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MESSAGE FROM THE EDITOR(S)

Date: January 26, 2019

Saturday

Dear All,

Let me first wish all the readers and the students a very Happy Republic Day, kudos to the student contributors of Volume VII too for bringing out this volume on the auspicious day of 26 January, 2019. We have dedicated this issue to the President of India by taking a bird's eye view of various dimensions of Indian Presidency. Keeping in tradition with the earlier volumes, Dr. Jain has written a short piece by way of introduction to analyze Articles 372(2) and 372A (1) of the Indian Constitution, comparatively invisible provisions dealing with power of the President to make adaptation of laws. We would appeal to all readers and students to read the issue and make reflective comments and suggestions, so that the team is encouraged and motivated to be more innovative, creative and simulative in its endeavors.

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(A.) INTRODUCTION

Reflections on the Power of the President to Adapt Laws

In this brief article, I want to grapple with an important issue of analysis of powers of President of India under articles 372 and 372A of constitution of India.

Since framers of Indian constitution decided to adapt the pre-constitutional laws to the constitutional structure of India, the following power was given to the President of India in clause (2) of article 372. The clause reads, 'For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.'

Evidently, the main objective underlying this clause vesting power to adapt laws in the President for a period of 3 years from the commencement of the constitution was to enable him to bring pre-constitutional laws in line with or compatibility with the provisions of Indian constitution. To make this power substantive and conclusive, the framers of the constitution had provided immunity to its exercise from judicial review for aforementioned period.

However, as an interesting twist to the tale, this power under article 372 clause (2) was expanded in scope by the 7th constitutional amendment with insertion of article 372A (1) to even make adaptations of the laws, 'For the purposes of bringing the provisions of any law in force in India or in any part thereof, immediately before the commencement of the Constitution (seventh amendment) Act, 1956, into accord with the provisions of this Constitution as amended by that Act.' This extraordinary power was to be vested in

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President till 1st November 1957 from the date of commencement of the 7th constitutional amendment.

Vesting of this extraordinary power in the President meant that, President could adapt any laws enacted by the parliament as a consequence of 7th amendment of the constitution. One of the main objectives of 7th amendment was to reorganize the states by division of bigger states into smaller states. The same would mean that, certain central acts enacted prior to the 7th amendment might not refer to these newly created states as a consequence of the 7th amendment. In order to deal with this, it appears that the article 372A was inserted in the constitution. In other words, this article introduced a legal fiction to equate all laws enacted by parliament and state legislatures prior to the 7th amendment of the constitution with pre-constitutional laws, so that the same could be brought in accord with the letter and spirit of the provisions introduced by the 7th amendment to the constitution to the extent of the incompatibility. Power under this article was also immune from judicial review till the stipulated time.

It is interesting to compare article 372 clause (2) and article 372A clause (1). Through both these clauses President is conferred the power to adapt laws. However, the scope of this power in respect of article 372A (1) is wider because President had been authorized to modify the laws enacted by the parliament so as to bring the same in compatibility with the provisions of the 7th constitutional amendment. In absence of judicial review of exercise of this power was bound to make this power extraordinary. It could be also questioned on the ground of doctrine of separation of powers; therefore the life of this power was extremely limited.

On the other hand, power of President to make adaptations in pre-constitutional laws is different in nature. It may be equated with quasi-legislative and quasi-judicial power. The objective underlying this power must have been to deal with incompatibility of pre-

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constitutional laws and to bring such laws in line with the letter and spirit of the provisions of the constitution.

Though this objective appears to be very laudable at the first blush, to my mind it is not the plausible approach. To expect the government to take up detailed and in-depth analysis of all the pre-constitutional laws within a period of 3 years sounds way disproportionate to its competence, particularly when it is borne in mind that, it was the first government of independent India facing a variety of challenges. To my mind, the objective underlying article 372 clause (2) was to stall constitutional challenges in the court against the validity of the pre-constitutional laws and I find the same to be at odds with the letter and spirit of article 13(1).

According to me, both article 372 (2) and 372A (1) suffer from a number of infirmities. Both these provisions run counter to the injunction enshrined in article 13(1) and (2) respectively in absence of *non-obstante* clauses, either in article 372 and 372A. These two provisions in fact suspend the operation of article 13 without providing any constitutional basis for the same. I wonder, if the designers of the constitution should enact mutually contradictory provisions. Lastly, as exercise of power by the President under both these provisions was immune from judicial review, propriety demanded that Presidential actions under these provisions should have at least been subject to parliamentary control with laying procedure. Detractors of this argument may contend that I am flogging a dead horse as the provisions no longer exist as powers in the constitution. This is not a correct argument because normatively mere redundancy of a provision because of lapse of time does not make it immune from criticism. However more importantly, the criticism is not directed on these two provisions simpliciter, rather by the analysis of these two provisions, I am trying to ignite the debate on design flaws under Indian constitution. The analysis also very vividly shows this regard for doctrine of excessive delegation by the parliament of India and this is endemic to the

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overall approach of Indian legislatures to its relevance for evolution of administrative law in India.

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CELEBRATING INDIA'S 70TH REPUBLIC DAY



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SPECIAL EDITION: THE PRESIDENCY SYSTEM IN INDIA

A. Names of the Presidents of India¹

Name	Tenure	Trivia	Memorable Quotes
Dr. Rajendra Prasad ² (1884-1963)	1950-1957 1957-1962	<ul style="list-style-type: none">• First President of Independent India• Longest serving President of India (only President to hold office for two terms)• Also member of Constituent Assembly• Received Bharat Ratna Award in 1962	<i>In attaining our ideals, our means should be as pure as the end!</i>
Sarvepalli Radhakrishnan ³ (1888-1975)	1962-1967	<ul style="list-style-type: none">• First Vice-President of India• First President from South India• Birthday	<i>A life of joy and happiness is possible only on the basis of knowledge and science.</i>

¹ This chart has been prepared by Saranya Mishra, V B.A. LL.B., at ILS Law College, Pune.

²<http://pastpresidentsofindia.indiapress.org/raj.html>

<https://siwan.nic.in/dr-rajendra-prasad/>

³<https://www.iep.utm.edu/radhakri/>

<http://www.liveindia.com/freedomfighters/11.html>

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		<p>commemorated as Teacher's Day</p> <ul style="list-style-type: none"> Received Bharat Ratna Award in 1954 	
<p>Zakir Hussain⁴ (1897-1969)</p>	<p>1967-1969</p>	<ul style="list-style-type: none"> First Muslim President First President who died in office Shortest serving President Co-founded Jamia Milia Islamia Received Bharat Ratna Award in 1963 Received Padma Vibhushan, 1954 	<p><i>"Education should not be made self centered. The same should be directed to moral and soul development."</i></p>
<p>Varahagiri Venkata Giri⁵ (1894-1980)</p>	<p>1969 <i>Acting</i></p>	<ul style="list-style-type: none"> First Acting President (stepped down from Vice President and Acting President to contest Presidential 	<p><i>The destiny of India if the destiny of the masses of the vast population that inhabit this country, and every citizen has a meaningful role in shaping that destiny.</i></p>

⁴<https://www.thehindu.com/news/cities/Hyderabad/history-under-threat/article2524995.ece>
<https://www.indiatoday.in/education-today/gk-current-affairs/story/zakir-husain-320934-2016-05-03>
<http://vicepresidentofindia.nic.in/former-vice-president/drzakir-hussain>

⁵<https://www.obituarytoday.com/remembrance-varahagiri-venkata-giri.php>
<http://pastpresidentsofindia.indiapress.org/giri.html>

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		<p>elections)</p> <ul style="list-style-type: none"> • Known as the 'Rubber Stamp President of India' • Received Bharat Ratna Award in 1975 	<p><i>There is a sacred duty cast on all of us – not written down in laws, but which is inherent – that we stand by this commitment.</i></p>
<p>Muhammad Hidayatullah⁶ (1905-1992)</p>	<p>1969 <i>Acting</i></p>	<ul style="list-style-type: none"> • Second Acting President • Also served as Chief Justice of India and Vice President of India • Reportedly youngest Advocate General, the youngest Chief Justice of a High Court and the youngest Judge of the Supreme Court of India.⁷ • HNLU Raipur (now) named after him on his 	<p><i>I was never in the mood of Lord Macaulay who said – I shall retire early I am very tired– I know that life meant that one must continue to occupy his time with work.</i></p>

⁶<https://web.archive.org/web/20101027004644/http://bombayhighcourt.nic.in/libweb/references/pdf/Justice%20Hidayatullah.pdf>

http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=543

<https://web.archive.org/web/20140106034450/http://www.supremecourtofindia.nic.in/judges/bio/mhidayatullah.htm>

<http://www.ebc-india.com/lawyer/articles/92v4a1.htm>

⁷<https://www.hnlu.ac.in/index.php/about-us/justice-m-hidayatullah>

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		birth centenary	
Varahagiri Venkata Giri (1894-1980)	1969-1974	<ul style="list-style-type: none"> • First President who had served as Acting President 	
Fakhruddin Ali Ahmed ⁸ (1905-1977)	1974-1977	<ul style="list-style-type: none"> • Second President to die in office 	<i>It should not be forgotten that we are carrying on the Government in the province under an irresponsible centre, and almost under the shadow of the scheme of the All India Federation which has been rejected not only by the National Congress but also by other political organizations and the Princes and the people of the States.</i>
Basappa Danappa Jatti ⁹ (1912-2002)	1977 <i>Acting</i>	<ul style="list-style-type: none"> • Third Acting President 	
Neelam Sanjiva	1977-1982	<ul style="list-style-type: none"> • First candidate declared 	<i>The Speaker is seen but not</i>

⁸<https://indianexpress.com/article/india/who-is-fakhruddin-ali-ahmed-nephew-nrc-assam-mamata-5286969/>

<http://pastpresidentsofindia.indiapress.org/ahmed.html>

⁹<https://www.thehindu.com/todays-paper/tp-national/tp-karnataka/quality-of-public-life-has-declined-governor/article3879641.ece>

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Reddy ¹⁰ (1913-1996)		<p>elected without a contest</p> <p>Youngest president at the age of 64</p> <ul style="list-style-type: none"> Elected as Speaker of Lok Sabha twice before Presidentship. 	<i>heard and the President is neither seen nor heard.</i>
Giani Zail Singh ¹¹ (1916-1994)	1982-1987	<ul style="list-style-type: none"> First Sikh President His tenure witness the anti-Sikh riot of 1984, Operation Bluestar and assassination of Indira Gandhi (Prime Minister) Beat H.R. Khanna J. in the Presidential race 	<i>Anybody can pilot a ship when the sea is calm.</i>
Ramaswamy Venkataraman ¹² (1910-2009)	1987-1992	<ul style="list-style-type: none"> Had served as Chief Minister of Bhopal and Vice President 	<i>A country is not born as a democracy. It evolved and matures into a democracy.</i>
Shankar Dayal Sharma ¹³	1992-1997		<i>Pluralism has been central to India's intellectual and</i>

¹⁰<http://pib.nic.in/newsite/PrintRelease.aspx?relid=102099>

¹¹<https://www.indiatoday.in/education-today/gk-current-affairs/story/giani-zail-singh-anniversary-251553-2015-05-05>

¹²<https://www.indiatoday.in/education-today/gk-current-affairs/story/r-venkataraman-president-of-india-facts-952533-2016-01-27>

<https://www.outlookindia.com/newswire/story/former-president-r-venkataraman-passes-away/652721>

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(1918-1999)			<i>spiritual heritage from ancient times. Respect for all religions and recognition of all religions as equally valid paths to truth constitute a national tradition.</i>
Kocheril Raman Narayanan ¹⁴ (1920-2005)	1997-2002	<ul style="list-style-type: none"> • First Dalit President of India • Beat T.N. Seshan in the Presidential race 	<i>India has been a cauldron of dreams, ideas and aspirations of the humankind and this is a distinctive character of India, and India in that sense represents the world in miniature. If a system can succeed in India, it will indicate the possibility of such success in the world as a whole.</i>
A.P.J. Abdul Kalam ¹⁵	2002-2007	<ul style="list-style-type: none"> • Known as Missile Man of India and People's 	<i>Unless India stands up to the world, no one will respect us. In this world</i>

¹³<https://www.indiatoday.in/education-today/gk-current-affairs/story/shankar-dayal-sharma-anniversary-1417433-2018-12-26>

<https://newsroom24x7.com/2018/08/19/dr-shanker-dayal-sharma-son-of-the-soil-who-was-destined-to-be-the-president/>

¹⁴<https://www.beaninspirer.com/kocheril-raman-narayanan-first-dalit-10th-president-india/>

¹⁵<https://www.speakingtree.in/article/drapjabul-kalam-down-the-memory-lane>

<https://www.rediff.com/news/column/in-memory-of-abdul-kalam-a-true-hero-/20150728.htm>

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(1931-2015)		<p>President</p> <ul style="list-style-type: none">• Received Bharat Ratna Award in 1997• Only President whose candidature was supported by two major parties, BJP and Congress	<p><i>Fear has no place. Only strength respects strength.</i></p>
Smt. Pratibha Patil ¹⁶ (1934-Alive)	2007-2012	<ul style="list-style-type: none">• First Women President• Fifth woman to have contested Presidential Election	<p><i>Human dignity is the backbone of human rights. The Constitution of India proclaims “the dignity of the individual” as a core value in its Preamble. Therefore, it is important that the development process in the country is equitable and that there is a wider spread of the fruits of development. Opportunities for growth for all sections of society in particular for the disadvantaged and vulnerable are important. Disparities should be</i></p>

¹⁶<https://blogs.wsj.com/indiarealtime/2012/07/03/how-good-a-president-was-pratibha-patil/>

