CASE NO.:
Writ Petition (civil) 217 of 2004

PETITIONER:
Kuldip Nayar

RESPONDENT:
Union of India & Ors.

DATE OF JUDGMENT: 22/08/2006

BENCH:
Y.K.SABHARWAL CJI & K.G.BALAKRISHNAN & S.H.KAPADIA & C.K.THAKKER & P.K.BALASUBRAMANYAN

JUDGMENT:
JUDGMENT

[With Writ Petition (C) Nos.262, 266 and 305 of 2004)

DELIVERED BY:
Y.K.SABHARWAL, CJI

Y.K. Sabharwal, CJI

Background

By this writ petition under Article 32 of the Constitution of India, petitioner seeks to challenge amendments made in the Representation of People Act, 1951 (for short, 'the RP Act', 1951') through Representation of People (Amendment) Act 40 of 2003 which came into force from 28th August, 2003. By the said Amendment Act 2003, the requirement of "domicile" in the State Concerned for getting elected to the Council of States is deleted which according to the petitioner violates the principle of Federalism, a basic structure of the Constitution.

In the writ petition, there is a further challenge to the amendments in Sections 59, 94 and 128 of the RP Act, 1951 by which Open Ballet System is introduced which, according to the petitioner, violates the principle of 'secrecy' which, according to the petitioner, is the essence of free and fair elections as also the voter's freedom of expression which is the basic feature of the Constitution and the subject matter of the fundamental right under Article 19(1)(a) of the Constitution.

Text of the Statute before the Amending Act 40 of 2003

From 1951 upto 2003, Sections 3, 59, 94 and 128 as originally stood were as follows:

"3. Qualification for membership of the Council of States. \027 A person shall not be qualified to be chosen as a representative of any State or Union territory in the Council of States unless he is an elector for a Parliamentary Constituency in that State or territory.

59. Manner of voting at elections. \027 At every election where a poll is taken votes shall be given by ballot in such manner as may be prescribed and no votes shall be received by proxy.

94. Secrecy of voting not to be infringed. \027 No witness or other persons shall be required to state for whom he has voted at an election.

128. Maintenance of secrecy of voting.\027 (1) Every officer, clerk, agent or

other person who performs any duty in connection with the recording or counting of votes at any election shall not (except for some purposes authorized by or under any law) communicate to any person any information calculated to violate such secrecy.

(2) Any person who contravenes the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to three months or fine or with both."

By Representation of People (Amendment) Act, 2003, (Act No.40 of 2003), in Section 3 for the words 'in that state or territory', the words 'in India' were substituted.

In Sections 59, 94 and 128, following provisos were inserted at the end.

"59. Provided that the votes at every election to fill a seat or seats in the Council of States shall be given by open ballot.

94. Provided that this Section shall not apply to such witness or other person where he has voted by open ballot.

128. Provided that the provisions of this sub-section shall not apply to such officer, clerk, agent or other person who performs any such duty at an election to fill a seat or seats in the Council of States."

Issues

Two issues arise for determination in this case. The first issue relates to the content and the significance of the word 'domicile' whereas the second issue deals with importance of the concept of 'secrecy' in voting under the constitutional scheme.

Broad framework of the Constitution

The Constitution of India provides for the Union Legislature, called "Parliament", through Article 79, to consist of the President and two Houses to be known respectively as the "Council of States", also known as the Rajya Sabha and the "House of the People", also known as the Lok Sabha. There is a similar provision in Article 168 for the State Legislature, which, besides the Governor of the State, includes a "Legislative Assembly', also known as the Vidhan Sabha in each State and "Legislative Council", also known as the Vidhan Parishad, in some of the States.

In the Union Legislature, i.e., the Parliament, the Council of States, consists of (not more than) 250 members, out of whom 12 are nominated by the President in accordance with Article 80(3), the remaining 238 being "representatives of the States and of the Union Territories". The Fourth Schedule to the Constitution sets out the allocation of seats in the Council of States to be filled by such representatives of the States and of the Union Territories.

Article 80(4) provides that "the representatives of each State in the Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote". Article 80(5) further

provides that representatives of the Union Territories in the Council of States shall be chosen in such manner as Parliament may by law prescribe.

Article 84 is styled as a provision to indicate "Qualification for membership of Parliament". In clauses (a) and (b), Article 84 makes it incumbent for any person seeking to be chosen to fill a seat in Parliament to be a citizen of India and of a certain age, which in the case of a seat in the Council of States cannot be less than 30 years. Article 84(c) provides that a candidate seeking to be elected as a Member of Parliament must "possess such other qualifications as may be prescribed in that behalf by or under any law made by Parliament".

Part XV of the Constitution pertains to the subject matter of "Elections". It includes, presently, Articles 324 to 329. The superintendence, direction and control of elections vests in the Election Commission.

Article 327 confers, on the Parliament, the power, subject to the provisions of the Constitution, to make, from time to time by law, provisions with respect to "all matters relating to, or in connection with, elections", inter alia, "to either House of Parliament", including "the preparation of electoral rolls, the delimitation of the constituencies and all matters necessary for securing the due consideration of such House or Houses".

Part XI of the Constitution pertains to the "Relations between the Union and the States". Chapter I of Part XI is in respect of "Legislative Relations". Article 245 generally states that the Parliament, subject to the provisions of the Constitution, may make laws for the whole or any part of the territory of India. Article 246 vests in the Parliament "the exclusive power" to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule ("Union List", hereafter). The Union List, as given in the Seventh Schedule includes Entry No.72, which relates to, amongst others, the "Elections to Parliament".

History of RP Acts, 1950 and 1951

In the year 1952, the Parliament came to be duly constituted and summoned to meet for the first session under the provisions of the Constitution. Till then, the Constituent Assembly, which had prepared and adopted the Constitution, functioned as the Provisional Parliament, in accordance with the provision contained in Article 379. It may be added here that after the first General Elections had led to the two Houses of Parliament being constituted, Article 379, having served its purpose, was deleted by Constitution (Seventh Amendment) Act, 1956 with effect from 1st November, 1956.

The Provisional Parliament, in exercise of its authority under Article 379 read with aforementioned enabling provisions, enacted a law called the "Representation of the People Act, 1950" (the RP Act, 1950), which came into force with effect from 12th May, 1950. This law had been enacted to provide for "the allocation of seats in and the delimitation of constituencies for the purpose of election to, the House of the People and the Legislatures of States, the qualifications of voter at such elections, the preparation of electoral rolls, and matters connected therewith". It must be mentioned here that the subject matter relating to "the manner of filling seats in the Council of States to be filled by the representatives of Part-C States (later "Union Territories") was inserted in this law by way of Act 73 of 1950 (to be read with the Adaptation of Laws (No. 2) Order, 1956) which, among others, added Part IVA to the RP Act, 1950.

The RP Act, 1950 did not contain all the provisions relating to elections. Provisions for the actual conduct of

elections, amongst others, to the Houses of Parliament, the qualifications for the membership of such Houses etc. had been left to be made in subsequent measures. In order to make provisions for such other subjects, the Provisional Parliament, in exercise of its authority under Article 379 read with aforementioned enabling provisions, enacted the RP Act, 1951, which was brought into force with effect from 17th July, 1951.

Chapter I of Part II of the RP Act, 1951 related to "Qualifications for membership of Parliament". It includes two sections, namely Sections 3 and 4. We are not much concerned with Section 4 inasmuch as it pertains to qualifications for membership of the House of the People. Section 3 of the RP Act, 1951, in its original form is the main bone of contention here.

Section 3 of the RP Act, 1951, as originally enacted, read as under:

"3. Qualification for membership of the Council of States. - (1) A person shall not be qualified to be chosen as a representative of any Part A or Part B State (other than the State of Jammu and Kashmir) in the Council of States unless he is an elector for a Parliamentary constituency in that State.

(2) A person shall not be qualified to be chosen as a representative of the States of Ajmer and Coorg or of the States of Manipur and Tripura in the Council of States unless he is an elector for any Parliamentary constituency in the State in which the election of such representative is to be held.

(3) Save as otherwise provided in sub-section (2), a person shall not be qualified to be chosen as a representative of any Part C State or group of such States in the Council of States unless he is an elector for a Parliamentary constituency in that State or in any of the States in that group, as the case may be."

Section 3 of the RP Act, 1951, was substituted by the following provision through the Adaptation of Laws (No. 2) Order, 1956 and thus came to read as under:

"3. Qualification for membership of the Council of States. - A person shall not be qualified to be chosen as a representative of any State other than the State of Jammu and Kashmir or Union territory in the Council of States unless he is an elector for a Parliamentary constituency in that State or territory."

The above provision underwent a further change, with effect from 14th December, 1966, as a result of Act 47 of 1966, which made it applicable to all the States and Union Territories of India by omitting the words "other than the State of Jammu & Kashmir".

Act 40 of 2003 has amended the provision, with effect from 28th August, 2003, so as to substitute the words "in that

State or territory" with the words "in India". The amended provision reads as under:

"3. Qualification for membership of the Council of States. - A person shall not be qualified to be chosen as a representative of any State or Union territory in the Council of States unless he is an elector for a Parliamentary constituency in India."

Issue No. I : Deletion of 'domicile'

The question which needs resolution is : what is meant by the word "elector". For this, one will have to refer to certain other provisions of the RP Act, 1950 and RP Act, 1951.

The effect of the amendment to Section 3 of RP Act, 1951, brought about by Act 40 of 2003 thus is that a person offering his candidature for election to fill a seat in the Council of States is now required to be simpliciter "an elector for a Parliamentary constituency in India"; that is to say, he is no longer required to be an elector for a Parliamentary constituency in the "State or Territory" to which the seat for which he is a candidate pertains.

The word "elector" has been defined in Section 2(e) of the RP Act, 1951 which reads as under:

" 'elector' in relation to a constituency means a person whose name is entered in the electoral roll of that constituency for the time being in force and who is not subject to any of the disqualifications mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950)."

Section 16 of the RP Act, 1950, which has been referred to in the above-quoted definition of the word "elector" reads as under:

"16. Disqualifications for registration in an electoral roll. \026 (1) A person shall be disqualified for registration in an electoral roll if he \026

is not a citizen of India; or

is of unsound mind and stands so declared by a competent court; or

is for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections.

(2) The name of any person who becomes so disqualified after registration shall forthwith be struck off the electoral roll in which it is included:

Provided that the name of any person struck off the electoral roll of a constituency by reason of a disqualification under clause (c) of sub-section (1) shall forthwith be reinstated in that roll if such disqualification is, during the period such roll is in force, removed under any law authorizing such removal."

Section 19 of the RP Act, 1950 relates to the "conditions of registration". It provides as under:

"19. Conditions of registration. \026
Subject to the foregoing provisions of this Part, every person who-

is not less than [eighteen years] of age on the qualifying date, and
is ordinarily resident in a constituency,

shall be entitled to be registered in the electoral roll for that constituency."

The expression "ordinarily resident" as appearing in Section 19(b) has been explained in Section 20 of the RP Act, 1950, which may also be extracted, inasmuch as it is of great import in these matters. It reads as under:

"20. Meaning of 'ordinarily resident'. \026
(1) A person shall not be deemed to be ordinarily resident in a constituency on the ground only that he owns; or is in possession of, a dwelling house therein.

(1A) A person absenting himself temporarily from his place of ordinary residence shall not by reason thereof cease to be ordinarily resident therein.

(1B) A member of Parliament or of the Legislature of a State shall not during the term of his office cease to be ordinarily resident in the constituency in the electoral roll of which he is registered as an elector at the time of his election as such member, by reason of his absence from that constituency in connection with his duties as such member.

(2) A person who is a patient in any establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or mental defectiveness, or who is detained in prison or other legal custody at any place, shall not by reason thereof be deemed to be ordinarily resident therein.

(3) Any person having a service qualification shall be deemed to be ordinarily resident on any date in the constituency in which, but for his having such service qualification, he would have been ordinarily resident on that date.

(4) Any person holding any office in India declared by the President in consultation with the Election Commission to be an office to which the provisions of this sub-section apply, shall be deemed to be ordinarily resident on any date in the constituency in which, but for the holding of any such office, he would have been

ordinarily resident on that date.

(5) The statement of any such person as is referred to in sub-section (3) or sub-section (4) made in the prescribed form and verified in the prescribed manner, that [but for his having the service qualification] or but for his holding any such office as is referred to in sub-section (4) he would have been ordinarily resident in a specified place on any date, shall, in the absence of evidence to the contrary, be accepted as correct.

(6) The wife of any such person as is referred to in sub-section (3) or sub-section (4) shall if she be ordinarily residing with such person be deemed to be ordinarily resident on in the constituency specified by such person under sub-section (5).

(7) If in any case a question arises as to where a person is ordinarily resident at any relevant time, the question shall be determined with reference to all the facts of the case and to such rules as may be made in this behalf by the Central Government in consultation with the Election Commission.

(8) In sub-sections (3) and (5) "service qualification" means-

being a member of the armed forces of the Union; or
being a member of a force to which the provisions of the Army Act, 1950 (46 of 1950), have been made applicable whether with or without modifications; or
being a member of an armed police force of a State, who is serving outside that State; or
being a person who is employed under the Government of India, in a post outside India.

All the above provisions of law have to be read together and the conjoint effect thereof is that a person in order to qualify to be registered as an elector in relation to a constituency, besides fulfilling other qualifications, must be a citizen of India, not less than 18 years of age on the qualifying date (which by virtue of Section 14 of RP Act, 1950, means the first day of January of the year in which the electoral list of the constituency is prepared or revised), and, what is significant here, be "ordinarily resident" in that constituency.

As a result of the impugned amendment to Section 3 of the RP Act, 1951, it is no longer required that the candidate for an election to fill a seat in the Council of States be "ordinary resident" of the State to which that seat pertains.

The above amendment, which can be loosely described as an amendment doing away with the requirement of domicile, has been challenged as unconstitutional in the writ petitions at hand.

Submissions on domicile requirements

Shri Sachar, learned senior counsel for the petitioner, contended that the impugned amendment to Section 3 of the RP Act, 1951 offends the principle of Federalism, the basic feature of the Constitution; it seeks to change the character of republic which is the foundation of our democracy and that it distorts the balance of power between the Union and the States and is, therefore, violative of the provisions of the Constitution. In this connection, it was urged that the Council of States is a House of Parliament constituted to provide representation of various States and Union Territories; that its members have to represent the people of different States to enable them to legislate after understanding their problems; that the nomenclature "Council of States" indicates the federal character of the House and a representative who is not ordinarily resident and who does not belong to the State concerned cannot effectively represent the State.

Learned counsel further submits that India has adopted parliamentary system of democracy in which the Union Legislature is a bi-cameral legislature, that such legislature represents the will of the people of the State whose cause has to be represented by the members. It is urged that the impugned amendments removes the distinction in the intent and purpose of Lok Sabha and Rajya Sabha and that the mere fact that there exists numerous instances of infringement of the law concerning the requirements of residence cannot constitute a valid object or rational reason for deleting the requirement of residence. Reliance is also placed in this connection on Rajya Sabha Rules to show the importance of residence as qualification of a representative of the State. It is further contended that the requirement of domicile makes the upper House an 'alter ego' of the lower House.

Mr. Nariman, appearing on behalf of the petitioner Shri Indrajeet, while supplementing the arguments above-mentioned, contended that the Constitution and the RP Acts 1950 and 1951 respectively have always been read as forming part of an integral scheme under which a person ordinarily resident in a constituency is entitled to be registered in the electoral roll of that constituency and that the said scheme is provided for in Article 80 and Article 84 of the Constitution as also in Sections 17, 18 and 19 of the RP Act, 1950 and in Section 3 of the RP Act, 1951, which scheme guarantees the representative character of the Council. It is urged that by deletion of the word 'domicile' or 'residence' or by not reading the word 'domicile' or 'residence' in Article 80(4), the basic requirement of the representative federal body stands destroyed.

Shri Vahanvati, Ld. Solicitor General of India, on the question of domicile submitted that the impugned amendments became necessary in view of various deficiencies experienced in the working of the RP Act, 1951; that the said amendments did not alter or distort the character of the Council of States and that the concept of residence/domicile is a matter of qualification under Article 84(c) which is to be prescribed by the Parliament under the Indian Constitution unlike the US Constitution. In this connection, it was urged that the members of the Legislative Assembly are in the best position to decide as to who would represent them in the Council of States. The submission made was that by the impugned amendment, the qualification is made more broad based and that the amendment became necessary for ensuring representation of unrepresented States. According to Union of India, there is no constitutional requirement for a member of the Council of States to be either an elector or an ordinary resident of the State which he represents and, therefore, the

word "States" appearing in clause (4) of Article 80 does not comprise the requirement of residence.

Constitutional & Legislative History

(i) Rule of interpretation

Before coming to the legislative history, we may state that the rule of interpretation says that in order to discern the intention behind the enactment of a provision if ambiguous and to interpret the same, one needs to look into the historical legislative developments.

The key question is whether residence was ever treated as a constitutional requirement under Article 80(4). In re: Special Reference No. 1 of 2002 [(2002) 8 SCC 237], it was observed that:

"One of the known methods to discern the intention behind enacting a provision of the Constitution and also to interpret the same is to look into the historical legislative developments, Constituent Assembly Debates, or any enactment preceding the enactment of the Constitutional provisions."

(ii) Legislative History

The Constitution has established a federal system of Government with bi-cameral legislature at the Centre which is not something which was grafted in the Constitution for the first time. Its history goes back to Government of India Act, 1915 as amended in 1919. Even under the Government of India Act, 1919, the qualification of residence in relation to a particular constituency was considered to be unnecessary. This position is indicated by Rule XI of the then Electoral Rules. This position is also indicated by the provisions of the Government of India Act, 1935 under which the Legislature at the Centre was bi-cameral. The Lower Chamber was called 'House of Assembly'. The Upper Chamber was called 'Council of States'. Under the Government of India Act, 1935 (for short, the 'GI Act'), the Council of States was a permanent body with one-third of its members retiring every third year. Sixth Schedule to the GI Act made provisions for franchise. Part I of that Schedule contained qualifications. It did not include residence as a qualification of the elector. However, there were other parts to the Sixth Schedule which dealt with certain subjects exclusive for different provinces in which there was a requirement of residence. This was under the heading 'general requirements. However, there was no uniformity. In certain cases, residence was prescribed as a qualification (for example in the case of Central Provinces, Berar and Bengal) whereas in provinces, namely, Assam, the qualification was 'a family dwelling place or a place where the elector ordinarily resided'. Therefore, the qualification of residence was not uniform. It depended upon local conditions. It deferred from province to province.

At this stage, we may clarify that under strict federalism, the Lower House represents 'the people' and the Upper House consists of the 'Union' of the Federation. In strict federalism both the Chambers had equal legislative and financial powers. However, in the Indian context, strict federalism was not adopted.

The Council of State under the GI Act became Council of States under the Constitution of India. This fact is important. In this connection, we have to look into the minutes of the Union Constitution Committee which recorded vide Item 21 the manner of computing weight proportional representation based on population strength. The said minutes further show the recommendation that the Upper House should include

scientists, teachers etc. for which purpose, the President should be given authority to nominate. The necessity of the Upper Chamber was also the subject matter of debate in the Constituent Assembly on 28th July, 1947. These debates indicate the purpose for having the Upper Chamber. The object of the Upper Chamber as envisaged was to hold dignified debates on important issues and to share the experience of seasoned persons who were expected to participate in the debate with an amount of learning.

Finally, on 28th July, 1947, a policy decision was taken by the Constituent Assembly that the Federal Parliament shall consist of two chambers.

In the first draft Constitution, Fourth Schedule related to the composition of the Federal Parliament. Paragraph 1 of Part I of the Fourth Schedule dealt with the general qualifications for the members which included citizenship and minimum age of not less than 35 years in the case of a seat in the Council of States. The said paragraph further stated that apart from citizenship and age qualifications, it would be open to the Parliament to describe any other qualification as may be appropriate. Paragraph 6 of Part I of the Fourth Schedule appended to the first draft Constitution provided for the qualification of residence in a State for a candidate to be chosen to the Council of States. Clause 60 of the first draft Constitution stated that all matters relating to or connected with elections to either House of the Federal Parliament shall be regulated by the Fourth Schedule, unless otherwise provided by the Act of the Federal Parliament. (Emphasis supplied). However, the Fourth Schedule was omitted by the Drafting Committee. This was on 11th February, 1948. Therefore, with this deletion, the requirement of residence was done away with.

The entire discussion with regard to the legislative history is only to show that residence was never the constitutional requirement. It was never treated as an essential ingredient of the structure of the Council of States. It has been treated just a matter of qualification. Further, the legislative history shows that qualification of residence has never been a constant factor. As the legislative history shows, ownership of assets, dwelling house, income, residence etc. were considered as qualification from time to time depending upon the context and the ground reality. The power to add qualifications was given to the Federal Parliament. Therefore, the legislative history of constitutional enactments like the GI Act shows that residence or domicile are not the essential ingredients of the structure and the composition of the Upper House.

At this stage, one event needs to be highlighted. The Drafting Committee included a separate chapter under Part XIII on the subject of 'elections' to the draft Constitution which corresponded to Article 327 in Part XV of the Constitution. Article 290 empowered the Parliament to make laws providing for all matters relating to or in connection with elections to the House of Parliament. Ultimately, despite all objections against bicameral legislature, the Constituent Assembly took the decision to have Federal Parliament consisting of two chambers. In its report, the Drafting Committee recommended basic qualifications for membership of Parliament being a subject which should be left to the wisdom of the Parliament. Accordingly, the Drafting Committee recommended Article 68A which corresponds to Article 84 in the Constitution. This was the first time when a provision was included to prescribe qualifications which included citizenship and the minimum age subject to any other qualification that may be prescribed by law made by the Parliament. The

Drafting Committee justified the inclusion of Article 68A in the following words :

"Article 152 prescribes an age qualification for members of State Legislatures. There is no corresponding provision for members of Parliament. There is, moreover, a strong feeling in certain quarters that a provision prescribing or permitting the prescription of educational and other qualifications for membership both of Parliament and of the State Legislatures should be included in the Draft. If any standard of qualifications is to be laid down for candidates for membership it must be so precise that an election tribunal will be able to say, in a given case, whether the candidate satisfied it or not. To formulate precise and adequate standards of this kind will require time. Further, if any such qualifications are laid down in the Constitution itself, it would be difficult to alter them if circumstances so require. The best course would, therefore, be to insert an enabling provision in the Constitution and leave it to the appropriate legislature to define the necessary standards later. Whatever qualifications may be prescribed, one of them would certainly have to be the citizenship of India."

To sum up, the legislative history indicates that residence is not a constitutional requirement of clause (4) of Article 80. Residence is a matter of qualification. Therefore, it comes under Article 84 which enables the Parliament to prescribe qualifications from time to time depending upon the fact situation. Unlike USA, residence is not a constitutional requirement. In the context of Indian Constitution, residence/domicile is an incident of federalism which is capable of being regulated by the Parliament as a qualification which is the subject matter of Article 84. This is borne out by the legislative history.

Composition of Parliament

India's Parliament is bicameral. The two Houses along with the President constitute Parliament [Article 79]. The Houses differ from each other in many respects. They are constituted on different principles, and, from a functional point of view, they do not enjoy a co-equal status. Lok Sabha is a democratic chamber elected directly by the people on the basis of adult suffrage. It reflects popular will. It has the last word in matters of taxation and expenditure. The Council of Ministers is responsible to the Lok Sabha.

Rajya Sabha, on the other hand, is constituted by indirect elections. The Council of Ministers is not responsible to the Rajya Sabha. Therefore, the role of Rajya Sabha is somewhat secondary to that of Lok Sabha, barring a few powers in the arena of Centre-State relationship.

Rajya Sabha is a forum to which experienced public figures get access without going through the din and bustle of a general election which is inevitable in the case of Lok Sabha. It acts as a revising chamber over the Lok Sabha. The existence of two debating chambers means that all proposals and programmes of the Government are discussed twice. As a revising chamber, the Rajya Sabha helps in improving Bills

passed by the Lok Sabha. Although the Rajya Sabha is designed to serve as a Chamber where the States and the Union of India are represented, in practice, the Rajya Sabha does not act as a champion of local interests. Even though elected by the State Legislatures, the members of the Rajya Sabha vote not at the dictate of the State concerned, but according to their own views and party affiliation. In fact, at one point of time in 1973, a private member's resolution was to the effect that the Rajya Sabha be abolished.

Composition of Rajya Sabha

The maximum strength of Rajya Sabha is fixed at 250 members, 238 of whom are elected representatives of the States and the Union Territories and 12 are nominated by the President. The seats in the Upper House are allotted among the various States and Union Territories on the basis of population, the formula being one seat for each million of population for the first five million and thereafter one seat for every two million population. A slight advantage is, therefore, given to States with small population over the States with bigger population. This is called "weighted proportional representation". The system of proportional representation helps in giving due representation to minority groups. The representatives of a State in Rajya Sabha are elected by the elected members of the State Legislative Assembly in accordance with the system of proportional representation by means of a single transferable vote [Article 80(1)(b) and Article 80(4)]. Rajya Sabha is a continuing body. It has nominated members. They are nominated by the President on the advice of Council of Ministers. There is no difference in status between elected and nominated members of Rajya Sabha except that the elected members can participate in the election of the President whereas the nominated members cannot do so. One-third of its members retire every two years and their seats are filled by fresh elections and nominations.

Rajya Sabha's power under Article 249 of the Constitution

The Indian union has been described as the 'holding together' of different areas by the constitution framers, unlike the 'coming together' of constituent units as in the case of the U.S.A. and the confederation of Canada. Hence, the Rajya Sabha was vested with a contingency based power over state legislatures under Article 249, which contributes to the 'Quasi-federal' nature to the government of the Indian union. Under Article 249(1), if the Rajya Sabha declares by a resolution, supported by not less than two-thirds of it's members present and voting, that it is necessary or expedient in national interest that Parliament should make laws with respect to any of the matters enumerated in the State list [List II of Seventh Schedule read with Article 246], specified in the resolution, it shall be lawful for parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force. Article 249 clause (2) and (3) specify the limitations on the enforcement of this provision. Article 251 when read with Article 249 provides that in case of inconsistency between a law made by parliament under Article 249 and a law made by a State legislature, the Union law will prevail to the extent of such inconsistency or 'repugnancy'. In effect this provision permits the Rajya Sabha to encroach upon the specified legislative competence of a state legislature by declaring a matter to be of national importance. Though it may have been incorporated as a safeguard in the original constitutional scheme, this power allows the Union government to interfere with the functioning of a State government, which is most often prompted by the existence of opposing party-affiliations at the Central and state level. This bias towards 'Unitary power'

under normal circumstances is not seen either in U.S.A. or Canada.

Federalism

A lot of energy has been devoted on behalf of the petitioners to build up a case that the Constitution of India is federal. The nature of Federalism in Indian Constitution is no longer res integra.

There can be no quarrel with the proposition that Indian model is broadly based on federal form of governance. Answering the criticism of the tilt towards the Centre, Shri T.T. Krishnamachari, during debates in the Constituent Assembly on the Draft Constitution, had stated as follows:

"Sir, I would like to go into a few fundamental objections because as I said it would not be right for us to leave these criticism uncontroverted. Let me take up a matter which is perhaps partly theoretical but one which has a validity so far as the average man in this country is concerned. Are we framing a unitary Constitution? Is this Constitution centralizing power in Delhi? Is there any way provided by means of which the position of people in various areas could be safeguarded, their voices heard in regard to matters of their local administration? I think it is a very big charge to make that this Constitution is not a federal Constitution, and that it is a unitary one. We should not forget that this question that the Indian Constitution should be a federal one has been settled by our Leader who is no more with us, in the Round Table Conference in London eighteen years back."

"I would ask my honourable friend to apply a very simple test so far as this Constitution is concerned to find out whether it is federal or not. The simple question I have got from the German school of political philosophy is that the first criterion is that the State must exercise compulsive power in the enforcement of a given political order, the second is that these powers must be regularly exercised over all the inhabitants of a given territory; and the third is the most important and that is that the activity of the State must not be completely circumscribed by orders handed down for execution by the superior unit. The important words are 'must not be completely circumscribed', which envisages some powers of the State are bound to be circumscribed by the exercise of federal authority. Having all these factors in view, I will urge that our Constitution is a federal Constitution. I urge that our Constitution is one in which we have given power to the Units which are both substantial and significant in the legislative sphere and in the executive sphere."

(emphasis supplied)

In this context, Dr. B.R. Ambedkar, speaking in the

Constituent Assembly had explained the position in the following words:

"There is only one point of Constitutional import to which I propose to make a reference. A serious complaint is made on the ground that there is too much of centralization and that the States have been reduced to Municipalities. It is clear that this view is not only an exaggeration, but is also founded on a misunderstanding of what exactly the Constitution contrives to do. As to the relation between the Centre and the States, it is necessary to bear in mind the fundamental principle on which it rests. The basic principle of Federalism is that the legislative and executive authority is partitioned between the Centre and the States not by any law to be made by the Centre but the Constitution itself. This is what the Constitution does. The States, under our Constitution, are in no way dependent upon the Centre for their legislative or executive authority. The Centre and the States are co-equal in this matter. It is difficult to see how such a Constitution can be called centralism. It may be that the Constitution assigns to the Centre too large a field for the operation of its legislative and executive authority than is to be found in any other Federal Constitution. It may be that the residuary powers are given to the Centre and not to the States. But these features do not form the essence of federalism. The chief mark of federalism, as I said lies in the partition of the legislative and executive authority between the Centre and the Units by the Constitution. This is the principle embodied in our Constitution." (emphasis supplied)

The Constitution incorporates the concept of federalism in various provisions. The provisions which establish the essence of federalism i.e. having States and a Centre, with a division of functions between them with sanction of the Constitution include, among others, Lists II and III of Seventh Schedule that give plenary powers to the State Legislatures; the authority to Parliament to legislate in a field covered by the State under Article 252 only with the consent of two or more States, with provision for adoption of such legislation by any other State; competence of Parliament to legislate in matters pertaining to the State List, only for a limited period, under Article 249 "in the national interest" and under Article 250 during "emergency"; vesting the President with the power under Article 258(1) to entrust a State Government, with consent of the Governor, functions in relation to matters to which executive power of the Union extends, notwithstanding anything contained in the Constitution; decentralization of power by formation of independent municipalities and Panchayats through 73rd and 74th Amendment; etc.

In re: Under Article 143, Constitution of India, (Special Reference No. 1 of 1964) [AIR 1965 SC 745 (Paragraph 39 at 762)], this Court ruled thus:

"In dealing with this question, it is necessary to bear in mind one fundamental feature of a Federal Constitution. In England, Parliament is sovereign; and in the words of Dicey, the three distinguishing features of the principle of Parliamentary Sovereignty are that Parliament has the right to make or unmake any law whatever; that no person or body is recognised by the law of England as having a right to over-ride or set aside the legislation of Parliament, and that the right or power of Parliament extends to every part of the Queen's dominions (1). On the other hand, the essential characteristic of federalism is "the distribution of limited executive, legislative and judicial authority among bodies which are coordinate with and independent of each other". The supremacy of the constitution is fundamental to the existence of a federal State in order to prevent either the legislature of the federal unit or those of the member States from destroying or impairing that delicate balance of power which satisfies the particular requirements of States which are desirous of union, but not prepared to merge their individuality in a unity. This supremacy of the constitution is protected by the authority of an independent judicial body to act as the interpreter of a scheme of distribution of powers. Nor is any change possible in the Constitution by the ordinary process of federal or State legislation (2). Thus the dominant characteristic of the British Constitution cannot be claimed by a Federal Constitution like ours."

In the case of State of Karnataka v. Union of India & Anr. [1978 (2) SCR 1], Justice Untwalia (speaking for Justice Singhal, Justice Jaswant Singh and for himself), observed as follows:

"Strictly speaking, our Constitution is not of a federal character where separate, independent and sovereign State could be said to have joined to form a nation as in the United States of America or as may be the position in some other countries of the world. It is because of that reason that sometimes it has been characterized as quasi-federal in nature".

