CHAPTER 1 CONSTITUTION OF INDIA

Q: Discuss the broad framework of the Constitution of India.

The Constitution of India came into force on January 26, 1950. It is a comprehensive document containing 448 Articles (divided into 25 Parts) and 12 Schedules. Apart from dealing with the structure of Government, the Constitution makes detailed provisions for the rights of citizens and other persons in a number of entrenched provisions and for the principles to be followed by the State in the governance of the country, labelled as "Directive Principles of State Policy". All public authorities – legislative, administrative and judicial derive their powers directly or indirectly from it and the Constitution derives its authority from the people.

Q: Comment on: The preamble to the constitution of India sets out the aims and aspirations of the people of India.

The preamble to the Constitution sets out the aims and aspirations of the people of India. It is a part of the Constitution (AIR 1973 SC 1961). The preamble declares India to be a Sovereign, Socialist, Secular, and Democratic Republic and secures to all its citizens Justice, Liberty, Equality and Fraternity. It is declared that the Constitution has been given by the people to themselves, thereby affirming the republican character of the polity and the sovereignty of the people.

The polity assured to the people of India by the Constitution is described in the preamble as a Sovereign, Socialist, Secular, and Democratic Republic. The expression "Sovereign" signifies that the Republic is externally and internally sovereign. Sovereignty in the strict and narrowest sense of the term implies independence all round, within and without the borders of the country. As discussed above, legal sovereignty is vested in the people of India and political sovereignty is distributed between the Union and the States.

The democratic character of the Indian polity is illustrated by the provisions conferring on the adult citizens the right to vote and by the provisions for elected representatives and responsibility of the executive to the legislature.

The word "Socialist", added by the 42nd Amendment, aims to secure to its people "justice—social, economic and political". The Directive Principles of State Policy, contained in Part IV of the Constitution are designed for the achievement of the socialistic goal envisaged in the preamble. The expression "Democratic Republic" signifies that our government is of the people, by the people and for the people.

Q: "The Constitution of India is basically federal but with certain unitary features". Discuss

Structure

Constitution of India is basically federal but with certain unitary features.

The majority of the Supreme Court judges in *Kesavananda Bharati* v. *State of Kerala,* were of the view that the *federal features* form the basic structure of the Indian Constitution. However, there is some controversy as to whether the Indian Constitution establishes a federal system or it stipulates a unitary form of Government with some basic federal features. Thus, to decide whether our Constitution is federal, unitary or quasi federal, it would be better to have a look at the contents of the Constitution.

The essential features of a Federal Polity or System are

- dual Government,
- distribution of powers,
- supremacy of the Constitution,
- independence of Judiciary,
- written Constitution, and
- A rigid procedure for the amendment of the Constitution.

The political system introduced by our Constitution possesses all the aforesaid essentials of a federal polity as follows:

a) In India, there are Governments at different levels, like Union and States.
b) Powers to make laws have been suitably distributed among them by way of various lists as per the Seventh Schedule.
c) Both Union and States have to follow the Constitutional provisions when they make laws.
d) The Judiciary is independent with regard to judicial matters and judiciary can test the validity of law independently. The Supreme Court decides the disputes between the Union and the States, or the States *inter se.*
e) The Constitution is supreme and if it is to be amended, it is possible only by following the procedure explained in **Article 368** of the Constitution itself.

From the above, it is clear that the Indian Constitution basically has federal features. But the Indian Constitution does not establish two co-ordinate independent Governments. Both the Governments coordinate, co-operate and collaborate in each other's efforts to achieve the ideals laid down in the preamble.

Peculiar Features of Indian Federalism

Indian Constitution differs from the federal systems of the world in certain fundamental aspects, which are as follows:

1. ***The Mode of Formation:*** A federal Union, as in the American system, is formed by an agreement between a number of sovereign and independent States, surrendering a defined part of their sovereignty or autonomy to a new central organisation. But there is an alternative mode of federation, as in the Canadian system where the provinces of a Unitary State may be transformed into a federal union to make themselves autonomous. India had a thoroughly Centralized Unitary Constitution until the Government of India Act, 1935 which for the first time set up a federal system in the manner as in Canada viz., by creation of autonomous units and combining them into a federation by one and the same Act.
2. ***Position of the States in the Federation:*** In a federal system, a number of safeguards are provided for the protection of State's rights as they are independent before the formation of federation. In India, as the States were not previously sovereign entities, the rights were exercised mainly by Union, e.g., residuary powers.

3. ***Citizenship etc****:* The framers of the American Constitution made a logical division of everything essential to sovereignty and created a dual polity with dual citizenship, a double set of officials and a double system of the courts. There is, however, single citizenship in India, with no division of public services or of the judiciary.
4. ***Residuary Power:*** Residuary power is vested in the Union. In other words, the Constitution of India is neither purely federal nor purely unitary. It is a combination of both and is based upon the principle that "In spite of federalism the national interest ought to be paramount as against autocracy stepped with the establishment of supremacy of law".

Q: Define the concept of 'State' with respect to fundamental rights enshrined in the Constitution of India.

Definition of State

With a few exceptions, all the fundamental rights are available against the State. Under Article 12, unless the context otherwise requires, "the State" includes—

a) the Government and Parliament of India;
b) the Government and the Legislature of each of the States; and
c) all local or other authorities:
   - Within the territory of India; or
   - Under the control of the Government of India.

Test for instrumentality or agency of the State

In *Ajay Hasia* v. *Khalid Mujib,* the Supreme Court has enunciated the following test for determining whether an entity is an instrumentality or agency of the State:

1. If the **entire share capital** of the Corporation is held by the Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of the Government.
2. Where the **financial assistance** of the State is so much as to meet almost the entire expenditure of the corporation it would afford some indication of the corporation being impregnated with government character.
3. Whether the corporation enjoys a **monopoly status** which is conferred or protected by the State.
4. Existence of **deep and pervasive State control** may afford an indication that the corporation is a State agency or an instrumentality.
5. If the **functions of the corporation are of public importance** and closely related to government functions, it would be a relevant factor in classifying a corporation as an instrumentality or agency of government.
6. If a **department of government is transferred to a corporation**, it would be a strong factor supporting an inference of the corporation being an instrumentality or agency of government.

In ***Zee Telefilms Ltd.*** **v.** ***Union of India***, the Supreme Court applying the tests laid down in *Pardeep Kumar Biswas* case held that the Board of Control for cricket in India (BCCI) was not State for purposes of Article 12 because it was not shown to be financially, functionally or administratively dominated by or under the control of the Government and control exercised by the Government was not pervasive but merely regulatory in nature.

Q: What is Existing Laws and Future Laws in relation to the Constitution of India.

Article 13 gives teeth to the fundamental rights. It lays down the rules of interpretation in regard to laws inconsistent with or in derogation of the Fundamental Rights.

***Existing Laws**:*

Article 13(1) relates to the laws already existing in force, i.e. laws which were in force before the commencement of the Constitution (pre constitutional laws). A declaration by the Court of their invalidity, however, will be necessary before they can be disregarded and declares that preconstitution laws are void to the extent to which they are inconsistent with the fundamental rights.

Future Laws:

Article 13(2) relates to future laws, i.e., laws made after the commencement of the Constitution (post constitutional laws). After the Constitution comes into force the State shall not make any law which takes away or abridges the rights conferred by Part III and if such a law is made, it shall be void to the extent to which it curtails any such right.

Q: Explain Doctrine of Severability, Doctrine of Eclipse and Doctrine of Waiver

Doctrine of Severability

One thing to be noted in Article 13 is that, it is not the entire law which is affected by the provisions in Part III, but on the other hand, the law becomes invalid only to the extent to which it is inconsistent with the Fundamental Rights. So only that part of the law will be declared invalid which is inconsistent, and the rest of the law will stand. However, on this point a clarification has been made by the Courts that invalid part of the law shall be severed and declared invalid if really it is severable, i.e., if after separating the invalid part the valid part is capable of giving effect to the legislature's intent, then only it will survive, otherwise the Court shall declare the entire law as invalid. This is known as the rule of severability.

Doctrine of Eclipse

The another noteworthy thing in Article 13 is that, though an existing law inconsistent with a fundamental right becomes in-operative from the date of the commencement of the Constitution, yet it is not dead altogether. A law made before the commencement of the Constitution remains eclipsed or dormant to the extent it comes under the shadow of the fundamental rights, i.e. is inconsistent with it, but the eclipsed or dormant parts become active and effective again if the prohibition brought about by the fundamental rights is removed by the amendment of the Constitution. This is known as the *doctrine of eclipse*.

