Distribution Of Taxes

- Most dynamic and have been consistently changing
- Centre State relations before 101 Amendment Act
Centre State Fiscal Relations
Centre State Fiscal Relations

1. Article 268
2. Article 268 A
3. Article 269
4. Article 270
5. Article 271
1. Article 268

- Stamp Duty + Duties Excise Duty on Medical + Toilet paper preparations
Article 268(1)

- Provision of levy of stamp duty and excise duty on medicinal and toilet preparation by union government and collection by state or by union.
- Now the duties on medicinal and toilet preparation has been omitted and same is been amalgamated in GST.
Article 268: Duties levied by the Union but collected and appropriated by the States.—

(1) Such stamp duties and such duties of excise on medicinal and toilet preparations as are mentioned in the Union List shall be levied by the Government of India but shall be collected:

(a) in the case where such duties are leviable within any Union territory, by the Government of India, and
(b) in other cases, by the States within which such duties are respectively leviable.

Examples: Stamp Duty-Cheque, P Notes, Insurance Polity, Share Transfer
2. Article 268 A

- Service tax levied by union and collected by both
Article 268A & Entry 92C - omitted

- Article in respect of levy and Collection of service tax has been omitted
- Entry 92C of List I (though not notified) enumerating levy of taxes on service tax by the Union, has also been omitted

Our comments:
- Shows clear intention of the Legislature to charge unified GST on services
Article 268A

- Power to government of India to levy the service tax and collected and apportioned by government of India and state. Now, this article has been omitted.
3. Article 269

- Tax on sale and purchase of commodities on the case of interstate trade and commerce.
- Union will levy and collect and assign to the State.
- Decided by Parliament by law (distribution).
Taxes levied & collected by Union (assigned to States) – Article 269

- Article on taxes on sale or purchase of goods and on consignment of goods (except as provided u/ Art. 269A), when the same is in course of inter-state trade or commerce has been sustained
- However, the Article specifically excludes the subject matter in Art. 269A
4. Article 270

- Financial commission decide formula only for this.
- Taxes other than that mentioned in Article 268, 268A, 269, 271
- Since the recommendation of 10\textsuperscript{th} Financial Commission, Alternative scheme for Financial devolution has been introduced by which all union taxes have been made shareable.
4. Article 270

- 14th Financial Commission has increased the share of State to 42%.

- They are taxes levied by union collected by union and distributed between union and State on the recommendation of Finance Commission.
Revenue Distribution between the States – Article 270

- Art. 270(1A) introduced:
  GST levied & collected by the Union,
  (except the GST having been apportioned with the States u/A 269A(1))

Shall be distributed between the States in accordance with Art. 270(2)

**Our comments:**
Not clear as to whether the entire tax referred in Art. 269A is to be excluded, or only the tax apportioned to the States is to be excluded
4. Article 271

- (Cess + Surcharge) Union Levies and Collected.
No surcharge w.r.t. GST – Article 271

- Power of the Parliament to impose surcharge over and above the taxes, has been curtailed as regards GST imposed u/A 246A
What Changes Introduced By 101 Amendment Act?

1. Introduce Article 246 A- It introduces concurrent jurisdiction of union and State to levy GST.
ARTICLE 246A

- Gives power to the Parliament & State legislatures to make laws on GST imposed by Union or by such States
- Begins with a *non-obstante clause*
- Such GST to be imposed on *supply*
- Parliament reserves *exclusive right* to legislate when *supply* happens in course of *inter-state state trade or commerce*
- *Exception:* GST in respect of crude petroleum, HSD, MS, Natural gas & ATF, to take effect from a later date to be recommended by the GST Council
What Changes Introduced By 101 Amendment Act?

2. Article 268 has been Amended - Excise is merged in GST and stamp duties are remaining.
What Changes Introduced By 101 Amendment Act?

3. Article 268 A- Repealed
What Changes Introduced By 101 Amendment Act?

4. Article 269- Amended- GST on interstate trade and commerce (GST on goods).
What Changes Introduced By 101 Amendment Act?

5. Article 269 A- has been added GST on interState trade and commerce on services.
What Changes Introduced By 101 Amendment Act?

6. Article 270- will be changed in accordance to other.
What Changes Introduced By 101 Amendment Act?

7. Article 270 (1A)- Added- Goods and Services Tax is levied and collected by union, it will also be shared.
8. Article 271- Central Government will not impose surcharge on GST as under Article 246.
What Changes Introduced By 101 Amendment Act?

9. Article 279 a- GST Council- decision making by weighted Voting $1/3^{rd}$ to the centre and $2/3^{rd}$ the State. For decision three fourth of majority is required.
Article 279A
- GST Council to be constituted by the President within 60 days from the coming into force of the Constitution Amendment
  - GST Council constituted on 15.09.2016

Article 366(12A)
- "’goods and services tax’ means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption”
- Article 286 prohibits States from taxing supply of goods/ and or services:
  - Outside the state
  - In the course of import into India
  - In the course or export out of India
- Petroleum products, natural gas and aviation turbine fuel to be subsumed under GST from a later date (to be notified based on recommendation of the GST Council)
GST Administration by GST Council

**GST Council**

- Each decision must have approval of 3/4<sup>th</sup> members of the council.
- **Chairman**
  - Union Min. of State for Finance/Revenue
    - 1/3<sup>rd</sup> voting power
  - Min. of Finance or any other Min. nominated by each State Govt.
    - 2/3<sup>rd</sup> voting power

**MIN QUORUM-50% MEMBERS**
Impact Of GST On Federalism
There are Two Major Concerns of the State

1. Loss of Revenue
2. Loss of Autonomy
There are Two Major Concerns of the State

1. Loss of Revenue
   Primary loss of manufacturing States because GST is a destination based tax, it is not major concern.

2. Loss of Autonomy
   Major concern sales tax has been the principal source of revenue for States the matter was fiercely debated in constituent assembly.
Ultimately it was agreed that there should not be any constitutional limitations on States power to levy taxes.

-(Ambedkar)
• USA is a capitalist country.
  • Yet not introduced GST because it undermines federal principles.

• Fiscal policies are social policies.
  • It should be the choice of the state.
For Example-

- It is alright, if government of Gujarat wants to follow Tax regime which will give incentive to the manufacturing sector or if government of Bihar imposes ban on the alcohol as a matter of principle despite the loss of revenue.

- After all federalism is adopted where units desire Union without uniformity.
Grassroot Democracy
What Is Grassroot Democracy?

- Empowerment of the people at lowest level "Antodya", "Sarvodaya" or as mentioned by John Ruskin "unto this last".
Democracy to be understood in the comprehensive sense that is Social, Economical as well as Political.
Advantages of Grassroot Democracy.

1. It is a proven fact that without decentralization and community participation, neither good governance is possible nor sustainable development or inclusive growth.
Advantages of Grassroot Democracy.

2. Participation also have great educative value.
Educative value creates responsible citizens without responsible citizens, No country can achieve its greatness as suggested by Plato, Father of Political Philosophy (State is individual writ large).
Advantages of Grassroot Democracy.

3. Even JS Mill, one of the greatest philosophers of 20th century mention that no State becomes great by dwarfing its own people.
Advantages of Grassroot Democracy.

4. Amartya Sen talks about interdependence between empowerment and development and believes that democracy has intrinsic values.
Panchayati Raj
Introduction Panchayats

- If we look at the 73rd Amendment Act, Panchayats are institutions of self governance at the local level.
Their prime responsibilities is

1. Prepare plans for social and economic development of rural areas.
2. Implementation of schemes for social and economic development of rural areas.
When we talk about Panchayats.
- they come into picture in context of challenge of rural development, poverty and deprivation.
What Is The Situation Of Rural Areas?

- Even after around 70 years of existence of the republic, the Gandhian vision of village republic self-sufficient villages remains a utopia.

- Despite the fact that every government has taken rural development on priority.
What Is The Situation Of Rural Areas?

- There is a greater representation of rural areas for constituencies in Parliament, legislative assembly and crores of rupees have been spent into eradication of poverty.
- This puts a question mark on Development strategy followed so far.
What Development Strategy, We Followed.

Uptill 1990 it was State led developmental model, it has resulted into India earning the title of "Soft State".