In S. R. Bommai & Ors. v. Union of India & Ors. [AIR 1994 SC 1918 : 1994 (3) SCC 1], a Constitution Bench comprising 9 Judges of this Court considered the nature of federalism under the Constitution of India. Justice A.M. Ahmadi, in Paragraph 23 of his Judgment observed as under:

"\005\005\005 the significant absence of the expressions like 'federal' or 'federation' in the constitutional vocabulary, Parliament's powers under Articles 2 and 3 elaborated earlier, the extraordinary

powers conferred to meet emergency situations, the residuary powers conferred by Article 248 read with Entry 97 in List I of the VII Schedule on the Union, the power to amend the Constitution, the power to issue directions to States, the concept of a single citizenship, the set up of an integrated judiciary, etc., etc., have led constitutional experts to doubt the appropriateness of the appellation 'federal' to the Indian Constitution. Said Prof. K. C. Wheare in his work 'Federal Government:

'What makes one doubt that the Constitution of India is strictly and fully federal, however, are the powers of intervention in the affairs of the States given by the Constitution to the Central Government and Parliament'."

Thus in the United States, the sovereign States enjoy their own separate existence which cannot be impaired; indestructible States having constituted an indestructible Union. In India, on the contrary, Parliament can by law form a new State, alter the size of an existing State, alter the name of an existing State, etc. and even curtail the power, both executive and legislative, by amending the Constitution. That is why the Constitution of India is differently described, more appropriately as 'quasi-federal' because it is a mixture of the federal and unitary elements, leaning more towards the latter but then what is there in a name, what is important to bear in mind is the thrust and implications of the various provisions of the Constitution bearing on the controversy in regard to scope and ambit of the Presidential power under Article 356 and related provisions."
(emphasis supplied)

Justice K. Ramaswami in Paragraph 247 and 248 of his separate Judgment in the same case observed as under: -

"247. Federalism envisaged in the Constitution of India is a basic feature in which the Union of India is permanent within the territorial limits set in Article 1 of the Constitution and is indestructible. The State is the creature of the Constitution and the law made by Articles 2 to 4 with no territorial integrity, but a permanent entity with its boundaries alterable by a law made by Parliament. Neither the relative importance of the legislative entries in Schedule VII, Lists I and II of the Constitution, nor the fiscal control by the Union per se are decisive to conclude that the Constitution is unitary. The

respective legislative powers are traceable to Articles 245 to 254 of the Constitution. The State qua the Constitution is federal in structure and independent in its exercise of legislative and executive power. However, being the creature of the Constitution the State has no right to secede or claim sovereignty. Qua the Union, State is quasi-federal. Both are coordinating institutions and ought to exercise their respective powers with adjustment, understanding and accommodation to render socio-economic and political justice to the people, to preserve and elongate the constitutional goals including secularism.
248. The preamble of the Constitution is an integral part of the Constitution. Democratic form of Government, federal structure, unity and integrity of the nation, secularism, socialism, social justice and judicial review are basic features of the Constitution."
(emphasis supplied)

Justice B. P. Jeevan Reddy, writing separate Judgment (for himself and on behalf of S.C. Agrawal, J.) concluded in Paragraph 276 thus:
"The fact that under the scheme of our Constitution, greater power is conferred upon the Centre vis-‘-vis the States does not mean that States are mere appendages of the Centre. Within the sphere allotted to them, States are supreme. The Centre cannot tamper with their powers. More particularly, the Courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States. \005\005\005\005must put the Court on guard against any conscious whittling down of the powers of the States. Let it be said that the federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle the outcome of our own historical process and a recognition of the ground realities. \005\005\005. enough to note that our Constitution has certainly a bias towards Centre vis-‘-vis the States (Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan, (1963) 1 SCR 491 at page 540 : (AIR 1962 SC 1406). It is equally necessary to emphasise that Courts should be careful not to upset the delicately crafted constitutional scheme by a process of interpretation.
(emphasis supplied)

In paragraph 98, Sawant, J. proceeded to observe as under: -
"In this connection, we may also refer to what Dr Ambedkar had to say while answering the debate in the Constituent

Assembly in the context of the very Articles 355, 356 and 357. \005\005\005\005. He has emphasised there that notwithstanding the fact that there are many provisions in the Constitution whereunder the Centre has been given powers to override the States, our Constitution is a federal Constitution. It means that the States are sovereign in the field which is left to them. They have a plenary authority to make any law for the peace, order and good Government of the State."

In Paragraph 106, his following observations are relevant:-

"Thus the federal principle, social pluralism and pluralist democracy which form the basic structure of our Constitution demand that the judicial review of the Proclamation issued under Article 356(1) is not only an imperative necessity but is a stringent duty and the exercise of power under the said provision is confined strictly for the purpose and to the circumstances mentioned therein and for none else." (emphasis supplied)

In ITC Ltd. v. Agricultural Produce Market Committee & Ors. [(2002) 9 SCC 232], this Court ruled thus: -

"The Constitution of India deserves to be interpreted, language permitting, in a manner that it does not whittle down the powers of the State Legislature and preserves the federalism while also upholding the Central supremacy as contemplated by some of its articles\005." (emphasis supplied)

In State of West Bengal v. Kesoram Industries Ltd. & Ors. [AIR 2005 SC 1646 : (2004) 10 SCC 201], decided by a Constitution bench comprising 5 Judges, the majority judgment in Paragraph 50 observed as under:

"Yet another angle which the Constitutional Courts would advisedly do better to keep in view while dealing with a tax legislation, in the light of the purported conflict between the powers of the Union and the State to legislate, which was stated forcefully and which was logically based on an analytical examination of constitutional scheme by Jeevan Reddy, J. in S.R. Bommai and others v. Union of India [(1994) 3 SCC 1], may be touched. Our Constitution has a federal structure. Several provisions of the Constitution unmistakably show that the Founding Fathers intended to create a strong centre\005.." (emphasis supplied)

True, the federal principle is dominant in our Constitution and that principle is one of its basic features, but, it is also equally true that federalism under Indian

Constitution leans in favour of a strong centre, a feature that militates against the concept of strong federalism. Some of the provisions that can be referred to in this context include the power of the Union to deal with extraordinary situations such as during the emergency (Article 250, 252, 253) and in the event of a proclamation being issued under Article 356 that the governance of a State cannot be carried on in accordance with the provisions of the Constitution; the power of the Parliament to legislate with respect to a matter in the State List in the national interest in case there is a resolution of the Council of States supported by prescribed majority (Article 249); the power of the Parliament to provide for creation and regulation of All India Services common to Union and the States in case there is a Resolution of the Council of States supported by not less than two-third majority (Article 312); there is only one citizenship namely the citizenship of India; and, perhaps most important, the power of the Parliament in relation to the formation of new States and alteration of areas, boundaries or names of States (Article 3).

This Court in the case of State of West Bengal v. Union of India [(1964) 1 SCR 371 at 396], has observed that our Constitution is not of a true or a traditional pattern of federation. In a similar vein are other judgments of the Court, like State of Rajasthan & Ors. v. Union of India Etc. Etc. [(1978) 1 SCR 1 at pages 4G and 33F], that speak of the conspectus of the provisions that whatever appearance of a federal structure our Constitution may have, judging by the contents of the power which a number of provisions carry with them and the use made of them, is in its operation, more unitary than federal.

The concept of federalism in our Constitution, it has been held, is vis-‘-vis the legislative power as would be evident by various Articles of the Constitution. In fact, it has come into focus in the context of distribution of legislative powers under Article 246. {ITC Ltd. V. Agricultural Produce Market Committee & Ors. [(2002) 9 SCC 232]}

The Commission on Inter-State Relations (Sarkaria Commission), in its Report has specifically said that the Constitution as emerged from the Constituent Assembly in 1949, has important federal features but it cannot be federal in the classical sense. It was not the result of an agreement to join the federation, unlike the United States. There is no dual citizenship, i.e., of the Union and the States. (Pages 8 and 9 of the Report of the Commission on Centre-State Relations, Part-I, and paragraphs 1.3.04, 1.3.05, 1.3.06, 1.3.07].

The arguments of the Writ Petitioners about the status, position, role and character of the Council of States in the Constitutional scheme have to be examined in the light of well-settled law, culled out above, as to the nature of Indian federalism.

In his attempt to argue that there necessarily has to be a territorial nexus with a State or a Union Territory in a federal set up, Mr. Rao for the State of Tamil Nadu referred to the use of the expression "We, the people of India" in the Preamble, description of India as a "Union of States" in Article 1; territory of India being comprised of (1) the territories of the States and (b) the territories of the Union Territories as per Article 1(3); Article 326 requiring a person to be a citizen of India so as to be an elector; and the provisions about citizenship of India as contained in Articles 5, 6, 8 & 9 laying stress on the territory of India. He also referred to the Collins Paperback English Dictionary to point out meanings of the expressions "Country" [a territory distinguished by its people, culture, geography, etc.; an area of land distinguished by its political autonomy; state; the people of a territory or state] and "State" [a sovereign

political power or community; the territory occupied by such a community; the sphere of power in such a community: affairs of state; one of a number of areas or communities having their own governments and forming a federation under a sovereign government, as in the U.S.].

Mr. Sachar, taking a similar line, submitted that requirement of domicile is so intrinsic to the concept of Council of States that its deletion not only negates the constitutional scheme making the working of the Constitution undemocratic but also violates the federal principle which is one of the basic features of the Constitution. He also submitted that the central idea to be kept in mind for appreciating the argument is that it is government "of the people" and "by the people".

Thus, it is the argument of the petitioners that "Birth" and "Residence" are the two constituently recognized links with a State or a Union Territory in terms of the Constitution. In order to represent a State or a Union Territory in the Council of States in terms of Article 80, a person should be a citizen of India having an identifiable nexus with the State or the Union Territory because the very concept of Council of States recognizes that in a federal constitutional set up, the States and Union Territories have their own problems, interests, concerns and views about many issues and, therefore, there shall be a forum exclusively to represent the States and the Union Territories in the national legislature, i.e. Parliament. Unless a person belongs to a State or a Union Territory, in the scheme of the Constitution he will not have the capacity to represent the State or the Union Territory, as the case may be.

But then, India is not a federal State in the traditional sense of the term. There can be no doubt as to the fact, and this is of utmost significance for purposes at hand, that in the context of India, the principle of federalism is not territory related. This is evident from the fact that India is not a true federation formed by agreement between various States and territorially it is open to the Central Government under Article 3 of the Constitution, not only to change the boundaries, but even to extinguish a State {State of West Bengal v. Union of India, [(1964) 1 SCR 371]}. Further, when it comes to exercising powers, they are weighed heavily in favour of the Centre, so much so that various descriptions have been used to describe India such as a pseudo-federation or quasi-federation in an amphibian form, etc.

The Constitution provides for the bicameral legislature at the centre. The House of the People is elected directly by the people. The Council of States is elected by the Members of the Legislative assemblies of the States. It is the electorate in every State who are in the best position to decide who will represent the interests of the State, whether as members of the lower house or the upper house.

It is no part of Federal principle that the representatives of the States must belong to that State. There is no such principle discernible as an essential attribute of Federalism, even in the various examples of upper chamber in other countries.

Other Constitutions \026 Role of Rajya Sabha vis-‘-vis role of Upper House in the other Constitutions

The growth of ’Bicameralism’ in parliamentary forms of government has been functionally associated with the need for effective federal structures. This nexus between the role of ’Second Chambers’ or Upper Houses of Parliament and better co-ordination between the Central government and those of the constituent units, was perhaps first laid down in definite

terms with the Constitution of the United States of America, which was ratified by the thirteen original states of the Union in the year 1787. The Upper House of the Congress of the U.S.A., known as the Senate, was theoretically modeled on the House of Lords in the British Parliament, but was totally different from the latter with respect to its composition and powers.

Since then, many nations have adopted a bicameral form of central legislature, even though some of them are not federations. On account of Colonial rule, these British institutions of parliamentary governance were also embodied in the British North America Act, 1867 by which the Dominion of Canada came into existence and The Constitution of India, 1950. In Canada, the Parliament consists of the House of Commons and the Senate ('Upper House'). Likewise the Parliament of the Union of India consists of the Lok Sabha (House of the People) and the Rajya Sabha (Council of States, which is the Upper House). In terms of their functions as agencies of representative democracies, the Lower Houses in the Legislatures of India, U.S.A and Canada \026 namely the Lok Sabha, the House of Representatives and the House of Commons broadly follow the same system of composition. As of now, Members of the Lower Houses are elected from pre-designated constituencies through universal adult suffrage. The demarcation of these constituencies is in accordance with distribution of population, so as to accord equity in the value of each vote throughout the territory of the country. However, with the existence of constituent states of varying areas and populations, the representation accorded to these states in the Lower House becomes highly unequal. Hence, the composition of the Upper House has become an indicator of federalism, so as to more adequately reflect the interests of the constituent states and ensure a mechanism of checks and balances against the exercise of power by central authorities that might affect the interests of the constituent states. However, the area of focus is to analyse the role of second chambers in the context of centre-state relations i.e. embodiment of different degrees of federalism. This motive also illustrates the choice of the Indian Rajya Sabha, the U.S. Senate and the Canadian Senate, since these three nations are notable examples of working federations over large territories and populations which have a high degree of diversity at the same time. The chief criterion of comparison will be the varying profile of representation accorded to the constituents units by the methods of composition and the differences in the powers vested with the 'Upper houses' in the constitutional scheme of the countries. Many Political theorists and Constitutional experts are of the opinion that in the contemporary context, 'Second Chambers' are losing their intended characteristics of effectively representing the interests of states and are increasingly becoming 'national' institutions on account of more economic, social and political affinity developing between states. Hence, a comparative study of the working of bicameralism can assist the understanding of such dynamics within a Federal system of governance.

As mentioned earlier, the emergence of Second Chamber in a Federal context was first seen in the Constitution of the United States. The thirteen original colonies had been governed under varying structures until independence from British Rule and hence the element of states' identity was carried into the subsequent Union. For purposes of the Federal legislature, there were concerns by the smaller states that the recognition of constituencies on the basis of population would accord more representation and power to the

bigger and more populous states. Furthermore, in that era, voting rights were limited to white males and hence the size of the electorates were relatively larger in the Northern states as compared to the Southern states which had a comparatively higher proportion of Negroid population who had no franchise. Hence, the motives of Federalism and ensuring of more parity between states of different sizes resulted in a compromise in the drafting of the constitution. While the Lower House of Congress, i.e. the House of representatives was to be constituted by members elected from Constituencies based on population distribution, the Senate was based on equal representation for all states. Initially, the two senators from each state were elected by the respective State legislatures but after the 17th amendment of 1913, Senators have been elected by open adult suffrage among the whole electorate of a state. This inherent motive of ensuring a counter-balance to the power of the federal government and larger states has persisted in the functioning of the Senate. This is reflected by the fact that the U.S. Senate has also been vested with certain extra-legislative powers, which distinguish it from Second Chambers in other countries. Moreover, the Senate is a continuing body with senators being elected for 6 year terms and 1/3rd of the members retiring or seeking re-election every 2 years. With the addition of more states to the Union, the numerical strength of the U.S. senate has also increased. The Parliament of the Dominion of Canada in its present from was established by the British North America Act, 1867 (also known as the Constitution Act, 1867). Canada to this day remains a constitutional monarchy with a parliamentary form of government, and a Governor-General appointed by the British sovereign acts as the nominal head of state. Prior to the 1867 Act, the large territories that now constitute Canada (with the exception of Quebec, which had the historical influence of French rule) were being administered as distinct territories. This act established a confederation among the constituent provinces. Hence, the parliament of the Dominion was in effect the federal legislature comprising of the House of Commons and the Senate. The Senate was given two major functions in the constitution. First, it was to be the chamber of "sober second thought". Such a limit should prevent the elected House of Commons from turning Canada into a "mobocracy", as the framers of Confederation (the 1867 Act) saw in case of the U.S.A. The Senate was thus given the power to overturn many types of legislation introduced by the Commons and also to delay any changes to the constitution, thus 'preventing the Commons from committing any rash actions'. While the House of Commons was to be constituted through constituency based elections on the lines of the House of Commons in the British Parliament and the House of Representatives in the U.S. Congress, the Senate accorded equivalent representation to designated regions rather than the existing provinces. The number of senators from each state has consequently varied with changes in the confederation. However, the Canadian senators are appointed by the Governor-General in consultation with the Executive and hence the Canadian senate has structurally been subservient to the House of Commons and consequently also to the Federal executive to an extent. This system of appointment of senators was preferred over an electoral system owing to unfavourable experiences with elected 'Second Chambers' like the Legislative Councils in Ontario and Quebec, prior to the formation of the Confederation in 1867. Another compelling factor behind the designing of a weak senate was the then recent example of the United States where some quarters saw the Civil war as a direct consequence of

allowing too much power to the states. However, the role of the Canadian senate has been widely criticized owning to it's method of composition.

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

In India, Article 80 of the Constitution of India prescribes the composition of the Rajya Sabha. The maximum strength of the house is 250 members, out of which up to 238 members are the elected representatives of the states and the Union territories [Article 80(1) (b)], and 12 members are nominated by the President as representatives of non-political fields like literature, science, art and social services [Articles 80(1)(a) and 80(3)]. The members from the states are elected by the elected members of the respective State legislative assemblies as per the system of Proportional representation by means of the single transferable vote [Article 80(4)]. The manner of election for representatives from Union territories has been left to prescription by parliament [Article 80(5)]. The allocation of seats for the various states and union territories of the Indian Union is enumerated in the Fourth schedule to the constitution, which is read with Articles 4(1) and 80(2). This allocation has obviously varied with the admission and re-organisation of States.

Under Article 83(1), the Rajya Sabha is a permanent body with members being elected for 6 year terms and 1/3rd of the members retiring every 2 years. These 'staggered terms' also lead to a consequence where the membership of the Rajya Sabha may not reflect the political equations present in the Lok Sabha at the same time. The Rajya Sabha cannot be dissolved and the qualifications for its membership are citizenship of India and an age requisite of 30 years [Article 84]. As per Article 89, the Vice-president of India is the Ex-officio Chairman of the Rajya Sabha and the House is bound to elect a Deputy Chairman. Articles 90, 91, 92 and 93

further elaborate upon the powers of these functionaries.
The American Senate on the other hand accords equal representation to all 50 states, irrespective of varying areas and populations. Under Article 1, section 3 of the U.S. Constitution, two senators are elected from every state by an open franchise, and hence the total membership of the Senate stands at 100. It is generally perceived in American society that the office of a senator commands more prestige than that of a member in the House of Representatives. As has been stated before, Senators were chosen by members of the respective State legislatures before the 17th amendment of 1913 by which the system of open franchise was introduced. The candidates seeking election to the Senate have to be more than 30 years old and should have been citizens of the U.S.A. for more than 9 years and also should have legal residence in the state they are seeking election from. Senators are elected for 6 year terms, with 1/3rd of the members either retiring or seeking re-election every 2 years. Senators can run for re-election an unlimited number of times. The Vice President of the U.S.A. serves as the presiding officer of the Senate, who has a right to vote on matters only in case of a deadlock. However, for all practical purposes the presiding function is performed by a President Pro Tempore (Temporary presiding officer), who is usually the senator from the majority party with the longest continuous service. The floor leaders of the majority and minority parties are chosen at separate meetings for both parties (known as Caucus/conference) that are held before each new session of Congress. The Democratic and Republican parties also choose their respective Whips and Policy committees in the Caucus.
The Senate in the Canadian Parliament, is however not an elected body. As indicated earlier, the Senators are appointed by the Governor-General on the advice of the Prime Minister. The membership of the house as of today is 105 and it accords equivalent representation to designated regions and not necessarily the constituent provinces and territories. The Prime Minister’s decision regarding appointment of senators does not require the approval of anyone else and is not subject to review. The qualifications for membership are an age requirement of 30 years, citizenship of the Dominion of Canada by natural birth or naturalization and residency within the province from where appointment is sought. In the case of Quebec, appointees must be residents of the electoral district for which they are appointed. Once appointed, senators hold office until the age of 75 unless they miss two consecutive sessions of Parliament. Until 1965, they used to hold office for life. Even though the Canadian senate is seen as entirely dependent on the Executive owing to party affiliations in appointments, the provision for holding terms till the age of 75 does theoretically allow for the possibility of the Opposition to command a majority in the Senate and thereby disagree with the Lower House or the executive, since the members of the Lower House are elected for 5 year terms.
Now that a general idea has been gained on the methods of composition of the Second Chambers in India, U.S.A. and Canada, one can analyse the varying degree of representation accorded to constituent states in the three systems before proceeding to compare the policy scope as well as the practical and extra-legislative powers accorded to these chambers.
The idea of equal representation for states in the Senate was built into the American Constitution. The 17th amendment can hence be considered a reform in so far as it threw the election of senators open to the general public. However, the weightage accorded to each vote across states is inversely proportional to the population of the concerned state.

Hence, actual representation per vote in the U.S. senate is higher for smaller states and likewise much lower for more populous states. On a theoretical as well as practical standpoint, this can create situations where the representatives of the minority of the electorate can guide legislation over those of the majority.

Canada opted for a variation of the equivalent representation for designated regions and hence the representation accorded to provinces and territories was loosely based on population distribution. However, demographic changes over many decades impact the actual representation accorded to each territory. Furthermore, the nominal system of appointment to the Canadian Senate creates the position that the will of the Senate will ordinarily flow with the federal executive.

The unequal yet weighed proportional representation method adopted for Rajya Sabha elections was a consequence of the analysis of representation in other federal bicameral legislatures. Even though it was recognized that smaller states required safeguards in terms of representation, it was further observed that enforcing equal representation for states like in the U.S.A. would create immense asymmetry in the representation of equally divided segments of the electorate. Furthermore, the formation and re-organisation of states in India since independence has largely been on linguistic lines and other factors of cultural homogeneity among groups, where the sizes of these communities vary tremendously in comparison to each other. Hence, allocating seats to the states in the Rajya Sabha, either on equal terms or absolutely in accordance with population distribution would have been extreme solutions. Hence, the formula applied for the purposes of allocation of seats in the Fourth schedule seems to be a justifiable solution. This point can be illustrated with the trend that between 1962 and 1987, six new states were carved out of Assam. If India had followed the equal representation model, these new states, containing barely 1% of India's population, would have had to be given 25% of all the votes in the upper chamber. Hypothetically, the more populous states would never have allowed this. Thus an essential feature of the working of federalism in India i.e. the creation of new states, some of which had violent separatist tendencies, would have been difficult under the U.S. principle of representation for each state equally.

The Irish Constitution like the Indian Constitution does not have strict federalism. Residence is not insisted upon under the Irish Constitution (See Constitution of India by Basu, 6th Edn. Vol.F). Similarly, in the case of Japanese Constitution, qualifications are prescribed by the statute and not by the Constitution. The various constitutions of other countries show that residence, in the matter of qualifications, becomes a constitutional requirement only if it is so expressly stated in the Constitution. Residence is not the essence of the structure of the Upper House. The Upper House will not collapse if residence as an element is removed. Therefore, it is not a prerequisite of federalism.

It can be safely said that as long as the State has a right to be represented in the Council of States by its chosen representatives, who are citizens of the country, it cannot be said that federalism is affected. It cannot be said that residential requirement for membership to the Upper House is an essential basic feature of all Federal Constitutions. Hence, if the Indian Parliament, in its wisdom has chosen not to require residential qualification, it would definitely not violate the basic feature of Federalism. Our Constitution does not cease to be a federal constitution simply because a Rajya

Sabha Member does not "ordinarily reside" in the State from which he is elected.
Whether Basic structure doctrine available to determine validity of a statute

The question arises as to whether the ground of violation of the basic feature of the Constitution can be a ground to challenge the validity of an Act of Parliament just as it can be a ground to challenge the constitutional validity of a constitutional amendment. It has been submitted on behalf of Union of India that basic structure doctrine is inapplicable to Statutes.

Mr. Sachar was, however, at pains to submit arguments in support of affirmative plea in this regard. He referred to Dr. D.C. Wadhwa & Ors. v. State of Bihar & Ors. [1987 (1) SCC 378] as an earlier case wherein the Bihar Intermediate Education Council Ordinance, 1985 was struck down as unconstitutional and void on the basis that it was repugnant to the constitutional scheme.

In that case Government of Bihar was found to have "made it a settled practice to go on re-promulgating ordinances from time to time and this was done methodologically and with a sense of deliberateness". Immediately at the conclusion of each session of the State legislature, a circular letter would be sent by the Special Secretary in the Department of Parliamentary Affairs to all the Departments intimating to them that the session of the legislature had been got prorogued and that under Article 213 clause (2)(a) of the Constitution all the ordinances would cease to be in force after six weeks of the date of reassembly of the legislature and "that they should therefore get in touch with the Law Department and immediate action should be initiated" to get all the concerned ordinances re-promulgated before the date of their expiry.

This Court in above fact situation held and observed as under :-

"When the constitutional provision stipulates that an ordinance promulgated by the Governor to meet an emergent situation shall cease to be in operation at the expiration of six weeks from the reassembly of the legislature and the government if it wishes the provisions of the ordinance to be continued in force beyond the period of six weeks has to go before the legislature which is the constitutional authority entrusted with the law-making function, it would most certainly be a colourable exercise of power for the government to ignore the legislature and to repromulgate the ordinance and thus to continue to regulate the life and liberty of the citizens through ordinance made by the executive. Such a strategem would be repugnant to the constitutional scheme, as it would enable the executive to transgress its constitutional limitation in the matter of law-making in an emergent situation and to covertly and indirectly arrogate to itself the law-making function of the legislature."

Noticeably the above view was taken about the Ordinances issued by the State of Bihar in the face of clear

violation of the express constitutional provisions.

The learned counsel next referred to L. Chandra Kumar v. Union of India & Ors. [1997 (3) SCC 261 (7 Judges) (Paragraph 17 page 277 and Paragraph 99 at p.311)], in which case not only was the Constitutional amendment depriving High Court of its jurisdiction under Article 226 and 227 (from decisions of Administrative Tribunal) struck down on the ground that taking away judicial review from the High Courts violated the basic structure doctrine but even Section 28 of the Administrative Tribunal Act 1985, providing for "exclusion of jurisdiction of Courts except the Supreme Court under Article 136 of Constitution" was also struck down.

In the above context, reference has also been made to Indra Sawhney v. Union of India & Ors. [2000 (1) SCC 168 at page 202 (Paragraph 65)]. A Bench of 3 Judges of this Court expressly held in that case that a State enacted law (Kerala Act on creamy layer) violated the doctrine of basic structure. The question before the Court essentially was as to whether the right to equality guaranteed by the Constitution and the law declared by the Supreme Court could be set at naught by a legislative enactment. The issues raised also concerned the legislative competence of the State Legislature. In paragraph 65 of the judgment, it was observed as under:-

"\005.Parliament and the legislature in this country cannot transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet. Whether the creamy layer is not excluded or whether forward castes get included in the list of backward classes, the position will be the same, namely, that there will be a breach not only of Article 14 but of the basic structure of the Constitution. The non-exclusion of the creamy layer or the inclusion of forward castes in the list of backward classes will, therefore, be totally illegal. Such an illegality offending the root of the Constitution of India cannot be allowed to be perpetuated even by constitutional amendment. The Kerala Legislature is, therefore, least competent to perpetuate such an illegal discrimination. What even Parliament cannot do, the Kerala Legislature cannot achieve."

It is well settled that legislation can be declared invalid or unconstitutional only on two grounds namely, (i) lack of legislative competence and (ii) violation of any fundamental rights or any provision of the Constitution (See \026 Smt. Indira Nehru Gandhi v. Raj Narain, [1975 Supp SCC 1]). In other cases relied upon by Mr. Sachar where observations have been made about a statute being contrary to basic structure, the question was neither raised nor considered that basic structure principle for invalidation is available only for constitutional amendments and not for statutes.

A.N. Ray, CJ, in Indira Nehru Gandhi's case (supra), observed in paragraph 132 as under: -

"The contentions on behalf of the respondent that ordinary legislative measures are subject like Constitution Amendments to the restrictions of not damaging or destroying basic structure, or basic features are utterly unsound. It

has to be appreciated at the threshold that the contention that legislative measures are subject to restrictions of the theory of basic structures or basic features is to equate legislative measures with Constitution Amendment.
(emphasis supplied)"

In paragraph 153 of his judgment, he ruled as under: -
"The contentions of the respondent that the Amendment Acts of 1974 and 1975 are subject to basic features or basic structure or basic framework fails on two grounds. First, legislative measures are not subject to the theory of basic features or basic structure or basic framework. Second, the majority view in Kesavananda Bharati's case (supra) is that the Twenty-ninth Amendment which put the two statutes in the Ninth Schedule and Article 31-B is not open to challenge on the ground of either damage to or destruction of basic features, basic structure or basic framework or on the ground of violation of fundamental rights."
(emphasis supplied)

In same case, K.K. Mathew, J. in Paragraph 345 of his separate judgment ruled as under: -
"I think the inhibition to destroy or damage the basic structure by an amendment of the Constitution flows from the limitation on the power of amendment under Article 368 read into it by the majority in Bharati's case (supra) because of their assumption that there are certain fundamental features in the Constitution which its makers intended to remain there in perpetuity. But I do not find any such inhibition so far as the power of Parliament or State Legislatures to pass laws is concerned. Articles 245 and 246 give the power and also provide the limitation upon the power of these organs to pass laws. It is only the specific provisions enacted in the Constitution which could operate as limitation upon that power. The preamble, though a part of the Constitution, is neither a source of power nor a limitation upon that power. The preamble sets out the ideological aspirations of the people. The essential features of the great concepts set out in the preamble are delineated in the various provisions of the Constitution. It is these specific provisions in the body of the Constitution which determine the type of democracy which the founders of that instrument established; the quality and nature of justice, political, social and economic which was their desideratum, the content of liberty of thought and expression which they entrenched in that document, the scope of equality of status

and of opportunity which they enshrined in it. These specific provisions enacted in the Constitution alone can determine the basic structure of the Constitution as established. These specific provisions, either separately or in combination determine the content of the great concepts set out in the preamble. It is impossible to spin out any concrete concept of basic structure out of the gossamer concepts set out in the preamble. The specific provisions of the Constitution are the stuff from which the basic structure has to be woven. The argument of Counsel for the respondent proceeded on the assumption that there are certain norms for free and fair election in an ideal democracy and the law laid down by Parliament or State Legislatures must be tested on those norms and, if found wanting, must be struck down. The norms of election set out by Parliament or State Legislatures tested in the light of the provisions of the Constitution or necessary implications therefrom constitute the law of the land. That law cannot be subject to any other test, like the test of free and fair election in an ideal democracy."

(emphasis supplied)

In Paragraph 356, he proceeded to rule as under: -

"There is no support from the majority in Bharati's case (supra) for the proposition advanced by Counsel that an ordinary law, if it damages or destroys basic structure should be held bad or for the proposition that a constitutional amendment putting an Act in the Ninth Schedule would make the provisions of the Act vulnerable for the reason that they damage or destroy a basic structure constituted not by the fundamental rights taken away or abridged but some other basic structure. And, in principle, I see no reason for accepting the correctness of the proposition."

(emphasis supplied)

In same case, Chandrachud, J. in Paragraph 691 of his separate judgment ruled as under: -

"Ordinary laws have to answer two tests for their validity: (1) The law must be within the legislative competence of the legislature as defined and specified in Chapter I, Part XI of the Constitution, and (2) it must not offend against the provisions of Article 13(1) and (2) of the Constitution. "Basic structure", by the majority judgment, is not a part of the fundamental rights nor indeed a provision of the Constitution. The theory of basic structure is woven out of the conspectus of the Constitution and the amending power is subjected to it

because it is a constituent power. "The power to amend the fundamental instrument cannot carry with it the power to destroy its essential features \027 this, in brief, is the arch of the theory of basic structure. It is wholly out of place in matters relating to the validity of ordinary laws made under the Constitution." (emphasis supplied)

In Paragraph 692, he would rule as under: - "There is no paradox, because certain limitations operate upon the higher power for the reason that it is a higher power. A constitutional amendment has to be passed by a special majority and certain such amendments have to be ratified by the legislatures of not less than one-half of the States as provided by Article 368(2). An ordinary legislation can be passed by a simple majority. The two powers, though species of the same genus, operate in different fields and are therefore subject to different limitations." (emphasis supplied)

A Constitution Bench (7 Judges) in State of Karnataka v. Union of India & Anr. [(1977) 4 SCC 608] held, per majority, (paragraph 120) as under:- "\005\005 in every case where reliance is placed upon it, in the course of an attack upon legislation, whether ordinary or constituent (in the sense that it is an amendment of the Constitution), what is put forward as part of "a basic structure" must be justified by references to the express provisions of the Constitution\005\005"

In Paragraph 197, it was observed as under: - "\005\005.if a law is within the legislative competence of the Legislature, it cannot be invalidated on the supposed ground that it has added something to, or has supplemented, a constitutional provision so long as the addition or supplementation is not inconsistent with any provision of the Constitution\005."

