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Constitutional Values and Democratic Institutions



In this issue

**Part 1: Features of the
Constitution**

**Part 2: Legislation Powers and the
Judiciary**





RAJIV GANDHI
INSTITUTE FOR CONTEMPORARY STUDIES

Editorial

The Rajiv Gandhi Institute for Contemporary Studies (RGICS) is the knowledge affiliate of the Rajiv Gandhi Foundation. RGICS carries out research and analysis as well as policy advocacy on contemporary challenges facing India. RGICS currently undertakes research studies on the following five themes of general public utility including:

- Constitutional Values and Democratic Institutions
- Growth with Employment
- Governance and Development
- Environment, Natural Resources and Sustainability
- India's Place in the World

As part of our work on the theme of Constitutional Values and Democratic Institutions and the theme Governance and Development, the RGICS had commissioned a study on Federalism in India in late 2022. It was conducted by Arnab Bose, Sr Research Associate, RGICS, with support and guidance from the undersigned. The study is in four parts, as follows:

Part 1 - Features of the Constitution

Part 2 – Union, State and Concurrent Lists and the Judiciary

Part 3 – Fiscal Relations

Part 4 - Inter-State Coordination and Dispute Resolution

Each part deals with the provisions as laid down in the Constitution, and reviews their status in actual practice, documenting several examples where the original provisions have been diluted or ignored in practice.

We present part 1 and part 2 of the study under the theme of Constitutional Values and Democratic Institutions and are publishing it as Policy Watch, Jul 2023 issue.

Part 3 and part 4 are under the theme Governance and Development and we will be publishing those as Policy Watch, August 2023 issue.

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Federalism in India

Part I: Features of the Constitution

Contents

I Introduction.....	4
2 Understanding Federalism.....	4
3 Federalism in the Indian Constitution.....	7
4 Formation of States.....	10
5 The Role of Governors.....	14
5.1 Recommendations of Sarkaria Commission on the Role of the Governor.....	16
6 Article 356: Proclamation of President's Rule in a State.....	17
6.1 Sarkaria Commission's Stand on Article 356.....	19
7 Article 370 and 30B: The Case of Jammu and Kashmir.....	20
7.1 Origin of Article 370.....	21
7.2 Abrogation of Article 370.....	22
8 Some Special Provisions: Article 371, Schedule 5 and Schedule 6.....	24
8.1 Article 371.....	24
8.2 Special areas: Schedule 5 and Schedule 6.....	26
9 Conclusion.....	28
10 References.....	28

Federalism in India

Part I: Features of the Constitution

I Introduction

Federalism is a basic feature of the Indian Constitution. Both the Centre and the States in India are co-operating institutions having independence, and are required to exercise their respective powers with mutual understanding and accommodation. However, Indian federalism is often characterized as a paradox of it being a centralized federalism. This paper outlines some of the basic features of India's federal system and seeks to explain their effectiveness in terms of managing center-state relations. The paper begins by providing a brief description of federalism. The next section highlights some of the key federal features of the constitution while bringing out its centralizing character. The third section describes how the federal process in India has led to the formation of states. The next two sections discuss some special provisions which have often been used to undermine the federal process in the country. The sixth section describes the special case of Jammu and Kashmir and the final section highlights some special provisions with respect to certain backward states. The main focus of the paper is in highlighting the dynamics between the federal and centralizing aspects of the Indian Constitution.

2 Understanding Federalism

A federal political arrangement is a political organization, typically within a territory, that is marked by a combination of shared rule and self-rule between various constituent units.¹ The theory or advocacy of such an arrangement, including principles for dividing final authority between the units, is called federalism.² In modern nation states the term federalism refers to the constitutionally allocated distribution of powers between various levels of government.³ The most salient aspect of a federal system is that the governments at various levels function in their respective jurisdictions with considerable independence from one another. Thus, sovereignty in a federal system is non-centralized, with each level being self governing in certain areas and having shared rule in certain other areas.⁴ At present the most well known form of federal organization is the federation.⁵

A Federation is defined as a system in which at least two territorial levels of government share sovereign constitutional authority over their respective division. Thus, it involves a territorial division of power between constituent units, sometimes called 'provinces', 'cantons', 'cities', or 'states', and a common government.⁶ The division of power is typically derived from a constitution which neither a member unit nor the common government can alter unilaterally.⁷ There are typically three models of formation of Federations.⁸

¹ Watts, Ronald L., 1998, "Federalism, Federal Political Systems, and Federations," *Annual Review of Political Science*, 1: 117–37

² *Ibid*

³ George Anderson, *Federalism: An Introduction*, (Newyork: Oxford, 2008)

⁴ Elazar, Daniel J., 1987, *Exploring Federalism*, Tuscaloosa: University of Alabama Press.

⁵ *Ibid*

⁶ Watts, Ronald L., 1998, "Federalism, Federal Political Systems, and Federations," *Annual Review of Political Science*, 1: 117–37

⁷ *Ibid*

⁸ Stepan, Alfred. *Arguing Comparative Politics*. Oxford: Oxford University Press, 2001.

First, they can be formed from previously independent states that decide to voluntarily “come together” to form a strong union. The US is a classic example of such a coming together model of federation of states.⁹ Second, a federation can develop through the transformation of a vast and diverse unitary state, where it gives autonomy to its provinces for administrative convenience and regional representation. This model of federation is called the “holding together” federation.¹⁰ Indian federalism has been broadly designed based on this model. The third formation is a federation “put together” by force.¹¹ This is a coercive approach and the prospects for democratization of such coercively put-together federations are not good.¹² An important example of the third type is that of the US having “put together” Bosnia and Herzegovina.¹³

Traditionally, there have been many arguments advocating for a federal system which include promoting various forms of liberty in terms of non-domination, and enhanced opportunities.¹⁴ When considering the reasons, the arguments can broadly be put in two categories: Arguments favoring a federal system over having completely independent sovereign states; and arguments supporting a federal system over a centralized unitary state.

Some reasons for having a federal system over separate states:

- Federations foster peace and prevent fears of war in several ways. States can join a federation to become jointly powerful to dissuade external aggressors as well as prevent aggressive and preemptive wars among themselves. Many European federalists had argued that only a European federation could prevent war between totalitarian, aggressive states.¹⁵
- Federations can promote economic prosperity by removing internal barriers to trade, through economies of scale, by establishing and maintaining inter-member unit trade agreements.¹⁶
- Federal systems may protect individual rights against state authorities by constraining state sovereignty by placing some powers with the center. Entrusting the center with authority to intervene in member units may help protect minorities’ human rights against abuse by member units.¹⁷
- Federations can facilitate coordination and fulfilling of certain common objectives of sovereign states by transferring some powers to a common central body.¹⁸

Reasons for preferring federal systems over unitary states:

- Federal systems may protect against central authorities by securing rights for minority groups or nations. Constitutional allocation of powers to a member unit protects individuals from the center as well as allows influence on central decisions via member unit bodies.¹⁹ Thus, federal arrangements can accommodate the preservation of culture, language or religion of minority nations.

⁹ Ibid

¹⁰ Alfred Stephan, “Federalism and democracy: Beyond the US model”. *Journal of Democracy* Vol 10(4), (1999):19–34.

¹¹ Ibid

¹² Stephan, Alfred. *Arguing Comparative Politics*. Oxford: Oxford University Press, 2001

¹³ Cohen, Lenard J. “Fabricating Federalism in “Dayton Bosnia”: Political Development and Future Options.” In *Federalism Doomed? European Federalism between Integration and Separation*, edited by Andreas Heinemann-Grüder, 116–45. Oxford: Bergahn Books, 2002.

¹⁴ Elazar, Daniel J., 1987, *Exploring Federalism*, Tuscaloosa: University of Alabama Press

¹⁵ 1941 Ventotene Manifesto

¹⁶ Keohane, Robert O., and Joseph S. Nye, 2001, *Power and Interdependence: World Politics in Transition* (3rd Edition), New York: Longman

¹⁷ Watts, Ronald L., 1998, *Comparing Federal Systems*, Montreal: McGill-Queens University Press.

¹⁸ Ibid

¹⁹ Goodin, Robert, 1996, “Designing constitutions: the political constitution of a mixed commonwealth,” *Political Studies*, 44: 635–46.

- Federal systems may increase the opportunities for citizen participation in public decision-making by having decision making bodies much closer to them within the member units, rather than having just one centralized decision making body at a distance.²⁰
- Federations may facilitate efficient and preference driven decision making. Local decisions can prevent overload of centralised decision-making, and local decision-makers may also have a better grasp of affected groups, allowing for better decisions than would be made by a central government that tends to ignore local preferences.²¹
- Federal systems can protect minority groups with preferences that diverge from the majority population so that they are not subject to majority decisions contrary to their preferences. Federations thus minimize coercion and are able to be responsive to as many citizens as possible.²²
- Federal arrangements may promote mobility and hence territorial clustering of individuals with similar values and preferences. Such mobility may further add to the benefits of autonomy over decision making by accounting for preferences.²³



Source: <https://leverageedublog.s3-ap-south-1.amazonaws.com/blog/wp-content/uploads/2020/09/09204227/federalism-class-10-notes.jpg>

While federal systems have many advantages over other forms of political arrangements, it has been observed that they face a specific challenge of stability. Federations often tend to drift toward disintegration in the form of secession, or toward centralization in the direction of a unitary state.²⁴ The main reason for such instability is the underlying tensions between the minority and majority regional communities, which is the reason for forming a federation in the first place.²⁵ Federal political orders are therefore often marked by a high level of ‘constitutional politics’.²⁶

Political parties often disagree on constitutional issues regarding the appropriate areas of member unit autonomy, the forms of cooperation and how to prevent fragmentation. Many authors have noted that the challenges of stability must be addressed not only by institutional design, but also by ensuring that citizens have an ‘overarching loyalty’ to the federation as whole in addition to loyalty toward their own member unit.²⁷ Therefore, a related concern for federal systems is the basis for division of power between member units and central bodies, to safeguard against the risks of instability. While federations do not guarantee stability, they still provide the best protection against secession, as well as provide ways of achieving autonomy that respect the rights of peoples.²⁸

²⁰ Mill, John Stuart, 1861, *Considerations on Representative Government*, New York: Liberal Arts Press, 1958

²¹ Smith, Adam, 1776, *An Inquiry into the Nature and Causes of the Wealth of Nations*, London: Dent, 1954.

²² Elazar, Daniel J., 1968, “Federalism,” *International Encyclopedia of the Social Sciences*, New York: Macmillan, p. 356–361

²³ Buchanan, James, 1999/2001, *Federalism, Liberty and the Law*, Collected Works (Volume 18), Indianapolis: Liberty Fund.

²⁴ Simeon, Richard, and Daniel-Patrick Conway, 2001, “Federalism and the Management of Conflict in Multinational Societies,” in Gagnon and Tully 2001, 338–65.

²⁵ *Ibid*

²⁶ *Ibid*

²⁷ Linz, Juan J., 1999, “Democracy, multinationalism and federalism,” in A. Busch and W. Merkel (eds.), *Demokratie in Ost und West*, Frankfurt am Main: Suhrkamp, 382–401.

²⁸ *Ibid*

3 Federalism in the Indian Constitution

At the time of independence, the framers of the Indian Constitution recognized that in a territorially vast and culturally diverse country like India, federalism was not merely necessary for administrative purposes but for the very survival of the nation.²⁹ Thus, they wanted federalism as an instrument for creating a strong and cohesive nation. However, at the same time, anxious that the newly independent country should not fall apart due to disunity and secessionist tendencies, they refrained from creating a fully federalised system.³⁰

This belief was further strengthened by the recent partition of the country. Therefore, adequate precautions had to be taken against any such future contingency. This was done by having a strong central government. During the Constituent Assembly debates, Jawaharlal Nehru had observed that “it would be injurious to the interests of the country to provide for a weak central authority which would be incapable of ensuring peace, of coordinating vital matters of common concern and of speaking effectively for the whole country in the international sphere.”³¹

While the center had been assigned a larger role than the states, this did not detract from the federal character of the constitution.³² The fundamental principle of federalism is that the legislative and executive authority are partitioned between the center and states, not by means of ordinary law, but by something more enduring, such as the constitution. This is what the Indian constitution does.³³ Under ordinary circumstances, the states do not depend on the center and the center cannot intrude on their domain. Dr. B R Ambedkar had assured the constituent assembly of the federal nature of the constitution by stating “The Constitution is a Federal Constitution...The Union is not a league of states...nor is the states the agencies of the Union, deriving powers from it. Both the Union and the states are created by the Constitution; both derive their respective authority from the Constitution.”³⁴ Thus, to govern India, a quasi-federal structure was adopted.³⁵

Some of the important federal features of the Indian Constitution:

i. Dual Polity:

The pivotal point of a federal constitution is the division of powers between the centre and the states. There is a supreme government at the centre and there is also a provision to establish an independent government at the state level. The whole structure of the federal system revolves around this central point. The Indian Constitution provides for a dual polity³⁶ with the Union Government at the Centre³⁷ and State Governments in various states.³⁸

ii. Supremacy of the Constitution:

Supremacy of the Constitution: Federal Constitutions follow the principle of *Suprema Lex*, that is, the Supremacy of the Constitution.³⁹ The States' existence and its powers are derived from the Constitution. All laws enacted both at the Centre and the State ought to be in line with the Constitution. India's Constitution is also considered supreme. If for any reason any organ of the State violates any provision of the Constitution,⁴⁰ the courts are empowered to ensure that dignity of the Constitution is upheld.⁴¹

²⁹ Mohit Bhattacharya, “The mind of the founding fathers,” in *Federalism in India: Origins and Development*, ed. N. Mukarji & B. Arora (Vikas Publishing House, 1992), 87–104.

³⁰ *Ibid*

³¹ *Constituent Assembly Debates, Volume V, 20 August 1947.*

³² Chaubey RK. *Federalism, Autonomy and Center State Relations*. Allahbad: Satyam; 2007.

³³ *Ibid*

³⁴ *Constituent Assembly Debates, Vol. VIII, 33.*

³⁵ Wheare, K.C., 1951, *India's New Constitution Analyzed, Federal Government*.

³⁶ *Schedule 7 of the Indian Constitution.*

³⁷ *Article 79, Ibid.*

³⁸ *Article 168, Ibid.*

³⁹ <https://pib.gov.in/PressReleasePage.aspx?PRID=1553845>

⁴⁰ *Article 32 of the Indian Constitution*

⁴¹ *Article 368, Ibid.*

iii. Written Constitution:

A Federal nation cannot exist without a written Constitution. This is important because the division of powers between various levels of government needs to be explicitly mentioned. Therefore, a written constitution is mandatory. The Indian Constitution is a written document containing 395 Articles and 12 schedules, thereby fulfilling the basic requirement of a federal constitution.

iv. Rigid Constitution:

Rigidity in amendment is a distinctive feature of a federal constitution. The Indian Constitution is largely a rigid Constitution. All the provisions of the Constitution concerning Union-State relations can be amended only by the joint actions of the State Legislatures and the Parliament. Such provisions can be amended only if the amendment is passed by a two-thirds majority of the members present and voting in the Parliament (which must also constitute the absolute majority of the total membership) and ratified by at least one-half of the States.⁴¹

v. Division of Power:

In a federation, there should be clear division of powers so that the centre and the states can enact and legislate within their sphere of activity and none encroaches upon the functions of others. This requisite is evident in the Indian Constitution. Part XI of the Indian Constitution is titled "Relations between the Union and the States".⁴² Chapter I relates to legislative relations. An important provision in the chapter is Article 246 which provides the subject-matter of laws made by the Parliament and the State Legislatures.⁴³

The article provides for a three-fold distribution of legislative powers between the Union and the states. The gist of the article is that Parliament has complete and exclusive power to legislate with respect to matters in List I (Union List), and also has the power to legislate with respect to matters in List III (Concurrent List). The State Legislature, on the other hand, has complete and exclusive power to legislate with respect to List II (State List), and has concurrent power with respect to matters included in List III. The provisions of Article 246 are to be read with the entries in the Union List, State List and the Concurrent List in Schedule VII.

vi. Bicameral Legislature:

A bicameral system is considered essential in a federation because it enables the states to be given direct representation in one of the Houses of the parliament. The Constitution of India also provides for a bicameral Legislature at the Centre consisting of Lok Sabha and Rajya Sabha.⁴⁴ While the Lok Sabha consists of the elected representatives of people, the Rajya Sabha mainly consists of representatives elected by the State Legislative Assemblies.



⁴² Part I I, Ibid

⁴³ Article 246, Ibid

⁴⁴ Article 81, Ibid

⁴⁵ Article 80, Ibid

⁴⁶ Wheare, K.C., 1951, *India's New Constitution Analyzed, Federal Government*

⁴⁷ Jennings, I.W., 1953, *Some Characteristics of the Indian Constitution*.

In the opinion of Kenneth Wheare, the Indian constitution is “quasi-federal”... a unitary state with subsidiary federal features, rather than a federal state with subsidiary unitary features.⁴⁶ Similarly, I. Jennings has characterized India as a federation with a strong centralizing tendency.⁴⁷ A.V. Dicey holds the view that the extent of federalism in India is largely watered down by the needs of progress and development of a country which has to be nationally integrated, politically, and economically coordinated and socially, intellectually, and spiritually uplifted.⁴⁸ Thus, Indian federalism is unique because of its quasi federal character. It is to be noted that term “Union of States” and not federation of states is used in the constitution.⁴⁹ In addition, the units have no right to secede.⁵⁰ The Indian constitution enshrines the principle that in spite of federalism, the national interest ought to be paramount.⁵¹ Thus, the constitution is mainly federal with unique safeguards for enforcing national unity.



Source: <https://blog.ipleaders.in/distribution-legislative-powers-union-states/>

The following are some areas in which the Indian constitution modifies the strict application of the federal principle by having the balance of power tilted towards the center. This highlights the centralizing tendency and the quasi federal character of the constitution.

i. Legislative Power:

Under Article 249, the parliament is empowered to make laws with respect to every matter enumerated in the state list, if it is necessary in the national interest.⁵² Such laws can also be legislated at a special request of a group of states. In case of an overlap between the matters of three lists, i.e., union, state, and concurrent list, predominance has been given to the union.⁵³ The Center also enjoys residuary powers i.e. the power which allows the Centre to make laws on subjects not mentioned in List II and III.⁵⁴ Laws of investigative agencies not mentioned in any of the lists empower the Parliament to make laws on the same.⁵⁵ Further, during President’s Rule in a state,⁵⁶ all the bills pending in the dissolved State Legislature are moved to the Parliament which then takes a decision on the bill.

⁴⁸ Kadian O, Pandey M. *Fundamentals of Indian Constitution*. New Delhi: Gaurav Books; 1993

⁴⁹ Article 1(1) of the Indian Constitution.

⁵⁰ Kadian O, Pandey M. *Fundamentals of Indian Constitution*. New Delhi: Gaurav Books; 1993.

⁵¹ *Ibid*

⁵² Article 249 of the Indian Constitution

ii. Emergency Power:

Only the Centre has the power to impose emergency under Articles 352, 356 and 360. Emergency under Article 352 can be imposed only when the nation is threatened by external aggression or armed rebellion.⁵⁷ Such an emergency was imposed in the 1970's during Indira Gandhi's tenure as Prime Minister. President's rule proclaimed due to failure of Constitutional Machinery in a State can be imposed under Article 356. This has been one of the most controversial provisions due to the abuse of power by the Centre.

iii. Power to form States:

The Parliament has power to form new states and alter boundaries of existing states.⁵⁸ Thus, the very existence of a state depends on the will of the union.

iv. Existence of Union Territories:

Union territories are regions directly governed by the central government.⁵⁹

v. Appointment of Governors:

The governors of states are appointed by the president and are answerable to him.⁶⁰ There are provisions in the constitution under which the governor is required to send certain state laws for the assent of the president.⁶¹

vi. Armed Forces:

The Armed Forces can be deployed in the States at the Centre's will without consultation with the State Government.⁶²

4 Formation of States

Article 1(1) of the Indian Constitution declares that India shall be a Union of States. In describing India as a Union of States, the Drafting Committee of the Constituent Assembly followed the language of the Preamble of the British North America Act, 1867. Explaining⁶³ the use of the expression Union instead of the expression Federation, Dr. B.R Ambedkar said that the phrase was adopted to indicate two things:⁶⁴

- That the Indian federation is not the result of an agreement between the units it is constituted of and,
- That the component units have no freedom to secede from the Union so created.