The prevalence of corruption made it impossible to implement land reforms and other programs of poverty alleviation (Gurnar Myrdal-"Asian Drama")
India has adopted **LPG Model** which resulted into “Rolling Back of the State”. The vacuum left by rolling Back was supposed to be filled by public private partnership.
However, the model has not resulted into inclusive growth and sustainable development. It has resulted into "Crony Capitalism".
Development Strategy After 1990

Former Prime Minister MMS acknowledged Naxalism as the biggest internal security threat. There is a direct linkage between failure of Land Reforms, failure in eradicating mass poverty, rural backwardness, continuation of feudal social relations and the domination of certain caste and communities.
Scholars like Meghnad Desai consider India as the nation of unrealized greatness.
Development Strategy After 1990

Scholars like VS Naipaul mentions about Million Mutinies.
India has started *Economic and Political Reforms* at the same time.

However, political reforms could not match the face of economic reforms.

When India has introduced new economic policy 1991 at the same time, India has introduced 73rd *Amendment Act 1992.*
• However, *Political Decentralization* could not match the pace of economic privatization.

• It has created a situation of developmental trap or clogging economic reforms cannot move ahead without political reforms.
• The situation of governance in both rural and urban areas in India is worse than its peers BRICS Economics.
India is Losing lot of investment because of Lack of Good Governance, Red-Tapism, Corruption, Lack of Judicial Reforms, Lack of Infrastructure and the provision of Basic Services.
• The only way to take this challenges is by strengthening the Institution of Local Self Government as suggested by II ARC.

• Good governance requires citizens Centric Governance.
But it is not the least important rather most important strata of government.
There is urgent need of adequate devolution of funds, functions and functionaries to this institution.
• **Mani Shankar Ayvar Committee** which was set up to take the stock of the 20 years of Panchayati Raj came to the conclusion that Bad Panchayati Raj is worse than no Panchayati Raj.
Situation has not improved even after the introduction of 73\textsuperscript{rd} and 74\textsuperscript{th} Amendment Acts because both this acts are half hearted attempts or half bake cakes.
• At present there is disillusionment is Prevailing with panchayats and impression has emerged that Members of panchayats are good for nothing.
• The impression is that the entire experiment has resulted into nothing but decentralization of corruption
• The so-called Panchayati Raj has emerged as Sarpanch Raj
• Sarpanch, Local Bureaucracy and Political Class have formed a nexus which is resulting into a such scenario.

• Hence, Committee suggested that the Panchayati Raj which we have at present is bad Panchayati raj.
• MS Aiyar Committee and before it Ashok Mehta Committee clearly mentions that there has been conspiracy against the institution.
• they have not failed but they have been made to be failed.
Whose Conspiracy (Who are Conspirators)

1. Bureaucracy
2. State Governments
• Who is Crime -Union Government?
Why bureaucracy is against?

1. It will shift the powers and resources from the heads of civil service to people's representative.
Why bureaucracy is against?

2. The colonial mindset of civil servants.
3. There have been evidence of the non cooperative attitude of the permanent officials towards Panchayat Representatives.
Why bureaucracy is against?

Kerala is the best example because Kerala Government has brought Model Code of Conduct for Civil Servants towards Panchayat representative.
Why State Leadership Against?

• 1. States in India themselves lack enough powers and resources and Hence, they are often termed "Glorified Municipality"
Why State Leadership Against?

2. The fear of the emergence of new leadership at the grassroots level challenging the hegemony of the traditional elites and dominate castes.
Why State Leadership Against?

• 3. If local government become significant, State government will go out of significance.
Why Union Against?

• 1. Union government has Limited role under the constitution with respect to Panchayats.

• As Panchayati are State Subject.
Why Union Against?

- However, Directive Principles of State Policy give huge scope for Union to legislate on the State subject, make policies on Such subjects undermining the relevance of States.
Why Union Against?

- 2. Not only Union has dominance over constitutional scheme. Successive governments have continued their centralizing drives.

- It is widely believed that until and unless there is an adequate devolution of power from Union to State.
Why Union Against?

• There will be no real inspiration and motivation among the State Government to Empower Local Governments.
What are the other weakness of experiments in Panchayati Raj?

1. The entire experiment remains supply driven rather than demand driven.
What are the other weakness of experiments in Panchayati Raj?

2. There has been never been any Grassroot Movement for Panchayats. In India's electoral Democracy, Empowerment of Panchayats and Protection of Environment is not an Issue.
What are the other weakness of experiments in Panchayati Raj?

3. There has not been adequate efforts for the capacity building of the Members of Panchayats.
History Of Panchayati Raj Experiment In India At The Time Of Independence.
History Of Panchayati Raj Experiment In India At The Time Of Independence.

1. Gandhian Approach
2. Nehruvian Approach
1. Gandhian Approach

- Gandhi proposed two methods to address rural poverty.
  - a) Land Reforms (Land to Tillers)
  - b) Democratic Decentralization.
2. Nehruvian Approach

• State led Development
Both Nehru and Ambedkar were against Panchayati Raj and favored State led models, Pandit Nehru preferred development Administration rather than Panchayati Raj.
What is Development Administration?

Main argument for Bureaucracy led Development.

Bureaucracy led Development.

Civil Servants form the most Modern Section of the Society.
Pandit Nehru started Community Development Programme 1952.

- One of the most ambitious rural development initiative taken in India.
- The entire country was divided into Developmental Blocks.
Pandit Nehru started Community Development Programme 1952.

- Each block to be Headed by BDO.

- BDO was to be assisted by village level worker.
What Was The Role Of BDO?

• To involve the villagers in governments development programme.
• To link them with objectives of planning commission.
• National Extension Service (NES) was also initiated to inform people in rural areas, give them training etc.
Outcomes

• 1. Balwant Rai Mehta Committee 1957
Balwant Rai Mehta Committee 1957

- The Committee was setup Planning Commission to review the working of community development programme.

- The Committee concluded that the program failed to achieve its objective.
Balwant Rai Mehta Committee 1957

• Committee concluded that community development take place when community participate.

• It held that the official failed to achieve the objectives.
Balwant Rai Mehta Committee 1957

• It recommended the introduction of three tier Panchayati Raj Institutions comprising of elected representative.
These representatives will Act as the communication link between people and government.

It was not possible for people or even for officials to establish the communication.
Phases of Panchayati Raj in India

I Phase (1960) - Phase of Enthusiasm

II Phase (1970-80) - Phase of Stagnation

III Phase (1990) - Phase of Revival

IV Phase (21st Century) - Face of Disillusionment
I Phase (1960s)- Phase of Enthusiasm

- Pandit Nehru inaugurated Panchayati Raj on 2<sup>nd</sup> October 1959 at Nagaur (Rajasthan).

- All State governments have introduced Panchayati Raj.
II Phase (1970-80)- Phase of Stagnation

- Very soon experiment stagnated.
- State lost the enthusiasm.
- On one hand union government was going for greater centralization on the other hand State leadership started feeling insecure with emergence of new leadership.
- Even bureaucracy was insecure.
II Phase (1970-80) - Phase of Stagnation

- **Indira Gandhi** started a more centralized bureaucracy driven **Integrated Rural Development Programme (IRDP).**
II Phase (1970-80)- Phase of Stagnation

- When Janata Party come to power and many leaders claimed themselves to be Gandhian socialist, party setup Ashok Mehta Committee 1977.
II Phase (1970-80) - Phase of Stagnation

- Ashok Mehta Committee mentions the conspiracy against Panchayat Raj Institutions and suggested many reforms unfortunately report was never tabled in Parliament.
III Phase (1990)- Phase of Revival

- Rajiv Gandhi Government brought 69th Amendment Bill to introduce very powerful panchayat.

- Bill could not be passed in Rajya Sabha.
III Phase (1990)- Phase of Revival

- Bill was introduced on the Recommendation of L.M.Singhvi Committee which had recommended the constitutional status to Panchayats.

- States thought that Central Government is aiming to bypass them.
III Phase (1990)- Phase of Revival

• It is to be noted that by mid 1980 there was a realization that world order is changing and India started taking baby steps towards liberalization.

• Ultimately N. Rao Government was successful in getting 73rd Amendment Act passed 1992.
III Phase (1990)- Phase of Revival

• How It Became Possible?
  • N. Rao Bill segregated at the provisions into two categories.
  • Those provisions where State had objections were made voluntary. Thus, the Bill was passed but remained half baked.
III Phase (1990)- Phase of Revival

• How It Became Possible?
  • There was no real decentralization, it was just a devolution.
  • Bill has created the skeleton but flesh and blood had to be supplied by the States.
III Phase (1990)- Phase of Revival

• Hence, we also see lot of variations in some States like Kerala, West Bengal, Maharashtra Sikkim.

• Panchayats have been given in enough hours but in many States the situation has been different primarily UP and Bihar.
IV Phase (21st Century)- Phase of Disillusionment

- As mentioned in Mani Shankar Ayer Committee Report, panchayat at present are facing the crisis of legitimacy.

