

6.8.04 Adjudication of disputes relating to waters of inter-State rivers

The Commission has examined the issue in detail in a separate volume of the report. The present state of affairs is obviously unsatisfactory as it is dilatory, time-consuming and seldom gets settled. Therefore change in the law and procedure is warranted. The possible courses of action are dealt with in Volume VII of the Report.

6.8.05 All India Services and Centre-State Co-operation for better Administration

The Constitution of All India Services is a unique feature of the Indian Constitution. The broad objectives in setting up All India Services relate to facilitating liaison between

the Union and States, promote uniform standards of administration, enabling the administrative officers of the Union to be in touch with field realities, helping the State administrative machinery to obtain the best available talent with wider outlook and broader perspectives and reduce political influence in recruitment, discipline and control in administration. Considering the importance of these objectives, the Commission strongly recommends the constitution of few other All India Services in sectors like Health, Education, Engineering and Judiciary. They existed prior to Independence which contributed significantly to the quality of administration.

There are many issues relating to the administration of All India Services which are appropriately discussed in the report of the Administrative Reforms Commission and they are not discussed herein. However, the Commission would recommend proper integration of All India Services in the context of the introduction of the third tier of governance. The local bodies are in dire need of building capacities and strengthening the planning process for which the officers of All India Services can play a lead role.

Equally important is the system of encadrement of officers of State Governments and local bodies into the All India Services. Structural integration at all three levels requires clear demarcation of criteria for encadrement of posts, objective performance appraisal system, systematic career development and professionalisation plans and a rational system of postings and transfers. For this purpose, the Commission would suggest constitution of an Advisory Council under the Chairmanship of the Cabinet Secretary with the Secretary Personnel and the concerned Chief Secretaries of States.

CHAPTER 7

SMALLER STATES AND BALANCE OF POWER IN FEDERAL GOVERNANCE

CONTENTS

Sections/Headings	Para Nos.	Page Nos.
7.1 Central Legislature (Union Parliament) and States	7.1.01-7.1.12	153-156
7.2 Sarkaria Commission Recommendations and Re-allocation of Seats	7.2.01-7.2.07	156-160
7.3 Domicile Requirement and Supreme Court Views on State Representation	7.3.01-7.3.02	160-167
7.4 Conclusions and Recommendations	7.4.01-7.4.02	167-169

7

SMALLER STATES AND BALANCE OF POWER IN FEDERAL GOVERNANCE

7.1 Central Legislature (Union Parliament) and States

7.1.01 The Union Parliament consists of two Houses i.e. Council of States (Rajya Sabha) and the House of People (Lok Sabha). In a federal Constitution, the Second Chamber has been considered to be essential because it plays an important role in vital aspects of policy and legislation concerning both the Union and States.

7.1.02 The allocation of seats to be filled by the representatives of States in the Council of States is done in proportion to the population of State. Clause (4) of Article 80 provides that the representatives of each State in the Rajya Sabha shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote. In this process, nine States in India have just one member each in the Rajya Sabha. Just ten populous States occupy 160 seats which is nearly seventy per cent of the total elected membership of the Upper House. Some smaller States have expressed resentment at their inability to make their voice felt at the Centre and sought amendment either to give equal representation to all States (as in the U.S. Senate) or ensure a minimum number of seats irrespective of their population size. They argue that legislative federalism demands such a step. More so in the current situation in which different parties are ruling at the Centre and in the States. Given the fact that the Centre can influence under the constitutional scheme matters pertaining to States, the demand assumes significance.

7.1.03 Representation is a manner of ensuring the participation of people in matters which affect them. Some such matters may well affect others (questions of national importance and those which have inter-State characteristics), while some may just affect a particular state. At the least, our federal character tries to ensure a say of the States in matters which impact them and also in matters of national importance. There are a number of ways in which the voice of the States can be made significant in such matters. The federal scheme of the Constitution reflects at least two major ways of doing so:

1. Division of legislative power and fields of legislation.
2. Ensuring representation of the states at the centre.

7.1.04 Amongst these two, the second one addresses the possibility that electoral fortunes impact Center-State relations. However, the objectives sought to be achieved by the representation of states at the Centre may well be achieved in other ways as well. This is so, if it is agreed that the primary objective is to maintain the federal character of the Indian state. This can be done not only by ensuring a say of the States in issues of national importance, but also by providing them equal say in such matters which are of national importance. The federal character seems to argue for control of the State over its own affairs and ensuring its say in matters over which it has decision making power. Of course, all this is to be discounted by the interests of having uniform development of the country which warrants some degree of bias towards the centre.

7.1.05 A quick survey of other federations (e.g., Canada and the U.S.) with bicameral arrangement and mode of division of seats reveals that while the Lower House typically links representation to population, the Upper House may link representation to territory, irrespective of the population. Delinking population from representation in the Upper House aims to offset the sway that larger States could have in both Houses.

7.1.06 The Constitutional framework of the composition of the Rajya Sabha in India (Article 80) does not necessarily link population with the number of seats. Schedule IV details the number of seats that each State has, though in practice it has worked out the scheme on the basis of population: the formula is one seat for a population of each million for the first five million and then a seat each for every next two millions. This formula is infused with a system of weighted representation which is expected to address the interests of States with relatively less population.

7.1.07 If federalism aims to ensure rational distribution of power and States' involvement in the governance of the nation, both Houses of Parliament can play this role. Since the Lok Sabha is directly linked to the population, delinking the relation between population and number of seats per State/ Union Territory in the Rajya Sabha would only create a balance of power between the different constituents in the federation.

7.1.08 Alternatively, it could be argued that since larger States and States with relatively higher population already have more representatives in the Lok Sabha, the Rajya Sabha could be a place where the states as the constituents of federation have equal say irrespective of the size and population.

7.1.09 The fact of weighted representation is not an alien concept to our constitutional scheme, as it has already been a part of Article 80 and 81. Any change considered necessary could be made by amending the IVth Schedule. Presumably the greatest opponents of such a change would be those states that enjoy larger number of representatives in the Rajya Sabha.

7.1.10 Regarding the manner of representation of the States in the Upper House, it was contended in the Constituent Assembly that since the Council of States was going to represent the States, it would only be fair to the State units that these units should be dealt with as units and every unit was equally represented. Otherwise, there was no sense in saying that the States shall be represented in the Council of States. To support this fact, the example of the United States and of other countries was given where the second chambers, the representation given to the units was always the same. Further, it was also argued that since the elected members of the Council of States will be returned by the State Assemblies, then the election of the members on the basis of proportional representation according to the population, would serve no real purpose. Moreover, conceptually it will be an unnecessary duplication of the House of the People. Further, it was argued that the House of the People itself will be representative of the people of the states themselves, because the States will be sending in their representatives to the House of the People on almost the same basis. Thus, it was emphasized that unless every State was taken as an equal unit, by sending in equal number of representatives to safeguard their special interests, there was no sense in having a Second Chamber to represent the States. So, an amendment to clarify that the Council of States will be representative of the State interests, and therefore the States, must be equally represented was sought after. On this ground, it was suggested that the allocation of seats to the representatives of the State in the Council of States should be on the basis of equal representation to each of the component States.²¹⁵

7.1.11 Supporting the special role assigned to the Rajya Sabha as a representative of the States under Articles 249 (authorising Parliament to make laws on a specified matter under the State list in national interest) and 312 (creation of All-India Services) of the Constitution, DR. B. R. Ambedkar said, "*ex-hypothesi, the Upper Chamber represents the States and, therefore, their resolution would be tantamount to an authority given by the States*".²¹⁶

7.1.12 Unfortunately, this concept of federalism has been watered down in practice. Part of the blame can be attributed to the fact that the Rajya Sabha has been

²¹⁵ Constituent Assembly Debate, Vol. VII, 3rd January, 1949

²¹⁶ Constituent Assembly debate, Vol. IX, 8th September, 1949.

thought of in a strong Centre framework that has placed inherent limitations on its design and evolution since 1950. Secondly, the concept of Rajya Sabha as being the representative of the states has also been diluted with the manipulative practices of the political parties represented in the Rajya Sabha. As has been observed, in the era of coalition politics, the interests of parties take precedence over the interests of the States. Further, the dichotomies and antinomies in the interests of regional parties of various States as well as between the interests of individual States and the larger interests of India have become difficult to reconcile. Third, though the original mechanism to have the system of proportional representation as the basis was noble so that the "Council of States" was indeed truly representative of all the states, however, the population ratio methodology remained unsatisfactory. As Alistair McMillan has opined in the context of the 91st Amendment that provided for the Delimitation Bill, the decision to freeze inter-State allocation in the name of population control violates the basic one-person one-vote principle of our Constitution. His suggestion that federal political balancing should be attempted by restructuring the Rajya Sabha to give greater representation to smaller states needs to be taken seriously.²¹⁷ In fact, the need for increasing federalisation of the party system and power structure in the country, there is a greater need for reforming the Rajya Sabha structure and organization.

7.2 Sarkaria Commission Recommendations and Re-allocation of Seats

7.2.01 A case was made out against the present composition of the Rajya Sabha by the smaller states on the following grounds:

1. A resolution that required two-thirds of the majority to be present and voting to be passed did not reflect the consent of the majority of the States through their representatives. This was illustrated through the process of amendment provided under Article 368 of the Constitution on the ground that 2/3rd majority could be easily mustered up through the seven States, viz, Uttar Pradesh, Madhya Pradesh, Tamil Nadu, Bihar, Andhra Pradesh, Maharashtra and West Bengal, holding the majority of the representation along with the nominated members. In such an event, the opposition by the remaining States would be of no use.
2. The method of allocation of seats on the basis of the population also came under heavy fire since it was opined that a majority of two-thirds of the members present and voting would be able to pass a resolution under Article

²¹⁷ Alistair McMillan, 'Delimitation, Democracy and End of Constitutional Freeze', *Economic and Political Weekly* 35(15), 8 April 2000.

249 even if it was opposed by all the members elected from the last 14 States in the list of States arranged according to the descending order of their populations. Thus, a resolution that lacked the support of almost two-thirds of the total number of the States could not be regarded as the decision of the States as such.

7.2.02 The Commission then went on to analyze through the debates of the Constituent Assembly the role as was envisaged for the Rajya Sabha. In this aspect it made the following observations:

1. Securing, for the legislative process at the Union level, the thinking and guidance of mature and experienced persons, popularly known as "The Elders", who are disinclined to get involved in the rough-and-tumble of active politics and contest in direct elections to the Lok Sabha;
2. Enabling the States to give effective expression to their view points at the Parliamentary level;
3. Ensuring some degree of continuity in the policies underlying Parliamentary legislation; and
4. Functioning as a House of Parliament which would, more or less, be coordinate with the Lok Sabha, with safeguards for speedy resolution of any conflicts between the two Houses on legislation.²¹⁸

7.2.03 Commenting on the reasons as to why the Commission thought that the principle of equal representation as provided for in the USA and Australia was not provided, it was opined by the Sarkaria Commission that the States of the Indian Union were not independent entities having pre-existing rights or powers anterior to or apart from the Constitution. Another reason in the view of the Commission was that the constituent units of the Indian Union differed vastly in area and population. In the Commission's view, the purpose of having nominated members also made it clear that the Rajya Sabha was not envisaged to function primarily as a Federal Chamber of the classical type like the Senate of the U.S.A.

7.2.04 Noting the provisions of Article 249 and 312, it was opined by the Commission that *"It is clear that the Rajya Sabha in our Constitution does not exclusively represent the federal principle. The primary role assigned to it is that of a Second Chamber of Parliament exercising legislative functions, more or less, coordinate with the Lok Sabha. However, in the exercise*

²¹⁸ Sarkaria Commission Report, , Chapter 2 Legislative Relations, paragraph 2.26.06

of its special functions such as those under Articles 249 and 312, its role assumes a pre-dominantly federal character."²¹⁹ On the question as to how far, in reality, a resolution of the Rajya Sabha passed under Article 249 by a two-thirds majority of members present and voting, signifies consent of the majority of the States, the Commission gave the following reply:

1. Though, in theory, the pattern of voting on a resolution moved in the Rajya Sabha under Article 249, is supposed to reflect the broad view-point or consent of the State Assemblies and their Governments, yet, in practice, it may not be invariably so. It may happen that the concerted view of the majority party in the Rajya Sabha supporting the resolution, stands, at that point of time, in direct contrast to the known views of the parties running the governments and dominating the majority of the State Legislatures. While electing members to the Rajya Sabha, members of State Assemblies vote on party lines. It is only to be expected that the members so elected would continue to owe allegiance to their respective parties and vote on party lines in the Rajya Sabha.
2. For the past nearly two decades, parties other than the ruling party at the Union, have been in power in many States. The fact that these other parties or groups of them have been in a majority in certain State Legislative Assemblies, has had an impact on the relative strengths of the different parties in the Rajya Sabha.
3. As a result, the ruling party and its allies have generally been having a lower percentage of seats in the Rajya Sabha than in the Lok Sabha. In fact, there were occasions when the ruling party was not able to muster the requisite two-thirds majority in the Rajya Sabha in order to pass a Constitution Amendment Bill. For example, the 43rd and 44th Constitution Amendment Acts could not have been passed in 1977 and 1978, respectively, but for the broad agreement between the ruling party, which had a majority only in the Lok Sabha, and the main opposition party, which had a majority in the Rajya Sabha.
4. The apprehension of the two State Governments and some political parties, to the effect, that in the Rajya Sabha as at present composed, a few bigger States can muster the requisite two-thirds majority of votes to push through a legislation or a resolution, even when a larger number of smaller States are opposed to it, is not borne out, as already noticed, by an empirical analysis of

²¹⁹ Ibid, paragraph 2.26.16

the voting pattern with respect to the Resolution passed in the Rajya Sabha in 1986 when Article 249 was invoked. Nevertheless, a remote possibility of the apprehended situation arising in future, cannot be ruled out. The problem is aggravated when the more populous States are ruled by one party, and the opposition party or parties are running the government in the smaller States.²²⁰

7.2.05 Although the Sarkaria Commission acknowledged the future perils of the majority States outvoting the minority States, the Commission refused to suggest changes in the composition of the Rajya Sabha to eliminate such a peril. Thus, neither of the two proposals—one suggesting a new scale of representation and the other equal representation for the States in the Rajya Sabha, were accepted by the Commission for reforming the Rajya Sabha. In the Commission's opinion, neither of them would provide a fool proof safeguard against the interests or view points of the smaller States being overridden by the bigger and more populous States, inter alia, due to the prevailing pattern of voting on party lines. Rather, the Commission was of the view that the proposed changes in the composition of the Rajya Sabha, if made, might mar its proceedings by endemic conflicts and frequent deadlocks, seriously undermining its primary role and smooth functioning as a second Legislative Chamber of Parliament. In the alternative, according to the Commission, the crux of the problem of how to strengthen the special role of the Rajya Sabha as an instrument for effective representation of the view-points of the States, could be best solved not by restructuring the composition of the Rajya Sabha, but by devising procedural safeguards in its internal functioning. The Commission recommended that the Rajya Sabha by its Rules of Procedure may provide for setting up of a special Committee reflecting various cross-sections of the House. This Committee could then ascertain by free and frank discussions the views of the various sections of the House and thus ensure, beforehand, that a proposed resolution under Article 249 or Article 312 would be passed only on the basis of consensus. The Commission was of the view that this procedural device would serve to dispel the apprehensions about the misuse of these special provisions for transferring the power otherwise belonging to the smaller States to the Union with the support of numerically larger votes of a few bigger States.²²¹

7.2.06 The main point to be noted from this discussion by the Sarkaria Commission is indeed the acknowledgement of the fact that the Rajya Sabha was increasingly unable to function as a Representative of the States because of the trend of voting on party lines in the Rajya Sabha, the perils of a majority party dominating the voting process in Rajya Sabha and the rising threat of coalition politics that created different party alliances at the Centre and the States.

²²⁰ Ibid, at paragraph 2.26.21

²²¹ Ibid, at paragraph 2.26.25

7.2.07 The present Commission has difficulty in agreeing with the interpretation of the Sarkaria Commission particularly in view of the need to resurrect the federal principle in the changed circumstances.

7.3 Domicile Requirement and Supreme Court Views on State Representation

Federations aim to accommodate diversity and pluralism with shared systems of governance. One of the aspects of the federal arrangement is participation of the constituent units in the decision making processes at the federal level particularly in areas which affect governance at their level. This is organized through institutional arrangements, consultation processes and through the units' and sub-units' representation in the central legislature. An Upper House is one such mechanism for the units' representation and avoiding appearance of domination or arbitrariness by the Centre in the decision-making process. Centralisation processes which are inevitable in administration are to some extent moderated at the policy making level and the equilibrium in contentious issues is attempted to be maintained. Representatives of States can reflect the interests of States in the creation of national policies in the Upper House. Where States do not have adequate or competent representation, it will be difficult to argue that the Upper House will properly defend State interests. World wide, the composition and manner of representation of the Upper House have become an indicator of federalism. It has become an important aspect of federal practice that the Upper House should reflect the interests of the units, besides doing other things which a Second Chamber is expected to do, and provide checks and balances against the exercise of power by the Central authorities that might affect the interests of the constituents. The composition of the Rajya Sabha (Council of States) in the context of the federal principle and Centre-State relations in India is therefore of critical importance.

7.3.01 An Amendment which deserves to be repealed

The law as it stood before *The Representation of People (Amendment) Act*, (40 of 2003), had stipulated an inevitable territorial link between the representative of the Rajya Sabha and the state which they represent²²². The law had prescribed that one of the qualifications to become the representative of a particular state in the Rajya Sabha was being an elector of a Parliamentary constituency in that State. The purpose of this provision was to ensure that the person who represented the State had a territorial nexus to the State, and thereby an interest in the affairs of the State.