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			<p><i>removed to ensure that needs of everyone are met. Appropriate strategies should be developed to achieve this result. It is only when the potential of all human beings is fully realized that we can talk of true human development.</i></p>
<p>Pranab Mukherjee¹⁷ (1935-Alive)</p>	<p>2012-2017</p>	<ul style="list-style-type: none"> • Held many cabinet portfolios: Defence, Finance, External Affairs 	<p><i>We are all equal children before our mother; and India asks each one of us, in whatsoever role we play in the complex drama of nation-building, to do our duty with integrity, commitment and unflinching loyalty to the values enshrined in our Constitution.</i></p>
<p>Ramnath Kovind¹⁸ (1945-Alive)</p>	<p>2017- incumbent</p>	<ul style="list-style-type: none"> • Second Dalit President • Served as member of Rajya Sabha for two 	<p><i>Dream of a New India does not belong to one political party or organisation. It is an embodiment of the</i></p>

¹⁷ <https://www.livemint.com/Politics/lilKt9exDZebW3ogdU2nSJ/Manmohan-Singh-says-Pranab-Mukherjee-was-more-qualified-to-b.html>

¹⁸

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		consecutive terms	<i>aspirations of 1 hundred 30 crore countrymen. To fulfil this dream, we all have to work together with complete dedication.</i>
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B. Chart of Important Articles pertaining to Presidential Powers¹⁹

Article No.	Subject Matter
52.	The office of the President is created by this Article of the Constitution. The President is elected by method of indirect election.
53.	It confers executive power on the President. It states that the executive power of the Union shall be vested in the President and shall be exercised by him directly or through officers subordinate to him in accordance with this Constitution.
54.	It provides that the President shall be elected by an electoral college consisting of the: a) elected members of both houses of Parliament b) elected members of the legislative assemblies of the state.
55.	It provides for the manner of election of the President.
56.	It states that the President shall hold office for a term of five years from the date on which he enters upon his office. It further provides

¹⁹ This chart has been prepared by Yash Venkatraman, V B.A. LL.B., ILS Law College, Pune.

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	that even after expiry of his term he shall continue to hold office, until his successor enters upon his office.
57.	It provides that the President is eligible for re-election.
58.	It provides that no person shall be eligible for election as President unless he: (a) is a citizen of India, (b) has completed the age of thirty-five years, and (c) is qualified for election as a member of the House of the People. Further this article also provides that a person is also not qualified to stand for election as President if he holds office of profit.
59.	It lays down conditions of President's office.
60.	This article provides that every President and every person acting as President or discharging the functions of the President shall, before entering upon his office, make and subscribe in the presence of the Chief Justice of India or, in his absence, the senior most Judge of the Supreme Court available, an oath or affirmation in the prescribed form.
61.	It lays down the procedure for the impeachment of the President. The President can be removed from his office by a process of impeachment for the 'violation of the Constitution '. The impeachment charge against him may be initiated by either House of Parliament.

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62.	This Article lays down the time of holding election to fill vacancy in the office of the President.
65.	It provides that the Vice President shall act as the President or discharge his functions during casual vacancies in the office or during absence of the President.
71.	This article deals with matters relating to the election of the President.
72.	It empowers the President to grant pardons and to suspend, remit or commute sentences in certain cases.
74.	It provides that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.
75.	This Article provides that the Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister. It also makes other provision as to ministers like appointment, terms , salaries, etc.
76.	It provides that the President shall appoint the Attorney General for India who shall hold office during the pleasure of the President.
77.	It provides that all executive action of the Government of India shall be expressed to be taken in the name of the President and that the President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business.

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78.	This Article lays down the duties of prime minister in respect of furnishing of information to the President etc.
85.	It lays down that the President shall summon sessions of each House of Parliament. It also empowers him to prorogue the Houses and to dissolve the House of the People.
111.	This Article lays down that when a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall either declare that he assents to the Bill, or that he withholds assent therefrom It further provides that the President may return the Bill, if it is not a Money Bill, to the Houses for reconsideration.
112.	This Article provides that the President shall in respect of every financial year cause to be laid before both the Houses of Parliament an annual financial statement of the Government of India for that year.
123.	This Article empowers the President to promulgate ordinances.
143.	This Article empowers the President to consult the Supreme Court when a question of law or fact arises which is of such nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court.

C. Extent of Presidential Discretion in India²⁰

Introduction

²⁰ This essay is authored by Rajmohan CV, IV B.A. LL.B., ILS Law College, Pune.

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The Constitution of India vests the Executive power of the Union of India in the hands of a President²¹ indirectly elected to his office.²²The Union shall always have a President,²³ as he is an important cog in the Constitutional machinery, exercising legislative²⁴and judicial powers²⁵ as well as executive powers. India, having adopted a Parliamentary form of government does not vest executive power in the President in the same manner that the American Constitution does. The drafters of the Indian Constitution outlined the position of the President of India on the Irish Model with certain alterations and created the position of an elected President acting on the advice of a council of ministers collectively responsible to the Legislature²⁶. Pandit Nehru has described the position of the Indian President thus: *“Under the Constitution of India, the President occupies the same position as the King under the English Constitution. He is the head of the State, but not of the executive. He represents the nation, but does not rule the nation. He is the symbol of the nation.”* This position is clear from Article 74 of the Constitution of India that mandates the President to act in accordance with the aid and advice of the council of ministers.²⁷

The Constitutional obligation of the President to act in accordance with such aid and advice does not mean that he is a figurehead with no other duty or power. It is the duty of the President of India to preserve, protect and defend the Constitution of India.²⁸ The

²¹Article 53 of the Constitution of India.

²²Article 54 of the Constitution of India.

²³Article 52 of the Constitution of India.

²⁴See Article 123 of the Constitution of India. The President has also been conferred the power to make rules under different Articles of the Constitution.

²⁵Article 72 of the Constitution of India. See also Articles 103(2) & 217(3) of the Constitution of India.

²⁶Durga Das Basu, *Commentary on the Constitution of India*, 9th Edition, Volume 7, Lexis Nexis.

²⁷Article 74 as it stood when the Constitution came into effect had not expressly stated that the President had to function in accordance with the aid and advice of the Council of Ministers. Even though the Article was amended to state this explicitly only in 1976 vide the Forty-Second Constitution (Amendment) Act, the position has always been the same from the inception of the Constitution as held by the Supreme Court in *Samsher Singh v. State of Punjab* AIR 1974 SC 2192.

²⁸Article 60 of the Constitution of India. Contrast the Oath taken by the President under this Article to the oaths taken by the Vice-President under Article 69 and the Prime Minister and other ministers of the Union prescribed under the Third Schedule to the Constitution.

President has the right to be informed,²⁹ to warn,³⁰ and to encourage the council of ministers. There are some exceptions to this rule that the President is bound by the aid and advice of the Council of Ministers. One exception is explicitly mentioned in the Constitution³¹ and another has been judicially incorporated.³² Another relates to the discretionary powers of the President. Similar to the British monarch, the President of India also enjoys discretionary powers under special circumstances. These circumstances are those in which aid and advice are not available or where the function concerned is such that it cannot be performed with the aid and advice of the existing council of ministers.³³ This Article discusses the extent of the discretionary powers of the President.

Appointment of Prime Minister

Article 75(1) of the Constitution of India provides that the President shall appoint the Prime Minister of India. It also provides that the President on the advice of the Prime Minister shall appoint the other ministers in the Council of Ministers. The appointment of a Prime Minister is necessary in the event where an incumbent Prime Minister resigns, dies or otherwise becomes incapacitated to discharge the responsibilities of his office. It also becomes necessary when the incumbent Prime Minister loses the confidence of the Lower House or when there arise a new majority party in the Lower House after Elections or otherwise.

In any of the above circumstances, it becomes necessary for the President to act in his personal discretion. This is a consequence of the fact that in the above circumstances the aid and advice of the Council of Minister is either not available or is not of the same

²⁹ Article 78(a) & (b) of the Constitution of India.

³⁰ Article 78(c) of the Constitution of India.

³¹ Articles 103(2).

³² Supreme Court Advocates on Record Association v. Union of India, AIR 1994 SC 268 regarding the operation of Articles 124 and 217.

³³ Supra Note 23 at pp. 7429.

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legitimacy as it once used to be. When a Prime Minister resigns, the entire council also conventionally follows with their resignation. Thus, in the event of such resignation, there exists no council to aid and advice the President as to a successor. Even otherwise, the aid and advice of the resigning Prime Minister and his council as to a successor ought not to be binding on the President as the resignation itself strips the Prime Minister and/or the Council of its right to advice.

The death or incapacity of the Prime Minister to discharge his responsibilities or his resignation without that of the Council of Ministers, also places the President in a similar situation. While the legitimacy of a Minister's position in the council can be traced to the legitimacy of the Prime Minister's position in the council, the same is not true vice versa. The legitimacy of the position of the Prime Minister is extrinsic and is dependent upon the continued confidence of the Lower House. It is the will of the Lower House as a whole that determines who becomes the Prime Minister and not the advice of a small category of persons who compose the Lower House and were presently in the council of the deceased, incapacitated or resigning Prime Minister. This is also the reason why a new Prime Minister has to be appointed by convention when a no confidence motion against the council is passed or when a new majority arises in the Lower House. When a Prime Minister who lost the confidence of the Lower House refuses to resign along with his Ministry it may even be legitimate for the President to dismiss the said council including the Prime Minister³⁴ under the terms of Article 75(2) that provides that Ministers hold their office only during the pleasure of the President.

This discretion of the President to appoint the President in the above circumstances is not unfettered and has to be guided by the spirit of the Constitution and Parliamentary conventions. So guided,³⁵ the President has to invite the person who he reasonably believes can muster the confidence of the Lower House to be the Prime Minister. This

³⁴Shamsher Singh v. State of Punjab, AIR 1974 SC 2192, Per Krishna Iyer J.

³⁵MadanMurariVerma v. ChoudhariCharan Singh and Anr, AIR 1980 Cal 95.

person is usually the leader of the largest majority party unless there exists a leader of a coalition with larger support.

Dissolution of the House

The term of the Lower House is five years. However, the President has been empowered to dissolve the House from time to time³⁶ and the House is so dissolved only on the advice of the Council of Ministers. While this advice is normally acceded to, ought the President in all cases accede to the same?

The contention that the President may refuse such advice had substantial force prior to the 1976 Amendment mentioned above. However, post the amendment the position is unclear. It is the opinion of the author that the President does have the discretion to refuse the advice and to not dissolve the house even after the 1976 Amendment.

In *U.N.R Rao v. Indira Gandhi*³⁷ as well as in *Shamsher Singh's case*,³⁸ it was recognized by the Supreme Court of India that the Constitution cannot be read in isolation and has to be read in light of established constitutional conventions. This was reiterated in the *Second Judges case*,³⁹ where the Court in one of the opinions went to the extent of observing that constitutional conventions are part of the Constitution and thus legally enforceable. If not legally enforceable, there is ample authority to read the Constitution in light of conventions. In such a case the power to dissolve the House under Article 85(2)(b) and the binding effect of the advice to dissolve under the terms of Article 75 will have to be read in light to the conventions that regulate dissolution of Parliament in the Westminster model.

³⁶Article 85(2)(b) of the Constitution of India.

³⁷AIR 1971 SC 1002.

³⁸ AIR 1974 SC 2192.

³⁹*Supra* Note 28.

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In the United Kingdom there exists a convention⁴⁰ that the Crown can deny the advice for dissolution under three circumstances:

- A. Where an alternative Government can formed with another person as the Prime Minister, to carry on the administrations with a working majority, for a reasonable period.
- B. Where there is a general feeling that a fresh election would be detrimental to the national economy, particularly when the request for dissolution comes closely to the last election. (This circumstance is taken into consideration when the Prime Minister who makes the advice still has a working majority. Thus, it is also an exception to the general power of the Prime Minister to call for dissolution at any time before the expiry of the term.)
- C. Where a Prime Minister who has advised dissolution, is defeated at the General Election that ensues, and requests for a dissolution again.

It has been observed that the Prime Minister may only ask the sovereign, but not demand, that Parliament be dissolved and that no wise sovereign would deny the request unless upon ground A or B mentioned above or when the existing Parliament was still vital, viable and capable of doing its job.⁴¹ It is the opinion of this author that, on parity of the reasoning involved in the Second Judges' Case, the binding character of the aid and advice of the council of ministers should be made subject to the above convention where in the specified circumstances the President can deny dissolution. The President's obligation to act in accordance with aid and advice even in the above circumstances would conflict with his duty to preserve, protect and defend the Constitution. An advice to dissolve when another majority can take its place or when the present Parliament is still vital, viable and stable is contrary to the standards of

⁴⁰Wade and Phillips, Constitutional Law, 1970, pp. 84, 120 as cited by D.D. Basu at Pg. 7436.

⁴¹D.D. Basu, Commentary on the Constitution of India, at Pp. 7441.

constitutionalism that the Constitution through the principle of non-arbitrariness seeks to imbibe.

Pocket Veto

Article 111 of the Constitution of India provides that when a bill which is passed by Parliament is presented to the President, the President shall declare his assent thereto or withhold the same. The proviso to the Article confers upon the President, in cases of all bills except money bills, the power to return the same, as soon as possible, to the Parliament with a message requesting reconsideration of the entire bill or any portion thereof and/or recommending amendments for the same. A bill so returned has to be reconsidered by the Parliament. However if it is passed again, with or without further amendments, and presented to the President for assent the President cannot withhold it.

