

PROJECT/ASSIGNMENT

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PAPER-II

CONSTITUTIONAL LAW-II

SEMESTER - II

TOPIC FOR PRESENTATION

NATIONAL EMERGENCY

- IMPACT ON FEDERAL STRUCTURE

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Introduction

World's Largest Democracy we see in India. Whole world observed minutely the recent LOKSABHA Election. The overall percentage of voting throughout the country shows the real interest of general public in building emotional Integration of the vast nation.

An Academic Question raised time to time; whether the Indian Constitution can be characterised as FEDERAL.

Some scholars hesitate to consider the Indian Constitution as "TRULY" federal. They say it is QUASI-FEDERAL; UNITARY WITH FEDERAL FEATURES or FEDERAL WITH UNITARY FEATURES.

① According to WHEARE :- It is Quasi-Federal JENNINGS :- "Federation with strong centralizing tendency"

① M. P. JAIN - Indian Constitutional Law (P.724)
Fifth Edition, Reprint 2005
Publisher :- Wadhwa, Nagpur and New Delhi-110019

AUSTIN describes it as a "co-operative federation."

Characteristics of Federal Structure

"^②A federal structure is a complex document."

It involves division of powers between two sets of government. There is concentration of power in regard to certain subjects in the Centre e.g. The Armed Forces, foreign relations, treaties etc.

Yet there are some subjects in regard to which power rests totally with the states. e.g. Agriculture, public order, police, prisons etc.

In normal times a federation functions well. But when an enemy stands at the gate, a unified and effective response is needed immediately.

During the 2nd World War the U.S.A. and Australia transformed their constitutions with considerable help from the judiciary.

The post-war federal constitutions generally contain a mechanism in the constitution which converts it temporarily

② BRIJ KISHORE SHARMA - Introduction to the Constitution of India (P. 303) First Edition - 2002
Publisher - Prentice Hall of India, New Delhi - 110 001

into a unitary one during an emergency so that the federal principle is sacrificed for preserving the country.

Our Constitution makers were framing the Constitution immediately after the 2nd world war came to an end (1939-1945). They considered it wise to provide in constitution how the arrangement could be changed in times of extra-ordinary peril. The country must make a united effort to sustain itself in times of peril. The dividing line would vanish. But as soon as the calamity is over the normal provisions would be reset.

③ Executive power of the union

Article 53 declares the executive power of the union. It shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this constitution.

It is the duty of union to protect states against internal disturbance and external aggression. The government of every state is carried with provision of constitution.

Constitutional Position of the President

The legal powers of the president are vast. Yet he is intended to stand in relation to the union administration substantially in the same position as does the king under the English Constitution.

④ Dr. Rajendra Prasad, First President of India says "The position of the president is more or less the same as that of the king of England in constitutional matters, but the position of the Indian President is different from that of king of England, in that he is an elected person who has to justify his election whereas a hereditary king is thereby right of Birth."

He is nominal or constitutional head of the government.

His position is not like that of the president of the United States of America who is the real executive head and exercises the powers vested in him under the constitution on his own initiative and responsibility.

The presidential form of government as prevailing in America is ruled out and it is a Parliamentary type of government that is provided by the constitution of India.

④ VALMIKI CHOWDHARY - President and
The Indian Constitution (Cover Page)

First Edition - 1985

Publisher - Allied Publishers Private Limited, New Delhi
110 002

In estimating constitutional position of the president of India, the provisions of Article 53, 74 and 75 may particularly be referred to.

Article 53 vests the executive power of the Union in the president, but he is required to exercise his powers in accordance with the constitution.

Article 74 of the constitution says that there shall be council of ministers to aid and advise the president in the exercise of his functions.

Article 75(3) lays down that the Council of Ministers shall be collectively responsible to the House of the people (LOKSABHA).

⑤

NATIONAL EMERGENCY

TYPES OF EMERGENCY

The Constitution of India provides for THREE types of emergency.