Doctrine of Waiver

The doctrine of waiver of rights is based on the premise that a person is his best judge and that he has the liberty to waive the enjoyment of such rights as are conferred on him by the State. However, the person must have the knowledge of his rights and that the waiver should be voluntary. The doctine was discussed in *Basheshar Nath* v. *C.I.T.*, where the majority expressed its view against the waiver of fundamental rights. It was held that it was not open to citizens to waive any of the fundamental rights. Any person aggrieved by the consequence of the exercise of any discriminatory power, could be heard to complain against it.

Q: Discuss the fundamental rights in relation to Right of equality enshrined in the Constitution of India.

Right of equality

Articles 14 to 18 of the Constitution deal with equality and its various facets.

Article 14: Equality before the law and equal protection of the laws

Article 14 of the Constitution says that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

Article 14 guarantees to every person the right to equality before the law or the equal protection of the laws. The expression 'equality before the law' which is barrowed from English Common Law is a declaration of equality of all persons within the territory of India, implying thereby the absence of any special privilege in favour of any individual. Every person, whatever be his rank or position is subject to the jurisdiction of the ordinary courts. The second expression "the equal protection of the laws" which is based on the last clause of the first section of the Fourteenth Amendment to the American Constitution directs that equal protection shall be secured to all persons within the territorial jurisdiction of the Union in the enjoyment of their rights and privileges without favouritism or discrimination. Article 14 applies to all persons and is not limited to citizens. A corporation, which is a juristic person, is also entitled to the benefit of this Article (*Chiranjit Lal Chowdhurary* v. *Union of India*). The right to equality is also recognised as one of the basic features of the Constitution (*Indra Sawhney* v. *Union of India*).

As a matter of fact all persons are not alike or equal in all respects. Application of the same laws uniformly to all of them will, therefore, be inconsistent with the principle of equality. Of course, mathematical equality is not intended. Equals are to be governed by the same laws. But as regards unequals, the same laws are not complemented. In fact, that would itself lead to inequality.

Test of valid classification

Since a distinction is to be made for the purpose of enacting a legislation, it must pass the classical test enunciated by the Supreme Court in *State of West Bengal* v. *Anwar Ali Sarkar*. Permissible classification must satisfy two conditions, namely;

a) it must be founded on an *intelligible differentia* which distinguishes persons or things that are grouped together from others left out of the group; and
b) the differentia must have a rational nexus with the object sought to be achieved by the statute in question.

The classification may be founded on different basis, such as, geographical, or according to objects or occupation or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. A law based on a permissible classification fulfills the guarantee of the equal protection of the laws and is valid. On the other hand if it is based on an impermissible classification it violates that guarantee and is void.

Scope of Article 14

The true meaning and scope of Article 14 has been explained in several decisions of the Supreme Court. The rules with respect to permissible classification as evolved in the various decisions have been summarized by the Supreme Court in *Ram Kishan Dalmiya* v. *Justice Tendulkar,* as follows:

a) Article 14 forbids class legislation, but does not forbid classification.
b) Permissible classification must satisfy two conditions, namely,
   - It must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and
   - The differentia must have a relation to the object sought to be achieved by the statute in question.
c) The classification may be founded on different basis, namely geographical, or according to objects or occupations or the like.
d) In permissible classification, mathematical nicety and perfect equality are not required. Similarly, non identity of treatment is enough.
e) Even a single individual may be treated a class by himself on account of some special circumstances or reasons applicable to him and not applicable to others; a law may be constitutional even though it relates to a single individual who is in a class by himself.
f) Article 14 condemns discrimination not only by substantive law but by a law of procedure.
g) There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.

Article 15: Prohibition of discrimination on grounds of religion etc

Article 15(1) prohibits the State from discriminating against any citizen on grounds only of:

- religion
- race
- caste
- sex
- place of birth or
- any of them

Article 15(2) lays down that no citizen shall be subjected to any disability, restriction or condition with regard to—

a) access to shops, public restaurants, hotels and places of public entertainment; or
b) the use of wells, tanks, bathing ghats, roads and places of public resort, maintained wholly or partially out of State funds or dedicated to the use of the general public.

Under Article 15(3) the State can make special provision for women and children. It is under this provision that courts have upheld the validity of legislation or executive orders discriminating in favour of women (*Union of India* v. *Prabhakaran*).

Article 15(4) permits the State to make special provision for the advancement of—

- Socially and educationally backward classes of citizens;
- Scheduled casts; and
- Scheduled tribes.

Article 16: Equality of opportunity in matters of public employment

Article 16(1) guarantees to all citizens equality of opportunity in matters relating to employment or appointment of office under the State. Article 16(2) prohibits discrimination against a citizen on the grounds of religion, race, caste, sex, descent, place of birth or residence.

However, there are certain exceptions provided in Article 16(3), 16(4) and 16(5). These are as under:

1. Parliament can make a law that in regard to a class or classes of employment or appointment to an office under the Government of a State on a Union Territory, under any local or other authority within the State or Union Territory, residence within that State or Union Territory prior to such employment or appointment shall be an essential qualification. [Article 16(3)]
2. A provision can be made for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services under the State. [Article 16(4)]
3. A law shall not be invalid if it provides that the incumbent of an office in connection with the affair of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination. [Article 16 (5)]

Article 17: Abolition of untouchability

Article 17 says that "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law. Untouchability does not include instigation to social boycott (*Davarajiah* v. *Padamanna*).

Article 18: Abolition of titles

Article 18 is more a prohibition rather than a fundamental right. British Government used to confer titles upon persons who showed special allegiance to them. Many persons were made Sir, Raj Bahadur, Rai Saheb, Knight, etc. These titles had the effect of creating a class of certain persons which was regarded superior to others and thus had the effect of perpetuating inequality. To do away with that practice, now Article 18 provides as under:

1. No title, not being a military or academic distinction, shall be conferred by the State.
2. No citizen of India shall accept any title from any foreign State.
3. No person, who is not a citizen of India shall, while he holds any office or trust under the State, accept without the consent of the President, any title from any foreign State.
4. No person, holding any office of profit or trust under State shall without the consent of the President, accept any present, emolument or office of any kind from or under a foreign State.

Q: Discuss the fundamental rights in relation to Rights Relating to Freedom enshrined in the Constitution of India.

Rights Relating to Freedom

Article 19(1), of the Constitution, guarantees to the citizens of India six freedoms, namely:

a) freedom of speech and expression;
b) assemble peaceably and without arms;

c) form associations or unions
d) move freely, throughout the territory of India;
e) reside and settle in any part of the territory of India;
f) practice any profession, or to carry on any occupation, trade or business.

None of these freedoms is absolute but subject to reasonable restrictions specified under clauses (2) to (6) of the Article 19. The Constitution under Articles 19(2) to 19(6) permits the imposition of restrictions on these freedoms subject to the following conditions:

- The restriction can be imposed by law and not by a purely executive order issued under a statute;
- The restriction must be reasonable;
- The restriction must be imposed for achieving one or more of the objects specified in the respective clauses of Article 19.

Reasonableness

Reasonableness of the restriction is an ingredient common to all the clauses of Article 19. Reasonableness is an objective test to be applied by the judiciary. Legislative judgment may be taken into account by the Court, but it is not conclusive. It is subject to the supervision of Courts. The following factors are usually considered to assess the reasonableness of a law:

- The objective of the restriction;
- The nature, extent and urgency of the evil sought to be dealt with by the law in question;
- How far the restriction is proportion to the evil in question
- Duration of the restriction
- The conditions prevailing at the time when the law was framed.
  The onus of proving to the satisfaction of the Court that the restriction is reasonable is upon the State.

Scope and Limitations on the Freedoms

a) <u>Right to freedom of speech and expression</u>

The right to speech and expression includes right to make a good or bad speech and even the right of not to speak. The Courts have held that this right includes the freedom of press and right to publish one's opinion, right to circulation and propagation of one's ideas, freedom of peaceful demonstration, dramatic performance and cinematography. It may also include any other mode of expression of one's ideas. The Supreme Court in *Cricket Association of Bengal* v. *Ministry of Information & Broadcasting* (*Govt. of India*), has held that this freedom includes the right to communicate through any media - print, electronic and audio visual.

The freedom of speech and expression under Article 19(1)(a) means the right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode.

Regarding Commercial advertisements it was held in *Hamdard Dawakhana* v. *Union of India,* that they do not fall within the protection of freedom of speech and expression because such advertisements have an element of trade and commerce. A commercial advertisement does not aim at the furtherance of the freedom of speech. Later the perception about advertisement changed and it has been held that commercial speech is a part of freedom of speech and expression guaranteed under Article 19(1)(a) and such speech can also be subjected to reasonable restrictions only under Article 19(2) and not otherwise (*Tata Press Ltd*. v. *MTNL*).