The terms of the Article above mentioned does not specify any time limit within which the President may declare his assent. While he cannot withhold the assent if the council of minister advises against it or in case it has been re-sent to him after consideration, the provision does not say when the assent has to be declared after receiving the advice or the bill respectively. It merely states; in the first case, covered by the main paragraph, that he may declare assent or withhold it and in the second case, covered by the proviso, that he cannot withhold it. The same ambiguity with regard to the period within which the assent has to be declared exists in other provisions dealing with declaring assent as well. This results in the practice of pocket veto.

Pocket Veto, as the name itself suggests, is an indirect veto where the bill is retained by the President and he neither declares assent nor withholds the same. President Zail Singh is considered to have exercised this power in relation to the Indian Post Office (Amendment) Bill, 1986 during the Rajiv Gandhi government. When presented with the bill, President Zail Singh had the option of assenting to it in accordance with the

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ministerial advice or send the bill for reconsideration or withhold assent, both of which was not in accordance with Ministerial advice. He send for reconsideration to the Law Ministry which is not one of the means mentioned in the Constitution and thus halted his for more time. Whether the President can be held to be acting in disregard of the Constitution by exercising his pocket veto is a moot point which has not come to the fore.

Conclusion⁴²

Does the duty of the President to act in accordance with the aid and advice of the council of ministers extend to acting so in clear violation of the Constitution? Let us analyze this question with an example.

Article 103(2) of the Constitution provides that if any question arises as to whether a member of either House of Parliament has become subject of any disqualification mentioned in Cl. (1) of Article 102, the President shall obtain the opinion of the Election Commission and that he shall act in accordance with the opinion of the Election Commission. It is quite clear that in such a case if the President acts in accordance with a contrary opinion given by the council of ministers he shall be violating the Constitution. This would make him liable for impeachment as well as would make his decision liable to struck down as ultra vires the Constitution. So how can the imperative duty to follow ministerial advice be reconciled with the equally imperative duty to follow the opinion of the Election Commissioner?

The reconciliation is possible only by placing one imperative duty over the other by way of construction. D.D. Basu explains this reconciliation from the perspective of the right of the council of ministers to provide such advice. He observes that *if the Constitution is to function according to its provisions, certain necessary implications have to be*

⁴²This section of this Article is drawn from the opinions expressed in D.D. Basu, Indian Constitutional Law, at Pp. 7429.

drawn. In context of the above example he observes, *Articles 60 and 61 read with Article 361 and Articles 74, 88 and 103 read together, lead to the necessary implication that the right of the Ministry to advise the President does not extend to advising the President to violate a mandatory provision like Article 103(2).* This reconciliation would mean that when the ministerial advice conflicts with the opinion of the Election Commission under Article 103, the President can legitimately deny to follow the ministerial advice without being liable to the sanction of impeachment.

This construction that would deprive the ministry of the right to advice in violation of Article 103 necessarily by extension has to extend with regard to all other mandatory provisions of the Constitution. If that is the case, we can answer the above question that, a ministerial advice that would lead to a violation of the Constitution cannot impose a duty on the President to comply with the aid and advice. An absence of duty corresponds to a presence of a privilege or discretion.

This begs two questions with which I conclude. Can the President refuse to sanction any action, legislative or executive, that he reasonably believes would violate a citizen's fundamental right? Isn't that a necessary Presidential Discretion.

D. Election of the President⁴³

Office of the President:

The Constituent Assembly, under the Chairmanship of Dr. B.R.Ambedkar, framed the Constitution of India, which came into force on 26th January 1950. The Constitution declares India to be a 'Republic'.⁴⁴ This essentially means that the head of the State is to be elected by the people and that the post is not that of a hereditary monarch.

⁴³ This essay is authored by Neha Deshmukh, V B.A. LL.B., ILS Law College, Pune.

⁴⁴ Preamble, Constitution of India.

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The Constitution of India creates the office of the President.⁴⁵The office of the President is the highest authority in the country. The President of India is the constitutional head of the Republic of India. Since the establishment of post of the President of India is the result of the extremely long British Rule in India, it akin to the position of the British Monarch in quite a few respects. In this regard, Dr. Rajendra Prasad, the President of the Constituent Assembly and also the person who went on to become the 1st President of India, had made an observationsto the effect that:

*“We considered whether we should adopt the American model or the British model where we have a hereditary King who is the fountain of all honor and power, but who does not actually enjoy any power. All the power rests in the legislature to which the Ministers are responsible. We have had to reconcile the position of an elected President with an elected legislature and in doing so, we have adopted more or less the position of the British monarch for the President. His position is that of a constitutional President.”*⁴⁶The office of the President of India is thus a unique blend of the position of the British Crown as well as the American President.

Procedure For Election:

At the outset it is pertinent to note that the procedure for election of the President was borrowed from Ireland. The electoral college of the President of India consists of the elected members of both Houses of the Parliament and also the elected members of the Legislative Assemblies of the State.⁴⁷ The word “State” here also includes the National Capital Territory and the Union Territory of Puducherry.⁴⁸Thus, it becomes clear that while the entire adult population of the country takes part in the election of the members of the Parliament and Legislative Assemblies by way of universal adult

⁴⁵ Article 52, Constitution of India.

⁴⁶[11.166.29, Constituent Assembly Debates, available at: https://cadindia.clpr.org.in/constitution_assembly_debates/volume/11/1949-11-26.](https://cadindia.clpr.org.in/constitution_assembly_debates/volume/11/1949-11-26)

⁴⁷ Article 54, Constitution of India.

⁴⁸ Explanation to Article 54, Constitution of India.

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franchise, the President is elected by the representatives who represent the entire population of the country.⁴⁹It further becomes pertinent to note that this electoral college thus consists of representatives, representing the same population twice over – first as the representatives of the Parliament of the Country and second as their representatives in the State Legislative Assembly. However, nominated members of either the state assemblies or the two Houses of the Parliament are not allowed to participate in the presidential election as they have been nominated by the President himself/herself. The President of India thus becomes the Head of the State through the process of indirect election. While explaining the rationale behind the idea of indirect election of the President, Pandit Jawaharlal Nehru said:

“The framers of the Indian Constitution wanted to emphasize the ministerial character of the Government that power really resided in the Ministry and in the Legislature and not in the President as such...Now, therefore, if we had an election by adult franchise and yet did not give him any real powers, it might become slightly anomalous.”⁵⁰

A similar reasoning was also advanced by Dr. B. R. Ambedkar favoring indirect elections. He stated that the size of the electorate, lack of administrative machinery to carry out the election procedure and the fact that the President was a mere figurehead with no real powers, did not call for direct elections.

Now, the value of votes of every elected of Member of Parliament or Member of State Legislative Assembly is decided by applying a designated formula. The value of each vote is basically determined on the basis of the population of the States. The rationale behind such a provision is to ensure uniformity in the scale of representation of the

⁴⁹[11.166.30, Constituent Assembly Debates, available at: https://cadindia.clpr.org.in/constitution_assembly_debates/volume/11/1949-11-26.](https://cadindia.clpr.org.in/constitution_assembly_debates/volume/11/1949-11-26)

⁵⁰Himanshu Roy, M. P. Singh, Indian Political System, Fourth Edition, Pearson; Pravin Kumar Jha, Indian Politics in Comparative Perspective, Pearson Education India, 2012.

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different States.⁵¹ Furthermore, considering the dynamic nature of the population figures, it was been decided that until the population figures for the first census after 2026 are published, the population of the States for the purpose of this calculation will mean the population as per the 1971 census.⁵² Earlier a similar freeze was imposed on the population figure for readjustment at the 1971 census⁵³ and the same has been extended by the Constitution (Eighty-fourth Amendment) Act 2001 till 2026. Thus, there is now a freeze on undertaking fresh delimitation up to the year 2026.

The procedure for calculating the value of the vote of a Member of the State Legislative Assembly is that the value is calculated by dividing the population of the State as per 1971 Census, by the total number of elected members of the respective state assembly, and further dividing the quotient by 1000.⁵⁴ In order to find out the total value of all members of each State Assembly, one needs to multiply the number of seats in the Assembly by the number of votes for each member.

The procedure for calculating the value of the vote of a Member of the Parliament is however different. The total value of votes of all the States is divided by the total number of elected members of Parliament, in order to get the value of vote.⁵⁵ Thus, it may be noticed that value of a vote of a Member of the Parliament is substantially higher than the value of a Member of Legislative Assembly vote. Finally, both these values are added to get the total value of votes for the Presidential Election. This election is held in accordance with the system of proportional representation by means of the single transferable vote.⁵⁶

Doubts Or Disputes As To Election Of The President:

⁵¹ Article 51(1), Constitution of India.

⁵² The Constitution (Eighty-fourth Amendment) Act, 2001.

⁵³ The Constitution (Forty Second Amendment) Act 1976.

⁵⁴ Article 55(2)(a), Constitution of India.

⁵⁵ Article 55(2)(c), Constitution of India.

⁵⁶ Article 55(3), Constitution of India.

The power to inquire into or decide any doubts or disputes in regard to the election of the President vests only in the Supreme Court of India. Furthermore, the decision of the Supreme Court in this regard shall be final.⁵⁷

It has been held by the apex court in the case of *Narayan Bhaskar Khare vs Election Commission of India*⁵⁸ that the phrase “doubts and disputes arising out of or in connection with elections” constitutes any doubt or dispute irrespective of which stage in the entire election process the doubt or dispute relates to.

Qualifications:

The Constitution of India states the qualifications of the President.⁵⁹ They are as follows:

- Must be a citizen of India.
- Must have completed 35 years of age.
- Must be eligible for an election as a member of the Lok Sabha.
- Must not hold any office of profit under the Government of India or the Government of any State or under any local government. However, the exceptions to this are the offices of President and Vice-President, Governor of any State and Ministers of Union or State.⁶⁰

Freedom To Vote For Any Given Candidate?

It is pertinent to note that the provisions of Anti-Defection law are not applicable to the Presidential elections.⁶¹ Hence, when an elected member votes in defiance of the political party he/she belongs to, it would not attract the grounds for disqualification under Tenth Schedule to the Constitution of India. Issuing whips to gather votes for any

⁵⁷ Article 71(1), Constitution of India; Sec 14(2).

⁵⁸ *Narayan Bhaskar Khare vs Election Commission of India*, AIR1957SC694.

⁵⁹ Article 58, Constitution of India.

⁶⁰ Explanation to Article 58, Constitution of India.

⁶¹ <https://www.livelaw.in/anti-defection-law-not-apply-presidential-elections-eci-issues-clarification/>.

particular presidential candidate is prohibited. Furthermore, in any case there is absolutely no compulsion on the members to cast their vote. This is because the 'electoral right' of a voter as defined in Indian Penal code means 'the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at election'.⁶² Thus, every elector has the freedom of choice to vote or not to vote.

E. The Practicality of Impeachment of the President⁶³

Under the Indian Constitution, the impeachment of the President is provided for under Article 61 of the Constitution. The provision is inspired by the impeachment provisions in the US Constitution.

Article 61: "Procedure for impeachment of the President.

(1) When a President is to be impeached for violation of the Constitution, the charge shall be preferred by either House of Parliament. (b) such resolution has been passed by a majority of not less than two-thirds of the total membership of the House."

The Constitution of India is premised on the principles of check and balance and crucial separation of powers between the various organs of the government. In doing so, the sovereign organs of the Indian Government maintain a system of checks on each other's functioning. Yet, a highly nuanced and underappreciated provision of the Constitutional framework is the procedure provided for impeachment of President and Vice President.

The more one reads about the framework and the discussions leading up to it, the more one realises that the process of impeachment is only to superficially complete the Constitutional framework and display accountability. However, if we closely examine this system of accountability that is based on the threat or possibility of impeachment, it

⁶² Section 171A(b), Indian Penal Code, 1860.

⁶³ This essay is authored by Sharanya Shivaraman, V B.A. LL.B., ILS Law College, Pune.

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assumes the improbability of usage of the provision. There can be a few obvious reasons for that. Practically speaking, impeachment is a rare occurrence. It is extremely rare to have the head of state being held accountable in such a public fashion. Amongst Presidents, such a level of public scrutiny is almost incomprehensible. That is probably why; the members of Constituent Assembly do not dwell into the issue deeply.

Drafting the impeachment provisions:

On the debate that ensued on 28th December and 29th December 1948, while drafting Article 61 of the Constitution, the only contentious consideration was whether the legislative councils at the state level should be part of the Electoral College.⁶⁴

It was stated that “in bringing this amendment before the House, I am following the usual practice that if impeachment is to be made, it should be by the People's representatives and not by the other House, the Council of States. The Council of States would be composed of people not directly elected by the people. There may be some appointed elements in that House; and that Body may consist of representatives of units and interests rather than of the people themselves. Now here are offences and the trial thereof, as against the Head of the State, which can, in my opinion, be only done by the House of the representatives of the people. After all, it is the people who are the sovereign in the scheme of the Constitution that this Draft presents, and that I have accepted. Under that scheme it should be the real sovereign, the people, who should and might, through their representatives, be empowered and entitled to try for such offences the Head of the State.”

Hence, the electoral college consists only of the representatives of the people from the various states and the elected representatives at the Centre. The discussions also

⁶⁴ CONSTITUENT ASSEMBLY OF INDIA DEBATES (PROCEEDINGS)- VOLUME VII
<http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C28121948.pdf>

revolved around the remuneration, pension or retirement emoluments for the office of president and vice-president.⁶⁵

Interpretation of 'violation of Constitution' as a ground for the impeachment of the president:

President or Vice-president can be impeached only for violation of Constitution. But what exactly constitutes a violation of the Constitution of the country. Can a misinterpretation or error in understanding of the Constitutional framework constitute a violation of the Constitution? Technically, yes. But the reality is far away from this technicality.