A] National Emergency - due to war, external aggression or armed rebellion (Art. 352)

B] State Emergency - due to the failure of constitutional machinery in states (Art. 356)

C] Financial Emergency (Art. 360)

⑥

PROCLAMATION OF EMERGENCY

Art. 352(1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war, or external aggression or armed rebellion, he may, by proclamation, make a declaration, to that effect, in respect of the whole of India or of such part of the territory thereof as may be specified in the proclamation.

A notable feature of the Indian Constitution is the way in which the normal peace time Federalism can be adapted to an emergency situation. The framers of the constitution felt that, in an emergency the centre should have overriding powers to control and direct all aspects of administration and legislation throughout the country.

Proclamation of an emergency is a very serious matter as it disturbs the normal fabric of the constitution and

⑥ Dr. DURGA DAS BASU - Shorter Constitution of India 13th Edition, Reprint 2004. (P. 1581)
Publisher: - Wadhwa and Company Law publishers
Agra, Nagpur, New Delhi (India)

adversely affects the rights of the people. Such a proclamation should, therefore, be issued only in exceptional circumstances and not merely to keep an unpopular government in office as happened in June 1975 when an emergency was declared on the ground of internal disturbance without there being adequate justification for the same.

As a consequence thereof, the emergency provisions (especially Art. 352 and 356) have been extensively amended by the Constitution (Forty-Fourth Amendment) Act with a view to introduce a number of safeguards against abuse of powers by the executive in the name of emergency.

(7) Amendments have thus been made by the Forty-fourth Amendment to the emergency provisions of the Constitution to make repetition of the 1975 situation extremely difficult, if not impossible.

The expression 'internal disturbance' was too vague and broad. The 44th Amendment has introduced a clause, viz Art. 352(3) to the effect that the President shall not issue a proclamation of emergency, unless the decision of the Union Cabinet has been

(7) PROF. M.P.JAIN - Indian Constitutional Law (P. 673)

Fifth Edition - Reprint 2005

Publisher :- Wadhwa and Company Nagpur.

communicated to him in writing. This means that the decision to issue such a proclamation has to be arrived at collectively by the cabinet and not by the Prime Minister alone without consulting the cabinet.

It so happened in 1975 that the President proclaimed emergency on the advice of the Prime Minister alone, and Council of Ministers was later informed.

It is to avoid any such situation in future that Art. 352(3) has been introduced in the constitution.

DURATION OF EMERGENCY

Prior to the enactment of Constitution (Forty-Fourth Amendment) Act 1978, a proclamation of Emergency could remain in force in the first instance for 'two' months.

However, once approved by Parliament Emergency could remain in force indefinitely, i.e. as long as the executive wanted it to continue.

The Constitution (Forty-Fourth Amendment) Act 1978 has curtailed the power of the executive to prolong the operation of emergency unnecessarily and indefinitely. After the said amendment, a proclamation of Emergency may remain in force

⑧ Dr. RANBIR SINGH AND Dr. A. LAKSHMINATH

Constitutional Law - First Edition - 2006 (P. 113)

Publisher: - Lexis Nexis, New Delhi - 110 001

in the first instance for one month.

Such a proclamation, if approved by parliament, shall remain in force for the period of six months, unless revoked earlier.

The resolution approving the proclamation of Emergency must be passed by either House of Parliament by the special majority, i.e. by a majority of the total membership of that House, and majority of the members present and voting.

For the further continuance of Emergency beyond the period of six months, approval by Parliament would be required after every six months.

Thus, now the continuance of Emergency does not depend upon the direction of the executive it can now be done only with the approval of Parliament, and that too by a special majority of the House.

⑨ Emergency Power under Art. 356

is conditional, the condition being formation of satisfaction of the President; satisfaction of the council of Ministers since president acts on the aid and advice of the council of Ministers.

⑨ H.K. SAHARAY - The Constitution of India
- (An Analytical Approach) (P. 1172)

Fourth Edition - 2012
Publisher: - Eastern Law House, New Delhi 110 002.

Parliament may confer powers and impose duties upon the centre, or its officers and authorities even though the law pertains to a matter not in the Union List (Art. 353(1))

When emergency is declared not in the whole of India but only in part of India, the executive power of the centre to give directions, and the power of Parliament to make laws, extend not only to the state in which the territory under emergency lies, but also to any other state.