Thus, the States form an integral part of India as a Union. They represent their unique identities and play a vital role in securing and preserving the Federal Structure in India.

The authors of the Constitution recognized that the States in India are not static, but may evolve and change over time, and hence made provisions for the creation of new States in the Union.⁶⁵ New states in India are created following the provisions as prescribed under Articles 2, 3 and 4 of the Constitution.

⁵³ Article 246, *Ibid*

⁵⁴ Article 248(2), *Ibid*.

⁵⁵ Article 248, *Ibid*.

⁵⁶ Article 356, *Ibid*.

⁵⁷ Article 352, *Ibid*.

⁵⁸ Article 2, *Ibid*.

⁵⁹ Article 239, *Ibid*

⁶⁰ Article 155, *Ibid*

⁶¹ Article 200, *Ibid*.

⁶² Article 355, *Ibid*.

⁶³ Narendra Kumar, 2014, *Constitutional Law of India*.

⁶⁴ *Ibid*

⁶⁵ Suvir Raghuvansh, 2016, *Creation of new States in India*.

⁶⁶ Article 2 of the Indian Constitution.

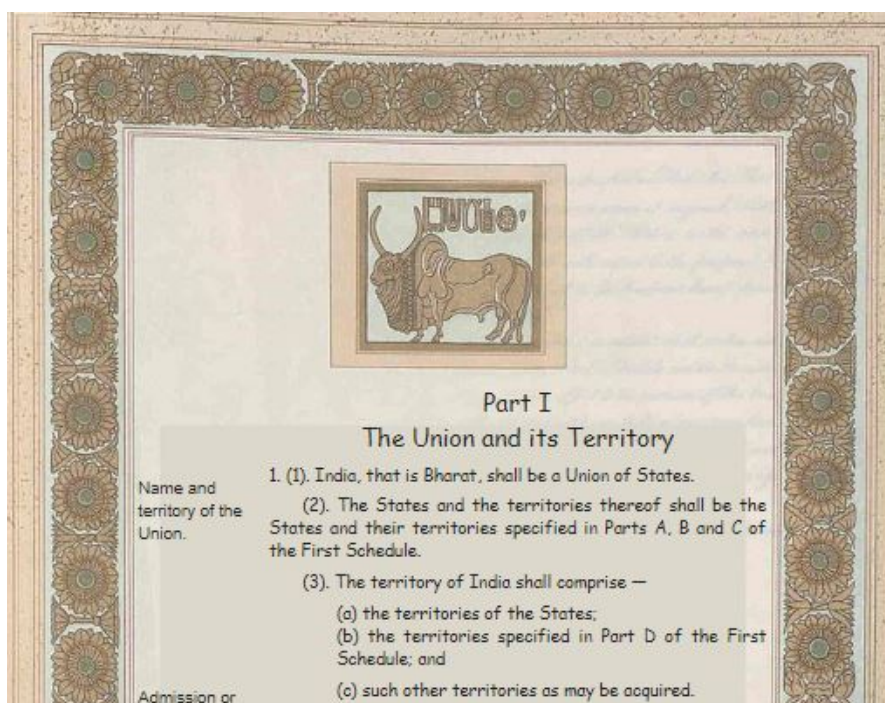
⁶⁷ Article 3 of the Indian Constitution

Article 2 of the Constitution vests in the Indian Parliament the exclusive power to admit or establish new states into the Indian Union on such terms and conditions as the Parliament may provide for.⁶⁶ This authority is with the Indian Parliament only and the State legislatures have no power to frame laws on this subject matter.

Article 3 of the Constitution of India further authorises the Indian Parliament to alter the area, boundaries or names of existing states by legislation.⁶⁷ The parliament, under this Article, is empowered to form a new state by separating a territory from any state or by uniting states or parts of States or by uniting any territory to a part of any state. It is also empowered to increase or diminish the area of any state or to alter the boundaries or the name of any state. It should be noted that in clauses from (a) to (e) under Article 3, the expression 'State' includes a Union Territory.⁶⁸

There is a clause attached to Article 3 which provides that any legislation framed upon the provisions of Article 3 shall not be introduced in either House of the Indian Parliament, except when it is first recommended by the President of India.⁶⁹ This clause further provides that where such legislation affects the area, boundary or the name of any existing State, then such a legislation shall not be introduced in either House of the Parliament unless, views of the affected State legislature are first acquired.

It is to be noted that the views by the State legislature needs to be communicated to the Parliament within a time period as allowed by the President. Only if the Centre accepts the State's recommendation, a bill can be introduced in either House of Parliament. Before drafting the Bill, the Center can appoint a Commission to fix the boundaries, for sharing of waters, for providing the location of capitals, High Courts and to fulfill all other requirements of the States that is to be formed.⁷⁰ It is only on receipt of a report of the Commission that the President may recommend a Bill, on the advice of the Union Council of Ministers.⁷¹ However, the Parliament is also not bound to accept or act upon the views of the State legislature, even if such views are received in time. Therefore, even if there is opposition to a referred Bill, the parliament can go ahead with the formation of a new State.⁷²



Source: <https://life.futuregenerali.in/media/nqfbbwh5/what-are-the-benefits-of-paying-income-tax.jpg>

⁶⁸ Clause (e), *Ibid*

⁶⁹ *Ibid*

⁷⁰ Narendra Kumar, 2014, *Constitutional Law of India*.

⁷¹ *Ibid*

⁷² *Ibid*

Article 4 of the Indian Constitution provides a mandatory limit to the Parliament while framing laws under Article 2 and 3.⁷³ It directs the Parliament to frame laws which only contain such provisions for the amendment of the First Schedule and the Fourth Schedule, which may be necessary to give effect to the law. Further, it may also contain such supplemental provision (such as provisions for representation in the Parliament and in the State Legislature of the affected state) as the Parliament may deem necessary.⁷⁴ However, the Article bars the Parliament to frame laws intending to be an amendment to the Constitution for the purposes of Article 368.⁷⁵ The First Schedule of the Indian Constitution enlists the names of the States and the Union Territories which are included in the expression 'Union of States'.⁷⁶ The Fourth Schedule prescribes the allocation of seats in the Council of States.⁷⁷

The federal structure in India has accepted as a useful and working system in conflict situations such as issues of separation, division of large regions, diverse culture etc.⁷⁸ It is within this federal framework that the inter-state boundaries among Indian states have continuously been reorganized since the 1950s.

At the time of independence in 1947, India consisted of more than 500 disjointed princely states that were merged together to form 27 states.⁷⁹ The grouping of states at the time was done on the basis of political and historical considerations rather than on linguistic or cultural divisions, but this was a temporary arrangement.⁸⁰ On account of the multilingual nature and differences that existed between various states, there was a need for the states to be reorganized on a permanent basis.

In 1948, the SK Dhar Committee was appointed by the government to look into the need for the reorganization of states on a linguistic basis.⁸¹ However, the Commission preferred reorganisation of states on the basis of administrative convenience including historical and geographical considerations instead of on linguistic lines. Later, in December 1948, the JVP Committee, comprising Jawaharlal Nehru, Vallabh bhai Patel and Pattabhi Sitaramayya was formed to study the issue.⁸² The Committee rejected the linguistic basis for reorganisation but said that the issue could be relooked at in case of public demand.⁸³ Both these committees also expressed concern over the new forms of inequalities based on the disproportionate spread of linguistic majority and minority groups in the reorganized provinces.⁸⁴

In 1953, Andhra Pradesh, the first linguistic state for Telugu speaking people was born. Faced with prolonged agitation including the death of an activist, Potti Sriramulu, during a hunger strike the government was forced to separate the Telugu speaking areas from the state of Madras.⁸⁵ Consequently, there were similar demands from other parts of the country. Later in December 1953, Jawaharlal Nehru appointed the States Reorganization Committee under Fazl Ali to look into the issue of reorganization of states.⁸⁶

The committee submitted its report in 1955 recommending some basic principles for reorganization such as strengthening the unity and security of India, linguistic and cultural homogeneity, and financial and administrative efficiency.⁸⁷ Based on this it suggested that the whole country be divided into 16 states and three union territories.⁸⁸ However, the government divided the country into 14 states and 6 union territories under the States Reorganisation Act, passed in November 1956.⁸⁹ The states were Andhra Pradesh, Assam, Bihar, Bombay, Jammu and Kashmir, Kerala, Madhya Pradesh, Madras, Mysore, Orissa, Punjab, Rajasthan, Uttar Pradesh and West Bengal. The six union territories were Andaman and Nicobar Islands, Delhi, Himachal Pradesh, Laccadive, Minicoy and Amindivi Islands, Manipur and Tripura. Thereafter, in 1960 the state of Bombay was divided to create the states of Gujarat and Maharashtra⁹⁰ and in 1963 Nagaland was created for the Nagas, taking the total states to 16.⁹¹

⁷³ Article 4 of the Indian Constitution.

⁷⁴ Clause (1), *Ibid*.

⁷⁵ Clause (2), *Ibid*.

⁷⁶ Schedule 1 of the Indian Constitution.

⁷⁷ Schedule 4 of the Indian Constitution.

⁷⁸ Watts, Ronald (1966). *New Federations: Experiments in the Commonwealth*. Oxford Clarendon Press.

⁷⁹ <https://www.thequint.com/news/india/linguistic-division-of-states-in-india-history#read-more>

⁸⁰ *Ibid*

⁸¹ Virendra Kumar (1976). *Committees And Commissions In India Vol. I : 1947-54*

⁸² *Ibid*

The Punjab Reorganisation Act was passed in April 1966 based on the Shah Commission report.⁹² This led to the state of Haryana getting the Punjabi-speaking areas while the hilly areas went to the Union Territory of Himachal Pradesh. Chandigarh was made a Union Territory and would become the common capital of Punjab and Haryana.⁹³

In 1969 and 1971, the states of Meghalaya⁹⁴ and Himachal Pradesh⁹⁵ were formed. Thereafter, the Union Territories of Tripura, Mizoram and Manipur were converted into states, and the total number of states rose to 21.⁹⁶ In 1975, Sikkim,⁹⁷ and in 1987 Arunachal Pradesh⁹⁸ also acquired the status of becoming states. In May 1987, Goa became the 25th state,⁹⁹ and in November 2000 three new states of Jharkhand, Chhattisgarh and Uttaranchal were created.¹⁰⁰ Finally, in 2014, Telangana officially became the 29th state.¹⁰¹ At present, India has 29 states and 7 union territories.

Today, there is an increasing demand for formation of new states based on socio-cultural identities.¹⁰² All these demands have risen from a need for better governance, equitable growth, increasing demands for participation and development at the sub-regional levels.¹⁰³ These demands are also based on issues such as the preservation of forests, welfare of tribal communities, the emergence of other backward classes and an increase in the number regional political parties within a state. This is evident from the demands for the states of Vidharba (Maharashtra), Saurashtra (Gujarat), Bodoland (Assam), Coorg (Karnataka), Harit Pradesh (Uttar Pradesh) etc.¹⁰⁴ The issue of state formation has also become an important part of the Indian political system due to the emergence of coalition politics.¹⁰⁵



Source: <https://storypivot.com/wp-content/uploads/new-map-of-India-990x660.jpg>

⁸³ Ibid
⁸⁴ Sarangi, Asha and Pai, Sudha, 2011, *Interrogating Reorganization of States: Culture, Identity and Politics in India*. New Delhi: Routledge Publication.
⁸⁵ <https://www.thebetterindia.com/190778/potti-sriramulu-andhra-pradesh-telugu-linguistic-reorganisation-history-india/>
⁸⁶ Chandra, Bipan; Mukherjee, Aditya; Mukherjee, Mridula (2008), *India Since Independence*, Penguin Books India.
⁸⁷ Ibid
⁸⁸ Ibid
⁸⁹ <https://www.casemine.com/act/in/5a9779da64a93263ca60b71cc>
⁹⁰ <https://legislative.gov.in/sites/default/files/A1960-11.pdf>
⁹¹ <https://nagaland.gov.in/pages/nagaland-profile#:~:text=The%20State%20of%20Nagaland%20was, and%20Manipur%20in%20the%20South.>
⁹² <https://indianexpress.com/article/explained/punjab-haryana-chandigarh-disputes-neighbours-7858162/>
⁹³ <https://indiankanoon.org/doc/933499/>
⁹⁴ <https://legislative.gov.in/sites/default/files/A1969-55.pdf>
⁹⁵ <https://www.indiatoday.in/education-today/gk-current-affairs/story/himchal-pradesh-305386-2016-01-25>

5 The Role of Governors

In India, the President and the Governor are often regarded as titular heads of the state. Article 153 of the Indian Constitution specifies the position of a governor.¹⁰⁶ The Governor has been accorded a nominal status, whereas the council of ministers, headed by the Chief Minister, are supposed to run the affairs of a state. Therefore, on most issues, the governor needs to exercise his powers and functions on the advice of Council of ministers headed by the chief minister. As per Article 155 of the Constitution, the President appoints the Governor under his seal and warrant.¹⁰⁷ However, it is the Central government that files nominations of candidates for the position of Governor, and then the President takes a call. Article 156 of the Constitution, prescribes the Governor's term in office as being during the pleasure of the President.¹⁰⁸

A state's Governor acts in a dual capacity. Firstly, he acts as the executive head of the state, and secondly, he acts as a representative of the central government.¹⁰⁹ The second role of the Governor often leads to friction between his position and that of the state government, especially when a party that governs a state is in opposition to the central government. The primary cause for friction is that a Governor is not elected by anybody and is still perceived as an integral part of the state.¹¹⁰

Moreover, the state government has no power to overrule the orders of the Governor, and neither is there a procedure for his impeachment. Thus, the Governor essentially has no accountability to anyone, apart from the people who have appointed him.¹¹¹ If the Governor acts in a manner against the interests of the people of the State, as perceived by the State Legislature they cannot do anything except complain to the President. Additionally, the Chief Minister is also appointed by the Governor. Under circumstances where one party gets a clear majority, the Governor may have no discretion in the matter, however, when no single party or coalition gets a clear majority, the Governor has the discretion to exercise his judgment on who should be invited.¹¹²

Over the years since independence there has been a rise of various regional political parties which has led to a situation that different political parties are in power in different States. In such a situation and because the Governor owes his appointment and his continuation in office to the Union Council of Ministers, in states where different parties are in power than the central government, there is apprehension that he is likely to act in accordance with the instructions, received from the Union Council of Ministers rather than on the advice of the state Council of Ministers. Consequently, they have often been pejoratively called agents of the Centre.¹¹³

One of the more famous examples of the controversial role played by the governor was the dismissal of the SR Bommai (Janata Dal) government in Karnataka in 1989.¹¹⁴ S.R. Bommai was the Chief Minister of the Janata Dal government in Karnataka between August 13, 1988 and April 21, 1989. His government was dismissed on April 21, 1989 under Article 356 of the Constitution and President's Rule was imposed.

⁹⁶ <https://timesofindia.indiatimes.com/city/guwahati/3-ne-states-to-complete-50-yrs-of-statehood-on-jan-21/articleshow/88984019.cms>

⁹⁷ <https://sikkim.gov.in/departments/sikkim-legislative-assembly>

⁹⁸ <https://www.firstpost.com/india/statehood-day-for-arunachal-pradesh-and-mizoram-brief-history-of-the-two-north-eastern-states-3291898.html>

⁹⁹ <https://www.oneindia.com/feature/goa-celebrates-its-statehood-day-2113238.html>

¹⁰⁰ <https://www.india.com/education/the-new-states-jharkhand-uttarakhand-and-chhattisgarh-1590295/>

¹⁰¹ <https://www.thehindu.com/news/national/telangana/The-story-of-Indias-29th-State-%E2%80%94-Telangana/article60507002.ece>

¹⁰² Sarangi, Asha and SudhaPai (2009). *States Reorganization: Contemporary Concerns*. ESS Report, January

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ Verghese, B G (2014). *Interrogating Reorganisation of States: Culture, Identity and Politics in India*.

¹⁰⁶ Article 153 of the Indian Constitution

¹⁰⁷ Article 155, Ibid.

¹⁰⁸ The doctrine of pleasure has its origins in English law. In England, the moral rule is that a civil servant of the Crown holds office during the pleasure of the Crown. This means his services can be terminated at any time by the Crown, without assigning any reason. Even if there is a contract of employment involving the Crown, the Crown is not bound by it.

The doctrine of pleasure is based on public policy and this pleasure is absolute.

¹⁰⁹ <https://legallaffairs.gov.in/sites/default/files/The%20Institution%20of%20Governor%20under%20the%20Constitution.pdf>

The dismissal was on grounds that the Bommai government had lost majority following large-scale defections. The then Governor P. Venkatasubbaiah refused to give Bommai an opportunity to test his majority in the Assembly. To challenge the decision of the Governor, Bommai first moved the Karnataka High Court, which dismissed his writ petition. Then he moved the Supreme Court.

On March 11, 1994, a nine-judge Constitution Bench of the Supreme Court issued a landmark judgment on the S.R. Bommai v Union of India case,¹¹⁵ which put an end to the arbitrary dismissal of State governments under Article 356 by spelling out restrictions. The verdict concluded that the power of the President to dismiss a State government is not absolute. It said the President should exercise the power only after his decision is approved by both Houses of Parliament. Till then, President can only suspend the Legislative Assembly by suspending the provisions of Constitution relating to the Legislative Assembly. The case put an end to the arbitrary dismissal of State governments by a hostile Central government. And the verdict also categorically ruled that the floor of the Assembly is the only forum that should test the majority of the government of the day, and not the subjective opinion of the Governor.



Source: <https://lexlife68840978.wordpress.com/2021/08/03/role-of-governor-in-india-critical-analysis/>

Some other instances of misuse of power by Governors:

- In Feb 1998, the Kalyan Singh led BJP government in UP lost the majority after Janata Dal and Loktantrik Congress MLAs withdrew their support.¹¹⁶ Thereafter, Governor Romesh Bhandari dismissed the government and installed Loktantrik Congress' Jagdambika Pal as the new CM of the state. However, the decision was challenged by Kalyan Singh in the Allahabad HC. The court ordered a floor test to determine the real CM, and after 3 days Kalyan Singh was reinstated as the CM and Jagdambika Pal had to resign.