The following observations in Paragraph 238 of same judgment are also germane to the issue: - "Mr. Sinha also contended that an ordinary law cannot go against the basic scheme or the fundamental backbone of the Centre-State relationship as enshrined in the Constitution. He put his argument in this respect in a very ingenious way because he felt difficulty in placing it in a direct manner by saying that an ordinary law cannot violate the basic structure of the Constitution. In the case of Smt Indira Nehru Gandhi v. Shri Raj Narain such an argument was expressedly rejected by this Court\005\005.."

The doctrine of 'Basic Feature' in the context of our Constitution, thus, does not apply to ordinary legislation which has only a dual criteria to meet, namely:

(i) It should relate to a matter within its competence;

(ii) It should not be void under Article 13 as being an unreasonable restriction on a fundamental right or as being repugnant to an express constitutional prohibition.

Reference can also be made in this respect to Public Services Tribunal Bar Association v. State of U.P. & Anr. [2003 (4) SCC 104] and State of Andhra Pradesh and Ors. V. McDowell & Company & Ors. [1996(3) SCC 709].

The basic structure theory imposes limitation on the power of the Parliament to amend the Constitution. An amendment to the Constitution under Article 368 could be challenged on the ground of violation of the basic structure of the Constitution. An ordinary legislation cannot be so challenged. The challenge to a law made, within its legislative competence, by Parliament on the ground of violation of the basic structure of the Constitution is thus not available to the petitioners.

As stated above, 'residence' is not the constitutional requirement and, therefore, the question of violation of basic structure does not arise.

Argument of contemporary legislation & Constitutional Scheme

Mr. Nariman further submitted that the Constitution and the Representation of People Act, 1951 are to be read as an "integral scheme". In this context, reference was made to the fact that the Provisional Parliament that passed the Representation of People Act, 1950 and the Representation of People Act, 1951 was the same as the Constituent body that had passed and adopted the Constitution.

In support of the contention about the integrated scheme of 'Election', Mr. Nariman would first refer to N.P. Ponnuswami v. Returning Officer, Namakkal Constituency & Ors. [AIR 1952 SC 64:1952 SCR 218]. In that case, the appellant had challenged the dismissal by the High Court of his petition under Article 226 of the Constitution praying for a writ of certiorari to quash the order of the Returning Officer rejecting his nomination paper in an election, on the ground that it had no jurisdiction to interfere with the order of the Returning Officer by reason of the provisions of Article 329(b) of the Constitution.

Justice Fazal Ali, speaking for the Bench, observed as under:

"Broadly speaking, before an election machinery can be brought into operation, there are three requisites which require to be attended to, namely, (1) there should be a set of laws and rules making provisions with respect to all matters relating to, or in connection with, elections, and it should be decided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections. Articles 327 and 328 deal with the first of these requisites, Article 324

with the second and Article 329 with the third requisite. \005\005.. Part XV of the Constitution is really a code in itself providing the entire ground-work for enacting appropriate laws and setting up suitable machinery for the conduct of elections.

"The Representation of the People Act, 1951, which was passed by Parliament under Article 327 of the Constitution, makes detailed provisions in regard to all matters and all stages connected with elections to the various legislatures in this country.

"The fallacy of the argument lies in treating a single step taken in furtherance of an election as equivalent to election. The decision of this appeal however turns not on the construction of the single word "election", but on the construction of the compendious expression \027 "no election shall be called in question" in its context and setting, with due regard to the scheme of Part XV of the Constitution and the Representation of the People Act, 1951. Evidently, the argument has no bearing on this method of approach to the question posed in this appeal, which appears to me to be the only correct method."
(Emphasis supplied)

In Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors. [1978 (1) SCC 405 (427)], a similar view was taken in the following words: -
"The paramount policy of the Constitution-framers in declaring that no election shall be called in question except the way it is provided for in Article 329(b) and the Representation of the People Act, 1951, compels us to read, as Fazal Ali J. did in Ponnuswami, the Constitution and the Act together as an integral scheme. The reason for postponement of election litigation to the post-election stage is that elections shall not unduly be protracted or obstructed. The speed and promptitude in getting due representation for the electors in the legislative bodies is the real reason suggested in the course of judgment.
38. Article 324, which we have set out earlier, is a plenary provision vesting the whole responsibility for national and State elections and, therefore, the necessary power to discharge that function. It is true that Article 324 has to be read in the light of the constitutional scheme and the 1950 Act and the 1951 Act."

The above view was reiterated by the Constitution Bench in Gujarat Assembly Election case [2002 (8) SCC 237]. By reading the Constitution and the Representation of People Act together as constituting a scheme, it was observed as under: -

"(e) Neither, under the Constitution nor under the Representation of the People Act, any period of limitation has been prescribed for holding election for constituting Legislative Assembly after premature dissolution of the existing one. However, in view of the scheme of the Constitution and the Representation of the People Act, the elections should be held within six months for constituting Legislative Assembly from the date of dissolution of the Legislative Assembly."

Mr. Nariman submitted that the same Parliamentary body which passed the Constitution, acting as the Provisional Parliament under Article 379 (since repealed), also passed the law with regard to who was to be the representative of a State in the Council of States. He pointed out that Section 3 of the RP Act 1951, as originally enacted, while prescribing "Qualifications for membership of the Council of States" had made it essential that the person offering himself to be chosen as a representative of any State in the Council of States must be "an elector" for a Parliamentary Constituency "in that State", which principle applied uniformly to Part A or Part B States (other than the State of Jammu & Kashmir). In the original enactment, there was a separate arrangement for Part C States, some of which were put in different groups to provide for unified constituencies for returning a common representative (for the State or the Group) to the Council of States, though the qualification in the nature of compulsory status of elector "in that State" would apply there also, with some modification here and there, in that, generally the person was required to be "an elector for a Parliamentary constituency in that State or in any of the States in that group, as the case may be". In the case of the States of Ajmer and Coorg or of the States of Manipur and Tripura, which formed two separate groups for the purpose in the Council of States, the arrangement was to rotate the seats and so it was essential for the candidate to be "an elector for any Parliamentary constituency in the State in which the election of such representative is to be held".

Mr. P.P. Rao, Senior Advocate appearing for the State of Tamil Nadu had a similar take on the subject and pressed in aid the principle of 'contemporanea expositio'. His submission was that this principle is relevant for interpreting the words "the representative of each State" in Article 80(4) of the Constitution. His argument was that the RP Acts 1950 and 1951 are contemporaneous legislations made by the Constituent Assembly itself acting as provisional Parliament and that they are a useful aid for the interpretation of Articles 79 and 80, just as subordinate legislation is for interpreting an Act.

In the above context, Mr. Rao referred to various decisions. He would urge that the following words, extracted from Paragraph 236 in I.C. Golak Nath & Ors. v. State of Punjab & Anr. [(1967) 2 SCR 762] be borne mind:

"The best exposition of the Constitution is that which it has received from contemporaneous judicial decisions and

enactments. We find a rare unanimity of view among judges and legislators from the very commencement of the Constitution that the fundamental rights are within the reach of the amending power. No one in the Parliament doubted this proposition when the Constitution First Amendment Act of 1951 was passed. It is remarkable that most of the members of this Parliament were also members of the Constituent Assembly." (emphasis supplied)

He would then refer to Hanlon v. The Law Society [(1980) 2 All ER 199, 218 (H.L.)], it was held as under: "A study of the cases and of the leading textbooks (Craies on Statute Law (7th Edn., 1971, p. 158), Maxwell on the Interpretation of Statutes (12th Edn., 1969, pp 74-75) Halsbury's Laws (3rd Edn.) (1961) Vol.36, paragraph 606, p. 401) appears to me to warrant the formulation of the following propositions:
(1) Subordinate legislation may be used in order to construe the parent Act, but only where power is given to amend the act by regulations or where the meaning of the Act is ambiguous.
(2) Regulations made under the Act provide a parliamentary or administrative contemporanea expositio of the Act but do not decide or control its meaning to allow this would be to substitute the rule-making authority or the judges as interpreter and would disregard the possibility that the regulation relied on was misconceived or ultra vires.
(3) Regulations which are consistent with a certain interpretation of the Act tend to confirm that interpretation.
(4) Where the Act provides a framework built on by contemporaneously prepared regulations, the latter may be a reliable guide o the meaning of the former.
(5) The regulations are a clear guide, and may be decisive, when they are made in pursuance of a power to modify the Act, particularly if they come into operation on the same day as the Act which they modify.
(6) Clear guidance may also be obtained from regulations which are to have effect as if enacted in the parent Act."

Mr. Rao also placed reliance on British Amusements Catering Trades Association v. Westminister City Council [(1988) 1 ALL ER 740, 745 d.e. (H.L.)], a judgment that is

said to have followed the case referred to in the preceding Paragraph.

In Desh Bandhu Gupta And Co. & Ors. v. Delhi Stock Exchange Association Ltd. [(1979) 4 SCC 565], this court held as under:

"The principle of contemporanea expositio (interpreting a statute or any other document by reference to the exposition it has received from contemporary authority) can be invoked though the same will not always be decisive of the question of construction (Maxwell 12th ed. P. 268). In Crawford on Statutory Construction (1940 ed.) in paragraph 219 (at pp. 393-395) it has been stated that administrative construction (i.e. contemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned; such a construction, commonly referred to as practical construction, although not controlling, is nevertheless entitled to considerable weight; it is highly persuasive. In Baleshwar Bagarti v. Bhagirathi Dass ILR 35 Cal. 701 at 713 the principle, which was reiterated in Mathura Mohan Saha v. Ram Kumar Saha ILR 43 Cal. 790 : AIR 1916 Cal 136 has been stated by Mookerjee, J., thus:

It is well-settled principle of interpretation that courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it\005 I do not suggest for a moment that such interpretation has by any means a controlling effect upon the courts; such interpretation may, if occasion arises, have to be disregarded for cogent and persuasive reasons, and in a clear case of error, a court would without hesitation refuse to follow such construction."

The State of U.P. & Ors. v. Babu Ram Upadhya [(1961) 2 SCR 679(CB)], it was observed as under:

"Rules made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act, and are to be judicially noticed for all purposes of construction or obligation: see Maxwell "On the Interpretation of Statutes", 10th edn., pp. 50-51."

In State of Tamil Nadu v. M/s. Hind Stone & Ors. [(1981) 2 SCC 205], it was held as under:

"The Mines and Minerals (Regulation and Development) Act is a law enacted by

> Parliament and declared by Parliament to be expedient in the public interest. Rule 8-C has been made by the State Government by notification in the official Gazette, pursuant to the power conferred upon it by Section 15 of the Act. A Statutory rule, while ever subordinate to the parent statute, is otherwise, to be treated as part of the statute and as effective. "Rules made under the statute must be treated for all purposes of construction or obligation exactly as if they were in the act and are to be of the same effect as if contained in the Act and are to be, judicially noticed for all purposes of construction or obligation": (State of U.P. v. Babu Ram Upadhya (1961) 2 SCR 679, 702; see also Maxwell: INTERPRETATION OF STATUTES, 11th Edn. Pp. 49-50). So, statutory rules made pursuant to the power entrusted by Parliament are law made by Parliament within the meaning of Article 302 of the Constitution."

In Commissioner of Income Tax, Jullundur v. Ajanta Electricals, Punjab [(1995) 4 SCC 182], it was ruled thus: "Though the rule cannot affect, control or derogate from the section of the Act, so long as it does not have that effect, it has to be regarded as having the same force as the section of the Act."

The submission, thus, is that the principle of contemporanea expositio is relevant for interpreting the words "the representatives of each State" in Article 80(4) of the Constitution with reference to contemporary legislation made by the Constituent Assembly itself acting as provisional Parliament just as subordinate legislation is used in order to construe the parent Act.

But then, the fallacy of the above approach to the subject lies in the fact that legislation by the provisional Parliament did not produce a constitutional rule. It does not have the sanctity or normative value of Constitutional Law. When the Act of 1951 was debated, no one argued that the residence qualification had already been decided upon by the Constituent Assembly and, therefore, no debate should take place. The difference between the original and derived power is the basis of the doctrine of basic structure.

The principle of "contemporanea expositio', is totally irrelevant if not misleading for present purposes. If the Constitution had used an ambiguous expression, which called for interpretation, the manner in which the Constitution had been interpreted soon after it was enacted would be a useful aid to interpretation. No such question arises in this case. Indeed, the Parliament had earlier provided for residential qualification. But it decided to repeal it through the impugned amendment. Both times, that is while originally enacting the RP Act in 1951 and the while amending it in 2003, the Parliament was acting within its legislative competence. It is true that the provisional Parliament in 1951 did prescribe residence inside the State as a qualification for Membership of the Council of States. But, it also needs to be borne in mind that the same Parliament in its character of a Constituent Assembly had refused to exalt the qualification (including that

of residence) to a Constitutional requirement and rather showed consciousness that the provision for qualifications might need to be revisited from time to time and, therefore, finding it inadvisable to prescribe the same in the Constitution itself.

The provision of residence existed, prior to impugned amendment, in a Parliamentary law, i.e., the Representation of the People Act, 1951 (and not the Constitution). There is no express provision in the Constitution itself requiring residence as a qualification. It cannot be said that amendment of the Act to remove what the Constitution itself did not provide for, is unconstitutional.

It has been argued that it was the Provisional Parliament, which succeeded the Constituent Assembly, that had passed the RP Act, 1951. However, if that reasoning were to be accepted, it would not mean that all the laws passed by the Provisional Parliament enjoy the same status as the Constitution or some such special status. This would be neither a healthy nor a permissible approach. All enactments passed by provisional Parliament, including the RP Act 1951, are laws like any other law made by Parliament. Accordingly, each of them is subject to power of Parliament to bring about amendments like any other statute. Over the years, there have been several amendments to the RP Act, 1950 and RP Act, 1951. If the argument of the petitioner were to be correct, all the amendments made so far in these Acts would have required Constitutional amendments.

While there need be no quarrel with the proposition that the Constitution and the RP Acts form an integrated scheme of elections, it does not follow that on this account the domiciliary requirement in Section 3 RP Act 1951, as originally enacted, is part of the said scheme so as to be treated a constitutional requirement.

Restrictions under Article 368

It has been submitted that Section 3 of RP Act, 1951, as it stood before amendment, read with Article 80(4), had ensured the "representation of States" in Parliament. Referring to proviso (d) in Article 368 (2), it has been argued that even a Constitutional amendment making any change in representation of States in Parliament cannot be effectuated without the ratification by one half of the States Legislatures. On this premise, it has been submitted that it should follow, as a necessary corollary, that the change made in Section 3, RP Act, 1951 is one that no longer ensures, by Parliamentary law, the representation of States in Parliament, or in any case one that makes a change in the existing law, and thus an amendment that could not be effectuated simply by amending Section 3 of the RP Act, 1951.

Article 368 relates to power of Parliament to amend the Constitution and the procedure therefor. The Proviso in question puts limits on the power of Parliament to amend the Constitution. Article 368 (2), to the extent relevant, reads as under: -

"An amendment of the Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with

the terms of the Bill:

Provided that if such amendment seeks to make any change in \026

(a) xxxx
(b) xxxx
(c) xxxx

(d) the representation of States in Parliament, or
(e) xxxx,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent."

The above provision shows that subject to some conditions and procedural requirements, the Parliament is competent to amend the Constitution except, inter alia, in the event the amendment sought to be made, changes "the representation of States in Parliament". In that case, the amendment Bill would require, before presentation to the President for assent, ratification by the Legislatures of not less than one half of "the States". A question thus has been raised as to the scope of the expression "representation of the States" occurring in Proviso (d) to Article 368 (2).

The argument is without merit in the context in which it has been made. The expression "representatives of States" as used in Article 80 and the expression "representation of States" as used in proviso (d) of Article 368(2) are not synonymous or employed in same sense. These expressions are materially different and used in different context in the two provisions. This is clear from the simple fact that Article 80 is talking of "representatives" of States in the Council of States while proviso (d) of Article 368 (2) pertains to "representation" of States in Parliament. The first provision is of limited import while the latter has a wider connotation.

Article 1, having declared in its sub-Article (1) that India "shall be a Union of States", provides through sub-Article (2) as under:-

"The States and the territories thereof shall be as specified in the First Schedule."

The First Schedule mentions the names of the States and Union Territories and specifies their respective territories. Article 2 empowers the Parliament to admit, by law into the Union of India, or to establish new States. Article 3 empowers Parliament, by law, inter alia, to "form a new State", "increase the area of any State", "diminish the area of any State" or "alter the name of any State". This power has been used many a time by Parliament to reorganize the States and their territories. Article 4 is of great relevance for purposes at hand. It reads as under: -

"Laws made under articles 2 and 3 to provide for the amendment of the First and the Fourth Schedules and supplemental, incidental and consequential matters.- (1) Any law

referred to in article 2 or article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions (including provisions as to representation in Parliament and in the Legislature or Legislatures of the State or States affected by such law) as Parliament may deem necessary.

(2) No such law as aforesaid shall be deemed to be an amendment of the Constitution for the purposes of article 368."

Article 4 thus also uses the expression "representation in Parliament". It specifically excludes such amendments as contemplated in Articles 2 and 3 from the requirements of the procedure prescribed in Article 368 for Constitutional amendments. The expression "representation of States in Parliament", as used in Proviso (d) to Article 368 (2), therefore, cannot be of any use to the case of the petitioners.

Article 80 (1) prescribes in clause (b) that, besides the 12 members nominated by the President, the Council of States shall consist of not more than 238 "representatives" of States and Union Territories. If an amendment were to increase or decrease this composition, it would result in change in the ratio of representation of States in Parliament.

The provision contained in Article 80 (1) (b), in so far as it pertained to the maximum number of members constituting the House has remained unchanged ever since it was adopted in the Constitution by the Constituent Assembly on 26th November, 1949. But this figure of seats of the representatives of States (and Union Territories) was subject to allocation to the States and Union Territories in terms of the Fourth Schedule, as provided in Article 80 (2). The Fourth Schedule provided for the allocation of seats in the Council of States and the total number of seats indicated therein has varied from time to time, subject to the ceiling of 238, as given in Article 80 (1) (b).

In the Fourth Schedule, as originally enacted, the seats allocated to States were 205. By way of the Constitution (Seventh Amendment) Act, 1956, which came into effect on 1st November, 1956, the Fourth Schedule was substituted and consequently, the total number of seats allocated in the Council of States was increased to 220, also indicating the distribution thereof among the various States. This figure of "220" was periodically increased by the Constitution (Thirty Sixth Amendment) Act, 1975 and various States Reorganisation Acts passed by the Parliament from time to time, lastly by the Goa, Daman and Diu Reorganisation Act, 1987 which came into effect on 30 May 1987, whereby State of Goa was inserted into the Fourth Schedule and the figure ’increased to ’233’. The figure "233" occurs in the Fourth Schedule as on date.

It has been submitted that every time there has been reorganization of States, the consequential amendments in the Fourth Schedule have been brought about through Constitutional amendments, in accord with the provisions contained in Article 368, in particular Proviso (d) thereof. It

has been pointed out that even the existing representatives of the States affected by the reorganization were reflected by name in the Constitutional amendments and allocated to the States, having regard to their respective domicile.

The argument based on the provision of the Acts relating to Reorganization of States does not carry the matter further at all. Obviously, at the time of creation of new States, the existing members of the Council of States had to be allocated to the old or new States. This was done in conformity with the then existing principles underlying the relevant law. The documents placed before the Court show that specific consideration of a residential requirement was never made after Paragraph 6 of the Fourth Schedule in the first draft Constitution dated 27th October 1947 had been deleted on 11th February 1948.

The amendment of the Constitution can affect "representation of the States" in Parliament, within the meaning of the proviso extracted above, in more ways than one which we will presently show.

Article 80 (4) prescribes the manner of voting and election of the representatives of States for Council of States in the following terms: -

"The representatives of each state in the Council of states shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote."

If the above-mentioned prescribed manner of voting and election is sought to be changed, for example, by including members of Legislative Councils in such States as have legislative Councils or by change in the system of proportional representation, that would also have the effect of changing the representation of the States.

Article 83 (1) provides as under: -

"The Council of States shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law."

If the duration of Council of States as provided in Article 83(1) is sought to be changed such amendment would also affect the representation of the States.

Fourth Schedule to the Constitution lays down the number of persons who would represent each State in the Council of States. This balance between the various States is not at all affected by way of the legislation impugned in the writ petitions at hand. In the instant case, the amendments made by the impugned Act relates only to the residential qualification of the 'representatives' and is not concerned with the "representation of the States" in Parliament.

The argument that the impugned amendment affects the "representation" of the States in the Council of States is not correct. The States still elect their representatives to the Council of States through the elected members of their respective legislative assemblies as provided in the Constitution. There was, therefore, no need for a constitutional amendment as has been contended.

Distinction between the two Houses

Mr. Nariman, learned Senior Advocate pointed out that under un-amended Section 3 of the RP Act 1951, one of the requisite qualifications for a person offering his candidature for membership to the Council of States, since beginning had been that he must be "an elector" for a Parliamentary Constituency in the State or Union Territory which he seeks to represent. On the other hand, as per Section 4 of the RP act 1951, in the case of the House of the People, a person is qualified to be chosen to fill a seat in that House if he is "an elector for any Parliamentary constituency"; that is to say, one can get elected as people's representative in the House of the People for a constituency in one particular State even though one is an elector registered as such in a Parliamentary constituency in another State.

He pointed out that the composition of the House of the People, as per Article 81(1)(a), is different, since it consists of "members chosen by direct election from territorial constituencies in the States", such members not representing, nor expected to represent, the States from which they are so chosen. This is why the 'Qualifications for the membership of the House of the People', as prescribed in Section 4 of the RP Act 1951, have always permitted "an elector for any Parliamentary constituency" to get chosen to fill a seat in the House of the People.

The argument is that by the impugned amendment in Section 3, the qualification for Membership of the Council of States is now "equated" with that of the House of the People, the only difference remaining being the manner of election, the former by indirect election and the latter by direct election.

While Section 3 has been amended to substitute the words "in that State or territory" with the words "in India", Section 4 remains the same as before. The result is that the point of distinction between the characters of representation in the two Houses has become obliterated.

The word "elector" has been defined in Section 2 (e) of RP Act 1951 and means "a person whose name is entered in the electoral roll of that constituency for the time being in force" and who is not subject to any of the disqualifications mentioned in Section 16 of the RP Act, 1950.

The above mentioned statutory provisions, according to Mr. Nariman, unmistakably show that the test of "ordinary residence" has been woven into the constitutional scheme as an essential qualification for membership of either House of Parliament, which can be residence anywhere in India for House of the People, but must be residence in the State one seeks to represent in the Council of States, as required in Section 3 of the 1951 Act as it existed till the impugned amendment brought about a qualitative change.

Mr. Nariman contended that the impugned amendment has destroyed the essential characteristic of the Council of States because a person who is an elector, and so an ordinary resident, in any constituency in India, not necessarily of the particular State can now be chosen to be a representative of such State, only by virtue of being so elected to the Council of States by the Members of the Legislative Assembly of such State. According to him, the need for a Second Chamber viz. the Council of States has become redundant, in that it now merely duplicates the House of the People, since a person is qualified to be chosen as a representative of any State in the Council of States if he is an elector for a Parliamentary constituency in that State or in any other State.

He further argued that as a result of the impugned amendment, the person elected to the Council of States, if he is at all "representative" of anyone, he is only a representative of the State Assembly that elected him and not a

"representative" of the State, as he was required to be under Article 80. The intendment of the Constitution that he should be a representative of the State is required to be reflected in some statutory requirement as to qualification qua the person elected and the State, be it birth, residence for some period in the past or at present, or ordinary residence. The law enacted by Parliament had to prescribe some connection between the person standing for election and the State that he is to represent in the Council of States, which is now missing.

These arguments do not appeal to us. Article 79 leaves no doubt about the fact that House of the People and the Council of States are both "Houses" of Parliament. The names given to the two Houses are proper nouns and do not spell out any right or obligation, much less limitations on Parliament's legislative power available to it under Article 84 (c).

Parity in the matter of qualification to the extent concerning residence of a person seeking to be elected as member of either House does not make one House duplicate of the other. Their role, functions, powers or prerogatives, especially in the matter of legislation, remain unchanged.

Mr. Nariman also urged that Article 80 of the Constitution (Composition of the Council of States) be read in contrast of Article 81 (Composition of the House of the People). He was at pains to point out that under Article 80, the Council of States must consist of "representatives" of the States and Union Territories and that it is only the representatives of "each State" in the Council of States who are to be elected by the elected Members of the Legislative Assembly of the State [Article 80(4)]. On the other hand, under Article 81, the House of the People consists of "members" chosen by direct election from the territorial constituencies in the State, i.e. chosen by the electors in one of the Parliamentary Constituencies in India.

His argument is that if the intention was that the body called the Council of States was also to consist of members "chosen", then Article 80 would have used the expression 'members chosen by elected representative of State Legislative Assemblies and Union Territories' instead of the expression "representatives of the States and Union Territories."

He proceeded to build up on the argument by submitting that the expression "representatives of the State" in Article 80 (1) (b) and Article 80 (2), and the expression "representatives of each State" in Article 80 (4), are not merely tautologous or mere surplussage, but intended to be words of critical and crucial significance.

Almost on similar lines, Mr. P.P. Rao, learned counsel for State of Tamil Nadu, submitted that the Democratic Republic constituted by the Constitution of India, as reflected in the expression used in the Preamble - "We, the people of India" - means 'We the people of the States and Union Territories' - in other words, the citizens of India, inhabitants of the States and the Union Territories.

It has been argued that the principles underlying "the House of the People" are evident from Articles 79 and 81. It is a House of the People of India as a whole. Its members are chosen by direct election from territorial constituencies in the States. To become a member one has to be an Indian first. A non-Indian cannot represent the people of India. Only an elector in any part of India will have the capacity to represent the people of India.

It has been submitted, the term "the Council of States" in Articles 79 and 80, likewise means the House that represents the States. Each State is a territorial constituency by itself for this House. It is argued that only a person belonging to a State will have the capacity to represent the State in the Upper

House and that a person could claim to belong to a State only by birth, domicile or residence. On this premise, it has been submitted that some such visible nexus between the State and the person seeking to be its representative is a must in the scheme of the Constitution.

It is further the argument of the learned Counsel for the petitioners that the words "representatives of the States" in Article 80 (1)(b) and (2) and the words "representatives of each State in the Council of States" in Article 80(4) need to be interpreted in such a manner that it tends to strengthen the basic structure of the Constitution, having due regard to its federal character and the foundational feature of democracy, namely the system of self-governance.

In above context, the Counsel would rely upon Sub-Committee on Judicial Accountability v. UOI & Ors. [(1991) 4 SCC 699] and P.V. Narasimha Rao V. State (CBI/ SPE) [1998 (4) SCC 626].

In Sub-Committee on Judicial Accountability v. Union of India (supra), this Court ruled thus:

"In interpreting the constitutional provisions in this area the Court should adopt a construction which strengthens the foundational features and the basic structure of the Constitution."

The following observations made in paragraph 47 in P.V. Narasimha Rao's case (supra) have been relied upon:

"As mentioned earlier, the object of the immunity conferred under Article 105(2) is to ensure the independence of the individual legislators. Such independence is necessary for healthy functioning of the system of parliamentary democracy adopted in the Constitution. Parliamentary democracy is a part of the basic structure of the Constitution. An interpretation of the provisions of Article 105(2) which would enable a Member of Parliament to claim immunity from prosecution in a criminal court for an offence of bribery in connection with anything said by him or a vote given by him in Parliament or any committee thereof and thereby place such Members above the law would not only be repugnant to healthy functioning of parliamentary democracy but would also be subversive of the rule of law which is also an essential part of the basic structure of the Constitution. It is settled law that in interpreting the constitutional provisions the court should adopt a construction which strengthens the foundational features and the basic structure of the Constitution. (See: Sub-Committee on Judicial Accountability v. Union of India (1991) 4 SCC 699 SCC at p. 719.)"

It has been argued by Mr. Nariman that it is because of the scheme of the Constitution and the RP Act, 1951, that representation of the States in the Council of States has to be secured and assured viz. by insisting upon, as a qualification, some link or nexus between the person elected to the Council

of States by the State Assembly and the State which he is to represent in the Council of States. That connection, according to him, was, and for 53 years remained a connection, by way of "ordinary residence" in the State. Section 3 of the RP Act, 1951, fulfilled the role of not only providing a qualification but defining who was to be the "representative of each State" in Article 80 (4).

It has been argued that if by electing a person as a Member of the Council of States by a particular State Assembly itself made that person a 'representative' of that State then it was unnecessary to enact Section 3 of the RP Act. Therefore, according to the argument, it has to be concluded that the Provisional Parliament (which had also drafted and enacted the Constitution), when enacting Section 3 of the RP Act, had thought it necessary to define the "representative of the State", with reference to his residence "in that State".

The above mentioned argument to the extent founded on the principle of basic structure need not detain us any further as it is the same argument as dealt with in the context of federal structure, albeit with a slightly different shade. Moreover, the link factor is retained by the impugned amendments inasmuch as the candidate for the election to the Council of States is now required to be an elector for Parliamentary constituency. Therefore, the linking factor is made broad based.

Article 80 shows that the Council of States consists of 12 Members nominated by the President and 238 representatives of the States and Union Territories. The representatives fill the seats in accordance with Article 80 (2). Both, the members nominated by the President and the representatives elected by the State Legislatures are collectively 'Members' of the Council of States, as clearly flowing from Article 83.

Further answer to this argument can be found in Article 84 itself, which refers to 'membership' of the Parliament, and this covers the Council of States as well as the House of the People. Then, Article 84 also uses the word 'chosen' with reference to filling a seat in Parliament, in both the Council of States as well as House of the People. Therefore, a representative of the State is as much a Member of Parliament as is a member of the House of the People. The expression "representatives" is equally used with reference to the House of the People.

There is thus no distinction between the expressions 'members' and 'representatives'. The submissions of the learned Counsel are untenable. The plea that the choice of expression "representative" in relation to the Council of States as against word "member" used in relation to the House of the People holds the key is also liable to be rejected.

Relevance of the word "Each"

It is the submission of Mr. Nariman that whilst it is open to Parliament to prescribe by laying the qualifications for being chosen to the Council of States, the prescribed qualifications must be such as to ensure that the person so chosen is a representative of that State, the Assembly of which has elected him. He submitted that the use of the word "each" in Article 80(4), in relation to representation of States in the Council of States was not without significance, in as much as the stress is on providing representation to "each State" so as to give to the House the character of a body representing the States. Emphasis has been placed on the words representatives of "each State" in Article 80(4) of the Constitution. In Upper Chambers of other Federal Constitutions, like the Senate in United States, members are elected by the electorate by treating each State as a Unit equal of the other. There would be no doubt in such Constitutions that the elected members

represent the State. In the Indian Constitution, we did not opt for equal representation of States in the Council of States. This could have led to an impression that Rajya Sabha Members of Parliament do not represent the State, as each State would have different ratio in the number of members representing it. It appears that in order to dispel such an impression it has been provided that, notwithstanding the fact that they are elected as per allocation made in the Forth Schedule, on the basis of population, members of the Council of States are indeed representatives of the State.

The reliance on the word "each" is misplaced. It fails to notice as to why the word "each" was inserted in the Article in the first place. Sub-Articles (4) & (5) of Article 80, in its original form, read as under: -

"(4) The representatives of each State specified in Part A or Part B of the First Schedule in the Council of State shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote.