While the proclamation of emergency is in operation, the president may by order direct that any provisions (Art. 268 to 279) relating to the distribution of revenue between the centre and states shall take effect subject to such exception or modifications as he thinks fit [Art. 354(1)].

⑩ During the Emergency, Parliament can also levy any tax which ordinarily falls in the state List [Art. 250]

EMERGENCY PROVISIONS IN OTHER CONSTITUTIONS

The kind of emergency provisions as exists in the Indian Constitution are not to be found in the U.S.A., Canada and Australia.

FEDERALISM, says DICEY

"is a weak government because of the distribution of powers between the centre and the units."

⑩ PROF. M. P. JAIN - INDIAN CONSTITUTIONAL LAW

Fifth Edition - Reprint 2005 (P. 678)

Publisher: - Wadhwa and Company, Nagpur
Administrative office, 110 019.

Federations have faced the Emergency of two world wars (1911-14) and (1939-45). In U.S.A. and Australia, the emergency was met by the courts giving an expansive and liberal interpretation to the 'war' or 'defence' power of the centre, and, thus, giving it a greater area of operation than its peace-time ambit so as to enable it to do all those things which are necessary for the safety of the country, or the effective prosecution of war.

In Canada, the 'general power' of the centre was interpreted by the courts broadly and so the centre became more powerful during the wartime than it would be in the peace-time.

⑩ During the war-crisis, the Constitution of U.S.A., Canada and Australia functioned very differently from their normal peace-time behaviour.

In India, on the other hand the method provided to meet an emergency is more overt, more direct and simpler because it depends on the central executive issuing the necessary proclamation, and the incidents flowing therefrom are settled by the constitution itself without making them dependent on the judicial attitude or interpretation.

⑪ PROF. M.P. JAIN - Indian Constitutional Law
Fifth Edition - Reprint 2005 (P. 679)

Publisher:- Wadhwa and Company, Nagpur
Administrative office, 110 019.

(12)

INVOCATION OF ART. 352

Art. 352 has been invoked four times so far on NATIONAL LEVEL.

A proclamation of emergency was issued under Art. 352, for the first time, on October 26, 1962, in the wake of conflict with China. It remained in force during the Indo-Pakistan conflict in 1965 and was revoked only in January, 1968.

Emergency was proclaimed again in December 1971, as a result of the Indo-Pakistan dispute on the ground of external aggression (CREATION OF BANGLA DESH).

While the 1971 proclamation was still effective, another proclamation was issued on June 26, 1975. This time the proclamation was issued on the ground of "Internal disturbance" threatening the security of India. Both these proclamations were revoked in March 1977.

Again the proclamation of Emergency at the time of KARGIL-WAR between INDIA and PAKISTAN in 1999.

Atal Bihari Vajpeyi was the Prime Minister. He tried to build good relationship with India and Pakistan; but failed in his sincere attempt since emotional enmity was becoming stronger day by day.

(12) PROF. M. P. JAIN - Indian Constitutional Law

Fifth Edition - Reprint 2005 (P. 679)

Publisher:- Wadhwa and Company, Nagpur
Administrative office, 110 019.

(13) CRITICISM OF 1975 EMERGENCY

The proclamation of 1975 Emergency on the ground of 'internal disturbance', proved to be the most controversial. There was violation of the Fundamental Rights of the people on a large scale, drastic press censorship was imposed. A large number of persons were put in preventive detention. The reasons for imposing the emergency were explained by the Central Government in a white paper, dated July 21, 1975, and the two Houses of Parliament approved the proclamation on the same day.

The general public perception was that issuing of this proclamation amounted to misuse of power on the part of the central Government of the day in so far as there was no real emergency. The public reaction to the proclamation was so intense that when elections were held in 1977, for the LOK SABHA after the proclamation ceased to exist, the Congress Party, which was responsible for the proclamation, lost its majority and the JANATA GOVERNMENT came in power.

The Janata Government appointed the Shah Commission to probe into the circumstances which led to declaration of the emergency in 1975.