The freedom of speech and of the press does not confer an absolute right to speak or publish without responsibility whatever one may choose.

The right to know, 'receive and impart information' has been recognized within the right to freedom of speech and expression (*S.P. Gupta* v. *President of India*. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. *(Secretary, Ministry of I&B, Govt. of India* v. *Cricket Association of Bengal*)

The right to reply, i.e. the right to get published one's reply in the same news media in which something is published against or in relation to a person has also been recognised under Article 19(1)(a), particularly when the news media is owned by the State within the meaning of Article 12. It has also been held that a Government circular having no legal sanction violates Article 19(1)(a), if it compels each and every pupil to join in the singing of the National Anthem despite his genuine, conscientious religious objection (*Bijoe Emmanuel* v. *State of Kerala*).

The Supreme Court in *Union of India* v. *Naveen Jindal*, has held that right to fly the National Flag freely with respect and dignity is a fundamental right of a citizen within the meaning of Article 19(1)(a) of the Constitution being an expression and manifestation of his allegiance and feelings and sentiments of pride for the nation.

Dramatic performance is also a form of speech and expression. In *K.A. Abbas* v. *Union of India,* the Court held that censorship of films including (pre-censorship) is justified under Article 19(1)(a) and (2) of the Constitution but the restrictions must be reasonable. The right of a citizen to exhibit films on the Doordarshan subject to the terms and conditions to be imposed by the latter has also been recognized. *(Odyssey Communications (P) Ltd.* v. *Lokvidayan Sangathan)*.

This freedom as mentioned above is subject to reasonable restriction and clause (2) of Article 19 specifies the limits upto which the freedom of speech and expression may be restricted. It enables the Legislature to impose by law reasonable restrictions on the freedom of speech and expression under the following heads:

- Sovereignty and integrity of India.
- Security of the State.

- Friendly relations with foreign States.
- Public Order.
- Decency or morality or
- Contempt of court.
- Defamation or
- Incitement to an offence.

b) Freedom of assembly

The next right is the right of citizens to assemble peacefully and without arms [Art. 19(1)(b)]. Calling an assembly and putting one's views before it is also intermixed with the right to speech and expression discussed above, and in a democracy it is of no less importance than speech. However, apart from the fact that the assembly *must be peaceful* and *without arms*, the State is also authorised to impose reasonable restrictions on this right in the interests of:

- the sovereignty and integrity of India, or
- Public order.

c) Freedom of association

The freedom of association includes freedom to hold meeting and to takeout processions without arms. Right to form associations for unions is also guaranteed so that people are free to have the members entertaining similar views [Art. 19(1)(c)]. This right is also, however, subject to reasonable restrictions which the State may impose in the interests of:

- the sovereignty and integrity of India, or
- public order, or
- morality.

d) Freedom of movement

Right to move freely throughout the territory of India is another right guaranteed under Article 19(1)(d). This right, however, does not extend to travel abroad, and like other rights stated above, it is also subject to the reasonable restrictions which the State may impose:

- in the interests of the general public, or
- for the protection of the interests of any scheduled tribe.

e) Freedom of residence

Article 19(1)(e) guarantees to a citizen the right to reside and settle in any part of the territory of India. This right overlaps the right guaranteed by clause (d). This freedom is said to be intended to remove internal barriers within the territory of India to enable every citizen to travel freely and settle down in any part of a State or Union territory. This freedom is also subject to reasonable restrictions in the interests of general public or for the protection of the interests of any Scheduled Tribe under Article 19(5). That apart, citizens can be subjected to reasonable restrictions (*Ebrahim* v. *State of Bom.*). Besides this, certain areas may be banned for certain kinds of persons such as prostitutes (*State of U.P.* v. *Kaushaliya*).

f) Right to acquire, hold and dispose of property — deleted by 44th Amendment in 1978.

g) Freedom to trade and occupations

Article 19(1)(g) provides that all citizens shall have the right to practise any profession, or to carry on any occupation, trade or business.

Article 19(1)(g) of the Constitution guarantees that all citizens have the right to practice any profession or to carry on any occupation or trade or business. The freedom is not uncontrolled and the Article authorises legislation to:

- imposes reasonable restrctions on this freedom in the interests of the general public;
- prescribes professional or technical qualifications necessary for carrying on any profession, trade or business; and
- enables the State to carry on any trade or business to the exclusion of private citizens, wholly or partially.

Q: Discuss the Fundamental Rights in relation to Protection in respect of conviction for offences under the Constitution of India

Protection in respect of conviction for offences

Article 20 guarantees to all persons — whether *citizens* or *non-citizens-three* rights namely:—

1. *Protection against ex-post facto laws*

According to Article 20(1), no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

Ex-post facto laws are laws which punished what had been lawful when done. If a particular act was not an offence according to the law of the land at the time when the person did that act, then he cannot be convicted under a law which with retrospective declares that act as an offence. For example, what was not an offence in 1972 cannot be declared as an offence under a law made in 1974 giving operation to such law from a back date, say from 1972. Even the penalty for the commission of an offence cannot be increased with retrospective effect. For example, suppose for committing dacoity the penalty in 1970 was 10 years imprisonment and a person commits dacoity in that year. By a law passed after his committing the dacoity the penalty, for his act cannot be increased from 10 to 11 years or to life imprisonment.

2. *Protection against double jeopardy*

According to Article 20(2), no person shall be prosecuted and punished for the same offence more than once. It is, however, to be noted that the conjunction "and" is used between the words prosecuted and punished, and therefore, if a person has been let off after prosecution without being punished, he can be prosecuted again.

3. *Protection against self-incrimination*

According to Article 20(3), no person accused of any offence shall be compelled to be a witness against himself. In other words, an accused cannot be compelled to state anything which goes against him. But it is to be noted that a person is entitled to this protection, only when all the three conditions are fulfilled:

- that he must be accused of an offence;

- that there must be a compulsion to be a witness; and
- such compulsion should result in his giving evidence against himself.

So, if the person was not an accused when he made a statement or the statement was not made as a witness or it was made by him without compulsion and does not result as a statement against himself, then the protection available under this provision does not extend to such person or to such statement.

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

Article 21 confers on every person the fundamental right to life and personal liberty. It says that, "No person shall be deprived of his life or personal liberty except according to procedure established by law." Thus, Article 21 seeks to prevent encroachment upon personal liberty by the Executive except in accordance with law and in conformity with the provision of law. Prior to *Maneka Gandhi* v. *Union of India,* Article 21 was understood to guarantee the right to life and personal liberty to citizens only against the arbitrary action of the executive and not against the legislative action. The State could interfere with the liberty of the citizens if it could support its action by a valid law. But after Maneka Gandhi's decision, Article 21 now protects the right to life and personal liberty of citizens from legislative action also on certain grounds.

*"*Personal Liberty" under Article 21 means freedom from physical restraint by incarceration or otherwise. It also includes all the varieties of rights which together make up a man's personal liberties other than those which are already included in the various clauses of Article 19. In *A.K. Gopalan* v. *State of Madras,* gave a narrow meaning to the expression 'personal liberty' confining it to the liberty of the person (that is, of the body of a person). The expression 'personal liberty' is not limited to bodily restraint or to confinement to prison, only is well illustrated in *Kharak Singh* v. *State of U.P*. In *Satwant Singh Sawhney* v. *A.P.O., New Delhi*, it was held that right to travel is included within the expression 'personal liberty' and, therefore, no person can be deprived of his right to travel, except according to the procedure established by law. It was stated in *Maneka Gandhi* v. *Union of India,* that 'personal liberty' within the meaning of Article 21 includes within its ambit the right to go abroad, and no person can be deprived of this right except according to procedure prescribed by law.

Procedure established by law: The expression 'procedure established by law' means procedure laid down by statute or procedure prescribed by the law of the State. The Supreme Court has widened the ambit of Article 21 in many of its decisions as for example,

- solitary confinement is inhuman (*Sunil Batra v. Delhi Administration*)
- speedy trial is included in Article 21 (*Hussainara Khatoon v. Home Secretary Bihar*);
- detenue's right to have interviews with his lawyers and family members (*Francis Coralie v. U.T. of Delhi*);
- right to free legal service (*S. Bhowmic's case*);
- non-payment of wages is violation of Article 21 (*Asiad Project case*);
- right to education (*Unnikrishnan v. State of A.P.*);
- right to information *R.P. Ltd. India Express Newspapers*;
- right to have free and unpolluted environment (*Subhash v. State of Bihar*) etc.