- Disillusionment is prevailing, as at present Panchayat Raj has been a General a bad Panchayat Raj.
IV Phase (21st Century)- Phase of Disillusionment

- Neither at the union level nor at the State level, there has been in a political will for adequate devolution of funds, functions and functionaries.

- It is suggested that social and economic democracy are interdependent.
IV Phase (21st Century)- Phase of Disillusionment

- Without bringing social and economic changes even political reforms will alone not work.

- There is need to transform agrarian relations, the need of Land Reforms have never been as urgent as it is today.
IV Phase (21st Century)- Phase of Disillusionment

- There is a need of capacity building of the people at grassroot level.

- There is need for entitlement based governance (people's basic rights).
Critical Evaluation Of 73rd Amendment Act.

1. Strength
2. Gram Sabha
3. Elections
4. Reservations
1. Strength

1) It has become mandatory to constitute the three tier Panchayati Raj System throughout the country earlier it was not mandatory to constitute Panchayats.
What Is The Flaw?
What Is The Flaw?

All the States have Three Tier Panchayat (Directly Elected) but that Act does not do activity mapping and so there is no uniformity and lot of chaos.

Hence, activity mapping using subsidiarity principal is required.
The term Gram Sabha is defined in the Constitution of India under Article 243(b).

Gram Sabha is the primary body of the Panchayati Raj system and by far the largest.

It is a permanent body.

Gram Sabha is the Sabha of the electorate. All other institutions of the Panchayati Raj like the Gram Panchayat, Block Panchayat and Zilla Parishad are constituted by elected representatives.

The decisions taken by the Gram Sabha cannot be annulled by any other body. The power to annul a decision of the Gram Sabha rests with the Gram Sabha only.
2. Gram Sabha

1. There is one Gram Sabha for all villages coming under Village Panchayat though ideally there should be separate Gram Sabha for every village.
2. Gram Sabha

2. The Act creates Gram Sabha but does not talk about the functions of Gram Sabha. Some States like Madhya Pradesh have empowered Gram Sabha but in some states Gram Sabha has not clear mandate.
2. Gram Sabha

3. Like The PESA Act, the powers of Gram Sabha should be clearly defined.
2. Gram Sabha

4. 2 Gram Sabha meeting take place in a year which is not sufficient.
2. Gram Sabha

5. Bogus meeting have been reported. video recording of Gram Sabha should be made mandatory.
3. Elections

1. Lack of regular elections was the major weakness of the panchayats in earlier phase. Hence, the Act makes regular elections mandatory.
3. Elections

2. For free and fair elections SEC has been set up. For the sake of it, it has been suggested to bring State Election Commission under election commission of India.
4. Reservations

1. It introduces reservation for the weaker section but reservation does not ensure participation. There are examples where dalit member were not allowed to participate including chairperson (T.N.) .
4. Reservations

Hence, it should be mandatory that without the presence of required number of Dalit member resolution shall not be passed. For Dalits as well as women, government should take capacity building measures.
4. Reservations

2. Constituency is reserved only for a single tenure. It is proposed that at least it should be reserved for two terms to take the benefits of the experience gained by the Reserve a member.
5. Finance

- Lack of adequate Finance of always been the weakness of local self-government 73rd Amendment act-
  - 1) Give additional obligation to the fc to give recommendations to union government with respect to the panchayat Finance.
  - 2) Make provision for State FC
1. Union is implementing the recommendations of FC but the attitude of State governments towards the recommendations of SFC is not encouraging.
Actual Scenario

2. 14\textsuperscript{th} FC in its formation that many State governments do not even lay down the reports of even SFC in the legislatures
3. In terms of compositions SFC is not as professional expertise in comparison to F.C
Actual Scenario

There is a need to streamline the terms of FC and SFC for Harmonization. There have been reports of mismanagement of Panchayat funds. Government of Kerala has set up Panchayat ombudsman to deal with such cases. Other states should also establish search institutions.
Actual Scenario

Step to be taken to create independent sources for Panchayat finances.

At present out of the total Panchayat finances, not more than 5% are from their own sources. It is not clear how GST which will submerge all indirect taxes will impact the State of Panchayat Finance.
Other Shortcomings Of The Act

1. It does not mention about separate Cader of Panchayat.
Other Shortcomings Of The Act

• 2. It is silent about the relationship between bureaucracy and Panchayat representatives.
Other Shortcomings Of The Act

- With the exception of village Panchayats, MPS and MLA are present at other levels.
- The presence of MPs and MLAs impact the autonomous scope for decision making and brings party politics in Panchayats.
Other Shortcomings Of The Act

4. It is a paradox that Panchayats do not have resources but MPS and MLA have been given funds under MPLAD and MLALAD schemes.
Other Shortcomings Of The Act

• 5. There is a presence of parallel agencies like DRDA.
• Many schemes of central government given direct funds to NGOS and SHG bypassing Panchayat.
Conclusion

• The existing PR is bad PR and Hence, fails to achieve the objectives
• What Is Required?
1. Union should value the powers of State

2. State should go for Devolution of 3F (Funds, Functions, Functionaries)

3. Steps should be taken to address the corruption at the level of panchayat

4. Kerala Panchayati raj Act should be made a model Act adopted by other State.
5. Capacity building of the Panchayat Representative

6. Transparency and accountability.

7. Land Reforms to reduce social and economic disparity which will minimize the political disparity.

8. Like national commission for Human rights and women we can create a watchdog body to safeguard the Panchayats.

10. There has to be civil society led Movement because as suggested by A. Sen govt. Respond only when there is a demand.

Thus it should be made a matter of public debate, public reasoning and brought it in the public sphere.

It is said that a century can institute constitutional governance but it cannot realize the spirit of Liberty without Municipal governance.
(Note) Auditing

• Auditing plays important role in checking corruption 73rd Amendment Act mention about auditing
• but does not make any clear provision for any institution.
• In most of the State auditing has been given to CAG.
(Note) Auditing

• CAG has started the practice of social auditing
  social auditing can work only when the
  environment in the villages is non-threatening
  and local have adequate means of capacity.
• Hence, Act should have made social auditing
  mandatory.
• Government should take adequate steps to
  make it meaningful.
74th Amendment Act

- State Of Urban Governance In India
1. Urban areas have always been neglected when we PR are found place in part 4, Municipal areas are not found place even in the non enforceable part of constitution.

2. This is a paradox for following reasons. (Shown on following page)
2. This is a paradox for the following reasons:

A) Most of the leaders during national movement were from an urban background.

B) Historical India has one of the best urban civilizations, Indus Valley is known for its two planning.

C) There were urban centers situated on the old Silk route and the reasons for India's prosperity.
• Urban administration remains neglected and even when 74th Amendment.
• There has been no change in the quality of life in urban areas.
• Municipal institutions suffer some problems like Panchayat.
• It is also a paradox that after introduction of nep which is best all attracting for an investment urban areas remain neglected.
India's performance is worse in comparison to its peers Brics.

- China has been able to attract huge investment by receiving it cities.
- Even when china is the communist country, provincial governments enjoy a lot of autonomy the institution of the mayor of shanghai is a prestigious and powerful as mayor of London.
- china has even involved its cities in diplomatic initiative.
We fail to even imagine how much loss we are incurring in terms of investment by neglecting urban areas.

Urban areas are providing the source of revenue to the government as well as employment to rural population.
India is fast urbanizing.
In coming years, there is going to be a quantitative change in the composition of population.

Even State like Punjab are going to have more Urban population.
the lack of rural development has created push and pull factors for unplanned urbanisation.
According to Isher Judge Ahluwalia, smart city is not possible without smart municipality.
• Without improving the basic governance delivery of basic services, law and order situation, skill development, urban poverty.
• we will not be able to realize the potential of India's urban centers according to her, There are three fundamental roadblocks.
Three Fundamental Roadblock

1. A federal system which does not empower the third tier.
2. Political system which is biased towards rural sectors.
3. Lack of adequate institutional framework for metropolitan planning and governance.
There are some structural problems towards Empowerment of Municipal Administration.

1. Since cities are generating revenue, politicians are reluctant to lose their control.
There are some structural problems towards Empowerment of Municipal Administration.

2. The political weightage of urban areas is less than the political wastage of rural areas till 2026. So urban areas are under represented.
There are some structural problems towards Empowerment of Municipal Administration.

3. The situation of urban administration is more chaotic because many parallel agencies exist with overlapping jurisdiction.
There are some structural problems towards Empowerment of Municipal Administration.

4. There is no uniformity in municipalities
There are some structural problems towards Empowerment of Municipal Administration.