(5) The representatives of the State specified in Part C of the First Schedule in the Council of States shall be chosen in such manner as Parliament may by law prescribe."

By the Constitution (Seventh Amendment) Act 1956, which brought about States reorganization, among others, Article 80 was amended. The Statement of Objects and Reasons of the Constitution (Seventh Amendment) Act 1951, to the extent germane here, read as follows:-

"Clause 2. - The reorganization scheme involves not only the establishment of new States and alterations in the area and boundaries of the existing States, but also the abolition of the three categories of States (Part A, Part B and Part C States) and the classification of certain areas as Union territories. Article 1 has to be suitably amended for this purpose and the First Schedule completely revised.

Clause 3. - The amendments proposed in Article 80 are formal and consequential. The territorial changes and the formation of new States and Union Territories as proposed in Part II of the States Reorganization Bill, 1956, involve a complete revision of the Fourth Schedule to the Constitution by which the seats in the Council of States are allocated to the existing States. The present allocation is made on the basis of the population of each State as ascertained at the census of 1941 and the number of seats allotted to each Part A and Part B State is according to the formula, one seat per million for the first five millions and one seat for every additional two millions or part thereof exceeding one million. It is

proposed to revise the allocation of seats on the basis of the latest census figures, but according to the same formula as before."

Clause 4. - The abolition of Part C States as such and the establishment of Union territories make extensive amendment of articles 81 and 82 inevitable. The provision in Article 81(1)(b) that "the States shall be divided, grouped or formed into territorial constituencies" will no longer be appropriate, since after reorganization each of the States will be large enough to be divided into a number of constituencies and will not permit of being grouped together with other States for this purpose or being "formed" into a single territorial constituency. Clause (2) or Article 81 and Article 82 will require to be combined and revised in order to make suitable provision for Union territories. Instead of amending the articles piecemeal, it is proposed to revise and simplify them. Incidentally, it is proposed in clause (1)(b) of the revised Article 81 to fix a maximum for the total number of representatives that may be assigned to the Union territories by Parliament."

By the Constitution (Seventh Amendment) Act 1951, the words "specified in Part A or Part B of the First Schedule" as used in Article 80 (4) were deleted. By the same amendment, the words "States specified in Part C of the First Schedule" in Article 80(5), were substituted by the words "Union Territories."
The States were being reorganized. The categorization of the States as Part A, Part B or Part C States was being abolished. Some of the States earlier classified as Part C States were now being named as "Union Territories". Since the allocation of seats in the Council of States as given in the Fourth Schedule must necessarily correspond to the States (and Union Territories) mentioned in the First Schedule, in view of the requirement of Article 1 (2) and Article 4, the provisions contained in Article 80 had to undergo consequential amendments.
Noticeably, the word "each" had appeared only in Article 80(4) in the context of the representatives of the States. The expression "representatives of the States" appears first in Article 80(1) and then in Article 80(2) so as to specify the number (to be elected) and the allocation of seats (to be specified in the Fourth Schedule) respectively. In neither clause the word "State" is qualified by the word "each". Since sub-Article (4) and sub-Article (5) were meant to indicate the manner of election by States of different categories, they were created as separate provisions. If the word "each" had the significance attributed during arguments by the writ petitioners, it would have occurred not only in sub-Article (4) in the context of Part A and Part B States, but also in sub-Article (5) in the context of Part C States, inasmuch as States of all categories represented different units of the Union of India.
In the above view, the employment of the word "each" preceding the word "State", in the context of representation in

the Council of States, is meant only to underscore the fact that the Legislative Assembly of each State was intended to be a separate electoral college for returning a member to fill in the seat allocated to the particular State as specified in the Fourth Schedule. Nothing more and nothing less. This is more so, in view of the fact that the expression "representatives of the States" had already occurred twice earlier in the preceding clauses of the same Article. The word "each" was not required to be used in the context of Part C States (now Union territories), in Article 80 (5), as originally provided or even later amended, since the manner of representation of such units of the Union of India was left to be prescribed by the Parliament and since each such unit was not intended at that time to be provided with its own Legislative Assembly.

In the above view, the argument that the use of the word "each" in Article 80 (4) gives to the House the character of a body representing the States, does not appeal to us.

Person to have representative character before being elected

It is the argument of the petitioners that the word "representative" in the context of democracy requires two things; i.e. (a) capacity to represent and (b) authority to represent. They submit that only a member of a class can represent the class in a system of self-governance.

It has been argued that the words "representatives of the States" in Article 80 (1) (b) and (2) and the words "representatives of each State in the Council of States" as appearing in Article 80 (4) need to be interpreted in a manner consistent with the basic structure of the Constitution keeping in mind the concept of democracy, i.e. system of self-governance. Reliance has been placed in this context once again on Sub-Committee on Judicial Accountability v. UOI & Ors. (supra); P.V. Narasimha Rao v. State (CBI, SPF) (supra); and S.R. Bommai v. UOI (supra).

The first two cases have already been taken note of.

Regarding S.R. Bommai, the following observations, at page 118, have been referred to : -

"Thus the federal principle, social pluralism and pluralist democracy which form the basic structure of our Constitution demand that the judicial review of the Proclamation issued under Article 356(1) is not only an imperative necessity but is a stringent duty and the exercise of power under the said provision is confined strictly for the purpose and to the circumstances mentioned therein and for none else. It also requires that the material on the basis of which the power is exercised is scrutinised circumspectly."

The argument is that the word "representative" in the context of parliamentary democracy requires both capacity to represent and authority to represent. Only a member of a class can represent the class in a system of self-governance. It follows that unless a person belongs to a State he will not have the capacity to represent the people of the State or the State. A person belongs to a State either by birth and residence or by domicile or ordinary residence in the State.

The concept of "State" implies not only territory but also the people inhabiting the territory. Article 1 says that India shall be a Union of States. Therefore, it is the submission of

the petitioners, the expression "representatives of each State" in Article 80 (4) refers to persons who represent the people of each State and only a person who belongs to the State or who is one among the people of the State will have the capacity to represent the State and not a person belonging to another State.

It is further argued by the petitioners that the very fact that Article 80 (4) provides for election by the elected members of the Legislative Assembly of the State coupled with the fact that in terms of Article 170, members of the Legislative Assembly shall be those chosen by direct election from territorial constituencies in the State and the further requirement that each one of them is required to be an elector for any Assembly constituency in the State in terms of Section 5 (c) of the RP Act, 1951 shows that Members of the Council of States representing a State shall have the qualifications prescribed for Members of the Legislative Assembly. Both are representatives of the people; while Members of Legislative Assemblies (MLAs) are directly elected, members of the Council of States are indirectly elected by the people of the State through their MLAs.

Section 5 (c) of the RP Act, 1951 requires a person to be an elector for an Assembly constituency in the State to be eligible to contest for a seat in the Legislative Assembly. It is the argument of the petitioners that the capacity to represent arises from being a registered voter for any Assembly constituency in the State. Therefore, to be able to represent a State, it is necessary that the person concerned shall be a registered voter in the State.

Section 19 of the RP Act, 1950 lays down the requirement of being "ordinarily resident in a constituency" for being entitled to be registered in the electoral roll for that constituency. Section 20 gives the meaning of "ordinarily resident".

It has been argued by Mr. Nariman that an elected member to the Council of States does not "represent" the State only because he is elected by the State Assembly. In order to represent the State (as distinct from representing the State Assembly) in the Council of States, he must first be the representative of the State under Article 80(4) before the legislative body elects him. He buttressed this plea by seeking to highlight that in the said sub-Article, the expression "representatives of each State in the Council of States" precedes the prescription about mode of election (the system of proportional representation by means of the single transferable vote).

The Counsel further argued that the expression "representatives of the States", as used in Article 80 (1) (b) and Article 80 (2) and the expression "representatives of each State", as employed in Article 80 (4) have been left to be defined by Parliament "by law" made under Article 84 (c) which requires Parliament to prescribe as to what "such other qualifications" a person must possess in order to qualify to be chosen as a member of parliament, that is qualifications other than those given in Article 84 (a) & (b) that relate to citizenship of India, oath or affirmation inter alia of faithfulness and allegiance to the Constitution and the prescription about minimum age.

It has been contended that Article 80 (4), by using the expression "representatives of each State" emphasizes that person who is elected must first be qualified as a representative of the State in question. If the qualification was meant to originate from his being merely elected by any particular State Assembly, the clause would have read: -

"The elected members of the Legislative

Assembly of each State shall elect their representative in the Council of States in accordance with the system of proportional representation by means of a single transferable vote."

The Counsel has submitted that unlike Article 81, which does not stipulate that a person elected to the House of the People shall be from a territorial constituency in a particular State so as to be the representative of such State in the House of the People, Article 80 does require the person in question to first be a representative of the State before he is elected by the elected members of the Legislative Assembly of that State. The mere fact of election by particular State Assembly of any "elector" in India cannot render that person as being "qualified" to represent that State.

Mr. Nariman referred to the term "elector" which has been defined in Section 2 (e) of the RP Act 1951, in relation to constituency, as a person whose name was entered in the electoral rolls of the constituency for the time being in force. He also pointed out that under Section 19 of the RP Act 1950, every person who is not less than 18 years of age on the qualifying date and is "ordinarily resident" in a constituency only is entitled to be registered in the electoral roll of that constituency.

He submitted that provisions of RP Act, 1950 and 1951 were in the nature of "further qualifications for membership", as clarified through Notes on Clauses on what was enacted as Section 3 of the RP Act, 1951, as published in the Gazette of India, December 23, 1950-Part II-Sec.2, which reads as follows:-

"Clauses 3 to 6 - Articles 84 and 173 of the Constitution have laid down certain qualifications for membership of Parliament and of the State Legislatures and have left it to Parliament to prescribe such further qualifications as it may consider necessary. Clauses 3 to 6 seek to prescribe these further qualifications for membership. (Emphasis supplied)

Section 4 of the RP Act, 1951 prescribes the qualifications for membership of the House of the People. The said provision generally requires a person seeking to fill a seat in the House of the People to be "an elector for any Parliamentary constituency". There was thus a material difference between the qualification of domicile within the particular State as prescribed for the Council of States and the qualification of domicile within any Parliamentary constituency in India as prescribed for the House of the People. This was subject matter of debate in the provisional Parliament on 11th May 1951, at the time of consideration of the Bill, which would later take the shape of RP Act, 1951. Mr. Nariman referred to the debate in Parliament on Section 3 of the RP Act 1951.

It appears that in the course of the said debate it came to be pointed out as incongruous as to why a candidate to the Council of States should be a resident of the State concerned while a candidate to the House of the People need only be a resident in any Parliamentary constituency in the country. The record of Parliamentary debates would show that Dr. Ambedkar had explained the distinction referring to the requirement of residence within the State concerned on account of the House in question being the Council of States and the absence of such requirement of residence within the

State concerned for the other House because it was the House of the People.

It is the submission of the learned counsel that the Parliamentary debates on the justification for distinction is clearly indicative of the reason why the representative character of the member elected to the Council of States was defined, it being that the election was to the Council of States and not to the House of the People; that is to say that a person residing or working in Area "A", therefore, could not represent Area "B", or for that matter any other place.

It is the contention of the Counsel that the impugned amendment sets at naught the representative character of the person elected, as grafted in the provision amended in the form of his connection with the State he represents in the Council of States, leaving it undefined either with reference to "residence" (in the past or in the present), or to place of birth, or to performance of public duties in the State whose Assembly elects him to the Council of States.

Before proceeding further, we would like to refer to certain observations of a Constitution bench of this Court in G. Narayanaswami v. G. Pannerselvam & Ors. [(1972) 3 SCC 717], appearing in Paragraph 4 which read as under: -

"Authorities are certainly not wanting which indicate that courts should interpret in a broad and generous spirit the document which contains the fundamental law of the land or the basic principles of its Government. Nevertheless, the rule of "plain meaning" or "literal" interpretation, described in Maxwell's Interpretation of Statutes as "the primary rule", could not be altogether abandoned today in interpreting any document. Indeed, we find Lord Evershed, M.R., saying: "The length and detail of modern legislation, has undoubtedly reinforced the claim of literal construction as the only safe rule". (See: Maxwell on Interpretation of Statutes, 12th Edn., p. 28.) It may be that the great mass of modern legislation, a large part of which consists of statutory rules, makes some departure from the literal rule of interpretation more easily justifiable today than it was in the past. But, the object of interpretation and of "construction" (which may be broader than "interpretation") is to discover the intention of the law-makers in every case (See: Crawford on Statutory Construction, 1940 Edn., paragraph 157, pp. 240-42). This object can, obviously, be best achieved by first looking at the language used in the relevant provisions. Other methods of extracting the meaning can be resorted to only if the language used is contradictory, ambiguous, or leads really to absurd results. This is an elementary and basic rule of interpretation as well as of construction processes which, from the point of view of principles applied, coalesce and converge towards the common purpose of both which is to get at the real sense and meaning, so far as it may be reasonably possible to do this, of

what is found laid down. The provisions whose meaning is under consideration have, therefore to be examined before applying any method of construction at all. \005\005\005."

We endorse and reiterate the view taken in the above quoted paragraph of the Judgment. It may be desirable to give a broad and generous construction to the Constitutional provisions, but while doing so the rule of "plain meaning" or "literal" interpretation, which remains "the primary rule", has also to be kept in mind. In fact the rule of "literal construction" is the safe rule unless the language used is contradictory, ambiguous, or leads really to absurd results.

Regarding the words in Article 80(4) of the Constitution, viz., "the representatives of each State", as already stated, we are not impressed with the submission that it is inherent in the expression "representative", that the person, in order to be a representative, must first necessarily be an elector in the State. If this concept were to be stretched further, it might also require birth in the particular State, or owning or having rented property or belonging to the majority caste, etc. of that State. Needless to mention, no such qualification can be added to say that only an elector of that State can represent that State. The "representative" of the State is the person chosen by the electors who can be any person who, in the opinion of the electors, is fit to represent them. There is absolutely no basis for the contention that a person who is an elector in the State concerned is more "representative" in character than one who is not.

We do not find any contradiction, ambiguity, or absurdity in the provisions of the law as a result of the impugned amendment. Even while construing the provisions of the Constitution and the RP Acts in the broadest or most generous manner, the rule of "plain meaning" or "literal" interpretation compels us not to accept the contentions of the petitioners. Upon being given their plain meaning, the words "representatives of the States" in Article 80 (1) (b), Article 80 (2) and Article 80 (4) must be interpreted to connote persons who are elected to represent the State in the Council of States. It is the election that makes the person elected the "representative". In order to be eligible to be elected to the Council of States, a person need not be a representative of the State before hand. It is only when he is elected to represent the State that he becomes a representative of the State. Those who are elected to represent the State by the Electoral College, which for present purposes means the elected members of the legislative assembly of the State, are necessarily the "representatives" of the State.

Article 84 applies to the Council of States as much as it does to the House of the people. This Article begins with the words: -

"A person shall not be qualified to be chosen to fill a seat in Parliament unless\005\005\005."

Thus, every member of Parliament, be one "nominated by the President" under Article 80 (1) (a), or "a representative of the State" elected under Article 80 (1) (b) read with Article 80 (4) & (5), or a "member" of the House of the People elected under Article 81, fills a seat in Parliament.

A Constitution Bench of this Court in Shri V.V. Giri v. Dippala Suri Dora & Ors. [(1960) 1 SCR 426: AIR 1959 SC 1318] had while construing the expressions "seat' and "to fill a seat" as used singly or together in Articles 81(2) (b), 84, 101(2), and 330 held as under: -

"\005\005.. some articles of the Constitution and some sections of the Act refer to seats in connection with election to the House of the People. For instance, when Article 81(2)(b) provides for the same ratio throughout the State between the population of each constituency and the number of seats allotted to it, it does refer to seats, but in the context the use of the word "seats" was inevitable. Similarly Article 84 which lays down the qualification for the members of parliament begins by saying that a person shall not be qualified to be chosen "to fill a seat" in Parliament unless he satisfies the tests prescribed by its clauses (a), (b) and (c). Here again the expression "to fill a seat" had to be used in the context. The same comment can be made about the use of the word "seat" in Articles 101(2) and in 330. There is no doubt that when a candidate is duly elected from any constituency to the House of the People he fills a seat in the House as an elected representative of the said constituency; and so the expression "filling the seat" is naturally used whenever the context so requires."
(emphasis supplied)

On the same analogy, it must be said that when a candidate is elected by the electorate comprising of the members of the Legislative Assembly of the State to represent the State in the Council of States, he is elected and chosen as "a representative of the State". The words "representative of the State" do not in any manner connote that the representative must also be an elector or a voter registered in the State itself.
It is the status acquired upon election as a member of the legislature that bestows upon the person the character of a "representative". This has been the view taken by this Court earlier also. In B.R. Kapur v. State of T.N. & Anr. [(2001) 7 SCC 231], a Constitution Bench of this Court was considering the questions relating to entitlement of a person, not a member of the legislature, to be appointed as a Chief Minister. On the basis of construction of various provisions of the Constitution, in particular Articles 163 (1), 164 (1) (2) & (4), 173, 177 and 191, this Court held at page 289: -
"There is necessarily implicit in these provisions the requirement that a Minister must be a member of the Legislative Assembly and thus representative of and accountable to the people of the State."

An elector has to be an ordinary resident of the Constituency in which he is registered as such in view of the statutory requirements of Sections 19 and 20 of the RP Act, 1950. There is no requirement in law that the person elected must possess the same qualifications as the elector possesses. This is further clear from the scheme of the Constitution as is evident from Article 171 (3) of the Constitution that provides for the composition of the Legislative Council, which is a House at the level of the States, akin to the Council of States

at the level of the Union.
Members of the municipalities and boards, graduates, teachers are required under Article 171 to elect a certain percentage of members of the Legislative Council. It is not necessary that the person elected must either be a member of the municipal board or a graduate or himself a teacher. The electorate can elect whoever in their wisdom is considered most suited to be a representative of theirs.
In G. Narayanaswami's case (supra), a Constitution Bench of this Court was considering the provisions contained in Articles 171 & 173 and Sections 5 & 6 of the RP Act, 1951. The following observations made in Paragraph 7 of the Judgment are of relevance here: -
"The plain and ordinary meaning of the term "electorate" is confined to the body of persons who elect. It does not contain, within its ambit, the extended notion of a body of persons electing representatives "from amongst themselves". Thus, the use of the term "electorate", in Article 171(3) of our Constitution, could not, by itself, impose a limit upon the field of choice of members of the electorate by requiring that the person to be chosen must also be a member of the electorate."

Undoubtedly, Section 6 of the RP Act, 1951 continues to require domicile within the State as a necessary qualification for a person seeking to be elected as a member of Legislative Assembly or the Legislative Council of the State. But, in view of the above law laid down by this Court, from which we do not find any good reason to make a departure in the case at hand, there is no merit in the plea that the "representative of the State" elected by the legislative assembly of the State must also be an ordinary resident of the State just because the electorate that is electing him are required by law to be so. The question of "ordinarily resident" is relevant for preparation of electoral rolls and nothing further. This is evident from bare reading of the scheme of provisions contained in RP Act, 1950, in particular Sections 13D, 14, 15, 17, 18, 19 and 20. Electoral rolls for purposes of elections governed by the RP Acts are prepared assembly-constituency wise under Section 15. Section 13D relates to the Electoral rolls for Parliamentary constituencies and renders the electoral rolls for all assembly constituencies comprised within the parliamentary constituency put together as the electoral roll for such parliamentary constituency. Electoral rolls are prepared basically for assembly constituencies and revised year-wise. A conjoint reading of Sections 17, 18, 19 & 20 shows that a person can get himself registered as voter once in only one assembly constituency which must be the one within which he is an ordinary resident.
In Pampakavi Rayappa Belagali v. B.D. Jatti & Others [1971 (2) SCR 611], the election of the first respondent to the Mysore Legislative Assembly had been challenged, amongst others, on the ground that he had ceased to be a person "ordinarily resident" within the Jamkhandi constituency and thus questioning the validity of entry of his name on the electoral roll for that constituency. The High Court had rejected the election petition including on the aforesaid ground. This Court while dismissing the appeal against the judgment of the High Court observed, inter alia, that the conditions of registration as an elector in the electoral roll, as provided in Section 19 of the RP Act, 1950 includes the condition that the person must be "ordinarily resident" in the

constituency and that the meaning of the expression "ordinarily resident" is given in Section 20 and further that "the conditions about being ordinarily resident in a constituency for the purpose of registration are meant for that purpose alone\005\005.".

The qualification of "ordinarily resident" is provided for registration as a voter in a general election for deciding the place of voting by an elector and for the preparation of electoral rolls. Under our constitutional scheme, Parliamentary or Assembly constituencies are territorially divided and hence territorial link is provided for the voter, but importantly not for the candidates.

The expression "representative of each State" in Article 80 (4) of the Constitution is not a qualification and cannot be read as a condition precedent for being elected. The Constitution has dealt with "qualifications" exclusively in Article 84 of the Constitution, as would also be clear from the marginal note besides the contents of the provision itself.

We agree with the submission that by definition, the word "representative" simply means a person chosen by the people or by the elected Members of the Legislative Assembly to represent their several interests in one of the Houses of Parliament. A person becomes a representative only after he is chosen in the prescribed manner. He is not a representative earlier. At best, he can claim to be called a candidate or a potential representative. The theory that before he becomes a representative he should have some nexus other than one prescribed by the law in force is not palatable and not supported by any law or view taken in any case.

Panchayati Raj Amendment \026 territorial link

Mr. Nariman has submitted that there is a constitutional recognition of the concept of territorial link of the members of the Council of States (as representing the particular State in the Council of States).

He buttressed this contention by referring to the 73rd and 74th Constitutional Amendment Acts 1992 which introduced Part IX and Part IX-A to provide that there shall be constituted in every State, Panchayats (at village, intermediary and district levels) and Municipalities as institutions of self government (Article 243B and Article 243Q). Article 243C (Composition of Panchayats), through clauses (c) & (d) of sub-Article (3), authorizes the Legislature of a State, by law, to provide for the representation "of the members of the House of the People and the members of the Legislative Assembly of the State representing constituencies which comprise wholly or partly a Panchayat area at a level other than the village level in such Panchayat" and "of the members of the Council of States and the members of the Legislative Council of State, where they are registered as electors within" a Panchayat area at the intermediate or district level, as the case may be.

Similarly, under Article 243R (Composition of Municipalities), through sub-Article (2), the Legislature of a State has been vested with the power to, by law, provide for the representation in a municipality of "the members of the House of the People and the members of the Legislative Assembly of the State representing constituencies which comprise wholly or partly the municipal area" and "the members of the Council of States and the members of the Legislative Council of the State registered as the electors within the municipal area".

According to Mr. Nariman, the constitutional recognition given to the territorial link between the member of the Council of States (as representing the particular State in the Council of States) and his position as a registered elector in any Panchayat or Municipal area in that State for purposes of local

bodies reinforced the plea that the insistence on local residence within the particular State for representatives of the States in the Council of States was part of the Constitutional scheme.

The argument is found, on close scrutiny, to be devoid of merit for several reasons.

First and foremost, the provisions mentioned above are not exceptional in relation to a member of the Council of States on account of his position as a registered elector in any Panchayat or Municipal area in that State for purposes of local bodies. They equally apply to the members of the House of the People and the Legislative Assemblies (as indeed, the Legislative Councils) of the State concerned.

Secondly, the above provisions are part of the scheme of local self-government engrafted in the Constitution, the object sought to be achieved thereby being to provide a linkage between the local bodies and the legislature at the State and Union levels. The purpose sought to be achieved is to give to the Members of State Legislature and the Parliament access to the grass-root level, equipping them with knowledge about local problems, issues, opinions and aspirations, thereby strengthening democracy.

Then, the enabling provisions may not have uniform application. Their effect would depend on the provisions enacted or to be enacted by the respective State Legislatures for each State. The enabling provisions, the import of which is reflected in phraseology extracted above, themselves make it abundantly clear that the claim of the members of the State or Union Legislature for representation in the Panchayat or municipality depends on various factors that may or may not exist vis-‘-vis each such member. To elaborate, it can be said that if there can be a member of the Council of States registered as an elector within a Panchayat area or municipal area there can also be a member of the Council of States not so registered as an elector within a Panchayat area or municipal area. Moreover, the relevant clauses do not apply only to elected members of the Council of States. Thus, even a nominated member of the Council of States qualifies to be a representative in the Panchayat or a municipality if he fulfills the qualification prescribed. So, a conclusion in respect of the elected "representatives of the State" in the Council of States cannot be reached on such basis.

Further, these provisions generally provide for the qualifications of various categories of persons, which happen to include the members of the Council of States, to be representatives in a Panchayat or municipality, and share in local self governance. Since the members of the Council of States were one of the several sources being tapped for the purpose of providing for representation of different interest groups in the deliberative wing at the local level, it was incumbent to lay down some method of selection.

Last, but not the least, the provisions that have been referred are Constitutional provisions. Even on the premise that in enacting them the factor of registration as elector within a particular Panchayat or municipal area was considered important in relation to the members of the Council of States so as to give them the additional responsibility of representation in the local Panchayat or municipality, it cannot be said that these provisions add the requirement of domicile to the qualifications for membership in the Council of States. There is no such express Constitutional provision prescribing such additional qualification.

Thus, the argument based on the 73rd and 74th Constitutional Amendment Acts 1992 which introduced Part

IX and Part IX-A to provide for Panchayats and Municipalities as institutions of self government is of no avail to the petitioners.

Concept of Residence to change with passage of time

It is the argument of the Writ Petitioners that there must be a rational nexus between the State and its representatives in the Council of States. Such nexus, as per the submissions, could be found only in the requirement of residence in the State for a minimum specified period. To be able to "represent" the State, it has been urged, one has to be fully conversant with the language, current problems, needs, aspirations and interests of the people of the State and the concerns of the State Government. It is not difficult to visualize a conflict between duty and interest in the case of members belonging to one State being elected from another State on issues upon which the two States are at loggerheads.

The contention of the petitioners is that the provision contained in Section 3 of the RP Act, 1951, prior to the impugned amendment, provided for a reasonable nexus between a member of the Council of States and the State from which he is elected, viz. the nexus on account of domicile. It has been argued that the amendment doing away with the said provision i.e. requirement of residence in the State, has the effect of snapping the rational nexus necessary to fulfill the object of representation in the Council of States having regard to the federal character of the Indian Union.

Mr. Nariman, in the course of his arguments, has referred to the arrangement in Section 3 of the RP Act 1951, as originally enacted, as the constitutional scheme. On this premise, he would argue that Parliament could make a departure from this scheme only by providing some other criteria or link for determining the representative capacity of a prospective member of the Council of States. He illustrated this by submitting that the test of "ordinary residence", as inherent in Section 3 of the 1951 Act before its amendment, could be modified by Parliament only so as to provide some other characteristic of effective representation, viz. (i) born in the State, (ii) having property in the State, (iii) philanthropic or charitable works done in the State, (iv) education in the State, (v) having worked for some period of time in the State, or some such other criteria.

It was also submitted by some petitioners that the impugned amendment in Section 3 of the RP Act, 1951 has opened the floodgates of corrupt practices in the matter of allotting seats to the candidates of choice of powers that be in the political parties and their election is ensured by maneuvers or manipulations.

The above argument is based upon the intrinsic concept of the word ’representative’. This word ’representative’ has no definite meaning. Like ’residence’, ’representative’ is a malleable concept. In some federal countries, the Upper House has been designed to reflect the views or interests of the constituent States and to provide a means to protect the States against improper federal laws. In the United States, the Senate is composed on federal principles. Each State, irrespective of its size or population, sends two Senators and, thus, has an equality of representation in the House. On the other hand, the House of Representatives is constituted on population basis. In US the Senators are elected by the population vote. The Senate is a continuing body and one-third of its members retire every two years.

In Canada, the Senate is composed on a different principle. Each province is assigned a fixed number of Senators, though unequal. The allegiance of the Senators in

Canada is usually to the party which appoints them.
Rajya Sabha resembles the American Senate insofar as it is a continuing body. Rajya Sabha, however, differs from the US Senate insofar as its members are not elected directly by the States and there is no equality of representation of the States. Rajya Sabha resembles the Australian Senate insofar as both are based on the principle of rotation.
The point which we would like to emphasize here is that even in countries where strict federalism exists, with the passage of time, the original role of the Senate of guarding interests of the States as political units has largely disappeared. With globalization, the US Senate now functions as a national institution rather than as a champion of local interests. This transformation has taken place in US due to several factors such as direct election of Senators by the people of a State, development of strong political parties advocating national programmes and development of national integration, etc.
Similarly, in India, after 1990, due to relaxation of central economic control, the conceptual and theoretical framework of federalism has undergone a sea-change. The concepts of the words 'residence' and 'representative' are not fixed concepts, therefore, they have to change with time. The constitutional framers have kept that flexibility in mind, they have left it to the Parliament to decide the qualification for membership of the Parliament and, while deciding the qualification, the Parliament has to take into account the contextual scenario. There cannot be one uniform, consistent and internal definition or connotation of these concepts. These concepts undergo changes with the passage of time. They cannot be decided etymologically by reference to dictionaries.
Sub-Section (1) of Section 20 of the RP Act, 1950 clarifies that mere ownership or possession of a dwelling house at a certain place does not necessarily mean that a person is ordinarily residing there. Sub-Section (2) declares that incarceration as a prisoner in jail or confinement as a patient of mental illness at a certain place does not make that place the ordinary residence of the individual.
On the other hand, some of the sub-Sections collectively indicate that temporary absence on account of certain specified exigencies cannot disrupt the ordinary resident status of an individual.
Sub-Section (1A) provides that temporary absence of a person from a particular place does not result in cessation of his ordinary residence there.
Sub-Sections (1B) (3) and (4) protect the ordinary resident character of an individual vis-'-vis the place where he would be ordinarily residing but for official engagements. Sub-Section (1B) takes care of legislators' absence from their respective constituencies in connection with responsibilities of the office they hold. Sub-Sections (3) and (4) pertain to compulsions of the service (in Armed forces or police or foreign posting in service under Government of India) to be at a place other than the one where one ordinarily resides.
Sub-Sections (5) and (6) of Section 20 of RP Act, 1950 render the declaration, in prescribed form, of a person about the place of his (and that of his spouse) ordinary residence as sufficient proof, though subject to determination, should a question be raised in such regard, under rules to be framed under sub-Section (7).
Lexicon refers to Cicutti v. Suffolk Country Council, [(1980) 3 All. ER 689], to denote that the word "ordinarily" is primarily directed not to duration but to purpose. In this sense the question is not so much where the person is to be

found "ordinarily", in the sense of usually or habitually and with some degree of continuity, but whether the quality of residence is "ordinary" and general, rather than merely for some special or limited purpose.

The words "ordinarily" and "resident" have been used together in other statutory provisions as well and as per the Law Lexicon they have been construed as not to require that the person should be one who is always resident or carries on business in the particular place.

The expression coined by joining the two words has to be interpreted with reference to the point of time requisite for the purposes of the provision, in the case of Section 20 of RP Act, 1950 it being the date on which a person seeks to be registered as an elector in a particular constituency.

Thus, residence is a concept that may also be transitory. Even when qualified by the word "ordinarily" the word "resident" would not result in construction having the effect of a requirement of the person using a particular place for dwelling always or on permanent uninterrupted basis. Thus understood, even the requirement of a person being "ordinarily resident" at a particular place is incapable of ensuring nexus between him and the place in question.

The nexus between the candidate and the State from which he gets elected to fill a seat in the Council of States is provided by the perception and vote of the elected Members of the Legislative Assembly who consider him (necessarily an Indian Citizen) as best qualified to further the interests of the State in Parliament.

When voting for a candidate in an election, perception of his skills as a legislator, his knowledge of State affairs, his services to the constituency he seeks to represent and the satisfaction or confidence in having him as the representative of the electorate are enough considerations or qualifications. These considerations undoubtedly are certainly of more weight than transitory or often illusory concept of "residence".

This Court would refrain from passing comment on the argument of the Union of India that it is a matter of common knowledge that, before the impugned amendment was brought about, in the anxiety to secure good candidates, the requirement of residence was being bypassed usually by illegitimate subterfuges like being compelled to make false declarations about their real residence or further that the experience had shown that the qualification of domicile was proving to be an obstacle in getting the right members into the Council.