¹¹⁰ Ibid

¹¹¹ Ibid

¹¹² Ibid

¹¹³ <https://www.mondaq.com/india/constitutional-administrative-law/1080480/powers-of-a-governor-head-of-state-or-mouthpiece-of-centre>

¹¹⁴ <https://www.thehindu.com/news/national/what-is-the-sr-bommai-case-and-why-is-it-quoted-often/article61834854.ece>

¹¹⁵ 1994 AIR 1918, 1994 SCC (3) 1

¹¹⁶ <https://www.news18.com/news/politics/maharashtra-strange-floor-test-of-1998-revisiting-past-when-india-saw-a-murkier-crisis-in-uttar-pradesh-2400939.html>

¹¹⁷ <https://www.indiatoday.in/magazine/states/story/20050314-sibu-soren-to-be-sworn-in-as-jharkhand-cm-despite-dubious-claims-of-majority-788181-2005-03-14>

¹¹⁸ <https://www.indiatoday.in/magazine/states/story/20050328-jharkhand-political-drama-ends-with-arjun-munda-winning-trust-vote-788024-2005-03-28>

¹¹⁹ <https://www.hindustantimes.com/assembly-elections/cong-is-single-largest-party-in-manipur-but-not-necessary-to-invite-them-to-form-govt-governor-najma-heptulla/story-XDgTlcB1wALyH0zArbeGJl.html>

¹²⁰ <https://thewire.in/politics/bihar-nitish-kumar-rjd-lalu-prasad-yadav-mahagathbandhan>

- In 2005 after the elections, Governor Syed Sibtey Razi installed Jharkhand Mukti Morcha's Shibhu Soren as the new CM of Jharkhand, despite the NDA claiming the support of 41 MLAs in the 80 member assembly.¹¹⁷ The matter reached Supreme Court which ordered a floor test. Soren failed to prove his majority in the house and BJP's Arjun Munda was sworn in as the CM of the state.¹¹⁸
- In the 2017 election, in the 60 member assembly in Manipur, Congress emerged as the single largest party winning 28 seats, however governor Najma Heptulla invited BJP to prove majority.¹¹⁹ Later BJP got together 4 MLAs from the National People's Party, 4 from the Naga Peoples Front and one from TMC to form the government, with BJP's Biren Singh sworn in as Chief Minister of the state.
- In 2017 in Bihar, Nitish Kumar-led JD(U) broke the alliance with Congress and RJD, and later formed an alliance with the BJP and staked claim to form the government. BJP appointed Governor Keshari Nath Tripathi ignored the single largest party RJD's claim and made Nitish Kumar the Chief Minister.¹²⁰
- In the 2018 Meghalaya elections, Congress, despite winning more seats than any other party, could not form the government.¹²¹ In the 50 seat assembly, the Congress won 21 seats, followed by NPP 19, and BJP and UDP, two and six, respectively. However, governor Ganga Prasad invited Conrad Sangma of the NPP to prove his majority. Sangma's NPP formed an alliance with the UDP, PDF, HSPDP, and the BJP to form the government in the state.

Over the years various commissions have attempted to understand the role of the governor in our federal democratic set up, and have recommended ways to make this institution conducive to strengthening center-state relations. The most important recommendations have come from the Sarkaria Commission of 1988.

5.1 Recommendations of Sarkaria Commission regarding the role of the Governor:¹²²

- The governor should be an eminent person
- He must be a person from outside the State
- He must not have participated in active politics at least for some time before his appointment. When the state and the center are ruled by different political parties, the governor should not belong to the ruling party at the center.
- The governor should be a detached person and not too intimately connected with the local politics of the State
- He should be appointed in consultation with the Chief Minister of the State, Vice-President of India and the Speaker of the Lok Sabha;
- The State Government should be given prominence in appointing the Governor.
- His tenure of office must be guaranteed.
- After leaving his office, the person appointed as Governor should not be eligible for any other appointment or office of profit under the Union or a State Government except for a second term as Governor or election as Vice-President or President of India
- At the end of his tenure, reasonable post-retirement benefits should be provided
- The Commission also recommended that the Governor should appoint a CM who is the leader of the majority. The CM should seek the vote of confidence in the assembly within 30 days of his appointment. Further, as long as the council of ministers possessed a majority in the assembly the governor could not use his discretionary powers.

¹²¹ <https://economictimes.indiatimes.com/news/politics-and-nation/big-jolt-to-congress-meghalaya-governor-reportedly-invites-npp-to-form-govt/articleshow/63159045.cms>

¹²² <http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERIV.pdf>

6 Article 356: Proclamation of President's Rule in a State



The jurisdiction of the central and state governments with regard to the law-making process has been explicitly mentioned in Schedule 7 of the Indian Constitution. However, there are certain circumstances under which the central government can enter the jurisdiction of states. The Presidential proclamation of emergency in a state, under Article 356, is one of them.

Article 356 provides that the President of India can take over the legislative and executive powers of the state by imposing emergency in a state in case of “failure of the Constitutional machinery” in the state.¹²³ It further states that President’s rule can be imposed based on a report sent by the governor, or otherwise in any circumstance that the President deems fit, upon the aid and advice of the council of ministers.¹²⁴ With the proclamation of President’s rule in a state, the elected government is dismissed and the administration of the state is directly controlled by the President through his representative governor. Since the Governor acts under the pleasure of the President, who in turn acts on the advice of the council of ministers belonging to the ruling party at the center, there is a possibility of the governor’s report being influenced by the ruling party’s interests. Therefore, the courts have been given the power to examine the subject matter of the governor’s report.¹²⁵

The extraordinary power of imposing emergency has been provided to safeguard the state against constitutional crisis. However, since its inception, it has been a matter of great contention and debate due to its ability to hamper the federal structure of the nation. Despite the allowance of judicial review of the governor’s report, there have been many cases of misuse. The National Commission to Review the Working of the Constitution (NCRWC) noted that article 356 had been invoked more than 100 times and in at least twenty instances the invocation might be termed as a misuse.¹²⁶

¹²³ <https://indiankanoon.org/doc/8019/>

¹²⁴ K. Madhusudhana Rao, Authority to recommend President’s rule Under Article 356 of the Constitution, 46 (1) Indian Law Institute 125-132 (2004).

¹²⁵ Ibid

¹²⁶ <https://legallaffairs.gov.in/sites/default/files/Article%20356%20of%20the%20Constitution.pdf>

¹²⁷ https://www.orfonline.org/research/the-paradox-of-centralised-federalism/#_ftn24

¹²⁸ 1977 AIR 1361, 1978 SCR (1) 1.

¹²⁹ https://eparlib.nic.in/bitstream/123456789/761237/1/Presidents_Rule_in_St_UT_Eng_9th_ed_2016.pdf

¹³⁰ <https://www.dnaindia.com/india/report-uttarakhand-the-curious-case-of-president-s-rule-2206032>

Some instances of misuse of article 356:

- After the 1977 elections post emergency, the government at the Centre headed by the Janata Party, dismissed the Congress-led governments on the ground that they had lost the people's mandate.¹²⁷ The matter was challenged in the Supreme Court, in the *State of Rajasthan v. Union of India*¹²⁸ case. A seven-judge bench dismissed the petition due to its refusal to get into political questions. Some judges even held that presidential satisfaction in invoking Article 356 of the Constitution was not justiciable.
- In 1996 in Gujrat, CM Suresh Mehta of the BJP faced rebellion from Shankar Singh Vaghela and 40 other MLAs. Post-defection, Governor Krishna Pal Singh ordered Mehta to prove his majority in the Vidhan Sabha. The government succeeded in proving its majority, but Pal sent the report to the then PM H D Deve Gowda, recommending President's Rule in the state.¹²⁹
- In 2016, in Uttarakhand,¹³⁰ during passing of the state Budget, 9 MLAs of the Harish Rawat led Congress government, rebelled against the party and joined hands with the opposition.¹³¹ Consequently, the majority of the Rawat government was challenged and governor KK Paul invited CM Rawat to prove his majority on the floor of the house. However, before the floor test, much political turmoil ensued, and on March 27, 2016, on the advice of the Union cabinet, Article 356 was imposed by President Pranab Mukherjee citing the failure of constitutional machinery in the state.¹³² When the President's rule was challenged before the Uttarakhand HC, the court quashed the President's rule and ordered a floor test.¹³³
- In 2016, political instability arose in Arunachal Pradesh when 20 MLAs of the ruling congress joined hands with the BJP and rebelled against chief minister Nabam Tuki.¹³⁴ The MLAs communicated their wish to form a government in the state before the governor, who, without informing the chief minister, advanced the assembly session and listed the removal of the speaker of the legislative assembly. Subsequently, the speaker disqualified the 20 MLAs on grounds of defection. However, the governor sent a report to the President citing failure of Constitutional machinery. The President on the basis of the governor's report imposed article 356 and dismissed the Congress-led government. Later, the SC quashed the governor's order calling it illegal and re-instated the Congress government.



Source: <https://qph.cf2.quoracdn.net/main-qimg-c30754d017c11e5f092b2e4c3b04ed4b.webp>

¹³¹ <https://indianexpress.com/article/india/india-news-india/uttarakhand-vijay-bahuguna-nine-rebel-cong-mlas-join-bjp/>

¹³² <https://www.hindustantimes.com/india/centre-imposes-prez-s-rule-in-uttarakhand-a-day-before-floor-test/story-WL3F0BcoVpljs4sRbx6Jbl.html>

¹³³ *Harish Chandra Singh Rawat v. Union of India*, 2016 AIR CC 2455.

¹³⁴ <https://www.thehindu.com/news/national/other-states/Arunachal-political-crisis-A-timeline/article14983750.ece>

6.1 Sarkaria Commission's Stand on Article 356

The Sarkaria Commission Report recommended an extremely rare use of Art.356. The Commission stood by the intention of the Framers of the Constitution who wanted Art.356 to be an exception to the rule, and decided that it should be used sparingly, as a last measure, when all available alternatives had failed.¹³⁵ The Report also observed "...each and every breach of a constitutional provision, irrespective of its significance, extent and effect, cannot be treated as constituting a failure of the constitutional machinery."¹³⁶

In a situation of political breakdown, the Commission recommended the Governor should explore all possibilities of having a Government prove majority support in the Assembly. The report further required that every Proclamation of Emergency should be presented before each House of Parliament at the earliest, in any case before the expiry of the two-month period.¹³⁷ The State Legislative Assembly should not be dissolved either by the Governor or the President before such a Proclamation has been laid before the Parliament.

On the issue of the governor's report, the commission recommended appropriately amending Art.356 to include material facts and grounds under which Art.356 is invoked to make the judicial review more meaningful. As per the Commission, the Governor's Report should be a 'speaking document, containing a precise and clear statement of all material facts and grounds on the basis of which the President may satisfy himself or otherwise of the emergency situation contemplated in Art.356'.¹³⁸

The Sarkaria Commission's recommendations on article 356 are extensive and define its applicability in detail. However, it is unfortunate that the recommendations given by the commission are regularly disregarded in the present day scenario, and there have been many recent instances of invoking article 356 that are prima facie against the letter and spirit of the Constitution of India.



¹³⁵ *The Sarkaria Commission Report (1987), para 6.8.01*

¹³⁶ *Ibid, para 6.3.23.*

¹³⁷ *Ibid, at para 6.8.05.*

¹³⁸ *Ibid, at para 6.8.08.*

¹³⁹ *Ibid*

7 Article 370 and 35A: The Case of Jammu and Kashmir

Article 370 of the Indian Constitution, similar to the “compact”¹⁴⁰ in the US, was an essential feature of federalism in India. It was included in the Indian Constitution in October, 1949.¹⁴¹ The Article governed the Union’s relationship with Jammu & Kashmir. Through this article, the constitution gave special status to J&K, exempting it from the Indian Constitution and permitting it to draft its own constitution. The article further restricted Parliament’s legislative powers in respect to the region. To extend certain central laws to J&K, on subjects which were part of the Instrument of Accession (IoA), consultation with the state government was mandated; however, on matters which were outside of the IoA, concurrence of the state government was mandatory.¹⁴²

Article 370 was included in Part XXI of the Constitution, which included “Temporary, Transitional and Special Provisions”. Also, the Article itself states that it is a temporary provision.¹⁴³ Therefore, an important issue concerning Article 370 has been with respect to the interpretation of its temporary nature. One view has been that due to the above reasons, it is an entirely temporary provision,¹⁴⁴ whereas, another interpretation of it being temporary has been in the sense that the Constituent Assembly of Jammu & Kashmir had been given the right to modify, delete or retain it. At the time of dissolution of the Constituent Assembly, the assembly had decided to retain it, therefore it had become permanent.¹⁴⁵

Another contentious issue regarding 370 is with respect to clause 3 of the Article. As per clause 3, the President of India has been given the right to delete Article 370; however, it could only be done on the recommendation of the Constituent Assembly of the State.¹⁴⁶ Since the Constituent Assembly of J&K was dissolved in 1957,¹⁴⁷ therefore, the possibility of it being deleted thereafter, even if it is considered temporary, is in question. On this issue, one view is that, since the constituent assembly no longer exists, article 370(3) is no longer valid i.e. Article 370 can no longer be deleted by a presidential order. In order to delete 370, one has to take the normal route of article 368 to amend the constitution.¹⁴⁸ However, another perspective is that post the dissolution of the Constituent Assembly; recommendations of the State Legislature can be taken.¹⁴⁹

There are 2 important Supreme Court judgments which are often considered in regard to these questions.

In the Prem Nath Kaul (1959),¹⁵⁰ a five-judge bench of the Supreme Court observed on Article 370(2): “This clause shows that the constitution-makers attached great importance to the final decision of the Constituent Assembly, and the continuance of the exercise of powers conferred on the Parliament and the President by the relevant temporary provisions of Article 370(1) is made conditional on the final approval of the Constituent Assembly of Kashmir.” Thus, this judgment gave the Constituent Assembly of Kashmir the final call to decide on the matter. As mentioned above, since the Constituent Assembly of Kashmir decided to retain Article 370, an interpretation of this judgment is that 370 is a permanent provision.

In Sampat Prakash (1968),¹⁵¹ the apex court had decided that Article 370 could still be invoked even after the dissolution of Jammu and Kashmir’s Constituent Assembly. A five-judge Bench said “Article 370 never ceased to be operative and there could be no challenge on this ground to the validity of the orders passed by the president in exercise of the powers conferred by it.” Thus, this judgment can be interpreted as allowing clause 3 of the Article to be invoked even after the dissolution of the Constituent Assembly.

Some legal experts have argued that these two judgments are in conflict with each other. Since both these judgments were decided by a five-judge bench, therefore, they argue, there needs to be a larger bench to decide on this matter.¹⁵²

¹⁴⁰ http://www2.gcc.edu/orgs/GCLawJournal/articles/2018/GCC_Law_Journal_Spring_2018.pdf

¹⁴¹ <https://www.hindustantimes.com/india-news/october-17-1949-special-status-is-born/story-TjBc9IVBSW6icN7kTBG4L.html>

¹⁴² Article 370(1) of the Indian Constitution.

¹⁴³ <https://indiankanoon.org/doc/666119/>

¹⁴⁴ <https://www.thehindubusinessline.com/news/national/article-370-is-a-temporary-provision-in-constitution-government-tells-raja-sabha/article28349533.ece>

¹⁴⁵ <https://www.thehindu.com/news/national/article-370-became-otiose-after-1957-dissolution-argues-senior-advocate-dinesh-dwivedi/article30618253.ece>

7.1 Origin of Article 370

Before independence, there were two kinds of territories in India. One was under the direct administrative control of the British and the other comprised the princely states that had signed alliance treaties with the British. When the independence Act 1947 was enacted, the princely states that had alliances with the British¹⁵³ had their sovereignty fully restored to them and were given three options: to remain as independent countries, or to join the Dominion of India or the Dominion of Pakistan.¹⁵⁴ Section 6(a) of the 1947 Act said that this act of joining one of the two countries was to be through an Instrument of Accession. The Instrument of Accession was supposed to regulate and govern the distribution of powers between the central government and the concerned princely state.¹⁵⁵

At the time, Maharaja Hari Singh, the ruler of Kashmir, had decided to remain independent. However, in October 1947 there was an armed infiltration by tribesmen from Pakistan in J&K. The maharaja realized that he needs help from India, thus, reached out to Prime Minister Jawaharlal Nehru and Patel, who agreed to send troops under the condition that Kashmir acceded to India.¹⁵⁶ Thus, Hari Singh signed the Instrument of Accession on October 26, 1947 and Governor General Lord Mountbatten accepted it on October 27, 1947.¹⁵⁷

During that time it was India's policy that wherever there was a dispute on accession, it should be settled in accordance with the wishes of the. Lord Mountbatten had stated that "it is my Government's wish that as soon as law and order have been restored in Kashmir and her soil is cleared of the invader, the question of the State's accession be settled by a reference to the people".¹⁵⁸ Further, Government of India's White Paper on J&K in 1948, made it clear that India regarded the accession of Kashmir as purely temporary and provisional.¹⁵⁹ In a letter to J&K Prime Minister Sheikh Abdullah dated May 17, 1949, Prime Minister Jawaharlal Nehru wrote: "It has been the settled policy of Government of India, which on many occasions has been stated both by Sardar Patel and me, that the Constitution of Jammu and Kashmir is a matter for determination by the people of the state represented in a Constituent Assembly convened for the purpose."¹⁶⁰



Source: <https://thedispatch.blob.core.windows.net/thedispatchimages/2021/12/362841-article-370.jpg>

¹⁴⁶ Article 370(3) of the Indian Constitution.

¹⁴⁷ <https://www.constitutionofindia.net/blogs/the-jammu-kashmir-constituent-assembly>

¹⁴⁸ <https://www.newslaundry.com/2019/08/06/article-370-supreme-court-samprakash-jammu-kashmir-special-status#:~:text=Gonsalves%20said%3A%20%E2%80%9CIn%20October%201968,Assembly%20had%20ceased%20to%20exist>

¹⁴⁹ <https://www.thehindu.com/news/national/other-states/explained-how-the-status-of-jammu-and-kashmir-is-being-changed/article28822866.ece>

¹⁵⁰ 1959 AIR 749, 1959 SCR Supl. (2) 270

¹⁵¹ 1970 AIR 1118, 1970 SCR (2) 365

¹⁵² <https://www.scobserver.in/reports/manohar-lal-sharma-union-of-india-article-370-reference-judgment-summary/>

¹⁵³ https://www.gale.com/binaries/content/assets/gale-us-en/primary-sources/archives-unbound/primary-sources_archives-unbound_india-from-crown-rule-to-republic-1945-1949_records-of-the-u.s.-state-department.pdf

Thereafter, in May 1949, Article 306A (now 370) was passed in the Constituent Assembly. Moving the motion, Gopalaswami Ayyangar had said that though the accession was complete, India had offered to have a plebiscite in J&K when the conditions were created.¹⁶¹ He further stated, if accession was not ratified, “we shall not stand in the way of Kashmir separating herself away from India”.¹⁶² On October 17, 1949, when Article 370 was finally included in the Constitution by India’s Constituent Assembly, Ayyangar reiterated India’s commitment to plebiscite and drafting of a separate constitution by J&K’s Constituent Assembly.¹⁶³

7.2 Abrogation of Article 370

In August 2019, Amit Shah, the Union Home Minister, read out a resolution in the Rajya Sabha abolishing Article 370 of the Indian Constitution, thereby stripping Jammu and Kashmir of its special status.¹⁶⁴ Jammu, Kashmir and Ladakh were now going to be three separate segregated units. Ladakh was further separated and was accorded a separate Legislature, whilst Jammu and Kashmir valley were to have a State Assembly.¹⁶⁵ Thus, the debate on Article 370 was back on centre-stage.