5. Whether mayor is directly elected or indirectly elected.

The office is ceremonial because the real power lies with CEO representing State Bureaucracy.
There are some structural problems towards Empowerment of Municipal Administration.

6. 74th Amendment Act does not prescribe any institution of direct democracy as Gram Sabha. There is a need to create Mohalla Sabha or public sphere.
Planning (74th Amendment Act)

- Bottom up planning is the objective of the entire experiment.
- The main function of panchayat is to prepare the plans for social and economic development.
Planning (74th Amendment Act)

- There is a provision for creation of district planning Committee and metropolitan planning Committee MPCS.
1. Initially States were reluctant to introduce DPCS and MPCS.
2. Later on, when they introduced planning committees, the entire attempt remained half-hearted.
Why

Planning is the technical exercise.

Hence, it requires the capacity building of the representative.

It also require resource mapping of the district.
3. The bureaucracy at district level lacks cooperative attitude towards the representatives. Thus the entire idea of bottom up plan is just on Papers.
Article -324

• Election Commission
Questions

1) Criminalization of Politics
2) Vohra Committee Cases
3) Jan Chaukidar Case
4) Lily Thomas Case
5) Political Funding
1. As per for data analyzed by ADR with respect to 16th LS, 185 out of 543 have declared criminal cases against them.
2. 21% of them (185) are accused of Henious Crimes.
3. 31% of 4032 MLAs have criminal cases against them.
Safeguards Available

1. Rule 4(A) of conduct of Election Rules (1961)

This expects candidates to fill form number 26 that is i.e affidavit against criminal antecedents.
Safeguards Available

• 2. Non-disclosure could make election void under Section 100(1) of RPA 1951
Recommendation

• 1. **Election Commission** is of the view that affidavit to be countersigned by the political parties.
Recommendation

2. Law Commission recommended for Quasi Judicial Body that would ensure the fitness of candidate on the basis of certain standards beyond the angle of criminality.
II Safeguards Available

- Section 8(1)- If convicted for crimes related to law in Section 8(1)
- He or she will be disqualified for 6 years from date of release.
II Safeguards Available

• Action 8(2)- 6 year disqualification from date of conviction and another 6 year from date of release.
II Safeguards Available

- **Section 8(3)**- For committing any crime where punishment is minimum 2 years, person will be subjected to disqualification for 6 years from date of release.
Lilly Thomas Case

- SC has declared section 8(4) utravires of RPA 1951 which make difference between candidate and sitting MLA or MP with respect to disqualification.
Lilly Thomas Case

- It is in contrast to earlier judgement when convicted members held on their seats until all the judicial options does not get exhausted.
Jan Chowkidar Case

- SC held that person in police custody or judicial custody does not have right to vote under Section 62 (5) of RPA 1951.
- Thus, any person should not be allowed to contest in elections.
Issue Of Political Funding

- Section 29(1) of RPA 1951 requires that all the political party should furnish annual Statement contribution with excess to 20000 to EC.
Finding of ADR

• More than 75% of points raised by parties has come from unknown sources.
Que. What Is The Main Issue

1) EC imposes a limit of 70 lakh rupees for LS and 16-50 Lakhs for State legislative Assembly. But there is no stipulated limit on what political parties can spend on behalf of candidates.
Que. What Is The Main Issue

2) Six National and 51 Regional Parties together had an income of rupees 11366 crore, but only rupees 1835 crore came from named donors.
Contemporary Debates

- Announcement In The Budget
- Analysis
Announcement In The Budget

1. Ceiling of Rupees 2000 on Cash Donation
Announcement In The Budget

2. Electoral Bonds
3. Political parties would be entitled to receive donation in the Form of Cheque or Digital Mode.
Announcement In The Budget

4. Filling **IT Returns** within prescribed time limit.
Analysis

1. 3 and 4 point is redundant because they were also receiving donation by cheque earlier also.
2. The existing limit of Rupees 20,000 on anonymous donation as per Section 23 of RBI has been left untouched.
The minister has merely proposed an additional clause that limits cash donation from source to rupees 2000.
Analysis (Electoral Bonds)

- Anyone wants to donate to a political party would be able to purchase bonds from authorized bank.
- However, once purchased this bonds will become bearer bonds and will not contain the name of eventual Beneficiary.
Que. Why Political Funding is still going on

1) It is a dumping ground of unaccounted money through Hawala Routes.
Que. Why Political Funding is still going on

2) Section 13 of income tax Act provides exemption to the political parties.
Que. Why Political Funding is still going on

3) Recent Amendment to FCRA allows political parties to receive contribution from foreign companies.
Que. Why Political Funding is still going on

4) Changes introduced by government through Amendment to Finance Bill of 2017.
Que. Why Political Funding is still going on

4As of now companies can only contribute up to 7.5 % of their average net profit of preceding 3 years to the Political Parties.
Que. Why Political Funding is still going on

The Government has brought Amendments to do away with this.
Suggestions

1. To create National Electoral Fund where political parties can request for the funds to E. C.
Suggestions

2. **Law Commission** is of the views that corporate should seek shareholder approval at Annual General Meeting.
Suggestions

- 3. **State Funding**- Political funding comes from 3cs (Cooperate, Criminals and Contactors) with promise of favor after election.
Political Funding

- Cooperate
- Criminals
- Contactors
Indrajeet Gupta Committee talks for partial State funding, for the purpose of reducing illegitimate and unnecessary funding.
1. Whether we should go for partial State Funding or complete State funding
2. Which is better cash or kind in State Funding.
3. Tarkunde Committee suggested for kind that is giving printing cards with registered number of voters, making available school rooms and halls.
4. It would result in mushrooming of Political Parties.
Question

• Que. Why It is Difficult to go For State Political Funding
The funds that a political party advances to its party candidates vary from one candidate to another, one constituency to another.

It is believed that MLA spends on an average of Rs. 5 crore.
1. It is required to put strong regulatory framework like internal party election and accounting procedures.
Issue Of Dual Constituency

- Subhash Kashyap says that it is an insurance whose premium is paid by citizens of India.

- Section 33 (7) of RPA Act allows candidate to contest elections from maximum 2 seats.
Arguments Against

• 1) It allows candidate to remain MP or MLA even if it loses one seat.
Arguments Against

• 2) If he managed to win from two seats.

• Section 70 of RPA Act becomes applicable and vacating of one of the seats, resulting in by election.
Arguments Against

• 3) It undermines representative process, a candidate rejected by voters in one constituency can still make decisions that affect whole community or whole country.
Suggestions

- 1. Amend Section 33 (7) to permit candidates to stand up from only one constituency.
Model Code Of Conduct
Model Code Of Conduct

- MCC is a set of guidelines issued by EC for conduct of political parties and candidate mainly with respect to speech, polling day and polling booth.
Objectives of Model Code Of Conduct

1. To create a level playing field for all political parties

2. Guidelines On Election Manifesto
   - The SC in its judgement S Subramaniam balaji vs T.N has directed the EC to frame guidelines with regard to content of election manifesto.
Model Code Of Conduct

• Legalize it or Not?
Arguments For

1. Parliamentary standing Committee on law and justice is in favour of legalizing MCC.
Arguments For

Most of stipulation of MCC are already contained in various laws and therefore are enforceable.
Arguments Against

1. It will increase litigation
Arguments Against

2. It has potential to erode the credibility of ECI of India.
SC In Harbans Singh Jalal Case

• 1. To increase the quantum of punishment in case of violation which is already backed by law.
SC In Harbans Singh Jalal Case

- 2. Use of whip office to regulate activities on working of political parties.
Why is EC opposed to media coverage of Opinion Poll and Exit Poll?

1. Both polls can be controversial if the agency conducting them is perceived to be biased.
2. Critics say the projection of the survey can be influenced by choice, wording, timing of election.
Why is EC opposed to media coverage of Opinion Poll and Exit Poll?

3. There is a chance that both the kinds of the polls are motivated and sponsored by rivals.
Why is EC opposed to media coverage of Opinion Poll and Exit Poll?

4. Bandwagon and underdog effect.
Que. When did EC 1st attempt to place curbs on the Search Survey?
• The EC held at first consultation with political parties in 1997.
• In the meeting of representative of most national parties and State parties agree to the dictum that these surveys are unscientific and suffer from bias in size and nature of samples.
Then in 1998 EC issued guidelines under Article 324 prohibiting newspaper and news channel from prescribing result of election survey in five State.
Que. Why is the current ban limited to Exit Polls?
• After the success of 1998, EC tried to invoke guidelines in LS poll of 1999 but section of media refused to follow it forcing EC to move to the court.
• The matter was referred to apex court, Which Observed that EC cannot enforce such guidelines in the absence of statutory recognition.