Q: Discuss Right to Education as Fundamental Right

Article 21A: Right to Education

This was introduced by the Constitution (Eighty sixth Amendment) Act, 2002. According to this, the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

Q: Discuss the fundamental rights relating to protection against arrest and detention

Protection against arrest and detention

Article 22 of the Constitution guaranteed the fundamental right relating to protection against arrest and detention cases. However, Article 22 does not apply uniformly to all persons and makes a distinction between alien enemies, person arrested or detained under preventive detention law, **and** other persons.

So far as alien enemies are concerned the article provides no protection to them. So far as persons is other persons, it provides the following rights (These rights are not given to persons detained under preventive detention law).

a) A person who is arrested cannot be detained in custody unless he has been informed, as soon as he may be, of the grounds for such arrest.
b) Such person shall have the right to consult and to be defended by a legal practitioner of his choice.
c) A person who is arrested and detained must be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time of journey. And such a person shall not be detained in custody beyond twenty-four hours without the authority of magistrate.

Q: Write a note on "Preventive Detention"

Preventive detention means detention of a person without trial. The object of preventive detention is not to punish a person for having done something but to prevent him from doing it. No offence is proved nor any charge formulated and yet a person is detained because he is likely to commit an act prohibited by law. Parliament has the power to make a law for preventive detention for reasons connected with defence, foreign affairs or the security of India. Parliament and State Legislatures are both entitled to pass a law of preventive detention for reasons connected with the security of State, the maintenance of public order, or the maintenance of supplies and services essential to the community.

Safeguards against Preventive Detention

Article 22 contains following safeguards against preventive detention:

a) such a person cannot be detained for a longer period than 3 months unless:
    - An Advisory Board constituted of persons who are or have been or are qualified to be High Court judges has reported, before the expiration of the said period of three months that there is, in its opinion sufficient cause for such detention.

- Parliament may by law prescribe the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention and the procedure to be followed by an Advisory Board.

b) The authority ordering the detention of a person under the preventive detention law shall:
   - communicate to him, as soon as may be, the grounds on which the order for his detention has been made, and
   - afford him the earliest opportunity of making the representation against the order.

Q: Write a note on "Right against Exploitation"

Articles 23 and 24 provides for rights against exploitation of all citizens and non-citizens.

1. Prohibition of traffic in human beings and forced labour

Article 23 imposes a complete ban on traffic in human beings, federal and other similar forms of forced labour. The contravention of these provisions is declared punishable by law. Thus the traditional system of beggary particularly in villages becomes unconstitutional and a person who is asked to do any labour without payment or even labourer with payment against his desire can complain against the violation of his fundamental right under Article 23.

'Traffic' in human beings means to deal in men and women like goods, such as to sell or let or otherwise dispose them of. 'Begar' means involuntary work without payment.

The State can impose compulsory service for public purposes such as conscription for defence for social service etc. While imposing such compulsory service the State cannot make any discrimination on grounds only of religion, race, caste or class or any of them.

2. Prohibition of employment of children

Article 24 prohibits employment of children below the age of 14 years in any factory or mine.

Q: Discuss the fundamental rights relating to Right to Freedom of Religion

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

Article 25 gives to every person the:

a) freedom of conscience, and

b) the right freely to profess, practice and propagate religion.

But this freedom is subject to restrictions imposed by the State on the following grounds:

- public order, morality and health,
- other provisions in Part III of the Constitution (i.e. Fundamental Rights),
- any law regulating or restricting any economic, financial political or other secular activity which may be associated with religious practice, and
- any law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

The Supreme Court in *State of Karnataka* v*. Dr. Praveen Bhai Thogadia*, held that secularism means that State should have no religion of its own and each person, whatever his religion, must get an assurance from the State that he has the protection of law to freely profess, practise and propagate his religion and freedom of conscience.

The freedom of religion conferred by the present Article is not confined to the citizens of India but extends to all persons including aliens and individuals exercising their rights individually or through institutions (*Ratilal* v. *State of Bombay, Stanslaus* v. *State*).

Collective rights of religious denominations

Article 26 grants to every religious denomination or any sect thereof the right—

- to establish and maintain institutions of religious and charitable purposes;
- to manage its own affairs in matters of religion;
- to own and acquire movable and immovable property; and
- to administer such property in accordance with law.

All these rights are subject to public order, morality and health. However, a religious denomination is not a 'citizen'.

Freedom as to payment of tax for the promotion of any particular religion

According to Article 27, no person can be compelled to pay any taxes, the proceeds of which are specially appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. It is notable that freedom not to pay taxes is only with respect to those taxes the proceeds of which are specially appropriated in payment of expenses for the promotion or maintenance of any particular religion or denomination.

Freedom as to attendance at religious instruction or religious worship in educational institutions

Article 28 prohibits religious instruction in certain educational institutions and gives freedom to a person to participate in such religious instructions. The Article states that—

a) No religious instruction can be provided in any educational instituion wholly maintained out of State funds. However, this prohibiton does not extend to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

b) No person attending an educational institution recognised by the State or receiving aid out of State funds cannot be required:
   - to take part in any religious instruction that may be imparted in such institution; or
   - to attend any religious worship that may be conducted in such institution or any premises attached thereto,

   Unless such person or if such person is a minor, his guardian has given his consent thereto.

Q: Discuss the fundamental rights relating to Cultural and Educational Rights [Rights of Minorities]

Cultural and Educational Rights [Rights of Minorities]

Minority

The word 'minority' has not been defined in the Constitution. The Supreme Court in *D.A.V. College, Jullundur* v. *State of Punjab,* seems to have stated the law on the point. It said that minority should be determined in relation to a particular impugned legislation. The determination of minority should be based on the area of operation of a particular piece of legislation. If it is a State law, the population of the State should be kept in mind and if it is a Central Law the population of the whole of India should be taken into account.

The two Articles guarantee the following rights:

1. Protection of interests of Minorities

Article 29 guarantees two rights:

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

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

This provision is general and applies to each citizen individually and is not confined to a group of citizens. An exception is made to this right to the effect that if a special provision is made for the admission of persons belonging to educationally or/and socially backward classes or scheduled castes or scheduled tribes it shall be valid.

2. Right of Minorities to establish and administer educational institutions

Article 30 provides following rights:

a) All minorities, whether based on religion or on language, shall have the right to establish and administer educational institutions of their choice. It may be noted here that this right is not limited only to linguistic minorities but it extends to religious minorities also. Both of them have been given the freedom to establish and administer educational institutions of their own choice. So they can establish educational institution of any type and cannot be restrained from its administration. The maladministration may be checked by the State but administration cannot be entrusted to outside hands.

b) The State cannot, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. It has been held that the State cannot impose conditions in granting aid to such institutions. Further, the minority institutions are also entitled to recognition and the State cannot deny them that right, merely because they do not follow the directions of the State which impair rights under Article 30.

Q: Write a note on Right to property

Right to property is no more a fundamental right which was previously guaranteed under Part III of the Constitution by Article 31.

But the right to property has been inserted by Article 300A under Part XII of the Constitution.

Article 300A reads — "No person shall be deprived of his property save by authority of law".

Saving of Laws Providing for Acquisition of Estates etc.

Such laws are those which provide for—

a) the acquisition by the State of any estate or any rights therein or the extinguishment or modification of any such rights.
b) the taking over of the management of any property by the State for a limited period in the public interest or in order to secure the proper management of the property, or
c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or
d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors or managers of corporations, or of any voting rights of shareholders thereof, or
e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning any mineral or mineral oil or the premature termination or cancellation of any such agreement, lease or licence.

Q: Write a short note on: Right to Constitutional Remedies

Right to Constitutional Remedies

Article 32 guarantees the enforcement of Fundamental Rights. It is remedial and not substantive in nature.

Remedies for enforcement of Fundamental Rights

It is a cardinal principle of jurisprudence that where there is a right there is a remedy (*ubi jus ibi remedium*) and if rights are given without there being a remedy for their enforcement, they are of no use. While remedies are available in the Constitution and under the ordinary laws, Article 32 makes it a fundamental right that a person whose fundamental right is violated has the right to move the Supreme Court by appropriate proceedings for the enforcement of this fundamental right. It is really a far reaching provision in the sense that a person need not first exhaust the other remedies and then go to the Supreme Court. On the other hand, he can directly raise the matter before highest Court of the land and the Supreme Court is empowered to issue directions or orders or writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto and certiorari*, whichever may be appropriate for the enforcement of the right, the violation of which has been alleged. This power of the Supreme Court to issue directions, etc., may also be assigned to other Courts by Parliament without affecting the powers of the Supreme Court.