The main controversy was that the abrogation happened by invoking 370(3). As discussed above, 370(3) gave the President power to delete Article 370 on recommendation of the Constituent Assembly. This meant that the Union government was of the position that 370(3) was valid even after the dissolution of the Constituent Assembly of J&K, and the recommendation needed to be taken from the State Government. However, at the time there was no state government in J&K, therefore, the Governor was taken to mean the state government.¹⁶⁶

The opposition questioning the constitutional validity of the abrogation criticized the decision on three grounds. Firstly, some argued that post the dissolution of the Constituent Assembly of J&K, Article 370 was a permanent provision and could not be abrogated.¹⁶⁷ Secondly, some argued that the use of 370(3) after the dissolution of the Constituent Assembly of J&K was invalid. In order to abolish Article 370, the normal route of Constitutional amendments through article 368 needed to be taken.¹⁶⁸ The third argument was that the State Legislature’s assent cannot be derived from the Governor, who is the representative of the central government. “Government” cannot be equated as such with “Governor”, especially in matters involving the restructuring of States.¹⁶⁹

The 2019 Presidential order also resulted in nullifying Article 35A.¹⁷⁰ Article 35A stems from Article 370, having been introduced through a Presidential Order in 1954. It gives Jammu and Kashmir the right to decide who are its permanent residents and give them special rights in government jobs, on buying property in the state, scholarships and other schemes.¹⁷¹ Jammu and Kashmir defines its permanent residents as “persons born or settled within the state before 1911 or after having lawfully acquired immovable property and are resident in the state for not less than 10 years before that date.”¹⁷² The law bans non-permanent residents from settling permanently in the state, buying land, from taking government jobs and scholarships.

¹⁵⁴ *Ibid*

¹⁵⁵ <https://thewire.in/history/public-first-time-jammu-kashmirs-instrument-accession-india/amp/>

¹⁵⁶ <https://www.sundayguardianlive.com/legally-speaking/story-jks-accession-india>

¹⁵⁷ *Ibid*

¹⁵⁸ <https://www.mtholyoke.edu/acad/intrel/kasmount.htm>

¹⁵⁹ <https://www.orfonline.org/research/the-kashmir-that-india-lost/>

¹⁶⁰ <https://thewire.in/law/article-370-amendment-reorganisation-jammu-kashmir-unconstitutional-violate-fundamental-rights-petition-supreme-court>

¹⁶¹ <https://www.legalserviceindia.com/legal/article-1106-article-370-the-only-bridge-which-connects-the-people-of-j-k-to-the-people-of-india.html>

¹⁶² *Ibid*

¹⁶³ *Ibid*

¹⁶⁴ <https://pib.gov.in/newsite/PrintRelease.aspx?relid=192505>

¹⁶⁵ *Ibid*

¹⁶⁶ <https://thewire.in/law/article-370-jammu-kashmir-constituent-assembly>

¹⁶⁷ <https://thewire.in/law/jammu-and-kashmir-decoding-article-35a-and-article-370>

¹⁶⁸ <https://www.newslandia.com/2019/08/06/article-370-supreme-court-sampath-prakash-jammu-kashmir-special-status#:~:text=Gonsalves%20said%3A%20%E2%80%9CIn%20October%201968,Assembly%20had%20ceased%20to%20exist>

¹⁶⁹ <https://thewire.in/law/article-370-jammu-kashmir-constituent-assembly>

¹⁷⁰ <https://frontline.thehindu.com/cover-story/article29048647.ece>

Article 35A was nullified on the claims that it was unconstitutional, which was based on two arguments. Firstly, it was argued that Article 35A was introduced by a Presidential order than by following the ordinary procedure of amendment under Article 368 of the constitution.¹⁷³ Secondly, it was argued that Article 35A violated the equal protection clause under Article 14 of the Constitution.¹⁷⁴

However, critics have argued that Article 370 vests in the President the power to extend the provisions of the constitution. The Supreme Court endorsed this view in *Sampat Prakash v State of Jammu and Kashmir*.¹⁷⁵ The Court observed: “Article 370 is a special provision for amending the Constitution in its application to the state of Jammu and Kashmir.....Article 368 does not curtail the power of the President under Article 370.” Further, critics argue that article 14 has not been violated due to the provision of intelligible differentia as observed by SC,¹⁷⁶ which in this case is to preserve the autonomy of the state. Many other north-eastern states also enjoy similar protection.

Since the abrogation of 370, around two dozen petitions filed by various political parties and individuals have challenged the validity of the nullification in the Supreme Court.¹⁷⁷ However, the petitions remain pending before the court for over two years. On 2 March 2020, the 5-judge bench while hearing the petitions rejected the request to refer these petitions to a larger bench.¹⁷⁸ The request for a larger bench was made by the petitioners by referring to the *Sampat Prakash* and the *Prem Nath Kaul* case.¹⁷⁹ As mentioned earlier, the petitioners had argued that both these judgments were in conflict with each other and both judgments had a five-judge bench, therefore, the matter could only be resolved by a larger bench.

The court while denying the request for a larger bench held that there was no conflict.¹⁸⁰ It primarily gave two reasons for its decision. One, it observed that the circumstances in which these cases were decided were different. And two, the issues involved in them were completely different.

Article 370 is an important part of the federalism in India. It had been introduced considering the unique history of Jammu and Kashmir joining the Indian Union. Tomorrow, even if the Supreme Court upholds the constitutional validity of the abrogation of 370 and 35A, there is no doubt that this has undermined the federal structure of the nation.



Source: <https://images.thequint.com/thequint%2F2019-08%2Ffc6d0517-119e-40fd-a4e9-ef35e3571df5%2Fpun370.jpg>

¹⁷¹ <https://economictimes.indiatimes.com/news/politics-and-nation/what-is-article-35a-and-why-is-everyone-in-india-talking-about-it-now/articleshow/70507788.cms>

¹⁷² <https://timesofindia.indiatimes.com/india/why-theres-turmoil-over-article-35a-in-kashmir/articleshow/70526833.cms>

¹⁷³ <https://thewire.in/law/why-article-35a-matters>

¹⁷⁴ Ibid

¹⁷⁵ 1970 AIR 1118, 1970 SCR (2) 365

¹⁷⁶ *Chiranjit Lal Chowdhury v Union Of India and Others*, 1951 AIR SC 41

¹⁷⁷ <https://www.tribuneindia.com/news/nation/abrogation-of-article-370-around-two-dozen-petitions-hang-fire-in-supreme-court-273416>

8 Some special provisions: Article 37I, Schedule 5 and Schedule 6

8.1 Article 37I

Article 37I of the Indian Constitution is connected to granting some special provisions to certain states. It appears in Part XXI of the Constitution, titled 'Temporary, Transitional and Special Provisions'.¹⁸¹ Article 37I deals with special provisions for the states of Gujarat and Maharashtra. Articles 37IA, 37IB, 37IC, 37ID, 37IE, 37IF, 37IG, 37IH, and 37IJ define special provisions with regard to the states of Nagaland, Assam, Manipur, Andhra Pradesh, Sikkim, Mizoram, Arunachal Pradesh, Goa and Karnataka. The main objectives behind Article 37I are to meet the unique needs of the backward regions of these states, protect their economic and cultural interests, combat local challenges and protect the customary laws in these regions.¹⁸² Article 37I was part of the Constitution at the time of its commencement in 1950, whereas Articles 37IA through 37IJ were incorporated subsequently.¹⁸³

- **Article 37I, Provisions for Gujarat and Maharashtra:**¹⁸⁴

This article provides special powers to the governors of Gujarat and Maharashtra to create independent development boards for Vidarbha, Marathwada and the rest of Maharashtra and Saurashtra, Kutch and the rest of Gujarat. The purpose is to ensure that there is equitable allocation of funds for developmental expenditure over these areas. It further gives room to provide more facilities for employment opportunities, vocational and technical education in the state.

- **Article 37IA (13th Amendment Act, 1962), Nagaland:**¹⁸⁵

This provision was inserted after a 16-point agreement between the Centre and the Naga People's Convention in 1960, which led to the creation of Nagaland in 1963. As per this article, the Parliament cannot legislate in matters of Naga religion or social practices, Naga customary law and procedure, administration of civil and criminal justice involving decisions according to Naga customary law, and ownership and transfer of land without concurrence of the state Assembly.

- **Article 37IB (22nd Amendment Act, 1969), Assam**¹⁸⁶

This article empowers the President to constitute a committee of the elected tribal representatives of the Assam Legislative Assembly and also provide for its functions.

- **Article 37IC (27th Amendment Act, 1971), Manipur**¹⁸⁷

This article empowers the President to create a committee with the elected members from the hilly regions of the state. It also entrusts the governor to secure the powers of this committee to ensure its proper functioning.

- **Article 37ID (32nd Amendment Act, 1973; substituted by The Andhra Pradesh Reorganisation Act, 2014), Andhra Pradesh and Telangana:**¹⁸⁸

As per this article, the President must provide equal opportunities and facilities for the local population in public education and employment. The President can ask the state to create an administrative tribunal to solve all the disputes with regard to appointments and promotions to civil posts in the state. The President also has similar powers for admissions in educational institutions.

¹⁷⁸ <https://www.scobserver.in/reports/manohar-lal-sharma-union-of-india-article-370-reference-judgment-summary/>

¹⁷⁹ Ibid

¹⁸⁰ Ibid

¹⁸¹ <https://www.mea.gov.in/Images/pdf1/Part21.pdf>

¹⁸² <https://timesofindia.indiatimes.com/india/what-is-article-37I-and-how-is-it-different-from-article-370/articleshow/83946915.cms>

¹⁸³ <https://thewire.in/government/jammu-kashmir-constitution-special-powers-10-states>

¹⁸⁴ <https://indiankanoon.org/doc/89891/>

¹⁸⁵ <https://indiankanoon.org/doc/371998/>

¹⁸⁶ <https://indiankanoon.org/doc/825999/>

- **Article 371E:**

This has allowed for the establishment of a central university in Andhra Pradesh by a law of the Parliament.

- **Article 371F (36th Amendment Act, 1975), Sikkim:**¹⁹⁰

This empowers the members of the Legislative Assembly of Sikkim to elect the representative of Sikkim in the House of the People. Further, to protect the rights and interests of various sections of the population of Sikkim, the Parliament may provide for a number of seats in the Assembly to be filled only by candidates from those sections.

- **Article 371G (53rd Amendment Act, 1986), Mizoram:**¹⁹¹

This article states that without the consent of the State Legislative Assembly, the Parliament cannot decide on matters of religious and social practices of the Mizos, Mizo customary law and procedure, civil and criminal law of the land, and the transfer of land ownership.

- **Article 371H (55th Amendment Act, 1986), Arunachal Pradesh:**¹⁹²

This article gives special powers to the Governor of Arunachal Pradesh, on the directions from the President with regard to the law and order in the state. Although the Governor needs to consult the Council of Ministers, the governor's decision will be final. This special power of the Governor can cease only on the direction of the President.

- **Article 371I (56th Amendment Act, 1987), Goa:**¹⁹³

As per this article, the State Legislative Assembly of Goa will consist of not less than 30 members.

- **Article 371J (98th Amendment Act, 2012), Karnataka:**¹⁹⁴

This Article provides for some special provisions for the Hyderabad-Karnataka region. The President shall give special responsibility to the Governor of Karnataka to create a separate board for the development of the Hyderabad-Karnataka region. Every year, a report regarding the working of this board needs to be presented before the State Legislative Assembly. Equitable funds need to be allotted for developing this region. Further, a proportion of seats in educational institutions and state government jobs in Hyderabad-Karnataka need to be reserved for individuals from this region.



Source: <https://i.ytimg.com/vi/WID4SkDu-4/maxresdefault.jpg>

¹⁸⁷ <https://indiankanoon.org/doc/424060/>
¹⁸⁸ <https://indiankanoon.org/doc/1466428/>
¹⁸⁹ <https://indiankanoon.org/doc/87434/>
¹⁹⁰ <https://indiankanoon.org/doc/338476/>
¹⁹¹ <https://indiankanoon.org/doc/1184172/>
¹⁹² <https://indiankanoon.org/doc/181196/>
¹⁹³ <https://indiankanoon.org/doc/1404922/>

8.2 Special areas: Schedule 5 and Schedule 6

The Government of India Act 1935 led to the creation of 'excluded' and 'partially excluded' areas with separate political representation for the tribes in India.¹⁹⁵ Under this act, while the elected governments administered the provinces, the 'excluded' areas were administered by the Governor who functioned as per his discretion. In 'partially excluded' areas, the Governor functioned on the advice of his ministry.¹⁹⁶ Since the north-eastern tribal regions were considered very backward, they were completely excluded from the scope of normal laws and the central or provincial legislature had no power to make laws with regard to these areas.¹⁹⁷ These provisions were continued even after independence by having them incorporated into the Constitution with some modifications.

The Constitution has defined the term 'Scheduled Areas' as "such areas as the President may by order declare to be Scheduled Areas after consultation with the Governor of the state."¹⁹⁸ The Fifth Schedule to the Constitution has prescribed the following criteria for scheduling, rescheduling and alteration of Scheduled Areas: a) preponderance of tribal population, b) compactness and reasonable size of the area, c) A viable administrative entity such as a district, block or taluk d) Economic backwardness of the area as compared to the neighbouring areas.¹⁹⁹

These criteria are rooted in the principles followed in declaring 'Excluded' and 'Partially-Excluded Areas' under the Government of India Act, 1935.²⁰⁰ While the wholly excluded areas have been incorporated into the Sixth Schedule, covering Assam, Meghalaya, Tripura and Mizoram in the North East, the Fifth Schedule has covered the tribal areas of the rest of the country.²⁰¹ Currently, the Fifth Schedule covers tribal areas in ten states namely, Andhra Pradesh, Orissa, Jharkhand, Chhattisgarh, Madhya Pradesh, Maharashtra, Gujarat, Rajasthan, Telangana and Himachal Pradesh.²⁰² These two schedules provide for alternate or special governance mechanisms for scheduled areas, thereby further strengthening the federal character of the constitution

Important Provisions of the Fifth Schedule:

- The Governor of a state has been entrusted with special responsibilities in the administration of the Scheduled Areas in the state. He/she is required to prepare a special report annually or whenever required, and submit it to the President, regarding the administration of the Scheduled Areas.²⁰³
- The Union Government can issue appropriate directives to the State Governments as to the administration of the Scheduled Areas.²⁰⁴
- This Schedule also provides for the constitution of a Tribal Advisory Council with 20 members, 3/4th of whom should be scheduled tribe members of the state legislature,²⁰⁵ to advice on such matters pertaining to the welfare and advancement of Schedule Tribes.²⁰⁶
- The Governor may make rules regarding the number of members of the Tribal Advisory Council, its conduct, meeting and other incidental matters.²⁰⁷
- The Governor may, by public notification, direct that a particular Act of the Parliament or of the State Legislature, shall not apply to a Scheduled Area or to its parts, with exceptions as may be directed.²⁰⁸

¹⁹⁴ <https://www.latestlaws.com/bare-acts/central-acts-rules/article-371-j-constitution-of-india-special-provisions-with-respect-to-state-of-karnataka>

¹⁹⁵ Ibid

¹⁹⁶ Ibid

¹⁹⁷ Ibid

¹⁹⁸ https://tribal.nic.in/downloads/CLM/CLM_Reports/6.pdf

¹⁹⁹ Ibid

²⁰⁰ National Commission for Scheduled Tribes (2012). *Special Report: Good Governance for Tribal Development and Administration*. New Delhi, Gov.

²⁰¹ https://tribal.nic.in/downloads/CLM/CLM_Reports/6.pdf

- The Governor may make Regulations for peace and good governance in the Scheduled Areas by which she/he may, among other things, prohibit or restrict the transfer of land by members of the Schedule Tribes amongst themselves; regulate the allotment of land to members of the Scheduled Tribes in such areas; and regulate the business of moneylenders who lend money to members of the Schedule Tribes, etc..²⁰⁹ While making such regulations the Governor may, in consultation with the Tribal Advisory Council, repeal or amend any Act of parliament or of the Legislature of the State, or any existing law which for the time being is applicable to the area in question.²¹⁰ The Governor shall submit all such regulations to the President, and these shall be effective only after the assent of the president.²¹¹

Important provisions of the Sixth Schedule

- This schedule provides for two kinds of governing units in Tribal Areas: the Autonomous District Councils and the Autonomous Regions. A District Council has been provided for Each Autonomous District comprising not more than 30 members, and a Regional council has been provided for Autonomous Regions.²¹²
- The Governor has the Power to include, exclude or diminish any of these areas or define their boundaries.²¹³
- The powers of administration are vested in these Districts and Autonomous Councils.²¹⁴ The Governor is entitled to make rules for the constitution of the Councils, its Composition, term of office, appointment of officers and staff, and procedure and conduct of business.²¹⁵
- The Elected members of the councils shall have a normal term of five years.²¹⁶
- The District and the Regional Council have the power to make rules in respect to land other than Reserved Forest land, management of forest, other than reserved forest, use of canal or water courses for agriculture, Regulation of shifting cultivation, establishment of village or town committees, appointment or succession of chief or headmen, inheritance of property, marriage and divorce and social customs with the prior approval of the government.²¹⁷
- The District and the Regional Councils are also empowered to constitute village councils for trials. They may also prescribe and lay down the procedures for trial and enforcement of the decisions.²¹⁸
- The District Councils may establish and manage primary schools, agriculture, animal husbandry and other community projects.²¹⁹
- The Councils have their own district and regional funds and may assess and collect land revenue and impose taxes, grant licenses and leases for minerals;²²⁰ make regulations for control of money lending and trading by non-tribals,²²¹ regulate publications²²² etc.
- The Governor has the power to direct exclusion or modification of any Act of the State Legislature relating to the consumption of non-distilled alcoholic liquor.²²³
- The Governor also has the power to appoint Commissions to enquire into the affairs of any Council,²²⁴ annul or suspend any office acts or resolutions,²²⁵ and dissolve the Council and direct elections subject to the prior approval of the State Legislature.²²⁶

²⁰² http://panchayatonline.gov.in/viewappswindow.htm?OWASP_CSRFTOKEN=1S7M-6TT4-6S3I-LCW7-66P0-RFKJ-SNQFYMK&appname=indexPESA#:~:text=In%20short%20form%20this%20is,%2C%20Odisha%2C%20Rajasthan%20and%20Telangana.

²⁰³ Section (3) of Schedule 5 of the Indian Constitution.

²⁰⁴ Ibid

²⁰⁵ Section 4(1), Ibid.

²⁰⁶ Section 4(2), Ibid.

9 Conclusion

The above discussion has demonstrated that the framers of the Constitution always intended for India to have a federal structure with a relatively strong Union. At the time of framing of the Constitution, a need was felt to ensure that union government is empowered so as to maintain the integrity of the nation. Over the years, the Supreme Court of India has recognised this feature of Indian federalism. The decision of the Court in S.R. Bommai case has further strengthened federalism by recognizing it to be a part of the basic structure of the Constitution. However, it appears that over the years, the Parliament, which is a responsible constitutional organization, has used its power to regularly encroach upon the powers of other authorities. If this practice is not checked, then it may lay down dangerous precedents and enable a powerful Centre to change the very nature of federalism in India by making itself the sole repository of executive and legislative powers.

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Federalism in India

Part 2: Legislation Powers and the Judiciary

Contents

1	Introduction.....	31
2	Scheme of distribution of legislative powers.....	31
2.1	Territorial Jurisdiction.....	32
2.2	Jurisdiction with respect to subject matter.....	33
2.3	Scheme of interpretation of legislative power.....	34
2.4	Power of the parliament to legislate on state subjects.....	36
3	Union encroachment over state authority.....	38
3.1	Some instances of union encroachment.....	39
3.2	Attempts to rebalance the Union vs State powers.....	41
3.3	Resolving Centre-State disputes: Article 131.....	42
4	Key issues for an Independent and Federal Judiciary.....	43
4.1	Encroaching on authority of High Courts.....	43
4.2	Centralized Supreme Court.....	45
5	Judicial appointments.....	46
6	Conclusion.....	48
7	References.....	48
8	Annexure - Judicial system in India.....	49
8.1	Hierarchy of Courts.....	50
8.2	Judicial appointments, Removals and Transfers.....	56

Federalism in India

Part 2: Legislation Powers and the Judiciary

I Introduction

The essence of federalism lies in the sharing of legal sovereignty between the Union and the federal units. In general, the most precise way of demarcating the respective areas of the Union and federal units is to demarcate their respective areas in regard to legislation. The Indian Constitution, based on the principle of federalism, has elaborate provisions for the distribution of legislative powers between the union and states. Article 246 of the Constitution confers legislative powers on the Parliament and the State Legislatures on the subjects enumerated in the Seventh Schedule. This schedule contains three lists i.e. List I or the Union List over which the Parliament has exclusive competence, List II or the State List over which the State Legislatures have exclusive competence and List III or the Concurrent List over which both the Parliament and the State Legislatures have competence.