• In 2004 EC moved to Law Ministry and asked for Amendment in Section 126 (a).
1. EC demands that like CAG its budget should be charged on consolidated funds of India.
2. EC needs secretariat so that it should not dependent on DOPT to appoint its officials.
Demands of Election Commission

3. Amend Section 58 of RPA Act 1951 to postpone or countermand Polls on the ground of use of money power.
Major Debate

• Whether To Give Powers of Contempt Or Not?
**Question**

- Why EC Is Demanding For This Power?

**Answer**

- The EC has asked to empower itself to punish anyone to being disobedient towards its authority.
Why It Should Not Be Give Power?

- The Contempt of Powers which EC is seeking has itself gone through major change in recent decades.
Why It Should Not Be Give Power?

- In *Rajesh Kumar v/s High Court* of judicature of MP, justice RV Ravindran remarked that it is possible that it is done to upheld the Majesty of the court.
- But judges like everyone else will have to earn respect.
- They cannot demand respect by demonstration of power.
Way Forward

The Solution in 2 Fold

2. Give it more Disciplinary Powers.
Independence

- 1. The system of appointment of EC must change.
- It should be like collegium system.

- 2. The power, position of election commissioners should be made equivalent to CEC.
• Role Of President
Question

• Explain what is cohabitation (Related to Prime Minister President to same party or opposite) to what extent it is appropriate to say that the President in India is just the rubber stamp?
India is a **Parliamentary form of government.** In Parliamentary form of Government there are Two Heads

**A)** Parliamentary form of government. In Parliamentary form of Government there are Two Heads

**B)** Federal Form of Government.

- **a)** Real
- **b)** Nominal

**a)** Real

President is a nominal head like Queen in Britain.

**b)** Nominal

Indian model is a Cooperative.

Hence, members of State legislative assembly participate in President election.
According to James Manor, constituent assembly has not done its task well in designing Institution of President. There are many anomalies with institution. It is not exact replica of the queen in Britain.
Question
• How Position Of Indian President Deviates From The Queen (Britain)

Answer
• 1) Queen hereditary and President is elected by proportional representation where even the State participate. It appears contradiction where the nominal head is elected by a rigorous method.
• 2) In Britain the convention is king can do no wrong. King enjoy absolute immunity.
Indian Scenario

1. President take the both to defend constitution
Indian Scenario

2. President can be impeached for the violation of constitution
Indian Scenario

3. Pocket Veto of Indian President is even stronger than US President.
Pocket Veto

- Since the constitution does not prescribe any time frame within which the president is to declare his assent or refusal, President could exercise something like a pocket veto by not taking any action on the bill for an indefinite time.

- In 1986 President Zail Singh exercised the pocket veto with respect to the Indian Post office amendment bill.
4. President can send message to Parliament
Indian Scenario

5. Under the original constitution President was not bound to
President are not bound to

a) To Act on the Advice of Council of Ministers

b) To give Assent to Amendment Bill
Consequences Of Above Anomalies.

Dispute emerged in very first year of the Republic between first President who himself was a lawyer and chairman of constituent assembly and India's 1st Prime Minister.

Dispute emerged on issue of Hindu code Bill where Dr Rajendra Prasad declines to give assent.

Ultimately the then Attorney General MC Setalvad had to intervene and clarify that India has Parliamentary form of Government where real powers lie with Prime Minister.
24th Amendment Act 1971

• It made it mandatory for President to give assent to the Amendment Bill
42nd Amendment Act 1976

- It made it mandatory for President to Act on advice of Council of Ministers headed by Prime Minister.
- According to constitutional expert 42nd Amendment had settle the controversy and was a right move at least with respect to office of President.
42\textsuperscript{nd} Amendment Act 1976

- Effect Of 42\textsuperscript{nd} Amendment Act
  - It reduced President to a mere rubber stamp thus like Queen in Britain who is known as Golden zero.
  - President became rubber stamp.
44th Amendment Act 1978

- Again unsettled the post.
- It restored partial discretionary power to the President.
44\textsuperscript{th} Amendment Act 1978

- Consequence Of 44\textsuperscript{th} Amendment Act
- What was the motivation
  - The motivation was to use the position of President if a situation arises where Prime Minister is from different party and President from different party (situation of cohabitation) a term imported from French system.
Office Of President And Hung Assembly

- Hung Parliament created scope for situational discretionary powers.
- fortunately.
- R. Venkataraman was President when the era of coalition politics started.
- He tried to keep the discretion minimum and develop healthily conventions.
Presidential Activism

• From the yardstick of Parliamentary form of Government.
• Presidential activism would imply, President not acting on the aid and advice of Council of Ministers.
1. Rajendra Prasad
2. Gyani Zail Singh
3. K R Narayan
4. APJ Abdul Kalam
5. Pranab Mukherjee
1. Rajendra Prasad

Denied assent to Hindu code Bill.
2. Gyani Zail Singh

Heroes pocket Veto on the Amendment Bill related to post office.
Examples

3. K R Narayan

a) Sent the Recommendation of imposition of Article 356 in Bihar for reconsideration
b) He didn't read the speech on the eve of the Republic Day and insist that he will give interview on Doordarshan.
Examples

3. K R Narayan

c) He insisted to read his own speech during the dinner hosted in honor of US President in the speech. He talked about the relevance of nam and criticized the unipolar world.
4. APJ Abdul Kalam

a) He was a not activist President. He was populist President.

According to constitutional experts, it is not appropriate for President who have excessive interaction with people because it develops alternative centers of power.
4. APJ Abdul Kalam

b) He returned the office of profit Bill for reconsideration
5. Pranab Mukherjee

He was also activist President because on number of occasions, he has Expressed the dissatisfaction with the working of government in media.
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
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<tbody>
<tr>
<td>• What Is The Actual Position Of President</td>
<td>• Whether constitution expects President to possess any discretionary powers.</td>
</tr>
<tr>
<td></td>
<td>• The position of President in best described by former President</td>
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</table>
R. VENKATARAMAN

• He used to call himself copybook President.
• He was President when the era of condition politics started.

• He described President position as following,
• 1. President is an emergency lamp which comes to power when main switch is off.
Conclusion

• President's office should not be considered as rubber stamp rather it's a position of dignity.
• It's a constitutional office.

• President is the friend, philosopher and guide of Union Cabinet.
Conclusion

• Article 78 of the Constitution mentions PM’S obligations towards the President.
• Hence, constitution makes a fragile balance between Prime Minister and President.
• To conclude, it can be said that constitution envisages constitutional President and not the rubber stamp.
Consequence Of 44th Amendment Act

- It unsettles the position of President in a Parliamentary setup and creates the scope for politicisation of Institution.
Role Of Prime Minister

- Any institution is not just shaped by the constitutional provisions but by systemic factors like nature of party system, political culture as well as personality of the person holding the positions.
Since India has a Parliamentary system, the Prime Minister has real power. We can explain the position of the Prime Minister with respect to:

a) President

b) Council of Ministers
PM’s Position With Respect To Council Of Minister

So far the position can be explained through 2 Phrases.

1. Primus Inter Pares
2. Inter Stellas Luna - moon among stars.
In Parliamentary System We Have 2 Models

1. West Ministerial Model
2. German Model / Chancellor Democracy
<table>
<thead>
<tr>
<th>Model</th>
<th>Characteristics</th>
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</table>
| 1. West Ministerial Model | - Base on concept of cabinet form of Government.  
                           - All the Minister have equal status. |
| 2. German Model /Chancellor Democracy | - Chancellor has clear cut priority over other Minister.  
                                         - chancellor makes the policies and other implement it. |
INDDIAN MODEL

- In principle West ministerial and in practice it has shown different trends at different time.
- Sometimes like chancellor.
- Democracy at times even Presidential types.
- There are examples of authoritarian model also
DURING TIMES OF PANDIT NEHRU

- A. Till SARDAR PATEL was alive Nehru's position was first among equals.
- B. After death of SARDAR PATEL, there was no one who could challenge the charisma of Nehru.
- Thus Nehru become moon among stars.
LAL BAHADUR SHASTRI'S PERIOD

- Period is too short to identify the trend.
- Yet the concentration of power in the hands of Prime Minister started during times of Shastri, during his time PMO was established.
INDIRA GANDHI

- Till 1971, she was a weak Prime Minister.
- In 1971 her party got absolute majority.
- She started concentrating powers in her hands.
- On one hand she has weakened the cabinet, on the other hand the Congress Party.
INDIRA GANDHI

• During her time Indian model exhibited the trends of Presidential form.
• She relied more on personal advisor then on the ministers.
• Gradually the Institutions started developing authoritarian trends.
He continued the style of Indira Gandhi, started new trends also. He preferred technocrats over political leader.
They have shown exemplary leadership in managing minority Government and huge coalition in the most unstable times.