This Commission in its report held that there was no evidence of any circumstances which could warrant the declaration, of the emergency in 1975.

There was no unusual event, or even a tendency in that direction, to justify the imposition of emergency. There was no threat at all to the well-being of the nation from external or internal sources.

One of the direct results of the proclamation of the emergency 1975 was the amendment of Art. 352 by the 44th Constitutional Amendment so as to introduce some more safeguards therein against any unwarranted declaration of emergency in future.

The idea underlying the 44th Constitutional Amendment is that it ought to be ensured that what happened in 1975 is not repeated in future.

⑭ FINANCIAL EMERGENCY

The duration of a proclamation of financial emergency, will be in operation for two months and unless approved by president it shall cease to operate at the expiry of two months' period.

Art. 360 makes provisions concerning financial emergency.

⑭ Dr. J. N. PANDEY - The Constitutional Law of India
Forty Eighth Edition - 2011 (P. 766)

Publisher: - Central Law Agency, 30-D/
Motilal Nehru Road, ALLAHABAD-2.

When such proclamations is in operation, the Centre can give directions to any state to observe financial instructions as may be specified by the President.

Any such directions may provide for the reduction of salaries and allowance of all or any class of persons serving in the state. [Art. 360(4)(a)(i)]

The Centre, may require that all money bills, or those which involve expenditure from the State Consolidated Fund, shall be reserved for the President's Consideration after being passed by the State Legislature. [Art. 360(4)(a)(ii)]

⑯ Thirty-Eighth Amendment of the Constitution gave absolute powers to the PRESIDENT saying that he is not questionable in any court on any ground. However, the provision has now been deleted by the FORTY-FOURTH Amendment of Constitution.

DISTINCTION BETWEEN EMERGENCY AND MARTIAL LAW

The Presidential Proclamations are meant generally to cover the country as a whole. 'Martial law' is generally of a locally restricted application.

⑯ PROF. M. P. JAIN · Indian Constitutional Law Fifth Edition - Reprint 2005 (P. 704)

Publisher :- Wadhwa and Company, Nagpur
Administrative office, 110 019

(16) "Another difference is that conditions in which what is called 'MARTIAL LAW' may prevail result in taking over by MILITARY COURTS of powers even to try offences, and the ordinary or civil courts will not interfere with this special jurisdiction under extra-ordinary conditions. Such a taking over by MILITARY COURTS is certainly outside the provisions of Article 359(1) of the constitution taken by itself."

(17) THE ROLE OF FINANCE COMMISSIONS

"The Finance Commissions are appointed from time to time by the president to enquire into the financial matters of the states and also to allocate finances among them from central Revenues. It functions independently and submits the report to parliament."

SPECIAL POWER OF PRESIDENT

Writ proceedings will not lie against the president or governor of a state with reference to any act of omission in his official capacity.

No criminal proceedings can be instituted against the President and the Governors of states during their term of office.

No process of arrest or imprisonment of the president or the Governor of a state, shall issue from any court during his term of office.

The President or the Governor of a State shall not be answerable in any court for the exercise and performance of the powers and duties of his office or for any act done.

(16) S. K. AWASTHI - The Constitution of India
Fourth Edition - 2009 (P. 903)

Publisher :- Dwivedy Law Agency, Allahabad.

(17) VALMIKI CHOWDHARY - President and the Indian Constitution (P. 134)
Publisher : - Allied Publishers Private Limited, New Delhi-110002

CENTRE'S DUTY TO PROTECT THE STATES

Art. 355 imposes a two fold duty on the Centre.

- (i) To protect every state against external aggressions and internal disturbance, and
- (ii) To ensure that the Government of every state is carried on accordance with the provisions of the Constitution.

⑯ INQUIRY INTO COMPLAINTS AGAINST STATE CHIEF MINISTERS

It has been a common feature of Indian political life that such complaints are usually made to the centre against state chief Ministers.

On several occasions, the centre has moved against the State Chief Ministers. It appointed a commission of enquiry to go into certain charges against the Chief Ministers.

