NAME: ARJIT KUMAR

Subject : Constitutional Law - Test I

Phone: [redacted]

Start Time : 11:23pm

End Time : 2:42pm

① Form of Structure/Presentation

② Content is Good, but needs improvement

③ Complete all in time

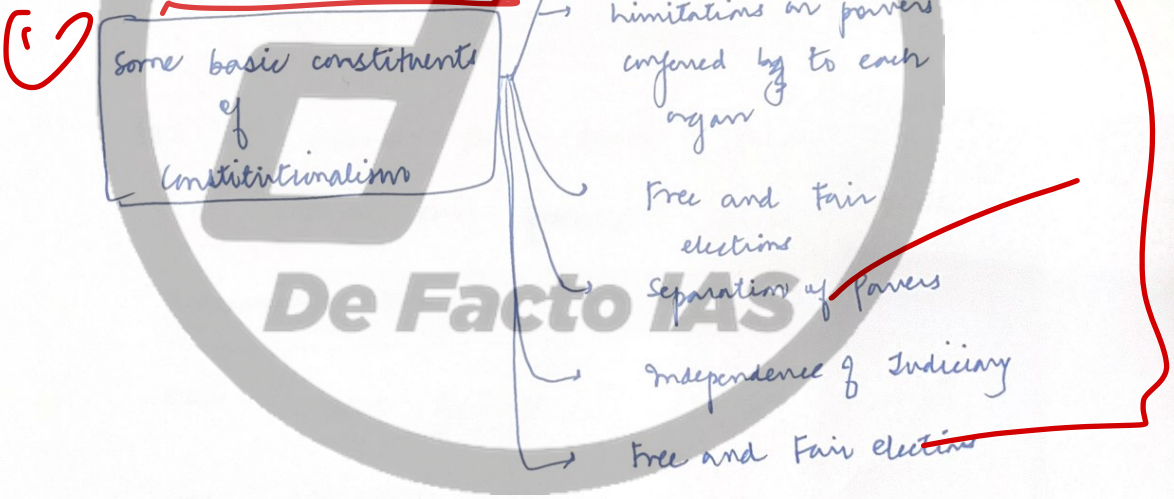
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Section A

Q.1 (a)

A country may have a constitution, but not necessarily constitutionalism. Ex- Dictator.

Constitutionalism emphasises on need to have limitations on powers conferred to each organs of the government.



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Constitutionalism as Anti Thesis of Power:

1) Constitutionalism ensures Rule of Law. This implies that government in sum as per law and not by whims and fancies of individual.

(b)

2) It ensures checks and balances, thus ensures that government functions in sound manner.

Ex. ⇒ Judicial Review derived from Article 13 of Constitution.

L. Chandra Kumar v. Union of India : Judicial Review was held as basic feature of constitution.

3) Ensures that laws are "just fair & reasonable" as held in Maneka Gandhi v UOI.

4) It ensures that laws of legislature are within the framework of constitution. Keshavanda Bharati v. State of Kerala - held that "Basic features" of constitution cannot be amended.

(b)

Hence, it can be seen that Constitutionalism ensures justice & fairness in true sense.

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Q1 (b) : Rule of Law

The Theory of "Rule of Law" was given by "Montesquie". It implies that a nation must be run as per "rule of law" and not "rule of men" - i.e. whims and fancies of rulers.

Constituents of Rule of law as per Montesquie

① All are subject to same laws before ordinary courts

② Rights flow from customs & tradition
↳ This is not applicable in Indian context.

In Indian context Rule of Law has a positive connotation, Ex: Affirmative Action or Reservations under Article 16(4) or Speedy courts for speedy justice.

In Minerva Mills v UOI, Rule of law was recognised as basic feature of constitution.

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In L. Chandra Kumar v UOI → Rule of Law & Judicial Review was held to be basic feature of Constitution.

Content 3

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Q. 1(c) Preamble;

The Indian Constitution has a Preamble which is often referred to a "Key-note" to the minds of makers of the Constitution.

Preamble contains all the fundamental points which was moved by Pt. Jawharlal Nehru in Objective Resolution.