Q: Write a short note on: Amendability of the Fundamental Rights

Amendability of the Fundamental Rights

1. Since 1951, questions have been raised about the scope of amending process contained in Article 368 of the Constitution. The basic question raised was whether the Fundamental Rights are amendable. The question whether the word 'Law' in Clause (2) of Article 13 includes amendments or not or whether amendment in Fundamental Rights guaranteed by Part III of the Constitution is permissible under the procedure laid down in Article 368 had come before the Supreme Court in *Shankari Prasad* v. *Union of India,* in 1951 where the First Amendment was challenged. The Court held that the power to amend the Constitution including the Fundamental Rights, was contained in Article 368 and that the word 'Law' in Article 13(2) did not include an amendment to the Constitution which was made in exercise of constituent and not legislative power. This decision was approved by the majority judgement in *Sajjan Singh* v. *State of Rajasthan*.
2. Thus, until the case of I.C. Golak Nath v. State of Punjab, the Supreme Court had been holding that no part of our Constitution was unamenable and that parliament might, by passing a Constitution Amendment Act, in compliance with the requirements of Article 368, amend any provision of the Constitution, including the Fundamental Rights and Article 368 itself.
3. But, in Golak Nath's case, a majority overruled the previous decisions and held that the Fundamental Rights are outside the amendatory process if the amendment takes away or abridges any of the rights. The majority, in *Golak Nath's* case, rested its conclusion on the view that the power to amend the Constitution was also a legislative power conferred by Article 245 by the Constitution, so that a Constitution Amendment Act was also a 'law' within the purview of Article 13(2).
4. To nullify the effect of Golak Nath's case, Parliament passed the Constitution (Twenty-Fourth Amendment) Act in 1971 introducing certain changes in Article 13 and Article 368, so as to assert the power of Parliament (denied to it in *Golak Nath's* case) to amend the Fundamental Rights. **The Constitutional validity of the 24th Amendment was challenged in the case of *Kesavanand Bharti* v. *State of Kerala*. The Supreme Court upheld the validity of 24th Constitutional Amendment holding that Parliament can amend any Part of the Constitution including the Fundamental Rights. But the Court made it clear that Parliament cannot alter the basic structure or framework of the Constitution.** In *Indira Gandhi* v. *Raj Narain,* the appellant challenged the decision of the Allahabad High Court who declared her election as invalid on ground of corrupt practices. In the mean time Parliament enacted the 39th Amendment withdrawing the control of the S.C. over election disputes involving among others, the Prime Minister. The S.C. upheld the challenge of 39th amendment and held that democracy was an essential feature forming part of the basic structure of the Constitution. The exclusion of Judicial review in Election disputes in this manner damaged the basic structure. The *doctrine of 'basic structure'* placed *a limitation on the powers of the Parliament to introduce* substantial alterations or to make a new Constitution.

5. To neutralise the effect of this limitation, the Constitution (Forty-Second Amendment) Act, 1976 added to Article 368 two new clauses. By new clause (4), it has been provided that no amendment of the Constitution made before or after the Forty-Second Amendment Act shall be questioned in any Court on any ground. New clause (5) declares that there shall be no limitation whatever on the Constitutional power of parliament to amend by way of addition, variation or repeal the provisions of this Constitution made under Article 368.

Q: Define Directive Principles of State Policy. Discuss the position of fundamental rights vis-a- vis Directive Principles of State Policy.

The Articles included in Part IV of the Constitution (Articles 36 to 51) contain certain Directives which are the guidelines for the future Government to lead the country. Article 37 provides that the 'provisions contained in this part

- *shall not be enforceable by any Court*, but the principles therein laid down are nevertheless
- *Fundamental in the governance of the country* and it shall be the duty of the state to apply these principles in making laws.

The Directives, however, differ from the fundamental rights contained in Part-III of the Constitution or the ordinary laws of the land in the following respects:

a) The Directives are not enforceable in the courts and do not create any justiciable rights in favour of individuals.
b) The Directives require to be implemented by legislation and so long as there is no law carrying out the policy laid down in a Directive neither the state nor an individual can violate any existing law.
c) The Directives per-se do not confer upon or take away any legislative power from the appropriate legislature.
d) The courts cannot declare any law as void on the ground that it contravenes any of the Directive Principles.
e) The courts are not competent to compel the Government to carry out any Directives or to make any law for that purpose.
f) Though it is the duty of the state to implement the Directives, it can do so only subject to the limitations imposed by the different provisions of the Constitution upon the exercise of the legislative and executive power by the state.

Conflict between a Fundamental Right and a Directive Principle

In case of conflict between a Fundamental Right and a Directive Principle, a Fundamental Right would prevail over the Directive Principle and thus a Directive Principle could not override a Fundamental Right.

Important Directive Principles:

The important Directive Principles are *inter alia* enumerated below:

a) State to secure a social order for the promotion of welfare of the people:

- The State must strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political should inform all the institutions of the national life (Article 38).
- The State shall, in particular, strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities, and opportunities, not only amongst individuals but also among groups of people residing in different areas or engaged in different vocations.

b) Certain principles of policy to be followed by the State. The State, particularly, must direct its policy towards securing:
   - that the citizens, men and women equally, have the right to an adequate means of livelihood;
   - that the ownership and control of the material resources of the community are so distributed as best to subserve the common goods;
   - that the operation of the economic systems does not result in the concentration of wealth and means of production to the common detriment;
   - equal pay for equal work for both men and women;
   - that the health and strength of workers and children is not abused and citizens are not forced by the economic necessity to enter avocation unsuited to their age or strength;
   - that childhood, and youth are protected against exploitation and against moral and material abandonment (Article 39).

   The State shall secure that the operation of legal system promotes justice on a basis of equal opportunity, and shall, in particular provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities (Article 39A).

c) The State must take steps to organise the Village Panchayats and enable them to function as units of self-government (Article 40).

d) Within the limits of economic capacity and development the State must make effective provision for securing the right to work, to education and to public assistance in case of unemployment, old age, etc. (Article 41).

e) Provision must be made for just and humane conditions of work and for maternity relief (Article 42).

f) The State must endeavour to secure living wage and good standard of life to all types of workers and must endeavour to promote cottage industries on an individual of co-operative basis in rural areas (Article 43).

g) The State must endeavour to provide a uniform civil code for all Indian citizens (Article 44).

h) Provision for free and compulsory education for all children upto the age of fourteen years (Article 45).

i) The State must promote the educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections (Article 46).

j) The State must regard it one of its primary duties to raise the level of nutritional and the standard of living and to improve public health and in particular it must endeavour to bring about prohibition of the consumption, except for medicinal purposes, in intoxicating drinks and of drugs which are injurious to health (Article 47).

k) The State must organise agriculture and animal husbandry on modern and scientific lines and improve the breeds and prohibit the slaughter of cows and calves and other milch and draught cattle (Article 48).
l) Protection of monuments and places and objects of national importance is obligatory upon the State (Article 49).
m) The State must separate executive from judiciary in public services of the State (Article 50).
n) In international matters the State must endeavour to promote peace and security, maintain just and honourable relations in respect of international law between nations, treaty obligations and encourage settlement of international disputes by arbitration (Article 51).

Q: Enumerate Fundamental Duties imposed on citizens of India under the Constitution.

Fundamental Duties have been enumerated under Part IVA of the Constitution. Article 51A of the Constitution contains provision relating to Fundamental Duties. According to Article 51A of the Constitution, it shall be the duties on every citizen of India-

a. To abide by the constitution and respect its ideals and institutions, the National Flag and the National Anthem;
b. To cherish and follow the noble ideals which inspired our national struggle for freedom;
c. To uphold and protect the sovereignty, unity and integrity of India;
d. To defend the country and render national service when called upon to do so;
e. To promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
f. To value and preserve the rich heritage of our composite culture;
g. To protect and improve the natural environment including forests, lakes, rivers and wild life, and
h. To have compassion for living creatures;
i. To develop the scientific temper, humanism and the spirit of inquiry and reform;
j. To safeguard public property and to abjure violence;
k. To strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement

As is evident the Fundamental Duties enumerated Part IVA of the Constitution. Articles 51A of the Constitution are addressed to the citizens. He owes theses duties to the State. These duties are not enforceable through court of law.

Q: Ordinance-making power of the President of India

The Ordinance making power is the most important legislative power conferred on the President of India under Article 123 of the Indian Constitution. The President can legislate by Ordinance at any time when a Parliamentary enactment is not possible. This power enables the Executive to meet a sudden situation arising in the country when Parliament is not in session and which it cannot deal with under the ordinary law. This power is co-extensive with legislative power of the Parliament.