-N. Rao, Vajpayee
A new trend developed where power has gone outside the institution of Prime Minister into the leader of a party. The system started corresponding to the communist form of govt. where the leader of the party enjoys ultimate power.
Since is party enjoys absolute majority in LS and the coalition is namesake. He is able to reassert the centrality of the institution of Prime Minister.
Conclusion

• Thus there can be a gap between the text and the context.
• Though Indian political system concentrate power in the hands of the P.M.
• yet, There is a old saying in political theory i.e real rulers are undiscoverable.
Question

- Q1. Discuss the envisaged role of S.C and the actual record.
- Q2. Critically evaluate the role of judiciary in general and SC in particular in context of Indian political system.
• Envisaged role of SC
Envisaged role of SC

According to Pandit Nehru constitution does not envisage a passive judiciary, like the other and branches of govt., judiciary has to play an active role in India's social revolution.
Envisaged role of SC

It is to be noted that judiciary also comes within the definition of the State under Article 36(4).
DIRECTIVES....

Article 36:-
• Definition of state:
  “The State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

Article 37:-
• Application of the principles.
Envisaged role of SC

Hence, it is also the obligation of judiciary that these directives are observed, if legislature and executive are not playing the role judiciary can take the initiative.
1. It is an Ultimate Court of appeal in civil and criminal matters.
Jurisdiction of SC

• 2. Ultimate interpreter of the constitution.
Jurisdiction of SC

- 4. Federal Court (Article 131)
5. Protector of the rule of law/constitution.
Powers Of Supreme Court

1. Article 129
2. Article 137
3. Article 141
1. Article 129 - Supreme Court is a court of record. As a court of record, it has power to punish for its contempt.
2. Article 137 - Review petition. Only Supreme Court can review its judgement. It means between there is no authority over and above Supreme Court.
3. Article 141- Law declared by supreme court shall be binding on all court, supreme court can even make law, its decision are treated as law.
Ordinarily the power to make law lies with legislature. In a situation where legislature has not made law, Supreme Court can declare law. It will have same effect.

However, if Parliament makes the law on the same subject it will replace the law made by the court.
Example - till Parliament has not enacted the law on sexual harassment of women at workplaces. VISHAKHA GUIDELINES issued by Supreme Court to be treated as law.
The Vishakha guidelines:

- All workplaces should have an appropriate complaints mechanism with a complaints committee, special counsellor or other support services.
- A woman must head the complaints committee and no less than half its members should be women.
- The committee should include an NGO/individual familiar with the issue of sexual harassment.
- The complaints procedure must be timebound.
- Confidentiality must be maintained.
- Complainants/witnesses should not experience victimisation/discrimination during the process.
Curative Petition

- Review of judgment activism go beyond on what is written in constitution.
4. **Article 142**- In any case pending before the Court, Court can pass any order to do complete justice in the case.
Powers Of Supreme Court

It is application of Parliament to make laws to give effect and it is obligation of Executive to get it implemented and where Parliament has not made law, get it implemented by Presidential order. Under Article 142 sky is the limit.
5. **Article 144** all civil and judicial authority shall act in aid of Supreme Court.
Examples

a) Appointment of Judges.

b) Removal of Judges.

c) Salary and Expenditure charged upon the consolidated fund of India.
Actual Record of Supreme Court
Actual Record of Supreme Court

- Actual record can be analyzed on the basis of supreme courts constitutional obligations.
1. AS A GUARDIAN OF Fundamental RIGHTS

- Till 1978 supreme court role was passive.
- It allowed Parliament to Amend the Fundamental rights.
- There was huge dissatisfaction with its judgement in a K Gopalan Case 1950, Habeas corpus case 1976.
AK Gopalan Case, 1950-
- SC- Protection under Article 21 is available only against arbitrary executive action & not from arbitrary legislative action.

Menaka Gandhi Case, 1978-
- SC overruled its judgement
- Introduced the American expression ‘due process of law’
- Protection under Article 21 should be available not only against arbitrary executive action but also against arbitrary legislative action.
- Procedure established by law- duly enacted by legislature or concerned body is valid if it is followed correct procedure (person can be deprived of his life or personal liberty according to this only).
1. AS A GUARDIAN OF Fundamental RIGHTS

• Habeas corpus judgment is called as the darkest hour of judiciary.
• During emergency when citizens needed the protection of Financial rights most, judiciary has been passive.
• After emergency with Maneka Gandhi Case supreme court started playing an active role in the protection of Financial rights.
1. AS A GUARDIAN OF Fundamental RIGHTS

- Judiciary has expanded the scope of Article 21 instituted PIL to help the marginalized section and to provide them access to justice.

- In contemporary times the record of judiciary is mixed.
1. AS A GUARDIAN OF Fundamental RIGHTS

• One of the revolutionary judgment of supreme court.
2. AS A Protector OF CONSTITUTIONALISM OR RULE OF LAW

• Till K. Bharti Case 1973, Supreme Court has permitted Parliament to make far reaching changes.

• However, with the pronouncement of doctrine of basic structure, it has become the guardian of constitution.
• Judiciary has also checked the excesses of executive, prevented the misuse of Article 356, strengthened the secular and the federal dimensions of the Indian political system.
2. AS A Protector OF CONSTITUTIONALISM OR RULE OF LAW

- Not only the protection of constitution, judiciary has taken step to deal with political corruption.
2. AS A Protector OF CONSTITUTIONALISM OR RULE OF LAW

• There have been instances where either judiciary has disappointed or in some cases it has overreach its powers yet the overall assessment of judiciary is better in comparison to other two branches of government.
• It is a paradox that various surveys showed non elected institutions like SC, EC, CAG as favorite institutions of Indians rather than elected institutions like Parliament.
• This State is called as P Bhanu Mehta as post democracy.
2. AS A Protector OF CONSTITUTIONALISM
OR RULE OF LAW

• However, there is a lack of consensus among the political scholars with respect to the contribution of judiciary towards Indian political system.

• One of the strongest defence of supreme court or judiciary comes from professor Upendra Bakshi.
According to Upendra Bakshi, Judiciary has done chemotherapy of the carcinogenic Indian political system.
Pratap Bhanu Mehta in his Article Indian judiciary the promise of uncertainty suggest that Indian judiciary is a paradoxical institution, it is a highly political institutions.
• It has increased its powers at the cost of other institutions.
• It grabs every opportunity to strengthen itself.
• It has played its cards more smartly than the other two institutions.
PB Mehta suggest that despite so much activism nothing could be translated at the ground level.
According to PB Mehta, occasional failures of the other two branches of the government in itself does not become the case for self congratulations by judiciary.
• In his Article "SC diminished" - he highlights the crises of institutional credibility in the judiciary.

• According to him the so-called rule of law has become the rule of court.
• The so-called rule of court is the artifact of the individual judges rather than the base on overreaching principles.
• Professor Upendra Bakshi in the response to P B Mehta in his Article "Unfair to Judges" suggest that judging the judges is a talk which has to be done with huge sense of responsibility.

• Questioning the credibility of the institution can have for reaching effect.
It is true that some of the segments have been controversial but it does not undermine the contribution of supreme court.
Question

- Explain the phenomena of judicial activism and critically evaluate the role of judicial activism towards strengthening the rule of law.
What is Activism?

- The concept of activism is taken from chemistry. Electron in the higher energy State jumps into the orbit of the other.
Judicial Activism?

• The term judicial activism reflect the high energy State of the judiciary where judiciary jumps into the orbit of Legislature or Executive.

• It is to be noted that activism is not unique to judiciary.

• In India we have witness activism or overreach of the executive, Parliament, election commission, President, CAG.
Judicial Activism?

- Judicial activism is not unique to India; it is a global trend.
- Globalization has strengthened human rights consciousness which has strengthened judicial activism.
- There is activist judiciary not only in India but in entire south Asia.
Question

• What Is The Basis For Judicial Activism And What Conditions Give Rights To Judicial Activism.
• In any country with the written constitution there is a scope for judicial activism.
• In countries with written constitution judiciary has power of judicial review.
• Judicial Review in itself is not judicial activism, it is application to the judiciary.
• When judiciary declines to review we can suggest that judiciary is passive.
• However, judiciary review give scope for judicial activism.
• When judiciary is not limited at declaring the validity of the law but also suggest the law.
Judicial activism and judicial overreach are subjective terms. At present, we are living in the age where there is a consent for judicial activism. Actions of judiciary which do not generate the consent of the governed can be called as judicial overreach.
It's a subjective concept and will vary from person to person.