²²² Section 3 as it originally stood reads thus; **3. Qualification for membership of the Council of States.** – (1) A person shall not be qualified to be chosen as a representative of any Part A or Part B State (other than the State of Jammu and Kashmir) in the Council of States unless he is an elector for a Parliamentary constituency in that State... (Emphasis added)

The 2003 amendment to *the Representation of People Act, 1951* (RP Act) severed this territorial nexus²²³ by providing that the candidate could be an elector from any of the parliamentary constituencies of the nation. The reason for this amendment is clear: it was to facilitate the election of certain persons to Rajya Sabha and to legitimize some past actions of violation of Section 3, which were being challenged.

Since India is already considered a quasi-federation or federation with strong centralizing tendencies, the Representation of People (Amendment) Act's move in August 2003 to delink territorial nexus of representation in the Rajya Sabha seems suspect, particularly because it appeared that it was adopted for reasons of mere expediency.

The relevance of the need for a link between domicile and representation in the Rajya Sabha can be seen in some of the functions of the Rajya Sabha, for example, Article 249(1). This article enables the Parliament to legislate on the fields earmarked for the states in List II of Schedule VII.

The present position of the amended law undermines the spirit of federalism. As the very name suggests, the Rajya Sabha, "Council of States", seeks to determine and protect the interests of the *states*. The Rajya Sabha locates and balances these interests in the larger milieu of the national interests. It is designed to give an opportunity to ventilate the claims and concerns of the states where the centre legislates on matters that could have a direct or indirect bearing on the States and Union Territories. This calls for a direct link between the representative and the territory, which they are representing.

Therefore the Commission believes that Section 3 of the RP Act needs to be placed back to the position previous to the amendment of 2003 if the federal balance in governance is to be redeemed. The territorial link as prescribed by the Representation of People Act is necessary and desirable to let the States realize that they are equal partners in national policy making and governance.

7.3.02 A Judgement which Warrants Review

The decision of the Supreme Court in *Kuldip Nayar v. Union of India*²²⁴ was concerned with determining the validity of the challenge to the amendments made in the Representation of People Act, 1951 (the RP Act', 1951) through Representation of People (Amendment) Act, 2003(40 of 2003) which came into force from 28th August, 2003. By the said Amendment Act 2003, the requirement of "domicile" in the State concerned for

²²³ The amended section stands as; **3. Qualification for membership of the Council of States.** – A person shall not be qualified to be chosen as a representative of any State or Union territory in the Council of States unless he is an elector for a Parliamentary constituency in India ... (Emphasis added)

²²⁴ (2006)7SCC1

getting elected to the Council of States was deleted which according to the petitioner violated the principle of Federalism, a basic structure of the Constitution. It was argued that the amendment had the effect of unbalancing the power between the Union and the States and was, therefore, violative of the provisions of the Constitution. In this connection, it was urged that the Council of States is a House of Parliament that had been constituted to provide representation of various States and Union Territories; that its members have to represent the people of different States to enable them to legislate after understanding their problems; that the nomenclature "Council of States" indicates the federal character of the House and a representative who is not ordinarily resident and who does not belong to the State concerned cannot effectively represent the State.

On the other hand it was argued that the impugned amendments became necessary in view of various deficiencies experienced in the working of the RP Act, 1951; that the said amendments did not alter or distort the character of the Council of States and that the concept of residence/domicile is a matter of qualification under Article 84(c) which is to be prescribed by the Parliament only under the Indian Constitution.

To determine the above question, the court looked into the legislative history of the relevant provisions and the Constituent Assembly debates on the same.

Analysing the Constituent Assembly debates and the minutes of the Union Constitution Committee, the court observed that the said minutes showed that the Upper House should include scientists, teachers etc. for which purpose, the President should be given authority to nominate. The object of the Upper Chamber as envisaged was to hold dignified debates on important issues and to share the experience of seasoned persons who were expected to participate in the debate with an amount of learning. From this premise the Court concluded that residence was never a constitutional requirement. It was held that even if residence/domicile was an incident of federalism, it is capable of being regulated by Parliament as a qualification under powers of Article 84.

The Court then made certain observations on the role, composition and functions of Rajya Sabha which are relevant in this context:

"India's Parliament is bicameral. The two Houses along with the President constitute Parliament [Article 79]. The Houses differ from each other in many respects. They are constituted on different principles, and, from a functional point of view, they do not enjoy a co-equal status. Lok Sabha is a democratic chamber elected directly by the people on the

basis of adult suffrage. It reflects popular will. It has the last word in matters of taxation and expenditure. The Council of Ministers is responsible to the Lok Sabha. Rajya Sabha, on the other hand, is constituted by indirect elections. The Council of Ministers is not responsible to the Rajya Sabha. Therefore, the role of Rajya Sabha is somewhat secondary to that of Lok Sabha, barring a few powers in the arena of center-State relationship. Rajya Sabha is a forum to which experienced public figures get access without going through the din and bustle of a general election which is inevitable in the case of Lok Sabha. It acts as a revising chamber over the Lok Sabha. The existence of two debating chambers means that all proposals and programmes of the Government are discussed twice. As a revising chamber, the Rajya Sabha helps in improving Bills passed by the Lok Sabha. Although the Rajya Sabha is designed to serve as a Chamber where the States and the Union of India are represented, in practice, the Rajya Sabha does not act as a champion of local interests. Even though elected by the State Legislatures, the members of the Rajya Sabha vote not at the dictate of the State concerned, but according to their own views and party affiliation. In fact, at one point of time in 1973, a private member's resolution was to the effect that the Rajya Sabha be abolished."

"...The maximum strength of Rajya Sabha is fixed at 250 members, 238 of whom are elected representatives of the States and the Union Territories and 12 are nominated by the President. The seats in the Upper House are allotted among the various States and Union Territories on the basis of population, the formula being one seat for each million of population for the first five million and thereafter one seat for every two million population. A slight advantage is, therefore, given to States with small population over the States with bigger population. This is called "weighted proportional representation". The system of proportional representation helps in giving due representation to minority groups. The representatives of a State in Rajya Sabha are elected by the elected members of the State Legislative Assembly in accordance with the system of proportional representation by means of a single transferable vote [Article 80(1)(b) and Article 80(4)]."
[emphasis supplied]

On Rajya Sabha's power under Article 249 of the Constitution, the court observed that :

"The Indian union has been described as the 'holding together' of different areas by the constitution framers, unlike the 'coming together' of constituent units as in the case of the U.S.A. and the confederation of Canada. Hence, the Rajya Sabha was vested with a contingency based power over state legislatures under Article 249, which contributes to the 'Quasi-federal' nature to the government of the Indian union."

Further observing the scope of Articles 249, 246 and 251, the court held that:

"Under Article 249(1), if the Rajya Sabha declares by a resolution, supported by not less than two-thirds of its members present and voting, that it is necessary or expedient in national interest that Parliament should make laws with respect to any of the matters enumerated in the State list [List II of Seventh Schedule read with Article 246], 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. Article 249 Clause (2) and (3) specify the limitations on the enforcement of this provision. Article 251 when read with Article 249 provides that in case of inconsistency between a law made by Parliament under Article 249 and a law made by a State legislature, the Union law will prevail to the extent of such inconsistency or 'repugnancy'. *In effect this provision permits the Rajya Sabha to encroach upon the specified legislative competence of a state legislature by declaring a matter to be of national importance. Though it may have been incorporated as a safeguard in the original constitutional scheme, this power allows the Union government to interfere with the functioning of a State government, which is most often prompted by the existence of opposing party-affiliations at the Central and state level. This bias towards 'Unitary power' under normal circumstances is not seen either in U.S.A. or Canada.*"
[Emphasis supplied]

The court then analysed the role of second chambers in the context of Center-State relations i.e. embodying different degrees of federalism. This was done by a comparative study of the role of Rajya Sabha vis-à-vis role of the Upper House in the Canadian and United States senate. The chief criterion of comparison was the varying profile of representation accorded to the constituent units by the methods of composition and the differences in the powers vested with the 'Upper Houses' in the constitutional scheme of the countries. The court defended this methodology on the ground that "*many Political theorists and Constitutional experts are of the opinion that in the contemporary context, 'Second Chambers' are losing their intended characteristics of effectively representing the interests of states and are increasingly becoming 'national' institutions on account of more economic, social and political affinity developing between states. Hence, a comparative study of the working of bicameralism can assist the understanding of such dynamics within a Federal system of governance.*"

Regarding the Rajya Sabha, the court made the following observations:

"The genesis of the Indian Rajya Sabha on the other hand benefited from the constitutional history of several nations which allowed the Constituent assembly to examine the federal functions of an Upper House. However, 'bicameralism' had been introduced to the provincial legislatures under British rule in 1921. The Government of India Act, 1935 also created an Upper House in the Federal legislature, whose members were to be elected by the members of provincial legislatures and in case of Princely states to be nominated by the rulers of such territories. However, on account of the realities faced by the young Indian Union, a Council of States (Rajya Sabha) in the Union Parliament was seen as an essential requirement for a federal order. Besides the former British provinces, there were vast areas of princely states that had to be administered under the Union. Furthermore, the diversity in economic and cultural factors between regions also posed a challenge for the newly independent country. *Hence, the Upper House was instituted by the Constitution framers which would substantially consist of members elected by state legislatures and have a fixed number of nominated members representing non-political fields. However, the distribution of representation between states in the Rajya Sabha is neither equal nor entirely based on population distribution. A basic formula is used to assign relatively more weightage to smaller states but larger states are accorded weightage regressively for additional population. Hence the Rajya Sabha incorporates unequal representation for states but with proportionally more representation given to smaller states. The theory behind such allocation of seats is to safeguard the interests of the smaller states but at the same time giving adequate representation to the larger states so that the will of the representatives of a minority of the electorate does not prevail over that of a majority.*" [Emphasis supplied]

The Court seem to have appreciated the role of Council of States as a representative Chamber to advance the interests of States at the Centre; yet reluctant to admit so based on what is perceived as decreasing importance of that role under a multi-party system.

The Supreme Court's reasoning to reject the status of the Upper House as representative of States, it is respectfully submitted, is faulty and warrants re-consideration. Equally important it is for the Court to review its reluctance to accept the need for territorial link for being elected to the Council of States. The Constituent Assembly Debates do give support to the view that the Council of States was intended to give a say to the

Units in the affairs of the Centre. There was evidence to show that the equal representation formula was substituted by the "weighted proportional system" under the Fourth Schedule only to avoid extreme solutions to a difficult situation at the time of independence.

Contrary to the conclusion of the Supreme Court, this Commission, having studied the composition and functioning of the second Chamber in other federal systems and having analyzed the intention of the framers of the Constitution, is persuaded to take the view that Rajya Sabha was indeed perceived as a representative assembly of the States in the Indian Union. It may be true that the Council of States has failed to function as such because of the asymmetry of coalition politics and the way party system developed in the country. It appears that such a phenomenon is not uncommon in other federations with bicameral legislatures. They have addressed the issue by reforming the functioning of the Second Chamber without diluting its representative character in a federal system. It is open to India also to look at reforming Rajya Sabha to perform this unique role in federal equilibrium. In this regard, the restoration of the territorial link as originally prescribed by the Representation of People Act is necessary and desirable to let the States realize that they are equal partners in national policy making and governance. Centre has no territory of its own and the Union is made of States. Therefore the Union cannot be viewed as an adversary to the States, even if it enjoys superior powers to override the States in certain circumstances. Given the unavoidable trends towards centralization in the modern world, the available institution to moderate it for good governance cannot be allowed to lose its importance in federal arrangements.

On the question of equal representation of all States, there are arguments for and against it. Equality of seats among States in the Council of States is a principle which found great deal of acceptance in the Constituent Assembly though it could not be straightaway adopted because of the circumstances obtaining at that time. There is need for a fresh look at the existing scheme.

The essence of federalism lies in maintaining a proper balance of power in governance and in this respect the Council of States (Rajya Sabha) occupies a significant role. There is no doubt that Rajya Sabha is representative of States of the Union and is supposed to protect States' rights in Central policy making. The Commission is of the considered view that factors inhibiting the composition and functioning of the Second Chamber as a representative forum of States should be removed or modified even if it requires amendment of the Constitutional provisions. This is felt more important now

when centralization tendencies are getting stronger and fragmentation of the polity is becoming intense.

Whenever Central policies are formulated in relation to one or more States, it is only proper that Committees of Rajya Sabha involving representatives of concerned States are allowed to discuss and come up with alternate courses of action acceptable to the States and the Union. Thus, compensating the mineral rich States or the Hill States can well be negotiated in the Rajya Sabha Committee. Similarly, States adversely affected by the Centre entering into treaties or agreements with other countries can get appropriate remedies if the forum of the Rajya Sabha is utilized for the purpose. In fact, Rajya Sabha offers immense potential to negotiate acceptable solutions to the friction points which emerge between Centre and States in fiscal, legislative and administrative relations.

The principle of equality and equal representation in institutions of governance is as much relevant to States as to individuals in a multi-party, diverse polity. Equally applicable is the idea of preferential discrimination in favour of backward States in the matter of fiscal devolution from Union to States. There are other federations which give equal number of seats to the federating units in the Council of States irrespective of the size of their territory and population. The number of seats in the House of People (Lok Sabha) anyway is directly linked to the population and there is no need to duplicate the principle. A balance of power between States *inter se* is desirable and this is possible by equality of representation in the Rajya Sabha. If the Council of States has failed to function as representative of States as originally envisaged, it is because of the asymmetry of coalition politics and the way the party system developed. The functioning of Rajya Sabha can be reformed to achieve the original purpose of federal equilibrium. The Commission, therefore, strongly recommends amendment of the relevant provisions to give equality of seats to States in the Rajya Sabha, irrespective of their population size.

7.4 Conclusions and Recommendations

7.4.01 Rajya Sabha to be a Chamber to protect States' rights

The essence of federalism lies in maintaining a proper balance of power in governance and in this respect the Council of States (Rajya Sabha) occupies a significant role. There is no doubt that Rajya Sabha is representative of States of the Union and is supposed to protect States' rights in Central policy making. The Commission is of the considered view that factors inhibiting the composition and functioning of the Second Chamber as a representative forum of States should be removed or modified even if it

requires amendment of the Constitutional provisions. This is felt more important now when centralization tendencies are getting stronger and fragmentation of the polity is becoming intense.

Whenever Central policies are formulated in relation to one or more States, it is only proper that Committees of Rajya Sabha involving representatives of concerned States are allowed to discuss and come up with alternate courses of action acceptable to the States and the Union. Thus, compensating the mineral rich States or the Hill States can well be negotiated in the Rajya Sabha Committee. Similarly, States adversely affected by the Centre entering into treaties or agreements with other countries can get appropriate remedies if the forum of the Rajya Sabha is utilized for the purpose. In fact, Rajya Sabha offers immense potential to negotiate acceptable solutions to the friction points which emerge between Centre and States in fiscal, legislative and administrative relations.

7.4.02 Equal representation of States in Rajya Sabha

The principle of equality and equal representation in institutions of governance is as much relevant to States as to individuals in a multi-party, diverse polity. Equally applicable is the idea of preferential discrimination in favour of backward States in the matter of fiscal devolution from Union to States. There are other federations which give equal number of seats to the federating units in the Council of States irrespective of the size of their territory and population. The number of seats in the House of People (Lok Sabha) anyway is directly linked to the population and there is no need to duplicate the principle. A balance of power between States inter se is desirable and this is possible by equality of representation in the Rajya Sabha. If the Council of States has failed to function as representative of States as originally envisaged, it is because of the asymmetry of coalition politics and the way the party system developed. The functioning of Rajya Sabha can be reformed to achieve the original purpose of federal equilibrium. The Commission, therefore, strongly recommends amendment of the relevant provisions to give equality of seats to States in the Rajya Sabha, irrespective of their population size.

The Commission is also of the considered opinion that the reasoning of the Supreme Court in *Kuldip Nayyar v. Union of India* [(2006) 7SCC1] rejecting the status of Rajya Sabha as a Chamber representing the States in the federal Union is faulty and deserves review. Meanwhile, Parliament should act restoring Section 3 of the Representation of People Act as it originally stood to redeem the federal balance in shared

governance. The territorial link as prescribed by the Representation of People Act is necessary and desirable to let the States realize that they are equal partners in national policy making and governance.

CHAPTER 8
DECENTRALIZED GOVERNANCE AND
INTERGOVERNMENTAL RELATIONS
CONTENTS

Sections/Headings	Para Nos.	Page Nos.
8.1 Introduction	8.1.01-8.1.03	173
8.2 Devolution or Delegation?	8.2.01-8.2.02	173-174
8.3 Issues in Inter-Governmental Relations	8.3.01-8.3.11	174-177
8.4 Para-Statals and Panchayats	8.4.01-8.4.04	178-179
8.5 Conclusions and Recommendations	8.5.01-8.5.02	179

8

DECENTRALIZED GOVERNANCE AND INTERGOVERNMENTAL RELATIONS

8.1 Introduction

8.1.01 Prior to 1992, local government in India was a prerogative of the States. While some States did take measures to create local bodies, these bodies were typically provided with limited autonomy. The 73rd and 74th Amendments to the Constitution in 1992 have provided rural local bodies (known as 'Panchayats') and urban local bodies (known as 'Municipalities') with Constitutional status and stronger legal authority. This is a major breakthrough in democratic governance under a federal framework. However, several issues of governance and intergovernmental relations are still left open with the result the Constitutional object remains to be fulfilled.