The power has following peculiarities:

- President has the power under this article to pass on Ordinance (order) on an important and urgent matter.
- This power is exercised only when the Parliament is not in session.
- This power can be exercised only on the advice of Council of Ministers.
- On re-assembly of Parliament, the Parliament within 6 weeks of re-assembly shall decide upon the orders passed by President.
- President can pass orders with matters related to judiciary, executive, legislative & military.
- Genuineness of President's Ordinance cannot be challenged.
- The Ordinance shall cease to operate at the expiry of six weeks from the reassembly of Parliament. An Ordinance has the same force and effect as an Act of Parliament.

Q: Discuss the powers of the Governor relating to issuance of ordinances.

As per Article 154 of the Constitution, the Governor of State is the executive head of the State and all executive powers emanates from him. The Constitutional position of the governor in relation to the legislature and administration is the same as that of the Union President. Like the President, the Governor possesses executive, legislative and judicial powers except that he has no diplomatic or military powers.

The Governors power to make Ordinances has been stipulated under Article 213 of the Constitution of India having the force of an Act of the State legislature. It is similar in scope to the ordinance making power of the President of India. The slight difference is that Article 213 requires Governor to get the assent of the President of India on certain matters. The Governors can make Ordinances only when the state Legislature or either of the two Houses (where it is bicameral) is not in session. He must be satisfied that circumstances exist which render it necessary to take immediate action. While exercising this power Governor must act with the aid and advice of the Council of Ministers.

- Governor passes an Ordinance on important and urgent matters.
- It is passed when Legislative Assembly is not in session.
- This power is exercised on the advice of Council of Ministers.
- Within 6 weeks of re-assembly the Legislative Assembly shall decide upon.
- Can pass orders with matters related to judiciary, executive, legislative
- Governor cannot pass Ordinance with matters related to military.
- In case there is a clash between governor's ordinance and union law then Governor's Ordinance shall be followed.
- The Ordinance shall automatically cease to have effect at the expiration of six weeks from the date of the re-assembly unless disapproved earlier by that legislature.

Q: Write a short note on Territorial Distribution

Territorial Distribution

The Union Legislature, i.e., Parliament has the power to make laws for the whole of the territory of India or any part thereof, and the State Legislatures have the power to make laws for the whole or any part of the territory of the respective States. Thus, while the laws of the Union can be enforced throughout the territory of India, the laws of a State cannot

be operative beyond the territorial limits of that States. A Union Territory is administered directly by the Central Executive. Article 239(1) provides save as otherwise provided, by Parliament by law, every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an Administrator to be appointed by him with such designation as he may specify.

Q: Write a short note on Legislative Powers of the Union and the States with respect to Legislative Subjects

The arrangement for the operation of legislative powers of the Centre and the States with respect to different subjects of legislation is as follows:

1. With respect to the subject enumerated in the Union i.e., List I, the Union Parliament has the *exclusive* power to make laws. The State Legislature has no power to make laws on any of these subjects and it is immaterial whether Parliament has exercised its power by making a law or not. Moreover, this power of parliament to make laws on subjects included in the Union List is notwithstanding the power of the States to make laws either on the subjects included in the State List or the Concurrent List. If by any stretch of imagination or because of some mistake — which is not expected — the same subject which is included in the Union List is also covered in the State List, in such a situation that subject shall be read only in List I and not in List II or List III. By this principle the superiority of the Union List over the other two has been recognised.
2. With respect to the subjects enumerated in the State List, i.e., List II, the legislature of a State has *exclusive* power to make laws. Therefore Parliament cannot make any law on any of these subjects, whether the State makes or does not make any law.
3. With respect to the subjects enumerated in the Concurrent List, i.e., List III, Parliament and the State Legislatures both have powers to make laws. Thus, both of them can make a law even with respect to the same subject and both the laws shall be valid in so far as they are not repugnant to each other. However, in case of repugnancy, i.e., when there is a conflict between such laws then the law made by Parliament shall prevail over the law made by the State Legislature and the latter will be valid only to the extent to which it is not repugnant to the former. It is almost a universal rule in all the Constitutions where distribution of legislative powers is provided that in the concurrent field the Central law prevails if it conflicts with a State law. However, our Constitution recognises an exception to this general or universal rule. The exception is that if there is already a law of Parliament on any subject enumerated in the Concurrent List and a state also wants to make a law on the same subject then a State can do so provided that law has been reserved for the consideration of the President of India and has received his assent. Such law shall prevail in that State over the law of Parliament if there is any conflict between the two. However, Parliament can get rid of such law at any time by passing a new law and can modify by amending or repealing the law of the State.
4. With respect to all those matters which are not included in any of the three lists, Parliament has the exclusive power to make laws. It is called the residuary legislative power of Parliament. The Supreme Court has held that the power to impose wealth-tax on the total wealth of a person including his agricultural land belongs to Parliament in its residuary jurisdiction *(Union of India* v. *H.S. Dhillon*).

Q: Explain the powers of the parliament to make law of the State list

The Constitution draws three long lists of all the conceivable legislative subjects. These lists are contained in the VII Schedule to the Constitution. List I is named as Union List. List II as the State list and List III as the Concurrent List. With respect to subjects enumerated in the Union List, the Union Parliament has the exclusive power to make laws. The State Legislature has no power to make any law on any of these subjects. Regarding subjects enumerated in the State list, the Legislature of a State has exclusive power to make law. Parliament cannot make any law on any of these subjects whether the State makes or does not make any law. For subject stated under Concurrent List, Parliament and the State Legislature have powers to make laws.

As discussed above, the State legislatures have the exclusive powers to make laws with respect to the subjects included in the State List and Parliament has no power to encroach upon them.

The exceptional circumstances are:

1. **In the National Interest (Article 249)**: Parliament can make a law with respect to a matter enumerated in the State List if the Council of States declares by a resolution supported by two-thirds of its members present and voting, that it is necessary or expedient in the national interest that Parliament should make a law on that matter. But such resolution shall remain in force for a period not exceeding one year unless renewed by a fresh resolution.
2. **During a proclamation of emergency (Article 250)**
   While a Proclamation of Emergency is in operation, Article 250 of the Constitution of India, Parliament shall have power to make laws for the whole or any part of the territory of India with respect to all matters in the State List.
3. **Breakdown of Constitutional Machinery in a State (Article 356 and 357)** (President Rule in a State) Parliament can make laws with respect to all state matters as regards the particular state in which there is a breakdown of constitutional machinery and is under the President's rule.

4. **On the request of two or more States (Article 252):**
   If two or more States are desirous that on any particular item included in the State List there should be a common legislation applicable to all such States then they can make a request to Parliament to make such law on that particular subject. Such request shall be made by passing a resolution in the legislatures of the State concerned. If request is made in that form then parliament can make law on that subject as regards those States. The law so made may be adopted by other States also
5. **Legislation for enforcing international agreements/ treaties/ conventions (Article 253):**
   The Constitution authorises Parliament to make law on any subject included in any list to implement:
   (i) Any treaty, agreement or convention with any other country or countries, or
   (ii) Any decision made at any international conference, association or other body.
   To implement such decisions, agreements, treaties, the Parliament may have to pass laws sometimes on the State subjects also.

Q: Write a short note on Plenary Powers

Plenary Powers:

The first and foremost rule is that if legislative power is granted with respect to a subject and there are no limitations imposed on the power, then it is to be given the widest scope that its words are capable of, without, rendering another item nugatory.

Thus, a legislature to which a power is granted over a particular subject may make law on any aspect or on all aspects of it; it can make a retrospective law or a prospective law and it can also make law on all matters ancillary to that matter. For example, if power to collect taxes is granted to a legislature, the power not to collect taxes or the power to remit taxes shall be presumed to be included within the power to collect taxes.

Q: Write a short note on Harmonious Construction

Harmonious Construction:

Different entries in the different lists are to be interpreted in such a way that a conflict between them is avoided and each of them is given effect. It must be accepted that the Constitution does not want to create conflict and make any entry nugatory. Therefore, when there appears a conflict between two entries in the two different lists the two entries should be so interpreted, that each of them is given effect and, for that purpose the scope and meaning of one may be restricted so as to give meaning to the other also.

Q: Write a short note on: Doctrine of pith and substance.

The rule of pith and substance means that where a law in reality and substance falls within an item on which the legislature which enacted that law is competent to legislate, then such law shall not become invalid merely because it incidentally touches a matter outside the competence of legislature. Therefore, where such overlapping occurs, the question must be asked, what is, “pith and substance” of the enactment in question and in which list its true nature and character is to be found. For this purpose the enactment as a whole with its object and effect must be considered.