In the drafting process, concerns regarding the broadness and vagueness of the clause were raised.

Pandit Thakur Dass stated that "Another short-coming which I find in this article is that the words "Violation of the Constitution" have nowhere been defined. There can be "Violation of the Constitution" in various ways, e.g., by not conforming to the instructions contained in Schedule Four; by not fulfilling the undertaking imposed by the Oath under Article 49 and infailing to carry out his other functions. Hence, these words "Violation of the Constitution" are vague and require clarification. The President will be the highest official of the Indian Union, and there is a possibility of his being unnecessarily harassed for his act on account of the presence of those vague words. This is a very undesirable position."

This issue seems to be unresolved since most members conferred and came to the conclusions that the provision is going to be put to use very rarely. While discussing the scope of the clause during an amendment proposed by Sir Kazi Syed Kamiruddin, the assembly was of the opinion that The phrase 'violation of the Constitution' is quite a large one and may well include treason, bribery and other high crimes or

⁶⁵ <https://indiankanoon.org/doc/110404/>

misdeemeanours. Treason, certainly, would be a violation of the Constitution. Bribery also will be a violation of the Constitution because it will be a violation of the oath taken by the President. The assembly seemed to be in consensus over the broad and over-reaching enabling provision given the unlikelihood and improbability of the initiation of impeachment proceedings.

Exclusion of the state legislative assembly from impeachment proceedings:

Impeachment proceedings can be initiated in either Upper or Lower House of the Parliament. Proceedings initiated in one house will be investigated into by the other house. The state legislative assembly is conspicuously absent from impeachment proceedings even though the assembly participates in the election of the president. This violates the basic principle of he who appoints must also have a say in the removal.

The only plausible explanation for the same could be the federal structure of India. As soon as the Governor is appointed, he/she assumes the role of the President at the state level. The interaction and accountability is largely limited to the President and Parliament at the Central level and the Governor and State Legislature at the state level.

In the case of *Raja Ram Pal v. Speaker, Lok Sabha*,⁶⁶ the special privilege of the Parliament in the impeachment of President was recognised. The drafters of the Constitution acknowledged that “those who enjoy high position, and who hold high offices, live in glass houses. Their every act, every utterance, every movement, is liable not only to public comment, but also to public misinterpretation.” This understanding bolsters the idea that the grounds for impeachment although not adequately enumerated, are couched in principles of good conduct and morality that is expected from a public figure.

⁶⁶ (2007) 3 SCC 184

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F. Doctrine of Pleasure⁶⁷

Doctrine of Pleasure is Common law practice (originally English Law⁶⁸), based on the Latin phrase "*durantebeneplacito*" ("during pleasure"), which means that the civil servant shall hold office as long as it enjoys pleasure of the Crown (The Crown thereby enjoying absolute discretion). This also implies that the tenure of such civil servant is terminable at the instance of displeasure of the Crown, without justification, unless provided by law.

The 'doctrine of pleasure' is one of the many principles borrowed, rather continued from the British era till date. The doctrine was systematically incorporated in the Government of India Act, 1935 (as a prerogative power i.e. unfettered discretion, which cannot be questioned) and had been carried forward in the Constitution (as a matter of public policy), almost verbatim, except for Article 310.⁶⁹

**Doctrine of Pleasure under the Constitution of India and Government of India Act,
1935**

(A comparative table)

Government of India Act, 1935⁷⁰	Constitution
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⁶⁷ This essay is authored by Saranya Mishra, V B.A. LL.B., ILS Law College, Pune.

⁶⁸ *Dunn v. Queen*, 1896 (1) QB 116

⁶⁹ However it has been observed by the Supreme Court in *Moti Ram Deka v. G.M., North East Frontier Rly.*, (1964) 5 SCR 683 and *State of Bihar v. Abdul Majid*, (1954) SCR 786 that

"...the rule of English law pithily expressed in the latin phrase, "durantobeneplacito" ("during pleasure") has not been fully adopted either by Section 240 of the Government of India Act, 1935 or by Article 310(1). To the extent to which that rule has been modified by the relevant provisions of Section 240 of the Government of India Act, 1935, or Article 311 the government servants are entitled to relief like any other person under the ordinary law and that relief must be regulated by the Code of Civil Procedure."

⁷⁰ Additional provisions with respect to [prior to India (Provisional Constitution) Order, 1947]:

15. Financial adviser to Governor-General

107. Inconsistency between Federal laws and Provincial or State laws

257. Officers of political department

303. Provisions as to Sheriff of Calcutta

32. Assent to Bills and power of Crown to disallow Acts

42. Power of Governor-General to promulgate ordinances during recess of Legislature

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Federation	Province	Union	State
		-	<p>156. Term of office of Governor. –(1) The Governor shall hold office during the <u>pleasure</u> of the President.</p> <p>See CAD dated 31st May, 1949, draft Article 132⁷¹.</p>
<p>10. Other provisions as to ministers.</p> <p>(1) The Governor-General's ministers shall be chosen and summoned by him, shall be sworn as members of the</p>	<p>51. Other provisions as to ministers.</p> <p>(1) The Governor's ministers shall be chosen and summoned by him, shall be sworn as members</p>	<p>75. Other provisions as to Ministers.</p> <p>(2) The Ministers shall hold office during the <u>pleasure</u> of the President.</p>	<p>164. Other provisions as to Ministers.</p> <p>(1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister,</p>

76. Bills reserved for consideration

88. Power of Governor to promulgate ordinances during recess of Legislature.

⁷¹In a debate on formulation of Article 156, it was debated whether "Governor shall hold office only at the pleasure of the President", it was observed by Prof. Shibban Lal Saksena⁷¹ that "*by making him continue in office at the pleasure of the President, you are taking away his independence altogether*". However it was argued by Shri Lokanath Misra that "*when the President has appointed a man, in the fitness of things the President must have the right to remove him when he is displeased*". The latter argument subsisted and 'doctrine of pleasure' is reflected in holding of office by Governor.

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<p>council, and shall hold office during his <u>pleasure</u>.</p>	<p>of the council, and shall hold office during his <u>pleasure</u>.</p>	<p>See CAD dated 30th December, 1948, 31st December, 1948, 14th October, 1949 and 17th October, 1949, draft Article 62.</p>	<p>and the Ministers shall hold office during the <u>pleasure</u> of the Governor:</p> <p>See CAD dated 1st June, 1949 and 14th October, 1949, draft Article 144.</p>
<p>16. Advocate-General for Federation.</p> <p>(3) The Advocate-General shall hold office during the <u>pleasure</u> of the Governor-General, and shall receive such remuneration as the Governor-General may determine.</p>	<p>55. Advocate-General for Province.</p> <p>(3) The Advocate-General shall hold office during the <u>pleasure</u> of the Governor, and shall receive such remuneration as the Governor may determine.</p>	<p>76. Attorney-General for India.</p> <p>(4) The Attorney-General shall hold office during the <u>pleasure</u> of the President, and shall receive such remuneration as the President may determine.</p> <p>See CAD dated 7th January, 1949, draft Article 63</p>	<p>165. Advocate-General for the State.</p> <p>(3) The Advocate-General shall hold office during the <u>pleasure</u> of the Governor, and shall receive such remuneration as the Governor may determine.</p> <p>See CAD dated 1st June, 1949, draft Article 145.</p>

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			<p>239-AA. Special provisions with respect to Delhi.</p> <p>(5) The Chief Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Chief Minister and the Ministers shall hold office during the <u>pleasure</u> of the President.</p>
<p>240. Tenure of office of persons employed in civil capacities in India.</p> <p>(1) Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's <u>pleasure</u>.</p> <p>(2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to</p>	<p>310. Tenure of office of persons serving the Union or a State.</p> <p>(1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union, holds office during the <u>pleasure</u> of the President, and every person who is a member of a civil service of a State or holds any civil post under a State</p>		

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<p>that by which he was appointed.</p> <p>(3) No such person as aforesaid ¹[who having been appointed by the Secretary of State or the Secretary of State in Council continues after the establishment of the Dominion to serve under the Crown in India shall be dismissed from the service of His Majesty by any authority subordinate to the Governor-General or the Governor according as that person is serving in connection with the affairs of the Dominion or of a Province, and no other such person as aforesaid] shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:</p> <p>Provided that this sub-section shall not apply –</p> <p>(a) where a person is dismissed or reduced or in rank on the ground of conduct which has led to his conviction on a criminal charge; or</p> <p>(b) where an authority</p>	<p>holds office during the pleasure of the Governor ¹[* * *] of the State.</p> <p>(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor ²[* * *] of the State, any contract under which a person, not being a member of a defence service or of an all-India service or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor ³[* * *], as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post.</p> <p>See CAD dated 7th September, 1949, draft Article 282A.</p> <p>311. Dismissal, removal or reduction in</p>
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<p>empowered to dismiss a person or reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause.</p> <p>(4) Notwithstanding that a person holding a civil post under the Crown in India holds office His Majesty's pleasure, any contract under which a person, not being a member of a civil service of the Crown in India, is appointed under this Act to hold such a post may, if the Governor-General, or, as the case may be, the Governor, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post.</p>	<p>rank of persons employed in civil capacities under the Union or a State.</p> <p>(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.</p> <p>(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges:</p> <p>Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:</p> <p>Provided further that this clause shall not apply –]</p> <p style="padding-left: 40px;">(a) where a person is dismissed or removed or reduced in rank on the</p>
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	<p>ground of conduct which has led to his conviction on a criminal charge; or</p> <p>(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or</p> <p>(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.</p> <p>(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.</p>		
			<p style="text-align: center;">Sixth Schedule (Articles 224(2) and 275(1))</p>

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			<p style="text-align: center;">2. Constitution of District Councils and Regional Councils.</p> <p>(6-A) The elected members of the District Council shall hold office for a term of five years from the date appointed for the first meeting of the Council after the general elections to the Council, unless the District Council is sooner dissolved under paragraph 16 and a nominated member shall hold office at the pleasure of the Governor:</p> <p>See CAD dated 6th September, 1949.</p>
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Judiciary's take on 'doctrine of pleasure'

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Judicial interpretation of the Constitutional provisions, as made in the case of *B.P. Singhal v. Union of India*, (2010) 6 SCC 331⁷², by the 5 judge bench⁷³, classified the tenure as follows:

a. offices held during the pleasure of the President (without restrictions)	Articles 75(2), 76(4), Article 156(1), 164(1), 165(3) i.e. Ministers, Governors, Attorney General and Advocate General
b. offices held during the pleasure of the President (with restrictions)	Article 310 read with Article 311 ⁷⁴ i.e. Members of defence services, Members of civil services of the Union, Member of an All India service, holders of posts connected with defence or any civil post under the Union, Member of a civil service of a State and holders of civil posts under the State
c. appointments to which the said doctrine is not applicable	Articles 56, 124, 148, 218 and 324. ⁷⁵ i.e. President, Judges of the Supreme Court, the Comptroller and Auditor General of India, Judges of the High

⁷²See paras 26-32.

⁷³Comprising of K.G Balakrishnan, C.J and S.H Kapadia, R.V Raveendran, B. Sudershan Reddy and P. Sathasivam, JJ.

⁷⁴Clause (1) of Article 310 relates to the tenure of office of persons serving the Union or a State, being subject to doctrine of pleasure. However, clause (2) of Article 310 and Article 311 restricts the operation of the "at pleasure" doctrine contained in Article 310(1).

⁷⁵ It is specifically provided that they shall not be removed from office except by impeachment, as provided in the respective provisions.

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	Courts, and Election Commissioners
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It also observed that in contradistinction to the feudal setup of 19th Century, in a democracy, *“the doctrine of pleasure does not mean a licence to act arbitrarily, capriciously or whimsically. It is presumed that discretionary powers conferred in absolute and unfettered terms on any public authority will necessarily and obviously be exercised reasonably and for public good”*.

The following cases are the landmark cases which discuss and apply ‘doctrine of pleasure’:

The *Union of India v. Tulsiram Patel*⁷⁶ case deals with removal and dismissal of certain government servants from service without holding inquiry and sought to enforce principles of natural justice. The Court delved into the origin and scope of the doctrine. It observed that “whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so.” And “The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this that clause (3) of Article 311 makes the decision of the disciplinary authority on this question final.”

There is also the dismissal of Navy chief Admiral Vishnu Bhagwat for refusing to accept the government’s choice for the post of his deputy when *“The President is pleased to withdraw his pleasure for continuance of Admiral Vishnu Bhagwat ... on account of loss of confidence in his fitness ...”* While the dismissal was not challenged, the post-dismissal

⁷⁶(1985) 3 SCC 398.

period was rife with politics⁷⁷. The course of events was expected to replay in context of developments surrounding Army chief V.K. Singh⁷⁸.

Conclusion

Conclusively, **should the Doctrine of Pleasure be retained?**

During drafting of Constitution:

In the words of **Pocker Sahib Bahadur**, in context of 'doctrine of pleasure' with respect to Ministers

"So long as the Ministers enjoy the confidence of the House of the People, certainly they will not be dismissed by the President. But as a matter of practice, it is not a fact to say that the Ministers hold office during the pleasure of the President. It is really a fiction to say that the Ministers hold office during the pleasure of the President. It is not so, as a matter of fact. No doubt, the convention prevails in Great Britain and some other countries. But when we are providing for the country a written Constitution, I do not see any reason why we should hang on to the conventions that obtain in other parts of the world. Even when we have got an opportunity to put down everything clearly in the Constitution, should we be left to quote the precedents of the United Kingdom or the United States? There is absolutely no harm in putting on paper, in the Constitution, the actual state of affairs, namely, that the ministers shall hold office so long as they enjoy the confidence of the people."