Those decisions of judiciary where people think that judiciary has done the right thing are called as activism and where people think that judiciary should not have done, are treated as overreach.
Example

- Judiciary directions to government of India to release the food grains getting rotten in the store house was considered as judicial overreach by economist including ManMohan Singh.
- Similarly decision to implement interstate interlinking of rivers is considered as overreach by environmentalist.
Besides written constitution, following factors in general and in case of India in particular creates conditions for activism.
Factors creates conditions for Activism

1. Written Constitution
2. Fundamental Rights
3. Federalism
4. Overreach by Executive
5. Corruption
Factors creates conditions for Activism

6. Civil Society Activism

7. Indian culture which give lot of Respect

8. To the Judges.

9. Reference of Judges

10. Indian public romanticising Judicial Activism.
• Is Judicial Activism Desirable?
There are two Schools of Thoughts

1. Conventional View
2. Non Conventional View
According to Lord Jowet, it is not decent for judges to make Laws.
According to Katju, Judges should tell if there is one, should not make if there is none.
According to Bharucha, Judiciary neither has experience nor resources nor infrastructure to manage administrative leviathan. Besides above, judiciary is least representative and least accountable.
Non-Conventional View

Justice Stanley Forman Reed

P. N. Bhagwati
According to Reed,
Whenever judges tell the law, they always make law. Telling law is never a photographic function.
According to P N Bhagwati, gone are the days when it was not decent for the judges to make laws. At present judiciary should play active role there is nothing to feel guilty or shy.
If judges do not play active role it implies they want to stay away from the public criticism and live in the comfort zone.
Judicial Activism in India
Judicial Activism in India

• On one hand Indian constitution create an activist judiciary.
• On the other hand, individual judges under the changing trends around the world gone beyond the conventional approach.
Judicial Activism in India

• Era of judicial activism in India starts with the pronouncement of doctrine of basic structure the judiciary has protected constitutionalism.
According to Jia Modi, Uncertain Democracy is preferable to certain authoritarianism. Had judiciary not protected the constitution by doctrine of the "Basic Structure".
Thus democracy would have collapse in India like other third world countries with the Institution of PIL and liberal interpretation of Article 21. Judiciary has strengthen the rights of Indian against executive accesses.
Judicial Activism in India

- It is for this reason Supreme Court of India has become the supreme court of Indians (Upendra Bakshi).
- In the era of coalition politics, defection, misuse of Executive powers Judiciary has provides governance in the country.
According to Bhikhu Parekh, "India is a case of Judicial co Governance".
According to Upendra Bakshi, when the two branches are not fulfilling their obligations and Judiciary has also closed its doors, the only option left is Revolution. Thus judicial activism has acted as safety valve.
• It is true that Judicial Activism has protected democracy in India and it became an ideal example of judicial governance and even judicial Sovereignty.

• However, the very existence of judicial activism suggest that all is not well.
Conclusion

• It shows the problem in the other two branches of government, country cannot be governed permanently by the judges.

• Instead of criticizing Judiciary it is important that the other two branches of government start fulfilling their constitutional obligations.
Conclusion

• In the end we can say that judicial activism can be a medicine but it should not become the daily bread.
Judicial Reforms

- Judicial Reforms And What Reforms And Who Are Stakeholders Of Reforms
WHY JUDICIAL REFORMS?

• According to Lord Bryce, there is no better test of excellence of the government than the functioning of its judicial system.

• Thus, we cannot achieve good governance without the efficient judicial system, study shows that there is a direct relation between official functioning of the judicial system as well as of economic growth.
Virtues of the Judicial System

- If justice is the first virtue of the social systems, Judiciary is the most important institution.
The Virtues of the Judicial System are

1. Speedy delivery because justice delayed is justice denied.
The Virtues of the Judicial System are

2. Accessibility means Judiciary system should be accessible to all irrespective of economic status.
The Virtues of the Judicial System are

3. Transparency in its internal functioning because in democracy, it is the right of people to know how our Institutions are functioning.
The Virtues of the Judicial System are

4. We want fair and corruption free judicial system. Corruption of any branch of government is unacceptable but corruption in judiciary is not unthinkable.
In the Bible it is mentioned that, "You are the salt of the Earth, if salt loses its savour from where the earth will be salted".

It is also said that if the lamp of justice goes, we cannot imagine the darkness.
• Problems In Indian Judicial System
Problems In Indian Judicial System

1. Executive Delays
2. Corruption
3. Out of all three Branches
1) Excessive Delays

- Indian system is notorious for the excessive delays and there are cases where case has been filed by grandfather and even the great grandson could not get final award (Arya Samaj case).
- If we look at the statistics on the average most of the cases take more than 5 years.
1) Executive Delay

- In high courts only 5% cases where client in the time frame of 5 years otherwise the normal span is 10 to 15 years.

- In USA the average time from filing till disposal is 7 to 8 months.
2) Corruption

- According to Transparency International, Judiciary in India is the second most corrupt institutions after police.
- Judicial corruption is not limited to subordinate judiciary in the past there have been allegations against the judges of high court, Supreme Court, including Chief Justice of India.
2) Corruption

• Such a scenario puts a big question mark on the credibility of the judiciary.
3. Out of all Three Branches

- Judiciary is the least transparent, least accountable.

- Supreme Court order against the Revolutionary judgment of Delhi High Court for beginning the office of Chief Justice of India under Right to Information. Judiciary is reluctant to reform in the name of judicial independence.
Question

- What is to be done and who is supposed to take the initiative?
Who is supposed to take the initiative?

The biggest stakeholders in entire process is Government of India.

Then 2nd stakeholder is judiciary itself then comes bar association and civil society.
Question

• What measures are more urgent?
Since the biggest concern is huge pendency of cases.

Huge pendency not only impacts the economic growth it leads to criminalisation.

Hence, the most important area is the Creation of Infrastructure.
• It includes both physical as well as human infrastructure, the standard per capita availability of judges is 50 judges per Million population, in India it is 12 judges permanent population.

• Besides there is a huge vacancy in high courts because of unofficial functioning of the Collegium System.
• There is a need to create more number of courts as well as post at all level.

• At present there is a sub optimal utilisation of the existing infrastructure like Delhi all State should start the practice of evening Court.
• The number of days of the vacations of the judges need to be reduced.
Government Should Reform

Government has to take steps to see how to reduce burden of Court, introduction of ICT for better case management accessibility, it is suggested that government should reform-
A) The Laws specifically *land related laws* because most of the series which are in contact of land and property.
B) Government has to reform the criminal justice system which also requires police reforms as suggested by Malimath Committee, India should introduce Plea bargaining.
C) The judicial impact assessment of each new law should be done effectively.
Government Should Reform

D) there is a need for mobile courts, government has brought **Gram Nyayalaya Act** but the number of such Court have been very less.
Besides Creation of Infrastructure there is a need for enhancing the efficiency of the judges. As a result of globalization, new complications having much with respect to interpretation of laws and their applications.
Government Should Reform

Hence, regular training and capacity building of the changes is required to understand the Global norms.
Government Should Reform

E) Create regional Branches of Supreme Court because system is not fair and equitable.
Data show that the number of appeals, problems India are more in comparison two other parts because of the distance.
F) It has been suggested to introduce All India Judicial Service, But States are reluctant as it weakens the federal structure the member of subordinate Judiciary are also against because it impacts their prospects of promotion.
G) To deal with corruption previous government has proposed judicial standards and accountability Bill.
Objective of the Bill was to impose a statutory code of conduct on judges, improve the process of impeachment. However, Judiciary was reluctant towards the Bill.
H) There is also a need for further institutional reforms.
Government Should Reform

One of the major institutional reforms is changing the system of appointment of Supreme Court and high court as well as their transfer.
Government Should Reform

Government had passed 99th Amendment Act. However, it could not pass the test of the basic structure.
• Short Note On Appointment Of Judges Of High Judiciary
What Is The System In The Constitution?

• As per Article 124 judges are appointed by President after consultation with the judges of supreme court and high court as he thinks fit. It is mandatory to consult Chief Justice of India in case of appointment of judges other than Chief Justice of India.
What are the systems prevailing in the world?

1. The most common system is executive appointing judges.
What are the systems prevailing in world?

- 2. In recent years many countries are going for commission for appointment to ensure professionalism and to protect it from politicization.
What are the systems prevailing in world?