For the first time in 1984, a state minister was dismissed from office in Andhra Pradesh on the charge of corruption.

A very significant chapter has been added to the legal and constitutional history of India by the criminal prosecution of A.R. Antulay, ex-chief Minister of Maharashtra, under the Prevention of Corruption Act as a private complaint. The Supreme Court ruled that a private citizen can launch a prosecution against the ex-chief Minister on charges of corruption.

⑯ PROF. M.P. JAIN - Indian Constitutional Law.

Fifth Edition - Reprint 2005 (P. 682)

Publisher: - Wadhwa and Company, Nagpur
Administrative Office, 110 019.

Consequences of Invoking Art. 356

Under Art. 356(1)(a) The President can assume to himself the powers of the Governor. "One of the Governor's powers is to dissolve the Legislative Assembly."

⑯ When is Art. 356 invoked

"The Government of state can not be carried on in accordance with the provisions of this constitution."

Failure of the constitutional machinery in a state may arise because of various factors:-

These factors are diverse and imponderable. Some situations of the breakdown of the Constitutional machinery may be as follows:-

(i) No party in the Assembly has a majority in the State Legislative Assembly to be able to form the government.

(ii) A government in office loses its majority due to defections and no alternative government can be formed.

(iii) A government may have majority support in the House, but it may function in a manner subversive of the Constitution. As for example, it may promote fissiparous tendencies in the state.

(iv) State Government does not comply with the directions issued by the Central Government under various constitutional provisions.

⑯ PROF. M. P. JAIN - Indian Constitutional Law

Fifth Edition - Reprint 2005 (P. 689)

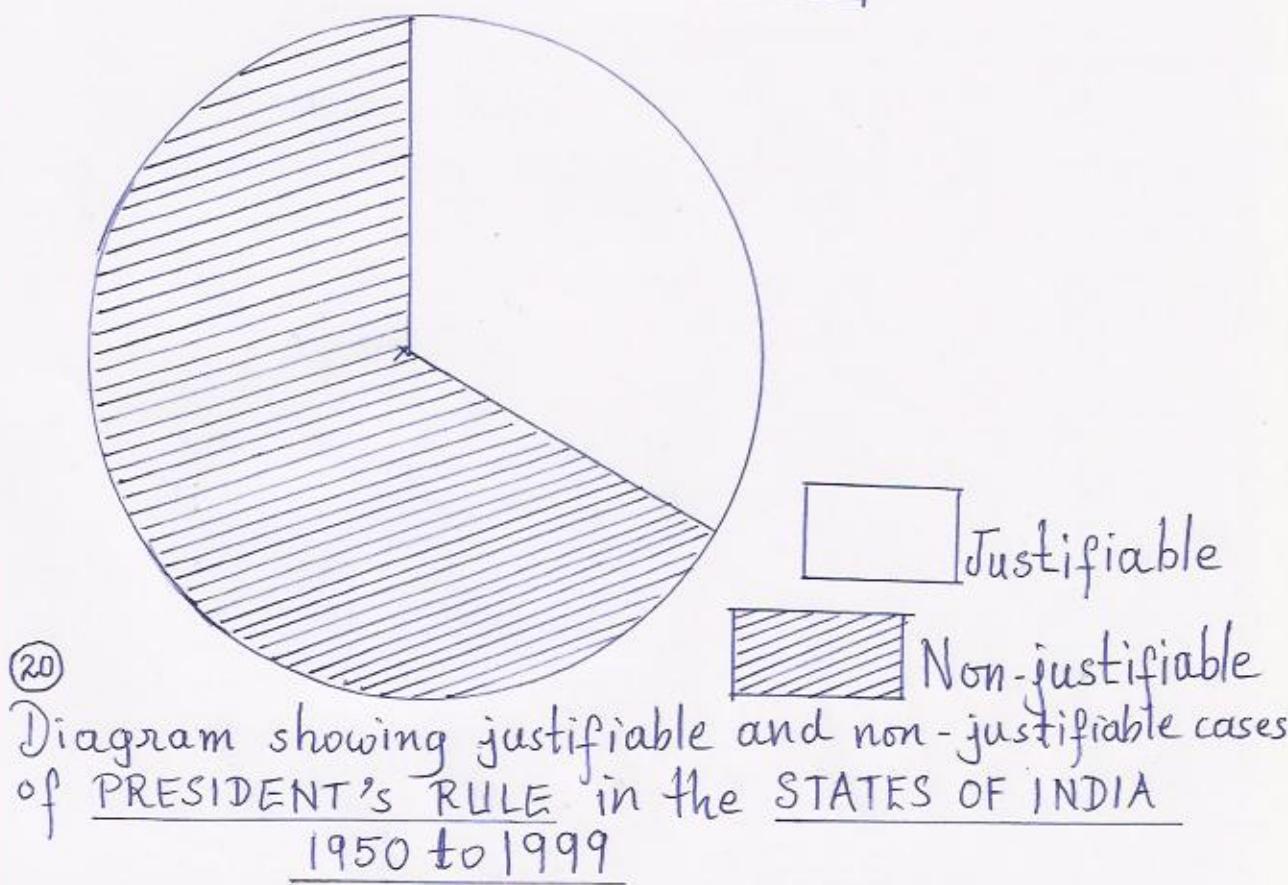
Publisher; - Wadhwa and Company, Nagpur
Administrative Office, 110 019.