Suffice it to say here that our electoral system needs to be rendered free from all known vices and so there is no reason why Parliament should be denied the opportunity to bring in such legislation as is deemed by it, in its wisdom, as would plug the possible holes of abuse, for which Parliament has the necessary legislative competence.

Article 80 (4) is not being correctly read by the petitioners when they make the submissions that have been noticed above. The suggestion that the expression ’representative of each State’ implies a condition of residence or other link with the States to be represented ignores the importance of the expression "in" preceding the expression "the Council of States".

Article 80 (4) does not say that representative of each State to be elected must first be a representative of the State before election. To read this requirement into Article 80 (4) would do violence to the words and would be grammatically incorrect.

A grammatical clause analysis of Article 80 (4) shows that it is nothing more and nothing less than what is reflected

if it were to be worded thus: -
"The elected members of the Legislative Assembly of the State shall elect the representatives of each State in the Council of States in accordance with the system of proportional representation by means of a single transferable vote".

In the provision contained in Article 80 (4), thus put in the active voice, the emphasis is on 'who elects'. In the existing passive form, the emphasis is on how the representatives would be elected. The result, either way, is the same. Article 80 (4) deals with the manner of election and nothing more.

Therefore, the words "representative of each State" only refers to the members and do not import any further concept or requirement of residence in the State.

Absence of Justification \026 Objects & Reasons

Another submission urged is that the Statement of Objects and Reasons for the Bill which brought about the amendment itself shows the absence of justification for doing away with the will of the Parliament as earlier reflected in original Section 3 of the RP Act 1951, which was in consonance with the scheme of the Constitution. The Statement of Objects and Reasons for the Bill mentioned that "a precise definition for 'ordinarily resident' was very difficult" and that after the matter was "examined in depth by the Government" it had been decided to do away with the requirement of residence in a particular State or Union Territory for contesting election to the Council of States from that State or Union Territory, and further that there were numerous instances where persons who were not normally residing in the State had got themselves registered as voters in such State simply to contest the elections to the Council of States.

The petitioners point out that the definition of "ordinarily resident" contained in Sections 19 and 20 of Representation of the People Act, 1950 remain unamended. As per their submissions, if persons actually not residing in a particular State have wrongly got themselves registered as voters in such State or there was difficulty in applying the words 'ordinarily resident', the statute afforded the remedy in Section 20 (7) of Representation of the People Act, 1950, giving authority to the Central Government to frame rules, in consultation with the Election Commission, to determine the questions arising. Besides, it has been argued, the decision of the Election Officer in above regard, under the existing law, is rendered final and cannot be raised again in an Election Petition, as held by a Constitution Bench in Hari Prasad Mulshanker Trivedi v. V.B. Raju & Ors. [1974 (3) SCC 415].

It has been argued that the reasons given in the Statement of Objects and Reasons for the Amendment Act do not provide any rational justification for the impugned amendment. The problem that some persons, though not ordinarily resident in the State, yet manage to get themselves registered as voters in a Parliamentary Constituency of the State and get elected to the Council of States, needs to be tackled by making more effective the provision so as to prevent such registration, if any, and for cancellation of such registration and deletion of their names from the voters list. This problem, according to the petitioners, requires a different treatment but not by striking at the root of meaningful and effective representation of the States in the Council of States by amending Section 3. The petitioners' contention, thus, is that the amended Section 3 is irrational, arbitrary and unconstitutional.

The petitioners further argue that the reasons given in affidavit in reply, by Union of India, to justify the impugned amendment for amending Section 3 are different from the reasons given in the Statement of Objects and Reasons for the Bill.

The Counter Affidavit of the Union of India states that the members of Legislative Assemblies are in the best position to decide who would best represent their States' interest in the Rajya Sabha. The petitioners submit that this is a doubtful proposition having regard to what the Ethics Committee of the Council of States said in its report about large sums of money being the motivating factor in electing members of the Council of States.

The petitioners also lament that the well considered view expressed by an eminent body like the National Commission on Working of the Constitution has been unreasonably brushed aside. The Commission in Paragraph 5.11.5 of its report did express its view that the Parliamentary legislation that had been initiated seeking to do away with the domiciliary qualification for being chosen as a representative of any State or Union territory in the Council of States would affect "the basic federal character of the Council of States" and that in order to maintain the said basic federal character of the said House, "the domiciliary requirement for eligibility to contest elections to Rajya Sabha from the concerned State is essential". Union of India has stated that it respectfully differs from the views expressed by the Commission.

We need not go into the question whether the views of the National Commission on Working of the Constitution were supported or not by elaborate examination of the issue in all of its dimensions, since the said views are not binding on the Government. The role of the Commission was more in the nature of being advisory. We are not impressed with the other submissions, having already rejected the plea based on the federal character of polity. The views of the Commission were founded on that premise.

In Hari Prasad Mulshanker Trivedi v. V.B. Raju (supra), relied upon by the petitioners, this Court was concerned with the question whether the election of respondent numbers 4 & 5 as members of the Council of States from the State of Gujarat which was challenged by way of an election petition, was void on the ground that they were not ordinarily resident in the area covered by any parliamentary constituency in the State of Gujarat and that their names had been illegally entered in the electoral rolls of the respective constituencies in Gujarat and as they were not 'electors' within the meaning of Section 2 (1)(e) of RP Act, 1951, they were not eligible to become candidates in the election.

While dealing with the contention about jurisdiction of the Court to decide whether the entries in the electoral roll regarding the respondents were valid or not, this Court observed: -

"The requirement of ordinary residence as a condition for registration in the electoral rolls is one created by Parliament by Section 19 of the 1950 Act, and as we said, we see no reason why Parliament should have no power to entrust to an authority other than a court or a tribunal trying an election petition the exclusive power to decide the matter finally. We have already referred to the observation of this Court in Kabul Singh case that Sections 14 to 24 of the 1950

Act are integrated provisions which form a complete code in the matter of preparation and maintenance of electoral rolls. Section 30 of that Act makes it clear that civil courts have no power to adjudicate the question. In these circumstances we do not think that it would be incongruous to infer an implied ouster of the jurisdiction of the Court trying an election petition to go into the question. That inference is strengthened by the fact that under Section 100(1) (d) (iv) of the 1951 Act the result of the election must have been materially affected by non-compliance with the provisions of the Constitution or of that Act or of the rules, orders made under that Act in order that High Court may declare an election to be void. Non-compliance with the provisions of Section 19 of the 1950 Act cannot furnish a ground for declaring an election void under that clause."

While disposing off the appeal, the Court concluded thus: "We think that the intention of the Parliament to oust the jurisdiction of the Court trying an election petition to go into the question whether a person is ordinarily resident in the constituency in the electoral roll of which his name is entered is manifest from the scheme of 1950 and the 1951 Acts. It would defeat the object of the 1950 Act if the question whether a person was ordinarily resident in a constituency were to be tried afresh in a court or tribunal, trying an election petition."

The above observations do not advance the case of the petitioners in any manner. There may be a separate machinery available under the RP Act, 1950 to question and inquire into the correctness of the entry of the name of an individual in the electoral roll of a particular constituency, a remedy distinct from that of an election petition to challenge the election of the candidate declared to have been returned in an election, but this fact cannot lead to the conclusion, by any stretch of reasoning, that the removal of the domiciliary requirement from the qualifications for membership of Parliament is opposed to law or common sense.
Union of India would refer to the Registration of Electoral Rules, 1960 as the rules framed under Section 20 of the RP Act, 1950. The said rules, generally speaking, provide for the form and languages of the electoral rolls; preparation thereof in parts; order of names; forms in which declaration about the claim and fulfillment of qualification is required to be made; information to be supplied by occupants of dwelling houses; access to the registers; publication of draft electoral rolls and publicity to be given thereto; lodging of claims and objection with manner and forms prescribed in that regard; procedure for process, rejection or acceptance of claims and objections after or without inquiry; inclusion or deletion of names; final publication of electoral rolls; appeals or revisions against the orders passed; identity cards etc. We have not been able to find any specific provision in these rules as could be held to be

a guide to the concerned authorities for determining in a particular fact situation if an individual is, or is not, "ordinarily resident" of a particular place at a particular point of time.

We must hasten to add that we are not saying that it is not possible to give a precise definition of the expression "ordinarily resident" for purposes mentioned in the electoral law. We would also not make an attempt to give such definition in these proceedings since that would be a matter within the domain of the Legislature. What we want to emphasize is only the fact that the Central Government faced difficulty in giving a precise definition of the expression and candidly admitted the difficulty while introducing the amendment.

In this context, what could be open to the Court is to examine whether the difficulty in giving precise definition was not a bona fide reason in view of the meaning of the expression given in Section 20 of the RP Act, 1950 or in the face of the dictionary meaning by which the said expression can be generally understood. We have already found that the provision in question leaves much to be desired and the guidance provided by law is deficient in that it does not give a clear cut definition as to how the question of ordinary residence of an individual is to be determined.

Article 84 of the Constitution provides for qualifications for membership of Parliament. The requirements in Article 84 for a person to fill up a seat in either House of Parliament, including the Council of States, are: -

(i) The person elected should be a citizen of India;

(ii) He must subscribe an oath of affirmation as per the form set out in the Third Schedule;

(iii) In the case of Council of States he must be not less than 30 years of age;

(iv) He must possess such other qualifications as may be prescribed in this behalf by or under any law made by Parliament.

The disqualifications for being chosen as, or for being, a member of either House of Parliament are contained in Article 102. A person incurs disqualification if he: -

(i) holds any office of profit;

(ii) is of unsound mind and stands so declared by a competent court;

(iii) is an un-discharged insolvent;

(iv) is not a citizen of India or has voluntarily acquired a citizenship of a foreign State etc;

(v) is so disqualified under any law made by the Parliament.

The Constitution, thus, has no requirement that a person chosen to represent a State in the Council of States must necessarily be a voter in that State itself. The Constitution, after prescribing certain qualifications and disqualifications, has left it to the Parliament to provide other such qualifications or disqualifications. The Parliament had initially prescribed an additional qualification that a person so chosen should be an elector for a Parliamentary constituency in the State. After working out this provision for more than five decades, the Parliament in its legislative wisdom, decided

through the impugned amendment that a person chosen to be a representative of a State in the Council of States need not necessarily be an elector within the particular State or, in other words he must be an elector in any parliamentary constituency in India, but not necessarily in the concerned State.

Union of India has submitted that the Parliamentary Debates and the Report of the Standing Committee indicate that the experience of the past fifty years has been considered. According to its submissions, the considerations which weighed with the Parliament, inter alia, included the fact that the Constitution does not prescribe any mandatory requirement that the elected member should be an elector in the State from where he is elected.

Union of India would also claim that several persons whose presence could add to the quality of debates and proceedings in the Council of States had, under the dispensation before amendment, been constrained to enroll themselves as voters in another State just in order that they could be elected from such State. It has been further submitted that unless they did so, some States would remain unrepresented in the Council of Ministers due to the non-availability of such talented members of these States in the House of the People and the Council of States and, thus, the opening out of the residential provision was meant to help in this regard. The Constitution under Article 19(1)(e) guarantees the freedom to a citizen to choose a residence of his choice. There are several cases of elected representatives who may have multiple residences and may have to choose any one of them as a matter of convenience where to vote.

The cases of persons maintaining multiple residences at several places would be few and far between. Even otherwise that should not have posed any problem since the requirement of law was that of ordinary residence which would not apply to each of the several residences of a person.

We are not concerned with the political compulsions or considerations that are implied by some of the above-mentioned submissions of the Union of India and others supporting its stand. It is not necessary for us to examine the plea of the Union of India as to the competence or talent of, or the addition to the quality of debates or discussion in Parliament due to participation by, certain specific members of Parliament reference to whose names was sought to be made by the learned counsel in the course of arguments contesting the contentions of the writ petitioners.

Suffice it to say here that the submissions on both sides would show that the erstwhile arrangement in the law, that is the arrangement prior to the impugned amendment, to determine the question as to whether a particular person is ordinarily resident of a particular place or not had not worked satisfactorily. The law does not give a clear concise definition or guidance in this regard. The declaration of the person concerned is generally taken as the gospel truth and before the correctness of such declaration is disputed, the challenger must arm himself with cogent proof showing facts to the contrary. In this scenario, declarations that were false to the knowledge of the makers thereof seem to have been used brazenly and with impunity. We mention this trend because its existence was alleged by some counsel and not denied by anyone. This undoubtedly could not be a happy state of affairs.

Nonetheless, if the Parliament in its wisdom has chosen to do away with the domiciliary requirement as qualification for contesting an election to fill a seat as representative of a particular State in the Council of States, fault cannot be found

with such decision of the Parliament on the ground that difficulty to define what was meant by the expression "ordinarily resident" was not an honest ground. This, for the simple reason that there was nothing in the Constitution or the law at any point of time rendering the domiciliary requirement as crucial qualification for purposes particularly of the Council of States.

We must, however, add here that while the impugned amendment cannot be assailed on the above mentioned reasons, doing away with the domiciliary requirement cannot always be the answer since it would remain an obligation of the Legislature and the Central Government to define precisely as to what is meant by the expression "ordinarily resident" because that would remain sine qua non for registration of a person as an elector in a particular Constituency and thus a subject from which one cannot shy away. We would only hope for purposes of its proper application under the relevant provisions of the law concerning elections that the Parliament and the Central Government would take necessary steps to unambiguously define the said expression.

As regards the criticism that the reasons given in the counter affidavit of the Union of India are distinct from those set out in the Statement of Objects and Reasons of the Bill that became the impugned law, we may only state that the Statement of Objects and Reasons of a proposed legislation is not the compendium of all possible reasons or justification. We do not find any contradiction in the stand taken by the Union of India in these proceedings in relation to the Statement of Objects and Reasons of the impugned amendment.

Rendering it a case of 'No qualification' - Abdication of its Function by Parliament

The counsel for the petitioners have argued that the impugned amendment has dispensed with the only qualification (the residential qualification) that had been built in by the Parliament in the provision to give meaning to the representative character of the person chosen to be the member of the Council of States, and at the same time failed to define or prescribe any other criteria which Parliament regards as relevant for the person elected being a "representative" of that State. They would submit that the marginal note "Qualification for the Membership of Council of States" which had been retained for Section 3 of the RP Act, 1951 had been rendered meaningless.

The learned counsel, Mr. Nariman, would grant that, under Article 84 (c) read with Article 327 and Entry 72 of the Union List, it is within the legislative competence of Parliament to define or modify the qualifications for the Member of Parliament by making law from time to time. The Petitioners would even concede that the only way of ensuring the representative character may not be by the State being represented by a person "ordinarily resident" in that State which, according to them, was the original method adopted, as reflected in Section 3 of RP Act, 1951 but other links can be found. Thus, it is not disputed that the connection of "residence" could from time to time be changed or amended when circumstances so demanded.

The argument, however, is that Section 3 could be amended by Parliament only so long as it mentioned some qualification for representation of person to be elected as member of Council of States. According to the petitioners, this must be done by putting in position some other appropriate method of ensuring representation of a particular State in the Council of States.

It has been submitted that the impugned amendment had failed to provide alternative additional qualification, since any citizen of India, resident anywhere in India, can now be elected by any State Assembly even when he is ordinarily resident, and even when his registration as an elector is, outside that State. No further additional qualifications are provided to indicate his or her usefulness in the debates or discourses to take place in the Council of States.

It is the contention of the petitioners that on the assumption that there was need for laying down a criteria other than the requirement of residence in a particular State, some different or alternative qualification or method of representation could have been prescribed; such as birth, education, carrying on business or working for gain in the place for a period prescribed or doing philanthropic or charitable work in a State by persons residing outside the State. They argue that some roots or some connection had to be ensured to be existing so as to maintain the representative character of the person to be elected as representative of the particular State.

But, it is the grievance of the petitioners that by the impugned amendment a 'qualification' has been introduced which is not a qualification at all, and which only means that anyone in India who is on the electoral roll of any Parliamentary Constituency in India can be chosen by any State Assembly in India as a representative of that State in the Council of States.

Developing the above argument further, Mr. Nariman submitted that, after the impugned amendment, there is "in effect" no qualification prescribed by Parliament for the person elected being a representative of the particular State, Assembly of which has elected him, since he may be an elector in any Parliamentary Constituency "in India", which according to the Counsel is not a qualification for the person chosen by the particular State Assembly to be a "representative of" that State. It is now left to the entire subjective determination of each State Assembly, to elect any one, even one who is an elector (i.e. ordinarily resident) in any other State or one who has no connection whatsoever with the State that chooses him to be its representative in the Council of States.

It has been argued that by the impugned amendment, Parliament has whilst purporting to set up "qualification" for membership to the Council of States failed to have due regard to the expression "representative of the State" in Article 80. The contention is that by this amendment, Parliament has in effect abdicated its allotted function under Article 84(4), which had been examined when enacting Section 3 of the RP Act 1951 by defining as to who would be the representatives of each State in the Council of States, but this has now been left to be determined in each individual case by the majority of Members of the State Assembly who elect a particular person i.e. irrespective of whether or not the person chosen has any connection with the State by birth, residence, performance of public duties or otherwise.

The argument is that the will of the State assemblies on the issue as to who qualifies to be a representative of the State within the meaning of the expression used in Article 80 is not sufficient or good guide since the question of qualifications had been left by the Constitution to be prescribed by the Parliament and not the members of State Legislative Assemblies. To deny to the State assemblies reference to some criteria prescribed by law by Parliament totally negates one important aspect of federation in the Constitution viz. the effective representation of States in the Council of States.

The arguments of the petitioners on above lines do not

impress us. It is all a matter relating to the legislative competence of Parliament on which the challenge to the validity falls apart.

The Constitutional provisions dealing with elections to the Council of States are, inter alia, contained in Articles 80 and 327. Article 80 (4) provides that elections to the Council of States shall be by a system of proportional representation by means of a single transferable vote by the elected members of the legislative assemblies of the States. Article 327, inter alia, provides that subject to the provisions of the Constitution, Parliament may "from time to time" by law make provisions with respect to all matters relating to or in connection with elections to either House of Parliament.

The above provisions leave no room for doubt that the Constitution recognized the need for changes in the law relating to elections from time to time and entrusted Parliament with the responsibility, as also the requisite power, to bring in legislative measures as and when required in such regard, which would include the power to amend the existing measures. Should there be any doubt entertained by any quarter in this respect, reference may be made to the case of Hari Prasad Mulshanker Trivedi v. V.B. Raju & Ors. [(1974) 3 SCC 415: (1974) 1 SCR 548], wherein it has been held by this Court that:-

"Article 327 gives full power to Parliament subject to the provisions of the Constitution to make laws with respect to all matters relating to or in connection with elections including the preparation of electoral rolls".

Parliament has the power, rather an exclusive one, under Article 246 to make laws with respect to any of the matters enumerated in the Union List of the Seventh Schedule. In exercise of the powers conferred on it under Article 246 read with Articles 84 & 327 and Entry 72 of the Union List of the Seventh Schedule to the Constitution, it is a matter for Parliament to decide by making law as to what qualifications "other" than those prescribed in the Constitution be made compulsory to be fulfilled by persons seeking to fill seats in the Council of States as representatives of the States. It is provided in Article 80 (2) that allocation of seats in the Council of States to be filled by the representatives of States and the Union Territories shall be in accordance with the provisions in that behalf contained in the Fourth Schedule. In Article 80 (4), it is provided that the representatives of each State shall be elected by the elected Members of the Legislative Assembly of that State in accordance with the system of proportional representation by means of a single transferable vote.

Article 84 of the Constitution prescribes the qualifications for membership of Parliament while Article 102 indicates the disqualifications. Under the most relevant clause, Article 84 (c), it is for Parliament to prescribe "such other qualifications" for membership of the Council of States as it may deem necessary or proper; that is, qualifications other than the two Constitutionally prescribed under Article 84(a) and (b), viz., citizenship of India and minimum age (not less than 30 years).

Apart from the above, the Constitution does not put any restriction on the legislative powers of the Parliament in this regard.

If the Constitution had intended that the "representatives" of the States must be residents of the State or must have a link or nexus with the State from where the representatives are chosen, that is, link or nexus of the kind

mentioned by the petitioners, such a provision would have been expressly made in this context as has been done in respect of requirement of age and citizenship. In the absence of such express requirement, the requirement of residence or any other nexus as a matter of qualification cannot be read into Articles 80 or 84.

The fact that a candidate needs to be enrolled in any parliamentary constituency in India does not deprive him of the locus to be the representative of the State simply on the ground that he is not enrolled there.

In People's Union For Civil Liberties & Anr. v. Union of India & Anr. [(2003) 4 SCC 399], this Court treated the right to vote to be carrying within it the Constitutional right of freedom of expression. But the same cannot be said about the right to stand for election, since that is a right regulated by the statute.

Even without going into the debate as to whether right to vote is a statutory or Constitutional right, the right to be elected is indisputably a statutory right, i.e., the right to stand for elections can be regulated by law made by Parliament. It is pure and simple a statutory right that can be created and taken away by Parliament and, therefore, must always be subject to statutory limitations.

In N.P. Ponnuswami v. Returning Officer, Namakkal Constituency & Ors. [1952 SCR 218], this Court noticed with approval the decision of Privy Council in Joseph Theberge & Anr. v. Phillippe Laudry [(1876) 2 AC 102], and held that the right to stand as a candidate for election is not a civil right, but is a creation of statute or special law and must be subject to the limitations imposed by it. It was observed in Paragraph 19 of the Judgment as under: -

"The points which emerge from this decision may be stated as follows:

"(1) The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it.

(2) Strictly speaking, it is the sole right of the legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a Special Tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it."
(emphasis supplied)

In the case of Hari Prasad Mulshanker Trivedi (supra), it was reiterated that: -

"The right to stand for election is a statutory right and the statute can therefore regulate the manner in which the right has to be enforced or the remedy for enforcing it."

Similar view was expressed by this Court once again in Jyoti Basu v. Debi Ghosal, [(1982) 1 SCC 691], in following

words:-
"A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, court is put in a strait-jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act, 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self-contained code within which must be found any rights claimed in relation to an election or an election dispute. ....."
(emphasis supplied)

The Constitution by Article 84 has prescribed qualifications for membership of either House of Parliament. Article 84 (c) does not make it compulsory for Parliament to prescribe any qualification other than those prescribed by Clauses (a) & (b). Parliament may or may not prescribe some such qualifications, and having prescribed some may repeal them whenever it so desires. It is difficult to accept the argument that once the Parliament prescribes a qualification, it cannot revoke or repeal it. There is no such limitation on Parliament’s legislative power, which is confirmed by Entry 72 of the Union List in the Seventh Schedule. The language of Clause (c) of Article 84 creates a power and not a duty. If it is not bound to prescribe any additional qualification, it is also

not bound to provide a substitute for the one done away with. The thrust of the argument of the petitioners is that 'outsider' would be given preference to an 'insider'. This need not be invariably the end result, since outcome of an election would depend on the choice of the Electoral College, viz. the legislative assembly of the State, than on any other factor. In any event, even if an 'outsider' is selected, it is too far-fetched to contend that the "character" of the House would consequently stand altered.

What has been essentially done by the amendment is to provide that even a person registered as an elector outside the State can contest the election to the Council of States from that State. The choice of the electors has been widened and expanded by making this provision. If the electors so chose, they can always choose a person who has link or nexus with the State, that is link of the kind mentioned by the petitioners.

The argument that the amended Section 3 of RP Act, 1951 is futile or that the impugned amendment makes Section 3 nugatory is not correct. Whilst Article 84 prescribes citizenship of India as qualification for membership Section 3, after the amendment, restricts qualification of member of Council of States to an elector who is resident in India. This would exclude non resident Indian citizens. This is also a significant restriction. It is, therefore, clear that Section 3 continues to provide a qualification for membership of the Council of States, namely that one has to be a citizen who is a resident of India. All that the impugned amendment has done is to enlarge the scope of consideration for election to the Council of States by removing the restriction that persons qualified to stand would only be electors in the State concerned. Having regard to the purpose for which the second chamber was conceived, that is to say, to have representation of a wide spectrum of people the amendment does not change the character of the Council of States.

The submission that the Parliament has 'abdicated' its obligations is not correct. In the first place, as has been observed above, it was not obligatory on Parliament to enact a law regarding qualifications or to frame any qualifications. It is important to note that, even after the amendment, (i) the electors remain the same, namely the State Assemblies; (ii) the elected persons remain representatives of the State; and (iii) the choice and the decision as to whom to elect continues to be with the State Legislative Assemblies.

The field of consideration before the State Assembly is enlarged. But the ultimate choice and decision is always that of the State Legislatures. Therefore, if they decide to elect a person who is not ordinarily a resident of the State they would do so with the full knowledge of all circumstances and it would be their decision as to who should be the representative of their State. This, by no stretch of reasoning, can be said to be an abdication of the Parliament's obligations or functions.

Under the aforesaid Constitutional mandate, Parliament has, inter alia, enacted the RP Acts of 1950 and 1951, as well as the impugned amendment Act. By the impugned amendment Act, the requirement of being a voter in a particular State has been done away with.

Thus, in our view the arguments raised by the petitioners do not hold water. The impugned amendment to Section 3 of the RP Act, 1951 cannot be assailed as unconstitutional. It passes muster in view of legislative competence. It does not transgress the provisions of Part III of the Constitution, nor for that matter any other provision, express or implied, of the Constitution. The requirement of 'residence' cannot be read in Article 80(4) of the Constitution. The challenge thus must be repelled.

Issue No.II : Secrecy of Voting

Section 59 provided for the 'Manner of voting at elections' to be "by ballot in such manner as may be prescribed". Section 94 made its prescription clear by marginal note reading 'Secrecy of voting not to be infringed', giving immunity mainly to the voter against compulsion to disclose by declaring, in no uncertain terms, that "No witness or other person shall be required to state for whom he has voted at an election". Section 128 made further provision for insulating the right of the voter to secrecy of vote from onslaught and arranging 'Maintenance of secrecy of voting' by making it an obligation of every person entrusted with election duties to "maintain, and aid in maintaining, the secrecy of the voting" and, unless so "authorized by or under any law", not to "communicate to any person any information calculated to violate such secrecy".

Through the impugned amendments a proviso each has been added to Sections 59, 94 and 128, as noted in the beginning of the judgment. These amendments have carved out an exception to the general rule of secrecy for purposes of the elections for filling up a seat in the Council of States, which is now to be held "by open ballot", thus no longer subject to the principle of secret ballot.

Petitioners' submissions on Open Ballot and Secrecy

For filling the seats in Council of States, the amendments made in Sections 59, 94 and 128 of the RP Act 1951 have introduced the concept of Open Ballot in place of Secret Ballot.

It has been submitted that the right of secrecy in the election of Members of Rajya Sabha is an essential part of democracy that is based on free and fair elections. The voters should have freedom of expressing their view through their votes. The impugned amendment violates the right of secrecy by resorting to open ballot system that is nothing but a political move by clique in political parties for their own achievement.

It is contended that the impugned amendments violate the Fundamental Right under Article 19(1)(a) of the Constitution as well as the provisions in the Representation of the People Act, 1951, Universal Declaration of Human Rights and International Covenant on Civil and Political Rights. The petitioners urge that Human Rights contained in Universal Declaration of Human Rights and International Covenant on Civil and Political Rights may be taken in aid of Fundamental Rights to elucidate them and to make them more effective, as has been held in various cases. On the above premise, it has been contended that, the amendments made in Sections 3, 59, 94 and 128, are unconstitutional and violative of Article 19(1)(a) of the Constitution of India.

Submission of Union of India on Open Ballot & Secrecy

The submission is that there is no constitutional requirement that election to the Council of States be conducted "by secret ballot", as has been expressly provided under Article 55(3) and Article 66(1) for elections to the offices of the President of India and the Vice President of India respectively.

It has been submitted that it was pursuant to the view expressed by the Ethics Committee of the Parliament in its report dated 1st December, 1998, in the wake of "emerging trend of cross voting in the Rajya Sabha and Legislative Council elections", for the elections "by open ballot" to be examined that the Union of India incorporated such provision through the impugned Act. In this context reference has been made to the "influence of money power and muscle power in Rajya Sabha elections" and also to the provisions contained in

Tenth Schedule to the Constitution. Union of India contends that after considering the available material and report of the Ethics Committee, it had come to the conclusion that "the secret ballot system had in fact become counter-productive and opposed to the effective implementation of the principles of democratic representation of States in the Rajya Sabha".

Further submission is that "secret ballot is not an inflexible or mandatory procedure" for ensuring free and fair elections in the country and so the provision for open ballot system has been incorporated having regard to "the emerging trends in the election process and as warranted by a rational, reasonable, democratic objective".

Union of India has also submitted copy of the First Report of the Ethics Committee of Parliament, as adopted on 15th December, 1999 and published by the Rajya Sabha Secretariat, under the chairmanship of Shri S.B. Chavan, which had recommended the open ballot system as follows: -

"19. The Committee has also noted the emerging trend of cross-voting in the elections for Rajya Sabha and the Legislative Councils in States. It is often alleged that large sums of money and other considerations encourage the electorate for these two bodies to vote in a particular manner leading sometimes to the defeat of the official candidates belonging to their own political party. In order not to allow big money and other considerations to play mischief with the electoral process, the Committee is of the view that instead of secret ballot, the question of holding the elections to Rajya Sabha and the Legislative Councils in States by open ballot may be examined."

The amendments brought about by Act 40 of 2003 which are also subject matter of challenge in these matters have already been noticed.

Part V of the RP Act, 1951 relates to the "Conduct of Elections". Chapter 4 of the said Part of the RP Act, 1951 covers the topic of "The Poll". Amongst others, it includes Section 59 relating to the "manner of voting on elections".

Section 59 of RP Act, 1951 was amended twice in the year 2003, firstly with effect from 22nd March, 2003 by the Election Laws (Amendment) Act, 2003 (Act 24 of 2003) and then with effect from 28th August, 2003 by Act 40 of 2003 (the impugned amendment). The amendment through Act 24 of 2003 is not of much consequence for the present purposes and had only substituted the words "and no votes shall be received by proxy" with the words "and, save as expressly provided by this Act, no votes shall be received by proxy".

The amendment through Act 40 of 2003 added a proviso to Section 59 of RP Act, 1951, so as to provide for elections to fill seats in the Council of States to be held "by open ballot". Section 59, after amendment, reads as under: -

"59. Manner of voting at elections. - At every election where a poll is taken votes shall be given by ballot in such manner as may be prescribed and, save as expressly provided by this Act, no votes shall be received by proxy.

Provided that the votes at every election to fill a seat or seats in the Council of States shall be given by open

ballot."

There were two other provisions of RP Act, 1951 that were amended by Act 40 of 2003, which changes have been described as amendments consequential to the amendment made to Section 59. These others provisions also need to be noticed at this stage.

Part VI of the RP Act, 1951 relates to "Disputes Regarding Elections". The election petitions lie under these provisions to the High Courts. Chapter III of Part VI relates to the "Trial of Election Petitions". Section 94 falling under this Chapter, as originally enacted read as under :

"Secrecy of voting not to be infringed \026
No witness or other person shall be
required to state for whom he has voted
at an election."

The Act 40 of 2003 has added a proviso to the aforesaid provision. The amended provision now reads as under: -

"Secrecy of voting not to be infringed \026
No witness or other person shall be
required to state for whom he has voted
at an election.
Provided that this section shall not apply
to such witness, or other person where he
has voted by open ballot."

Part VII of RP Act, 1951 relates to the "Corrupt Practices and Electoral Offences". Chapter I defines "Corrupt Practice". Chapter III relates to "Electoral Offences". Section 128 falling in this Chapter, as originally enacted read as under: -

"128. Maintenance of secrecy of voting.
\026 (1) Every officer, clerk, agent or other
person who performs any duty in
connection with the recording or counting
of votes at an election shall maintain, and
aid in maintaining, the secrecy of the
voting and shall not (except for some
purpose authorized by or under any law)
communicate to any person any
information calculated to violate such
secrecy.

(2) Any person who contravenes the
provisions of sub section (1) shall be
punishable with imprisonment for a term
which may extend to three months or
with fine or with both."