Almost 70 years with the Constitution, there is but one thing to say that there is nothing more archaic and crippling for governance and employment than the existence of

⁷⁷<https://www.indiatoday.in/magazine/cover-story/story/19990111-naval-chief-admiral-vishnu-bhagwat-sacked-for-defiance-of-civilian-authority-779870-1999-01-11>

See also <https://www.economist.com/asia/1999/04/08/the-admiral-starts-a-mutiny>

⁷⁸<https://timesofindia.indiatimes.com/india/Is-Admiral-Vishnu-Bhagwat-saga-playing-out-again/articleshow/12447781.cms>

‘doctrine of pleasure’. India has slowly and steadily outgrown and developed jurisprudence beyond the clutches of Victorian law either by way of legislation or judicial activism (for example, unconstitutionality of S.377 and 497 of Indian Penal Code), it is time to now discard ‘pleasure’ constitutionalism.

G. President’s Power to Sanction Prosecution of the Prime Minister⁷⁹

Introduction

The Indian Presidency appears to be a unique political phenomenon as far as its status and functions are concerned which are neither exclusive like those of the British monarch nor all inclusive like those of the American President. The founding fathers of the Indian Constitution neither endowed the presidency with real executive powers, nor did it create a merely wooden figurehead. The office was intended to be the embodiment of stability and hallowed with great responsibility. It will not be out of place or inappropriate to state figuratively that the Indian presidency is like a steering wheel of the parliamentary machinery in the Indian polity.

However, the million dollar question is whether all these constitutional fetters and safeguards really reduce the status of the President to a mere figure head and rubber stamp under the present mercurial circumstances of Indian politics?

Power of the President to Grant Sanction to prosecute the Prime Minister

After the landmark judgment of *Shamsher Singh*,⁸⁰ the Constitution (Forty Second Amendment) Act, 1976 and the Constitution (Fourth fourth Amendment) Act, 1978, it is well established that the President is a constitutional head of the Union government who is generally obligated to act on the aid and advice of the Council of the Ministers in the exercise of his powers conferred by the Constitution. Yet, there remain certain instances where President can act on his own discretion.

⁷⁹ This essay is authored by Varad S. Kolhe, IV B.A. LL.B., ILS Law College, Pune.

⁸⁰ *Shamsher Singh v. State of Punjab*, AIR 1974 SC 2192.

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One of many such instances is the power conferred on the President is to grant sanction for prosecution of public servants under the **Prevention of Corruption Act, 1988**, which includes the prosecution of the Prime Minister as well as any minister, whether or not he is a part of the Council of Ministers.

When sanction of the President is sought to prosecute the Prime Minister or any minister against whom prima facie charges of corruption are levied, (1) if the council of ministers advises the President not to grant such sanction or; (2) the Council of Ministers refrains from taking a position on the grant of such sanction owing to political considerations, the President may grant such sanction by exercise of his own discretion. The premise of the exercise of such discretion is that the council of ministers cannot be a judge in its own cause when serious charges of corruption are leveled against the Prime Minister or any of its members.

Is this power constitutionally justified?

Under Article 75(1) of the Constitution, it is the President who appoints the Prime Minister and other Ministers, on the advice of the Prime Minister. Being the appointing authority of the Prime Minister and other Ministers, the President can also dismiss them as they hold office during the pleasure of the President. But he cannot dismiss them on his own will generally when they retain the support of majority in the House. It is constitutionally justifiable that the President can grant sanction of prosecution against the Prime Minister or any of his colleagues under the Prevention of Corruption Act which needs the sanction of appointing authority.

The President is the guardian of the Constitution and under Article 60 of the Constitution; it is his duty to see that the Government is carried on in accordance with the Constitution and the law and if he fails to protect the Constitution and the law, he may be impeached by the Parliament under Article 61 of the Constitution. The President cannot argue that the Council of Ministers compelled him to do an

unconstitutional act. The President cannot remain a silent spectator when the Prime Minister or other Ministers are involved in corruption and some citizen approaches him to grant sanction of prosecution against the Prime Minister. The President is fully empowered to obtain necessary information from the Prime Minister under Article 78 of the Constitution relating to the affairs of the Union Government and the Prime Minister is duty bound to furnish such information to the President. If the President is satisfied about the evidence, he can proceed against the Prime Minister.

What do constitutional Scholars opine?

Professor T. K. Tope argues that the President can accord sanction of prosecution against the Prime Minister on his own discretion: "It is submitted that in case such a situation arises when permission for prosecution of Prime Minister is required, such permission will have to be obtained only from the President of India. It is true that there is no specific constitutional discretionary power of the President of India; even then such a power is inherent in the office of the President. Moreover, in the Samsher Singh's case, the Supreme Court while mentioning the circumstances under which the President or the Governor will exercise his power without consulting the Prime Minister or the Chief Minister has stated that the circumstances mentioned therein are not exhaustive. However, it must be stated that there is neither any constitutional provision nor any judicial pronouncement regarding a remedy in case such permission is refused by the President or the Governor, as the case may be."⁸¹

However, H.M. Seervai takes a contrary view and opines that the President cannot be allowed to grant sanction of prosecution against an elected Prime Minister commanding majority support of the Lok Sabha unless and until the evidence against the Prime Minister is established in a court of law:

⁸¹ Sujata V. Manohar, T. K. Tope's Constitutional Law of India, 3rd Edition, 2010, at 774

“It would be surprising if a power of this nature was entrusted to the President- a power in effect to remove or incapacitate a Prime Minister elected by the people and commanding the confidence of the House. This is not to say that the Prime Minister is not amenable to criminal law for committing crimes under the ordinary law: e.g. cheating or assault. But then he is presumed to be innocent till he is proved to be guilty.”

Stand of the Judiciary

In *State of Maharashtra v. R.S. Naik*⁸², the apex court observed that the entire Council of Ministers becomes interested in the use of the statutory power one way or the other, the doctrine of necessity will fill up the gap by enabling the Governor by dispensing with the advice of his Council of Ministers and take a decision of his own on the merits of the case. Such discretion of the Governor must be implied as inherent in his constitutional powers. The doctrine of necessity will supply the necessary power to the Governor to act without the advice of the Council of Ministers in such a case where the entire Council of Ministers is biased. In fact, it will be contrary to the Constitution and the principles of democratic Government which it enshrines if the Governor was obliged not to act and to decline to perform his statutory duties because his Ministers had become involved personally. For the interest of democratic Government, and its functioning, the Governor must act in such a case on his own. Otherwise, he will become an instrument for serving the personal and selfish interest of his Ministers. In *M.P. Special Police Establishment v. State of M.P.*,⁸³ a constitution bench of the Supreme Court reiterated this view.

Conclusion

⁸² 1983 SCR (1) 8

⁸³ (2004) 8 SCC 788.

Thus, in respect of corruption cases, it is a discretionary power of the President to grant sanction of prosecution against the Prime Minister or any of his colleagues under Section 197 of the Cr. P. C. and Section 19 of the Prevention of Corruption Act, 1988.

But, as H. M. Seervai argues, this is a very important weapon in the hands of the President which he must exercise carefully and exceptionally because the sanction of prosecution can unseat the Prime Minister or Minister, as the case may be. If used irresponsibly, it would be a peril to the country's Parliamentary Government system. In our country the Union Council of Ministers is collectively responsible to the Lok Sabha under Article 75(3) of the Constitution, and not to the President. Only the Lok Sabha has power to make or unmake the Governments. The President is always bound to have a Council of Ministers even if the Lok Sabha is dissolved and he cannot exercise his powers without the advice of the Council of Ministers and if he acts without ministerial advice, his actions will be liable to set aside. Unless and until solid and reliable evidence is presented to the President by the applicant against the Prime Minister, he should not exercise his independent power.

H. The Cabinet Ceiling⁸⁴

Article 74 of the Indian Constitution provides that,

"74. Council of Ministers to aid and advise President

(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice."

Further Article 75(1) provides that,

"Article 75: Other provisions as to ministers

(1) The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister."

⁸⁴ This essay is authored by Yash Venkatraman, V B.A. LL.B., ILS Law College, Pune.

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At the inception there was no provision in the Constitution which imposed a maximum limit on the size of the Council of Ministers. But on July 7, 2004, Constitution (Ninety-first Amendment) Act came into force which inserted Article 75 (1-A) and Article 164 (1-A) which laid down that the size of the council of ministers in the union government and in a state government cannot be more than **15 per cent** of the total number of members of the Lower House of the Parliament or State Legislature respectively.

Article 75 (1-A) reads as, *“The total number of Ministers, including the Prime Minister, in the Council of Ministers shall not exceed fifteen per cent. of the total number of members of the House of the People.”*

The Statement of Object and Reasons of this Amendment Act states that, *“The NCRWC has also observed that abnormally large Councils of Ministers were being constituted by various Governments at Centre and States and this practice had to be prohibited by law and that a ceiling on the number of Ministers in a State or the Union Government be fixed.”*

But there are no express consequences provided in case this ceiling on the size of the Council of ministers is exceeded. This raises a question that, is the President empowered to exceed this limit of 15 per cent when appointing Council of Ministers for the Union?

It is submitted that the very object of the 91st Constitutional Amendment was to fix a ceiling on the number of Ministers in a State or Union. To act contrary to this restriction will be a gross violation of the said mandate. The President and the Government are under an obligation to act in accordance with the provisions of Constitution of India and not according to their whims and fancies.

In principles of statutory interpretation by Justice G.P Singh, it is observed that the Court can always take into consideration while interpreting the provisions, the historical facts and circumstances. Article 75 (1-A) and Article 164(1-A) were not in existence till 2004. After deliberation and recommendation of the standing committee it

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was introduced. The circumstances existed definitely indicate, it was to ensure that Council of Ministers does not exceed the prescribed size, therefore, the framers chose not to provide any exception. The main purpose of enacting these Article was not only to check defection on the part of the Members of Legislative Assembly but also to limit the size of the Cabinet for better governance and also to avoid heavy burden on public exchequer. Both the Union and the State Government are bound this Constitutional mandate.

Furthermore, what is directly prohibited cannot be achieved by indirect method by appointing Parliamentary Secretaries.

The Calcutta High Court in the case of *Vishak Bhattacharya vs. The State of West Bengal & Ors.* Held that, “Where it is not permissible to enlarge the Council of Ministers beyond the prescribed size, adopting an indirect method to defeat the Constitutional mandate by giving the nomenclature of Parliamentary Secretary to a Member of Legislative Assembly, who could not make it to become a Minister is nothing but defeating the very purpose and intent of the Constitutional mandate.”

In the case of *Adv. Aires Rodrigues vs. The State of Goa and others* (as cited in *Anami Narayan Roy vs. Union of India*), a Division Bench of the Bombay High Court discussed the impact of arbitrary State action relating to appointment of Parliament Secretaries in Goa. It held that appointing Parliamentary Secretaries of the rank and status of a Cabinet Minister is in violation to Article 164 (1-A) of the Constitution and set aside the appointment of two Parliamentary Secretaries in the state government. In *Citizen Rights Protection Forum vs Union of India and Others* (decided on 18 August, 2005), the Himachal Pradesh High Court quashed the appointment of Chief Parliamentary Secretaries and Parliament Secretaries. It held that Parliamentary Secretaries are usurpers of public office since their appointments did not owe their origin to any constitutional or legal

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provision, they having been appointed by person(s) not vested with the power of appointment.

The Apex Court in *Government of NCT of Delhi Vs. Union of India & Another* [Civil Appeal No. 2357 of 2017] observed that, *“When a country is endowed with a Constitution, there is an accompanying promise which stipulates that every member of the country right from its citizens to the high constitutional functionaries must idolize the constitutional fundamentals. This duty imposed by the Constitution stems from the fact that the Constitution is the indispensable foundational base that functions as the guiding force to protect and ensure that the democratic setup promised to the citizenry remains unperturbed. The constitutional functionaries owe a greater degree of responsibility towards this eloquent instrument for it is from this document that they derive their power and authority and, as a natural corollary, they must ensure that they cultivate and develop a spirit of constitutionalism where every action taken by them is governed by and is in strict conformity with the basic tenets of the Constitution.”*

Ergo it is submitted that the President is bound by this Constitutional mandate and is not empowered to exceed the limit imposed upon the size of the Council of Ministers either directly or indirectly.

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(B.) PUBLIC LAW IN THE NEWS

1. Recent developments in the Ayodhya land dispute case:

On 27th September, 2018, a three-judge bench comprising former CJI Dipak Misra and Justices Ashok Bhushan and S. Abdul Nazeer, by 2:1 majority, had refused to refer to a five-judge constitution bench for reconsideration of the observations in its 1994 Ismail Farooqi judgement that a mosque was not integral to Islam.

The most recent development pertains to the Chief Justice of India reconstituting the constitutional bench hearing Ayodhya case by replacing Justices UU Lalit and NV Ramana with Justices Ashok Bhushan and S. Abdul Nazeer.

2. Constitutional validity of the Insolvency and Bankruptcy Code :

The Constitutional validity of the IBC 2016 was challenged before the Supreme Court in *Swiss Ribbons v. Union of India*. While dismissing the petition, it was held by the Court that the classification between financial creditor and operational creditor is neither discriminatory, nor arbitrary, nor violative Of Article 14 - Sections 21 and 24 since operational creditors have no vote in the committee of creditors. Moreover, even though the operational creditors ranked below all other creditors, including other unsecured creditors who happen to be financial creditors; this does not violate Article 14 of the Indian Constitution.

In the judgment, the Court also noted the success and accomplishments of the Code since its inception.

