FUNDAMENTALS OF CONSTITUTIONAL LAW OF INDIA

Dr. Atul Kumar Sahuwala

Fundamentals of Constitutional Law of India

Fundamentals of Constitutional Law of India

Dr. Atul Kumar Sahuwala (Assistant Professor)
LL.M., PhD (Law), Faculty of Law, Tantia University, Sri Ganganagar

ACADEMIC
UNIVERSITY PRESS

Fundamentals of Constitutional Law of India

Dr. Atul Kumar Sahuwala

ACADEMIC
UNIVERSITY PRESS

4378/4-B, Murarilal Street, Ansari Road, Daryaganj, New Delhi-110002.
Ph. No: +91-11-23281685, 41043100, Fax: +91-11-23270680
E-mail: academicuniversitypress@gmail.com

Year of Publication 2024-25

ISBN : 978-93-6284-329-6

Printed and bound by: Global Printing Services, Delhi
10 9 8 7 6 5 4 3 2 1

Contents

Preface ..... *vii*

Chapter 1 Constitutional Law 1

Chapter 2 Revision of the Constitution of India 20

Chapter 3 The Judicial and Executive Branches of India 33

Chapter 4 Indian Constitution Parts and Articles 78

Chapter 5 The Law of Specific Relief 97

Chapter 6 Amendment of the Constitution of India 119

Chapter 7 Constitutionalism Rule of Law 132

Preface

"Fundamentals of Constitutional Law of India" provides a comprehensive examination of the foundational principles and structures that shape the Indian legal and governance system. At its core, the book delves into the Constitution of India, which serves as the supreme law of the land and embodies the aspirations of the nation towards democracy, equality, and justice. Enacted on January 26, 1950, the Constitution of India lays down the framework for the organization of the government, delineates the powers and responsibilities of different branches, and guarantees fundamental rights to all citizens.

Key components of India's constitutional framework, such as the parliamentary form of government, the separation of powers between the executive, legislative, and judicial branches, and the federal structure that balances central and state authority, are meticulously analyzed in the book. The interplay between these elements shapes the functioning of the Indian state and the relationship between the government and its citizens.

Fundamental rights, enshrined in Part III of the Constitution, form the cornerstone of India's constitutional jurisprudence. The book explores these rights in detail, including the right to equality, freedom of speech and expression, freedom of religion, and the right to constitutional remedies. It also delves into the mechanisms for the enforcement of these rights through the judiciary, which serves as the guardian of the Constitution and exercises the power of judicial review to ensure that laws and governmental actions are consistent with constitutional principles.

Moreover, the book sheds light on the role of independent institutions, such as the Election Commission, the Comptroller and Auditor General, and the Union

Public Service Commission, in ensuring transparency, accountability, and efficiency in governance. It examines their functions and powers, as well as their significance in upholding democratic principles and good governance.

Through an in-depth analysis of the fundamentals of constitutional law in India, the book provides readers with a nuanced understanding of the legal and political framework that underpins the nation's governance. It serves as an invaluable resource for students, scholars, policymakers, and practitioners seeking to navigate the complexities of India's constitutional landscape and contribute to the advancement of democracy, rule of law, and human rights in the country.

Additionally, the Constitution establishes independent bodies such as the Election Commission, the Comptroller and Auditor General, and the Union Public Service Commission to ensure transparency, accountability, and efficiency in governance. Federalism is another hallmark of India's constitutional framework, with powers divided between the central government and the states, each with its own sphere of jurisdiction.

In 'Fundamentals of Constitutional Law in India,' readers explore the cornerstone principles and structures underpinning the country's legal and governance framework.

–Author

1

Constitutional Law

Constitutional law is the body of law which defines the relationship of different entities within a State, namely, the executive, the legislature, and the judiciary.

Not all Nation States have codified Constitutions, though all such states have a *jus commune*, or law of the land, that may consist of a variety of imperative and consensual rules. These may include customary law, conventions, statutory law, judge-made law orinternational rules and norms.

CONSTITUTIONAL LAW: AN OVERVIEW

The broad topic of constitutional law deals with the interpretation and implementation of the United States Constitution. As the Constitution is the foundation of the United States, constitutional law deals with some of the fundamental relationships within our society. This includes relationships among the states, the states and the federal government, the three branches (executive, legislative, judicial) of the federal government, and the rights of the individual in relation to both federal and state government. The area of judicial review is an important subject within Constitutional Law. The Supreme Court has played a crucial role in interpreting the Constitution. Consequently, study of Constitutional Law focuses heavily on Supreme Court rulings. While the topic also covers the interpretation and implementation of state constitutions, without qualification it is usually understood as referring to the Federal Constitution.