8.1.02 Is it necessary for states to transfer any powers and functions onto local governments under the present dispensation? What happens if they do not? What is the extent of freedom envisaged for local government from State Government control in the exercise of powers transferred to it? These and related questions are still being asked even after a decade of Panchayati Raj amendments.

8.1.03 Delegation is the transfer of power and responsibility for specifically defined functions, without ceding the authority and responsibility in respect of that function. It is a complex issue in participatory, multi-level governance. Hence, there is discretion on the part of the transferor government in deciding whether or not to delegate power, which powers to delegate, to circumscribe the power at the time of transfer, and to withdraw the delegation.²²⁵ Alternatively, devolution is the full and permanent transfer of power and responsibility to a lower or regional level government.²²⁶ Hence, the devolving government no longer has discretion and it has only supervisory powers over the lower level government.

8.2 Devolution or Delegation?

8.2.01 It is submitted that if Articles 243G and 243W are read to mean that they leave it to the discretion of states whether or not to devolve any powers to the local

²²⁵ Jaap De Visser, *Developmental Local Government: A Case Study of South Africa* (Oxford: Hart Publishing, 2005).

²²⁶ Bernard Dafflon, "The Assignment of Functions to Decentralized Government: From Theory to Practice", in *Handbook of Fiscal Federalism* (Giorgio Brosio et al. eds., Cheltenham: Edward Elgar Publishing Ltd., 2006).

bodies, there would be no difference between the pre-amendment and post-amendment position. Such an interpretation defeats the whole purpose of the constitutional amendments. Moreover, Panchayats and Municipalities are defined as 'institutions of self-government', and their constitution is made mandatory. A reading of the provisions suggests that states have the discretion to decide and vary the subject matters in respect of which it wants to devolve powers and responsibilities onto local government, and the extent of the functional responsibilities,²²⁷ but not whether they should devolve any powers at all.

8.2.02 Although 'self-government' status is conferred on local government, the term 'self-government' is not defined or explained in the Constitution. States have exploited this constitutional silence, and the use of the word 'may' in Articles 243G and 243W to grant themselves unfettered discretion to interfere in the functioning of local bodies. Unfortunately, the way things have turned out in many states, the local government except in some states is being conducted by state government administrators, assisted in implementation by elected representatives, as was the case before the 1992 constitutional amendments.²²⁸ It appears a fresh Constitutional amendment may be necessary to ensure effective devolution of powers to local bodies towards fulfilling the Constitutional mandate.

8.3 Issues in Intergovernmental Relations

8.3.01 Articles 243G and 243W are sometimes read to mean that they leave it to the discretion of States whether or not to devolve any powers and functions to the local bodies. Such a reading makes the Constitutional Amendments superfluous defeating the whole purpose of the exercise. Although States have the discretion to decide and vary the subject matters in respect of which it wants to devolve powers and responsibilities, States are not free to decide not to devolve anything at all. After all, local bodies have been given the status of "self-government" which term unfortunately has not been defined in the Constitution.

8.3.02 In *Ranga Reddy District Sarpanches' Association v. Government of Andhra Pradesh*²²⁹, the Andhra Pradesh High Court held Article 243G to be only an enabling

²²⁷ See also Nirmal Mukerji, "The Third Stratum", in *Decentralization and Local Politics* (P.C. Mathur et al. eds., New Delhi: Sage Publications, 1999) at 72 (suggesting that the devolution of powers to local bodies should be done on the principle of subsidiarity).

²²⁸ Saila K. Ghosh et al., "Dependency versus Autonomy: Identity Crises of India's Panchayats", 38(38) *Economic and Political Weekly* 3984 (2003) at 3988; Vinod Vyasulu, "Transformation in Governance since 1990s: Some Reflections", 39(23) *Economic and Political Weekly* 2377 (2004); Nandana Reddy et al., "Striking at the Roots of Democracy", 42(18) *Economic and Political Weekly* 1601 (2007)

²²⁹ 2004(2)ALD1

provision, giving states the absolute discretion to decide what powers should be devolved and what constitutes 'self-government'.²³⁰ Justice Raghuram, however, in his dissent held that the 73rd Amendment, despite the inconclusiveness of the language in Article 243G, signals a "discernable autonomy in the area of governance, in identifying local needs, aspirations, [and] prioritizing local development choices..." In his view, Article 243G is not merely an enabling provision as suggested by the majority, but a constitutional directive that "cannot be subverted by the state legislative exercise".

8.3.03 In *B.R. Jayanth v. State of Karnataka*²³¹, the Karnataka High Court held that it is the prerogative of the District Panchayat alone to prepare and submit the priority list of works relating to roads and buildings for approval of the government, and thus attempted to take a middle ground. In *Gujarat Panchayat Parishad v. State of Gujarat*²³², the Supreme Court dealt with the powers of the District Development Officer, a State Government official exercising all executive powers of the District Panchayat, *vis-à-vis* the powers of the President of District Panchayat (an elected representative) under the Gujarat Panchayats Act, 1993. The petitioners claimed that this was inconsistent with the constitutional set-up envisaged by the 73rd Amendment, and sought a directive from the Court compelling the District Development Officer to consult the President and/or the District Panchayat in these matters. However, the Apex Court held that the issue had no bearing at all on the constitutional status of local self-government. The Supreme Court observed that "Article 243G makes no change in the essential feature of the Panchayat organization".²³³ Unfortunately, it did not delve into the scope of the expression 'institutions of self-government' used in Article 243G and in the definition of Panchayat in Article 243(d).

8.3.04 The interpretational question here is whether Article 243G/243W controls Articles 246(3) and 162, or is it vice versa? Articles 243G and 243W are made "subject to the provisions of the Constitution", which could be read to imply that it cannot be used to curtail the authority of the State to legislate on matters within its competence. But there is also Article 245 which also makes the legislative power of States subject to other provisions of the Constitution.

²³⁰ This has also been suggested by some commentators. See, for example, T.N. Srivastava, "Local 'Self' Government and the Constitution", 37(30) Economic and Political Weekly 3190 (2002) at 3190, 3194 (stating that "the implications of the constitutional changes brought out by these amendments have not been understood properly, leading to expectations which do not emanate from it").

²³¹ 2006(6)KarLJ623

²³² 2007(9)SCALE452

²³³ *Ibid*, at para 26 (C.K. Thakker J)

8.3.05 One way to construe these provisions harmoniously is that the "subject to" clause in Articles 243G and 243W ensures that state devolves only those matters which are within its legislative competence, while that in Article 245 ensures that the plenary power of the state legislature is not used to erode the purpose of Article 243G/243W, namely devolution of powers (as opposed to delegation), so that State Government confine itself only to matters of policy that cut across the domain of local governments.

8.3.06 A more nuanced way of construing the provisions harmoniously would be by applying the principle of subsidiarity. Subsidiarity essentially means that what can best be done at the lower levels of government should not be done by higher levels.²³⁴ Although it does not find express mention in Article 243G/243W,²³⁵ courts can possibly read it into these provisions. One possible route to achieve such a result, for example, could be to utilise imaginatively the expression "as may be necessary to enable them [Panchayats/Municipalities] to function as institutions of self-government". Another is the idea that the term "self-government" inheres in itself the principle of subsidiarity. The Commission is inclined to think that either way the issue must be resolved if necessary by a Constitutional amendment.

8.3.07 There are a few cases dealing with the kind of problem that is being discussed in this part. What is really interesting about them is that inadvertently, perhaps intuitively, they seem to have relied on some notion of subsidiarity. For example, when the question arose in *T.J. Manijamma v. State of Karnataka* whether²³⁶ State Government notifications constituting, reconstituting, varying the composition of the committees for selecting *Anganwadi workers* under the Integrated Child Development Scheme and laying down guidelines and procedure for such selection amounts to an unwarranted interference with the functioning of the Panchayati Raj Institutions which were empowered with respect to implementation of women and child welfare programme and promotion of school health and nutrition programme, the Court decided that the State Government should restrict its functioning only to the aspects of coordination and supervision. This meant that it could lay down uniform guidelines for the selection process across all *Anganwadi* centres in the scheme, but not interfere in the actual process of implementation of the scheme by choosing members of the selection committee etc.

²³⁴ A classic formulation of the principle is embodied in the Maastricht Treaty in Article 3b: "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."

²³⁵ The Administrative Reforms Commission has suggested an amendment to Articles 243G and 243W which expressly incorporates the principle of subsidiarity.

²³⁶ 2008(5)KarL1392.

8.3.08 In *N. Sumathi Reddy, Chairman, Zilla Parishad v. Government of Andhra Pradesh*,²³⁷ the constitution of body by the State government for selection of teachers to posts for schools under the control of Panchayats was challenged as being contrary to Article 243G. The A.P. Panchayat Raj Act had entrusted functions relating to "education, including primary and secondary schools" to Panchayats. After holding that the transfer of powers and responsibilities in respect of education does not denude the State executive of its power to act under Entry 25 in List III of Schedule VII (relating to education) read with Article 162 of the Constitution, the Andhra Pradesh High Court observed that even if a law grants rights of self-governance in the matters of education to Panchayats, it is perfectly conceivable that the right of selection of teachers including the fixation of their qualifications is retained by the government body in order to maintain uniformity of educational standards in all educational institutions of the State.

8.3.09 Again, in a similar case, the Rajasthan High Court disallowed a challenge to the conduct of a uniform written test for the selection of primary school teachers working under the Panchayat by the Rajasthan Public Service Commission.²³⁸

8.3.10 In all these cases, the court has allowed all things which are most efficiently done at the state-level, like laying down uniform implementation guidelines or conducting selection tests, to be done by the State Government, but not something like selection of beneficiaries or grass root level functionaries of a particular welfare scheme, which are best done at the local level. This is not strictly subsidiarity, because subsidiarity is a bottom-up approach, but it could be regarded as a "top-down" version of it.

8.3.11 The Commission is of the view that the scope of devolution of powers to local bodies to act as institutions of self-government should be constitutionally defined through appropriate amendments, lest decentralised governance should elude realization indefinitely. The approach should be on the principle of "subsidiarity" which is implicit in the scheme of Constitutional Amendment and letting the State Government confine itself only to matters of policy that cut across the entire domain of local governments. Articles 246(3) and 162 have to be read down in the light of the Amendment giving meaning and content to the expression "as may be necessary to enable them (Panchayats and Municipalities) to function as institutions of self-government".

²³⁷ 1997(3)ALT469

²³⁸ Richhpal Singh v. State of Rajasthan, 2005(1)WLC548

8.4 Parastatals and Panchayats

8.4.01 The other question is with regard to parastatals and other institutions created by the State Government whose functional domain is in direct competition with that of local bodies. These institutions are a classic example of delegation. It has been suggested that effective devolution requires that such parallel institutions and parastatals must be wound up, or put under local government control.²³⁹ Such a stance is not constitutionally infeasible as it is arguable that creation of such institutions runs counter to the purpose of the 73rd and 74th Amendment generally, and Article 243G/243W specifically. The argument is slightly easier in case of parastatals constituted before the Amendments by courtesy of Articles 243N and 243ZF. They provide that notwithstanding anything in Part IX/IXA, any provision of any law relating to Panchayats/Municipalities in force in a State immediately before the 73rd/74th Amendment Act, 1992, which is inconsistent with Part IX/IXA shall not continue to be in force after one year after the Amendment Acts until amended or repealed.

8.4.02 The Supreme Court had an opportunity to make an authoritative declaration on this issue in *Shanti Patel v. State of Maharashtra*,²⁴⁰ but it confined itself to facts of the case, saying that unless a statute is enacted by the State legislature in terms of Article 243W transferring the function of town planning and regulation of land use to urban local bodies, existing state laws (in this case, the Maharashtra Regional and Town Planning Act, 1966) continue to govern the field.

8.4.03 The High Courts, on the other hand, don't seem to think that laws relating to parastatals are laws "relating to Panchayats/Municipalities" or "inconsistent" with Part IX or IXA, but rather that they are supplemental to local government legislations of the state. There are two cases- one in relation to the Bangalore Development Authority,²⁴¹ and another in relation to the Jaipur Development Authority²⁴² both of which vindicate the existence of these authorities even after the 74th Constitutional Amendment, pursuant to which the state had devolved functions like local town planning and construction of roads and streets to municipalities. These decisions are premised on understanding Article 243W as not conferring exclusive power to urban local bodies to deal with matters entrusted to them, and not denuding the state legislature of its power under Article 246(3) of the Constitution to legislate on matters covered in the State and Concurrent List of Schedule VII.

²³⁹ Abdul Aziz, "Democratic Decentralisation: Experience of Karnataka", 35(39) Economic and Political Weekly 3521 (2000) at 3526

²⁴⁰ AIR 2006 SC 1104.

²⁴¹ Commissioner, Bangalore Development Authority v. State of Karnataka, 2006(1)KarLJ1

²⁴² Ram Chandra Kasliwal v. State of Rajasthan, 2004(4)WLC17

8.4.04 The legal relationship between the state and local government that seems to have been intended by the 73rd and 74th Amendment to the Constitution, particularly Article 243G/243W is part devolutionary, and part delegatory. It is devolutionary to the extent that the creation of local government, endowing them with some essential powers, and non-interference in the exercise of those powers by the state government are necessary.

8.5 Conclusions and Recommendations

8.5.01 The detailed analysis and recommendations of the Commission on decentralized governance under the 73rd and 74th Constitutional Amendments are discussed elsewhere in the Report. However, an aspect of Constitutional relevance on intergovernmental relations arising out of the 73rd Amendment alone is stated here for appropriate action through a fresh Constitutional Amendment.

8.5.02 Relationship of Article 246(3) and 162 with Articles 243G and 243W

Articles 243G and 243W are sometimes read to mean that they leave it to the discretion of States whether or not to devolve any powers and functions to the local bodies. Such a reading makes the Constitutional Amendments superfluous defeating the whole purpose of the exercise. Although States have the discretion to decide and vary the subject matters in respect of which it wants to devolve powers and responsibilities, States are not free to decide not to devolve anything at all. After all, local bodies have been given the status of "self-government" which term unfortunately has not been defined in the Constitution.

The Commission is of the view that the scope of devolution of powers to local bodies to act as institutions of self-government should be constitutionally defined through appropriate amendments, lest decentralised governance should elude realization indefinitely. The approach should be on the principle of "subsidiarity" which is implicit in the scheme of Constitutional Amendment and letting the State Government confine itself only to matters of policy that cut across the entire domain of local governments. Articles 246(3) and 162 have to be read down in the light of the Amendment giving meaning and content to the expression "as may be necessary to enable them (Panchayats and Municipalities) to function as institutions of self-government".

CHAPTER 9

OBLIGATIONS OF STATES AND UNION IN RESPECT OF SUBORDINATE COURTS

CONTENTS

Sections/Headings	Para Nos.	Page Nos.
9.1 The Problem in Context	9.1.01-9.1.03	183-184
9.2 Separation of Powers, Judicial Independence and Doctrine of Inherent Powers	9.2.01-9.2.02	184
9.3 Neglect of Obligations under Article 247 and Entry 11-A of List III	9.3.01-9.3.04	184-187
9.4 Why Art. 73 cannot be Read to Avoid Obligation of Centre to Fund State Courts	9.4.01-9.4.03	187-189
9.5 Instituting Mechanisms for Preparing Judicial Budgets for Centre-State Sharing of Burden	9.5.01-9.5.02	189-190
9.6 Recommendations	9.6.01-9.6.08	190-192
9.7 Conclusions and Recommendations	9.7.01-9.7.02	192-193

9

OBLIGATIONS OF STATES AND UNION IN RESPECT OF SUBORDINATE COURTS

9.1. The problem in Context

9.1.01 Judiciary is dependent on the Executive for providing the budgetary resources for its efficient functioning. According to Article 146(3), "The administrative expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of India, and any fees or other moneys taken by the Court shall form part of that Fund". Similarly with respect to expenses on High Courts Article 229(3) States : "The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the Court shall form part of that Fund."

9.1.02 While the budgets of Superior Courts are thus provided for by the Constitution itself, the Constitution is silent on the expenses of the Subordinate Courts leaving it to the individual States to determine the judicial budget in consultation with the High Court. The bulk of litigation in the country arise and end with the Subordinate Courts which together are contributing to over 90 per cent of arrears in the judicial system. Nearly Three Hundred and Forty Central legislations referable to the Union List and Concurrent List are being administered by the Courts established by the State Governments.²⁴³ The present allocation for judiciary under the ninth, tenth and eleventh Five Year Plans are 0.0 percent, 0.078 percent and 0.07percent respectively of the Plan Outlays which is totally insufficient for any expansion of the Court System in the country.

9.1.03 The consequence of the above approach to judicial planning and budget is the long pendency of cases in the system and a virtual suspension of access to justice for the millions of litigants particularly of the disadvantaged sections of society. The States blame the Centre for not providing adequate funds and the Centre seem to think it is not part of its responsibility to support the Subordinate Courts. In the process the Subordinate Courts which service the problems of the poorer sections of society are neglected with the affluent classes including the Government crowding out the less affluent

²⁴³ Report of Task Force on Judicial Impact Assessment, Vol.I Department of Justice, Govt. of India (2008) p.1

groups. Of late, it has been noticed that the docket explosion and inordinate delay in judicial proceedings have started negatively impacting the economic development and welfare of the people as well. In this context, the Commission felt it appropriate to look at the issue from the perspective of Centre-State relations.