3. The Citizenship Amendment Bill and its Salient Features:

The Citizenship Amendment Bill, 2019 was introduced in the Lok Sabha on 08-01-2019. The Bill seeks to facilitate acquisition of citizenship by 6 identified minority communities i.e. Hindus, Sikhs, Jains, Buddhists, Christians and Parsis from

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Afghanistan, Pakistan and Bangladesh who came to India before 31-12-2014. The proposed amendment will make these persecuted migrants eligible to apply for citizenship. Citizenship will be given to them only after due scrutiny and recommendation of district authorities and the State Government. The minimum residency period for citizenship is being reduced from existing 12 years under the present law to 7 years. However, the Bill has run into difficulty due to the perception of being motivated by Hindu Nationalist propaganda.

4. Supreme Court's views on Dance Bars in Maharashtra:

Partially upholding the validity of the Maharashtra Prohibition of Obscene Dance in Hotels, Restaurant and Bar Rooms and Protection of Dignity of Women (Working therein) Act, the bench comprising of Dr. AK Sikri and Ashok Bhushan held that the State must have an "open mind" in matters relating to staging dance performances in dance bars. It observed:

"State cannot take exception to staging dance performances per se. It appears from the history of legislative amendments made from time to time that the respondents have somehow developed the notion that such performances in the dance bars do not have moralistic basis."

5. Writ petitions filed against the Constitutional (103rd Amendment) Act 2019:

The Constitutional (103rd Amendment) Act 2019 seeks to provide 10% reservation of jobs in Central Government jobs, Government educational institutions as well as private higher educational institutions to the citizens belonging to the economically weaker sections of the society. Another important thing to note is that this reservation is "in addition to the existing reservations and subject to a maximum of ten per cent of the total seats in each category". This Act amends the Constitution by adding Article 15(6) and Article 16(6). Further, an explanation has been added stating that economic weakness" shall be decided on the basis of "family income" and other "indicators of economic disadvantage."

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Several writ petitions have been filed before the Supreme Court of India challenging the validity of Constitutional (103rd Amendment) Act 2019 on the ground that it violates and abrogates the basic structure of the Constitution of India by exceeding the 50% ceiling limit on reservations. The Supreme Court of India in the case of Indira Sawhney and Ors. v. Union of India held that the extent of the reservation of posts in the services under the State under Article 16(4) cannot exceed 50% of the posts in the cadre or service under the State. Considering the already existing 27 % reservation quota allotted to the OBCs and the 22% to the SC/STs, this additional 10% makes the total reservation count up to 60% approximately. The petitions further aver that the Constitution merely provides for making reservations on the basis of social and educational backwardness and not economic backwardness.

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(C.) CASES ACROSS THE POND

DATE	NAME OF THE CASE AND COURT	DECISION
22 nd January 2019	Trump v. Karnoski Trump v. Stockman (American Supreme Court)	<p>The issue before the court was whether two injunctions granted by lower courts blocking Trump administration's partial ban on transgender Americans from serving in the military should be lifted.</p> <p>The ban was imposed on the grounds of "tremendous medical costs and disruption". Transgender Americans had begun to serve in the US Military from 2016 under the Obama Administration and as per this new ban the military would no longer accept Transgender Americans. This ban was announced in July 2017 but was kept at bay vide nationwide injunctions.</p> <p>The Supreme Court voted in a 5-4 decision along conservative and liberal lines, to lift the stay on the</p>

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		policy decision hence, temporarily allowing the President to enforce the partial transgender military ban.
17 th January 2019	Finkelstein Evgeny Grigorievich. ⁸⁵ (Constitutional Court of the Russian Federation)	The issue before the court was the validity of a Russian law prohibiting foreigners from being founders of Russian media and restricting foreign ownership in media houses to 20 %. The case was filed by Evgeny Finkelstein who has dual citizenship in Russia. The court upheld the validity of the law on the grounds that it has been designed to prevent the strategic influence and control of the media which may threaten the state's information security.
17 th January 2019.	UKM v Attorney-General. ⁸⁶ (High Court of Singapore, Family Division.)	The case involved the rights of a same-sex couple to adopt a child. In this case a gay couple conceived a child through IVF and surrogacy. The issue before the court was

⁸⁵<http://www.ksrf.ru/ru/News/Pages/ViewItem.aspx?ParamId=3455>.

⁸⁶[2018] SGHCF 18 available at [https://www.singaporelawwatch.sg/Portals/0/Docs/Judgments/\[2018\]%20SGHCF%2018.pdf](https://www.singaporelawwatch.sg/Portals/0/Docs/Judgments/[2018]%20SGHCF%2018.pdf).

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		<p>whether an adoption order was in the best interests of the child on consideration of the parenting arrangement and the ethics of the means by which the child was conceived.⁸⁷</p> <p>One of the submissions canvassed against the making of an adoption order was public policy which also had to be taken into consideration in such cases. It was argued that the adoption would be contrary to public policy against the formation of same sex family units. While the court identified that the existing public policy on surrogacy was unclear, it held that such a policy as contented was not sufficiently powerful to enable the court to ignore the statutory imperative to promote the welfare of the child. The court thus allowed an adoption in favour of the gay couple by adjudging that it was not against the best interests of the child.</p>
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⁸⁷<https://blog.sconline.com/post/2019/01/17/singapore-hc-welfare-of-child-to-be-considered-before-public-policy-court-allows-adoption-by-same-sex-couple/>.

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15 th January 2019	Case of Mătăsaruv. The Republic of Moldova. ⁸⁸ (European Court of Human Rights)	<p>The issue before the court was the validity of the conviction of Anatol Mătăsaruv on grounds of demonstration of obscene sculptures in front of the Prosecutor General's office in Moldova. The applicant was given a two-year suspended prison sentence for hooliganism.</p> <p>The applicant in the present case had used sculptures to liken public officials to genitals in order to draw attention to the corruption in and political control over the Prosecutor's office.</p> <p>The ECHR held that the conviction was a violation of Article 10 of the Convention for Protection of Human Rights and Fundamental Freedoms and adjudged that the conviction was manifestly disproportionate and that it was not within the ambit of any legitimate aim pursued by the domestic authorities.</p>
10 th January	The Uk Withdrawal From	This reference was with regard to

⁸⁸[https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-189169%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-189169%22]}).

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2019.	The European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland (Scotland) ⁸⁹	the legislative competence of the Scottish Parliament to enact the European Union (Legal Continuity) (Scotland) Bill enacted as a consequence of the Brexit referendum. The UKSC held that certain parts of the bill was beyond the legislative competence of the Scottish Parliament. ⁹⁰
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⁸⁹[2018] UKSC 64 available at <https://www.supremecourt.uk/cases/docs/uksc-2018-0080-judgment.pdf>.

⁹⁰<https://www.lexology.com/library/detail.aspx?g=28fb201c-00ac-433a-bd59-000ef50795f7>.

(D.) VITAL CONSTITUTIONAL QUESTIONS

Sleeping over the Bill⁹¹

The entire controversy surrounding regarding the President's Legislative Powers turns upon the interpretation of Articles 53(1), 74(1), 74(2) and 75(3). Article 53(1) lays down that the executive power of the Union shall be vested in the President and is to be exercised by him in accordance with the Constitution i.e. in accordance with the stipulation made in Article 74(1) which provides that there shall be a Council of Ministers, with the Prime Minister at the head, to aid and advise the President in the exercise of its functions. Article 74(1) connotes that there must be always be a Council of Ministers and that the President cannot act without their advice. Hence, the President is in-fact an organic limb of the Parliament.

One of the most important legislative power of the President is the power to assent Bills. In the exercise of such a power, the President may influence the mind of the Parliament in its functioning to a considerable extent, since, all Bills passed by the Parliament require his assent to become Acts, or certain bills before being introduced or proceeded with, require to be recommended by the President.

Hence, when a bill has been passed by both the Houses of the Parliament, it shall be presented to the President for assent and the President shall declare either that he assents to the Bill or that he withholds assent therefrom.

Moreover, in accordance with Article 255, no Act of the Parliament and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by the Constitution was not given, if assent to the Act, was given by the President.

⁹¹ This essay is authored by Varad S. Kolhe, IV B.A. LL.B., ILS Law College, Pune.

Assenting Powers of the President in England and U.S.

In England, royal assent, however, is accorded as matter of course, to a Bill that has been passed by both the Houses or by the House of Commons under the Provisions of the Parliament Act, 1911 as amended in 1949. In law, the Crown still possesses the prerogative of absolute veto but absolute veto power of the Monarch has practically become obsolete since 1707, in view of the growth of the Cabinet form of government. All legislations are initiated and piloted by the Cabinet in the Parliament, the Cabinet being responsible to the popular i.e. House of Commons. The prevailing practice and usage in Britain, indicate adequately that there is at present no executive power of veto with the British monarch.

In the United States, a Bill which is presented to the President for assent may meet any of the following consequences:

1. If the President approves the Bill, it becomes law with his signature.
2. If he does not approve the bill, and returns the same within 10 days with a statement of his objection, and if it is adopted in each house again by a two-thirds majority of the members present, the Bill becomes an Act without the signature of the President. Thus, the qualified veto of the President is overridden. If the bill fails to secure two-thirds majority in each House of the Congress, the veto stands and the Bill fails to become law.
3. If the President neither signs nor returns the Bill until the 10th day limit has expired, the bill becomes a law, notwithstanding the absence of the President's assent.
4. But in the last case, if the Congress has adjourned before the expiry of the ten day limit, the Bill fails to become law. This method of preventing a Bill from becoming law is known as "pocket veto."

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The qualified veto of the American President is, in effect, an appeal to the Congress to revise its own judgment. Thus, the American President's veto is a "total veto", i.e. he must either accept or reject the Bill, as a whole. The President, however, has a ten-day limit at his disposal. He may check the Congress by his veto power, but his veto power on legislation is suspensive and not final, though the Presidency is the seat of action.

In India, however, no bill can be an Act unless and until it receives the assent of the President. When a Bill, after being passed by both Houses of Parliament is presented to the President, the President may take any one of the following steps:

1. The President may declare his assent to the Bill; or
2. He may declare that he withholds his assent to the Bill; and
3. Finally, he may, in case of Bills, other than Money Bills, return the same for reconsideration of the Houses on the desirability of introducing any such amendment as the President may recommend in his message. When a bill is so returned, the Houses are obliged to reconsider the Bill accordingly. If the Bill is passed again by both the houses of the Parliament with or without amendments, the President shall not withhold his assent therefrom.

The consequence of Indian President's veto in order to effect the enactment of a returned bill is similar to that of his American counterpart, being merely suspensive in character.

It is significant to note that the Indian Constitution does not specify any time limit within which the President, shall be required to declare his assent or refusal, or to return the Bill.⁹² Article 111 simply says, "as soon as possible" after the presentation to him of a Bill for assent. In view of the absence of the requirement of any time limit, an unwilling President would be able to exercise something like a 'pocket veto' by simply

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keeping the Bill on his desk for an indefinite period without taking any action whatsoever.

Thus, D D Basu, while commenting on the 'pocket veto' power of the President, points out that "The veto power of our President is a combination of the absolute, suspensive and pocket vetoes."

(E.) INTERSECTION(S) OF PUBLIC LAW

Citizenship and the Constitution of India⁹³

Introduction

On 8th January 2019, the Lower House of the Parliament of India passed the Citizenship (Amendment) Bill, 2019. This bill was initially introduced in the Lower House on July 19th 2016 and was referred to a Joint Parliamentary Committee on August 12th 2016. The bill came to be passed after the Committee submitted its report on January 7th 2019.⁹⁴

Certain provisions of this bill have evoked controversy because:

- i. It selectively excludes, from the present definition of “*illegal migrants*”,⁹⁵ persons belonging to minority communities from Afghanistan, Bangladesh and Pakistan (*hereinafter* “specified countries”), namely Hindus, Sikhs, Buddhists, Jains, Parsis and Christians (*hereinafter* “specified minorities”) who have been exempted⁹⁶ from the application of Passport (Entry into India) Act, 1920 and Foreigners Act, 1946 or any orders made thereunder (*hereinafter* “the Stakeholders”).⁹⁷

⁹³ This essay is authored by Rajmohan CV, IV B.A. LL.B., ILS Law College, Pune.

⁹⁴ <http://prsindia.org/billtrack/the-citizenship-amendment-bill-2016-4348>.

⁹⁵ Section 2(b) of the Citizenship Act, 1955 presently reads thus:

[In this Act, unless the context otherwise requires, -] “illegal migrant” means a *foreigner* who has entered into India –

- (i) without a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf; or
- (ii) with a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf but remains therein beyond the permitted period of time.

A *foreigner* is defined under Section 2(a) of the Foreigners Act, 1946 thus:

[In this Act] “foreigner” means a person who is not a citizen of India.

⁹⁶ http://prsindia.org/sites/default/files/bill_files/Foreigners_Act_and_Passport_Act_Notification_September_2015_0.pdf.

⁹⁷ Section 2 of the Citizenship (Amendment) Bill, 2019.

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- ii. Abates all proceedings against the Stakeholders and entitles them to apply for naturalisation.⁹⁸
- iii. It alters, for the Stakeholders, the mandatory aggregate periods of residence in India or service of a Government in India or a combination of both, during the 14 years preceding the period of twelve months of continuous residence before application for citizenship, from 11 years to 6 years.⁹⁹

These provisions have come to be criticised on the following grounds:

- A. It may violate the Right to Equality enshrined in Article 14 of the Constitution as there is an unreasonable classification on the basis of religion and as the provision is manifestly arbitrary.¹⁰⁰
- B. It will legitimise a large number of illegal migrants and confer on them the right to acquire citizenship. As per the records of the Intelligence Bureau the same is a total of 31,313 persons. This criticism arises significantly from the North-Eastern states of India which have faced the brunt of illegal immigration. It is also contended that this exercise will effectively nullify the process of updating the National Register of Citizens in Assam.¹⁰¹

In this Article, I describe the Criticism mentioned as (A) and the Government narrative with regard to the Bill. Hereinafter each part of the Article discusses related topics. Part

⁹⁸Ibid.