In addition to distribution of legislative power another integral requirement of a federal state is a robust federal judicial system which interprets the constitution, and therefore adjudicates upon the rights of the federal units and the union. While the Indian constitution has provided for a federal polity, there is no federal judiciary. The High Courts and the Supreme Court form one single integrated judiciary.

The purpose of this paper is to inquire into both, the nature of legislative power distribution between the centre and the states, as well as the nature of judiciary, in the context of federalism in India. The first part of the paper deals with the issue of legislative power. It begins by highlighting the scheme of distribution of powers, including the main principles for interpretation of legislative entries. Thereafter the paper highlights some of the important instances of union encroachment over state legislative authority. The second part of the paper deals with the Judiciary, including discussing the hierarchy of the court system and the issue of judicial appointments, transfers and removals. The final section of the paper highlights some of the key issues for judicial federalism in India.

2 Scheme of distribution of legislative power

In a federal system the centre and the states are supreme in their respective domains, however, harmony and coordination between them is essential for the effective operation of the system.²²⁷ Hence, the Indian Constitution contains elaborate provisions to regulate the various dimensions of the relations between the Centre and the states. This includes the demarcation of their respective areas of legislation. The Constitution has followed the Government of India Act, 1935 in providing for a two-fold method of distribution of legislative powers:²²⁸ (a) With respect to territory; and (b) With respect to subject matter. The constitutional provisions on this subject are provided in articles 245-254, with articles 245 and 246 dealing with territory and subject matter respectively.²²⁹



Source:
<https://d1whlypfis84e.cloudfront.net/guides/wp-content/uploads/2019/04/10162629/parliament-300x150.png>

²²⁷ Elazar, Daniel J., 1987, *Exploring Federalism*, Tuscaloosa: University of Alabama Press.

²²⁸ https://www.legislation.gov.uk/ukpga/1935/2/pdfs/ukpga_19350002_en.pdf

²²⁹ *The Constitution of India*.

2.1 Territorial Jurisdiction

Article 245 provides that (subject to the provisions of the Constitution).²³⁰

- Parliament may make laws for the whole or any part of the territory of India and
- The legislature of a State may make laws for the whole or any part of the State.



Source: <https://flyingcdn-e01a343a.b-cdn.net/wp-content/uploads/2023/01/article-245-of-indian-constitution.png>

Thus, article 245 sets out the limits of the legislative powers of the Union and the States with respect to geography. However, clause (2) of Article 245 states that a law made by Parliament cannot be invalidated on the grounds that it has extra-territorial operation i.e. it takes effect outside the territory of India.²³¹ Thus, if any law is made by the parliament regarding extraterritorial operations, no questions can be raised on its validity purely on the grounds of extra-territoriality.

This provision can be understood on the basis of the doctrine of territorial nexus.²³² While under normal circumstances, the state legislature has the power to make laws only within its territorial jurisdiction; territorial nexus is one such exception which allows the state to make laws even for extraterritorial operations. According to this doctrine a State law, in reference to an extra-territorial operation, is valid if it can be shown that there exists a sufficient nexus between the object and the state.²³³ Thus, if the State law has sufficient nexus/connection with the subject matter of the law, the State law is valid even when it has extraterritorial operation.

The doctrine of territorial nexus was first evolved by the Privy Council in the case of *Wallace v/s Income-tax Commissioner, Bombay*.²³⁴ In this case, a company which was registered in England was a partner in a firm in India. The Indian Income-tax Authorities sought to tax the entire income made by the company. The Privy Council applied the doctrine of territorial nexus and held the levy of tax to be valid. It stated that since the company had derived a major part of its income for a year from British India, it gave the company a sufficient territorial connection to justify it being treated as a home company in India, for all purposes of tax on its income for that year from whatever source the income may be derived.

²³⁰ Article 245, Ibid

²³¹ Article 245(2), Ibid

²³² <https://thelawexpress.com/doctrine-of-territorial-nexus>

²³³ *Kavalappara kottarathil kochuni v. States of Madras & kerala*, AIR 1960 SC 1080

²³⁴ AIR 1948 SC 118.

This doctrine was further applied by the Supreme Court in the *State of Bombay v. R. M. D. C* case.²³⁵ In this case the Bombay State levied a tax on lotteries and prize competitions. The tax was extended to a newspaper printed and published in Bangalore but had wide circulation in Bombay. The respondent conducted the prize competitions through this paper. The Court held that there existed a sufficient territorial nexus to enable the Bombay State to tax the newspaper.

In *A. H Wadia vs Income-Tax Commissioner Bombay*,²³⁶ it was held that a question of extraterritoriality of enactment can never be posed against a supreme legislative authority, on the basis of challenging its validity, in the municipal court. The legislation may be in violation of international law, may not be recognized by foreign courts, or may pose practical challenges in implementing it, but these are policy problems that are not the concern of domestic tribunals.²³⁷

2.2 Jurisdiction with respect to subject matter

Article 246 of the Indian constitution provides for a threefold distribution of legislative powers between Union and the State Governments based on subject matter. The article provides that:²³⁷

1. The Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I of the Seventh Schedule (the Union List).
2. The Parliament and the Legislature of any State has power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (the Concurrent List).
3. The Legislature of any State has exclusive power to make laws with respect to any of the matters enumerated in List II in the Seventh Schedule (the State List).
4. The Parliament has power to make laws with respect to any matter for any territory of India not included in a State, including the matters enumerated in the State List.

The provisions of Article 246 are to be read with the entries in the Union List, State List and the Concurrent List in Schedule VII of the Indian Constitution.

• The Union List (List I):

This list gives exclusive legislative powers to the union to legislate on 100 items which comprise of subjects of national importance, and uniform laws for the whole of the country. Only the parliament can legislate with respect to these matters including: defense, armed forces, atomic energy, foreign affairs, citizenship, Banking, Currency, Union Taxes etc.

• The State List (List II):

This list gives exclusive legislative powers to the states on 61 items and comprises of subjects of local or state interest such as maintaining law and order, police forces, healthcare, transport, land policies, electricity in state, village administration, etc.

• The Concurrent List (List III):

This list empowers both the union and the state governments with concurrent power of legislation on 52 items. This List was included to avoid excessive rigidity of a two-fold distribution. The subjects in this list are such that both the union government and the governments of the states have an interest in them including education, economic and social planning, labor welfare, electricity etc.

²³⁵ *AIR 1957 SC 699.*

²³⁶ *AIR 1949 FC 18.*

²³⁷ *Article 246, The Constitution of India.*

Broadly, the entries that are related to national importance have been allocated to the Union list and entries of local concern have been allocated to the States. The Concurrent list mostly serves as a device to loosen the excessive rigidity of the two-fold distribution by allowing the legislative power to vary from state legislature to Parliament based on the importance of the matter.²³⁸ As per the Sarkaria Commission, concurrent list subjects are neither exclusively of national concern nor of local concern and hence occupy a constitutional 'grey' area.²³⁹ The Seventh Schedule is thus indicative of the spirit of cooperation between the Union and the States. Also, it represents a limitation to powers of both Centre and States which is essential to ensure that the different institutional layers in a federal system are able to function autonomously in their respective spheres of influence.

2.3 Scheme of interpretation of legislative power

The legislative power of the Centre and states are divided which prevents them from making laws outside their allotted subjects. However, the distribution of subject matter cannot be claimed to be perfectly objective, and there happens to be frequent overlap between the three lists. In such cases, questions are constantly raised on the constitutionality of a particular law and whether a particular subject falls in the sphere of one or the other government.²⁴⁰ The duty to resolve such issues is vested in the Supreme Court of India. The Supreme Court follows a certain scheme of interpretation in order to determine the respective legislative power of the Union and the States, under the three lists, as given below:

i. Residuary powers:

Article 248 vests the residuary powers of legislation in the Parliament.²⁴¹ It states that the Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent list or the state list. Entry 97 in the Union list also lays down that the Parliament has exclusive power to make laws including any tax not mentioned in either of these lists.²⁴² This reflects the leaning of the constitution makers towards a strong centre.

In *Union of India v H.S. Dhillon*,²⁴³ the question involved was whether parliament had legislative competence to pass a Wealth-tax Act imposing wealth tax on the assets of a person on their agricultural land. The Court held that in case of a central Legislation the proper test was to inquire if the matter fell in List II (State List) or List III (Concurrent List). Once it was found that the matter did not fall under List II, the Parliament would be competent to legislate on it under its residuary power given in Entry 97 of List I. In such a case it would be immaterial whether the subject lies under List I or not.

ii. Predominance of the union list:

Article 246 includes the non-obstante clause which not only talks about distribution of powers, but also explains the supremacy of powers. Article 246(1) provides exclusive powers to the parliament to make laws on subjects in the union list but also includes that clause (1) is applicable "notwithstanding anything in clauses (2) and (3)". Further, clause 246(3) provides powers to the state legislatures with respect to the state list, but includes that the applicability of clause (3) is "subject to clauses (1) and (2)".²⁴⁴

When these clauses are read together it clearly expresses the predominance of the Union List over the State List and the Concurrent List, and that of Concurrent List over the State list. Thus, in case of an overlap between the Union and the Concurrent List, or the Union and the State List, it is the Union List that will prevail, and in case of a conflict between the Concurrent List and State List, it is the Concurrent List that will prevail.

²³⁸ <https://legallaffairs.gov.in/sites/default/files/Concurrent%20Power%20of%20Legislation%20under%20List%20III%20of%20the%20Indian%20Constitution.pdf>

²³⁹ The Sarkaria Commission Report (1987).

²⁴⁰ M.P. Jain, 'Indian Federalism: A Background Paper' in Alice Jacob (ed), *Constitutional Developments Since Independence* (N. M. Tripathi, 1975).

²⁴¹ Article 248, The Constitution of India

²⁴² Union List, Seventh Schedule, Ibid

²⁴³ AIR 1972 SC 1061

²⁴⁴ Article 246(1), The Constitution of India.

²⁴⁵ Article 246(3), Ibid

The Supreme Court of India has also held that subject to the overriding predominance of the Union List, the entries in the various lists should have a broad interpretation. In *Calcutta Gas Ltd. V. state of Bengal*,²⁴⁶ the Supreme Court held that the “widest possible” and the ‘most liberal’ interpretation should be given to the language of each entry. In *Prem Chand Jain v R.K. Chabra* the Supreme Court held, a general word used in an entry.....must be construed to the extent to all ancillary or subsidiary matters which can fairly and reasonably be held to be included in it.²⁴⁷

iii. Repugnancy between central and state laws within the concurrent list:

Article 254 resolves the issue of any repugnancy between any law made by the union and the state relating to any subject matter in the concurrent list. According to article 254(1), if any provision of a law made by any state legislature is repugnant to any law made by the parliament, which is competent to enact a law on the matter enumerated in the Concurrent List, then in such a case, the law made by the parliament, whether passed before or after the law made by the state, shall prevail and the law made by the state shall, to the extent of the repugnancy, be void.²⁴⁸

The Supreme Court in *Deep Chand v. State of Uttar Pradesh*,²⁴⁹ laid down the following criteria for determining the repugnancy between the Union Law and a State Law, upon which the union law would prevail: (a) If there is inconsistency in the actual terms of the two Statutes, i.e., when one says "do" and the other says "do not". (b) If both the State and the Union Laws seek to exercise their powers over the same subject-matter, and (c) Though, there may be no direct conflict, the Union Law is intended to be a complete, exhaustive code, which would also render the state law inoperative.



Source: <https://blog.ipleaders.in/wp-content/uploads/2020/12/Constitution-and-Gavel-780x500.jpg>

The issue of repugnancy was further discussed by the Supreme Court in the *M. Karunanidhi v. Union of India* case.²⁵⁰

²⁴⁶ AIR 1962 SC 1044.

²⁴⁷ (1984) 2 SCC 302.

²⁴⁸ Article 254(1), The Constitution of India

²⁴⁹ 1959 AIR 648, 1959 SCR Supl. (2) 8.

²⁵⁰ AIR 1979 SC 898

According to the court: (a) repugnancy would arise between the two statutes if it is shown that there is a clear and direct inconsistency between the two laws (Central Act and State Act) which is irreconcilable, such that they cannot operate in the same field. (b) There can be no repeal unless the inconsistency appears on the face of the two statutes. (c) Where the two statutes occupy a particular field, but there is room for both the statutes operating in the same field to exist without coming into conflict with each other, there would be no repugnancy (d) Where a statute occupying the same field seeks to create distinct and separate provisions, no repugnancy would arise and both the statutes would continue to operate in the same field.

The above rule of predominance of central law in case of repugnancy is however, subject to the exception provided in clause (2) of Article 254. According to article 254(2), where a law made by the state legislature with respect to one of the matters enumerated in the concurrent List contains any provision repugnant to the provisions of any existing law made by the Parliament then, the law so made by the state legislature shall prevail if it has been reserved for the consideration of the President and has received his assent.²⁵¹ However, this clause does not prevent the Parliament from enacting any law in the future with respect to the same matter including a law adding to, amending, varying or repealing the law made by the state Legislature.

The principle behind article 254(2) was illustrated in the case of *Zaverbhai Amaldas v. State of Bombay*,²⁵² where a central law was enacted to regulate the supply, production and distribution of essential commodities in 1946. The law also prescribed punishments for those who acted in contravention of the act. The Bombay legislature did not consider these punishments adequate and enacted another law in 1947, increasing the amount of punishment. This subsequent state law received the assent of the president and continued to operate, until 1950, when the parliament itself amended the original law and increased the punishments. The Supreme Court in the case held that the state law would become void as it was repugnant to the central law as both the laws had been enacted on the same subject of enhanced punishments.

2.4 Power of the Parliament to legislate on state subjects

Under normal circumstances the distribution of legislative powers as provided by the constitution must be strictly adhered to, and neither the State nor the Centre can encroach upon the sphere allotted to the other. However, there are certain exceptional circumstances under which the system of distribution is either suspended or the powers of the Union are extended over the subjects mentioned in the State List.



²⁵¹ Article 254(2), The Constitution of India.

²⁵² 1954 AIR 752, 1955 SCR 799.

The exceptional circumstances are as follows:

- **In national interest:**

According to Article 249, if the Rajya Sabha passes a resolution by a special majority that it is necessary or expedient in the national interest that the Parliament make laws with respect to any matter enumerated within the State List, then it shall be lawful for the Parliament to make laws for the whole or any part of the territory of India with respect to such matters.²⁵³ However, such laws can only be made while the resolution is in force, which is a period of one year unless extended. Also, any law made by the Parliament during such time, will cease to have effect after the expiration of a period of six months after resolution the original has ceased to exist. This power of the Parliament is used only during national emergencies.

Article 249 was first invoked in August, 1950 with the purpose of controlling black-marketing, when in pursuance of a resolution of the Rajya Sabha, dated August 8 1950, the Parliament enacted the Essential Supplies (Temporary Powers) Amendment Act, 1950 and the Supply and Price of Goods Act, 1950.²⁵⁴ Again, in 1951, pursuant to another resolution of the Rajya Sabha under this Article, the Parliament passed the Evacuee Interest (Separation) Act, 1951, which was applicable to all evacuee property including agricultural land.²⁵⁵ This Act was enacted to resolve the problem relating to the rehabilitation and settlement of displaced persons from Pakistan.

- **During the proclamation of National Emergency:**

According to article 250 while the Proclamation of National Emergency is in operation the Parliament shall have the power to make laws for the whole or any part of the territory of India with respect to all matters in the State List.²⁵⁶ Such a law, however, shall cease to have effect on the expiration of six months after the proclamation of emergency has ceased to operate. The proclamation of emergency must be such as made under Article 352. National emergency has been imposed thrice in the country: in 1962 at the time of Chinese aggression, in 1971 during the Indo-Pak war, and in 1975 on the grounds of internal disturbances.

- **With consent of states:**

According to article 252, if the legislature of two or more states pass a resolution to the effect that it is desirable to for the parliament to pass a law on any matter in the state list, it shall become lawful for the parliament to enact such a law.²⁵⁷ Any other state may also adopt such a law by passing a resolution to that effect, and such a law can only be amended or repealed by an Act of the parliament. The Estate Duty Act, 1952, the Prize Competition Act, 1955, the Urban Land (ceiling & Regulation) Act, 1976 and the Transportation of Human Organs Act, 1994 are some laws passed by the parliament under Article 252.²⁵⁸

- **To give effect to treaties and international agreements:**

Article 253 empowers the Parliament to make any law for the whole or any part of the territory of India for implementing treaties and international agreements and conventions.²⁵⁹ The normal distribution of powers cannot stand in the way of the Parliament to pass any law for giving effect to an international obligation even though such law may relate to any subject on the State List. Thus, this article enables the union government to give effect to all its international obligations and commitments.

The Environment Protection Act, 1986 was enacted by the Government of India under Article 253 of the Constitution.²⁶⁰ The Act came in as a result of the Bhopal gas tragedy, as well as India's commitment to follow the United Nations Conference on the Human Environment that took place in Stockholm in June, 1972. The Act came into force on November 19, 1986, and was extended to the whole country.

²⁵³ Article 249, The Constitution of India

²⁵⁴ <http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERII.pdf>

²⁵⁵ Ibid

²⁵⁶ Article 250, The Constitution of India.

²⁵⁷ Article 252, Ibid.

- **Upon failure of Constitutional machinery in a state:**

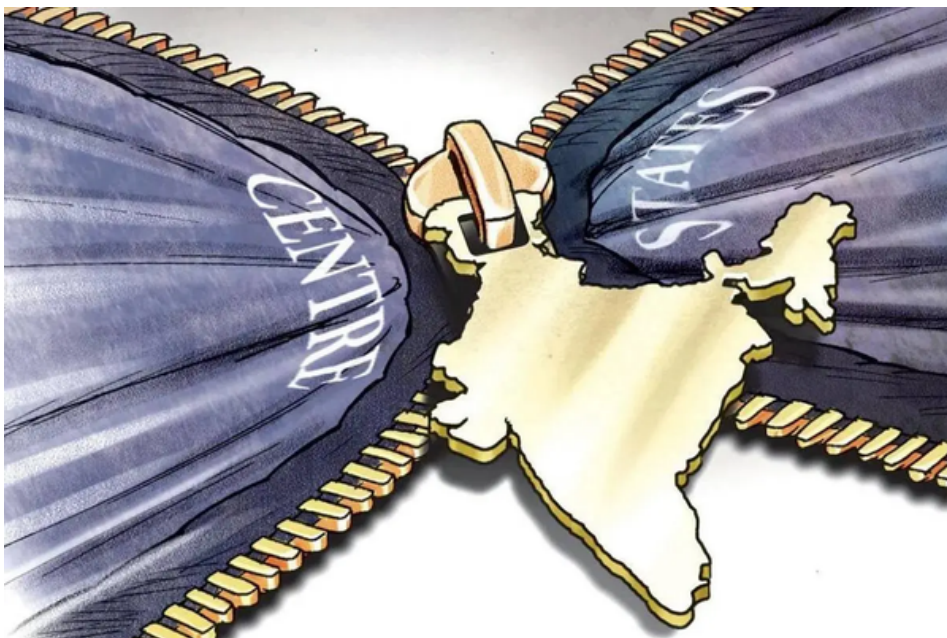
Article 356 provides that the President of India can take over the legislative and executive powers of the state by imposing emergency in case of “failure of the Constitutional machinery” in the state.²⁶¹ It further states that President’s rule can be imposed based on a report sent by the governor, or otherwise in any circumstance that the President deems fit, upon the aid and advice of the council of ministers.²⁶²

With the proclamation of President’s rule in a state, the elected government is dismissed and the administration of the state is directly controlled by the President through his representative governor. In such a case, the Parliament may make laws with respect to any or all the matters contained in the State List, and the laws so made by the Parliament would be operative in that State only. Such laws would continue in force until amended or repealed by the appropriate Legislature, i.e., either by the Parliament during the operation president’s rule or by the State Legislature after such a proclamation ceases to operate.