• 3. In some countries legislature have role. USA President proposes the name and congress has to notify.
Constituent Assembly Debates

- Since India aimed at creating independent judiciary, constituent assembly even considered the system of judges appointing judges.

- However, it was rejected by assembly as Ambedkar held that there can be no imperium in inferio that is State within States.
What systems was adopted

Constitution made find balance where power of the appointment in with executive but executive was not given free and for the sake of

a) Professionalism

B) To check Politicization
Practice (Actual)

- Till 1973 Keshav Nand Bharti Case there was no executive interference in biased manner, healthy conventions were followed, in case of Chief Justice of India government followed the principles of seniority.
Practice (Actual)

• However, after basic structure doctrine, government has appointed A N Ray as CJI superseding 3 senior Judges.
• A N Ray had given dissenting judgment.
Practice (Actual)

• Again at the time of emergency Justice Mirza Hameedullah Beg who was appointed Chief Justice of India superceding Justice Khanna who gave dissenting judgment in habeas corpus case.
Practice (Actual)

• It is to be noted that there is no compulsion of government to appoint senior most person and CJI because merit has a primacy over seniority, law commission has recommended that merit should also be the principal.
Practice (Actual)

- However, government never implemented the recommendation and circumstances in which it implemented the recommendation had put a question mark.
Evolution of Collegium

- Entire debate started when Supreme Court was supposed to interpret the term “consultation”. Whether consultation means concurrence or it is just consultation.
COMPOSITION OF COLLEGIUM SYSTEM

- Chief Justice of India
- 4 Senior Judges of Supreme Court
- Chief Justice of high court
Evolution of Collegium

1. 1975 - Sankalchand Case
2. 1981 - I Judges Case
3. 1992 - II Judges Case
4. 1998 - III Judges Case
1. 1975- Sankalchand Case

- Case laws on transfer of high court judges.
- Supreme court held that consultation is not concurrence.
2. 1981- I Judges Case

- SP Gupta Case-
- Supreme Court again held in that consultation is not concurrence.
3. 1992- II Judges Case

- Supreme Court advocates on record versus Union Of India.
- Judiciary overruled its previous judgement and Hayat that consultation means concurrence. However, it killed Chief Justice of India will form opinion after consultation with two senior most judges.
4. 1998 - III Judges Case

- Presidential reference 1998 under Article 143.
- As a result of second judges case lot of chaos has emerged. There was no clarity and so government sought the opinion.
- Judiciary puts forward the condition that it will give its opinion only when government gives undertaking that government will abide to the decision government took the undertaking.
1. Consultation means Concurrence.
2. Chief Justice of India shall consult for senior most judges.
3. Second Judges Case tilted the balance towards Chief Justice of India. However, third judges case re-established the balance.

4. For recommendation of any name concurrence of at least three judges is needed it means it is not enough for Chief Justice of India to get concurrence of one more judge and give recommendation.
5. It also mentions that any name where CJI does not give concurrence will not be forwarded.
6. If government sends in any back and the collegium sends it again government is bound to appoint that person.
• Working of Collegium System.
Usually it Work will but later on the Problems Started Coming on Surface

1. Biggest problem was inefficiency and the consequences was lot of posts remained vacant increasing the number of pending cases.
Usually it Work will but later on the Problems Started Coming on Surface

2. Nepotism it has been accused that merit was not the criteria. Case, kinship, religion become the criteria.
3. Not only the bar associations but even some of the former judges held that complete anarchy is prevailing. Hence, NJAC was purposed.
Purpose of NJAC

1. Appointment of Chief Justice of India - Senior Most Judges until and unless, there is question mark on integrity.
Purpose of NJAC

2. appointment of other judge of Supreme Court and high court as well as transfer of judges of High Court.
National Judicial Appointments Commission (NJAC)

- Established through 99th constitution amendment.
- Responsible for the appointment and transfer of judges to the higher judiciary in India.
  - NJAC Bill and Constitutional Amendment Bill ratified by 16 of the state legislatures.
  - Assented by President of India Pranab Mukherjee on 31st December 2014.
- NJAC Act and Constitutional Amendment Act came into force from 13 April 2015.
Composition of NJAC

- Chief Justice of India (Chairperson)
- Two Senior Most Judges
- Law Minister
- Two eminent persons
Composition of NJAC

- Chief Justice of India
- Two senior judges of Supreme Court
- Union Minister of Law and Justice
- Two eminent persons
NOTE

- Eminent persons elected by Committee consisting of three persons-
  - Prime Minister,
  - Member of Opposition
  - CJI
NOTE

• Composition is such judicial primacy goes and was not according to the Recommendation of NCRWC.

• NCRWC recommended to maintain majority of the judiciary.
SYSTEM IN UK

- All members are from Judiciary
- Law Minister is not a part.
INDIA

• Decision Making-
  • Any two members can reject, thus law minister and one eminent person was sufficient.
  • Commission aims at politisation rather than increasing the efficiency.

• Why-
  • In UK, its open system posts are advertised to attract the persons of merit.
INDIA

• No open recruitment, names will be recommended by Chief Justices of High Court. Thus, no difference in the previous system as per the new Bill.

• As per the new bill, Chief Justice of High Court was to consult not only Governor but also CM.
What is the Present Status?

- **Supreme court has declared the Amendment Null and Void**
  still supreme court accepted that collegium system needs to be reformed.
- There is a need to create a memorandum of procedure to bring objectivity with respect to merit and integrity.
1. Adopt of the British Model
2. Government should not try to politicize the institution, judiciary should also take steps to bring transparency after all "sunlight is the best disinfectant and remedy should not be worse than disease."
Fundamental Rights

- Doctrine of Basic structure
KNOW YOUR
FUNDAMENTAL RIGHTS

- Right to Equality
- Right to Freedom
- Right against Exploitation
- Right to freedom of Religion
- Right to Culture and Education
- Right to Constitutional Remedies
Question

• Critically Evaluate The Doctrine Of Basic Structure.
Doctrine of Basic Structure

Whole Constitution

Basic Structure
It is a doctrine pronounced by Supreme Court in Keshava Nand Case determining the scope of Amending powers of Parliament.
The doctrine of basic structure makes Indian Supreme Court the strongest court in the world because even USA Supreme Court does not have power to question the validity of the Amendment.
3 stages in Basic Structure Theory

- Pre-Kesavananda position
  - No mention of basic structure
- Kesavananda Decision
  - Basic structure theory proposed
- Post-Kesavananda
  - Basic structure strengthened
  - Crystallised, new dimensions added
Unique Aspect of Doctrine of Basic Structure

- It makes Judiciary the supreme legislature which means constituent assembly.

- Normally Judiciary has to review the acts (ordinary law) and to see whether they are in accordance to the constitution or not.
Unique Aspect of Doctrine of Basic Structure

- Amendments are considered as the parts of the Constitution itself.
- Hence, Judiciary is not supposed to review the Amendments.
What Is The Logic Behind Basic Structure

- Amendment should not be the rewriting of constitution.
- There is no limit on Amending power but it should not go to the extent that we are unable to find original constitution.
Why

- We can assume that constituent assembly represent the general will or popular sovereignty.
- Same cannot be said with respect to Parliament which represents the political majority.
Question

Consequence of Doctrine of Basic Structure

• 1. Example of Judicial Activism
Consequence of Doctrine of Basic Structure

• 2. Judiciary has never given the comprehensive list and thus has assumed huge Discretionary Powers.
Consequence of Doctrine of Basic Structure

- 3. Judiciary is neither representative nor accountable.
- Even when there are objections yet it seems that it was necessary for judiciary to do so.
Criticism Of DPSP

1. Non enforceable and Hence, some members regarded it as dustbin of sentiments or like new year resolution to be broken on 2\textsuperscript{nd} January.
2. DPSP are non-enforcable, there should not be non-enforçable parts in the constitution. It creates problems for Judiciary because constitution is the fundamental law.
3. It dilutes the federal dimensions and gives opportunity to union government to make policies on State subjects.
4. It restrict the choices of future governments with respect to formation of policies.
5. It is a colonial legacy and it is like the instrument of instructions mentioned in Government of India Act 1935.
Criticism of Fundamental Duties

1. Non enforcable
Criticisms of Fundamental Duties

2. Not a feature of liberal constitutions
Criticism of Fundamental Duties

• 3. Duties are vaguely warded.
Criticism of Fundamental Duties

• 4. Some duties of paradoxical. For example- how government expect citizens to fulfill their duties like development of scientific temper without access to basic education.
Criticism of Fundamental Duties

- 5. Inclusion of Financial duties has not resulted into any qualitative change in the public sphere.