Utility of Preamble in Indian Constitution

1) It contains the enacting clause of the constitution.

2) It shows the type of "polity" of the Indian state viz- "Sovereign, Secular, Socialist, Democratic Republic".

3) It contains the fundamental ~~rights~~ ~~and~~ objectives which are guaranteed to all individuals; ~~or~~ : Liberty of Thought, Expression Belief Faith & worship

Justice : Socio, Economic & Political

~~Thought~~ Fraternity, etc.

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4) It contains the source of power of Indian Constitution i.e "will of people".

5) It is important to guide the courts in interpreting laws as it contains the vision of framers of the constitution.

5) Act as guide —

In Keshavananda Bharati v State of Kerala

it was held the preamble is a part of the Constitution and thus it can be amended however basic features enshrined in it cannot be amended.

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Thus preamble is of utmost ~~to~~ utility.

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2(1)(a) Art 14.

Article 14 of the Constitution ~~state~~ guarantees -

"equality before law and equal protection of laws within the territory of India."

Article 14
- "Equality before law" → ⊙ British concept
  - ⊙ Absence of any special privilege = ⊙ negative concept
- "Equal protection of laws" -
  - ⊙ American concept
  - ⊙ positive concept - like to be treated alike & unlike to be treated differently"

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Article 14 is not Negative Equality but positive

1) Article 14 incorporates American concept of "Equal protection of laws"

Eg. Tax slabs according to income criteria and not that everyone is under similar tax slab.

2) Article 14 permits reasonable classification but prohibits class legislation

Anwar Ali Sarkar v. State of West Bengal → (1) Held that any classification must be based on intelligible differentia and such differentia must have a rational nexus to the object sought to be achieved.

3) Treating unequals alike will amount to aggravating inequality [Indra Swahney v UOI].

4) Maneka Gandhi v UOI - Article 14 is a rule of non-arbitrariness.

5) EP Royappa v State of Tamil Nadu - Article 14 has positive connotation and not a negative one

Thus it can be seen from above that Article 14 is positive and not negative in essence.

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Q. 1 (e) PIL

Public Interest Litigation or Social Action Litigation or Pro Bono Litigation is a type of litigation where courts have relaxed the rule of locus standi.

Any public spirited citizen can approach the court at the instance of those who because of their socio-economic conditions are unable to approach the court for their grievance.

PIL as tool for strengthening Democracy

1) Extention of legal rights to marginalised and deprived.

Hussainara Khatoon
v
Home Sec. State of Bihar

→ The rights of under trial and detenues was recognised.

→ their right to speedy justice was addressed.

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2) Creation of new forms of remedies

MC Mehta v. UOI : Court upheld the principle of "polluter pays principle".

This made the company pay compensation to those who were affected.

3) Realisation of the objectives of Law / Policy

PIL can lead to court giving directions to administrative authorities. This allows better implementation of policies for poor & marginalised.

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Issues with PIL

1. Judges choosing litigants and vice versa
2. Absence of procedure
3. PIL seen as Panacea for all ills.
4. Judicial Romanticism

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~~Thus~~ PIL has although widened the scope of democracy and strengthened it.

However, it should not be seen as PILL for all ills.

Ques 2(a) Secularism is basic feature

42nd Amendment of the Constitution in the year 1976, entered the word "Secularism" along with socialist and integrity in Preamble.

SR Bommai v. UOI : Secularism has been held as basic feature of the Indian Constitution.

Meaning of Secularism in Indian Context

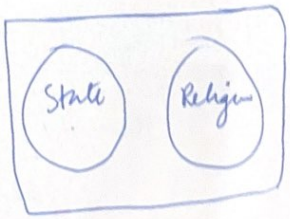
1) Indian secularism is different from western concept of secularism

2) Western concept of secularism connotes a complete separation between State & Religion.

3) Indian secularism does not accepts complete separation between State & Religion



Indian Secularism



Western Secularism

Continued

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How is Indian Secularism implicit before 42nd CAA

1) Article 25(1) uses the term - "subject to public order health and morality ... people have right to profess, practise & propogate" religion.

Thus Right is subject to Welfare restrictions.