Q: Discuss in brief the rule of colourable legislation

Where the legislative powers are divided into two bodies which have to act within their respective specific legislative spheres, these questions do arise as to whether the legislation in a particular case has or has not in respect of subject ,matter of the statute, or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent or direct, but it may be disguised, covert and indirect. In the later class of the legislation the expression ‘colourable legislation has been applied in certain judicial decisions.’

Rule of colourable legislation conveys that although a legislature in passing a statute purports to act within the limits of its powers, yet in substance and in reality it transgression those powers, the transgression being veiled by what appears on proper examination to be a mere practice or disguise. In other words, it is the substance of the Act that is material and not merely the form and if the subject matter in substance is something, which is beyond the powers of the legislature to legislate upon, the form in which the law is clothed would not save from declaring it as *ultravires*.

In *Shakammerayana v State of Mysore*, the Supreme Court observed that the doctrine of colourable legislation is relevant only in connection with the question of legislative competence. Objections based on colourable legislation have relevance only in situations when the power is restricted to particular topics and an attempt is made to escape legal fetters imposed is resorting to forms of legislation calculated to mask the real subject matter.

Q: Mention the provision relating of freedom of trade, commerce and intercourse in the Constitution of India

Under Article 301 of the Constitution, the freedom of trade, commerce and intercourse has been guaranteed. It says trade, commerce and intercourse throughout the territory of India shall be free. The framers of the Constitution were conscious that free trade, commerce and intercourse throughout the territory of India are necessary. At the same time, such freedom may require be curtailing or curbing in public interest and the Parliament and the State Legislature have been given powers under Article 302, 303 and 304.

The freedom guaranteed by Article 301 is not made absolute and is to be read subject to the following exceptions as provided in Articles 302-305.

a) Parliament to Impose Restriction in the Public Interest

According to Article 302 Parliament may, by law, impose such restrictions on the freedom of trade, commerce and intercourse as may be required in the public interest.

b) Parliament to make Preference or Discrimination

Parliament cannot by making any law give preference to one State over the other or make discrimination between the States except when it is declared by that law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India [Article 303 (1) and (2)].

c) Power of the State Legislature

The Legislature of a State may by law:

- Impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and
- Impose such reasonable restrictions on the freedom of trade, commerce or intercourse within the State as may be required in the public interest. However, no bill or amendment for making a law falling in this provision can be introduced or moved in the Legislature of a State without the previous sanction of the President. [Article 304] In *Kalyani Stores* v. *State of Orissa,* Supreme Court held that Article 304 enables State legislature to impose taxes on goods from other States, if goods produced within the state are subjected to such taxes. A subsequent assent of President is also sufficient, as held in *Karnataka* v. *Hansa Corpn.*.

d) Saving of Existing Laws

The law which was already in force at the commencement of the Constitution shall not be affected by the provisions of Article 301 except in so far as the President may, by order, otherwise direct (Art 305).

e) Saving of Laws providing for State Monopoly

The laws which create State monopoly in any trade, etc. are saved from attack under Article 301, i.e., they are valid irrespective of the fact that they directly impede or restrict the freedom of trade and commerce. So, if the State creates a monopoly in road, transporters cannot complain that their freedom of trade and commerce has been affected or if the State created monopoly in banking then other bankers cannot complain that their freedom of trade and commerce has been restricted.

Q: Define the judiciary system in India

The Courts in the Indian legal system, broadly speaking, consist of

- the Supreme Court,
- the High Courts, and
- the subordinate courts.

Supreme Court

The Supreme Court, which is the highest Court in the country (both for matters of ordinary law and for interpreting the Constitution) is an institution created by the Constitution. Immediately before independence, the Privy Council was the highest appellate authority for British India, for matters arising under ordinary law. But appeals from High Courts in constitutional matters lay to the Federal Court (created under the Government of India Act, 1935) and then to the Privy Council. The Supreme Court of India, in this sense, has inherited the jurisdiction of both the Privy Council and the Federal Court. However, the jurisdiction of the Supreme Court under the present Constitution is much more extensive than that of its two predecessors mentioned above.

The Supreme Court, entertains appeals (in civil and criminal and other cases) from High Courts and certain Tribunals. It has also writ jurisdiction for enforcing Fundamental Rights. It can advise the President on a reference made by the President on questions of fact and law. It has a variety of other special jurisdictions.

High Courts

The High Courts that function under the Constitution were not created for the first time by the Constitution. Some High Courts existed before the Constitution, although some new High Courts have been created after 1950. The High Courts in (British) India were established first under the Indian High Courts Act, 1861 (an Act of the U.K. Parliament). The remaining High Courts were established or continued under the Constitution or under special Acts. High Courts for each State (or Group of States) have appellate, civil and criminal jurisdiction over lower Courts. High Courts have writ jurisdiction to enforce fundamental rights and for certain other purposes.

Subordinate Courts

Finally, there are various subordinate civil and criminal courts (original and appellate), functioning under ordinary law. Although their nomenclature and powers have undergone change from time to time, the basic pattern remains the same. These have been created, not under the Constitution, but under laws of the competent legislature. Civil Courts are created mostly under the Civil Courts Act of each State. Criminal courts are created mainly under the Code of Criminal Procedure.

Q: Explain various types of Writs.

Habeas Corpus

The writ of *Habeas corpus* - an effective bulwark of personal liberty – is a remedy available to a person who is confined without legal justification. The words '*Habeas Corpus*' literally mean "to have the body". When a *prima facie* case for the issue of writ has been made then the Court issues a *rule nisi* upon the relevant authority to show cause why the writ should not be issued. This is in national order to let the Court know on what grounds he has been confined and to set him free if there is no justification for his detention. This writ has to be obeyed by the detaining authority by producing the person before the Court. Under Articles 32 and 226 any person can move for this writ to the Supreme Court and High Court respectively. The applicant may be the prisoner or any person acting on his behalf to safeguard his liberty for the issuance of the writ of *Habeas Corpus* as no man can be punished or deprived of his personal liberty except for violation of law and in the ordinary legal manner. An appeal to the Supreme Court of India may lie against an order granting or rejecting the application (Articles 132, 134 or 136). The disobedience to this writ is met with by punishment for contempt of Court under the Contempt of Courts Act.

Mandamus

The word '*Mandamus'* literally means we command. Hence, writ of *mandamus* is, a command from superior court to any government subordinate court, corporation or public authority to do or forbear from doing some specific act which that body is obliged under law to do or refrain from doing, as the case may be, and which is in the nature of public duty and in certain cases of a statutory duty. In Halsbury's Laws of England writ of mandamus has been defined as follows; the writ of mandamus is a writ of most extensive remedial nature and is in form, a command issuing from the High Court of justice directed to any person, corporation, inferior court, or Government requiring him or it do a particular thing specified therein which pertains to his or its office and is further in the nature of a public duty. Its purpose is to remedy defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is specific legal right; and it may issue in cases where, although there is an alternative remedy, yet that mode of redress is less convenient, beneficial and effectual.

The writ of *mandamus* will lie only where there is statutory duty imposed upon the officer and failure on his part to discharge that statutory obligation. The chief function of this writ is to compel the performance of public duties prescribed by the statute and ensure that subordinate tribunals and officials perform their public functions within the limits of their jurisdiction. Before a mandamus is issued to compel the authorities to do something, it must be shown there is statute which imposes a legal duty and the aggrieved party has the legal right under the statute to enforce its performance.

A writ of *mandamus* will lie where the government or public authority has failed to exercise or has wrongly exercised discretion conferred upon it by a statue or a rule or a policy decision or exercised such discretion *mala fide* or on irrelevant considerations or in such manner as to frustrate the object of conferring such discretion. No *mandamus* will lie where the duty sought to be enforced is of a discretionary nature nor will it lie to compel performance of an act contrary to law.

Under the Constitution of India, such power of writ jurisdiction is vested with the Supreme Court under Article 32 and with the High Courts under Article 226. The writ of *mandamus* does not lie against the President of India, the Governor of a State for the exercise of their duties and power (Article 361). It does not lie also against a private individual or body except where the state is in collusion with such private party in the matter of contravention of any provision of the Constitution of a statute. It is a discretionary remedy and the High Court may refuse if alternative remedy exists except in case of infringement of fundamental rights.

Prohibition

A writ of prohibition is issued to an Inferior Court preventing the latter from usurping jurisdiction which is not legally vested in it. When a tribunal acts without or in excess of jurisdiction, or in violation of rules or law, a writ of prohibition can be asked for. It is generally issued before the trial of the case.

While *mandamus* commands activity, prohibition commands inactivity, it is available only against judicial or quasi judicial authorities and is not available against a public officer who is not vested with judicial functions. If abuse of power is apparent this writ may be of right and not a matter of discretion.