After the 1977 elections post emergency, the government at the Centre headed by the Janata Party, dismissed the Congress-led governments on the ground that they had lost the people’s mandate.²⁶³ The matter was challenged in the Supreme Court, in the State of Rajasthan v. Union of India case.²⁶⁴ A seven-judge bench dismissed the petition due to its refusal to get into political questions. Some judges even held that presidential satisfaction in invoking Article 356 of the Constitution was not justiciable.

3 Union encroachment over state authority

Since independence, despite a clear-cut division of legislative power, the issue of Centre-State disputes has been a perennial one. Mostly, such disputes arise when the Centre encroaches upon State’s power by making laws on matters that should fall under the State authority or which affects the legal or Constitutional Rights of the State.



Source: <https://www.financialexpress.com/wp-content/uploads/2021/10/federal.jpg>

²⁵⁸ <http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERII.pdf>

²⁵⁹ Article 253, The Constitution of India.

²⁶⁰ http://iced.cag.gov.in/?page_id=1026

²⁶¹ <https://indiankanoon.org/doc/8019/>

²⁶² K. Madhusudhana Rao, Authority to recommend President’s rule Under Article 356 of the Constitution, 46 (1) Indian Law Institute 125-132 (2004).

3.1 Some instances of union encroachment

i. In 1951, the Parliament had passed the Industries (Development and Regulation) Act, 1951,²⁶⁵ specifying those industries, which had to be controlled by the centre in national interest. The Act, originally passed, was fair and reasonable, and gave the centre control over vital and strategic industries. However, in the course of time, more and more industries were brought within the purview of the said Act, and the result was a subversion of federalism.²⁶⁶ In the 1980 *Ishwari Khaitan Sugar Mills v. State of Uttar Pradesh* case,²⁶⁷ the centre had made an attempt to subvert the autonomy of UP government over its sugar industry.

In this case, the State Government of UP had proposed to acquire sugar industries under the U.P Sugar Undertakings (Acquisition) Act, 1971. This was challenged on the ground that these sugar industries were declared to be controlled by the union government under the Industries (Development and Regulation) Act, 1951. And accordingly, the state did not have the power of acquisition of property which was under the control of the union. However, the Supreme Court held in the case that the power of acquisition was not occupied by Industries (Development and Regulation) Act, 1951 and the state had a separate power under Entry 42 List III, and thereby upheld State autonomy.

ii. The Forty-second Amendment) Act, 1976,²⁶⁸ led to the introduction of Entry 2A in List I, in order to confer on the Union Government the power to control the armed forces of the Union, such as, BSF, CRP etc. Many state governments considered this an encroachment by the Union on the fields of “public order” and “police”, both of which were the responsibility of the States under Entries 1 and 2 of List II.²⁶⁹ Further, entry 2A itself contained the expression “deployment....in aid of the civil power”.²⁷⁰

This meant that the State Governments had the right to requisition CRPF when they had reasons to believe that the State Police Forces will need to be aided to deal with situations of serious disturbances. And, unless there was proclamation of emergency, any deployment of forces in a State should have been only be an aid of the state government and could not be forced on the State.²⁷¹ Unfortunately, this provision has been frequently violated.

Most recently, the Ministry of Home Affairs issued a notification extending the jurisdiction of the Border Security Force from 15 km to a depth of 50 km along the international borders in three states: Punjab, Assam and West Bengal, allowing the central forces to undertake search, seizure and arrest within a larger stretch.²⁷² The states were not consulted before reducing the area of jurisdiction of the state authorities, which was an encroachment on their autonomy.

iii. After India became independent, the constitution framers kept education under the domain of state governments, while vesting the Union government with responsibilities to ensure standard in education. The Entry 11 of List II laid out education including universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I, and Entry 25 of List III, should be a state subject.²⁷³ Yet, several key educational responsibilities were given to the Union (the entry nos. 62, 63, 64, 65 and 66 in the Union list) which included vital areas of national importance such as technical education or agencies to determine standards of higher education.

In addition, Entry 20 under the Concurrent list allowed the Union powers related to economic and social planning in the field of education. However, the passing of the 42nd amendment 1976 led to a change in balance in favour of the Union government when education was moved to the Concurrent list.²⁷⁴ The trend of centralization was furthered by the National Policy of Education (NPE) in 1986, which conferred statutory status on central-level regulatory bodies such as the AICTE and the National Council for Teacher Education (NCTE).²⁷⁵

²⁶³ https://www.orfonline.org/research/the-paradox-of-centralised-federalism/#_ftn24

²⁶⁴ 1977 AIR 1361, 1978 SCR (1) 1.

²⁶⁵ <https://indiankanoon.org/doc/800551/>

²⁶⁶ <http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERII.pdf>

²⁶⁷ 1980 AIR 1955, 1980 SCR (3) 331

The National Education Policy launched in 2020²⁷⁶ is a further step towards the centralization of education in the country. It robs the autonomy of states by vesting overarching powers to the Union government on a host of issues. For instance the NEP has proposed to bundle out several existing regulatory bodies including UGC, AICTE, National Council for Teachers Education (NCTE) to create a singular entity called Higher Education Commission of India (HECI) to regulate key aspects of education.²⁷⁷ This is going to be a top-heavy body with massive intervening powers.

Additionally, there are proposals to create overarching educational bodies such as having a National Testing Agency to offer common aptitude test for entire country. The controversies surrounding the introduction of in 2016 to standardize medical education already led to several states like Tamil Nadu openly challenging the Central government.²⁷⁸ The principles of federalism demands that states should be treated as equals in key decision making processes involving education, but the NEP does the opposite.²⁷⁹

iv. The 102nd amendment to the Indian constitution came into effect in August 2018 and inserted Articles 338B and 342A into the constitution.²⁸⁰ Article 338B set up a National Commission for Backward Classes and Article 342A vested the power to notify a class as a ‘backward class’.²⁸¹ In the case of the Maratha Reservation,²⁸² a constitution bench of the Supreme Court held that after the 102nd amendment, the states no longer had any power to determine backward classes.

The Court observed: “By introducing Articles 366 (26C) and 342A through the 102nd Constitution, the President alone, to the exclusion of all other authorities, is authorized to recognize SEBCs and include them in a list to be published under Article 342A(1), which shall be regarded to include SEBCs with each state and union territory for the Constitution.” The states can only offer recommendations to the President or the NCBC to remove, add, or change the list of backward classes.

v. A recent example of central encroachment on the state sphere was the Disaster management Act, 2005,²⁸³ which was invoked in light of the COVID-19 pandemic. The Act caused discontent among states²⁸⁴ as the Central guidelines were binding on them, even though public health is a state matter on which the Parliament could not legislate. The Disaster Management Act (DMA) itself had been enacted under entry 23 of the Concurrent list which put an added obligation on the centre to share equal powers with the states. Further, under Section 11 of DMA the national plan to deal with epidemic had to be prepared “in consultation with state governments and other expert bodies in the field of disaster management”²⁸⁵ which during the pandemic was missing.²⁸⁶



Source: https://www.lloydlawcollege.edu.in/images/LLC/website/images/blog_img/Covid-19_and_Na_1591952194.jpg

²⁶⁸ <https://legislative.gov.in/constitution-forty-second-amendment-act-1976>

²⁶⁹ <http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERII.pdf>

²⁷⁰ <https://legislative.gov.in/constitution-forty-second-amendment-act-1976>

²⁷¹ <http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERII.pdf>

3.2 Attempts to rebalance the Union vs State powers

Over the years several States have demanded transfer of powers from the Centre to the States, arguing that there is an imbalance in constitutional arrangement which requires rectification.²⁸⁷

In 1969, the Government of Tamil Nadu appointed a Centre-State Relations Inquiry Committee, popularly known as the Rajamannar Committee. In its 1971 report, the Committee recommended transferring several entries from the union and concurrent lists to the State List.²⁸⁸ It further recommended that State Governments should be consulted regarding the legislative proposals of the Centre with respect to the Concurrent List.²⁸⁹ The Union Government at the time had criticized the report claiming that it was an “overstatement of the States’ case 290”.²⁹⁰

Similarly, in Punjab, the Anandpur Sahib Resolution in 1973, demanded that the Centre limit itself only to defence, foreign relations, communications, railways and currency, with respect to the state, and that all residuary powers should be vested in the State.²⁹¹ A few years later the State of West Bengal adopted a memorandum on centre-state relations in 1977, recommending reformulation of the lists, demanding greater control over industries to States and also transferring residuary powers.²⁹² Until the 1980s these demands were not taken seriously by the Centre.

In 1983, the Central Government appointed a Commission under the chairmanship of Justice R.S. Sarkaria to review the arrangement between the Centre and the States with respect to powers, functions and responsibilities in all spheres.²⁹³ In its landmark report published in 1988, the Sarkaria Commission recorded many of the grievances raised by various state governments.²⁹⁴ However, the Commission took the view that the Centre should remain strong and transferring subjects like labour, electricity, education, etc. to the States would disturb the basic scheme of the Constitution.²⁹⁵

The recommendations of the Commission were threefold:²⁹⁶ 1. Residuary powers be transferred from the Union List to the Concurrent List, except for the residuary power to impose taxes which should be retained in the Union List. 2. The States should be consulted by the Centre before exercising its power over the entries in the Concurrent List. 3. The Centre should limit the field it occupies with respect to Concurrent List to only as much as is necessary for ensuring uniformity in national policy.

Similar to the Sarkaria Commission, the 2010 Puncchi Commission also recorded grievances of some State Governments regarding the division of legislative powers.²⁹⁷ However, it did not recommend any major changes, mainly reiterating the need for consultation by the Central Government when legislating on a field in the Concurrent List.²⁹⁸

The various commissions and reports, over the years, highlight the constant tension between the centre and the states since independence and reiterate the argument for periodically reviewing the Seventh Schedule.

²⁷² <https://economictimes.indiatimes.com/news/defence/bsf-now-has-uniform-50-km-jurisdiction-to-arrest-search-seize-in-border-states/articleshow/87002107.cms?from=mdr>

²⁷³ Schedule Seven, *The Constitution of India*.

²⁷⁴ <https://legislative.gov.in/constitution-forty-second-amendment-act-1976>

²⁷⁵ https://www.education.gov.in/sites/upload_files/mhrd/files/upload_document/npe.pdf

²⁷⁶ https://www.education.gov.in/sites/upload_files/mhrd/files/NEP_Final_English_0.pdf

²⁷⁷ <https://www.newslaundry.com/2018/07/09/heci-reform-ugc-scrapping>

²⁷⁸ <https://scroll.in/article/849815/the-neet-fiasco-makes-it-clear-that-states-must-be-at-the-core-of-framing-indias-education-policy>

²⁷⁹ <https://timesofindia.indiatimes.com/city/chennai/new-education-policy-and-erosion-of-states-powers/articleshow/77624663.cms>

²⁸⁰ <https://legislative.gov.in/sites/default/files/THE%20CONSTITUTION%20%28ONE%20HUNDRED%20AND%20SECOND%20AMENDMENT%29ACT%2C2018.pdf>

²⁸¹ *Ibid*

²⁸² <https://www.scobserver.in/cases/jaishri-laxmanrao-patil-chief-minister-maharashtra-maratha-reservation-case-background/>

²⁸³ <https://indiankanoon.org/doc/1166740/>

²⁸⁴ https://www.business-standard.com/article/economy-policy/centre-misusing-disaster-laws-to-step-on-states-rights-say-experts-120050501454_1.html

²⁸⁵ <https://indiankanoon.org/doc/1166740/>

²⁸⁶ https://www.business-standard.com/article/economy-policy/centre-misusing-disaster-laws-to-step-on-states-rights-say-experts-120050501454_1.html

²⁸⁷ M.P. Jain, ‘Indian Federalism: A Background Paper’ in Alice Jacob (ed), *Constitutional Developments Since Independence* (N. M. Tripathi, 1975).

²⁸⁸ *Report of the Centre-State Relations Inquiry Committee (1971)*

3.3 Resolving Centre-State disputes: Article 131

Under Article 131, the Supreme Court has exclusive and original jurisdiction over legal issues originating between states and the union or between states.²⁹⁹ For a dispute to qualify under Article 131, it has to necessarily be between the states and the Centre, and must involve a question of law or fact on which the existence of a legal right of the state or the Centre depends. However, over the decades, the Apex Court has taken contradictory decisions on whether a state can challenge a central legislation under Article 131.

In a 1978 judgment, *State of Karnataka v Union of India*,³⁰⁰ Justice P N Bhagwati had said that for the Supreme Court to accept a suit under Article 131, the state need not show that its legal right is violated, but only that the dispute involves a legal question. But, article 131 cannot be used to settle political differences between state and central governments headed by different parties. However, in the 2011 case of *State of Madhya Pradesh v Union of India*,³⁰¹ the Court held that Central enactments could only be challenged as writ petitions under Article 32 and 226 of the Constitution and not under the original jurisdiction of the Court under Article 131.

A few years later, in 2015 *State of Bihar v Jharkhand*,³⁰² the Court again disagreeing with the 2011 judgement stated that “We regret our inability to agree with the conclusion recorded in the case of *State of Madhya Pradesh v. Union of India and Anr.* (supra), that in an original suit under Article 131, the constitutionality of an enactment cannot be examined. Since the above decision is rendered by a coordinate Bench of two judges, judicial discipline demands that we should not only refer the matter for examination of the said question by a larger Bench of this Court, but are also obliged to record broadly the reasons which compel us to disagree with the above-mentioned decision.” As the Court did not have the requisite bench strength to overturn the previous decision, it left the matter open for a larger bench to decide. Since this inconclusive situation has not been resolved, it allows both the judgements to be used as a precedent for future references.

The *State of West Bengal v. Union of India* is a 1962 case that also dealt with the issue of State’s rights to challenge Central Laws. While this case did not specifically deal with the question of state power to contest central laws under Article 131, its proceedings does have a bearing on the issue. The case involved the West Bengal Government challenging the Coal Bearing Areas (Acquisition and Development) Act, 1957, a Central law that allowed it the rights to acquire coal mining lands even though the land belonged to the State.

The Supreme Court accepted the original suit filed by the State under Article 131, but upheld the constitutional validity of the law made by the Centre. While the court did not venture into the constitutional validity of the enactment under Article 131, its decision to hear State’s challenge against Centre under the said Article indicates that the Constitution does provide scope for the State to contest Central laws.

²⁸⁹ Mangal Chandra Jain Kagzi, ‘A Critique of the Rajamannar Committee Report’ in Alice Jacob (ed), *Constitutional Developments Since Independence* (N. M. Tripathi, 1975)
²⁹⁰ Ibid

²⁹¹ Satya Prakash Dash, ‘Indian Federalism and Distribution of Responsibilities’, (2007) 68(4) *Indian Journal of Political Science*

²⁹² <http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERII.pdf>

²⁹³ Satya Prakash Dash, ‘Indian Federalism and Distribution of Responsibilities’, (2007) 68(4) *Indian Journal of Political Science*.

²⁹⁴ *Report of the Commission on Centre-State Relations* (1988).

²⁹⁵ Satya Prakash Dash, ‘Indian Federalism and Distribution of Responsibilities’, (2007) 68(4) *Indian Journal of Political Science*.

²⁹⁶ *Report of the Commission on Centre-State Relations* (1988).

²⁹⁷ *Report of the Commission on Centre-State relations* (2010).

²⁹⁸ Ibid

²⁹⁹ Article 131, *The Constitution of India*

³⁰⁰ 1978 AIR 68, 1978 SCR (2) 1

³⁰¹ <https://indiankanoon.org/doc/125662/>

³⁰² <https://main.sci.gov.in/jonew/ropor/rop/all/184010.pdf>

³⁰³ 1963 AIR 1241, 1964 SCR (1) 371

Despite having Articles 32 and 226 for the States to challenge the validity of Central laws, the Court must settle its position with regards to Article 131. In doing so, it will enhance the Supreme Court's exclusive jurisdiction to hear cases on a priority that deal with centre-state disputes and potentially violate the federal structure of the Constitution.



Source: <https://s3-ap-south-1.amazonaws.com/adda247jobs-wp-assets-adda247/articles/wp-content/uploads/2022/09/27163644/Article-131-of-the-Constitution.jpg>

4 Key issues for an Independent and Federal Judiciary

4.1 Encroaching on authority of High Courts

The Indian Constitution envisaged equality of power between High Courts and the Supreme Court, with a High Court not being a subordinate to the Supreme Court, except in the appellate sense. The Supreme Court has also, on many occasions, reiterated this position. Therefore, the theoretical position has always been that High Courts and the Supreme Court are equals. However, in recent years, certain trends have greatly eroded the standing of the High Courts leading to an imbalance in the federal structure of the judiciary.



Source: <https://i0.wp.com/indianlegalsolution.com/wp-content/uploads/2018/07/Legal-Method-to-change-your-Name-1.jpg?fit=810%2C450&ssl=1>

Some of these issues are highlighted below:

i.) Encroaching on Use of Article 226:

Article 226 of the Constitution vests in the High Courts the power to issue directions, orders or writs, within its jurisdiction, to any person or authority, including in appropriate cases, any Government, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, for the enforcement of any of the fundamental rights.³⁰⁴ However, in the 2016 case of *Rajasthan High Court v Union of India*,³⁰⁵ wherein the High Court had taken suo moto cognizance of a breach of security matter at the Sanganer Airport and included the Chief Justices and the Judges of the High Court in the list of persons exempted from pre-embarkation security checks at airports, the SC had ruled to reverse the High Courts' use of Article 226.

The Bench had observed that undoubtedly breach of security at the airport is an issue of serious concern, however, "a suo moto exercise of the nature embarked upon by the High Court encroaches upon the domain of the executive" and that the judgment of the High Court was "an example of a matter where the court should not have entered in exercise of its jurisdiction under Article 226 of the Constitution".³⁰⁶ Thus, the SC encroached on the domain of HC to invoke Article 226.

ii.) Growth of Tribunals:

The concept of tribunalisation came into existence in India before independence with the establishment of the Income Tax Appellate Tribunal in 1941.³⁰⁷ After independence, a need was felt for resolving administrative disputes with flexibility and speed. The core objective of tribunalisation was to provide specialised and speedy justice. The 42nd Amendment to the Constitution introduced Part XIV-A, which included Article 323A and 323B, providing for the constitution of tribunals dealing with administrative matters and other such issues.³⁰⁸ According to these provisions, tribunals were to be organized and established in such a manner that they did not violate the integrity of the judicial system.

However, over the years, the growth of tribunals has resulted in an encroachment on the authority of high courts. Tribunals have replaced high courts for disputes under the Companies Act, Competition Act, SEBI Act, Electricity Act, and Consumer Protection Act among others. Any person aggrieved by an order of an appellate tribunal can directly appeal to the Supreme Court, side-stepping the high courts.³⁰⁹ Further, critics have argued that Tribunals are also not as accessible as high courts.³¹⁰

In this regard, the growth of Tribunals has also given rise to the issue of their constitutionality, primarily revolving around the question of setting them up without disturbing the intrinsic powers of the constitutional courts. In multiple cases, clauses requiring direct appeals to the Supreme Court, while by-passing the High Court's jurisdiction, have been scrutinized by the judiciary.