2) Article 25(2) gives power to State to carry out social reforms. Ex: Temple Entry for Hindus.

3) Only Essential Religious practices are allowed as part of Religion.

Mohammed Ahmed v. State of West Bengal:

Use of Loudspeakers were not held as essential practice in Islam.

4) Article 26 also imposes restrictions. It states that a religious institution can acquire property but State can regulate as per laws.

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5) Article 27: Freedom from paying taxes for promotion of any particular religion.

But SC held that a fee can be paid for all religions.

6) In Sabarimala Case, it was the proactive role played by judiciary that practices derogatory to women were disallowed.

↳ Since the concept of Secularism is enshrined in Indian constitution, these interventions practices are allowed.

7) In Triple Talaq case also SC struck down the Triple Talaq as illegal & ultra vires the Constitution

8) In cases such as Daniel Latifi & Shah Bano it was the positive concept of secularism that allowed courts to intervene in such matters.

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Secularism : Now Explicit

1) Initially also under various provisions of Constitution, courts interpreted its religious practices as "Secularism" in positive form was recognised

2) By 42nd Constitutional Amendment act has hence made something "explicit" which was already implicit in Indian Constitution.

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Q 2(b) : "State"

Article 12 of the Indian Constitution states that – "In this Part, unless the context otherwise requires, State shall include Parliament and Central Government, State Legislature & state Government and all local or other authorities".

Evolution of definition of term "State" by Judiciary

- **Initial Phases**
  1) Rule of "Ejusdem Generis" was applied.
  2) "Ejusdem Generis" means that "in like manner".
  3) In **State of Rajasthan v. Mukanlal**: it was held that "other authorities" State shall include of like nature i.e. those that are created by the Constitution or any statute.
  4) ONGC, LIC etc were only recognised as state within meaning of Article 12.

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Evolution [contd...]

Later Phases

1) Rule of Ejusdem Generis was found to be inapplicable.

2) A modern welfare state may involve many instrumentalities to perform its sovereign & non-sovereign functions.

3) **R.D Shetty v. Airport Authority of India**

Test laid down by supreme court to determine whether any entity is a State or not within Article 12.

→ (1) Government resources as chief funding source

→ (2) Existence of deep and pervasive state control.

→ (3) Enjoys monopoly which is State conferred or state protected

→ (4) Performs functions which are governmental in essence.

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In several other Supreme court cases, R.D Shetty test was applied and it was determined that whether an entity constitutes State or not.

Courts have thus broadened the scope because in a welfare state, State performs various functions and it is necessary to hold it responsible.

Ex: MC Mehta v UOI (Sri Ram Fertilisers case),

It was held that even a private entity can be included in definition of State.

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Q 2(c) Legal Services Auth. Act

Article 39A provides free legal Aid to the poor. In light of same, Legal Services Authority Act was passed in year 1987

Features of Legal Services Authority Act

1) Section 12 of the Act provides for the eligibility for an individual to avail legal services. Ex: Transgender, SC/ST, etc.

2) Following services are provided under the Act

- (1) Right to Representation through an advocate.
- (2) Right to get court fee paid
- (3) Right to get certified copies of court order
- (4) Right to gets written statement etc filed by an advocate.

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Features of Act (contd..)

3) Organising Lok Adalats, etc. for settling petty matters outside court.

4) Permanent Lok Adalats for settling matters wrt. public utility services.

5) Organising Legal literacy events, etc.

Effectiveness of Legal Services Authority Act

- Positive / Benefits

1) Ensure legal aid to marginalised.

2) Legal literacy campaigns have helped people become aware of their rights.

3) Lok Adalats have reduced burden on courts.

4) Parties have settled their disputes in amicable ways (Gandhian ways).

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Evaluation

Issues with Act

1. Advocates representing & marginalised people are fresher with lack of prior experience.

   Thus quality of legal aid is compromised.

2. Lok Adalat : people may not agree to amicable dispute resolution.

3. Delays, Latches - since matter is first referred to Lok Adalats and returned again to courts.

4. Lack of awareness among people.

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People need to be made aware about benefits of Legal Services Clinics & Lok Adalats so that real intent of the Act can be fulfilled.