9.2 Separation of Powers, Judicial Independence and Doctrine of Inherent Powers

9.2.01 In the report of the Judicial Impact Assessment Committee (2008) it is pointed out that invoking the "inherent powers" doctrine, the Supreme Court has been issuing several directions to the Executive since 1992 for providing necessary infrastructure and funds for the judicial offices, Courts and judiciary in general. The Court even asked the Government that income from Court fees should be spent on administration of justice.²⁴⁴ The States and the Centre were asked to increase the number of judges to 50 per million population in 5 year's time. In fact, pursuant to the directions, the Government appointed the first National Judicial Pay Commission and according to its recommendations revised the pay and service conditions of judges. Similarly, on the directions of the Supreme Court, the Government established Fast Track Courts and continued them²⁴⁵ which again was done under the "inherent powers" doctrine.

9.2.02 The "inherent powers" doctrine was invoked in other jurisdictions also to assert institutional independence of the judiciary and to claim the right to pass orders seeking funds from the Executive and Legislative branches to meet its Constitutional obligations in a reasonable way. As a general principle, it is argued, that under the doctrine of separation of powers, it is not open to any one of the three branches to underestimate the legitimate needs of the other branches so as to make it difficult for those branches to discharge their Constitutional obligations satisfactorily.²⁴⁶

9.3 Neglect of Obligations under Article 247 and Entry 11-A of List III:

9.3.01 The Judicial Impact Assessment Report made out a strong legally binding case for adequate financial support from the Centre to the Subordinate Courts and it is worth reproducing from the Report on the subject: ²⁴⁷

"It is well known that as of today, there are more than 2.50 crores of cases (25 million) pending in our Subordinate Courts, about 35 lakh cases pending in the High Courts (3.5 million) and are being administered by about 13000

²⁴⁴All India Judges Association V. Union of India, AIR 1992 S.C. 165

²⁴⁵Brij Mohan Lal V. Union of India AIR 2002 S.C. 2096 and (2004) 11 SCC 244

²⁴⁶Judicial Impact Assessment Report (2008) p.21.

²⁴⁷ Ibid p.40-41

Judicial Officers in the trial courts, about 700 Judges in the High Courts and 26 Judges in the Supreme Court of India. It is equally well known that while we have around 13 Judges per million population, advanced democracies have around 100 to 150 Judges per million. Even going by the ratio between the number of cases and the number of Judges, we perhaps have the highest ratios in the world. Trial Judges have between 50 to 100 cases listed before them everyday. There are Magistrates, particularly in Cities, who have more than 10,000 cases in each of their courts.

Further, the Central Government has not established sufficient number of courts for administering Central Laws falling under subjects listed in the Union List and Concurrent List of Schedule-VII of the Constitution of India and the entire burden of administering the Central Laws has been thrown upon the courts established by the State Governments. In 1976, the subject of **"Administration of Justice, Constitution and Organization of all Courts, except the Supreme Court and the High Courts"** was brought into the Concurrent List under a new Entry 11-A. By virtue of this amendment, it is obvious that the responsibility became that of the Union Government and the State Governments. But practically, nothing has been done by the Union Government by way of financial support to the Subordinate Courts, compared to the magnitude of the problem.

Further, under Art.247 of the Constitution of India, the Union Government has power to establish additional courts for the purpose of administering Central Laws. Hardly, any courts have been established by the Central Government to administer 340 or more Central Acts, arising out of the subjects mentioned in the Union List and Concurrent List, as pointed out by the Justice Jagannatha Shetty Commission.

In addition, the allotment for the Judiciary in the Five-Year Plans has been meagre. In the last two Five-Year Plans, the allocation was 0.071 percent, 0.078 percent and in the present Plan it is 0.07 percent. With such small allocations for the judiciary, it is not clear how the situation can be improved."

9.3.02 The Commission for Review of the Working of the Constitution of India (2002) in its report to the Government said as follows:

"The entire burden of establishing Subordinate Courts and maintaining subordinate judiciary should not be on the State Governments. There is a concurrent obligation on the Union Government to meet the expenditure for subordinate courts. Therefore, the Planning Commission and the Finance Commission must allocate sufficient funds from national resources to meet the demands of the State judiciary in each of the States".

9.3.03 If the scheme of division of legislative powers and the provisions of Article 117 Clause (3) together with Article 207 Clause (3) are analyzed, it becomes obvious that the expenditure on the Subordinate Courts where Parliament legislates on subjects in List I should be borne by the Union Government, whereas for laws made by the State Legislature on subjects in List II, such expenditure should be borne by the State Government. On legislation in respect of subjects in List III (Concurrent List) is concerned the natural conclusion would be that if the legislation is brought in by the Parliament such expenditure must be borne by the Union Government and where such legislation is brought in by the State legislature, such expenditure must be borne by the State Governments. The Judicial Impact Assessment Committee (JIAC) report concluded that, "...In as much as these expenditures relate to the sharing of the burden of the additional cases by the Subordinate Courts, the concerned sponsoring Ministry (of fresh legislation), be it the Ministry of the Central Government or the State Government, that Ministry must bear the expenditure on the Subordinate Courts and make adequate provision in advance, for meeting the expenditure"²⁴⁸ The present practice on the part of Union Ministries is to say in the Financial Memoranda attached to Central Bills that the expenditure on the Courts will be borne by the State Governments. This is the procedure adopted whether the Bill relates to a subject in List I or in List III. This, the JIAC Report contended is contrary to the scheme of the Constitution. For example, the report cited how the introduction of Section 138 into the Negotiable Instruments Act, which is an Act referable to Entry 46 of List I of Seventh Schedule, has given rise to Twenty Five lakh cases within a short period and the entire burden to deal with these cheque bouncing cases on the criminal side was thrown upon the Courts established by the State Governments.

9.3.04 The obligation of the Centre in this regard is described in the report as follows:

²⁴⁸ Ibid. p.60-61

"Under Art. 247 of the Constitution is provided that Parliament may by law, provide for the establishment of any additional courts for the better administration of laws made by Parliament or of any existing laws with respect to the matter enumerated in the Union List. No courts at the Subordinate level, worth mentioning, have been established by the Central Government to deal with litigation, civil and criminal, arising even out of laws made by Parliament on subjects in List-I. Further, Art. 247 is in addition to the responsibility of the Central Government to establish courts for the enforcement of the laws made by the Parliament on the subjects referred to in the Concurrent List.

Coming to the obligation of Central Government in relation to laws made on the subjects in the Concurrent List (List-III), the position after the 42nd Amendment of 1976 to the Constitution, under which the subject of "Administration of Justice: constitution and organization of all Courts except Supreme Court and the High Courts" was brought to List-III as Entry-11A, has not been given effect to by the Union Government. Earlier, before the Amendment of 1976, this subject was in Entry-3 of the State List (List-II). It is obvious that once the subject is shifted from List-II to List-III, the Union Government has to bear the additional financial burden that falls on the State by virtue of Central Legislation made on a subject in List-III.

The Commission for Review of the Constitution of India (as stated earlier) and the Jagannath Shetty Commission have also made similar observations as to the responsibility of the Central Government for providing funds for establishment of subordinate courts to administer laws made under the Union List and the Concurrent List."

9.4 Why Article 73 cannot be read to avoid the Obligation of Centre to fund State Courts?

9.4.01 There is an argument advanced that setting up Courts in the State is not within the scope of the executive power of the Union. Article 73 lays down the extent of executive power of the Union as follows:

"Art.73.(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend-

- (a) to the matters with respect to which Parliament has power to make laws, and

- (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State... to matters with respect to which the Legislature of the State has also power to make laws.

- (2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution."

9.4.02 Elaborating why this Article cannot be read to avoid the obligation of the Centre *vis-à-vis* the Subordinate Courts, the JIAC Report said:²⁴⁹

"The purpose of the proviso below clause(1) of Art.73 is that the Central Government should not exercise Executive powers in relation to the matters referred to in the entries in the Concurrent List in order to avoid conflict of orders of the Central Government and the State Government in this area. The said proviso has no relevance while dealing with the question of Central Government funding the subordinate courts established by the State Government, where the subordinate courts are implementing the laws made by the Parliament on subjects in the Concurrent List.

While it is true that Art.73 states that the Executive power of the Central Government will not extend to a subject in the Concurrent List unless such Executive power is conferred by the Constitution or by law made by the Parliament, the present issue does not relate to the exercise of Executive power by the Central Government in the sphere of the subjects enumerated in the Concurrent List. Here we are concerned with the consequences of Central Legislation on the subjects in the Concurrent List which throw burden on the Courts established by the State Governments. The simple point is that Central Government cannot make such laws without providing adequate budgetary support from the Central Government. Therefore, the proviso below clause(1) of Art.73 is wholly irrelevant in that context and cannot be interpreted

²⁴⁹ Ibid pp.64-65

to absolve the Central Government from providing funds necessary for implementation of Central laws on subjects in the Concurrent List.

Further, in view of Entry-11A of List-III introduced by the 42nd Amendment of 1976, the responsibility which belonged to the State Governments under Entry 3 of List II has been shifted to Concurrent List. Therefore, the Union Government must bear the financial burden of the Subordinate Courts in respect of cases arising out of Central Laws, whether made on subjects in List I or List III. In our view, that is the proper interpretation of Article 73. Further, the opening words of Article 73(1), namely, "Subject to the provisions of this Constitution" are sufficiently wide to make us refer to Entry 11A of List-III.

Therefore, as stated above, the sponsoring Ministry, be it the Central or the State Ministry concerned, must bear the additional financial burden of the Subordinate courts. The Central Government must bear the expenditure of the Subordinate Courts arising out of litigation from statutes made by Parliament on subjects referred to in List I and List III. The State Governments must bear the expenditure of the Subordinate Courts arising out of statutes made by the State Legislature on subject referred to in List II and List III. The present system under which the Union Executive is throwing the entire financial burden of enforcing of Central Laws made under List I and List III is contrary to the provisions of the Constitution of India and the constitutional scheme."

9.4.03 This Commission fully endorses the interpretation of Articles 73 and Art. 247 read with Entry 11A of List III by the Judicial Impact Assessment Committee and recommends to the Central Government to share the burden on Subordinate judiciary with States as required by the Constitution. This would go a long way not only in improving the efficiency of administration of justice but would directly benefit the common man to avail of his Constitutional right of access to justice.

9.5 Instituting mechanisms for preparing judicial budgets for Central-State sharing of burden

9.5.01 A related issue which arises in the implementation of the sharing of burden on the Subordinate Courts is about the calculation of expenditure and the preparation of respective budgets. The judicial system is an integrated unified structure and it is not wise to disturb it. What is required is an appropriate mechanism for preparing the budget of the High Courts and Subordinate Courts of the judiciary which will have constant

interaction between the Judiciary and the Executive at State as well as Central levels. Planning and budgeting of Courts requires special expertise both on the judicial and executive sides. The judicial impact assessment is part of that exercise. Improved management through proper budgeting is one dimension of the concept of independence of judiciary and its financial autonomy. In this regard, the functions of judicial budgeting are four-fold:

1. Allocating resources in such a way to achieve the desired objects,
2. Holding the sub-units who operate the system accountable for efficient and effective use of resources,
3. Controlling expenditures to avoid unnecessary expenditure and to maximize outcomes, and
4. Providing leverage to force effective and efficient management

9.5.02 To be able to organize the above functions after proper consultation between the Judiciary and the Executive, the Commission to Review the Working of the Constitution proposed an institutional mechanism which is worthy of adoption by the Centre and the States. The Commission recommended the establishment of Judicial Councils for preparing judicial budgets with inputs from experts. The Commission said :

"(129) A 'Judicial Council' at the apex level and Judicial Councils at each State level of the High Court should be set up. There should be an Administrative Office to assist the National Judicial Council and separate Administrative Offices attached to Judicial Councils in States. These bodies must be created under a statute made by Parliament. The Judicial Councils should be in charge of the preparation of plans, both short term and long term, and for preparing the proposals for annual budget.

(130) The budget proposals in each State must emanate from the State Judicial Council, in regard to the needs of the subordinate judiciary in that State, and will have to be submitted to the State Executive. Once the budget is so finalized between the State Judicial Council and the State Executive, it should be presented in the State Legislature."²⁵⁰

9.6 Recommendations

9.6.01 The Government of India, in view of Entry-11A of the Concurrent List and Art. 247 of Constitution of India and the general scheme of the Constitution, must

²⁵⁰ See Chapter Seven, The Judiciary, available at <http://lawmin.nic.in/ncrwc/finalreport/V1Ch7.htm>

have such judicial impact assessments made and make necessary financial provision, at the stage of the Bills, for implementation of Central laws in respect of subjects in the Union List or the Concurrent List (of the VII Schedule of the Constitution of India), in the Courts. The State Governments should not be made to bear the financial burden of implementing Central laws passed under the Union List or Concurrent List, through the Courts established by the State Governments.

9.6.02 The State Governments must likewise make adequate financial provision for meeting the expenditure of the Courts, at the stage of the Bills, for the implementation of the Laws to be made by the State Legislature with respect to subjects in the State List and Concurrent List.

9.6.03 Central Government must establish additional courts under Art. 247 of the Constitution of India for implementation of Central laws made in respect of subjects in the Union List or in respect of pre-constitutional laws referable to subjects enumerated in the Union List. In addition, the Central Government must establish additional Courts at its expense for implementation of Laws made by the Parliament in the Concurrent List in view of Entry-11A of the Concurrent List.

9.6.04 The expenditure on the courts in respect of fresh cases that may be added to the "Supreme Court" and the "High Courts" by new laws must be reflected in the Financial Memoranda attached to the Central Bills under Clause (3) of Art. 117 or attached to the State Bills under Clause (3) of Art. 207 of the Constitution of India, as required by the respective Rules of Business.

9.6.05 The expenditure in respect of fresh cases that may be added to the "Subordinate Courts" must be provided and met by the respective Central or State Ministries which sponsor the Bills in Parliament or in the State Legislatures, as the case may be.

9.6.06 The Planning Commission and the Finance Commission must, in consultation with the Chief Justice of India, allocate sufficient funds for the Judicial Administration in the Country, particularly in regard to the infrastructure, expenditure on judicial officers and staff in the Subordinate Courts and the High Courts to realize the basic human rights of 'Access to Justice' and 'Speedy Justice'.

9.6.07 "Judicial Councils" at the State and Central levels should be established involving the Executive and the Judiciary to prepare judicial budgets for approval of the

respective Legislature. Those Councils should decide on the proportion of sharing the budget expenditure between Centre and States on the basis of the data of the workload of Courts under Lists I, II and III.

9.6.08 The Commission is of the view that Central Government must make an assessment of the number of courts needed for efficient adjudication of disputes arising out of Central laws and establish the required number of Additional Courts as stipulated under Article 247 of the Constitution.

9.7 Conclusions and Recommendations

9.7.01 Governments' obligation to support court expenditure when laws are made

The Financial Memorandum attached to Bills usually do not provide for adjudication costs involved in enforcement of the new law. This puts the Subordinate Courts with little or no resources to cope up with additional workloads directly resulting from new legislations put on the Statute Book. An expert Committee has recommended to the Government that judicial impact assessment should be made whenever legislations are proposed and the Financial memorandum should reflect judicial costs as well. This Commission endorses the proposal.

The Commission is of the view that in view of Article 247 read with Entry 11A of the Concurrent List, Government of India is constitutionally obliged to make financial provision for implementation of Central laws through State Courts in respect of subjects in Lists I and III of the Seventh Schedule.

9.7.02 Judicial Councils to advise Centre-State share in judicial budgets

Enabling the justice system to discharge its functions efficiently is the joint responsibility of Central and State Governments. While the administrative expenses of the Supreme Court and High Courts are charged upon the Consolidated Funds of the Centre and States respectively, there is no such financial arrangement guaranteed by the Constitution for subordinate judiciary. Judicial planning and budget making ought to be undertaken jointly by the judiciary and the executive for which some joint forum needs to be established. An expert committee set up by the Union Law Ministry recommended the setting up of "Judicial Councils" at the State and Central levels for the purpose which the Commission endorses. These Councils should not only prepare the judicial budget for

approval by the Legislature but also decide on the proportion of sharing the budget expenditure between Centre and States on the basis of the data on the workload of courts under Lists I, II and III.

The idea is not to make the States bear the entire expenditure on Subordinate Courts which devote substantial time and resources to enforce the laws made by Parliament under List I and List III.

Finally, the Commission is of the view that Central Government must make an assessment of the number of courts needed for efficient adjudication of disputes arising out of Central laws and establish the required number of Additional Courts as stipulated under Article 247 of the Constitution.

CHAPTER 10

INTERGOVERNMENTAL RELATIONS REVISITED: TOWARDS A FRESH BALANCE OF POWER

CONTENTS

Sections/Headings	Para Nos.	Page Nos.
10.1 Some Macro-Perspectives in Constitutional Practice	10.1.01-10.1.03	197-198
10.2 An Appraisal of the Status of the Federal Idea in Intergovernmental Relations in India	10.2.01-10.2.04	198-200
10.3 Legislative Relations and the Federal Principle	10.3.01-10.3.03	200-201
10.4 Executive Federalism and Centre-State Relations	10.4.01-10.4.10	202-204
10.5 Fiscal Federalism and Centre-State Relations	10.5.01-10.5.06	204-206
10.6 Forums for Co-ordination of Inter-governmental Relations	10.6.01-10.6.05	206-208
10.7 The Need to strengthen and Empower the the Inter-State council	10.7.01-10.7.08	208-210
10.8 Conclusions and Recommendations	10.8.01-10.8.04	210-213

10

INTERGOVERNMENTAL RELATIONS REVISITED : TOWARDS A FRESH BALANCE OF POWER

10.1 Some Macro Perspectives in Constitutional Practice

10.1.01 In the concluding Chapter of this volume, we propose to look at available evidence on the working of the Constitutional scheme in the changing environment of the polity, the economy and the people's aspirations for a better quality of life and ask ourselves the question whether a fresh balance of power is needed to take governance forward on the path set by the Constitution. In this regard, we are of the firm opinion that the framers of the Constitution taking note of the pluralistic identities of the people and diverse historical characteristics of the polity of different regions have correctly come to the conclusion that a federal system alone can take the country forward as a united, democratic republic. Unity and integrity of the nation was their primary concern and they were wise enough to realize that a strong federal government alone can manage it, given the background in which the republic was born amidst the forces at work at that time. The geo-political security scenario has worsened since then and the Commission is of the opinion that nothing should be done to change the balance of power between the Union and the units which even remotely can disturb that balance *vis-à-vis* national security to the disadvantage of the Union. In fact, the need is to further strengthen the Union when it comes to the security question, both internal and external and the Commission did make certain recommendations in that direction.