In *S.P. Sampath Kumar v. Union of India*³¹¹ in 1986, the Supreme Court's five-judge bench had to decide the constitutionality of Section 28 of the Administrative Tribunals Act, which abolished the High Court's powers of judicial review. The bench concluded that the creation of 'alternative institutional structures,' would not infringe the constitution's basic structure. However, a 1993 decision by the High Court of Andhra Pradesh in *Sakinala Harinath v State of Andhra Pradesh*,³¹² indicated that a provision overthrowing the authority of judicial review of High Courts would be against the basic structure doctrine.

³⁰⁴ Article 226, The Constitution of India

³⁰⁵ <https://indiankanoon.org/doc/137398168/>

³⁰⁶ <https://www.indianconstitution.in/2021/03/union-of-india-vs-rajasthan-high-court.html>

³⁰⁷ https://prsindia.org/billtrack/prs-products/the-tribunal-system-in-india-3750#_edn2

³⁰⁸ <https://legislative.gov.in/constitution-forty-second-amendment-act-1976>

³⁰⁹ <https://www.thehindu.com/opinion/op-ed/devaluing-high-courts/article19944799.ece>

³¹⁰ *Ibid*

Subsequently, also in 1993, the Supreme Court, in *R.K. Jain v Union of India*,³¹³ criticized the reasoning behind the Sampath Kumar decision and emphasized that the scope of the High Court's judicial review under Article 226 cannot even be ruled out by a constitutional amendment. A 7-judge bench of the Supreme Court in *L. Chandra Kumar v Union of India* in 1997³¹⁴ concluded that, according to Articles 226 and 227 the right of the High Courts to exercise judicial superintendence over the judgments of all courts and tribunals is part of the constitution's basic structure. The court held that, under Article 226, an aggrieved party should be allowed to move to the High Court in all decisions of tribunals. It also claimed that under Article 136 of the Constitution, no appeal from a tribunal decision should lie directly before the Supreme Court.

iii.) Withdrawal of HC Orders:

In April 2021, the Supreme Court had issued an order to withdraw the orders of 6 high courts related to covid-19 and took over the cases.³¹⁵ The court stated, “We as a court wish to take suo motu cognisance of certain issues. We find that there are six high courts – Delhi, Bombay Sikkim, MP, Calcutta and Allahabad. They are exercising jurisdiction in best interest. But it is creating confusion and diversion of resources”.³¹⁶ Thereafter, the court took over four issues from the HCs including supply of oxygen, supply of essential drugs, method and manner of vaccination and power to declare lockdown.

This SC order came after high courts of Delhi and Mumbai made urgent interventions to ensure supply of oxygen to the states for the treatment of COVID-19 patients.³¹⁷ The Delhi high court had even criticized the Centre over the delay in providing oxygen supplies.

This decision of the SC was criticized by many senior advocates who believed this intervention was likely to undermine the efforts taken by the high courts with regard to holding the state governments accountable for Covid-19 management.³¹⁸ Many even called it an encroachment on the authority of high courts.

4.2 Centralized Supreme Court

In 1950, the Supreme Court consisted of seven judges and had a case pendency of 690 cases.³¹⁹ As of 2019, the Supreme Court had a sanctioned strength of 31 judges, but case pendency had increased to 61,300 cases, making it one of the most overburdened constitutional courts in the world.³²⁰ Amongst other reasons, frequent adjournments due to the geographical concentration of the Supreme Court in Delhi had a major contribution to the case backlog. A 2012 study had shown that of all the cases filed in the Supreme Court, the highest numbers are from high courts in the northern States:³²¹ 12 per cent from Delhi, 8.9 per cent from Punjab and Haryana, 7 per cent from Uttarakhand, 4.3 per cent from Himachal Pradesh, etc. The lowest figures are from the southern high courts: Kerala 2.5 per cent, Andhra Pradesh 2.8 per cent, Karnataka 2.2 per cent and a mere 1.1 per cent from Madras High Court.

In this context, the Law Commission of India in its 229th report in 2009,³²² recommended that a Constitutional Bench be set up at Delhi to deal with Constitutional and other allied issues and four Cassation Benches be set up, in the Northern region at Delhi, the Southern region at Chennai/Hyderabad, the Eastern region at Kolkata and the Western region at Mumbai, to deal with all appellate work arising out of the orders/judgments of the High Courts of the particular region.

³¹¹ AIR 1987 SC 386

³¹² 1993 (3) ALT 471

³¹³ AIR 1993 SC 1769

³¹⁴ AIR 1997 SC 1125

³¹⁵ https://www.livelaw.in/amp/top-stories/senior-lawyers-criticize-supreme-courts-move-to-transfer-covid-matters-from-high-courts-to-itself-172954?_twitter_impression=true

³¹⁶ <https://www.barandbench.com/news/litigation/supreme-court-takes-suo-motu-cognizance-covid-19-harish-salve-amicus-curiae>

³¹⁷ Ibid

³¹⁸ https://www.livelaw.in/amp/top-stories/senior-lawyers-criticize-supreme-courts-move-to-transfer-covid-matters-from-high-courts-to-itself-172954?_twitter_impression=true

³¹⁹ <https://www.theweek.in/news/india/2019/05/16/Opinion-decoding-demand-for-decentralising-supreme-court.html>

³²⁰ Ibid

³²¹ Robinson, Nick. (2012). A Quantitative Analysis of the Indian Supreme Court's Workload, *Journal of Empirical Legal Studies*.

³²² <https://lawcommissionofindia.nic.in/reports/report229.pdf>

Further, the 2nd (2004), 6th (2005) and 15th (2006) the Parliamentary Standing Committee on Law and Justice have also repeatedly suggested that to promote speedy justice available to the common man, benches of the Supreme Court have to be established in the Southern, Western and North-Eastern parts of the country.³²³

However, the Supreme Court has repeatedly rejected proposals for setting up benches outside Delhi. A full bench of the Supreme Court had rejected the recommendations of the Law Commission in 2010 stating that it “found no justification for setting of Benches of the Supreme Court outside Delhi”.³²⁴ While the recommendation of the Law Commission have been rejected the issue continues to be alive due to a recent Writ Petition No. 36 of 2016, filed before the Supreme Court and the matter is currently sub judice.³²⁵ The concentration of the highest body of the judiciary in one place leads to a situation where the distance of the court becomes a reason for not approaching it. This is not healthy for proper functioning of India’s judiciary. The top court in India should be made more accessible to people across the country.



5 Judicial appointments

Appointments to the higher judiciary, governed by Articles 124 and 217, for the Supreme Court and the High Courts respectively, are in hands of the executive.³²⁶ In the early decades after independence, the appointments were made primarily by the executive after consultation with the judiciary as per the provisions of the Constitution. Although it was not specifically provided for anywhere, the norm of seniority was always followed in the appointment of Judges. However, the elevation of Justice A.N. Ray to the post of Chief Justice of India created controversy when he was appointed as the Chief Justice of India superseding three senior judges.³²⁷ Questions were being raised on the issue of separation of the judiciary.

The provisions dealing with appointment and transfer of judges again came up for review in *S.P. Gupta v President of India* (First Judges Case) in 1981.³²⁸ In the said case, it was held by the SC that the opinion of the Chief Justice did not have primacy and the Union Government was not bound to act in accordance with the opinion of the constitutional functionaries as the Executive was accountable, and the Judiciary had no accountability. This ruling gave the executive primacy over judicial appointments.

³²³ AIR 1987 SC 386

³²⁴ 1993 (3) ALT 471

³²⁵ AIR 1993 SC 1769

³²⁶ AIR 1997 SC 1125

³²⁷ https://www.livewlaw.in/amp/top-stories/senior-lawyers-criticize-supreme-courts-move-to-transfer-covid-matters-from-high-courts-to-itself-172954?_twitter_impression=true

³²⁸ <https://www.barandbench.com/news/litigation/supreme-court-takes-suo-motu-cognizance-covid-19-harish-salve-amicus-curiae>

In *Supreme Court v Union of India (Second Judges Case)* in 1993,³²⁹ a nine judge bench of the SC overruled the *First Judges Case* and held that in the event of disagreement in the process of consultation, the view of judiciary was primal and the executive could appoint judges only if that was in conformity with the opinion of the Chief Justice.

This case led to the introduction of the collegium system consisting of the CJI and 2 senior most judges of the SC. Thereafter, in the third judges case (not a case but an opinion delivered by SC on a question of law regarding the collegiums system) in 1998,³³⁰ the SC expanding the collegium system to a 5 member body, clarifying that it was not the CJI's individual opinion that mattered, but an institutional opinion formed in consultation with the senior-most judges. At the time procedures and guidelines were laid down regarding judicial appointments and the executive's role was reduced to a minimum. Thus, the Collegium system of appointment become the law of the land and has been followed ever since.

Over time several critiques of the collegiums system emerged.³³¹ Firstly, it was considered to be an over-reading of the constitutional provisions. It was argued that if it was the intent of the framers to have a collegium, the Constitution would have explicitly stated this. Secondly, the system of appointments also attracted criticism for carrying nepotistic tendencies. Several scholars pointed out that a system like this, where the judiciary itself decides who becomes the part of the judiciary, is highly susceptible to favouritism, and may even result in a situation of judicial aristocracy.³³²

Owing to criticism, the Collegium system was sought to be done away right from 1990 with the 67th Constitutional Amendment Bill. Thereafter, it was followed by three more attempts.³³³ Finally after about two decades, after several discussions and recommendations made by various committees emphasizing the need for changing the collegium system, the National Judicial Appointments Commission Act, 2008 and the 99th constitutional Amendment Bill was introduced and received presidential assent.³³⁴ However, the NJAC too was criticized by many for not being neutral and having too much reliance on the executive.³³⁵

In fact, considering the importance of separation of judiciary, the NJAC could become much more problematic. If the executive decided who to appoint, the appointments would be political and the judgments would favour the executive.

Consequently, in *Supreme Court v Union of India* in 2015,³³⁶ both the NJAC Act and the 99th Constitutional Amendment was struck down by the Supreme Court on grounds of violation of the basic structure. The SC held that, "it is difficult to hold that the wisdom of appointment of judges can be shared with the political-executive. In India, the organic development of civil society, has not as yet sufficiently evolved. The expectation from the judiciary, to safeguard the rights of the citizens of this country, can only be ensured, by keeping it absolutely insulated and independent, from the other organs of governance".³³⁷ But the Bench admitted that all was not well with the collegium system of "judges appointing judges", and that the "time was ripe to improve the 21-year-old system of judicial appointments."³³⁸

There is a thin line between ensuring judicial accountability and maintaining judicial independence. While the NJAC was better suited than the collegiums system at ensuring accountability, it fell short in ensuring independence. Going forward, what is needed is a system which can be fair in ensuring a balance of both independence and accountability. Bringing in more transparency in the current collegium system can be a starting point.

³²⁹ (1993) Supp 2 SCR 659

³³⁰ 1998 Supp 2 SCR 400

³³¹ Prashant Bhushan, *The Dinakaran Imbroglio: Appointments and Complaints against Judges*, 44 EPW 10 (2009).

³³² Ibid

³³³ 82nd Constitutional Amendment Bill in 1997, 98th Constitutional Amendment Bill in 2003 and the 120th Constitutional Amendment Bill in 2013.

³³⁴ <https://www.thehindu.com/specials/in-depth/njac-vs-collegium-the-debate-decoded/article61470776.ece>

³³⁵ C. Raj Kumar & Khagesh Gautam, *Questions of Constitutionality – The National Judicial Appointments Commission*, 50 EPW 42 (2015); Indira Jaising, *National Judicial Appointments Commission – A Critique*, 49 EPW 6 (2014).

³³⁶ (2016) 5 SCC 1

³³⁷ Ibid

³³⁸ Ibid

6 Conclusion

The framers of the Constitution always intended for India to have a federal system with the Seventh Schedule of the Constitution and its three constituent lists forming the backbone of legislative power allocation between the Centre and the States. Over the years, the Supreme Court of India has recognised this feature of the Indian federal structure.

However, unfortunately, the parliament has used various methods to encroach upon the powers of other authorities. If this practice is not checked, then it may lay down certain precedents and enable a powerful Centre to change the very nature of federalism in India by making itself the sole repository of executive and legislative powers. Further, while the discourse around issues of political federalism in India mostly favour of greater decentralisation, the questions surrounding judicial federalism and devolution of powers among the courts are not considered sufficiently. For the court and its processes to be more meaningful, all such questions also need to be resolved, without compromising the independence of the institution.

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8 Annexure - Judicial System in India

Though India's legal system stretches back centuries, its modern judicial system is shaped by the Constitution of India.³³⁹ The Constitution has created three branches of government: the Executive, the Parliament; and the Judiciary, referred to in the Constitution as the Union Judiciary. The judiciary is unified. The highest court in the judicial system is the Supreme Court. The States and Union territories have high courts, with civil courts, criminal/sessions courts and various tribunals operating under them.

In drafting the Constitution, the Constituent Assembly drew on India's own legal history and on foreign constitutional experiences. The post-independence Indian legal system retained some features of British system, including the common law and the principle of stare decisis, while guaranteeing individual constitutional rights that are enforceable by Indian courts.³⁴⁰ Today the Indian judiciary presides over a busy and vibrant court system. This section focuses primarily on the formal system of courts and tribunals established under the Constitution and various statutes.

8.1 Hierarchy of Courts

i. Supreme Court

The Supreme Court of India is established by the Constitution, whose head is the Chief Justice of India.³⁴¹ The Court generally sits in New Delhi, but the Chief Justice can specify other locations with the approval of the President of India.³⁴² It is a court of record, with the power to punish for contempt of itself.³⁴³ Supreme Court judgments are binding on all courts,³⁴⁴ and must be delivered in an open court,³⁴⁵ with the concurrence of a majority of judges who presided over the case. Supreme Court decisions are also binding on smaller or equal-sized Supreme Court benches.³⁴⁶



Source: https://www.livelaw.in/h-upload/2021/07/20/1600x960_397057-supreme-court-of-india-sc-6.jpg

The Supreme Court of India has extensive jurisdiction and powers, specified in multiple sources including the Constitution, statutes and case laws: Additionally the Parliament has the power to extend its jurisdiction in certain areas and under certain circumstances. The jurisdiction of the SC includes:

a.) Original Jurisdiction:

Under Article 131 the Supreme Court has original jurisdiction in disputes between the Government of India and one or more States or between two or more States. The disputes must involve a question of law or fact on which a legal right depends. Further, the Supreme Court has jurisdiction in disputes over the election of a President or Vice President.³⁴⁷ However, the Supreme Court does not have jurisdiction in disputes arising out of a treaty, agreement, covenant, engagement or similar instruments executed before the Constitution commenced and which continues to operate.³⁴⁸ A 1956 law also excludes the Supreme Court's jurisdiction over disputes related to inter-State rivers.³⁴⁹

³³⁹ Rakesh Kumar Shrivastava, Versha Shah and Megha Srivastava (2014) 'Update: A Guide to India's Legal Research and Legal System', Hauser Global Law School Program, New York University School of Law.

³⁴⁰ Ibid

³⁴¹ Article 124(1), The Constitution of India.

³⁴² Article 130, Ibid

³⁴³ Article 129, Ibid

³⁴⁴ Article 141, Ibid

³⁴⁵ Article 145(4), Ibid

³⁴⁶ Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press.

³⁴⁷ Article 71, The Constitution of India.

³⁴⁸ Article 131, Ibid

b.) Writ Jurisdiction:

The citizens of India have the right to move the SC in order to enforce their fundamental rights. In such cases, the court has the power to issue directions, orders or writs, including habeas corpus, mandamus, prohibition, quo warranto and certiorari, to enforce the fundamental rights.³⁵⁰ The right of people to move the Supreme Court cannot be suspended, except as constitutionally permitted.³⁵¹ Further, the parliament can also empower the Supreme Court to issue directions, orders or writs for purposes other than the enforcement of fundamental rights.³⁵² Though writ jurisdiction is a form of original jurisdiction, it is often categorised separately due to its significance in public life and the emergence of public interest litigation.

c.) Appellate Jurisdiction:

The Supreme Court has jurisdiction to hear various forms of appeals including: (1) Constitutional appeals (2) civil appeals (3) criminal appeals, and (4) appeals by special leave.³⁵³ Some cases can be appealed to the Supreme Court as a matter of right, while others require High Court certification.

- **Constitutional Appeals:** The Supreme Court hears appeals from High Court judgments or final orders, if the High Court certifies that the case involves a 'substantial question' of constitutional interpretation.³⁵⁴ However, the Supreme Court has given little guidance on what constitutes a substantial question of constitutional law.³⁵⁵ At least five Supreme Court judges must determine such cases, but this requirement is often ignored.³⁵⁶
- **Civil Appeals:** The Supreme Court hears civil appeals from High Court judgments or final orders if the High Court certifies that there is 'a substantial question of law of general importance' that the Supreme Court must determine.³⁵⁷ However, the Supreme Court cannot hear civil appeals from decisions of single High Court judges, unless permitted by statute.³⁵⁸
- **Criminal Appeals:** In its criminal appellate jurisdiction, the Supreme Court has a crucial role in appeals against death sentences. The Court can hear appeals from High Court judgments or final orders that have convicted and sentenced a defendant to death. Beyond capital cases, the Supreme Court also has jurisdiction where a High Court certifies that a case is 'fit' for appeal to it.³⁶⁰ Further, the Parliament can also confer power on the Supreme Court to hear criminal appeals from High Court judgments or final orders.³⁶¹
- **Special Leave Appeals:** The Supreme Court has an overriding jurisdiction to grant special leave to appeal any judgment, decree, sentence or order, in any cause passed by any court or tribunal in the territory of India,³⁶² except military courts or tribunals.³⁶³ However, the Court has not developed clear jurisprudence to guide its discretion to grant or refuse special leave.³⁶⁴ Despite their 'special' character, these appeals constitute the bulk of the Supreme Court cases.

365

³⁴⁹ Article 262, *Ibid*; *Inter-State Water Disputes Act, 1956*.

³⁵⁰ Article 32(1) and (2), *Ibid*

³⁵¹ Article 32(4), *Ibid*

³⁵² Article 139, *Ibid*

³⁵³ Raeesa Vakil (2016) 'Jurisdiction' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press.

³⁵⁴ Article 132(1), *The Constitution of India*

³⁵⁵ Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press.

³⁵⁶ Nick Robinson et al (2011) 'Interpreting the Constitution: Supreme Court Constitution Benches Since Independence', 46(9) *Economic and Political Weekly* 27, 27-28.

³⁵⁷ Article 133(1), *The Constitution of India*.

³⁵⁸ Article 133(3), *Ibid*

³⁵⁹ Article 134(1), *Ibid*

³⁶⁰ Article 134(1)(c), 145(1), *Ibid*

³⁶¹ Article 134(2), *Ibid*

³⁶² Article 136(1), *Ibid*; H M Seervai (1996) *Constitutional Law of India: A Critical Commentary*. Vol 3. 4th edition. Mumbai: Universal Law Publishing.

³⁶³ Article 136(2), *Ibid*.