3)(a)

"The constitution is based on the bedrock of balance between Fundamental ~~Duties~~ & Rights and Directive Principles of State Policy ("DPSP") and to give primacy of one over another is to disturb the harmony."

- Minerva Mills v. Union of India

Fundamental Rights and Directive Principles are different means to achieve the same goal of Constitutionalism & Welfare Governance.

→ Difference in means i.e. ways of FRs & DPSP

Fundamental Rights	DPSP
1) These are negative obligations on State.	1) These are positive obligations of State (Art 37). These principles are fundamental in governance of the country.
2) They are fundamental in the sense that they are most important for overall development of individuals.	2) They are instructions to the government.

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FR	DPSP
③ They are automatically enforceable under Article 32 of the constitution.	③ They require laws to be made for their enforcement.
④ Their breach gives rise to action against government.	④ Their breach poses legal challenge to government

although they have different means/paths, the end goal of both is same - i.e. welfare State & Rule of law.

"DPSP and FRs - means to achieve same end"

FR	DPSP
① They pose limitations on powers of government - thus security liberty of individual	② They provide direction for policy making.

eg: Prohibition of child labour (Art 24) → Providing just and humane condition of work and preventing exploitation of children.

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FR	DPSP
2) Prohibition of Untouchability (Article 17)	2) Article 37: Securing a social order where justice : social, economic & political can be secured
3) Article 21A - Right to Education (Unni Krishnan v. State of AP)	3) Article 45 : Obligation on State to provide early childhood care.
4) Political Justice is secured eg: Olega Telis Case : Right to livelihood was recognised as Right to life.	4) Social, Economic justice is secured. ex: Right to livelihood Just and humane conditions of work
5) Right to Environment as Right to live : Bangalore Medical Trust v. BS Mundappa : where Right to environment was recognised.	5) Article 48A - where State is under obligation to protect forest, wildlife, etc.
6) Right to	

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Case laws stating relevance/relationship of DPSP & FRs

- Initially in Ram Jawaya Kapur v UOI - it was held that FR are to given primacy over DPSP
- However, in Keshavananda Bharati v State of Kerala, it was held the FR & DPSP supplement & reinforce each other.
- In Minerva Mills case, it was held that our constitution was based on bedrock between FR & DPSP.