Certiorari

The writs of *Certiorari* is a judicial order directed by the Supreme Court or High Court to any constitutional, statutory or non statutory body any or person requiring the records of any action to be certified by the court and dealt with according to law. Under the Constitution of India, such power of writs jurisdiction is vested with the Supreme Court under Article 32 and with the High Court's under Article 226.

A writ of *Certiorari* can be issued to a judicial body on the following grounds:

a) Lack or in excess of jurisdiction
b) Abuse of jurisdiction
c) Violation of principles of natural justice
d) Error of apparent on the face of the record.

a) Lack or in excess of jurisdiction:

Lack or in excess of jurisdiction refers to such situations where the authority has no jurisdiction at all to take action. Excess of jurisdiction refers to cases hwere authority has jurisdiction but it exceeds to permitted limits.

b) Abuse of jurisdiction:

An authority shall be deemed to have abused the jurisdiction when it exercises its power for an improper purpose or on extraneous considerations or in bad faith or leaves out relevant consideration or does not exercise the power by itself but at the instance and discretion of someone else

c) Violation of principles of natural justice:

(i) Bias; (ii) rule of *audi alteram partem* which means right to fair hearing. The requirement of reasoned decisions is also added to thses two as the third principle of nature justice. The writs of *Certiorari* will lie to set aside the decisions in violation of principles of nature justice.

d) Error of law apparent on the face of the record:

Error apparent on the face of the record shall include not a mere error but a manifest error based on clear ignorance or disregard of the law or on a wrong proposition of the law or on clear inconsistency between facts and the law and the decision.

Quo Warranto

Quo warranto means 'by what warrant or authority' it is judicial order issued by the Supreme Court or a High Court by which any person who occupies an independent public office or franchise or liberty is asked to show by what right he claims it, so that the title to the office, franchise or liberty may be settled and any unauthorized person ousted.

Conditions for the grant of *Quo warranto:* Writ of *quo warranto is issued* if the following conditions are proved:

- the office in question is public office;
- the office is substantive nature,
- the office is created by statute or by the Constitution itself, and
- the office is being held without any authority and illegally by the occupant.

Quo warranto will also be issued when a person validly occupies office but acquires a disqualification later on. The fundamental basis of the proceedings of *Quo warranto* is that the public has an interest to see that a lawful claimant does not usurp a public office. Public office is one which is created by the Constitution or a statute and the duties must be such in which public is interested. The office of speaker of the legislative Assembly or Advocate General or of a High Court judge have been held to be public offices in which public is interested.

Like any other extraordinary remedy, *Quo warranto* is a discretionary remedy which the Court may grant or refuse.

Q: What is 'delegated legislation'? What are the limits under which power of delegated legislation may be exercised?

Delegated or subordinate legislation may be defined as rules of lawmaking under the authority an act of parliament. Although laws are to be made by legislature, the legislature by statute may delegate its power to other body of persons. Such statute is known as enabling Act and it lays down the broad principles and leaves the detailed rules to be provided by regulations made by a Minister or other body of persons. Delegated legislation exists in the form of rules, regulations, orders and bye laws. The three relevant justifications for delegated legislation are:

a) The limits of the time of the legislature;
b) The limits of the amplitude of the legislature, not merely its lack of competence but also its sheer inability to act in many situations, where direction is wanted; and
c) The need of some weapon for coping with situations created by emergency.

Following principles have been laid down by various decisions:
a) The Legislature cannot delegate its primary or essential legislative function to an outside authority in any case.
b) The legislature, in other words must itself lay down the legislative policy and principles and must afford sufficient guidance to the rule-making authority
c) Act delegating law-making powers to a person or body shall be invalid, if it lays down no principles and provides no standard for the guidance
d) If the legislature has performed its essential function of laying down the policy of the law and providing guidance for carrying out the policy, there is no constitutional bar against delegation of subsidiary or ancillary powers in that behalf to an outside authority.

Classification of Subordinate Legislation

1. *Executive Legislation*
   The tendency of modern legislation has been in the direction of placing in the body of an Act only few general rules or statements and relegating details to statutory rules. This system empowers the executive to make rules and orders which do not require express confirmation by the legislature. Thus, the rules framed by the Government under the various Municipal Acts fall under the category.
2. *Judicial Legislation*
   Under various statues, the High Courts are authorised to frame rules for regulating the procedure to be followed in courts. Such rules have been framed by the High Courts under the Guardians of Wards Act, Insolvency Act, Succession Act and Companies Act, etc.
3. *Municipal Legislation*
   Municipal authorities are entrusted with limited and sub-ordinate powers of establishing special laws applicable to the whole or any part of the area under their administration known as bye-laws.
4. *Autonomous Legislation*
   Under this head fall the regulations which autonomus bodies such as Universities make in respect of matters which concern themselves.
5. *Colonial Legislation*
   The laws made by colonies under the control of some other nation, which are subject to supreme legislation of the country under whose control they are.

SEPARATION OF POWERS

It is generally accepted that there are three main categories of governmental functions – (i) the Legislative,(ii) the Executive, and (iii) the Judicial. At the same time, there are three main organs of the Government in State i.e. legislature, executive and judiciary. According to the

theory of separation of powers, these three powers and functions of the Government must, in a free democracy, always be kept separate and exercised by separate organs of the Government. Thus, the legislature cannot exercise executive or judicial power; the executive cannot exercise legislative or judicial power of the Government.

Article 50 of the Constitution of India dealing with Separation of judiciary from executive. It provides that the State shall take steps to separate the judiciary from the executive in the public services of the State. Montesquieu said that if the Executive and the Legislature are the same person or body of persons, there would be a danger of the Legislature enacting oppressive laws which the executive will administer to attain its own ends, for laws to be enforced by the same body that enacts them result in arbitrary rule and makes the judge a legislator rather than an interpreter of law. If one person or body of persons could exercise both the executive and judicial powers in the same matter, there would be arbitrary powers, which would amount to complete tyranny, if the legislative power would be added to the power of that person.

Law making process (How a Bill becomes an Act)

(i) A Bill undergoes three readings in each House of Parliament. The First Reading consists of the Introduction of a Bill. The Bill is introduced after adoption of a motion for leave to introduce a Bill in either of the House. With the setting up of the Department-related Parliamentary Standing Committees, invariably all Bills, barring Ordinance replacing Bills; Bills of innocuous nature and Money Bills, are referred to the these Committees for examination and report within three months. The next stage on a Bill i.e., second reading start only after the Committee summits its report on the Bill to the Houses. The Second Reading consists of two stages: the ‗first stage' consists of discussion on the principles of the Bill and its provisions generally on any of the following motions: that the Bill be taken into consideration; that the Bill be referred to a Select Committee of the Rajya Sabha ; that the Bill be referred to a Joint Committee of the Houses with the concurrence of the Lok Sabha; that it be circulated for the purpose of eliciting opinion thereon; and the ‗second stage' signifies the clause-by clause consideration of the Bill as introduced or as reported by the
Select/Joint Committee. Amendments given by members to various clauses are moved at this stage. The Third Reading refers to the discussion on the motion that the Bill (or the Bill as amended) be passed or returned (to the Lok Sabha, in the case of a Money Bill) wherein the arguments are based against or in favour of the Bill. After a Bill has been passed by one House, it is sent to the other House where it goes through the same procedure. However the Bill is not again introduced in the other House, it is laid on the Table of the other House which constitutes its first reading there.

(ii) After a Bill has been passed by both Houses, it is presented to the President for his assent. The President can assent or withhold his assent to a Bill or he can return a Bill, other than a Money Bill, for reconsideration. If the Bill is again passed by the Houses, with or without amendment made by the President, he shall not withhold assent there from. But, when a Bill amending the Constitution passed by each House with the requisite majority is presented to the President, he shall give his assent thereto. A Bill

becomes an Act of Parliament after being passed by both the Houses of Parliament and assented to by the President.

Parliamentary Committees:-

Ad hoc Committees and the standing Committees	*Ad hoc* Committees are appointed for a specific purpose and they cease to exist when they finish the task assigned to them and submit a report. Apart from the *Ad Hoc* Committees, Each House of Parliament has Standing Committees like the Business Advisory Committee, the Committee on petitions, the Committee of Privileges and the Rules Committee, etc.
Other Committees	These committees act as Parliament's 'Watch Dogs' over the executive. These are the Committees on Subordinate Legislation, the Committee on Government Assurances, the Committee on Estimates, the Committee on Public Accounts and the Committee on Public Undertaking and Departmentally Related Standing Committees (DRSCs).