³⁶⁴ Raeesa Vakil (2016) 'Jurisdiction' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press.

d.) Advisory Jurisdiction:

Under Advisory Jurisdiction the President can seek the advice of the Supreme Court by referring a question of law or fact, if it is 'of such a nature and of such public importance that it is expedient' to do so.³⁶⁶ At least five SC judges must hear such a reference, and after holding any hearings, if it thinks it appropriate, the SC can report its opinion to the President. Such opinions must be delivered in an open court.³⁶⁷ Further, a majority of judges present must concur with the opinion, but there is possibility of dissent.³⁶⁸ The President can also refer a dispute to the SC arising out of a treaty, agreement, covenant or similar instruments that were executed before the Constitution commenced and continues to operate.³⁶⁹

e.) Transfer Jurisdiction:

The Supreme Court can dispose of cases involving substantially similar legal questions that are either before the Supreme Court and one or more High Courts, or two or more High Courts, provided they involve 'substantial questions of general importance'.³⁷⁰ It can dispose of the cases: (1) on its own motion; (2) on an application by the Attorney-General of India; or (3) on a party's application.³⁷¹ The SC can return a withdrawn case to a High Court which is in line with its judgment. The SC can also transfer: (1) civil proceedings in a High Court or other civil court in one State, to a High Court or civil court in another State;³⁷² (2) criminal cases from one High Court to another;³⁷³ and (3) cases from a criminal court subordinate to one High Court, to a criminal court of equal or superior jurisdiction subordinate to another High Court.³⁷⁴

f.) Other Supreme Court Powers:

Some additional powers of the Supreme Court include:

- Powers of Review: The Supreme Court can review its own judgments and orders, subject to statute and Supreme Court rules.³⁷⁵
- Power to do Complete Justice: The Supreme Court can pass decrees or make orders 'necessary for doing complete justice' in matters before it, which are enforceable throughout India.³⁷⁶ It has used these powers widely, particularly in the enforcement of fundamental rights.³⁷⁷ The SC can also make orders to secure attendance in court, discover or produce documents, and investigate or punish contempt of itself, subject to a statute.³⁷⁸

g.) Power of the Parliament to alter Supreme Court jurisdiction:

In addition to enlarging the Supreme Court's criminal appellate jurisdiction, Parliament can confer further jurisdiction and powers on the Supreme Court in: (1) matters specified in the Union List, and (2) matters the Government of India and a State government agree to confer upon it. Parliament can also confer 'supplemental powers' that are 'necessary or desirable' to enable the Supreme Court 'more effectively to exercise' its jurisdiction, provided such laws are not inconsistent with the Constitution.³⁸⁰

³⁶⁵ Ibid

³⁶⁶ Article 143(1), *The Constitution of India*.

³⁶⁷ Article 145(4), Ibid

³⁶⁸ Article 145(5), Ibid

³⁶⁹ Article 131 and 143(2), Ibid

³⁷⁰ Article 139A(1), Ibid

³⁷¹ Ibid

³⁷² Code of Civil Procedure 1908 (Ind), s 25 ('Code of Civil Procedure').

³⁷³ Code of Criminal Procedure 1973 (Ind), s 406 ('Code of Criminal Procedure').

³⁷⁴ Code of Criminal Procedure, s406.

³⁷⁵ Article 137, *The Constitution of India*.

³⁷⁶ Article 142(1), Ibid.

³⁷⁷ Raeesa Wakil (2016) 'Jurisdiction' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press.

³⁷⁸ Article 142(2), Ibid.

³⁷⁹ Article 138, Ibid

³⁸⁰ Article 140, Ibid

ii) High Courts

Each State in India must have a High Court. The Parliament can establish a High Court for two or more States, or two or more States and a Union territory. There are currently 25 High Courts, with all Union territories sharing a High Court with one or more States, except the NCT, which has its own High Court in New Delhi. The jurisdiction of the high courts includes:

a.) Original Jurisdiction:

High Courts can issue directions, orders or writs to any person or authority within their territorial jurisdiction, including writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari, for the enforcement of fundamental rights or for any other purpose.³⁸² High Courts can also exercise extraordinary civil or criminal original jurisdiction at their discretion.³⁸³

b.) Appellate Jurisdiction:

High Courts hear certain civil and criminal appeals from lower courts and tribunals. In criminal cases, a person convicted by a Sessions Judge or Additional Sessions Judge, or by any other Court which imposed a sentence of over seven years' imprisonment, can appeal to a High Court. In civil cases, an appeal generally comes to a High Court from a lower court if the case involves a 'substantial question of law'.³⁸⁴ A question of law is substantial if it is 'of general public importance or ... directly or substantially affects the rights of the parties', and is controversial.³⁸⁵

c.) Transfer Jurisdiction:

High Courts can withdraw and determine cases from subordinate courts that involve a substantial question of constitutional interpretation.³⁸⁷

d.) Inherent Jurisdiction:

High Courts have inherent jurisdiction to give effect to any order under the Code of Criminal Procedure, 'to prevent abuse of the process of any Court' or to 'otherwise secure the ends of justice'.³⁸⁸



Source: <https://www.lawinsider.in/wp-content/uploads/2021/06/high-court-india.jpg>

³⁸¹ Ibid

³⁸² Article 143(1), *The Constitution of India*.

³⁸³ Article 145(4), *Ibid*

³⁸⁴ Article 145(5), *Ibid*

³⁸⁵ Article 131 and 143(2), *Ibid*

³⁸⁶ Article 139A(1), *Ibid*

³⁸⁷ *Ibid*

³⁸⁸ *Code of Civil Procedure 1908 (Ind)*, s 25 ('Code of Civil Procedure').

e.) Superintendence:

High Courts have superintendence over subordinate courts and tribunals within their territorial jurisdictions, except military courts and tribunals. They can exercise this superintendence on their own motion. Using this power, high courts can call for returns from courts and tribunals, and make rules for their practice and procedure. This power is limited to certain circumstances, such as cases involving want of jurisdiction, errors of law, and gross violations of natural justice.

f.) Power of parliament to alter jurisdiction of High Courts:

Parliament can extend the jurisdiction of a High Court to a Union territory, and exclude the jurisdiction of a High Court from a Union territory.

iii. District and Sub-District Courts

Each District in India has a District Court, and may have Sub-District Courts. District and Sub-District Courts are divided into civil courts, and criminal or sessions courts. Further, specialised courts operate at the District level, such as Commercial Courts and Family Courts. These subordinate courts are under the control of High Courts in their territorial jurisdictions.

Generally speaking, the subordinate civil judiciary has three levels: (1) District Judges (Additional District Judges) (2) Civil Judges (Senior Division), and (3) Civil Judges (Junior Division). Similarly, the subordinate criminal judiciary also has three levels: (1) Sessions Judges (Additional Sessions Judges and Assistant Sessions Judges) (2) Judicial Magistrates Class I and, in metropolitan areas, Metropolitan Magistrates (Chief and Additional Judicial Magistrates), and (3) Judicial Magistrates Class II. In most States, original jurisdiction for civil and criminal matters begins in the subordinate courts. On the criminal side, a Sessions (Criminal) Court can try offences under the Indian Penal Code 1860, subject to the Code of Criminal Procedure. Certain criminal courts can also try offences under other laws.

The Code of Criminal Procedure stipulates that:

- A Sessions Judge or Additional Sessions Judge can pass any sentence authorised by law, but a death sentence is subject to High Court confirmation, while an Assistant Sessions Judge can pass a sentence of up to ten years' imprisonment.
- A Chief Judicial Magistrate can pass a sentence of up to seven years' imprisonment.
- A Magistrate of the First Class can pass a sentence of up to three years' imprisonment, or a fine of up to 10,000 rupees, or both.
- A Magistrate of the Second Class can pass a sentence of up to a year's imprisonment, or a fine of up to 5,000 rupees, or both.

There is more variation in the civil jurisdiction as States have their own civil courts statutes, in which jurisdiction to hear a case depends on the monetary amount at stake.

iv. Commercial Courts and Divisions

The Commercial Courts Act 2015 provides for the establishment of: (1) Commercial Divisions in High Courts (2) Commercial Appellate Divisions in High Courts (3) Commercial Courts at District level, and (4) Commercial Appellate Courts at District level. These courts and divisions adjudicate a wide range of commercial disputes, from construction contracts to partnership agreements.

³⁸⁸ Ibid

³⁸⁹ Report of the Commission on Centre-State Relations (1988).

³⁹⁰ Satya Prakash Dash, 'Indian Federalism and Distribution of Responsibilities', (2007) 68(4) Indian Journal of Political Science.

³⁹¹ Report of the Commission on Centre-State Relations (1988).

³⁹² Article 230(1), The Constitution of India

³⁹³ Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press.

³⁹⁴ Article 227 and 235, The Constitution of India.

The value of the dispute must be at least three lakh rupees.⁴⁰² The Commercial Courts Act permits the transfer of certain pending commercial cases to Commercial Courts and Divisions.⁴⁰³ Parties must attempt mediation before they can come before a Commercial Court, provided they are not seeking urgent relief such as an injunction.⁴⁰⁴

a) Commercial Divisions in High Courts:

The Chief Justice of a High Court can constitute a Commercial Division with one or more single-judge benches.⁴⁰⁵ Commercial Divisions determine commercial disputes, and hear applications or appeals arising out of certain arbitrations involving a commercial dispute, with a value of at least three lakh rupees.⁴⁰⁶ The Chief Justice nominates High Court judges experienced in dealing with commercial disputes to be Division judges.⁴⁰⁷ No appeal lies from orders or decrees of the Commercial Division except as specified in the Commercial Courts Act.⁴⁰⁸

b) Commercial Appellate Divisions in High Courts:

The Chief Justice of a High Court must constitute a Commercial Appellate Division once there is a Commercial Division of a High Court or a Commercial Court at District level.⁴⁰⁹ The Chief Justice nominates High Court judges experienced in dealing with commercial disputes to be judges of the Appellate Division.⁴¹⁰ Parties can appeal to the Appellate Division within sixty days of a judgment or order of a Commercial Court at District level or Commercial Division of a High Court.⁴¹¹

c) Commercial Courts at District Level:

State governments can constitute Commercial Courts at District level after consulting with the High Court.⁴¹² States can specify territorial and monetary limits, but the monetary limit cannot be less than three lakh rupees.⁴¹³ Commercial Courts can adjudicate disputes arising out of the territory of a State over which they have been given jurisdiction.⁴¹⁴ They hear applications or appeals in certain arbitrations that involve a commercial dispute with a value of at least three lakh rupees.⁴¹⁵ State governments can appoint people, at District level or below, who are experienced in dealing with commercial disputes to be Commercial Court judges, with the agreement of the Chief Justice of the High Court.⁴¹⁶ No appeal lies from orders or decrees of the Commercial Court except as specified in the Commercial Courts Act.⁴¹⁷



Source: <https://www.taxscan.in/wp-content/uploads/2018/03/Commercial-Courts.jpg>

³⁹⁵ Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press.

³⁹⁶ *Ibid*

³⁹⁷ *The Code of Criminal Procedure applies across India. Code of Criminal Procedure, s 26(a)(ii).*

³⁹⁸ *Code of Criminal Procedure, s 26(b), sch I.*

³⁹⁹ *Code of Criminal Procedure s28 and s29.*

⁴⁰⁰ Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press.

⁴⁰¹ *Commercial Courts Act, s 2(1)(c).*

⁴⁰² *Ibid*

⁴⁰³ *Commercial Courts Act, s 15.*

⁴⁰⁴ *Commercial Courts Act, s 12A.*

⁴⁰⁵ *Commercial Courts Act, s 4(1).*

⁴⁰⁶ *Commercial Courts Act, ss 2(1)(c), 7, 10(1)-(2).*

⁴⁰⁷ *Commercial Courts Act, s 4(2).*

⁴⁰⁸ *Commercial Courts Act, s 13(2)*

⁴⁰⁹ *Commercial Courts Act, s 5(1).*

⁴¹⁰ *Commercial Courts Act, s 5(2).*

⁴¹¹ *Commercial Courts Act, s 13(1A).*

d) Commercial Appellate Courts at District Level:

After consulting with the High Court, State governments can establish Commercial Appellate Courts at District level, in areas where High Courts do not have ordinary original civil jurisdiction.⁴¹⁸ Parties can appeal to Commercial Appellate Courts within sixty days of a judgment or order of a Commercial Court.⁴¹⁹

v. Tribunals

Tribunals have existed in India since the colonial period, but a 1976 constitutional amendment inserted a new Part XIVA,⁴²⁰ which consisted of two articles on the creation of tribunals:

a.) Article 323A:

Parliament can permit administrative tribunals to adjudicate disputes and complaints about the recruitment and conditions of people in public services and posts connected with: (1) the Union (2) States (3) local or other authorities in India (4) local or other authorities under the control of the Union Government, or (5) corporations owned or controlled by the Union Government.⁴²¹ These laws can, among other things: (1) establish an administrative tribunal for the Union, and a separate tribunal for each State or for two or more States (2) specify their jurisdiction, powers and authority (3) outline their procedure, and (4) exclude the jurisdiction of courts in cases adjudicated by tribunals, except the Supreme Court's special leave jurisdiction under article 136 of the Constitution.⁴²²

b.) Article 323B:

Parliament and State legislatures can establish tribunals to adjudicate disputes, complaints or offences in a range of areas, provided they can legislate in those areas.⁴²³ Such laws may, among other things: (1) establish a hierarchy of tribunals (2) specify their jurisdiction, powers and authority (3) outline their procedure, and (4) exclude the jurisdiction of courts in cases adjudicated by tribunals, except the Supreme Court's special leave jurisdiction under article 136 of the Constitution.⁴²⁴ The Administrative Tribunals Act authorised the creation of the Central Administrative Tribunals and Administrative Tribunals for States.

8.2 Judicial appointments, Removals and Transfers

Originally under the Constitution, the President appointed Supreme Court and High Court judges in consultation with members of those courts.⁴²⁵ In the 1980s and 1990s, the Supreme Court developed jurisprudence for the appointment and transfer of Supreme Court and High Court judges, in reaction to perceived improper influence by the executive over the judiciary before and during the Emergency.⁴²⁶

Under this jurisprudence, a 'collegium' of the Chief Justice of India and the four most senior other judges recommend appointments to the Supreme Court, while High Court judges are appointed on the recommendation of the Chief Justice of India, the two most senior other Supreme Court judges and the Chief Justice of the High Court.⁴²⁷

⁴¹² Ibid

⁴¹³ Report of the Commission on Centre-State Relations (1988).

⁴¹⁴ Satya Prakash Dash, 'Indian Federalism and Distribution of Responsibilities', (2007) 68(4) Indian Journal of Political Science.

⁴¹⁵ Report of the Commission on Centre-State Relations (1988).

⁴¹⁶ Article 230(1), The Constitution of India

⁴¹⁷ Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press.

⁴¹⁸ Article 227 and 235, The Constitution of India.

⁴¹⁹ Ibid

⁴²⁰ Report of the Commission on Centre-State Relations (1988).

⁴²¹ Satya Prakash Dash, 'Indian Federalism and Distribution of Responsibilities', (2007) 68(4) Indian Journal of Political Science.

⁴²² Report of the Commission on Centre-State Relations (1988).

⁴²³ Article 230(1), The Constitution of India

⁴²⁴ Satya Prakash Dash, 'Indian Federalism and Distribution of Responsibilities', (2007) 68(4) Indian Journal of Political Science.

⁴²⁵ Report of the Commission on Centre-State Relations (1988).

⁴²⁶ Article 230(1), The Constitution of India

The Chief Justice initiates judicial transfers in consultation with the four most senior Supreme Court judges and any Supreme Court judges familiar with the relevant High Court.⁴²⁸ Until rejections by the current government,⁴²⁹ these recommendations were almost always followed.

In 2014, Parliament attempted to amend the Constitution to establish the National Judicial Appointments Commission, which would include members of the judiciary and executive and replace the collegium system.⁴³⁰ A five-judge bench of the Supreme Court struck down the amendment in 2015, leaving the collegium system in place.⁴³¹

i.) Supreme Court

The Supreme Court has a Chief Justice and 30 other judges, but Parliament can prescribe a larger number.⁴³² They must be Indian citizens, and: (1) have been a High Court judge for five successive years (2) have been an advocate at a High Court for 10 successive years, or (3) be, in the President's opinion, 'a distinguished jurist'.⁴³³ The President appoints Supreme Court judges, but under the 'collegium' system, the Supreme Court heavily influences those appointments.⁴³⁴ Supreme Court judges hold office until the age of 65.⁴³⁵ Seniority is the key unwritten factor in judicial appointments. Chief Justices are usually the longest-serving judges on the Supreme Court at the time of their appointment,⁴³⁶ meaning they typically serve for just over a year.⁴³⁷

Supreme Court judges can resign, or the President can remove them from office for 'proved misbehaviour or incapacity'.⁴³⁸ The removal process requires each House of Parliament to address the President supported by: (1) a majority of its total membership, and (2) a majority of at least two-thirds of the members present and voting, in the same session.⁴³⁹

ii) High Courts

High Courts must have a Chief Justice and other judges who are appointed by the President.⁴⁴⁰ Judges must be Indian citizens who have: (1) held a judicial office in India for ten years, or (2) been an advocate of a High Court for ten successive years.⁴⁴¹ Judges are appointed by the President after consultation with the Chief Justice of India, the State Governor and, where a judge other than the Chief Justice is being appointed, the Chief Justice of the High Court.⁴⁴² Judges hold office until the age of 62.⁴⁴³ As in the Supreme Court, the most senior High Court judge is typically appointed Chief Justice.⁴⁴⁴ Under the 'collegium' system, the Supreme Court and Chief Justices of the High Courts influence judicial appointments and transfers in the High Courts.

The President can transfer a High Court judge to a different High Court, after consulting with the Chief Justice of India.⁴⁴⁵ A High Court judge can vacate their office if they are appointed to the Supreme Court, or transferred to another High Court.⁴⁴⁶ High Court judges can resign, or be removed from office in the same manner as Supreme Court judges.⁴⁴⁷

⁴²⁷ Ibid

⁴²⁸ Ibid

⁴²⁹ Press Trust of India, 25 November, 2016. 'Rejected 43 High Court Judges Due to Adverse Intelligence Reports: Govt', *The Times of India*.

⁴³⁰ National Judicial Appointments Commission Act, 2014.

⁴³¹ (2015) AIR 2015 SC 5457

⁴³² Article 124(1), *The Constitution of India*.

⁴³³ Article 124(3), *Ibid*.

⁴³⁴ Article 124(2), *Ibid*.

⁴³⁵ *Ibid*

⁴³⁶ Abhinav Chandrachud (2014) *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India*. New Delhi: Oxford University Press.

⁴³⁷ Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press.

⁴³⁸ Article 124(2), *The Constitution of India*.

⁴³⁹ Article 124(4), *Ibid*

⁴⁴⁰ Article 216, *Ibid*

⁴⁴¹ Article 217, *Ibid*

⁴⁴² *Ibid*

⁴⁴³ *Ibid*

iii) District Courts

The District Judges are appointed by the State Governor in consultation with the High Court.⁴⁴⁸ A person who is not already in the service of the Union or a State is only eligible to be appointed a district judge if they have been an advocate or pleader for at least seven years and the High Court recommends them.⁴⁴⁹ The State Governor makes other judicial appointments.⁴⁵⁰ The High Courts control subordinate courts in their jurisdictions, including the posting and promotion of, and granting of leave to, members of the judiciary below the level of District judge.⁴⁵¹



⁴⁴⁴ Abhinav Chandrachud (2014) *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India*. New Delhi: Oxford University Press.

⁴⁴⁵ Article 222, *The Constitution of India*.

⁴⁴⁶ Article 217(1)(c), *Ibid*

⁴⁴⁷ Article 217(1), 218, 124(4) and 124(5), *Ibid*

⁴⁴⁸ Article 233(1), *Ibid*

⁴⁴⁹ Article 233(1), 233(2) and 236(a), *Ibid*

⁴⁵⁰ Article 234 and 236(b), *Ibid*

⁴⁵¹ Article 235 and 236, *Ibid*



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