10.1.02 The Commission, however, is convinced that the tilt in favour of the Union has increasingly accentuated over the years even outside the security needs leading to over-centralisation even in developmental matters. These emerging contradictions in federal constitutional practice have to be addressed early in the interest of not only better Centre-State relations but also to sustain the very unity and integrity for which the tilt in favour of the Centre was originally conceived.

10.1.03 The aggravation of the tilt in the Constitutional scheme of distribution of powers is noticed not only in the area of legislative relations but also in respect of

administrative and financial relations. For a variety of reasons, the States have not been able to assert and retain their autonomy or seek their legitimate claims through available channels. There has been distortions in governance which went in favour of certain states while others could do nothing about it. Available forums for ventilating grievances were found inadequate to correct the distortions. Clearly after the 73rd and 74th Constitutional Amendments, larger share of powers in the socio-economic sectors deserve to be shifted to the States for further devolution to Panchyats and the system should be strengthened to discharge responsibilities to the people particularly in matters covered under Part IV, the Directive Principles of State Policy. In areas such as National Security including grave internal security issues affecting the security of the country as a whole as well as in Environment matters which impinge upon sustainable development of the country's natural resources, the Centre understandably has to have a larger role. This balancing of distribution of powers can largely be accomplished through administrative arrangements supported by adequate devolution of finances for which the Finance Commission is a key institution. There may, however, be certain situations where constitutional amendments may be needed to tilt the balance in socio-economic matters in favour of the States to strengthen them to discharge their functions better. While security concerns might warrant greater powers to the Union, on the development front (education, health etc.) the Centre should respect the autonomy of the other two levels of government and consciously avoid the tendency to centralize powers and functions. Its role is to be limited in laying down policies, devolving funds and facilitating co-ordination leaving implementation entirely to States and Local Bodies.

10.2 An Appraisal of the Status of the Federal Idea in Intergovernmental Relations in India

10.2.01 We have already noted that the country's size, multiple identities, democratic imperatives, administrative convenience etc. have played a key role in structuring the federal arrangement in India including the way powers are divided between the Centre and States. However, the way the Constitutional scheme was played out in recent decades defies the constitutional distribution of competences and has engendered the federal idea itself. An extremely complex and diverse party system and the strange alliances amongst them at the State and Central levels are said to be partly responsible for this confusing scenario of shared governance in the country. Intergovernmental relations (who does what and how) have assumed greater complexity with the advent of globalization and economic liberalization at the national level and administrative decentralization introduced by the 73rd and 74th Constitutional amendments at the local level. Where does the federal arrangement stand today and what are its prospects for good governance in future? In the responses received by the Commission from the States to its Questionnaire, four major

States from different regions of the country have expressed serious reservations to the existing practice in varying degrees. The general observation in the responses of the stakeholders indicate that there has been increasing encroachment by the Centre into the powers of the States through direct and indirect methods. This has resulted in erosion of the federal structure to a significant extent and the States are genuinely aggrieved of the situation.

10.2.02 The study that the Commission made through a reputed University on how the federal arrangement and intergovernmental relations worked over the years pointed out several instances by which the federal balance got disturbed. There is no doubt that the Constitution makers have intended India to be a federal state with a strong centre. The contours of this bias towards the Centre were however unclear leading to judicial interpretations which have not been consistent. The Supreme Court did say that federalism is part of the basic feature of the Constitution and interpretation of its provisions shall not whittle down the powers of the States. The Supreme Court reiterating the position observed in *Kuldip Nayyar's* case²⁵¹ as follows:

"The fact that under the scheme of our Constitution, greater power is conferred upon the centre vis-à-vis the State does not mean that States are mere appendages of the centre. Within the sphere allotted to them, States are supreme. The centre cannot tamper with their powers. More particularly, the Courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States...must put the Court on guard against any conscious whittling down of the powers of the States. Let it be said that the federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle the outcome of our own historical process and a recognition of the ground realities. ...enough to note that our Constitution has certainly a bias towards center vis-à-vis the States (*Automobile Transport (Rajasthan) Ltd. V. State of Rajasthan*). It is equally necessary to emphasise that Courts should be careful not to upset the delicately crafted constitutional scheme by a process of interpretation".

10.2.03 This is a definite shift on the part of the Supreme Court from the position it took earlier in *Kesoram Industries* case²⁵² where the Court said:

"Tilt in favour of the Centre is required to be construed having regard to the importance of the subject matter of Parliamentary legislation and the impact and practical effect of

²⁵¹ *Kuldeep Nayyar v. Union of India* (2006) 7 SCC1

²⁵² *The State of West Bengal v. Kesoram Industries Ltd. And Ors* (2004) 10 SC201

the inroad of the State laws entrenching upon the legislative field occupied by Parliament. It would therefore not be correct for the Superior Courts to advocate the theory that while interpreting the Constitution, courts should lean in favour of the States. Federal character of the Union of States in India do not support the said theory."

10.2.04 The idea of co-operative federalism was repeatedly highlighted in several judgements of the Supreme Court and High Courts even while recognizing a tilt towards the Centre. In *Ranga Reddy District Sarpanches' Association V. Government of A.P. & Ors*²⁵³, the Court said that Federalism demands a special mode of political and social behaviour, involving a commitment to partnership and active co-operation on the part of individuals and institutions, at the same time preserving their own integrity..... Though the Panchayats are not strictly part of the federal structure, they nevertheless constitute an integral component of some measure of vertical division of governance power. The Panchayats with the constitutionally defined character of being "Self-governments" are now legitimate inhabitants in their own right to share in some measure, the Constitution space. The Union and States are required to recognize, respect and enable this spatial freedom and autonomy accorded to these entities under the Constitutional dispensation - post 73rd Amendment"

10.3 Legislative Relations and the Federal principle

10.3.01 Legislation by the Centre and the States sometimes overlap when the Seventh Schedule entries are related and possible conflicts in this regard are resolved by the judiciary with reference to legislative competence. Conflicts between entries in the Concurrent List are resolved by applying the doctrine of repugnancy under Article 254(1). In cases relating to Education, Courts have found creative rules to determine repugnancy of state legislation including the pith and substance doctrine. However, there are certain critical areas where the Centre has been pro-active in legislating in matters which fall in the States' jurisdiction as well. These include areas of security, education, employment and environment. Thus, though States contended that the Terrorist and Disruptive Activities (Prevention) Act, 1985 and its successor the Prevention of Terrorism Act, 2002 interfered with law and order/police functions exclusively in State List, the Court upheld the legislative competence of the Centre by distinguishing law & order problem within a State from terrorist acts and related offences against national security. It may be of interest to note that POTA is a legislation which was defeated in the Council of States but yet adopted in an extra ordinary joint session of both Houses of Parliament. The

²⁵³ 2004(2) ALDI

decisions of the Court pursuant to POTA also display centralizing tendencies in legislative activity involving national security. In this context, it is nearly certain that if ever the legislative competence of the Centre in enacting the National Investigation Agency Act, 2008 is to be challenged, it is unlikely that the Court will take a different view than the one it took *vis-à-vis* TADA and POTA. Perhaps this is as it should be, given the developments on the security front and the inability of some states even to control the routine law and order problems. After all, unity and integrity of the country cannot be compromised on issues of conflict of legislative relations between the Centre and the States.

10.3.02 But when it comes to education or employment the scenario changes and State's jurisdiction deserves greater respect and recognition. A large number of regulatory bodies (UGC, AICTE, NCERT, ICSSR, ICAR etc.) have been established by the Centre under Entries 25 of List III and 66 of List I occupying the field substantially. They have had a large impact on Centre-State relations as the ultimate control over these matters and authorities vest in the Central Government. For example, no State can make a law on any matter which is inconsistent with the AICTE Act. In effect it restricts State governments' powers on technical education and is substantially curtailed by the Central enactment. The claim is often justified by the need for co-ordinated and planned development of technical education which claim can apply to practically every field of governance.

10.3.03 The National Rural Employment Guarantee Act goes a step further in as much as it distributes powers and responsibilities between different set of governments and charts out an important role to be played by Panchayats as well. The implementation of the Act requires vigorous and continuing co-ordination between the Centre and the States. The Central Employment Guarantee Council has the power to give directions to the State Governments for effective implementation of the Act. It also has the power to cause an investigation if it receives any complaint regarding utilization of funds in respect of any Scheme and can also order stoppage of release of funds to the scheme and institute appropriate remedial measures for its proper implementation within a reasonable period of time. The Central Act makes use of the different tiers of government including Panchayats to implement the schemes. An interesting aspect is that the Union Parliament has prescribed the role to be played by the Panchayats and thus, does not leave it open to the State Government to determine the nature and scope of that role.

10.4 Executive Federalism and Centre-State Relations

10.4.01 The most frequent and wide ranging interaction between the Centre and the States takes place at the Executive level. This is how the Office of the Governor has become important for the State Government as much as for the Centre. The areas of friction in this regard and the possible ways to moderate it are discussed elsewhere in the Report. The controversy regarding failure of Constitutional machinery in the States dealt with in Articles 355 to 357 and 365 has also been discussed and is not necessary to be repeated again. When executive powers are shared, the quality of governance depends on the smooth and coordinated functioning of the administrative machinery at the two levels. The Constitutional provisions provide for a flexible scheme of allocation of administrative responsibilities though, in the process, it is relatively easy to put the blame on one another for non-performance of obligations. Executive federalism requires understanding and respect for each others' autonomy and a commitment to work together irrespective of political or ideological differences. If political parties do not appreciate the importance of Constitutional federalism, Centre-State relations will become a source of perennial trouble undermining good governance at both levels. This is more so when Government is organized through coalition of different political parties all of whom may not necessarily agree on policy choices and style of governance. In other words, what we call Executive Federalism is the key for good governance in a multi-layer, multi-party, parliamentary system of government.

10.4.02 Like the distribution of the legislative power between the Union and the States, the Constitution divides the executive power also between the Union and the units. Subject to few exceptions, the executive power has been declared co-extensive with the legislative power of both the Governments. The purposes for which such division of executive powers has been done can be classified into four categories, namely, (i) the administration of the laws which the two Governments have made, (ii) achieving co-ordination in their implementation between the Centre and the States, (iii) the settlement of disputes which may arise in the process, and (iv) for discharging the duty of the Union to protect States against external aggression and internal disturbance (Article 355).

10.4.03 The Constitution provides for the following techniques for achieving the most difficult task of co-ordination between the Centre and the States in the matter of exercise of executive powers:

1. Intergovernmental delegation of powers (Articles 258, 258A)

2. Directives given by the Centre to the States (Articles 256, 257)
3. All India Services (Article 312)
4. Inter-State Council (Article 263)

10.4.04 Intergovernmental delegation of executive powers may happen either by agreement or by legislation and in rare cases through entrustment of state's powers to the Centre by order of the Governor. Article 258A which talks about entrustment by the Governor was introduced by the Constitution (Seventh Amendment) Act, 1956 in order to remove practical difficulties in connection with the execution of certain developmental projects in a State.

10.4.05 The more problematic area in Centre-State relations is on the nature and scope of Centre's directions to the States in matters which are in the domain of States' executive power. The Commission examined the views expressed by the States and came to the conclusion that the powers under Articles 256 and 257 are necessary to remain with the Centre in order to exercise the administrative control for ensuring that the Centre's legislative and executive powers are duly honoured by the States. What directions are to be given by the Centre to the States and when is for the Central Government to decide, keeping in view the exigencies of the circumstances and administrative necessities.

10.4.06 Clauses (2) and (3) of Article 257 deal with directions in two specific matters relating to construction and maintenance of means of communication declared in the directions to be of national or military importance and in respect of measures to be taken for the protection of the railways within the states. The Centre shall pay to states such sums as agreed to execute the directions given under Clauses (2) and (3) of Art. 257. In default of an agreement as to the costs to be re-imbursed to the State, the matter is to be referred to an arbitrator to be appointed by the Chief Justice of India.

10.4.07 The Constitution has authorized the Centre to invoke the provisions of Article 356 read with Article 365 to compel any State, if it fails to comply with the directions. Though emergency provisions are not intended to be invoked every time a direction is not followed, the availability of such extreme measures may itself be sufficient to coerce a recalcitrant state to fall in line with the direction ultimately.

10.4.08 While All India Services and the Inter-State Council may facilitate execution of Union laws in the States and resolve disputes through negotiation, one has to acknowledge that over the years several informal channels of communication and co-

ordination have been developed to smoothen Centre-State relations in the administrative sphere. These include phone call conversations between civil servants to conferences of Secretaries and Ministers and execution of mutually evolved solemn agreements and arrangements. Some techniques of such consultation and co-ordination are highly structured and institutionalized like the Empowered Committee of State Finance Ministers to thrash out an agreement on indirect taxes. Some of these arrangements may be mainly horizontal, while others take place between the Union and the units.

10.4.09 The law and the Courts do play an important role in mediating Centre-State relations in the executive and legislative spheres. This is part of Constitutional governance, rule of law and judicial review of legislative and executive action. In fact, the Indian Administrative Law is full of precedents laying down a corpus of jurisprudence in organizing intergovernmental relations in the Indian federation. The lack of co-ordination at the political and administrative levels has led to increased intervention of Courts in federal governance. With the strengthening of intergovernmental consultation mechanisms like the Inter-State Council, it is expected that Court interventions will be reduced to settle Centre-State disputes.

10.4.10 On the more problematic issue of the nature and scope of Centre's directions to the States in matters which are in the domain of States' executive power, the Commission, after having examined the views expressed by the States, has come to the conclusion that the powers under Articles 256 and 257 are necessary to remain with the Centre in order to ensure that the Centre's legislative and executive powers are duly honoured by the States. What directions are to be given by the Centre to the States and when, is for the Central Government to decide, keeping in view the exigencies of the circumstances and administrative necessities.

10.5 Fiscal Federalism and Centre-State Relations

10.5.01 Federal countries differ a great deal in their choices about the character of fiscal federalism, specifically how the division of fiscal powers is allocated among various levels of government and the associated fiscal arrangements. Federalism in fiscal arrangements is good for large countries like India as they create incentives for Central, State and local governments to provide services competitively, efficiently, equitably and responsibly to the people. At the same time, fiscal federalism allows diversity in local identities and preferences.

10.5.02 Division of financial powers and functions among the Centre and States are said to be asymmetrical under the Indian Constitution with a pronounced bias in favour of the Union while the States carry the responsibility for delivery of most of the public services to the people. Since this asymmetry of revenue sources was perceived even at the time of making of the Constitution, a significant scheme of fiscal transfers from the Union was provided for under Article 280. The function of the Finance Commission is to ensure orderly and judicious devolution of finances to the units to ensure avoidance of vertical and horizontal imbalances. The problem today is significant transfers are taking place through mechanisms not envisaged by the Constitution. The problem is confounded when states are asked to make fiscal devolution to the third-tier of government. Allegations of political considerations influencing quantum of financial transfers have vitiated Centre-State relations. The challenge of placing fiscal transfers in a transparent and rule-based framework is indeed of great priority. At the same time, the responsibility of the Centre to correct the developmental imbalances has to be acknowledged. The thirteenth Finance Commission is engaged in this task. Meanwhile the views of this Commission on fiscal arrangements and transfers are discussed elsewhere in the Report.

10.5.03 The Constitutional principle in fiscal transfers is that the financial power of the Centre is to be used to enforce national standards as well as to remove vertical imbalance (i.e. between the Union and the States) and horizontal imbalances (i.e. amongst the States). Economic stabilization and revenue re-distribution is the function of the Union Government in federal polity. However, fiscal transfers are required to be guided by definitive principles based on equity, efficiency, stability and predictability. Even though fiscal federalism in India is described asymmetric even when it is largely rule-based, the asymmetry does not necessarily destroy the federal arrangements evolved by the Constitution. In fact, in the Indian situation asymmetry in the federal structure is inevitable for holding the federation together.

10.5.04 However, the existing fiscal arrangements are under stress for two additional reasons not envisaged at the time of making of the Constitution. Firstly, globalization and the emergence of a "borderless" world economy poses several challenges compelling the Centre and the States to re-position their roles in order to retain their relevance in economic governance. Simultaneous with this development is the emergence of Constitutionally organized local governments finding their role in the local economy to improve social and economic outcomes in their territories for the benefit of people in the

area. They act as facilitators, if not providers of services and function as gatekeepers and overseers of federal and State governments in areas of shared rule in their jurisdictions. Together with this political transformation, the information revolution has also thrown up several challenges to federalism in general and fiscal federalism in particular.