The Constitution establishes the three branches of the federal government and enumerates their powers. Article I establishes the House of Representatives and the Senate. Section 8 enumerates the powers of Congress. Congress has

specifically used its power to regulate commerce (the commerce clause) with foreign nations and among the states to enact broad and powerful legislation throughout the nation. The sixteenth Amendment gives Congress the power to collect a national income tax without apportioning it among the states. Section 9 of Article I prohibits Congress from taking certain actions.

For example, until the passage of the 16th Amendment Congress could not directly tax the people of the United States unless it was proportioned to the population of each state. Section 10 of Article I lists a number of specific actions that individual states may no longer take. Article II of the Constitution establishes the presidency and the executive branch of government. The powers of the President are not as clearly enumerated as those of the Congress. He is vested with the "executive" power by section 1. Section 2 establishes him as the "commander in chief" and grants him power to give pardons, except in cases of impeachment, for offences against the United States. Section 3 provides the power to make treaties (with the advice and consent of two-thirds of the Senate) and the power to nominate ambassadors, ministers, Judges of the Supreme Court, and all other Officers of the United States.

The role of the Supreme Court and the rest of the judicial branch of the federal government is covered by Article III. Article V of the Constitution provides the procedures to be followed to amend the Constitution. Currently, the Constitution has been amended twenty-seven times (including the Bill of Rights). Article VI of The United States Constitution states that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made or shall be made, under the Authority of the United States, shall be the Supreme Law of the Land." Furthermore, all federal, state, and local officials must take an oath to support the Constitution. This means that state governments and officials cannot take actions or pass laws that interfere with the Constitution, laws passed by Congress, or treaties. The Constitution was interpreted, in 1819, as giving the Supreme Court the power to invalidate any state actions that interfere with the Constitution and the laws and treaties passed pursuant to it. That power is not itself explicitly set out in the Constitution but was declared to exist by the Supreme Court in the decision of McCulloch v. Maryland.

The first section of the fourth article of the Constitution contains the "full faith and credit clause." This clause provides that each state must recognize the public acts (laws), records, and judicial proceeding of the other states. The Fourth Article also guarantees that a citizen of a state be entitled to the "privileges and immunities" in every other state. The power of the federal government is not absolute. The tenth Amendment specifically states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Specific provisions of the Constitution protect the rights of the individual from interference by the federal and state governments. The first ten amendments, called the Bill of Rights, were ratified in 1791, providing a check on the new federal government. The first eight amendments provide protection of some of

the most fundamental rights of the individual. For example, the First Amendment protects the fundamental civil rights of free speech, press and assembly. Subsequent amendments have also broadened the protection afforded the rights of the individual. The Thirteenth Amendment made slavery illegal. The Fourteenth Amendment prohibits the states from abridging "the rights and immunities" of any citizen without due process of law. The Supreme Court has interpreted the "due process" clause of the Fourteenth Amendment as affording citizens protection from interference by the state with almost all of the rights listed in the first eight amendments. The exceptions are the right to bear arms in the Second Amendment, the Fifth Amendment guarantee of a grand jury in criminal prosecutions, and the right to a jury for a civil trial under the Seventh Amendment. The Fourteenth Amendment also guarantees the equal protection of the laws.

STATE AND LEGAL STRUCTURE

Constitutional laws may often be considered second order rulemaking or rules about making rules to exercise power. It governs the relationships between the judiciary, the legislature and the executive with the bodies under its authority. One of the key tasks of constitutions within this context is to indicate hierarchies and relationships of power. For example, in a unitary state, the constitution will vest ultimate authority in one central administration and legislature, and judiciary, though there is often a delegation of power or authority to local or municipal authorities. When a constitution establishes a federal state, it will identify the several levels of government coexisting with exclusive or shared areas of jurisdiction over lawmaking, application and enforcement.

HUMAN RIGHTS

Human rights or civil liberties form a crucial part of a country's constitution and govern the rights of the individual against the state. Most jurisdictions, like the United States and France, have a codified constitution, with a bill of rights. A recent example is the Charter of Fundamental Rights of the European Union which was intended to be included in the Treaty establishing a Constitution for Europe, that failed to be ratified. Perhaps the most important example is the Universal Declaration of Human Rights under the UN Charter. These are intended to ensure basic political, social and economic standards that a nation state, or intergovernmental body is obliged to provide to its citizens but many do include its governments.

Some countries like the United Kingdom have no entrenched document setting out fundamental rights; in those jurisdictions the constitution is composed of statute, case law and convention. A case named *Entick v.*

Carrington is a constitutional principle deriving from the common law. John Entick's house was searched and ransacked by Sherriff Carrington. Carrington argued that a warrant from a Government minister, the Earl of Halifax was valid authority, even though there was no statutory provision or court order for it. The court, led by Lord Camden stated that, "The great end, for which men

entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. By the laws of England, every invasion of private property, be it ever so minute, is a trespass... If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment."

Inspired by John Locke, the fundamental constitutional principle is that the individual can do anything but that which is forbidden by law, while the state may do nothing but that which is authorized by law. The commonwealth and the civil law jurisdictions do not share the same constitutional law underpinnings.