⁹⁹Ibid at Section 4.

The qualifications concerned for naturalisation under Section 6(1) mentioned in the Third Schedule are –

(b) *that he has either resided in India or been in the service of a Government in India or partly the one and partly the other, throughout the period of twelve months immediately preceding the date of application;*

(c) *that during the fourteen years immediately preceding the said period of twelve months, he has either resided in India or been in the service of a Government in India, or partly the one and partly the other, for periods amounting in aggregate to not less than eleven years.*

¹⁰⁰<https://www.epw.in/journal/2019/3/commentary/constitutional-case-against-citizenship.html>.

¹⁰¹<https://www.livemint.com/Politics/8s04csNIIP4FDDhKoMGpCP/Why-citizenship-amendment-bill-has-created-a-row.html>; <https://timesofindia.indiatimes.com/blogs/toi-editorials/playing-with-fire-take-back-citizenship-amendment-bill-north-east-could-burn-over-it/>.

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II deals with the question of “Who is a Citizen” and defines citizenship. Part III provides an overview of citizenship law in India. Part IV describes the Government narrative in relation to this Bill. Part V describes the operation of the bill if it comes to be enacted. Part VI will then discuss the criticism mentioned above as (A) and Part VII will conclude the Article.

Who is a Citizen?

The Citizenship Act, 1955 does not provide a definition for citizenship. Hence, a definition extrinsic to the Act has to be adopted.

Citizens are members of a State who, as such members, owes allegiance to and claims reciprocal protection from its government.¹⁰² They are the people who, by birth, registration, naturalisation or by any other specified legal means, compose the political community of a State and who in their associated capacity, have established and submitted themselves to its government for the promotion of general welfare and protection of their individual as well as collective rights.¹⁰³ They are those persons who have full political rights in a State.¹⁰⁴

The term citizen, while in its literal sense means properly the inhabitant of a city, is usually employed under the republican form of government as the equivalent of subject in monarchies of feudal origin.¹⁰⁵ This term, in contradistinction to the term subject, connotes a change in government and sovereignty from being invested in one person to the collective body of the people.¹⁰⁶ In short, a citizen is a person from a country in

¹⁰²P. Ramanatha Aiyar’s *Advanced Law Lexicon*, 4th Edition, Lexis Nexis, Pp. 809.

¹⁰³*Ibid.*

¹⁰⁴*State Trading Corporation of India v. Commercial Tax Officer*, AIR 1963 SC 1811.

¹⁰⁵*Supra* Note 58 at Pp. 810.

¹⁰⁶*State v. Manuel*, 20 NC 122, 129.

which sovereignty is believed or supposed to belong to the collective body of the people.¹⁰⁷

The above incidents of the term citizen applies to the status of citizenship in India. Every Indian citizen has to owe his allegiance to the Republic of India. This is implicit from Sections 5(2) and 6(2) of the Act which requires that an oath of allegiance as provided under the Second Schedule be taken. Only citizens of India are guaranteed certain fundamental rights such as Article 19 & 29 as well as certain constitutional rights such as the right to vote and the right to compete in elections. Lastly, India is a sovereign republic where the sovereignty resides in the people and where the government is restricted by a Constitution which embodies the will of this sovereign and is supreme.

Overview of Citizenship Law in India

In India, the law governing citizenship is contained in Part II of the Constitution of India as well as in the Citizenship Act of 1955.

Part II of the Constitution deals with citizenship at the date of commencement of the Constitution. Article 5 provides who are citizens of India at such date and Articles 6 and 8 as well as the proviso to Article 7 r/w Article 6 lays down circumstances in which a person shall be deemed to be a citizen of India. Article 7 (the main paragraph) and Article 9 provides circumstances in which citizenship shall not arise under the above provisions. Article 11 clarifies that the above provisions conferring citizenship are not in derogation of the power of Parliament¹⁰⁸ to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship. And Article 10 subjects the continuation of citizenship acquired or deemed to have been acquired under the above provisions to a law relating to citizenship made by

¹⁰⁷ Bryan A. Garner, *Garner's Dictionary of Legal Usage*, Third Edition.

¹⁰⁸ Article 246 r/w Entry 17 of List I in the Seventh Schedule. Entry 17 reads thus "Citizenship, naturalisation and aliens."

Parliament. This analysis of the scheme of Part II and the power conferred by Article 246 reveals that Parliament has been conferred the plenary power to legislate on Citizenship subject however to Part III and standards of reasonability enshrined therein.

The Parliament in exercise of this power enacted the Citizenship Act, 1955. The Act provides for citizenship by birth,¹⁰⁹descent,¹¹⁰registration,¹¹¹ naturalisation,¹¹² and by incorporation of territory.¹¹³ Citizenship may also be attained under certain special provisions of the Act such as under Section 6A which was later enacted to give effect to the Assam Accord or Section 13 which empowers the grant of citizenship by the Central Government in cases of doubt. The Act has been successively amended over the years to bring about changes in the above provisions as well as to provide for overseas citizenship. The Act also exhaustively provides for termination of citizenship. The Citizenship Act read with Part II of the Constitution of India is exhaustive of the citizenship law in India.¹¹⁴

The Citizenship Amendment Act: The Government Narrative

We may now analyse the government narrative as regards the present Citizenship Bill. Excerpts of the Statements of Object and Reason of the Act read thus:

Under the existing provisions of the [Citizenship] Act, persons belonging to the minority communities, such as Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan, who have either entered into India without valid travel documents or the validity of their documents have expired are regarded as illegal migrants and hence ineligible to apply for Indian citizenship. It is proposed to make them eligible for applying for Indian citizenship.

¹⁰⁹Section 3.

¹¹⁰Section 4

¹¹¹Section 5

¹¹²Section 6.

¹¹³Section 7

¹¹⁴*Supra* Note 68.

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Many persons of Indian origin including persons belonging to the aforesaid minority communities from the aforesaid countries have been applying for citizenship under section 5 of the Act, but are unable to produce proof of their Indian origin. Hence, they are forced to apply for citizenship by naturalisation under section 6 of the Act, which, inter alia, prescribes twelve years residency as qualification for naturalisation in terms of the Third Schedule to the Act. This denies them many opportunities and advantages that may accrue only to the citizens of India, even though they are likely to stay in India permanently. It is proposed to amend the Third Schedule to the Act to make applicants belonging to minority communities from the aforesaid countries eligible for citizenship by naturalisation in seven years instead of the existing twelve years.

The reason for amending the Third Schedule is also explained thus: “Under Section 5(1) (a) & 5(1) (c) of the Citizenship Act, 1955, a period of 07 years of residency period in respect of applicants of Indian origin seeking Indian citizenship has been prescribed. The proposed reduction in residency period from 11 to 6 years for applicants who are not of Indian origin or are unable to provide proof of Indian origin thus aims to bring it at par with requirements of residency period under Sections 5(1) (a) & 5(1) (c) of the Citizenship Act, 1955.”¹¹⁵

The purpose behind this amendment, as clear from the above excerpts as well as the report of the Joint Parliamentary Committee, is to enable acquisition of citizenship by the Stakeholders who were forced to seek shelter in India due to religious persecution or fear thereof in their countries.¹¹⁶ The Stakeholders had made representations seeking extension of their visa and also for long term visas as they could not return to their countries on grounds of religious persecution¹¹⁷ and had also demanded permanent citizenship.¹¹⁸ The Stakeholders who entered India on or before 31st December, 2014

¹¹⁵ Joint Parliamentary Committee Report, Para 4.5 available at http://prsindia.org/sites/default/files/bill_files/Joint%20committee%20report%20on%20citizenship%20%28A%29%20bill.pdf.

¹¹⁶ Joint Parliamentary Committee Report, Para 2.3, 2.39 & 2.40.

¹¹⁷ Joint Parliamentary Committee Report, Para 2.7.

¹¹⁸ Joint Parliamentary Committee Report, Para 4.3.

were thus exempted¹¹⁹ from the provisions of the Foreigners Act and proceedings thereunder as well the Passport (Entry into India) Rules in 2015 effectively resulting to be a one-time waiver or amnesty granted to them. This amendment is thus a corollary to the above notifications.¹²⁰

Operation of the Bill

The bill inserts a proviso to the definition of “illegal migrant”. The phraseology of the proviso to be inserted by the bill seems to suggest that the benefit of the same will extend to minorities of the specified classes already exempted by a prior notification¹²¹ as well as to these minorities who may be exempted through future notifications. This conclusion may be drawn from the use of the phrase “*who have been exempted*” in the first proviso that is proposed to be added, without any other specification, such as a time bar, clarifying the true import of the proviso. If the interpretation is so, then the Central Government will hold the power to exclude as well as include the specified minorities into this definition through notifications subsequent to the commencement of this Act. This implies that persons belonging to the specified minorities who arrives in India even after the commencement of this Act and who have been exempted on such arrival will also be able to content that “they have been exempted” for the purposes of the above definition.

Additionally, the proviso to be added also does not specify that the benefit accrues to those facing religious persecution. If the above mentioned interpretation is true, the proviso as it stands now can be used to extend benefit to these specified minorities from the specified countries even on grounds other than religious persecution. This issue was raised in the Joint Parliamentary Committee as well where it was explained that: *the Bill*

¹¹⁹http://prsindia.org/sites/default/files/bill_files/Foreigners_Act_and_Passport_Act_Notification_September_2015_0.pdf.

¹²⁰ Joint Parliamentary Committee Report, Para 2.7, 2.39.

¹²¹http://prsindia.org/sites/default/files/bill_files/Foreigners_Act_and_Passport_Act_Notification_September_2015_0.pdf.

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has been drafted in such a way that it gives reference to the notifications of the Ministry of Home Affairs dated 7.9. 2015 and 18.7.2016 containing the expressions “religious persecution.”¹²² This answer however does not clarify the import of the proviso on this and the above ground.

The term “illegal migrant” has been used in three Sections of the Act namely, Sections 3, 5 & 6. As regards Section 3, the bill will operate to provide citizenship to the child born of a Stakeholder and a citizen of India. The child, however, has to be born after the benefit of the exemption as regards the child’s parent comes into effect. The children born before the benefit of exemption is granted will not be a citizen under this provision as *at the time of the child’s birth* the parent is deemed to be an illegal migrant.

The operation of the bill as regards Section 5 & 6 are clear. By virtue of the bill, the Stakeholders who were thus far disqualified from applying for citizenship by registration and naturalisation will now be entitled to the same and may gain citizenship on qualifying the conditions mentioned therein. The operation of the bill as regards one of the qualifications mentioned under the Third Schedule has been mentioned above.

Criticism

Article 14 of the Constitution of India confers on every person within the territory of India the right to equality before the law and equal protection of the law. In its most fundamental exposition, this provision means that “equals shall be treated equally” and that “un-equals shall not be treated equally”. Article 14 thus prevents all kinds of unreasonable classification i.e. a classification with no intelligible differentia and which has no rational nexus to the object sought to be achieved. It is contended that the provisions of the bill violate this basic principle of law. It is so contended because:

¹²² Joint Parliamentary Committee Report, Para 2.11 & 2.12.

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- (1) Migrants from the same specified minorities who migrated on the same grounds of religious persecution but from other countries apart from those specified will continue to be illegal migrants. For instance, a Sikh who migrates from Afghanistan (A) and one who migrates from Sri Lanka (B) on the grounds of religious persecution will be treated differently as A will not be an illegal migrant whereas B will be one.
- (2) All other migrants not included in the specified minorities, migrating on the ground of religious persecution from specified countries or not, will remain an illegal migrant whereas the specified minorities will not. This contention is based on the premise that any person who migrates on grounds of religious persecution regardless of their religion or country of origin are in the same position, and thus equals.
- (3) All migrants, whether from the specified minorities and/or specified countries or not, who migrated on grounds other than religion such as Ethnicity or political opinion will remain an illegal migrant whereas the specified minorities from the specified countries will not. This contention is based on the premise that any person who migrates on grounds of persecution whether religious or otherwise and from any community or country of origin are in the same position, and thus equals.

The above contentions thus hold that the amendments would violate Article 14 on grounds of unreasonable classification as it treats equals unequally. It has also been described as manifestly arbitrary on grounds of absence of any determining principles that differentiates religious persecution from other forms as mentioned in (3) above.

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A perusal of the report¹²³ of the Joint Parliamentary Committee appointed to review the bill reveals that the matter of probable violation of Article 14 has been duly considered by the Joint Parliamentary Committee. One of the constitutional experts who deposed before the committee went to the extent of saying thus:

“I submit that mentioning minority communities, namely, Hindus, Sikhs, Jains, Parsis, and Christians, is violative of the Constitution.... my humble submission for your consideration would be that if we do not change this, it may be thrown out by the Supreme Court within minutes.”¹²⁴

One of the proposals put before the Committee by the Constitutional expert was to omit reference to the specified minorities but instead to use the term ‘persecuted minorities’.¹²⁵ The Government responded holding that it would negate the objectives of the bill,¹²⁶ as mentioned above, and would allow a wide scope of interpretation thereby losing sight of the aspect of religious persecution.¹²⁷ It was also later clarified in relation to a related proposal that all other foreigner persecuted on account of race, religion, sex, nationality, ethnic identity, membership of a particular social group or political opinion can take the benefit of the Standard Operating Procedure put in place in 2011 for such foreigners.¹²⁸

While addressing the criticism, even though claims, such as there being no place for these specified minorities to take refuge as India is the only Hindu majority country left after Nepal were made,¹²⁹ the Ministries of Law and Justice, Home Affairs and others

¹²³http://prsindia.org/sites/default/files/bill_files/Joint%20committee%20report%20on%20citizenship%20%28A%29%20bill.pdf.