10.5.05 Under the Constitutional Scheme, unity and integrity of the country is of paramount importance. If large regional disparities are allowed to exist for long, it would pose serious threats to the very unity of the Republic. Regional fiscal equity is often addressed in federations (a) by evolving an internal common market allowing free movement of goods and services by removing barriers to trade and (b) by creating a level playing field for poorer jurisdictions with fiscal equalization and discretionary grants from the Centre enabling the weaker units to achieve national minimum standards. Such grants to poorer States work as the glue that holds the federation together by enabling those States to provide reasonably comparable levels of public services while fostering economic and social development. Thus perceived, the available scheme of fiscal transfers, though asymmetric, does provide a just and equitable framework for fiscal federalism. The problem is when distortions occur in fiscal arrangements due to politics in devolution, particularly through non-Constitutional channels. The views of stakeholders and the recommendations of the Commission in this regard are given in the volume on Fiscal Relations. All that can be said here is to emphasise the importance of strengthening the Constitutional Scheme of fiscal transfers to make the process more transparent, efficient and equitable. Perhaps there is a case to make the Finance Commission to be a permanent body with a regular Secretariat and allow State participation in its Constitution and in formulation of terms of reference so that it may not appear to be a creation of entirely of the Centre which is an interested party in the division of the kitty.

10.5.06 The early establishment of the Unified Common Market as envisaged in Part XIII of the Constitution is another important step towards fiscal unity and fiscal federalism. The national VAT system now in place to be developed into the GST now being proposed will break down the remaining fiscal barriers impeding the free flow of goods and services towards achievement of a unified common market long awaited in the country.

10.6 Forums for coordination of Intergovernmental Relations:

10.6.01 Intergovernmental relations in a multi-tier governmental system requires management with caution and sensitivity as they involve controversial issues of

Constitutional intent, fiscal relations, public policy inter-dependence, judicial interpretations, regional imbalances, ecological sustenance, investment and trade etc. Partisan approaches for electoral gains by political parties or regional interests groups can undermine the national goals besides distorting Centre-State relations. The Constitutional provisions for managing such complex relationships are not always adequate to the changing requirements and the political parties and regional groupings come to play very decisive roles not always transparent or necessarily in the interests of the larger interests of the nation as a whole. Given such critical importance to intergovernmental interactions, the question arises, how does the interaction happen and how intense and effective are they? What are the mechanisms and what are their relative advantages and disadvantages?

10.6.02 Intergovernmental relations assume a wide range of processes from phone calls and visits between civil servants to memoranda of understanding or written agreements. The objects may be information sharing to policy co-ordination, implementing joint projects to coordinated law making, establishing conflict resolution bodies to enhancing capacities for better delivery of public services. The techniques employed in these interactions also vary from informal one to highly institutionalized methods involving statutory or Constitutional systems. Despite the availability of these formal and informal practices, there is a feeling that the forums are either not enough or they are inadequately structured with the result there is heavy dependence on Courts or direct action methods to resolve disputes. Judicial proceedings take a long time, involve heavy costs and often leads to uncertain results at the cost of efficiency and accountability in governance. Direct action disrupts the development process and distorts good relations. There is a need to improve the functioning of existing institutions if intergovernmental relations have to be organized in the spirit of co-operative federalism.

10.6.03 One other factor need to be noted in the context of Indian federal practice. This is the fragmentation of political parties and the emergence of alliance/coalition government both at the Centre and in the States - and the coalitions are of different types. There are some which are opportunistic and naturally incoherent bringing instability in government. There are others in which some groups in the coalition do not participate in government but extend outside support in Parliament/Legislature. There are still others who negotiate coalition pacts before or after the elections based on common agenda and mutual obligations in it.

10.6.04 Coalition governments invariably result in dissatisfaction and acrimony in varying degrees among the partners and cause delay in governmental decision making. It foments problems in reconciling federal principles with the requirements of Parliamentary

system of governance thereby throwing up difficulties in Constitutional governance. If prior to 1990s, the Prime Minister dominated Parliament through single party majority, after 1990s it went to the other extreme where regional parties assumed disproportionate clout both in the government and in Parliament. The casualty in this phenomenon has been the cabinet cohesion. The authority of the Prime Minister and the collective responsibility of the Cabinet to Parliament are also diluted in the compromises made tending to make the Government weak. It is strange that while the Constitution prescribed for a strong Centre, in practice, the Centre has become weak in certain matters of policy making as a result of coalition politics.

10.6.05 The question to be asked is how these developments in the polity have impacted on Centre-State relations and the quality of governance. Do coalition politics undermine the national goals and marginalize certain states as against others? When consultation and co-ordination are essential for federal governance, does the change in the polity and the economy lead to confrontation, conflict and delay in decision making? More importantly, how do the available forums of consultation respond to the new challenges in federal governance and with what results?

10.7 The Need to Strengthen and Empower The Inter State Council

10.7.01 The present status and function of the Inter-State Council set up through a Presidential Order in 1990 are as follows:

The Council is a recommendatory body. The meetings of the Council are held *in camera*, and all questions, which come up for consideration of the Council in a meeting, are decided by consensus, and the decision of the Chairman as to the consensus is final.

10.7.02 The following duties have been assigned to the ISC:

1. Investigating and discussing such subjects, in which some or all of the States or the Union and one or more of the States have a common interest, as may be brought up before it;
2. Making recommendations upon any such subject and in particular recommendations for the better coordination of policy and action with respect to that subject; and

3. Deliberating upon such other matters of general interest to the States as may be referred by the Chairman to the Council.

10.7.03 The Council has not been assigned the function envisaged in clause (a) of Article 263 of the Constitution namely, *inquiring into and advising upon disputes, which may have arisen between States* as recommended by the Sarkaria Commission.

10.7.04 Very recently (2008) the Administrative Reforms Commission recommended that the conflict resolution role envisaged for the ISC under Art. 263 (a) of the Constitution should be effectively utilized to find solutions to disputes among States or between all or some of the States and the Union. It further added that the composition of ISC (of which there can be more than one) may be flexible to suit the exigencies of the matter referred to it under Article 263.

10.7.05 The Supreme Court even suggested an adjudicating role to the Council in certain types of disputes involving the Union and the States. Particularly on matters of policy where a consensual settlement is desired, the ISC could negotiate a more acceptable resolution of the dispute among the Constitutional entities.

10.7.06 The Council is empowered under the Presidential Order of 1990 to work out its own procedures with the approval of the Government.

10.7.07 Together with the full range of functional empowerment under Article 263, the Council should have functional independence with a professional Secretariat constituted with experts on relevant fields of knowledge supported by Central and State officials on deputation for limited periods. The Secretary of ISC should be designated ex-officio Secretary of the Department of States reporting directly to the Union Home Minister who is to be ex-officio Deputy Chairman of the Council. Given the Constitutional and quasi-judicial tasks, the Council should have experts in its organizational set up drawn from the disciplines of Law, Management and Political Science besides the All India Services. The proposed legislation should give the ISC an organizational and management structure different from the Government departments and flexible enough to accommodate management practices involving multidisciplinary skills conducive to federal governance under the Constitution.

10.7.08 This Commission is of the considered view that the Inter-State Council (ISC) need to be substantially strengthened and activated as the key player in intergovernmental relations. It must meet at least thrice a year on an agenda evolved after

proper consultation with States. Instead of the Prime Minister chairing the meeting, there must be a method to select an independent person of national stature conversant with Constitutional governance acceptable to the stakeholders. If decision by consensus does not work, it may be taken by majority in matters of national concern. In other areas, an empowered Committee of ministers may be asked to study and report within a prescribed time-frame a more acceptable way of resolving the problem. There must be a method to co-ordinate the functioning of the Inter-State Council with that of the National Development Council. The ISC must be empowered to follow up the implementation of its decisions for which appropriate statutory provisions should be made. The Government will be well advised to evolve an appropriate scheme to utilize the full potential of ISC in harmonizing Centre-State relations which has become urgent in the changed circumstances. Issues of governance must as far as possible be sorted out through the political and administrative processes rather than pushed to long-drawn adjudication in Court. Inter-State Council appears to be the most viable, promising Constitutional mechanism to be developed for the purpose provided it is properly restructured and duly empowered. Once the ISC is made a vibrant, negotiating forum for policy development and conflict resolution, the Government may consider the functions of the National Development Council also being transferred to the ISC.

10.8 Conclusions and Recommendations

10.8.01 Need for continuing emphasis on federal balance of power

On the question whether a fresh balance of power is needed to take governance forward on the path set by the Constitution, the Commission is of the view that the framers of the Constitution, taking note of the pluralistic identities of the people and the diverse historical traditions of the polity, have correctly come to the conclusion that a federal system alone can take the country forward as a united, democratic republic. The Commission, however, is convinced that the tilt in favour of the Union has increasingly accentuated over the years even outside the security needs of the country. This has led to avoidable over-centralisation even in developmental matters. These emerging contradictions in federal constitutional practice have to be addressed early in the interest of not only better Centre-State relations but also to sustain the very unity and integrity for which the tilt in favour of the Centre was originally conceived.

The Commission believes that this balancing of powers and functions which assumed added significance after the introduction of the 73rd and 74th Constitutional Amendments

can largely be accomplished through administrative arrangements supported by adequate devolution of finances for which the Finance Commission is a key institution. While security concerns might warrant greater powers to the Union, on the development front (education, health etc.) the Centre should respect the autonomy of the other two levels of government and consciously avoid the tendency to centralize powers and functions. Its role is to be limited in laying down policies, devolving funds and facilitating co-ordination leaving implementation entirely to States and local bodies.

10.8.02 Streamlining Administrative Relations

On the more problematic issue of the nature and scope of Centre's directions to the States in matters which are in the domain of States' executive power, the Commission, after having examined the views expressed by the States, has come to the conclusion that the powers under Articles 256 and 257 are necessary to remain with the Centre in order to ensure that the Centre's legislative and executive powers are duly honoured by the States. What directions are to be given by the Centre to the States and when, is for the Central Government to decide, keeping in view the exigencies of the circumstances and administrative necessities.

10.8.03 Fiscal Relations to be largely decided by the Finance Commission

On the interplay of Fiscal Federalism and Centre-State Relations, the views of stakeholders and the recommendations of the Commission in this regard are given in the volume on Fiscal Relations. The Commission would like to emphasise here the importance of strengthening the Constitutional scheme of fiscal transfers through Finance Commissions and reduce the scope of other forms of devolution which leads to complaints from States.

There is a case to make the Finance Commission to be a permanent body with membership changing every five years and with a regular Secretariat. The Centre should find a methodology to allow State participation in its Constitution and in formulation of terms of reference so that it may not appear to be a creation entirely of the Centre which is an interested party in the division of the kitty.

10.8.04 Need to strengthen and empower the Inter-State Council

On the issue of creating a forum for co-ordination of intergovernmental relations, this Commission is of the considered view that the Inter-State Council (ISC) need to be

substantially strengthened and activated as the key player in intergovernmental relations. It must meet at least thrice a year on an agenda evolved after proper consultation with States.

If decision by consensus does not work in the Inter-State Council, it may be taken by majority in matters of national concern. In other areas, an Empowered Committee of ministers may be asked to study and report within a prescribed time-frame a more acceptable way of resolving the problem. The ISC must be empowered to follow up the implementation of its decisions for which appropriate statutory provisions should be made.

The Government will be well advised to evolve an appropriate scheme to utilize the full potential of ISC in harmonizing Centre-State relations which has become urgent in the changed circumstances. Issues of governance must as far as possible be sorted out through the political and administrative processes rather than pushed to long-drawn adjudication in Court. Inter-State Council appears to be the most viable, promising Constitutional mechanism to be developed for the purpose provided it is properly re-structured and duly empowered.

The present status and function of the Inter-State Council set up through a Presidential Order in 1990 are as follows:

The Council is a recommendatory body. The meetings of the Council are held in camera, and all questions, which come up for consideration of the Council in a meeting, are decided by consensus, and the decision of the Chairman as to the consensus is final.

The following duties have been assigned to the ISC:

- a. Investigating and discussing such subjects, in which some or all of the States or the Union and one or more of the States have a common interest, as may be brought up before it;
- b. Making recommendations upon any such subject and in particular recommendations for the better coordination of policy and action with respect to that subject; and
- c. Deliberating upon such other matters of general interest to the States as may be referred by the Chairman to the Council.

The Council has not been assigned the function envisaged in clause (a) of Article 263 of the Constitution namely, *inquiring into and advising upon disputes, which may have arisen between States* as recommended by the Sarkaria Commission.

Very recently (2008) the Administrative Reforms Commission recommended that the conflict resolution role envisaged for the ISC under Art. 263 (a) of the Constitution should be effectively utilized to find solutions to disputes among States or between all or some of the States and the Union. It further added that the composition of ISC (of which there can be more than one) may be flexible to suit the exigencies of the matter referred to it under Article 263.

The Supreme Court even suggested an adjudicating role to the Council in certain types of disputes involving the Union and the States. Particularly on matters of policy where a consensual settlement is desired, the ISC could negotiate a more acceptable resolution of the dispute among the Constitutional entities.

The Council is empowered under the Presidential Order of 1990 to work out its own procedures with the approval of the Government.

Together with the full range of functional empowerment under Article 263, the Council should have functional independence with a professional Secretariat constituted with experts on relevant fields of knowledge supported by Central and State officials on deputation for limited periods. The Secretary of ISC should be designated ex-officio Secretary of the Department of States reporting directly to the Union Home Minister who is to be ex-officio Deputy Chairman of the Council. Given the Constitutional and quasi-judicial tasks, the Council should have experts in its organizational set up drawn from the disciplines of Law, Management and Political Science besides the All India Services. The proposed legislation should give the ISC an organizational and management structure different from the Government departments and flexible enough to accommodate management practices involving multidisciplinary skills conducive to federal governance under the Constitution.

CHAPTER 11

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

CONTENTS

Sections/Headings	Para Nos.	Page Nos.
11.1 Consultation with States while legislating on matters in Concurrent List	11.1.01	217
11.2 Transfer of Entries in the Lists, from List II to List III	11.2.01-11.2.02	217-218
11.3 Management of matters in concurrent jurisdiction	11.3.01	218
11.4 Bills reserved for consideration of the President	11.4.01-11.4.02	218-219
11.5 Treaty making powers of the Union Executive and Centre-State Relations	11.5.01-11.5.02	219-220
11.6 Appointment and Removal of Governors	11.6.01-11.6.06	220-222
11.7 Governors' discretionary powers	11.7.01-11.7.05	222-224
11.8 Governors as Chancellors of Universities and holding other Statutory Positions	11.8.01-11.8.02	224
11.9 Obligation of the Union to protect States from external aggression and internal disturbance	11.9.01-11.9.03	224-225
11.10 Conditions for exercise of power under Article 356	11.10.01	225-226
11.11 "Local emergency" under Article 355 and 356	11.11.01-11.11.02	226-227
11.12 Power of Union to give directions to State	11.12.01-11.12.04	227-228
11.13 Co-ordination between States, Centre-State Relations and Inter-State Council	11.13.01-11.13.04	228-229

11.14	Zonal Councils and Empowered Committees of Ministers	11.14.01-11.14.03	229-230
11.15	Adjudication of disputes relating to waters of inter-State rivers	11.15.01	230
11.16	All India Services and Centre-State Co-operation for better Administration	11.16.01-11.16.03	231
11.17	Rajya Sabha to be a Chamber to protect States' rights	11.17.01-11.17.02	231-232
11.18	Equal representation of States in Rajya Sabha	11.18.01-11.18.02	232-233
11.19	Relationship of Article 246(3) and 162 with Articles 243G and 243W	11.19.01-11.19.03	233-234
11.20	Governments' obligation to support court expenditure when laws are made	11.20.01-11.20.02	234
11.21	Judicial Councils to advise Centre-State share in judicial budgets	11.21.01-11.21.03	234-235
11.22	Need for continuing emphasis on federal balance of power	11.22.01-11.22.02	235-236
11.23	Streamlining Administrative Relations	11.23.01	236
11.24	Fiscal Relations to be largely decided by the Finance Commission	11.24.01-11.24.02	236
11.25	Need to strengthen and empower the Inter-State Council	11.25.01-11.25.10	237-238

11

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

11.1 Consultation with States while legislating on matters in Concurrent List

11.1.01 List III includes subjects on which the Union and the States can both legislate. For cultivating better Centre-State relations and to facilitate effective implementation of the laws on List III subjects, it is necessary that some broad agreement is reached between the Union and States before introducing legislation in Parliament on matters in the Concurrent List. The existing arrangements in this regard require institutionalization through the Inter-State Council. The Council, if found necessary, may use an independent mechanism like a Committee of State Ministers to thrash out contentions issues in the Bill so that there is a measure of support among the States to the administrative and fiscal arrangements the Bill ultimately proposes to Parliament. It is important that the record of proceedings in the Council/Committee including views of States are made available to Parliament while introducing the Bill on Concurrent List subjects.

[Para 3.4.04]

11.2 Transfer of Entries in the Lists, from List II to List III

11.02.01 Article 368(2) empowers Parliament to amend any provision of the Constitution in accordance with the procedure laid down therein. Should Parliament deplete or limit the legislative powers of the States through this process unilaterally or otherwise? In a federal system, the existence of the power in the Union does not by itself justify its exercise and it is the considered view of the Commission that the Union should be extremely restrained in asserting Parliamentary supremacy in matters assigned to the States. Greater flexibility to States in relation to subjects in the State List and "transferred items" in the Concurrent List is the key for better Centre-State relations.