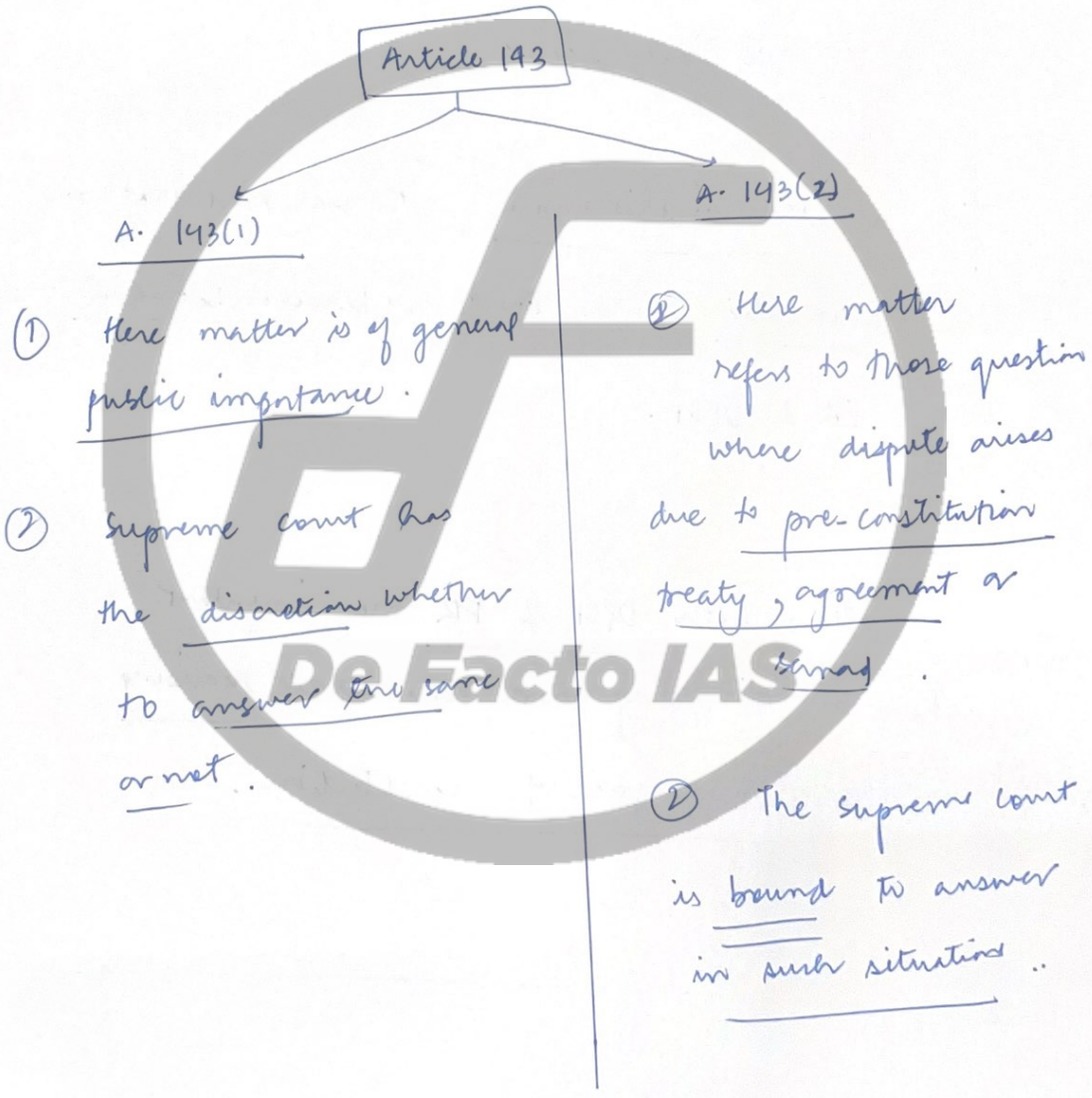
Thus both DPSP & FR are important for reinforcing each other and realising the true goal of constitution.

Study it better

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Q 3(6) Advisory Juris :

Article 143 of the constitution empowers the President of India to refer any ~~case~~ ~~to~~ matter ~~to~~ of public importance Supreme Court for its views.



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Nature of Advise tendered by Supreme Court under Article 143

1) → Advice is not binding on other courts as its not a law under Article 141. (In Re Keshav Singh's Case)

2) → The President is not bound by the advice tendered to him/her by the Supreme court.

3) → President must only refer such matters as has not been already decided by the Supreme court.

4) → Matter may be either of law or of fact.

5) → Supreme Court is not counsel for Government of India.

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The Advisory Jurisdiction of Supreme court can guide the ~~Pte~~ President in case of any opinion. Thus Advisory jurisdiction of Supreme Court holds immense value.

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Q: 3 (d)

Article 32 of the Indian Constitution ~~is~~ was termed as "heart and soul" of Indian Constitution by BR Ambedkar.

It allows the ~~petn~~ aggrieved to directly approach the Supreme Court in case of breach of any of the Fundamental Right guaranted under Part III of the Constitution.

Effect of guarantee provided under Article 32

1) The Right to seek Remedy is itself a fundamental right under Article 32.

2) The ~~aggr~~ existence of alternate remedy is no bar to approach the Supreme Court.

3) Matter is heard at the first instance and quick remedy is provided in form of various writs.

4) PIL as a concept originated out of Article 32.

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Res Judicata : Does it applies to Art 32

Res Judicata is a rule of public policy that applies to states finality to judgments which have been decided by courts of competent jurisdiction.

1) Yes, Res Judicata applies to Article 32 as held in Keshav Singh v UOI.

2) Where matter is heard by High Court and decided on basis of merit, case is barred by Res Judicata.

3) Principle of Res Judicata does not apply in cases of Habeas Corpus.

4) The case must have been decided on basis of merits. If there are violations of Principles of Natural Justice then Res Judicata does not apply.