¹²⁴ Joint Parliamentary Committee Report, Para 2.29.

¹²⁵ Joint Parliamentary Committee Report, Para 2.10

¹²⁶ Discussed under Part IV.

¹²⁷ Joint Parliamentary Committee Report, Para 2.10, 2.11 & 2.12.

¹²⁸ Joint Parliamentary Committee Report, Para 2.27.

¹²⁹ Joint Parliamentary Committee Report, Para 2.31.

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have not provided any substantial reasons¹³⁰ for the classifications except a reiteration of their purpose that “*the provisions of the Bill appear to have made a classification based on the fact of minority communities being persecuted in the specified countries on the basis of their religion and leaving their country without valid travel documents.*”¹³¹The responses of the ministry describe what the classification is and what its object is instead of why the classification is reasonable.

On the other hand, it has been remarked¹³² on the issue of necessity to confer citizenship on these migrants that:

"Conferment of Citizenship to foreign migrants living in India with valid documents ensures more facilities and power to exercise franchise and feel their responsibilities towards the nation. Since, India is not a signatory to the UN Convention, 1951 or its Protocol of 1967, it may not be prudent to treat them as refugees, if rules permit that they could be allowed to acquire Indian citizenship."

The reasons why the same consideration does not extend to the excluded communities cannot be traced in the committee report. The response of the government on this criticism will be clear if the matter is taken to the Supreme Court after the bill is enacted.

Conclusion

In conclusion, I contrast this bill to an earlier amendment bill¹³³ that was proposed in 2012 by Shri Kabindra Purkayastha, a former BJP MP from Silchar constituency of Assam. The 2012 bill which was a private bill is in stark contrast to the bill forwarded

¹³⁰ Joint Parliamentary Committee Report, Para 2.32

¹³¹ Joint Parliamentary Committee Report, Para 2.33.

¹³² *Id.*, Para 2.23

¹³³ http://prsindia.org/sites/default/files/bill_files/Joint%20committee%20report%20on%20citizenship%20%28A%29%20bill.pdf. at Pp. 117.

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by the BJP government in 2019 and has been presently passed by the Lower House. The Statement of Objects and Reasons¹³⁴ of the 2012 bill is illuminating. It reads thus:

“The proposed amendment in the Citizenship Act, 1955 has become necessary, after the insertion of Section 6A by the Citizenship (Amendment) Act, 1985 (Act 65 of 1985) incorporating “Special provisions as to Citizenship of persons covered by Assam Accord” because of the fact that certain category of persons have been identified as “D” voters in the Electoral Rolls of Assam.

India was partitioned in 1947 forming two countries, namely, India and Pakistan (including East Pakistan, now Bangladesh). But with the outbreak of riots in Pakistan, immediately after partition, huge number of people belonging to minority community had to flee to India owing to religious persecution, fear of such persecution, civil disturbance and the fear of civil disturbance in that country. At that time Government of India and the national leaders including the then Prime Minister, assured the people fleeing from Pakistan and Bangladesh due to religious persecution and civil disturbance full protection with dignity, honour and citizenship of India.

The proposed amendment to the Citizenship Act, 1955 (as amended till date) is required to protect the rights of the refugees from Bangladesh and Pakistan who had to leave their homeland owing to religious persecution or fear of such persecution or fear of civil disturbances and also to honour the solemn assurance given by the Government of India.”

The 2012 bill had proposed to amend Section 5(1) of the Citizenship Act vide the insertion of Cl. (bb) after Cl. (b) which reads thus:

“(bb) a person of Indian origin who has migrated or migrates to India on account of religious persecution or civil disturbance or fear of such religious persecution or disturbance from the territories now constituting Pakistan and Bangladesh”

¹³⁴ Ibid at Pp. 119

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It is also proposed to add an Explanation after Explanation I which reads thus:

“Explanation 1A. For the purpose of clause (bb) –

- (i) a person shall be deemed to be of Indian origin if he or either of his ancestors in maternal or paternal line was born in undivided India; and*
- (ii) a person of Indian origin who has migrated to migrates to India shall not be treated as illegal migrant or a foreigner under this Act or any other law for the time being in force. “.*

This amendment bill is clear in its purpose. It seeks to grant Indian citizenship to those migrants of Indian origin who as a result of the historical fact of partition had faced persecution and civil disturbance or its fear in Pakistan and Bangladesh and has taken refuge in India. The bill does not differentiate on the grounds of religion and creates a legitimate classification and classifies all refugees into two, the first being, refugees who have faced religious persecution or civil disturbance or its fear and the second being, all other refugees. The first category is further classified by the bill into three:

- a) Refugees of Indian origin who faced these circumstances in Pakistan and Bangladesh due to partition.
- b) Refugees of Non-Indian origin who have faced these circumstances in Pakistan and Bangladesh.
- c) Refugees of Indian and Non-Indian origin who have faced these circumstances in any of the countries in the world.

There exists intelligible differentia in this two fold classification as it is based on the fact of partition and consequences that arose due to it. The categories of refugees who will benefit are those directly affected by partition and its consequences whereas the other categories not benefitted have not been affected by the same. Thus it would have been legitimate to treat them apart. The object of the classification is also legitimate as it seeks

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to secure citizenship rights to those people to whom India was once homeland. The classification also bears a rational nexus to the object.

An analysis of this bill reveals some fundamental questions. If the bill of 2012, even though there are key differences¹³⁵ between the both, would have had the substantially the same effect on the refugees sought to be legitimised as the 2019 bill, then why a change in the nature of the amendments proposed? Has the fundamental principle for amendment changed? Can 2019 amendment bill also be defended on partition being ground of classification? Only time will tell.

¹³⁵ They are: 1. Exclusion of benefit to refugees from Afghanistan; 2. Inclusion of refugees belonging to communities other than the specified minorities; 3. A neater as well as less ambiguous drafting of provisions to achieve the object.

(F.) APPURTENANT SCHOLARSHIP

1. **International Journal of Constitutional Law**¹³⁶

The underlying theme for the December 2018 edition (Volume 16, Issue 4) is Law, Polity and the Legacy of Statehood. The Editorial is authored by Rosalind Dixon on Global public law scholarship and democracy. As usual the journal is meticulously curated and makes an interesting read for students of Public Law. “Comparative Constitutional Studies: Between Magic and Deceit” and “Counterproductive constitutionalization” are the recommended articles for beginners.

2. **President-Prime Minister Relations and Democratic Stability: One Decade of Semi-Presidentialism in Post-Conflict Timor-Leste**¹³⁷

The article discusses the issues and challenges that Semi-Presidentialism poses in a democracy, in the background of survival of premier-presidential regime for a decade in Timor-Leste.

3. **President's rule in the states, Rajeev Dhavan**¹³⁸

The book is a publication by Indian Law Institute and discusses the Presidential power to declare Emergency.

¹³⁶<https://academic.oup.com/icon/issue/16/4>

¹³⁷https://www.researchgate.net/publication/311486010_President-Prime_Minister_Relations_and_Democratic_Stability_One_Decade_of_Semi-Presidentialism_in_Post-Conflict_Timor-Leste

¹³⁸https://books.google.co.in/books/about/President_s_rule_in_the_states.html?id=OZJaAAAAIAAJ&redir_esc=y

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**4. Presidential Legislation in India: The Law and Practice of Ordinances,
Shubhankar Dam¹³⁹**

The book discusses Ordinance making power of the President, its practice and judicial review. This Cambridge publication is highly recommended for better understanding of Ordinance in India.

Other interesting reads on theme:

Assessing the President: The Media, Elite Opinion, and Public Support, Richard Brody¹⁴⁰

Presidential Leverage: Presidents, Approval, and the American State, Daniel E. Ponder¹⁴¹

¹³⁹<https://www.cambridge.org/core/books/presidential-legislation-in-india/A038814EA4AA9E861BD51E31240F54F7>

¹⁴⁰<https://books.google.co.in/books?hl=en&lr=&id=g7CP5OFta78C&oi=fnd&pg=PA3&dq=president+in+di&ots=8HOO1HnOVa&sig=E32ILQHEIXKDxobFkqpPtVgd3h8#v=onepage&q&f=false>

¹⁴¹https://www.sup.org/books/title/?id=28795&bottom_ref=subject

(G.) PUBLIC LAW ON OTHER BLOGS

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1. <https://blog-iacl-aidc.org/blog/2018/11/2/30-years-of-the-constitution-and-the-brazilian-presidential-election-the-challenge-of-preserving-democracy>
 2. <https://www.epw.in/journal/2018/33/indias-democracy-today/parliamentarism-not-presidentialism.html>
 3. <https://www.livelaw.in/columns/succession-planning-factor-overlooking-seniority-142294>
 4. <https://www.livelaw.in/columns/the-blind-can-indeed-judge-my-lords-142342>
 5. <https://www.livelaw.in/columns/rafale-supreme-court-and-jurisdiction-of-the-parliament-142275>
 6. <https://www.livelaw.in/columns/role-of-cji-in-collegium-142258>
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14. <http://www.icconnectblog.com/2019/01/five-questions-with-antonia-barragia/>
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(H.) MESMERIZING QUOTES

SIR S. RADHAKRISHNAN

The assertion of republicanism, the assertion of the sovereignty of the people, do not in any manner indicate antagonism to the princely rule itself. They do not refer to the present facts of the past history of the Indian States but they indicate the future aspirations of the peoples of the States

JOSEPH STORY

Republics are created by the virtue, public spirit and intelligence of the citizens. They fall, when the wise are banished from the public councils, because they dare to be honest, and the profligate are rewarded, because they flatter the people, in order to betray them

ALEXANDER HAMILTON

What is the most sacred duty and the greatest source of our security in a Republic? An inviolable respect for the Constitution and its Laws

(I.) CONTEST

1. The Indian Constitution and its Pakistani counterpart both repealed the X Act, an Act enacted and adopted by the British Parliament and which received the royal assent on 18 July, 1947. The Act contained provisions for the division and partition of British India into two independent dominions of India and Pakistan. Interestingly, barring some provisions, the X Act is yet to be repealed in the United Kingdom itself. ID X.
2. The idea of a Constituent Assembly was first propounded by this advocate of radical democracy before it was formally adopted by the Indian National Congress. He later published Constitution of Free India: A Draft in 1944, as an alternative draft of the Constitution as presently adopted. The Draft is organised around thirteen chapters of which seven deal with the Federal Union, rights and fundamental principles, provinces, economic organisation of society, judiciary and local self-government. The Draft embraces radical decentralisation and direct democracy, State/collective ownership of economic resources, proportional representation and separate electorates for minorities, and provision for free, compulsory and secular education for children up to the age of 14. ID this personality.
3. The original Constitution is an artistic marvel which was the result of the genius of X, the principal of Kala Bhavan at the Santiniketan Vishwabhavan. Along with his students, X took up the historic task of decorating the original manuscript of the Constitution of India. He was also famously asked by Jawaharlal Nehru to sketch the emblems for the Government of India's awards, including the Bharat Ratna and the Padma Shri. ID X.

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4. The first page of each of the 22 Parts of the Constitution is embraced by a personality or event related to the Indian essence/ history. Only one personality has embraced the first page of the parts of the Indian Constitution twice. Identify the personality.
5. The emergency provisions of the Indian Constitution were primarily borrowed from the Government of India Act, 1935 but a significant influence can be attributed to Article 48 of the Constitution of X. Article 48 allowed considerable powers to the President of X in an emergency, allowing him to rule by decree, to suspend civil rights and to deploy the military. Article 48 and the provision of 'Proportional Representation' was the downfall of the ill-fated X. ID X.
6. What was the direct implication (one among many) of the two publications on the modern day Constitution, wherein it was quipped by Sardar Patel that allowing the rights as they stood were tantamount to knocking 'the bottom out of our penal laws'? The same forced the government to adopt a provision which was originally proposed by Dr. Ambedkar in the Constituent Assembly Debates of December 1948 but was rejected in the final draft.
7. Which constitutional amendment was partly struck down for giving preference to the Directive Principles of State Policy over the Fundamental Rights wherein it had amended Article 31C of the Constitution to accord precedence to the Directive Principles of State Policy articulated in Part IV of the Constitution over the Fundamental Rights of individuals articulated in Part III?
8. By what act of the Indian government was the 100th Amendment introduced in the Constitution, wherein India officially lost 40 square kilometers and effectively put an end to the world's only third order land enclave known as chitmahals or pasha enclaves, allowing the residents to either reside at their present location or move to a country of their choice?

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9. Name this member of the constituent assembly (1946-1949) who was a member of the Fundamental rights sub-committee and who presented the Indian National Flag to the Assembly on 15th August 1947 on behalf of the 'women of India'. This was the first flag to fly over Independent India.
10. The first Republic Day parade, to commemorate the day when the Constitution came into effect, was not a march through Rajpath but was a parade at X. ID X.

Note: Kindly mail the solutions of this crossword to publiclawbulletin@gmail.com. Individuals who send the first two mails (in time) by January 28, 2019 emanating all correct solutions shall be awarded letters of appreciation.

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For any queries, insights, feedback, contributions, suggestions and advice, kindly write to us at publiclawbulletin@gmail.com. We eagerly look forward to hear from you.

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