Act 40 of 2003 has added a proviso to sub-section (1) so as to carve out an exception in relation to the election to the Council of States. After amendment, sub-section (1) of Section 128 reads as under :

"128. Maintenance of secrecy of
voting.\026 (1) Every officer, clerk, agent or
other person who performs any duty in
connection with the recording or counting
of votes at an election shall maintain, and
aid in maintaining, the secrecy of the
voting and shall not (except for some
purpose authorized by or under any law)
communicate to any person any
information calculated to violate such

secrecy.

Provided that the provisions of this sub-section shall not apply to such officer, clerk, agent or other person who performs any such duty at an election to fill a seat or seats in the Council of States."

The cumulative effect of the amendments to Sections 59, 94 and 128 of RP Act, 1951, brought about by Act 40 of 2003 thus is that the elections for filling up a seat in the Council of States is now to be held "by open ballot". The requirement of maintenance of secrecy of voting is now made subject to an exception mentioned in the proviso.

Free and Fair Elections

The learned Counsel representing the petitioners, while arguing on the challenge to the impugned amendment respecting the secrecy of ballot in the election to fill the seats of the representatives of the States in the Council of States again referred to the 'basic structure' theory and submitted that democracy was part of the basic features of the Constitution. They would submit that free and fair election was a concept inherent in the democratic values adopted by our polity.

There cannot be any quarrel with these preliminary propositions urged on behalf of the petitioners.

It has been authoritatively held, time and again, by this Court that democracy is a basic feature of the Constitution of India, one that is not amenable to the power of amendment of the Parliament under the Constitution. It has also been the consistent view of this Court that the edifice of democracy in this country rests on a system of free and fair elections. These principles are discernible not only from the preamble, which has always been considered as part of the Constitution, but also from its various provisions. Should there be any doubt still lurking in any mind, the following cases can be referred to, with advantage, in this context.

The views of Sikri, CJ in Kesavananda Bharati, expressed in Paragraph 292, have been noticed, in extenso, earlier in the context of plea regarding federalism. He has clearly referred to "Republican and Democratic form of Government" as one of the features constituting the basic structure of the Constitution.

In the same case, Shelat & Grover JJ, in their separate judgment, also found "Republican and Democratic form of government and sovereignty of the country" amongst "the basic elements of the constitutional structure" as discernible from "the historical background, the preamble, the entire scheme of the Constitution, relevant provisions thereof including Article 368".

Hegde and Mukherjee JJ, observed in their judgment that "the basic elements and fundamental features of the Constitution" found "spread out in various other parts of the Constitution" are also set out "in the provisions relating to the sovereignty of the country, the Republican and the Democratic character of the Constitution".

In the words of Jaganmohan Reddy, J in his separate judgment, the "elements of the basic structure are indicated in the Preamble and translated in the various provisions of the Constitution" and the "edifice of our Constitution is built upon and stands on several props" which, if removed would result in the Constitution collapsing and which include the principles of 'Sovereign Democratic Republic' and 'Parliamentary democracy', a polity which is "based on a representative

system in which people holding opposing view to one another can be candidates and invite the electorate to vote for them". The views of this Court, as expressed in Paragraph 264 of the judgment in Indira Nehru Gandhi have been extracted in earlier part of this judgment. Suffice it to note here again that the law laid down by the majority in Kesavananda Bharati (supra) was taken note of and on the question "as to what are the basic structures of the Constitution", it was found to "include supremacy of the Constitution, democratic republican form of Government".

The following observations in Paragraph 198 of the judgment in Indira Nehru Gandhi (supra) also need to be noticed as they are relevant in the context of the principle that 'free and fair elections' lies at the core of democracy: -

"198. This Court in the case of Kesavananda Bharati held by majority that the power of amendment of the Constitution contained in Article 368 does not permit altering the basic structure of the Constitution. All the seven Judges who constituted the majority were also agreed that democratic set-up was part of the basic structure of the Constitution. Democracy postulates that there should be periodical elections, so that people may be in a position either to re-elect the old representatives or, if they so choose, to change the representatives and elect in their place other representatives. Democracy further contemplates that the elections should be free and fair, so that the voters may be in a position to vote for candidates of their choice. Democracy can indeed function only upon the faith that elections are free and fair and not rigged and manipulated, that they are effective instruments of ascertaining popular will both in reality and form and are not mere rituals calculated to generate illusion of defence to mass opinion. Free and fair elections require that the candidates and their agents should not resort to unfair means or malpractices as may impinge upon the process of free and fair elections."
(emphasis supplied)

Mohinder Singh Gill v. Chief Election Commissioner [(1978) 1 SCC 405], is another case that is significant in the present context. In Paragraph 2, the following words indicated the controversy in the preface: -

"2. Every significant case has an unwritten legend and indelible lesson. This appeal is no exception, whatever its formal result. The message, as we will see at the end of the decision, relates to the pervasive philosophy of democratic elections which Sir Winston Churchill

vivified in matchless, words:

"At the bottom of all tributes
paid to democracy is the little
man, walking into a little
booth, with a little pencil,
making a little cross on a little
bit of paper \027 no amount of
rhetoric or voluminous
discussion can possibly
diminish the overwhelming
importance of the point."

If we may add, the little, large Indian shall not be hijacked from the course of free and fair elections by mob muscle methods, or subtle perversion of discretion by men "dressed in little, brief authority". For "be you ever so high, the law is above you"."

The Court spoke in Paragraph 23 about the philosophy of election in a democracy, which reads as under: -

"Democracy is government by the
people. It is a continual participative
operation, not a cataclysmic,
periodic exercise. The little man, in
his multitude, marking his vote at
the poll does a social audit of his
Parliament plus political choice of
this proxy. Although the full flower
of participative Government rarely
blossoms, the minimum credential
of popular Government is appeal to
the people after every term for a
renewal of confidence. So we have
adult franchise and general
elections as constitutional
compulsions. "The right of election
is the very essence of the
constitution" (Junius). It needs little
argument to hold that the heart of
the Parliamentary system is free and
fair elections periodically held,
based on adult franchise, although
social and economic democracy may
demand much more."
(emphasis supplied)

Some of the important holdings were set down in Paragraph 92 of the aforementioned judgment "for convenience" and to "synopsize the formulations". The holdings included the following: -

"\005\005\005(2)(a) The Constitution
contemplates a free and fair election and
vests comprehensive responsibilities of
superintendence, direction and control of
the conduct of elections in the Election
Commission. This responsibility may
cover powers, duties and functions of
many sorts, administrative or other,
depending on the circumstances.

(b) Two limitations at least are laid
on its plenary character in the exercise

thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission, shall act in conformity with, not in violation of, such provisions but where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from, pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice insofar as conformance to such canons can reasonably and realistically be required of it as fairplay-in-action in a most important area of the constitutional order viz. elections. Fairness does import an obligation to see that no wrongdoer candidate benefits by his own wrong. To put the matter beyond doubt, natural justice enlivens and applies to the specific case of order for total re-poll, although not in full panoply but in flexible practicability. Whether it has been complied with is left open for the Tribunal's adjudication.

\005\005\005\005.."
(emphasis supplied)

The case reported as S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra [1980 Supp. SCC 53] is also relevant for purposes at hand. While construing the provisions of the RP Act, 1951, this Court expressed the following views: -

"\005\005An Act to give effect to the basic feature of the Constitution adumbrated and boldly proclaimed in the preamble to the Constitution viz. the people of India constituting into a sovereign, secular, democratic republic, has to be interpreted in a way that helps achieve the constitutional goal. \005\005 The goal on the constitutional horizon being of democratic republic, a free and fair election, a fountain spring and cornerstone of democracy, based on universal adult suffrage is the basic. The regulatory procedure for achieving free and fair election for setting up democratic institution in the country is provided in the Act. \005\005".
(emphasis supplied)

The case reported as Kihoto Hollohan v. Zachillhu & Ors. [1992 Supp (2) SCC 651], also resulted in similar views being reiterated by this Court in the following words: -

"179. Democracy is a part of the basic structure of our Constitution; and rule of law, and free and fair elections are basic features of democracy. One of the postulates of free and fair elections is provision for resolution of election disputes as

also adjudication of disputes
relating to subsequent
disqualifications by an independent
authority\005"
(emphasis supplied)

That Parliamentary democracy is part of the basic structure of the Constitution was reiterated by this Court in P.V. Narasimha Rao's case (supra) in following words:
"As mentioned earlier, the object of the immunity conferred under Article 105(2) is to ensure the independence of the individual legislators. Such independence is necessary for healthy functioning of the system of parliamentary democracy adopted in the Constitution. Parliamentary democracy is a part of the basic structure of the Constitution."

In the case reported as Union of India v. Association for Democratic Reforms & Anr. [(2002) 5 SCC 294], this court reiterated as under: -
"21. Further, it is to be stated that: (a) one of the basic structures of our Constitution is "republican and democratic form of government"; (b) the election to the House of the People and the Legislative Assembly is on the basis of adult suffrage, that is to say, every person who is a citizen of India and who is not less than 18 years of age on such date as may be fixed in that behalf by or under any law made by the appropriate legislature and is not otherwise disqualified under the Constitution or any law on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election (Article 326); (c) holding of any asset (immovable or movable) or any educational qualification is not the eligibility criteria to contest election; and (d) under Article 324, the superintendence, direction and control of the "conduct of all elections" to Parliament and to the legislature of every State vests in the Election Commission. The phrase "conduct of elections" is held to be of wide amplitude which would include power to make all necessary provisions for conducting free and fair elections."
(emphasis supplied)

In People's Union for Civil Liberties (PUCL), this Court held that "It also requires to be well understood that democracy based on adult franchise is part of the basic structure of the Constitution."

There can thus be no doubt about the fact that democracy is a basic feature of the Constitution of India and the concept of democratic form of government depends on a free and fair election system.

It is the contention of the writ petitioners that free and fair election is a constitutional right of the voter, which

includes the right that a voter shall be able to cast the vote according to his choice, free will and without fear, on the basis of information received. The disclosure of choice or any fear or compulsion or even a political pressure under a whip goes against the concept of free and fair election, and that immunity from such fear or compulsion can be ensured only if the election is to be held on the principle of "secret ballot". These submissions need elaborate examination.

Right to vote \026 a Constitutional/Fundamental right

The learned Counsel have submitted that right to vote in an election under the Constitution of India, which includes the election of the representatives of States in the Council of States, as per the provisions contained in Article 80 (4), is a Constitutional right, if not a Fundamental right.

Reliance has been placed in this context by the petitioners on the Union of India v. Association for Democratic Reforms and Anr. (supra) wherein this Court was considering the right of the voter to know about the candidates contesting election. Having found that such a right existed, it was observed in Paragraph 22 as under: -

"\005..In democracy, periodical elections are conducted for having efficient governance for the country and for the benefit of citizens \027 voters. In a democratic form of government, voters are of utmost importance. They have right to elect or re-elect on the basis of the antecedents and past performance of the candidate. The voter has the choice of deciding whether holding of educational qualification or holding of property is relevant for electing or re-electing a person to be his representative. Voter has to decide whether he should cast vote in favour of a candidate who is involved in a criminal case. For maintaining purity of elections and a healthy democracy, voters are required to be educated and well informed about the contesting candidates\005\005." (emphasis supplied)

In Paragraph 46 of the judgment, the legal and constitutional position emerging from the discussion was summed up thus: -

"\005\005..

4. To maintain the purity of elections and in particular to bring transparency in the process of election, the Commission can ask the candidates about the expenditure incurred by the political parties and this transparency in the process of election would include transparency of a candidate who seeks election or re-election. In a democracy, the electoral process has a strategic role. The little man of this country would have basic elementary right to know full particulars of a candidate who is to represent him in Parliament where laws to bind his liberty and property may be enacted.

5. The right to get information in democracy is recognised all throughout and it is a natural right flowing from the concept of democracy. At this stage, we

would refer to Article 19(1) and (2) of the International Covenant on Civil and Political Rights, which is as under:
"(1) Everyone shall have the right to hold opinions without interference.
(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."
\005\005\005

7. Under our Constitution, Article 19(1)(a) provides for freedom of speech and expression. Voter's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is a must. Voter's (little man \027 citizen's) right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy. The little man may think over before making his choice of electing law-breakers as law-makers."
(emphasis supplied)

This Court thus held in the above-mentioned case that a proper disclosure of the antecedents by candidates in an election in a democratic society might influence intelligently the decisions made by the voters while casting their votes. Casting of a vote by a mis-informed and non-informed voter, or a voter having one sided information only, is bound to affect the democracy seriously. This Court, therefore, gave certain directions regarding the necessity of each candidate furnishing information.
The views expressed in Jyoti Basu (supra) have already been extracted earlier. It may be noticed again that in that case this Court had found that a "right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right" and that "Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election".
Certain amendments in the law were brought about in the wake of the judgment of this Court in Union of India v. Assn. for Democratic Reforms (supra). This Court proceeded to examine as to whether the amendments were legal in People's Union for Civil Liberties (PUCL).
In People's Union for Civil Liberties, the above views in Jyoti Basu's case were extracted by Shah, J. It may be added that same views were also reiterated in Rama Kant Pandey v. Union of India [(1993) 2 SCC 438], wherein it was said, "the right to vote or to stand as a candidate for election is neither a fundamental nor a civil right".
The following observations of Shah, J. in Paragraph 62 of the judgment in People's Union for Civil Liberties (PUCL)

(supra), need to be borne in mind: -
"\005\005\005Such a voter who is otherwise eligible to cast vote to elect his representative has statutory right under the Act to be a voter and has also a fundamental right as enshrined in Chapter III. \005\005\005..If any statutory provision abridges fundamental right, that statutory provision would be void. \005\005\005.. The right of an adult to take part in election process either as a voter or a candidate could be restricted by a valid law which does not offend constitutional provisions. \005\005\005."

In same case, P.V. Reddi J., in his separate judgment observed as under in Paragraph 94: -
"\005\005\005\005 In a democratic republic, it is the will of the people that is paramount and becomes the basis of the authority of the Government. The will is expressed in periodic elections based on universal adult suffrage held by means of secret ballot. \005\005\005\005Nothing is therefore more important for sustenance of democratic polity than the voter making an intelligent and rational choice of his or her representative. For this, the voter should be in a position to effectively formulate his/her opinion and to ultimately express that opinion through ballot by casting the vote. The concomitant of the right to vote which is the basic postulate of democracy is thus twofold: first, formulation of opinion about the candidates and second, the expression of choice by casting the vote in favour of the preferred candidate at the polling booth. \005\005\005The voter/citizen should have at least the basic information about the contesting candidate, such as his involvement in serious criminal offences. \005\005\005An enlightened and informed citizenry would undoubtedly enhance democratic values. Thus, the availability of proper and relevant information about the candidate fosters and promotes the freedom of speech and expression both from the point of view of imparting and receiving the information. \005\005\005\005 I would say that such information will certainly be conducive to fairness in election process and integrity in public life. The disclosure of information would facilitate and augment the freedom of expression both from the point of view of the voter as well as the media through which the information is publicized and openly debated."
(emphasis supplied)
In Paragraph 95, he proceeded to observe as under: -
"\005\005. As observed by this Court in Assn. for Democratic Reforms case a voter "speaks out or expresses by casting vote".

Freedom of expression, as contemplated by Article 19(1)(a) which in many respects overlaps and coincides with freedom of speech, has manifold meanings. It need not and ought not to be confined to expressing something in words orally or in writing. The act of manifesting by action or language is one of the meanings given in Ramanatha Aiyar's Law Lexicon (edited by Justice Y.V. Chandrachud).
\005\005. Having regard to the comprehensive meaning of the phrase "expression", voting can be legitimately regarded as a form of expression. Ballot is the instrument by which the voter expresses his choice between candidates or in respect to propositions; and his "vote" is his choice or election, as expressed by his ballot (vide A Dictionary of Modern Legal Usage, 2nd Edn., by A. Garner Bryan). "Opinion expressed, resolution or decision carried, by voting" is one of the meanings given to the expression "vote" in the New Oxford Illustrated Dictionary. It is well settled and it needs no emphasis that the fundamental right of freedom of speech and expression should be broadly construed and it has been so construed all these years. In the light of this, the dictum of the Court that the voter "speaks out or expresses by casting a vote" is apt and well founded. I would only reiterate and say that freedom of voting by expressing preference for a candidate is nothing but freedom of expressing oneself in relation to a matter of prime concern to the country and the voter himself."(emphasis supplied)

After referring to the view expressed in Jyoti Basu v. Debi Ghosal (supra) that the right to elect is "neither a fundamental right nor a common law right" but "pure and simple, a statutory right", Reddi J. in Paragraph 97 of the judgment further observed as under: -
" \005\005 With great reverence to the eminent Judges, I would like to clarify that the right to vote, if not a fundamental right, is certainly a constitutional right. The right originates from the Constitution and in accordance with the constitutional mandate contained in Article 326, the right has been shaped by the statute, namely the RP Act. That, in my understanding, is the correct legal position as regards the nature of the right to vote in elections to the House of the People and Legislative Assemblies. It is not very accurate to describe it as a statutory right, pure and simple. Even with this clarification, the argument of the learned Solicitor-General that the right to vote not being a fundamental right, the information which at best facilitates meaningful exercise of that right cannot be read as an integral

part of any fundamental right, remains to be squarely met. Here, a distinction has to be drawn between the conferment of the right to vote on fulfilment of requisite criteria and the culmination of that right in the final act of expressing choice towards a particular candidate by means of ballot. Though the initial right cannot be placed on the pedestal of a fundamental right, but, at the stage when the voter goes to the polling booth and casts his vote, his freedom to express arises. The casting of vote in favour of one or the other candidate tantamounts to expression of his opinion and preference and that final stage in the exercise of voting right marks the accomplishment of freedom of expression of the voter. That is where Article 19(1)(a) is attracted. Freedom of voting as distinct from right to vote is thus a species of freedom of expression and therefore carries with it the auxiliary and complementary rights such as right to secure information about the candidate which are conducive to the freedom. \005\005."(emphasis supplied)

Dharmadhikari, J., agreed with Shah, J. and in his separate judgment observed thus: -
"129. Democracy based on "free and fair elections" is considered as a basic feature of the Constitution in the case of Kesavananda Bharati. Lack of adequate legislative will to fill the vacuum in law for reforming the election process in accordance with the law declared by this Court in the case of Assn. for Democratic Reforms obligates this Court as an important organ in constitutional process to intervene."

The argument of the petitioners is that the majority view in the case of People’s Union for Civil Liberties, therefore, was that a right to vote is a constitutional right besides that it is also a facet of fundamental right under Article 19(1)(a) of the Constitution.
We do not agree with the above submission. It is clear that a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression, while reiterating the view in Jyoti Basu v. Debi Ghosal (supra) that a right to elect, fundamental though it is to democracy, is neither a fundamental right nor a common law right, but pure and simple, a statutory right.
Even otherwise, there is no basis to contend that the right to vote and elect representatives of the State in the Council of States is a Constitutional right. Article 80 (4) merely deals with the manner of election of the representatives in the Council of States as an aspect of the composition of the Council of States. There is nothing in the Constitutional provisions declaring the right to vote in such election as an absolute right under the Constitution.
Arguments based on Legislative Privileges and Tenth Schedule

Be that as it may, the moot contention that has been raised by the petitioners is that the election of members of the Council of States is provided for in the Constitution and, therefore, is a part of the Constitution and that it is inherent requirement of the principle of free and fair election that the right to vote be invariably accompanied by the right of secrecy of vote so as to ensure that the freedom of expression through vote is real.

Arguments based on Legislative Privileges and Tenth Schedule

It is the contention of Mr. Rao that apart from Article 19(1)(a), freedom of voting is Constitutionally guaranteed to a Member of a Legislative Assembly by Article 194 (1) & (2) in absolute terms. While the right under Article 19(1)(a) is subject to reasonable restrictions that may be imposed by law under Article 19(2), the freedom to vote under Article 194(1) and (2) is absolute. He would refer to Special Reference No.1 of 1964 [(1965) 1 SCR 413] and Tej Kiran Jain & Ors. V. N. Sanjiva Reddy & Ors. [(1971) 1 SCR 612].

Article 194 relates to the "Powers, privileges, etc., of the Houses of Legislatures and of the members and committees thereof". It is akin to the provisions contained in Article 105 that pertain to "Powers, privileges, etc., of the Houses of Parliament and of the members and committees thereof". It would be proper to take a look at the provisions in question.

Articles 105 and 194 run as follows :-

"105.Powers, privileges, etc., of the Houses of Parliament and of the members and committees thereof.\027(1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.

(2) No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of Section 15 of the Constitution (Forty-fourth Amendment) Act, 1978.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of Parliament or any committee thereof as

they apply in relation to members of Parliament."

"194. Powers, privileges, etc., of the Houses of Legislatures and of the members and committees thereof.\027(1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State.

(2) No member of the Legislature of a State shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of Section 26 of the Constitution (Forty-fourth Amendment) Act, 1978].

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of the Legislature of a State or any committee thereof as they apply in relation to members of that Legislature."

In Special Reference No.1 of 1964 [(1965) 1 SCR 413], this Court examined the provisions contained in Article 194. The issues concerned the constitutional relationship between the High Court and the State Legislature. The President of India had made a Reference under Article 143(1) to this Court against the backdrop of a dispute involving the Legislative Assembly of the State of Uttar Pradesh and two Judges of the High Court. The factual matrix of the case would show that the State Assembly had committed an individual to prison for its contempt. The prisoner had preferred a petition under Article 226 on which the judges of the High Court had ordered his release on interim bail. The State Assembly found that in entertaining the petition and granting bail, the judges of the High Court had also committed contempt of the State Legislature and thus issued process, amongst others, against the said two High Court Judges.
This Court found that Article 194 (1) makes it clear that "the freedom of speech in the Legislature of every State which it prescribes, is subject to the provisions of the Constitution, and to the rules and standing orders, regulating the procedure

of the Legislature" and that while interpreting the said clause "it is necessary to emphasize that the provisions of the Constitution subject to which freedom of speech has been conferred on the legislators, are not the general provisions of the Constitution but only such of them as relate to the regulation of the procedure of the Legislature". In this view, it was the opinion of this Court that while Article 194 (1) "confers freedom of speech on the legislators within the legislative chamber", Article 194(2) "makes it plain that the freedom is literally absolute and unfettered."

In Tej Kiran Jain v. N. Sanjiva Reddy (supra), the issue was as to whether proceedings could be taken in a court of law in respect of what was said on the floor of Parliament in view of Article 105(2) of the Constitution. It arose out of a suit for damages being filed against the respondents on the allegation that they had made defamatory statements on the floor of the Lok Sabha during a Calling Attention Motion against Shankaracharya. The High Court had ruled against the proposition. Reference was made in appeal to an observation of this Court in Special Reference No.1 of 1964, where this Court dealing with the provisions of Article 212 of the Constitution had pointed out that the immunity under that Article was against an alleged irregularity of procedure but not against an illegality, and contended that the same principle should be applied to determine whether what was said was outside the discussion on a Calling Attention Motion. It was submitted that the immunity granted by Article 105 (2) was to what was relevant to the business of Parliament and not to something that was utterly irrelevant.

This Court, dealing with the contentions of the appellants, held as under: -

"In our judgment it is not possible to read the provisions of the article in the way suggested. The article means what it says in language which could not be plainer. The article confers immunity inter alia in respect of "anything said ... in Parliament". The word "anything" is of the widest import and is equivalent to "everything". The only limitation arises from the words "in Parliament" which means during the sitting of Parliament and in the course of the business of Parliament. We are concerned only with speeches in Lok Sabha. Once it was proved that Parliament was sitting and its business was being transacted, anything said during the course of that business was immune from proceedings in any Court this immunity is not only complete but is as it should be. It is of the essence of parliamentary system of Government that people's representatives should be free to express themselves without fear of legal consequences. What they say is only subject to the discipline of the rules of Parliament, the good sense of the members and the control of proceedings by the Speaker. The Courts have no say in the matter and should really have none."

(emphasis supplied)

It is the contention of the learned counsel that the same should be the interpretation as to the scope and tenor of the

provision contained in Article 194 (2) concerning the privileges of the Members of the Legislative Assemblies of the States who constitute State wise electoral colleges for electing representatives of each State in the Council of States under the provisions of Article 80 (4). The counsel argue that the freedom of expression without fear of legal consequences as flowing from Article 194(2) should inure to the Members of the Legislative Assemblies while discharging their function as electoral college under Article 80(4).

This argument, though attractive, does not deserve any credence in the context at hand. The proceedings concerning election under Article 80 are not proceedings of the "House of the Legislature of State" within the meaning of Article 194. It is the elected members of the Legislative Assembly who constitute, under Article 80 the Electoral College for electing the representative of the State to fill the seat allocated to that State in the Council of States. It is noteworthy that it is not the entire Legislative Assembly that becomes the Electoral College, but only the specified category of members thereof. When such members assemble at a place, they do so not to discharge functions assigned under the Constitution to the Legislative Assembly. Their participation in the election is only on account of their ex-officio capacity of voters for the election. Thus, the act of casting votes by each of them, which also need not occur with all of them present together or at the same time, is merely exercise of franchise and not proceedings of the legislature.

It is time to take up the arguments based on the Tenth Schedule.

Tenth Schedule was added to the Constitution by the Constitution (Fifty-second Amendment) Act, 1985, with effect from 1st March 1985. The purpose of the said amendment as declared in the Objects and Reasons was to combat the "evil of political defections" which have been "a matter of national concern" and which menace has the potency to "undermine the very foundations of our democracy and the principles which sustain it".

The said amendment also added sub-Articles (2) to Article 102 and 191 that pertained to Disqualifications for membership of the Houses of Parliament and Houses of State Legislature respectively. Paragraph 1 (a) of the Tenth Schedule also confirms its application to "House" which has been defined to mean "either House of Parliament or the Legislative Assembly or, as the case may be, either House of the Legislature of a State". The new sub-Articles declared, in identical terms, that a "person shall be disqualified for being a member" of either of the said Houses "if he is so disqualified under the Tenth Schedule". Paragraph 2 of the Tenth Schedule, to the extent germane here, may be extracted as under : -

"2. Disqualification on ground of defection.\027(1) Subject to the provisions of paragraphs 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House\027

(a) XXXXXXX; or

(b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority, and such voting or

abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention.

Explanation.\027For the purposes of this sub-paragraph,\027

(a) an elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member;

(b) a nominated member of a House shall,\027

(i) where he is a member of any political party on the date of his nomination as such member, be deemed to belong to such political party;

(ii) in any other case, be deemed to belong to the political party of which he becomes, or, as the case may be, first becomes, a member before the expiry of six months from the date on which he takes his seat after complying with the requirements of Article 99 or, as the case may be, Article 188.

XXXXXXXXX "

It is the contention of the petitioners that the fact that election to fill the seats in the Council of States by the legislative assembly of the State involves 'voting', the principles of Tenth Schedule are attracted. They argue that the application of the Tenth Schedule itself shows that open ballot system tends to frustrate the entire election process, as also its sanctity, besides the provisions of the Constitution and the RP Act. They submit that the open ballot system, coupled with the looming threat of disqualification under the Tenth Schedule reduces the election to a political party issuing a whip and the candidate being elected by a show of strength. This, according to the petitioners, will result in people with moneybags occupying the seats in the Council of States.

The respondents opposing the petitions would, on the other hand, argue that the Tenth Schedule does not apply to the election in the Council of States. Its application is restricted to the proceedings in the House of Legislature and it has no application to the election conducted under the RP Act. Nonetheless, learned Counsel would argue, the principles behind making the elections by open ballot furthers the Constitutional provisions in the Tenth Schedule.

It has to be borne in mind that the party system is well recognized in Indian context. Sections 29-A to 29-C of the RP Act, 1951 speak of registration of political parties and some of their privileges & obligations.

In S.R. Bommai, this Court ruled as under: -

"104. What is further \027 and this is an equally, if not more important aspect of our Constitutional law we have adopted a pluralist democracy. It implies, among other things, a multi-party system. Whatever the nature of federalism, the fact remains that as stated above, as per the provisions of the Constitution, every State is constituent political unit and has to have an exclusive Executive and Legislature elected and constituted by the

same process as the Union Government. Under our political and electoral system, political parties may operate at the State and national level or exclusively at the State level. There may be different political parties in different States and at the national level. Consequently, situations may arise, as indeed they have, when the political parties in power in various States and at the Centre may be different. It may also happen \027 as has happened till date \027 that through political bargaining, adjustment and understanding, a State level party may agree to elect candidates of a national level party to Parliament and vice versa. This mosaic of variegated pattern of political life is potentially inherent in a pluralist multi-party democracy like ours. Hence the temptation of the political party or parties in power (in a coalition Government) to destabilise or sack the Government in the State not run by the same political party or parties is not rare and in fact the experience of the working of Article 356(1) since the inception of the Constitution, shows that the State Governments have been sacked and the Legislative Assemblies dissolved on irrelevant, objectionable and unsound grounds. So far the power under the provision has been used on more than 90 occasions and in almost all cases against Governments run by political parties in opposition. If the fabric of pluralism and pluralist democracy and the unity and integrity of the country are to be preserved, judiciary in the circumstances is the only institution which can act as the saviour of the system and of the nation."
(emphasis supplied)

Some of the observations appearing at pages 485-486 in Kesavananda Bharati are also relevant and are extracted hereunder: -
"Further a Parliamentary Democracy like ours functions on the basis of the party system. The mechanics of operation of the party system as well as the system of Cabinet Government are such that the people as a whole can have little control in the matter of detailed law-making. "\005 on practically every issue in the modern State, the serried millions of voters cannot do more than accept or reject the solutions offered. The stage is too vast to permit of the nice shades of quantitative distinctions impressing themselves upon the public mind. It has rarely the leisure, and seldom the information, to do more than indicate the general tendency of its will. It is in the process of law-making that the subtler adjustments must be effected." (Laski: A Grammar of Politics,

Fifth Edn., pp. 313-314)."
(emphasis supplied)

The Tenth Schedule of the Constitution recognizes the importance of the political parties in our democratic set-up, especially when dealing with Members of the Houses of Parliament and the Legislative Assemblies or Councils. The validity of the Tenth Schedule was challenged on various grounds, inter alia, that a political party is not a democratic entity and the imposition of whips on Members of Parliament was not in accordance with the Constitutional scheme. Rejecting this argument, this Court held that it was open for Parliament to provide that its Members, who have been elected on a party ticket, act according to the decisions made by the party and not against it.
In Kihoto Hollohan v. Zachillhu (supra) , it was held that: -
"43. Parliamentary democracy envisages that matters involving implementation of policies of the government should be discussed by the elected representatives of the people. Debate, discussion and persuasion are, therefore, the means and essence of the democratic process. During the debates the Members put forward different points of view. Members belonging to the same political party may also have, and may give expression to, differences of opinion on a matter. Not unoften the views expressed by the Members in the House have resulted in substantial modification, and even the withdrawal, of the proposals under consideration. Debate and expression of different points of view, thus, serve an essential and healthy purpose in the functioning of Parliamentary democracy. At times such an expression of views during the debate in the House may lead to voting or abstinence from voting in the House otherwise than on party lines.
44. But a political party functions on the strength of shared beliefs. Its own political stability and social utility depends on such shared beliefs and concerted action of its Members in furtherance of those commonly held principles. Any freedom of its Members to vote as they please independently of the political party's declared policies will not only embarrass its public image and popularity but also undermine public confidence in it which, in the ultimate analysis, is its source of sustenance \027 nay, indeed, its very survival. Intra-party debates are of course a different thing. But a public image of disparate stands by Members of the same political party is not looked upon, in political tradition, as a desirable state of things. Griffith and Ryle on Parliament Functions, Practice and Procedure (1989 edn., p. 119) say:
"Loyalty to party is the norm, being based on shared beliefs. A divided party is looked on

with suspicion by the electorate. It is natural for Members to accept the opinion of their Leaders and Spokesmen on the wide variety of matters on which those Members have no specialist knowledge. Generally Members will accept majority decisions in the party even when they disagree. It is understandable therefore that a Member who rejects the party whip even on a single occasion will attract attention and more criticism than sympathy. To abstain from voting when required by party to vote is to suggest a degree of unreliability. To vote against party is disloyalty. To join with others in abstention or voting with the other side smacks of conspiracy."
(emphasis supplied)
Clause (b) of sub-para (1) of Paragraph 2 of the Tenth Schedule gives effect to this principle and sentiment by imposing a disqualification on a Member who votes or abstains from voting contrary to "any directions" issued by the political party. The provision, however, recognises two exceptions: one when the Member obtains from the political party prior permission to vote or abstain from voting and the other when the Member has voted without obtaining such permission but his action has been condoned by the political party. This provision itself accommodates the possibility that there may be occasions when a Member may vote or abstain from voting contrary to the direction of the party to which he belongs. This, in itself again, may provide a clue to the proper understanding and construction of the expression "any direction" in clause (b) of Paragraph 2(1) \027 whether really all directions or whips from the party entail the statutory consequences or whether having regard to the extraordinary nature and sweep of the power and the very serious consequences that flow including the extreme penalty of disqualification the expression should be given a meaning confining its operation to the contexts indicated by the objects and purposes of the Tenth Schedule. We shall deal with this aspect separately."
(emphasis supplied)

In Paragraph 122, this Court proceeded to hold as under:-
122. While construing Paragraph 2(1)(b) it cannot be ignored that under the

Constitution Members of Parliament as well as of the State legislature enjoy freedom of speech in the House though this freedom is subject to the provisions of the Constitution and the rules and standing orders regulating the Procedure of the House [Article 105(1) and Article 194(1)]. The disqualification imposed by Paragraph 2(1)(b) must be so construed as not to unduly impinge on the said freedom of speech of a Member. This would be possible if Paragraph 2(1)(b) is confined in its scope by keeping in view the object underlying the amendments contained in the Tenth Schedule, namely, to curb the evil or mischief of political defections motivated by the lure of office or other similar considerations. The said object would be achieved if the disqualification incurred on the ground of voting or abstaining from voting by a member is confined to cases where a change of government is likely to be brought about or is prevented, as the case may be, as a result of such voting or abstinence or when such voting or abstinence is on a matter which was a major policy and programme on which the political party to which the Member belongs went to the polls. For this purpose the direction given by the political party to a Member belonging to it, the violation of which may entail disqualification under Paragraph 2(1)(b), would have to be limited to a vote on motion of confidence or no confidence in the government or where the motion under consideration relates to a matter which was an integral policy and programme of the political party on the basis of which it approached the electorate. The voting or abstinence from voting by a Member against the direction by the political party on such a motion would amount to disapproval of the programme on the basis of which he went before the electorate and got himself elected and such voting or abstinence would amount to a breach of the trust reposed in him by the electorate."
(emphasis supplied)

It is not without significance that, barring the exception in case of independents, which are few and far between, experience has shown that it is the political parties that mostly set up the members of legislatures at the Centre or in the States. We may also refer to the nomination papers prescribed under the Conduct of Election Rules, 1961 for election to the Council of States, being Form 2-C, or for election to the State Legislative Assembly, being Form 2B, each of which require a declaration to be made by the candidate as to particulars of the political party that has set him up in the election. This declaration binds the elected legislators in the matter of allegiance to the political party in all matters including, and we find the Attorney General is not wrong in so submitting,

the support of the party to a particular candidate in election to the Council of States. Yet, in view of the law laid down in Kihoto Hollohan v. Zachillhu (supra), it is not correct to contend that the open ballot system tends to expose the members of the Legislative Assembly to disqualification under the Tenth Schedule since that part of the Constitution is meant for different purposes.