[Para 3.4.01]

11.02.02 In this context, it is worthwhile to examine through a joint institutional mechanism whether the administration of the relevant subject under the Central law (on the transferred subject) has achieved the objects and whether it is desirable to continue the arrangement as an occupied field limiting thereby the exclusive jurisdiction of the States. If the findings are not positive it may be worthwhile to consider restoration of the item to its original position in State List in the interest of better Centre-State relations. Such a step hopefully will encourage the States to devolve the powers and functions on that subject to the Panchayats and Municipalities as stipulated in Parts IX and IX-A of the Constitution. In short, the Commission is of the opinion that the Union should occupy only that much of subjects in concurrent or overlapping jurisdiction which is absolutely necessary to achieve uniformity of policy in demonstrable national interest.

[Para 3.4.02 & 3.4.03]

11.3 Management of matters in concurrent jurisdiction

11.3.01 Given the joint responsibility of the Centre and the States it is imperative that legislation on matters of concurrent jurisdiction generally and transferred items from the State List in particular, should be managed through consultative processes on a continuing basis. The Commission recommends a continuing auditing role for the Inter-State Council in the management of matters in Concurrent or overlapping jurisdiction.

[Para 3.4.05]

11.4 Bills reserved for consideration of the President

11.4.01 Article 201 empowers the President to assent or withhold assent to a Bill reserved by a Governor for the President's consideration. If the President returns the Bill with any message, the State Legislature shall reconsider the Bill accordingly within a period of six months for presentation again to the President for his consideration.

[Para 3.6.02]

11.4.02 States have expressed concern that Bills so submitted sometimes are indefinitely retained at the Central level even beyond the life of the State Legislature. Allowing the democratic will of the State Legislature to be thwarted by Executive fiat is questionable in the context of 'basic features' of the Constitution. Therefore the President should be able to decide consenting or withholding consent in reasonable time to be communicated to the State. In the Commission's view, the period of six months prescribed

in Article 201 for State Legislature to act when the Bill is returned by the President can be made applicable for the President also to decide on assenting or withholding assent to a Bill reserved for consideration of the President.

[Para 3.6.03]

11.5 Treaty making powers of the Union Executive and Centre-State Relations

11.5.01 Entering into treaties and agreements with foreign countries and implementation of treaties, agreements and conventions with foreign countries are items left to the Union Government (Entry 14 of List I). Article 253 confers exclusive power on Parliament to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

11.5.02 In view of the vastness and plenary nature of the treaty making powers with the Union Government notwithstanding the scheme of legislative relations between the Union and States (Article 253), the Commission recommends that Parliament should make a law on the subject of Entry 14 of List I (treaty making and implementing it through Parliamentary legislation) to streamline the procedures involved. The exercise of the power obviously cannot be absolute or unchartered in view of the federal structure of legislative and executive powers. Several states have expressed concern and wanted the Commission to recommend appropriate measures to protect States' interests in this regard. The Commission recommends that the following aspects may be incorporated in the Central law proposed on the subject of Entry 14 of List I:

1. In view of the fact that treaties, conventions or agreements may relate to all types of issues within or outside the States' concern, there cannot be a uniform procedure for exercise of the power. Furthermore, since treaty making involves complex, prolonged, multi-level negotiations wherein adjustments, compromises and give and take arrangements constitute the essence, it is not possible to bind down the negotiating team with all the details that should go into it. Nonetheless, the Constitutional mandates on federal governance cannot be ignored; nor the rights of persons living in different regions or involved in different occupations compromised. Therefore there is need for a legislation to regulate the treaty making powers of the Union Executive.
2. Agreements which largely relate to defense, foreign relations etc. which have no bearing on individual rights or rights of States of the Indian Union can be

put in a separate category on which the Union may act on its own volition independent of prior discussion in Parliament. However, it is prudent to refer such agreements to a Parliamentary Committee concerned with the particular Ministry of the Union Government before it is ratified.

3. Other treaties which affect the rights and obligations of citizens as well as those which directly impinge on subjects in State List should be negotiated with greater involvement of States and representatives in Parliament. This can assume a two-fold procedure. Firstly, a note on the subject of the proposed treaty and the national interests involved may be prepared by the concerned Union Ministry and circulated to States for their views and suggestions to brief the negotiating team.
4. There may be treaties or agreements which, when implemented, put obligations on particular States affecting its financial and administrative capacities. In such situations, in principle, the Centre should underwrite the additional liability of concerned States according to an agreed formula between the Centre and States.
5. The Commission is also of the view that financial obligations and its implications on State finances arising out of treaties and agreements should be a permanent term of reference to the Finance Commissions constituted from time to time. The Commission may be asked to recommend compensatory formulae to neutralize the additional financial burden that might arise on States while implementing the treaty/agreement.

[Para 3.7.08]

11.6 Appointment and Removal of Governors

11.6.01 Given the status and importance conferred by the Constitution on the office of the Governor and taking into account his key role in maintaining Constitutional governance in the State, it is important that the Constitution lays down explicitly the qualifications or eligibility for being considered for appointment. Presently Article 157 only says that the person should be a citizen of India and has completed 35 years of age.

11.6.02 The Sarkaria Commission approvingly quoted the eligibility criteria that Jawaharlal Nehru advocated and recommended its adoption in selecting Governors. These criteria are:

1. He should be eminent in some walk of life
2. He should be a person from outside the State
3. He should be a detached figure and not too intimately connected with the local politics of the States; and
4. He should be a person who has not taken too great a part in politics generally and particularly in the recent past.

11.6.03 The words and phrases like "eminent", "detached figure", "not taken active part in politics" are susceptible to varying interpretations and parties in power at the Centre seem to have given scant attention to such criteria. The result has been politicization of Governorship and sometimes people unworthy of holding such high Constitutional positions getting appointed. This has led to some parties demanding the abolition of the office itself and public demonstration against some Governors in some States. This trend not only undermines Constitutional governance but also leads to unhealthy developments in Centre-State relations.

[Para 4.4.04]

11.6.04 The Commission is of the view that the Central Government should adopt strict guidelines as recommended in the Sarkaria report and follow its mandate in letter and spirit lest appointments to the high Constitutional office should become a constant irritant in Centre-State relations and sometimes embarrassment to the Government itself.

[Para 4.4.05]

11.6.05 Governors should be given a fixed tenure of five years and their removal should not be at the sweet will of the Government at the Centre. The phrase "during the pleasure of the President" in Article 156(i) should be substituted by an appropriate procedure under which a Governor who is to be reprimanded or removed for whatever reasons is given an opportunity to defend his position and the decision is taken in a fair and dignified manner befitting a Constitutional office.

[Para 4.4.06]

11.6.06 It is necessary to provide for impeachment of the Governor on the same lines as provided for impeachment of the President in Article 61 of the Constitution. The dignity and independence of the office warrants such a procedure. The "pleasure doctrine" coupled with the lack of an appropriate procedure for the removal of Governors is inimical

to the idea of Constitutionalism and fairness. Given the politics of the day, the situation can lead to unsavory situations and arbitrariness in the exercise of power. Of course, such impeachment can only be in relation to the discharge of functions of the office of a Governor or violations of Constitutional values and principles. The procedure laid down for impeachment of President, *mutatis mutandis* can be made applicable for impeachment of Governors as well.

[Para 4.4.17]

11.7 Governors' discretionary powers

11.7.01 Article 163(2) gives an impression that the Governor has a wide, undefined area of discretionary powers even outside situations where the Constitution has expressly provided for it. Such an impression needs to be dispelled. The Commission is of the view that the scope of discretionary powers under Article 163(2) has to be narrowly construed, effectively dispelling the apprehension, if any, that the so-called discretionary powers extends to all the functions that the Governor is empowered under the Constitution. Article 163 does not give the Governor a general discretionary power to act against or without the advice of his Council of Ministers. In fact, the area for the exercise of discretion is limited and even in this limited area, his choice of action should not be nor appear to be arbitrary or fanciful. It must be a choice dictated by reason, activated by good faith and tempered by caution.

[Para 4.5.02]

11.7.02 In respect of Bills passed by the Legislative Assembly of a State, the Governor is expected to declare that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President. He has the discretion also to return the Bill (except Money Bill) for re-consideration of the House together with the message he might convey for the purpose. If on such reconsideration the Bill is passed again, with or without amendments, the Governor is obliged to give his assent. Furthermore, it is necessary to prescribe a time limit within which the Governor should take the decision whether to grant assent or to reserve it for consideration of the President. The Commission had earlier recommended that the time limit of six months prescribed for the State Legislature to act on the President's message on a reserved Bill should be the time limit for the President also to decide on assenting or withholding of

assent. The Governor accordingly should make his decision on the Bill within a maximum period of six months after submission to him.

[Para 4.5.01]

11.7.03 On the question of Governor's role in appointment of Chief Minister in the case of an hung assembly there have been judicial opinions and recommendations of expert commissions in the past. Having examined those materials and having taken cognizance of the changing political scenario in the country, the Commission is of the view that it is necessary to lay down certain clear guidelines to be followed as Constitutional conventions in this regard. These guidelines may be as follows:

1. The party or combination of parties which commands the widest support in the Legislative Assembly should be called upon to form the Government.
2. If there is a pre-poll alliance or coalition, it should be treated as one political party and if such coalition obtains a majority, the leader of such coalition shall be called by the Governor to form the Government.
3. In case no party or pre-poll coalition has a clear majority, the Governor should select the Chief Minister in the order of preference indicated below:
 - (a) the group of parties which had pre-poll alliance commanding the largest number
 - (b) the largest single party staking a claim to form the government with the support of others.
 - (c) A post-electoral coalition with all partners joining the government
 - (d) A post-electoral alliance with some parties joining the government and the remaining including independents supporting the government from outside.

[Para 4.5.02]

11.7.04 On the question of dismissal of a Chief Minister, the Governor should invariably insist on the Chief Minister proving his majority on the floor of the House for which he should prescribe a time limit.

[Para 4.5.03]

11.7.05 On the question of granting sanction for prosecution of a State Minister in situations where the Council of Ministers advised to the contrary, the Commission would endorse the interpretation given by the Supreme Court to the effect that "if the Cabinet decision appears to the Governor to be motivated by bias in the face of overwhelming material, the Governor would be within his rights to disregard the advice and grant sanction for prosecution". The Commission recommends that Section 197 Criminal Procedure Code may be suitably amended to reflect the position of law in this regard.

[Para 4.5.12]

11.8 Governors as Chancellors of Universities and holding other Statutory Positions

11.8.01 To be able to discharge the Constitutional obligations fairly and impartially, the Governor should not be burdened with positions and powers which are not envisaged by the Constitution and which may expose the office to controversies or public criticism. Conferring statutory powers on the Governor by State Legislatures have that potential and should be avoided. Making the Governor the Chancellor of the Universities and thereby conferring powers on him which may have had some relevance historically has ceased to be so with change of times and circumstances. The Council of Ministers will naturally be interested in regulating University education and there is no need to perpetuate a situation where there would be a clash of functions and powers.

11.8.02 The Commission is also of the view that Governor should not be assigned functions casually under any Statute. His role should be confined to the Constitutional provisions only.

[Para 4.5.11]

11.9 Obligation of the Union to protect States from external aggression and internal disturbance

11.9.01 Concern for the unity and integrity of India is the rationale for the obligation put on the Union to protect States even against internal disturbances which ordinarily is a matter for the states to handle. This obligation is coupled with the power to enforce that duty, if necessary without any request coming from the State. This is consistent with the

federal scheme of the Constitution. Having examined similar provisions in other federal Constitutions and looking at socio-political developments in the country, the Commission is of the view that a whole range of action on the part of the Union is possible under this power depending on the circumstances of the case as well as the nature, timing and the gravity of the internal disturbance. The Union can advise the State on the most appropriate deployment of its resources to contain the problem. In more serious situations, augmentation of the States' own efforts by rendering Union assistance in men, material and finance may become necessary. If it is a violent or prolonged upheaval (not amounting to a grave emergency under Art. 352), deployment of the Union forces in aid of the police and magistracy of the State may be adopted to deal with the problem. Action to be taken may include measures to prevent recurring crises.

[Para 5.3.12]

11.9.02 When does a situation of public disorder aggravate into an internal disturbance as envisaged in Art. 355 justifying Union intervention is a matter that has been left by the Constitution to the judgement and good sense of the Union Government. Though this is the legal position, in practice, it is advisable for the Union Government to sound the State Government and seek its co-operation before deploying its Forces in a State.

[Para 5.3.13]

11.9.03 The Commission is also of the view that when an external aggression or internal disturbance paralyses the State administration creating a situation of a potential break down of the Constitutional machinery of the State, all alternative courses available to the Union for discharging its paramount responsibility under Article 355 should be exhausted to contain the situation and the exercise of the power under Art. 356 should be limited strictly to rectifying a "failure of the Constitutional machinery in the State".

[Para 5.3.14]

11.10. Conditions for exercise of power under Article 356

11.10.01 On the question of invoking Article 356 in case of failure of Constitutional machinery in States, the Commission would recommend suitable amendments to incorporate the guidelines set forth in the landmark judgement of the Supreme Court in

S.R. Bommai V. Union of India (1994) 3 SCC 1). This would remove possible misgivings in this regard on the part of States and help smoothen Center-State relations. Of course, the proper use of Article 356 can ultimately be governed by the inherent decency and honesty of the political process.

[Para 5.3.07]

11.11 "Local emergency" under Article 355 and 356

11.11.01 Given the strict parameters now set for invoking the emergency provisions under Articles 352 and 356 to be used only as a measure of "last resort", and the duty of the Union to protect States under Article 355, it is necessary to provide a Constitutional or legal framework to deal with situations which require Central intervention but do not warrant invoking the extreme steps under Articles 352 and 356. Providing the framework for "localized emergency" would ensure that the State Government can continue to function and the Assembly would not have to be dissolved while providing a mechanism to let the Central Government respond to the issue specifically and locally. The imposition of local emergency, it is submitted, is fully justified under the mandate of Article 355 read with Entry 2A of List I and Entry 1 of List II of the Seventh Schedule. It is submitted that Art. 355 not only imposes a duty on the Union but also grants it, by necessary implication, the power of doing all such acts and employing such means as are reasonably necessary for the effective performance of that duty.

[Para 5.4.21]

11.11.02 It is however necessary that a legal framework for exercising the power of "localized emergency" is provided by an independent Statute borrowing the model of the Disaster Management Act, 2005 and the Prevention of Communal Violence and Rehabilitation Bill, 2006. Only exceptional situations which fall within the scope of "external aggression" or "internal disturbance" should be considered for the purposes of separate legislation under the mandate of Article 355. Such situations include (a) separatist and such other violence which threatens the sovereignty and integrity of India, (b) communal or sectarian violence of a nature which threatens the secular fabric of the country, and (c) natural or man-made disasters of such dimensions which are beyond the capacity of the State to cope with. With regard to item (c) a Statute is already in place (Disaster Management Act, 2005) and in respect of situations contemplated in item (b), it is learnt that a revised Bill is being proposed. What is therefore required is a legislation

to provide for Central role in case of separatist and related violence in a State which participates the nature of "external aggression" or "internal disturbance" contemplated in Article 355. The Commission has provided a detailed list of specific conditions to be considered for such a framework legislation enabling invocation of "localized emergency". It is important that the legislation provides for appropriate administrative co-ordination between the Union and the State concerned. It may also need consequent amendments to certain sections of the Criminal Procedure Code as well. The subject is discussed in greater detail in Volume VI of the Commission's report on the subject of Criminal Justice, National Security and Centre-State Co-operation.

[Para 5.4.22]

11.12 Power of Union to give directions to State

11.12.01 Though States have raised objections to the power exercisable by the Union under Articles 256 and 257 on the ground that they are destructive of not only the autonomy of States but also inimical to the very foundation of a federal arrangement, the Commission is of the considered view that there is no case for amendment of these provisions. It must, however, be clarified that favouring the retention of these provisions is entirely different from advocating easy or quick resort to them. Articles 256 and 257 may be viewed as a safety valve, one which may never come into play but which is nevertheless required to be retained.

[Para 6.3.07]

11.12.02 The above view is substantiated by recent experiences where the Centre had to give directions on containing communal violence or insurgency in certain areas. The question that remains is about the consequence of non-compliance by a State of the Centres' directions in this regard. Though the Constitution has not provided any explicit course of action to such an eventuality, the obvious answer appears to be recourse available under Article 356 which indeed is an extreme step. In the existing scheme of things such a development is unlikely to happen which may explain why the Constitution makers avoided making remedial provision. The Commission is of the view that healthy conventions respecting the autonomy of states and restrained use of the power on behalf of the Union can go a long way to address the concern expressed by States in this regard.

11.12.03 Another related issue is about the term 'existing laws' used in Article 256

which are in addition to laws made by Parliament to which the executive power of State shall ensure compliance. The Commission is of the view that these relate to other laws including Presidential Ordinances and international treaties and customary international law applicable to the State concerned. Rule of Law demands executive compliance of all laws. Article 51 warrants it and there can be no exception unless a law specifically authorizes deviation.

11.12.04 A question is raised whether the scope of Article 257 Clause (3) should be widened besides railways to include other vital installations like major dams, space stations, nuclear installations, communication centres etc. The Commission is of the opinion that the executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection of Union property declared by the Union Government to be of national importance. Clause (3) of Art. 257 should accordingly be amended.

[Para 6.3.05 & 6.3.06]

11.13 Co-ordination between States, Centre-State Relations and Inter-State Council

11.13.01 Federalism is a living faith to manage diversities and it needs to be supported by institutional mechanisms to facilitate co-operation and co-ordination among the Units and between the Units and the Union. Co-operative federalism is easily endorsed but difficult to practice without adequate means of consultation at all levels of government.

[Para 6.4.05]

11.13.02 The Constitution has provided only limited institutional arrangements for the purpose and regrettably they are not adequately utilized. In this context, the Commission strongly recommends the strengthening and mainstreaming of the Inter-State Council to make it a vibrant forum for all the tasks contemplated in Clauses (a) to (c) of Article 263.