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Thus it can be said the Res Judicata is applicable to Article 32. This is because Art 32 is concurrent original jurisdiction with Art 226 of the Constitution.

However in cases of Habeas Corpus, Article 32 is not applicable.

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Section B

Q5 (a)

Eminent Domain refers to the power of the sovereign to acquire property without the consent of the property owner for public purpose.

Under modern welfare State, power of Eminent domain is not ~~violated~~ exploited and compensation is also paid to the property owner.

Relevance of Eminent Domain in India today

1) Article 300A provides that no one shall be deprived of his property, save by authority of law.

2) Land Acquisition Act, 2013 - provides for acquisition of property for public purposes and compensation paid in lieu thereof.

3) Also, under Land Acquisition Act 2013, the concept of Rehabilitation & Resettlement has also been introduced.

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Narrowed conception of Eminent Domain in Indian Context

1) Compensation needs to be provided

2) Property can be taken only by authority of law and not by mere executive order.

3) * Sooram Reddy v. Collector, Ranga Reddy

i) It was held that there was malafide exercise of power.

ii) Due process was not followed

iii) Acquisition was not done for public purpose

Eminent Domain remains relevance even today. It is important for sovereign to undertake developmental activities.

However checks & balances are incorporated to ensure goals of constitutionalism.

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Q 5(c)

Article 21 provides - "No one shall be deprived of his life or personal liberty except according to procedure established by law".

Supreme Court has been perplexed at the ~~fact~~ question whether "Right to Life" also includes "Right to Die".

In this regard Section 309 of IPC was challenged before Supreme court.

In P. Rathinam v UOI → Held that S. 309 is violative of Article 21.

In Gian Kaur v. State of Punjab → Held that Sec 309 of IPC is not violative of Article 21 of the Indian Constitution

→ Right to life doesn't include Right to Die.

In Aruna Shanbaug Case → It was held that ~~Section~~ passive Euthanasia cannot be allowed as Right to life doesn't mean Right to Die.

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In recent case of **Common Cause v Union of India** it was held that:

1) Passive Euthanasia was allowed.
2) court recognised Right to die with dignity as a fundamental Right.

Issues wrt. recognition of Right to Die

1) Death Wills - people stipulating in will what needs to be done in case of their terminal illness.
2) Ethical considerations: *going against laws of nature.

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There needs to be a fine balance and Right to Die cases should be recognised on a case to case basis.

Mains 5(a) Local Governance.

The 73rd and 74th Constitutional Amendment Act provided for grass root democracy for the purpose of democratic decentralization. It was done to realise Mahatama Gandhi's goal of village Panchayats as ~~~~ enshrined in Article 40 of the Constitution.

Issues with Local & Self Governing Bodies

1) Funding:
   i) Dependency on State Government Grants
   ii) No independent source of income.
   iii) Hesitant to impose taxes - because don't want to displease electorate.

2) Unplanned Urbanisation

3) Unskilled Staff: i) Low salaries have not attracted talented pool of youth.

4) Lack of Powers: Most functions controlled by State Governments.
   ex: Electricity Board, etc..

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Measures for Constitutional Revitalisation of Local Governance

1) Financial Devolution to be made by State Finance Commission - constitutional amendment for same.

2) Training & Upskilling of Staff

3) 2nd ARC's recommendation of providing more functions to local bodies.

4) 2nd ARC's recommendation of amending certain Articles of constitution.

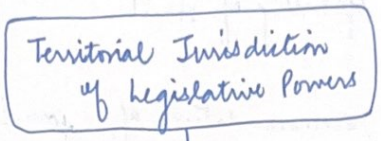
5) Local Laws : In Rajbala v. State of Haryana, Educational Qualification was made to be mandatory for contesting elections. This was upheld by courts.

This will ensure that competent & educated people are chosen as leaders.

Thus Local governance needs a fillip for an effective grass root democracy & to realise Gandhiji's idea of SARVODAYA.

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Q5(c) Indian Constitution provides Federal form of government. Hence, divisions of legislative powers are enshrined in the Constitution itself.