(v) Security of the state may be threatened by a widespread breakdown of law and order in the state.

(vi) It may be debatable whether Art. 356(1) can be invoked when there are serious allegations of corruption against the chief Minister and the Ministers in a state.

Reading Art. 355 and 356 together it can be argued plausibly that the constitutional machinery breaks down in the state when the government indulges in corruption.

EVALUATION



② K. SURYAPRASAD - ARTICLE 356 of the Constitution of India - Promise and Performance (P. 170)
First Edition - 2001.

Publisher :- Kanishka Publishers, Distributors
New Delhi - 110 002.

② During fifty years since the inauguration of the Constitution in 1950; PRESIDENT'S RULE was proclaimed one hundred times, which amounts to an average of two times a year.

The State of Punjab was the first state in the Union where President's Rule was necessitated within two years of the commencement of the constitution.

Kerala, Punjab, U.P. have come under President's Rule as many as nine times each. Bihar and Orissa eight times each.

Bihar and Karnataka had shortest - for only eight days.

The longest in Jammu & Kashmir and Punjab.

There were only twelve years during the period 1950-1999; when no President's Rule was proclaimed in any state.

② Nine Assemblies Dissolved in 1977 (Art. 356)

- 1. Rajasthan 2. Uttar Pradesh 3. Madhya Pradesh
- 4. Punjab 5. Bihar 6. Himachal Pradesh
- 7. Orissa 8. West Bengal 9. Haryana

Nine Assemblies Dissolved in 1980 (Art. 356)

- 1. Uttar Pradesh 2. Bihar 3. Rajasthan
- 4. Madhya Pradesh 5. Punjab 6. Orissa
- 7. Gujarat 8. Maharashtra 9. Tamil Nadu

Out of 100 → Ninety instances of president's Rule in the states since the year 1967

Till 1967 Article 356 maintained its genuine spirit after which political pluralism began to dominate the scene.

① K. SURYAPRASAD - ARTICLE 356 of the Constitution of India Promise and Performance (P. 240) First Edition - 2001
Publisher:- Kanishka Publishers, Distributors, New Delhi, 110002.

② Dr. J.N. PANDEY - The Constitutional Law of India Forty Eighth Edition - 2011 (P. 752)
Publisher:- Central Law Agency, Allahabad - 2.

Special Remark

It may be stated that on most of the occasions, there was no justification for invoking Article 356 and imposing President's Rule. It is seen that the ruling party at the Centre has misused the Article 356 for its petty political ends.

(23) The Importance of National Emergency

In part XVIII of the Indian Constitution Article 352-360, are deals with the Emergency provisions to cope with the difficult situations arising suddenly and to take immediate action.

The framers of the Indian Constitution felt that a difficult situation may arise under which it might not be possible to function the democratic set up in a normal way as provided in the constitution.