[Para 6.4.06]

11.13.03 Though the Article does not provide a dispute settlement function to the Council, it envisages the Council to inquire into and advise on disputes between States towards settlement of contested claims. The Commission is of the view that the Council should be vested with the powers and functions contemplated in Article 263(a) also as it would further enhance the capacity of the Council to discharge its functions in Clauses

(b) and (c) more effectively and meaningfully. The Council can further have expert advisory bodies or administrative tribunals with quasi-judicial authority to give recommendations to the Council if and when needed. In short, it is imperative to put the Inter-State Council as a specialized forum to deal with intergovernmental relations according to federal principles and Constitutional good practices.

[Para 6.4.07]

11.13.04 The Commission is of the view that the Council is an extremely useful mechanism for consensus building and voluntary settlement of disputes if the body is staffed by technical and management experts and given the autonomy required for functioning as a Constitutional body independent of the Union and the States. It should have sufficient resources and authority to carry out its functions effectively and to engage civil society besides governments and other public bodies. It needs to meet regularly with adequate preparation of agenda and negotiating points and position papers from parties involved. The Secretariat of the Council may have joint staff of the Union and States to inspire confidence and enhance co-ordination. Negotiation, mediation and conciliation to find common points or agreement and narrowing of differences employed in international intercourse and in judicial proceedings can usefully be cultivated in the Council Secretariat for advancing the cause of harmonious intergovernmental relations. Towards this end, the Commission would recommend suitable amendments to Article 263 with a view to make the Inter-State Council a credible, powerful and fair mechanism for management of inter-state and Centre-State differences.

[Para 6.4.08]

11.14 Zonal Councils and Empowered Committees of Ministers

11.14.01 The need for more consensus building bodies involving the Centre and the States has been canvassed before the Commission because of a wide spread perception that governance is getting over-centralised and states are losing their autonomy in their assigned areas. While legislative powers are clearly demarcated and the fiscal relations are subject to periodic review by the Finance Commission, the fear on the part of States is more on administrative relations and it is here the need for more forums for co-ordination is felt.

[Para 6.7.01]

11.14.02 Under the States Re-organization Act, 1956 five Zonal Councils were created ostensibly for curbing the rising regional and sectarian feelings and to promote co-operation in resolving regional disputes. Later the North Eastern Council was created under the North Eastern Council Act, 1971. In each of these Zonal Councils, Union Home Minister is the Chairman and the Chief Ministers of the States in the Zones concerned are members. The Commission is of the view that the Zonal Councils should meet at least twice a year with an agenda proposed by States concerned to maximize co-ordination and promote harmonization of policies and action having inter-state ramification. The Secretariat of a strengthened Inter-State Council can function as the Secretariat of the Zonal Councils as well.

[Para 6.7.02]

11.14.03 The Empowered Committee of Finance Ministers of States proved to be a successful experiment in inter-state co-ordination on fiscal matters. There is need to institutionalize similar models in other sectors as well. A Forum of Chief Ministers, Chaired by one of the Chief Minister by rotation can be similarly thought about particularly to co-ordinate policies of sectors like energy, food, education, environment and health where there are common interests to advance and differentiated responsibilities to undertake. Implementation of Directive principles can be a standing agenda for the Forum of Chief Ministers which can make recommendations to the National Development Council, National Integration Council, Planning Commission etc. on these Directives which, incidentally constitute the Millennium Development Goals set by the United Nations as well. It is pertinent to note that other federations like USA, Australia and Canada do have similar forums to facilitate public policy development and good governance. This Forum of Chief Ministers can also be serviced by the Inter-State Council.

[Para 6.7.03]

11.15 Adjudication of disputes relating to waters of inter-State rivers

11.15.01 The Commission has examined the issue in detail in a separate volume of the report. The present state of affairs is obviously unsatisfactory as it is dilatory, time-consuming and seldom gets settled. Therefore change in the law and procedure is warranted. The possible courses of action are dealt with in volume seven of the Report.

[Para 6.5.01]

11.16 All India Services and Centre-State Co-operation for better Administration

11.16.01 The Constitution of All India Services is a unique feature of the Indian Constitution. The broad objectives in setting up All India Services relate to facilitating liaison between the Union and States, promote uniform standards of administration, enabling the administrative officers of the Union to be in touch with field realities, helping the State administrative machinery to obtain the best available talent with wider outlook and broader perspectives and reduce political influence in recruitment, discipline and control in administration. Considering the importance of these objectives, the Commission strongly recommends the constitution of few other All India Services in sectors like Health, Education, Engineering and Judiciary. They existed prior to Independence which contributed significantly to the quality of administration.

11.16.02 There are many issues relating to the administration of All India Services which are appropriately discussed in the report of the Administrative Reforms Commission and they are not discussed herein. However, the Commission would recommend proper integration of All India Services in the context of the introduction of the third tier of governance. The local bodies are in dire need of building capacities and strengthening the planning process for which the officers of All India Services can play a lead role.

[Para 6 .6.07]

11.16.03 Equally important is the system of encadrement of officers of state Governments and local bodies into the All India Services. Structural integration at all three levels requires clear demarcation of criteria for encadrement of posts, objective performance appraisal system, systematic career development and professionalisation plans and a rational system of postings and transfers. For this purpose, the Commission would suggest constitution of an Advisory Council under the Chairmanship of the Cabinet Secretary with the Secretary Personnel and the concerned Chief Secretaries of States.

[Para 6.6.08]

11.17 Rajya Sabha to be a Chamber to protect States' rights

11.17.01 The essence of federalism lies in maintaining a proper balance of power in governance and in this respect the Council of States (Rajya Sabha) occupies a significant

role. There is no doubt that Rajya Sabha is representative of States of the Union and is supposed to protect States' rights in Central policy making. The Commission is of the considered view that factors inhibiting the composition and functioning of the Second Chamber as a representative forum of States should be removed or modified even if it requires amendment of the Constitutional provisions. This is felt more important now when centralization tendencies are getting stronger and fragmentation of the polity is becoming intense.

[Para 7.3.14]

11.17.02 Whenever Central policies are formulated in relation to one or more States, it is only proper that Committees of Rajya Sabha involving representatives of concerned States are allowed to discuss and come up with alternate courses of action acceptable to the States and the Union. Thus, compensating the mineral rich States or the Hill States can well be negotiated in the Rajya Sabha Committee. Similarly, States adversely affected by the Centre entering into treaties or agreements with other countries can get appropriate remedies if the forum of the Rajya Sabha is utilized for the purpose. In fact, Rajya Sabha offers immense potential to negotiate acceptable solutions to the friction points which emerge between Centre and States in fiscal, legislative and administrative relations.

[Para 7.3.15]

11.18 Equal representation of States in Rajya Sabha

11.18.01 The principle of equality and equal representation in institutions of governance is as much relevant to States as to individuals in a multi-party, diverse polity. Equally applicable is the idea of preferential discrimination in favour of backward States in the matter of fiscal devolution from Union to States. There are other federations which give equal number of seats to the federating units in the Council of States irrespective of the size of their territory and population. The number of seats in the House of People (Lok Sabha) anyway is directly linked to the population and there is no need to duplicate the principle. A balance of power between States inter se is desirable and this is possible by equality of representation in the Rajya Sabha. If the Council of States has failed to function as representative of States as originally envisaged, it is because of the asymmetry of coalition politics and the way the party system developed. The functioning of Rajya Sabha can be reformed to achieve the original purpose of federal equilibrium. The Commission, therefore, strongly recommends amendment of the relevant provisions to

give equality of seats to States in the Rajya Sabha, irrespective of their population size.

[Para 7.3.16]

11.18.02 The Commission is also of the considered opinion that the reasoning of the Supreme Court in *Kuldip Nayyar V. Union of India* [(2006) 7scc1] rejecting the status of Rajya Sabha as a Chamber representing the States in the federal Union is faulty and deserves review. Meanwhile, Parliament should act restoring section 3 of the Representation of People Act as it originally stood to redeem the federal balance in shared governance. The territorial link as prescribed by the Representation of People Act is necessary and desirable to let the States realize that they are equal partners in national policy making and governance.

[Para 7.3.11 & Para 7.3.02]

11.19 Relationship of Article 246(3) and 162 with Articles 243G and 243W

11.19.01 The detailed analysis and recommendations of the Commission on decentralized governance under the 73rd and 74th Constitutional Amendments are discussed elsewhere in the Report. However, an aspect of Constitutional relevance on intergovernmental relations arising out of the 73rd Amendment alone is stated here for appropriate action through a fresh Constitutional amendment.

11.19.02 Articles 243G and 243W are sometimes read to mean that they leave it to the discretion of States whether or not to devolve any powers and functions to the local bodies. Such a reading makes the Constitutional Amendments superfluous defeating the whole purpose of the exercise. Although States have the discretion to decide and vary the subject matters in respect of which it wants to devolve powers and responsibilities, States are not free to decide not to devolve anything at all. After all, local bodies have been given the status of "self-government" which term unfortunately has not been defined in the Constitution.

[Para 8.3.01]

11.19.03 The Commission is of the view that the scope of devolution of powers to local bodies to act as institutions of self-government should be constitutionally defined through appropriate amendments, lest decentralised governance should elude realization indefinitely. The approach should be on the principle of "subsidiarity" which is implicit

in the scheme of Constitutional Amendment and letting the State Government confine itself only to matters of policy that cut across the entire domain of local governments. Articles 246(3) and 162 have to be read down in the light of the Amendment giving meaning and content to the expression "as may be necessary to enable them (Panchayats and Municipalities) to function as institutions of self-government.

[Para 8.3.06]

11.20 Governments' obligation to support court expenditure when laws are made

11.20.01 The Financial Memorandum attached to Bills usually do not provide for adjudication costs involved in enforcement of the new law. This puts the Subordinate Courts with little or no resources to cope up with additional workloads directly resulting from new legislations put on the Statute Book. An expert Committee has recommended to the Government that judicial impact assessment should be made whenever legislations are proposed and the Financial memorandum should reflect judicial costs as well. This Commission endorses the proposal.

[Para 9.4.03]

11.20.02 The Commission is of the view that in view of Article 247 read with Entry 11A of the Concurrent List, Government of India is Constitutionally obliged to make financial provision for implementation of Central laws through State Courts in respect of subjects in Lists I and III of the Seventh Schedule.

[Para 9.6.01]

11.21 Judicial Councils to advise Centre-State share in judicial budgets

11.21.01 Enabling the justice system to discharge its functions efficiently is the joint responsibility of Central and State Governments. While the administrative expenses of the Supreme Court and High Courts are charged upon the Consolidated Funds of the Centre and States respectively, there is no such financial arrangement guaranteed by the Constitution for subordinate judiciary. Judicial planning and budget making ought to be undertaken jointly by the judiciary and the executive for which some joint forum needs to be established. An expert committee set up by the Union Law Ministry recommended the setting up of "Judicial Councils" at the State and Central levels for the purpose which the Commission endorses. These Councils should not only prepare the judicial budget for

approval by the Legislature but also decide on the proportion of sharing the budget expenditure between Centre and States on the basis of the data on the workload of courts under Lists I, II and III.

[Para 9.6.07]

11.21.02 The idea is not to make the States bear the entire expenditure on Subordinate Courts which devote substantial time and resources to enforce the laws made by Parliament under List I and List III.

[Para 9.5.01]

11.21.03 Finally, the Commission is of the view that Central Government must make an assessment of the number of courts needed for efficient adjudication of disputes arising out of Central laws and establish the required number of Additional Courts as stipulated under Article 247 of the Constitution.

[Para 9.6.08]

11.22 Need for continuing emphasis on federal balance of power

11.22.01 On the question whether a fresh balance of power is needed to take governance forward on the path set by the Constitution, the Commission is of the view that the framers of the Constitution, taking note of the pluralistic identities of the people and the diverse historical traditions of the polity, have correctly come to the conclusion that a federal system alone can take the country forward as a united, democratic republic. The Commission, however, is convinced that the tilt in favour of the Union has increasingly accentuated over the years even outside the security needs of the country. This has led to avoidable over-centralisation even in developmental matters. These emerging contradictions in federal constitutional practice have to be addressed early in the interest of not only better Centre-State relations but also to sustain the very unity and integrity for which the tilt in favour of the Centre was originally conceived.

[Para 10.1.01 & 10.1.02]

11.22.02 The Commission believes that this balancing of powers and functions which assumed added significance after the introduction of the 73rd and 74th Constitutional Amendments can largely be accomplished through administrative arrangements supported by adequate devolution of finances for which the Finance

Commission is a key institution. While security concerns might warrant greater powers to the Union, on the development front (education, health etc.) the Centre should respect the autonomy of the other two levels of government and consciously avoid the tendency to centralize powers and functions. Its role is to be limited in laying down policies, devolving funds and facilitating co-ordination leaving implementation entirely to States and Local Bodies.

[Para 10.1.02]

11.23 Streamlining Administrative Relations

11.23.01 On the more problematic issue of the nature and scope of Centre's directions to the States in matters which are in the domain of States' executive power, the Commission, after having examined the views expressed by the States, has come to the conclusion that the powers under Articles 256 and 257 are necessary to remain with the Centre in order to ensure that the Centre's legislative and executive powers are duly honoured by the States. What directions are to be given by the Centre to the States and when, is for the Central Government to decide, keeping in view the exigencies of the circumstances and administrative necessities.

[Para 10.4.10]

11.24 Fiscal Relations to be largely decided by the Finance Commission

11.24.01 On the interplay of Fiscal Federalism and Centre-State Relations, the views of stakeholders and the recommendations of the Commission in this regard are given in the volume on Fiscal Relations. The Commission would like to emphasise here the importance of strengthening the Constitutional scheme of fiscal transfers through Finance Commissions and reduce the scope of other forms of devolution which leads to complaints from States.

[Para 10.5.02]

11.24.02 There is a case to make the Finance Commission to be a permanent body with membership changing every five years and with a regular Secretariat. The Centre should find a methodology to allow State participation in its Constitution and in formulation of terms of reference so that it may not appear to be a creation entirely of the Centre which is an interested party in the division of the kitty.

[Para 10.5.05]

11.25 Need to strengthen and empower the Inter-State Council

11.25.01 On the issue of creating a forum for co-ordination of intergovernmental relations, this Commission is of the considered view that the Inter-State Council (ISC) need to be substantially strengthened and activised as the key player in intergovernmental relations. It must meet at least thrice a year on an agenda evolved after proper consultation with States.

[Para 10.6.06]

11.25.02 If decision by consensus does not work in the Inter-State Council, it may be taken by majority in matters of national concern. In other areas, an Empowered Committee of ministers may be asked to study and report within a prescribed time-frame a more acceptable way of resolving the problem. The ISC must be empowered to follow up the implementation of its decisions for which appropriate statutory provisions should be made.

[Para 10.6.06]

11.25.03 The Government will be well advised to evolve an appropriate scheme to utilize the full potential of ISC in harmonizing Centre-State relations which has become urgent in the changed circumstances. Issues of governance must as far as possible be sorted out through the political and administrative processes rather than pushed to long-drawn adjudication in Court. Inter-State Council appears to be the most viable, promising Constitutional mechanism to be developed for the purpose provided it is properly re-structured and duly empowered.

[Para 10.6.06]

11.25.04 The present status and function of the Inter-State Council set up through a Presidential Order in 1990 are as follows:

The Council is a recommendatory body. The meetings of the Council are held in camera, and all questions, which come up for consideration of the Council in a meeting, are decided by consensus, and the decision of the Chairman as to the consensus is final.

11.25.05 The following duties have been assigned to the ISC:

1. Investigating and discussing such subjects, in which some or all of the States or the Union and one or more of the States have a common interest, as may be brought up before it;

2. Making recommendations upon any such subject and in particular recommendations for the better coordination of policy and action with respect to that subject; and
3. Deliberating upon such other matters of general interest to the States as may be referred by the Chairman to the Council.

11.25.06 The Council has not been assigned the function envisaged in clause (a) of Article 263 of the Constitution namely, *inquiring into and advising upon disputes, which may have arisen between States* as recommended by the Sarkaria Commission.

11.25.07 Very recently (2008) the Administrative Reforms Commission recommended that the conflict resolution role envisaged for the ISC under Art. 263 (a) of the Constitution should be effectively utilized to find solutions to disputes among States or between all or some of the States and the Union. It further added that the composition of Inter State Council (ISC) (of which there can be more than one) may be flexible to suit the exigencies of the matter referred to it under Article 263.

11.25.08 The Supreme Court even suggested an adjudicating role to the Council in certain types of disputes involving the Union and the States. Particularly on matters of policy where a consensual settlement is desired, the ISC could negotiate a more acceptable resolution of the dispute among the Constitutional entities.

11.25.09 The Council is empowered under the Presidential Order of 1990 to work out its own procedures with the approval of the Government.

11.25.10 Together with the full range of functional empowerment under Article 263, the Council should have functional independence with a professional Secretariat constituted with experts on relevant fields of knowledge supported by Central and State officials on deputation for limited periods. The Secretary of ISC should be designated ex-officio Secretary of the Department of States reporting directly to the Union Home Minister who is to be ex-officio Deputy Chairman of the Council. Given the Constitutional and quasi-judicial tasks, the Council should have experts in its organizational set up drawn from the disciplines of Law, Management and Political Science besides the All India Services. The proposed legislation should give the ISC an organizational and management structure different from the Government departments and flexible enough to accommodate management practices involving multidisciplinary skills conducive to federal governance under the Constitution.

[Para 10.07.07]