① Article 245 states that the territorial extent of ~~executive~~ legislative power of the p/ment extend to whole or any part of territory of India.

② Article 245(2): Parliamentary laws have extra-territorial jurisdiction.

① Article 245 - states that territorial extent of legislative power of state legislative extends to whole or any part of State thereof.

① RMDC v. State of Bombay

① Kheybari Tea Company v. State of Assam

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Subject Jurisdiction of Legislative Power

Parliament

1) Article 246 - Parliament has exclusive power to make laws wrt any of matters in Union list

2) Art 246(2): Both Parliament & State legislature can make laws wrt. Concurrent list however Parliamentary laws prevails.

3) Article 248 : Residuary power vests with the Parliament

4) Art 253: Implementation of International Agreements Parliament has exclusive powers.

State legislature

1) State legislature has exclusive power to make laws for any matters in List II

2) "Pith & Substance" applied in case of conflict between List I & List II

Calcutta Gas Corp v. ~~Gross~~ State of WB

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Thus we observe that Parliament is superior in some aspects wrt. legislative powers - however within the sphere allotted to States, they are supreme.

Q6(a)

Article 163 provides that there shall be a Governor for each State. The Governor is appointed by the President and remains in office during pleasure of the President.

However there are certain instances where the Governor is removed even before the completion of the term.

Sarkaria Commission → recommended that there shall not be any removal before the term unless compelling reasons to do so.

Governor's independence

Article 163(1): provides Governor to act as per advise of state council of ministers "except he is required to act in his discretion".

Discretion of governor

- Art 356: Sending a report to the President that failure of constitutional machinery
- Art 200: Reservation of Bills for consideration of President.

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... speech & expression.

- Governor is not an agent of Central Government.
- Government is an independent constitutional offic...

(5) write more important

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6(b) Article 19(1)(a) provides freedom of speech & expression. It is a bulkwalk of democratic society where the citizens should be able to freely express their thoughts.

Scope of Article 19(1)(a)

1) Article 19(1)(a) has a wide scope and has given rise to various rights:
   1) → Right of Media / Newspapers
   2) → Right to Commercial Advertisement
   3) → Right of Information
   4) → Right of Silence

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2) Scope is limited by Article 19(2) which provides "Reasonable restrictions" on grounds of:
   i) public order
   ii) Morality
   iii) Security
   iv) ~~Friendly~~ relations with foreign States

Q6(a)

Various Rights emanating from Article 19(1)(a)

(A) — Right of ~~Media~~ Newspaper :

1) Bennett Coleman v Union of India : Restrictions on newspapers were held to be violative of Article 19(1)(a).

2) Sakal Newspaper v Union of India :

3) Express Newspaper v. Union of India — It was held reasonable to impose conditions such as working hours, etc.

(B) — Right to Commercial Advertisement

1) Tata Media v MTNL : Right to commercial advtisement was recognised as part of Art 19(1)(a).

2) Hamdard Dawakhana v UOI — It was held that obnoxious ~~to~~ ~~that~~ advertisements cannot be allowed.

(C) — Right to Information

1) Secretary, Min of IB v Cricket Association, Bengal : Right to information was held as Right under Article 19(1)(a).

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Right of Media :

1) LIC v Manubhai D Shah

2) Bandit Queen movie Case : where it was allowed to release the movie.

3) R. Rajgopal v. St of Tamil Nadu : Biography of Auto Shankar was allowed to be published

→ media

Hence it can be seen that Art 19(1)(a) is widely interpreted by the judiciary to emanate various rights. This has made Indian democracy stronger.

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6(c)

Article 29 & Article 30 all minorities (whether linguistic or religious) to establish educational institutions of their own choice

In Re Kerala Education Bill, it was held that right to administration does not include Right to maladministration.

As a part of Right to administration, ~~Religious~~ minority institution has following rights:

1) Right to appoint teachers
2) Right to appoint management
3) Right to prescribe educational criteria for education.

In Frank Anthony School Employees Association v State of Kerala: it was held that although minorities has right to administer but general laws of "wage, working hours, etc" will also applicable to them.

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Thus it is evident that general administrative guidance/laws can be provided by the State.

5.

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