For the safeguard of the Nation security and to protect the constitution an Emergency provision was made under the President Powers.

(24) While criticizing too much interference in State Government affairs during Emergency S.K. Das said — "If the widest view is accepted then there would be for all practical purposes an end of state autonomy even within the fields allotted to them under the distribution of powers envisaged by our constitution."

(23) V.P. PRADHAN - The Indian Constitution

First Edition - 2007 (P.120)

Publisher : - Ombudsman Publishing House, New Delhi-110001

(24) H.M. SEERVAI - Constitutional Law of India Third Edition 1983 - Reprint 1986 - Volume II (P.2628)

Publisher : - N.M. Tripathi Private Limited, Bombay-400 002.

②5 "If it be held that every law made by the legislature of a state which has repercussions on tariffs, licensing, marketing, regulations, price control etc. must have the previous sanction of the president, then the Constitution in so far as it gives plenary power to the states and state legislatures in the fields allocated to them would be meaningless."

CONCLUSION

We have FEDERAL and not a UNITARY form of PARLIAMENTARY GOVT.

②6 "In this Connection it may be noted that if the framers of our constitution had intended that the union should be able to supervise and interfere in the administration of states to secure good government the FRAMERS would have adopted a UNITARY CONSTITUTION for INDIA with a large devolution of power in favour of the states."

- ②5 H. M. SEERVAI - Constitutional Law of India
 Third Edition 1983 - Reprint 1986 - Volume II (P. 2628)
 Publisher: - N. M. Tripathi Private Limited, Bombay - 400 002
- ②6 _____ do. _____ do _____ (P. 2628)

The very fact that the framers enacted a federal constitution with a parliamentary form of government for the Union and States shows that internal Sovereignty was to be divided between the Union and the States.

Many ⁽²⁷⁾ Suits are filed by the States under Art. 131 — were discussed by Supreme Court.

There was the necessity of distinguishing different aspects of Mala-fide (bad faith).

In the framework of FEDERAL or QUASI-FEDERAL constitution, the question raised by the states was one of high constitutional importance, and it was so treated by the Court.

The Concept of MALA-FIDE (Bad Faith) Dishonesty (or Fraud) and malice, intention to promote private interests also possibility included.

Politicians should have fair and transparent politics for the

(27) Karnataka v. Union
Rajasthan v. Union

sound and bright future of Democracy.

(28) "the Constituent Assembly and its members were hopeful that the sovereign, socialist, secular and Democratic Republic would last for ever; founded as it was on the strength of 'WE THE PEOPLE' "

Nothing could be more dear to the framers than the idea of perpetuation of the Republican Union which they had established. Its sovereignty and territorial integrity under the constitution they had framed.

No wonder they intended to guard the quasi-federal union of the states against all eventualities including external dangers, internal disturbances and economic problems.

THE RAYS OF HOPES - We have seen in past that the whole INDIA gets united when foreign aggression is made. Emotional and national Integration of the country we saw in 1962, 1965, 1971 and 1999.

(28) PROF. Dr. M. C. JAIN KAGZI

KAGZI is the Constitution of India (P. 1535)
Very Exhaustive Commentary

SIXTH EDITION - 2004

Publisher: — R.C. Kataria - INDIA LAW HOUSE
48, MUNICIPAL MARKET, GORNAUGHT PLACE, NEW DELHI - 110 001.

Rome was not made within one day.
So India will not achieve everything
in ONE CENTURY ONLY.

We have a long way to go.
We achieved good progress after
Independence. Our literacy has gone
up. Our per-capita income
increased. Our FIVE-YEAR PLANS
are successful to certain extent.
We achieved good development
in Agriculture and Industry.
The world appreciates our
science and technology. The stress
should be given on VALUE-EDUCATION.
Our youth should be with sound
and strong character formation.

The future citizen will
build our Democracy with good
attitudes, BONA-FIDE (good faith)

The modern youth will
never keep the possibility of internal
disturbance and will be ever-ready
to protect the boundaries of nation.
Occasions of EMERGENCY will be limited.



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