International Conventions

The counsel for the petitioners have also submitted that International Instruments put emphasis on "secret ballot" since it lays the foundation for ensuring free and fair election which in turn ensures a democratic government showing the true will of the people. The significance of this emphasis lies in the recognition that it is a democratic Government that is ultimately responsible for protecting the Human Rights of the people, viz., civil, political, social and economic rights. In above context, reference was made to the Universal Declaration of Human Rights and International Convention on Civil and Political Rights (ICCPR).

Universal Declaration of Human Rights, through Article 21 provides as under: -

"(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
(2) Everyone has the right of equal access to public service in his country.
(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

International Convention on Civil and Political Rights (ICCPR), in its Article 25 provides as under: -

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country."

Both the documents, thus, provide for formation of a government through secret ballot. Prime importance is given in these two Human Rights instruments on "will of the electors" giving basis to the authority of Government. It may however be noticed that in Article 21 of Universal Declaration of Human Rights the requirement is satisfied not necessarily by secret ballot but even "by equivalent free voting procedures". The learned counsel would also rely upon the instrument called Inter-American Convention, in which the principles of the

Secret Ballot System, as free expression of the will of voter have been accepted.

Mr. Sachar pointed out that the above mentioned expressions were added in Article 25 (b) of ICCPR in the wake of one view of participatory countries in the Third Committee, 16th Session (1961) to the effect: -

"\005\005Others held that 'genuine periodic elections', 'universal and equal suffrage' and 'secret ballot' were the elements of genuine elections, which in turn guaranteed the free expression of the will of the electors (A/C.3/SR.1096, $ 36 (CL), $55(CHI), $63 & $75-76 (UAR), $66 (RL)]. These elements should therefore remain grouped together."

The learned counsel was at pains to argue that the international instructions can be used for interpreting the municipal laws and in support of his plea he would repeatedly refer to His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala & Anr. [(1973) 4 SCC 225]; Jolly George Varghese & Anr. v. The Bank of Cochin [(1980) 2 SCC 360]; People's Union for Civil Liberties (PUCL) v. Union of India & Anr. [(1997) 1 SCC 301]; Nilabati Behera v. State of Orissa & Ors. [1993 (2) SCC 746]; Kapila Hingorani v. State of Bihar [2003 (6) SCC 1] and State of W.B. v. Kesoram Industries Ltd. & Ors. [(2004) 10 SCC 201].

According to Mr. Sachar, the emphasis in the aforementioned judgments is that evolving jurisprudence of human rights is required to be used in interpreting the Statutes. This argument is in addition to the general argument that in the absence of any law, this Court may lay down guidelines in consonance with the principles laid down in the International Instruments so as to effectuate the Fundamental Rights guaranteed under the Constitution.

There can be no quarrel with the proposition that the International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory States and the meaning given to them have to be such as would help in effective implementation of the rights declared therein. The applicability of the Universal Declaration of Human Rights and the principles thereof may have to be read, if need be, into the domestic jurisprudence.

It was said as early as in Kesavananda Bharati v. State of Kerala (supra) that "in view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and solemn declaration subscribed to by India."

But then, the law on the subject as settled in India is clear enough as to render it not necessary for this Court to look elsewhere to deal with the issues that have been raised here. Further, in case of conflict, the municipal laws have to prevail.

Secrecy of Vote \026 requisite for free and fair election

The learned Counsel for the petitioners have submitted that the secrecy of voting has always been the hallmark of the concept of free and fair election, so very essential in the democratic principles adopted as our polity. They submit that this is the spirit of our constitutional law and also universally accepted norm and that any departure in this respect impinges on the fundamental rights, in particular freedom of expression by the voter.

Reference has been made to the case of S. Raghbir

Singh Gill v. S. Gurcharan Singh Tohra, [1980 Supp SCC 53], in which appeal the core problem concerned the issue as to whether "Purity of election and secrecy of ballot, two central pillars supporting the edifice of parliamentary democracy envisioned in the Constitution" stand in confrontation with each other or are complementary to each other.

The case of S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra (supra) pertained to the period anterior to the impugned amendment. As noticed earlier, Section 94 of the RP Act, 1951, as it then stood, made provision for ensuring that "Secrecy of voting" is not infringed in any election. In order to do this, the provision would make every witness or other person immune from being "required to state for whom he has voted at an election."

This Court found in the aforementioned case that Section 94 could not be interpreted or examined in isolation and that its scope, ambit and underlying object must be ascertained in the context of the Act in which it finds its place viz. the RP Act, 1951 and further in the context of the fact that this Act itself was enacted in exercise of power conferred by the Articles in Part XV titled "Elections" in the Constitution. It was the view of this Court that "Any interpretation of Section 94 must essentially subserve the purpose for which it is enacted. The interpretative process must advance the basic postulate of free and fair election for setting up democratic institution and not retard it. Section 94 cannot be interpreted divorced from the constitutional values enshrined in the Constitution".

This Court ruled thus: -

"13. Secrecy of ballot undoubtedly is an indispensable adjunct of free and fair elections. A voter had to be statutorily assured that he would not be compelled to disclose by any authority as to for whom he voted so that a voter may vote without fear or favour and is free from any apprehension of its disclosure against his will from his own lips. \005.. As Section 94 carves out an exception to Section 132 of the Evidence Act as also to Section 95 of the Act it was necessary to provide for protection of the witness if he is compelled to answer a question which may tend to incriminate him. Section 95 provides for grant of a certificate of indemnity in the circumstances therein set out. A conspectus of the relevant provisions of the Evidence Act and Sections 93, 94 and 95 of the Act would affirmatively show that they provide for a procedure, including the procedure for examination of witnesses, their rights and obligations in the trial of an election petition. The expression "witness" used in the section is a pointer and further expression "other person" extends the protection to a forum outside courts. \005".

(emphasis supplied)

After taking note of, amongst other provisions, Section 94 and 128 of the RP Act, 1951 and the Rules 23(3), 23(5)(a) & (b), 31(2), 38(4), 39(1), (5), (6) & (8), second proviso to 40(1), 38-A (4), 39-A (1) & (2) as contained in the Conduct of Election Rules, 1961 ("Rules" for short) and similar other rules, this Court found that while seeking to provide for maintaining

secrecy of ballot, they were meant "to relieve a person from a situation where he may be obliged to divulge for whom he has voted under testimonial compulsion". It was then observed in Paragraph 14 that: -

"\005. Secrecy of ballot can be appropriately styled as a postulate of constitutional democracy. It enshrines a vital principle of parliamentary institutions set up under the Constitution. It subserves a very vital public interest in that an elector or a voter should be absolutely free in exercise of his franchise untrammelled by any constraint which includes constraint as to the disclosure. A remote or distinct possibility that at some point a voter may under a compulsion of law be forced to disclose for whom he has voted would act as a positive constraint and check on his freedom to exercise his franchise in the manner he freely chooses to exercise. Therefore, it can be said with confidence that this postulate of constitutional democracy rests on public policy."
(emphasis supplied)

It was thus held that secrecy of ballot, a basic postulate of constitutional democracy, was "formulated not in any abstract situation or to be put on a pedestal and worshipped but for achieving another vital principle sustaining constitutional democracy viz. free and fair election". This Court found that Section 94 was meant as a privilege of the voter to protect him against being compelled to divulge information as to for which candidate he had voted. Nothing prevents the voter if he chooses to open his lips of his own free will without direct or indirect compulsion and waive the privilege. It was noticed that the provision refers to a "witness or other person". Thus, it is meant to protect the voter both in the court when a person is styled as a witness and outside the court when he may be questioned about how he voted. It was found that no provision existed as could expose the voter to any penalty if he voluntarily chooses to disclose how he voted or for whom he voted.

With a very clear view that 'Secrecy of ballot' as provided in Section 94 was mooted "to ensure free and fair elections", the Court opined thus: -

"\005If secrecy of ballot instead of ensuring free and fair elections is used, as is done in this case, to defeat the very public purpose for which it is enacted, to suppress a wrong coming to light and to protect a fraud on the election process or even to defend a crime viz. forgery of ballot papers, this principle of secrecy of ballot will have to yield to the larger principle of free and fair elections\005.."
(emphasis supplied)

The Court, after noticing that the RP Act, 1951 is a self-contained Code on the subject of elections and reiterating that "there is one fundamental principle which permeates through all democratically elected parliamentary institutions viz. to set them up by free and fair election", observed:

"\005The principle of secrecy of ballot cannot stand aloof or in isolation and in confrontation to the foundation of free and fair elections viz. purity of election. They can co-exist but as stated earlier, where one is used to destroy the other, the first one must yield to principle of purity of election in larger public interest. In fact secrecy of ballot, a privilege of the voter, is not inviolable and may be waived by him as a responsible citizen of this country to ensure free and fair election and to unravel foul play."
(emphasis supplied)

In formulating its views, support was found in certain observations of Kelly, C.B., in Queen v. Beardsall, [LR (1875-76) 1 QB 452], to the following effect: -
"The legislature has no doubt provided that secrecy shall be preserved with respect to ballot papers and all documents connected with what is now made a secret mode of election. But this secrecy is subject to a condition essential to the due administration of justice and the prevention of fraud, forgery, and other illegal acts affecting the purity and legality of elections".
(emphasis supplied)

Rejecting the apprehension that the principle of secrecy enshrined in Section 94 of the RP Act, 1951, cannot be waived because it was enacted in public interest and it being a prohibition based on public policy, and while agreeing with the contention that where a prohibition enacted is founded on public policy courts should be slow to apply the doctrine of waiver, it was held that the privilege of secrecy was granted for the benefit of an individual, even if conferred to advance a principle enacted in public interest, it could be waived because the very concept of privilege inheres a right to waive it. The Court thus found it an "inescapable conclusion" that the principle of secrecy in Section 94 enacts a qualified privilege in favour of a voter not to be compelled to disclose but if he chooses to volunteer the information the rule is not violated. Thus, even under the elections that continue to be based on principle of secrecy of voting, it is for the voter to choose whether he wishes to disclose for whom he had voted or would like to keep the secrecy intact. If he so chooses, he can give up his privilege and in that event, the secrecy of ballot should yield. Such an event can also happen if there is fraud, forgery or other illegal act and the disclosure sub-serves the purpose of administration of justice.
The contention of the learned Counsel for the petitioners is that what is significant is that when a voter is casting his vote he should be able to do so according to his own conscience, without any fear, pressure, or coercion. The fear that under any law, he maybe compelled to disclose for whom he had voted can also not interdict his choice. Assurance of such freedom is an essence of secrecy of ballot and constitutes an adjunct of free and fair election. Liberty of the voter to choose to disclose his ballot because of fraud or forgery is only for achieving the very same purpose of free and fair election. This liberty, however, does not affect, according to the petitioners, in any way the general principle that secrecy of

ballot forms a basis of free and fair election, which is necessary for survival of democracy.

Mr. Sachar also pressed in aid the decision in Charles W. Burson v. Mary Rebecca Freeman: [(1992) 119 L.ed. 2d 5 = 504 US 119], wherein it was held that: -

"Right to vote freely for the candidate of one's choice is of the essence of a democratic society."

"No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live. Other rights, even the most basic, are illusory if the right to vote is undermined".

In the above-mentioned case, after dealing with the evil associated with 'viva voce system' and the failure of law to secure secrecy which had opened the door to bribery it was summed up as follows:

"In sum, an examination of the history of election regulation in this country reveals a persistent battle against two evils; voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments."

"Finally, the dissent argues that we confuse history with necessity. Yet the dissent concedes that a secret ballot was necessary to cure electoral abuses. Contrary to the dissent's contention, the link between ballot secrecy and some restricted zone surrounding the voting area is not merely timing \026 it is common sense. The only way to preserve the secrecy of the ballot is to limit access to the area around the voter. Accordingly, we hold that some restricted zone around the voting area is necessary to secure the State's compelling interest."

Mr. PP Rao, learned senior advocate, in submitting that voting being a form of expression and a secret ballot ensures freedom of vote, relied upon observations in Paragraph 2 of the judgment in Lily Thomas v. Speaker, Lok Sabha & Ors. [(1993) 4 SCC 234], wherein the Court was taking note of the process under Article 124 (4) for removal of a Judge of the Supreme Court. It may be mentioned here that the proceedings in the nature envisaged under Article 124 (4) were held earlier in Sub-Committee on Judicial Accountability v. Union of India [(1991) 4 SCC 699], not to be proceedings in the Houses of Parliament and rather one that would partake of judicial character because it is removal after inquiry and investigation.

Mr. Rao quoted the following passage from Paragraph 2 of the Judgment in aforementioned case: -

"The statutory process appears to start when the Speaker exercises duty under the Judges Enquiry Act and comes to an end once the Committee appointed by the Speaker submits the report. The debate

on the Motion thereafter in the Parliament, the discussion and the voting appear more to be political in nature. Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue in question. In Black's Law Dictionary it is explained as, "the expression of one's will, preference, or choice, formally manifested by a member of a legislative or deliberative body, or of a constituency or a body of qualified electors, in regard to the decision to be made by the body as a whole upon any proposed measure or proceeding or in passing laws, rules or regulations, or the selection of an officer or representative". Right to vote means right to exercise the right in favour of or against the motion or resolution. Such a right implies right to remain neutral as well. \005\005"
(emphasis supplied)

Mr. Sachar, while submitting that the sanctity and purity of election where voter casts his choice without any fear and favour can be ensured only if it is by secret ballot, argued that it is secret ballot, which is the bedrock of free and fair election. There cannot be any distinction between a vote cast in the election for House of the People and a vote cast in the Council of States. He submitted that there couldn't also be a distinction between direct elections like that for the popular House, at the Centre or in the State and an indirect election like that for the office of the President of India or, closer to the subject, election to fill the seats of "the representatives of the States" in the Council of States.
In above context, he would cite the following passage from S.R. Chaudhuri v. State of Punjab & Ors. [(2001) 7 SCC 126]:-
"34. The very concept of responsible government and representative democracy signifies government by the people. In constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their chosen representatives and for exercise of those powers, the representatives are necessarily accountable to the people for what they do. The members of the Legislature, thus, must owe their power directly or indirectly to the people. The members of the State Assemblies like the Lok Sabha trace their power directly as elected by the people while the members of the Council of State like the Rajya Sabha owe it to the people indirectly since they are chosen by the representatives of the people. The Council of Ministers of which the Chief Minister is the head in the State and on whose aid and advice the Governor has to act, must, therefore, owe their power to the people, directly or indirectly."

It is the submission of Mr. Sachar that the reason used to justify the amendment is fallacious since it assumes as if secrecy of voting is only a routine matter of procedure and that it would also mean that Parliament could in future provide that election to the House of the People would be by open ballot because there is no such provision for secrecy mentioned in the Constitution. His submission is that secrecy of ballot is an integral part of a democratic set up and its absence means absence of free and fair election.

In A. Neelalohithadasan Nadar v. George Mascrene & Ors. [1994 Supp (2) SCC 619], the conflict was found to be between two principles of election law - one being "purity of elections" and the other "secrecy of ballot". On the basis of the former, the Kerala High Court had upset the election of the appellant who later came before this Court. Challenge to the order of the High Court was on the anvil of the latter principle. The factual matrix of the case would show that the appellant and the first respondent were contesting candidates for the Kovalam Assembly Seat in the State of Kerala. In the counting, the appellant was declared elected on ground that he had obtained 21 votes in excess of the first respondent. The respondent moved the election petition mainly on ground of impersonation and double voting by 19 specified voters. The High Court on examining the evidence led by the parties on the issue found that certain ballot papers deserved being picked out from the respective ballot boxes to be rejected as void. The ministerial work for the purpose was assigned to the Joint Registrar of the High Court. On such exercise being undertaken, the election petitioner entitled himself to be declared elected instead of the appellant.

The High Court had located the void votes on the assumption that both the contestants had bowed to the principle embodied in Section 64(4) of the RP Act for the sake of "purity of elections" principle and were willing partners to have the void element identified and extricated from the voted lot. In this view, rejecting the argument in appeal on breach of the principle of "secrecy of ballot", this Court quoted from the law in S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra (supra) and observed in Paragraph 10 as under: -

"The existence of the principle of "secrecy of ballot" cannot be denied. It undoubtedly is an indispensable adjunct of free and fair elections. The Act statutorily assures a voter that he would not be compelled by any authority to disclose as to for whom he has voted, so that he may vote without fear or favour and free from any apprehension of its disclosure against his will from his own lips. See in this connection Raghbir Singh Gill v. Gurcharan Singh Tohra. But this right of the voter is not absolute. It must yield to the principle of "purity of election" in larger public interest. The exercise of extrication of void votes under Section 62(4) of the Act would not in any manner impinge on the secrecy of ballot especially when void votes are those which have to be treated as no votes at all. "Secrecy of ballot" principle presupposes a validly cast vote, the sanctity and sacrosanctity of which must in all events be preserved. When it is talked of ensuring free and fair elections it is meant elections held on the

fundamental foundation of purity and the "secrecy of ballot" as an allied vital principle\005\005\005".
(emphasis supplied)

It was thus reiterated by this Court in A. Neelalohithadasan Nadar v. George Mascrene (supra) that out of the two competing principles, the purity of election principle must have its way and that the rule of secrecy cannot be pressed into service "to suppress a wrong coming to light and to protect a fraud on the election process."
The submission on the part of the Petitioner that a right to vote invariably carries as an implied term, the right to vote in secrecy, is not wholly correct. Where the Constitution thought it fit to do so, it has itself provided for elections by secret ballot, e.g., in case of election of the President of India and the Vice-President of India. It is apt to point out that unlike silence on the subject in the case of provisions of the Constitution concerning election to fill the seats of the representatives of States in the Council of States, Articles 55(3) and 66(1), that relate to the manner of election for the offices of the President and the Vice President respectively, provide for election by "secret ballot".
Articles 55(3) and 66(1) of the Constitution provide for elections of the President and the Vice President respectively, referring to voting by electoral colleges, consisting of elected members of Parliament and Legislative Assembly of each State for purposes of the former office and members of both Houses of Parliament for the latter office. In both cases, it was felt necessary by the framers of the Constitution to provide that the voting at such elections shall be by secret ballot through inclusion of the words "and the voting at such election shall be by secret ballot." If the right to vote by itself implies or postulates voting in secrecy, then Articles 55(3) and 66(1) would not have required inclusion of such words. The necessity for including the said condition in the said Articles shows that "secret ballot" is not always implied. It is not incorporated in the concept of voting by necessary implication. It follows that for 'secret ballot' to be the norm, it must be expressly so provided. To read into Article 80(4) the requirement of a secret ballot would be to read the words "and the voting at such election shall be by secret ballot" into the provision. To do so would be against every principle of Constitutional and statutory construction.
In view of it not being the requirement of the Constitution, as in the case of the President and the Vice President, it was permissible for Parliament when passing legislation like the Representation of the People Act to provide otherwise, that is to choose between the system of secret ballot or open ballot. Thus, from this angle, it is difficult to hold that there is Constitutional infirmity in providing open ballot system for the Council of States.
Other arguments & Conclusion
It has been argued by the petitioners that the Election Commission of India, which under the Constitution has been given the plenary powers to supervise the elections freely and fairly, had opposed the impugned amendment of changing the secret ballot system. Its view has, therefore, to be given proper weightage.
In this context, we would say that where the law on the subject is silent, Article 324 is a reservoir of power for the Election Commission to act for the avowed purpose of pursuing the goal of a free and fair election, and in this view it also assumes the role of an adviser. But the power to make

law under Article 327 vests in the Parliament, which is supreme and so, not bound by such advice. We would reject the argument by referring to what this Court has already said in Mohinder Singh Gill (supra) and what bears reiteration here is that the limitations on the exercise of "plenary character" of the Election Commission include one to the effect that "when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission, shall act in conformity with, not in violation of, such provisions".

The submission of learned Counsel for the Writ Petitioners is that the amendment violates the Constitution, which recognize the right to vote as a constitutional right, a facet of Article 19(1)(a) and the secret ballot preserving this right. Further that secret ballot is an adjunct of free and fair election and therefore, a part of a Parliamentary democracy and, therefore, taking away of voting right by secret ballot affects the basic feature of the Constitution. They argue that the impugned amendment was not called for.

The amendment, according to the Counsel for the petitioners, seems to proceed on the basis that it is only the leadership of the political parties that is to be trusted rather than the average legislator, which view is not very complimentary to the respect and dignity of the legislators, besides being factually unacceptable.

In above context, the Counsel referred to the following words of Dr. B.R. Ambedkar on the issue as to how the dignity of an individual should be upheld in the political system: -

"The second thing we must do is to observe the caution which John Stuart Mill has given to all who are interested in the maintenance of democracy, namely, not "to lay their liberties at the feet of even a great man, or to trust him with powers which enable him to subvert their institutions". There is nothing wrong in being grateful to great men who have rendered life-long services to the country. But there are limits to gratefulness. As has been well said by the Irish patriot Daniel O'Connel, no man can be grateful at the cost of his honour, no women can be grateful at the cost of her chastity and no nation can be grateful at the cost of its liberty. This caution is far more necessary in the case of India than in the case of any other country. For in India, Bhakti or what may be called the path of devotion or hero-worship, plays a part in its politics of any other country in the world. Bhakti in religion may be a road to the salvation of the soul. But, in politics, Bhakti or hero-worship is a sure road to degradation and to eventual dictatorship."

On the other hand, the respondents supporting the impugned amendment would argue that the Secrecy of voting had led to corruption and cross voting. They would point out that voting on all issues in the legislatures, including the Council of States and the Legislative Assemblies, is invariably open and not by secret ballot. The election of a representative is now at par with other important matters. They would concede that the common man participating in direct election

as voter exercising his vote in a polling booth requires the safeguard of secrecy. But elected members of legislative assemblies, as per the learned Counsel, are expected to have stronger moral fiber and public courage.

The learned Attorney General pointed out that the Statement of Objects and Reasons of the impugned Act refers to the Report of the Ethics Committee of Parliament. The Ethics Committee in its First Report of 08th December 1998 had recommended that the issue relating to open ballot system for election to the Rajya Sabha be examined. The issue again arose in the wake of allegations of money power made in respect of biennial elections to the Council of States held in 2000.

The relevant observations of the Ethics Committee have already been extracted, in extenso, in earlier part of this judgment. Suffice it to note here again that the committee took cognizance of "the emerging trend of cross voting in the elections for Rajya Sabha" and allegations that "large sums of money and other considerations encourage the electorate" for such purpose "to vote in a particular manner leading sometimes to the defeat of the official candidates belonging to their own political party". The Committee commended "holding the elections to Rajya Sabha and the Legislative Councils in States by open ballot" so as to remove the mischief played by "big money and other considerations" with the electoral process.

It is the submission of the learned Counsel for the petitioners that the observations of the Ethics Committee on which the impugned amendment was brought about not only fail to justify the amendment but run counter to the Constitutional scheme of conducting free and fair election which is necessary for preserving the democracy. On the other hand, the Attorney General submitted that since the bulk of the candidates are elected under the party system, the principle that a person elected or given the nomination of a party should not be lured into voting against the party by money power is wholesome and a salutary one.

Mr. Sachar has pointed out that the Conduct of Election Rules, 1961 were framed and notified in exercise of powers delegated by the RP Act, 1951. In the wake of the impugned amendment of Sections 59, 94 and 128 of RP Act, 1951, the said Rules have also been amended by the Central Government through S.O. 272 (E) dated 27.02.2004. This amendment has resulted in Rule 39-AA being added to the Rules for conduct of poll in election to the Council of States provided in Part \026 VI. Earlier, Rule 39-A had been added to the said Rules in furtherance of the system of secret ballot. Rule 39-A may be first taken note of. It reads as under: -

" 39-A. Maintenance of secrecy of voting by electors within polling station and voting procedure. \026 (1) Every elector, to whom a ballot paper has been issued under rule 38-A or under any other provision of these rules, shall maintain secrecy of voting within the polling station and for that purpose observe the voting procedure hereinafter laid down.

(2) The elector on receiving the ballot paper shall forthwith \026

(a) proceed to one of the voting compartments;

(b) record his vote in accordance with sub-rule (2) of rule 37-A,

with the article supplied for the purpose;
(c) fold the ballot paper so as to conceal his vote;
(c) if required, show to the Presiding Officer, the distinguished mark on the ballot paper;
(e) insert the folded paper into the ballot box, and
(f) quit the polling station.

(3) every elector shall vote without undue delay.
(4) No elector shall be allowed to enter a voting compartment when another elector is inside it.
(5) If an elector to whom a ballot paper has been issued, refuses, after warning given by the Presiding Officer to observe the procedure as laid down in sub-rule (2), the ballot paper issued to him shall, whether he has recorded his vote thereon or not, be taken back from him by the Presiding Officer or a polling officer under the direction of the Presiding Officer.
(6) After the ballot paper has been taken back, the Presiding Officer shall record on its back the words "Cancelled : voting procedure violated" and put his signature below those words.
(7) All the ballot papers on which the words "Cancelled : voting procedure violated" are recorded, shall be kept in a separate cover which shall bear on its face the words "Ballot papers :voting procedure violated".
(8) Without prejudice to any other penalty to which an elector, from whom a ballot paper has been taken back under sub-rule (5), may be liable, vote, if any, recorded on such ballot paper shall not be counted."

Rule 39-AA applied to such elections by virtue of Rule 70 reads as under: -
"Information regarding casting of votes. - (1) Notwithstanding anything contained in Rule 39-A, the presiding officer shall, between the period when an elector being a member of a political party records his vote on a ballot paper and before such elector inserts that ballot paper into the ballot box, allow the authorized agent of that political party to verify as to whom such elector has cast his vote:
Provided that if such elector refuses to show his marked ballot paper to the authorized agent of his political party, the ballot paper issued to him shall be taken back by the presiding officer or a polling officer under the direction of the presiding officer and the ballot paper so taken back shall then be further dealt

with in the manner specified in sub-rules (6) to (8) of Rule 39-A as if such ballot paper had been taken back under sub-rule (5) of that rule.

(2) Every political party, whose member as an elector casts a vote at a polling station, shall, for purposes of sub-rule (1), appoint, in Form 22-A, two authorized agents.

(3) An authorized agent appointed under sub-rule (2) shall be present throughout the polling hours at the polling station and the other shall relieve him when he goes out of the polling station or vice versa."

Since Rule 39-AA is required to be read with Rule 39-A, the former is necessarily an exception to the general rule in all other elections conducted under the RP Act, 1951 by the Election Commission. The norm has been, prior to the impugned amendment, that the voting shall be by a secret ballot, in which all concerned, including the electors are expected to preserve the sanctity of the vote by keeping it secret. But as already observed, the privilege to keep the vote secret is that of the elector who may choose otherwise; that is to say, he may opt to disclose the manner in which he has cast his vote but he cannot be compelled to disclose the manner in which he has done so, except in accordance with the law on the subject which ordinarily comes into play only in case the election is challenged by way of election petition before the High Court. In the case of election to the Council of States, in the post amendment scenario, the norm has undergone a change, in that the political party to which a particular member of the Legislative Assembly of the State belongs is entitled to ascertain through formally appointed authorized agent deputed at the polling station the manner in which the member in question, who is an elector for such purposes, has exercised his franchise. The exception applies only to such members of the Legislative Assembly, as are members of a political party and not to all members across the board. The voter at such an election may refuse to show his vote to the authorized agent of his political party, but in such an event he forfeits his right to vote, which is cancelled by the Presiding Officer of the poling station on account of violation of the election procedure.

The effect of the amended Rules, thus, is that in elections to the Council of States, before the elector inserts the ballot paper into the ballot box, the authorized agent of the political party shall be allowed to verify as to whom such an elector casts his vote. In case such an elector refuses to show his marked ballot paper, the same shall be taken back and will be cancelled by the Presiding Officer on the ground that the voting procedure had been violated. There is, therefore, a compulsion on the voter to show his vote.

But then, the above rules are only in furtherance of the object sought to be achieved by the impugned amendment. Rather, the rules show, the open ballot system put in position does not mean open to one and all. It is only the authorized agent of the political party who is allowed to see and verify as to whom such an elector casts his vote. The prerogative remains with the voter to choose as to whether or not to show his vote to the authorized agent of his party.

Voting at elections to the Council of States cannot be

compared with a general election. In a general election, the electors have to vote in a secret manner without fear that their votes would be disclosed to anyone or would result in victimization. There is no party affiliation and hence the choice is entirely with the voter. This is not the case when elections are held to the Council of States as the electors are elected members of the legislative assemblies who in turn have party affiliations.

The electoral systems world over contemplate variations. No one yardstick can be applied to an electoral system. The question whether election is direct or indirect and for which house members are to be chosen is a relevant aspect. All over the world in democracies, members of the House of Representatives are chosen directly by popular vote. Secrecy there is a must and insisted upon; in representative democracy, particularly to upper chamber, indirect means of election adopted on party lines is well accepted practice.

In "Australian Constitutional Law" [2nd Edition) by Fajgenbaum and Hanks, it is stated at page 51, that:

"Section 24 of the Australian Constitution embodies three principles, i.e., representative democracy, direct popular election and character of the House of representative democracy predicates enfranchisement of the electors, the existence of an electoral system capable of giving effect to the selection of their representatives and bestowal of legislative functions upon representatives selected. The extent of franchise comes under the heading "enfranchisement of electors". The electoral system with innumerable details including voting methods and qualifications of representatives as well as proportional representation in different forms etc. are maters in which there cannot exist a set formula said to be consistent with the representative democracy. The wide range of legislative functions which a legislature may possess must be given due weightage in such matters. Representative democracy covers an entire spectrum of political institutions, each differing in countless respects. However, at no point of time within such spectrum does there exist a single requirement so essential so as to be determinative of the existence of Representative Democracy. Section 24 of the Australian Constitution provides for direct choice of members by the people. The existence of variations in the number of persons or voters in the electoral division within a State does not detract from the description of the House of Representatives or the Senate or the existing electoral system. Proportionality is an element of "choosing of members" whereas qualification is different from the concept of 'choosing of members'. Section 30 of the Australian Constitution refers to qualifications of electors. Section 24 of the Australian Constitution deals with choosing of members in which

there is an element of proportionality. Proportional representation is the system of voting." (emphasis supplied)

Sections 8, 24, 30 and 128 of the Australian Constitution are as under:

"8. The qualification of electors of senators shall be in each State that which is prescribed by the Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives but in the choosing of senators each elector shall vote only once.

24. The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:-

(i) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators;

(ii) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, once more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

30. Until the Parliament otherwise provides, the qualifications of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once.

128. This Constitution shall not be altered except in the following manner:

The proposed law for the alteration thereof must be passed by an absolute

majority of each House of the Parliament, and n not less than two, nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it or passes it with any amendments to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen’s Assent.

No alternation diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representative, in increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

In this section, "Territory" means any territory referred to in section one

hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives."

Section 24 is quite similar to Article 80(4) and Section 30 to Article 84 of our Constitution.
In the case of Judd v. Mckeon reported in (1926) 38 CLR 380 at page 385, it is stated as follows:

"The extent of franchise in a democracy is a matter of fundamental importance. The purpose behind section 24 of the Australian Constitution is to ensure that the members of the Senate are chosen directly by popular vote and not by indirect means, such as, by the parliament or the legislative assembly or by the executive or by an electoral college. Section 24 of the Australian Constitution says that the members of the Senate shall be chosen by the people, which means, by people qualified to vote." (emphasis supplied)

In the case of King v. James reported in (1972) 128 CLR 221 at page 229, it has been held as follows:

"The fact that the world 'people' is used in section 24 of the Australian Constitution in contra-distinction to the word "elector" in Sections 8, 30 and 128 shows that the framers of the Constitution drafted Section 24 with the idea of providing in that section the manner of choosing rather than emphasizing the people who were to choose." (emphasis supplied)

In indirect election, when law provides for open ballot system; to decide whether it amounts to a denial to vote or it ensures party discipline, useful reference can be made to the judgment of Supreme Court of South Africa in the case of New National Party of South Africa v. Government of the Republic of South Africa & Anr. reported in 1999 (3) SA 191, head note whereof reads as under:

"Held (per Yacoob J; Chaskalson P. Langa DP, Ackermann J, Goldstone J, Madala J. Mokgoro J and Sachs J Concurring) that the right to vote was indispensable to, and empty without, the right to free and fair elections; the latter gave content and meaning to the former. The right to free and fair elections underlined the importance of the exercise of the right to vote and the requirement that every election should be fair had implications for the way in which the right to vote could be given more substantive content and legitimately exercised. Two of these implications were material for the present case: each citizen entitled to do so must

note vote more than once in any election and any person not entitled to vote must not be permitted to do so. The extent to which these deviations occurred would have an impact on the fairness of the election. This meant that the regulation of the exercise of the right to vote was necessary so that these deviations could be eliminated or restricted in order to ensure proper implementation of the right to vote. (Paragraph (12) at 201A/B-D) Held, further (per Yacoob J; Chaskalson P, Langa DP, Ackermann J, Goldstone J, Madala J, Mokgoro J and Sachs J concurring; O'Regan J dissenting), that the right to vote contemplated by section 19(3) of the Constitution was therefore a right to vote in free and fair elections in terms of an electoral system prescribed by national legislation which complied with the requirements laid down by the Constitution. The details of the system were left to Parliament. The national legislation which prescribed the electoral system was the Electoral Act. (Paragraph (14) at 202C/D-D/E)"
(emphasis supplied)

It shows that the right to vote in 'free and fair elections' is always in terms of an electoral system prescribed by national legislation. The right to vote derives its colour from the right to 'free and fair elections'; that the right to vote is empty without the right to 'free and fair elections'. It is the concept of 'free and fair elections' in terms of an electoral system which provides content and meaning to the 'right to vote'. In other words, 'right to vote' is not an ingredient of the free and fair elections. It is essential but not the necessary ingredient.

In the aforesaid case, the dispute was whether the Electoral Act could prescribe only one specific means as proof of enrolment on the voters roll for voting. Under Electoral Act, I.D. card was prescribed as the only proof of enrolment on the voters roll. This was challenged. Rejecting the objection, the Constitutional Court through Yacoob, J, on behalf of the majority held:

[10] The aspect of the Electoral Act in issue regulate the way in which citizens must register and vote. The question which must be answered is whether these requirements constitute an infringement of the right to vote. This can only properly be done in the context of an analysis of the nature, ambit and importance of the right in question, the effect and importance of other related constitutional rights, the inter-relationship of all these rights, the importance of the need for an effective exercise of the right to vote and the degree of regulation required to facilitate the effective exercise of the right.

[11] The Constitution effectively confers

the right to vote for legislative bodies at all levels of government only on those South African citizens who are 18 years or older. It must be emphasized at this stage that the right to vote is not available to everyone in South Africa irrespective of age or citizenship. The importance of the right to vote is self-evident and can never be overstated. There is however no point in belabouring its importance and it is sufficient to say that the right is fundamental to a democracy for without it there can be no democracy. But the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless.

[12] The Constitution takes an important step in the recognition of the importance of the right to exercise the vote by providing that all South African citizens have the right to free, fair and regular elections. It is to be noted that all South African citizens irrespective of their age have a right to these elections. The right to vote is of course indispensable to, and empty without, the right to free and fair elections; the latter gives content and meaning to the former. The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised. Two of these implications are material for this case: each citizen entitled to do so must note vote more than once in any election; any person not entitled to vote must not be permitted to do so. The extent to which these deviations occur will have an impact on the fairness of the election. This means that the regulation of the exercise of the right to vote is necessary so that these deviations can be eliminated or restricted in order to ensure the proper implementation of the right to vote.

[13] The Constitution recognizes that it is necessary to regulate the exercise of the right to vote so as to give substantive content to the right. Section 1(d) contemplates the existence of a national common voters roll. Sections 46(1), 105(1), and 157(5) of the Constitution all make significant provisions relevant to the regulation of the exercise of the right to vote. Their effect is the following:

(a) National, provincial and municipal elections must be held in terms of an electoral system which must be

prescribed by national legislation.

(b) The electoral system must, in general, result in proportional representation.

(c) Elections for the national assembly must be based on the national common voters roll.

(d) Elections for provincial legislatures and municipal councils must be based on the province's segment and the municipality's segment of the national common voters roll respectively.

The existence of, and the proper functioning of a voters roll, is therefore a constitutional requirement integral both to the elections mandated by the Constitution and to the right to vote in any of them.

[15] The requirement that only those persons whose names appear on the national voters roll may vote, renders the requirement that South African citizens must register before they can exercise their vote, a constitutional imperative. It is a constitutional requirement of the right to vote, and not a limitation of the right.

[16] The process of registration and voting needs to be managed and regulated in order to ensure that the elections are free and fair. The creation of a Commission to manage the elections is a further essential though, not sufficient ingredient in this process. In order to understand the enormity of the problem, one has just to picture the specter of millions of South Africans arriving at registration points or voting stations armed with all manner of evidence and that they are entitled to register or to vote, only to have the registration or electoral officer sift through this evidence in order to determine whether or not each of such persons is entitled to register or to vote. It is to avoid this difficulty that the Electoral Act makes detailed provisions concerning registration, voting and related matters including the way in which voters are to identify themselves in order to register on the common voters roll and to vote.

[17] The detailed provisions of the Electoral Act serve the important purpose of ensuring that those who qualify for the vote can register as voters, that the names of these persons are placed on a national common voters roll, and that

each such person exercises the right to vote only once. Some form of easy and reliable identification is necessary to facilitate this process. It is in this context that the statutory provision for the production of certain identity documents must be located. The absence of such a provision could render the exercise of the right to vote nugatory and have grave implications for the fairness of the elections. The legislature is therefore obliged to make such a provision.

The nature of the enquiry

[18] The appellant did not dispute that proof of identity and citizenship for registration, and proof of enrolment on the voters roll for voting, are necessary components of the electoral system contemplated by the Constitution. What was disputed was whether the Electoral Act could prescribe that the only means for such proof was a bar-coded ID or TRC for registering and a bar-coded ID or TIC for voting. The submissions on behalf of the appellant were advanced at two levels. In the first place, it was contended that the relevant provisions on their face and evaluated in relation to the constitutional right to vote infringe this right. The question of the facial inconsistency of the impugned provisions with the right to vote and the right to free and fair elections as encapsulated in the Constitution must be addressed both in relation to the rationality of the provision and to whether it infringes the right. Although it was specifically mentioned in response to questions by a member of the Court that the appellant relied on facial inconsistency, no substantial argument was advanced in support of such a contention. Secondly, the argument was that the consequences of the documentary requirements constituted a denial of the right to vote to millions of South African citizens who were not in possession of the bar-coded ID. Many of these persons (millions of people), so it was argued, would not be able to vote for a variety of inter-related reasons. The submissions were that the Department of Home Affairs (the department), charged with the responsibility of issuing these documents, did not have the capacity to produce them timeously, that the cost of acquiring the documents constituted a real impediment and that potential voters were not aware, or had not been made sufficiently aware, of the documentary requirements to enable them to apply for the documents in time. It was contended in this context that South African citizens who were in possession of identity

documents issued pursuant to legislation which was operative before the 1986 Act came into force ought to have been allowed to use them.

[19] It is to be emphasized that it is for Parliament to determine the means by which voters must identify themselves. This is not the function of a court. But this does not mean that Parliament is at large in determining the way in which the electoral scheme is to be structured. There are important safeguards aimed at ensuring appropriate protection for citizens who desire to exercise this foundational right. The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional. An objector who challenges the electoral scheme on these grounds bears the onus of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose.

[20] A second constraint is that the electoral scheme must not infringe any of the fundamental rights enshrined in chapter 2 of the Constitution. The onus is once again on the party who alleges an infringement of the right to establish it. The contention in this appeal is that the impugned provisions of the Electoral Act constitute a denial of the right to vote to a substantial number of South African citizens. Any scheme designed to facilitate the exercise of this right carries with it the possibility that some people will not comply with its provisions. But that does not make the scheme unconstitutional. The decisive question which arises for consideration in this case is the following: when can it legitimately be said that a legislative measure designed to enable people to vote in fact results in a denial of that right? What a party alleging that an Act of Parliament has infringed the right to vote is required to establish in order to succeed will emerge in the process of answering this question.

[21] The exercise to be carried out by a court entails an evaluation of the consequences of a statutory provision in the process of its implementation which occurs at some time in the future. It is necessary, at the outset of the enquiry, to

determine the nature of the consequence that is impermissible. The consequence that will be impermissible in the present case can best be determined by focusing on the question as to what Parliament must achieve. Parliament must ensure that people who would otherwise be eligible to vote are able to do so if they want to vote and if they take reasonable steps in pursuit of the right to vote. More cannot be expected of Parliament. It follows that an impermissible consequence will ensue if those who wish to vote and who take reasonable steps in pursuit of the right, are unable to do so.

[22] It is necessary to determine the circumstances that are to be taken into account in deciding whether the impugned provisions infringe the right to vote. There are two possibilities. A court can make an evaluation in the light of the circumstances pertaining at the time the provisions were enacted, or those which exist at some later date when the constitutionality of the provisions are challenged. This Court has adopted an objective approach to the issue of the constitutionality of statutory provisions. A pre-existing law becomes invalid to the extent of its inconsistency with the Constitution, the moment the Constitution comes into force. It is irrelevant that this Court may declare it to be inconsistent only several years later. Similarly, a statutory provision which is passed after the constitution comes into operation is invalid to the extent of its inconsistency with the Constitution, the moment the provision is enacted. This is so regardless of the fact that its invalidity is only attacked, or the concrete circumstances that form the basis of the attack only become apparent, long after its enactment. Consistent with this objective approach to statutory invalidity, the circumstances which become apparent at the time when the validity of the provision is considered by a court are not necessarily irrelevant to the question of its consequential invalidity. However, a statute cannot have limping validity, valid one day, invalid the next, depending upon changing circumstances. Its validity must ordinarily be determined as at the date it was passed. Nevertheless, the implementation of an Act which passes constitutional scrutiny at the time of its enactment, may well give rise to a constitutional complaint, if, as a result of circumstances which become apparent later, its implementation would infringe a constitutional right. In assessing the validity of such a complaint, it becomes

necessary to determine whether the proximate cause of the infringement of the right is the statutory provision itself, or whether the infringement of the right has been precipitated by some other cause, such as the failure of a governmental agency to fulfill its responsibilities. If it is established that the proximate cause of the infringement, in the light of the circumstances, lies in the statutory provision under consideration, that provision infringes the right. This is not a departure from the objective approach to unconstitutionality. It is merely a recognition of the fact that a constitutional defect in a statutory provision is not always readily apparent at the time of its enactment, but may only emerge later when a concrete case presents itself for adjudication.

[23] It is necessary to apply an objective test in deciding whether the Act of Parliament, which makes provision for the electoral scheme challenged in the present case, is valid. Parliament is obliged to provide for the machinery, mechanism or process that is reasonably capable of achieving the goal of ensuring that all persons who want to vote, and who take reasonable steps in pursuit of that right, are able to do so. I conclude, therefore, that the Act would infringe the right to vote if it is shown that, as at the date of the adoption of the measure, its probable consequence would be that those who want to vote would not have been able to do so, even though they acted reasonably in pursuit of the right. Any scheme which is not sufficiently flexible to be reasonably capable of achieving the goal of ensuring that people who want to vote will be able to do so if they act reasonably in pursuit of the right, has the potential of infringing the right. That potential becomes apparent only when a concrete case is brought before a court. The appellant bears the onus of establishing that the machinery or process provided for is not reasonably capable of achieving that purpose. As pointed out in the previous paragraph, it might well happen that the right may be infringed or threatened because a governmental agency does not perform efficiently in the implementation of the statute. This will not mean that the statute is invalid. The remedy for this lies elsewhere. The appellant must fail if it does not establish that the right is infringed by the impugned provisions in the manner described earlier. This Court held in August and Another v. The Electoral Commission and Others that all prisoners would have been effectively

disenfranchised without constitutional or statutory authority by the system of voting and registration which had been put into place by the Commission. This case is different, however, because the alleged disenfranchisement is said to arise from the terms of the statute and not from the acts or omissions of the agency charged with implementing the statute.

[24] O'Regan J in her dissenting judgment measures the importance of the purpose of the statutory provision in relation to its effect, and asks the question whether the electoral scheme is reasonable. She goes on to conclude that the scheme is not reasonable, and for that reason, to hold that the relevant provisions of the Electoral Act are inconsistent with the Constitution. In my view this is not the correct approach to the problem. Decisions as to the reasonableness of statutory provisions are ordinarily matters within the exclusive competence of Parliament. This is fundamental to the doctrine of separation of powers and to the role of courts in a democratic society. Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose. In such circumstances, review is competent because the legislation is arbitrary. Arbitrariness is inconsistent with the rule of law which is a core value of the Constitution. It was within the power of Parliament to determine what scheme should be adopted for the election. If the legislation defining the scheme is rational, the Act of Parliament cannot be challenged on the grounds of "unreasonableness". Reasonableness will only become relevant if it is established that the scheme, though rational, has the effect of infringing the right of citizens to vote. The question would then arise whether the limitation is justifiable under the provisions of section 36 of the Constitution, and it is only as part of this section 36 enquiry that reasonableness becomes relevant. It follows that it is only at that stage of enquiry that the question of reasonableness has to be considered. The first question to be decided, therefore, is whether the scheme prescribed by the Electoral Act is rational.

Rationality of the statutory provisions

[25] It is, in my view, convenient to determine whether the impugned provisions are rationally related to a legitimate governmental purpose in two stages. The first part of the enquiry is whether a facial analysis of the provisions in issue, in relation to the Constitution, has been shown to lack rationality; the second is whether these provisions can be said to be arbitrary or capricious in the light of certain circumstances existing as at the date of the adoption of the statute.

Effect of the relevant circumstances

[28] The facial analysis demonstrates that the statutory provisions asserting the disputed documentary requirements are rationally related to the legitimate governmental purpose of ensuring the effective exercise of the right to vote. I will now examine whether the disputed measures can be said to be arbitrary or capricious in the light of the circumstances which, according to the appellant, were relevant."

It is, therefore, evident that the right to vote is a concept which has to yield to a concept of the attainment of free and fair elections. The nature of elections, namely, direct or indirect, regulates the concept of right to vote. Where elections are direct, secret voting is insisted upon. Where elections are indirect and where members are chosen by indirect means, such as, by parliament or by legislative assembly or by executive, then open ballot can be introduced as a concept under the electoral system of voting. In the case of direct elections, members are chosen directly by popular vote which is not the case under indirect elections. Therefore, it cannot be said that the concept of open ballot would defeat the attainment of free and fair elections. In the present case, the question of denial of right to vote would be self inflicted only on the member of the Legislative Assembly declining to show his vote to the authorized representative of the party. If a MLA casts a vote in favour of any person he thinks appropriate and shows his vote to the authorized representative of the political party to which he belongs, Rules do not contemplate cancellation of such a vote.
It cannot be forgotten that the existence of political parties is an essential feature of our Parliamentary democracy and that it can be a matter of concern for Parliament if it finds that electors were resorting to cross voting under the garb of conscience voting, flouting party discipline in the name of secrecy of voting. This would weaken the party discipline over the errant Legislators. Political parties are the sine qua non of Parliamentary democracy in our country and the protection of party discipline can be introduced as an essential feature of the purity of elections in case of indirect elections. Parliamentary Democracy and multi party system are an inherent part of the basic structure of Indian Constitution. It is political parties that set up candidates at an election who are predominantly elected as Members of the State Legislatures. The context in which General Elections are held,

secrecy of the vote is necessary in order to maintain the purity of the Election system. Every voter has a right to vote in a free and fair manner and not disclose to any person how he has voted. But here we are concerned with a voter who is elected on the ticket of a political party. In this view, the context entirely changes.

That the concept of 'constituency-based representation' is different from 'proportional representation' has been eloquently brought out in the case of United Democratic Movement v. President of the Republic of South Africa and Others reported in 2003 (1) SA 495, where the question before the Supreme Court was: whether 'floor crossing' was fundamental to the Constitution of South Africa. In this judgment the concept of proportional representation vis-'-vis constituency-based representation is highlighted. The relevant passages from the said judgment read as under:

"24. The first question that has to be considered is the meaning of the phrase "a multi-party system of democratic government" in the context of section 1(d) of the Constitution. It clearly excludes a one-party state, or a system of government in which a limited number of parties are entitled to compete for office. But is that its only application?

25. The phrase is not a term of Article We were referred to no authority on political science or the South African Constitution that offers a meaning of these words. Nor can any assistance be gleaned from commentaries on the South African Constitution. Most authors seem to regard the meaning of the phrase to be self-evident and to require no explanation beyond the words themselves.

26. A multi-party democracy contemplates a political order in which it is permissible for different political groups to organize, promote their views through public debate and participate in free and fair elections. These activities may be subjected to reasonable regulation compatible with an open and democratic society. Laws which go beyond that, and which undermine multi-party democracy, will be invalid. What has to be decided, therefore, is whether this is the effect of the disputed legislation.

27. The applicants contend that the proportional representation system is an integral part of the Constitution, that the purpose of the ante-defection provision is to protect this system and that any interference with these provisions is an interference with the multi-party system of democratic government contemplated by section 1(d) of the Constitution.

Proportional Representation

28. In support of this contention reliance was placed by the applicants on constitutional principle VIII which was one of the principles with which the Constitution had to comply. Constitutional principle VIII provides:

"There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation."

29. Significantly, however, section 1(d) of the Constitution incorporates all the provisions of constitutional principle VIII, save for the last requirement that refers to proportional representation. If it had been contemplated that proportional representation should be one of the founding values it is difficult to understand why those words were omitted from section 1(d). Textually, proportional representation is not included in the founding values. Nor, in our view, can it be implied as a requirement of multi-party democracy. There are many systems of multi-party democracy that do not have an electoral system based on proportional representation.

30. The applicants contend, however, that an anti-defection provision is an essential component of an electoral system based on proportional representation. This, so the contention goes, is necessary to ensure that the results of an election are not affected by the defection of persons who gained their seats in a legislature solely because of their position on the party list. It is the party, and not the members, which is entitled to the seats, and if a member is allowed to defect, that distorts the proportionality that the system was designed to achieve.

31. There is a tension between the expectation of voters and the conduct of members elected to represent them. Once elected, members of the legislature are free to take decisions, and are not ordinarily liable to be recalled by voters if the decisions taken are contrary to commitments made during the election campaign.

32. It is often said that the freedom of elected representatives to take decisions contrary to the will of the party to which they belong is an essential element of democracy. Indeed, such an argument

was addressed to this Court at the time of the certification proceedings where objection was taken to the transitional ante-defection provision included in Schedule 6 to the Constitution. It was contended that submitting legislators to the authority of their parties was inimical to

"accountable, responsive, open, representative and democratic government; that universally accepted rights and freedoms, such as freedom of expression, freedom of association, the freedom to make political choices and the right to stand for public office and, if elected, to hold office, are undermined; and that the anti-defection clause militates against the principles of 'representative government', 'appropriate checks and balances to ensure accountability, responsiveness and openness' and 'democratic representation'."

33. This Court rejected that submission holding:

"Under a list system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate. A party which abandons its manifesto in a way not accepted by the electorate would probably lose at the next election. In such a system an anti-defection clause is not inappropriate to ensure that the will of the electorate is honoured. An individual member remains free to follow the dictates of personal conscience. This is not inconsistent with democracy.

\005. An ante-defection clause enables a political party to prevent defections of its elected members, thus ensuring that they continue to support the party under whose aegis they were elected. It also prevents parties in power from enticing members of small parties to defect from the party upon whose list they were elected to join the governing party. If this were permitted it could enable the governing party to obtain a special majority which it might not otherwise be able to muster and which is not a reflection of the views of the electorate. This objection cannot be sustained."

34. It does not follow from this, however, that a proportional representation system without an ante-defection clause is inconsistent with democracy. It may be that there is a closer link between voter and party in proportional representation electoral

systems than may be the case in constituency-based electoral systems, and that for this reason the argument against defection may be stronger than would be the case in constituency-based elections. But even in constituency-based elections, there is a close link between party membership and election to a legislature and a member who defects to another party during the life of a legislature is equally open to the accusation that he or she has betrayed the voters.

47. The fact that a particular system operates to the disadvantage of particular parties does not mean that it is unconstitutional. For instance, the introduction of a constituency-based system of elections may operate to the prejudice of smaller parties, yet it could hardly be suggested that such a system is inconsistent with democracy. If defection is permissible, the details of the legislation must be left to Parliament, subject always to the provisions not being inconsistent with the Constitution. The mere fact that Parliament decides that a threshold of 10% is necessary for defections from a party, is not in our view inconsistent with the Constitution.

Rule of law

55. Our Constitution requires legislation to be rationally related to a legitimate government purpose. If not, it is inconsistent with the rule of law and invalid.

68. In the pharmaceuticals Manufacturers case it was pointed out that rationality as a minimum requirement for the exercise of public power,

"does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately."
This applies also and possibly with greater force to the exercise by Parliament of the powers vested in it by the Constitution, including the power to amend the Constitution.

71. The final issue with regard to the founding values and rule of law relates to the filing of vacant seats. Members elected on party lists are subject to party discipline and are liable to be expelled from their party for breaches of discipline. If that happens they cease to be members of the legislature.

72. Defecting members who form or join another party become subject to that party's discipline and are equally liable to expulsion for breaches of discipline. Thus, if a defecting member is subsequently expelled from his or her new party, or if a member dies, provision has to be made for how the vacant seats are to be filled.

75. In the result the objection to the four Acts on the grounds that they are inconsistent with the founding values and the Bill of Rights must fail. That makes it unnecessary to consider whether such provisions can be amended by inference, or whether it is necessary if that be the purpose of an amendment, to draw attention to this in the section 74(5) notices, and to state specifically that the provisions of section 74(1) or 74(2), as the case may be, are applicable to such amendments."

The distinguishing feature between 'constituency-based representation' and 'proportional representation' in a representative democracy is that in the case of the list system proportional representation, members are elected on party lines. They are subject to party discipline. They are liable to be expelled for breach of discipline. Therefore, to give effect to the concept of proportional representation, Parliament can suggest 'open ballot'. In such a case, it cannot be said that 'free and fair elections' would stand defeated by 'open ballot'. As stated above, in a constituency-based election it is the people who vote whereas in proportional representation it is the elector who votes. This distinction is indicated also in the Australian judgment in King v. James (supra). In constituency-based representation, 'secrecy' is the basis whereas in the case of proportional representation in a representative democracy the basis can be 'open ballot' and it would not violate the concept of 'free and fair elections' which concept is one of the pillars of democracy.
Further, every vote on a motion inside the House is by an open ballot. The election of a Speaker, Deputy Speaker of the House of the People and the Deputy Chairperson of the Council of States is by a division which is a system of open ballot. Reference may be made in this respect to Rule 7, 8, 364, 365, 367, 367A, 367AA and 367B of Rules of Procedure and the Conduct of Business in the Lok Sabha and Rule 7, 252, 253 and 254 of Rules of Procedure and Conduct of Business in the Council of States.
In above view, the justification of the impugned amendment on the reasoning that open voting eradicates the evil of cross-voting by electors who have been elected to the

Assembly of the particular State on the basis of party nomination cannot be lightly brushed aside.

The submission on behalf of the Petitioners fails to take into account the distinction between direct elections and indirect elections. This is not a case of direct election by an individual voter in any particular election. This is a case of indirect election by members of the Legislative Assembly who owe their membership to the Legislative Assembly having been elected by reason of their being sponsored and promoted by the political parties concerned.

The contention that the right of expression of the voter at an election for the Council of States is affected by open ballot is not tenable, as an elected MLA would not face any disqualification from the Membership of the House for voting in a particular manner. He may at the most attract action from the political party to which he belongs. Being a Member of the political party on whose ticket he was elected as an MLA, in the first place, he is generally expected to follow the directions of the party, which is one of the basic political units in our democracy.

Since the amendment has been brought in on the basis of need to avoid cross voting and wipe out evils of corruption as also to maintain the integrity of our democratic set-up, it can also be justified by the State as a reasonable restriction under Article 19(2) of the Constitution, on the assumption that voting in such an election amounts to freedom of expression under Article 19(1)(a) of the Constitution.

Even if we were to cast aside the view taken in N.P. Ponnuswami and proceed on the assumption that right to vote is a constitutional right, expanding the view taken in the case of People's Union for Civil Liberties, there can be no denial of the fact that the manner of voting in the election to the Council of States can definitely be regulated by the Statute. The Constitution does not provide that voting for an election to the Council of States shall be by secret ballot. The voting for an election to the Council of States till now was by secret ballot due to a law made by Parliament. It cannot be said that secret ballot in all forms of elections is a Constitutional right.

By the amendment, the right to vote is not taken away. Each elected Member of the Legislative Assembly of the concerned State is fully entitled to vote in the election to the Council of States. The only change that has come owing to the impugned amendment is that he has to disclose the way he has cast the vote to the representative of his Party. Parliament would justify it as merely a regulatory method to stem corruption and to ensure free and fair elections and more importantly to maintain purity of elections. This Court has held that secrecy of ballot and purity of elections should normally co-exist. But in the case of the Council of States, the Parliament in its wisdom has deemed it proper that secrecy of ballot should be done away with in such an indirect election, to ensure purity of election.

The procedure by which an election has to be held should further the object of a free and fair election. It has been noted by the Parliament that in elections to the Council of States, members elected on behalf of the political parties misuse the secret ballot and cross vote. It was reported that some members indulge in cross voting for consideration. It is the duty of the Parliament to take cognizance of such misbehaviour and misconduct and legislate remedial measures for the same. Breach of Discipline of political parties for collateral and corrupt considerations removes the faith of the people in a multi party democracy. The Parliament, therefore, necessarily legislated to provide for an open ballot. A

multi party democracy is a necessary part of the basic structure of the Constitution. An amendment to law intended to restore popular faith in parliamentary democracy and in the multi party system cannot be faulted.

The principle of secrecy is not an absolute principle. The legislative Amendment cannot be struck down on the ground that a different or better view is possible. It is well settled that a challenge to Legislation cannot be decided on the basis of there being another view which may be more reasonable or acceptable. A matter within the legislative competence of the legislature has to be left to the discretion and wisdom of the latter so long as it does not infringe any Constitutional provision or violate the Fundamental rights.

The secrecy of ballot is a vital principle for ensuring free and fair elections. The higher principle, however, is free and fair elections and purity of elections. If secrecy becomes a source for corruption then sunlight and transparency have the capacity to remove it. We can only say that Legislation pursuant to a legislative policy that transparency will eliminate the evil that has crept in would hopefully serve the larger object of free and fair elections.

We would like to recall the following views of this Court in Indira Nehru Gandhi v. Raj Narain: -

"672. The contention that "democracy" is an essential feature of the Constitution is unassailable. \005\005\005 If the democratic form of government is the cornerstone of our Constitution, the basic feature is the broad form of democracy that was known to Our Nation when the Constitution was enacted, with such adjustments and modifications as exigencies may demand but not so as to leave the mere husk of a popular rule. Democracy is not a dogmatic doctrine and no one can suggest that a rule is authoritarian because some rights and safeguards available to the people at the inception of its Constitution have been abridged or abrogated or because, as the result of a constitutional amendment, the form of government does not strictly comport with some classical definition of the concept. The needs of the nation may call for severe abnegation, though never the needs of the rulers and evolutionary changes in the fundamental law of the country do not necessarily destroy the basic structure of its government. What does the law live for, if it is dead to living needs? \005\005..."
(emphasis supplied)

Thus, we do not find merit in any of the contentions raised by the petitioners to question the Constitutional validity of the introduction through the impugned amendment of "open ballot" system of election to fill the seats of the representatives of States in the Council of States.

It is provided in Article 80 (2) that allocation of seats in the Council of States to be filled by the representatives of States and the Union Territories shall be in accordance with the provisions in that behalf contained in the Fourth Schedule. In Article 80(4), it is provided that the representatives of each State shall be elected by the elected

Members of the Legislative Assemblies of the States in accordance with the system of proportional representation by means of a single transferable vote. Apart from this, the Constitution does not put any restriction on the legislative powers of the Parliament in this regard. The amendments in Sections 3, 59, 94 and 128 of the Representation of the People Act, 1951 by the Representation of the People (Amendment) Act, 2003 (40 of 2003) has been made in exercise of the powers conferred on the Parliament under Article 246 read with Articles 84 and 327 and Entry 72 of the Union List of the Seventh Schedule to the Constitution.

The impugned amendment does not infringe any Constitutional provision. It cannot be found to be violative of fundamental rights in Part III of the Constitution. It is not disputed that Parliament has legislative competence to enact the amending Act. In these facts and circumstances, the impugned legislation cannot be struck down as unconstitutional.

All the Writ Petitions questioning the Constitutional validity of the amendments brought about in the Representation of People the Act, 1951 through the Representation of the People (Amendment) Act, 2003 (Act No.40 of 2003), being devoid of merits are hereby dismissed. Interim orders stand vacated. All parties are left to bear their own costs.