LEGISLATIVE PROCEDURE

Another main function of constitutions may be to describe the procedure by which parliaments may legislate. For instance, special majorities may be required to alter the constitution. In bicameral legislatures, there may be a process laid out for second or third readings of bills before a new law can enter into force. Alternatively, there may further be requirements for maximum terms that a government can keep power before holding an election.

STUDY OF CONSTITUTIONAL LAW

The examples and perspective in this article may not represent a worldwide view of the subject. Please improve this article and discuss the issue on the talk page. *(December 2010)*

Constitutional law is a major focus of legal studies and research. For example, most law students in the United States are required to take a class in Constitutional Law during their first year, and several law journals are devoted to the discussion of constitutional issues.

THE RULE OF LAW

The doctrine of the rule of law dictates that government must be conducted according to law.

Dicey identified three essential elements of the British Constitution which were indicative of the rule of law:

1. Absence of arbitrary power;
2. Equality before the law;
3. The Constitution is a result of the ordinary law of the land.

THE SEPARATION OF POWERS

The Separation of Powers is often regarded as a second limb functioning alongside the Rule of Law to curb the powers of the Government. In most modern nation states, power is divided and vested into three branches of government: The Executive, the Legislature and the Judiciary. The first and the second are harmonized in traditional Westminster forms of government.

ADMINISTRATIVE LAW IN COMMON LAW COUNTRIES

Generally speaking, most countries that follow the principles of common law have developed procedures for judicial review that limit the reviewability of decisions made by administrative law bodies. Often these procedures are coupled with legislation or other common lawdoctrines that establish standards for proper rulemaking. Administrative law may also apply to review of decisions of so-called semi-public bodies, such as non-profit corporations, disciplinary boards, and other decision-making bodies that affect the legal rights of members of a particular group or entity.

While administrative decision-making bodies are often controlled by larger governmental units, their decisions could be reviewed by acourt of general jurisdiction under some principle of judicial review based upon due process (United States) or fundamental justice (Canada). Judicial review of administrative decisions is different from an administrative appeal. When sitting in review of a decision, the Court will only look at the method in which the decision was arrived at, whereas in an administrative appeal the correctness of the decision itself will be examined, usually by a higher body in the agency. This difference is vital in appreciating administrative law in common law countries.

The scope of judicial review may be limited to certain questions of fairness, or whether the administrative action is *ultra vires*. In terms of ultra vires actions in the broad sense, a reviewing court may set aside an administrative decision if it is unreasonable (under Canadian law, following the rejection of the "Patently Unreasonable" standard by the Supreme Court in Dunsmuir v. New Brunswick), *Wednesbury* unreasonable (under British law), or arbitrary and capricious (under U.S.) Administrative Procedure Act and New York State law). Administrative law, as laid down by the Supreme Court of India, has also recognized two more grounds of judicial review which were recognized but not applied by English Courts viz. legitimate expectation and proportionality.

The powers to review administrative decisions are usually established by statute, but were originally developed from the royalprerogative writs of English law, such as the writ of mandamus and the writ of certiorari. In certain Common Law jurisdictions, such as India or Pakistan, the power to pass such writs is a Constitutionally guaranteed power. This power is seen as fundamental to the power of judicial review and an aspect of the independent judiciary.

UNITED STATES

In the United States, many government agencies are organized under the executive branch of government, although a few are part of the judicial or legislative branches.In the federal government, the executive branch, led by the president, controls the federal executive departments, which are led by secretaries who are members of the United States Cabinet. The many important independent agencies of the United States government created by statutes enacted by Congress

exist outside of the federal executive departments but are still part of the executive branch. Congress has also created some special judicial bodies known as Article I tribunals to handle some areas of administrative law.

The actions of executive agencies and independent agencies are the main focus of American administrative law.

In response to the rapid creation of new independent agencies in the early twentieth century (see discussion below), Congress enacted the Administrative Procedure Act (APA) in 1946.

Many of the independent agencies operate as miniature versions of the tripartite federal government, with the authority to "legislate", "adjudicate" (through administrative hearings), and to "execute" administrative goals (through agency enforcement personnel). Because the United States Constitution sets no limits on this tripartite authority of administrative agencies, Congress enacted the APA to establish fair administrative law procedures to comply with the constitutional requirements of due process. Agency procedures are drawn from four sources of authority: the APA, organic statutes, agency rules, and informal agency practice.

The American Bar Association's official journal concerning administrative law is the *Administrative Law Review*, a quarterly publication that is managed and edited by students at the Washington College of Law.

HISTORICAL DEVELOPMENT

Stephen Breyer, a U.S., Supreme Court Justice since 1994, divides the history of administrative law in the United States into six discrete periods, according to his book, Administrative Law & Regulatory Policy (3d Ed., 1992):

- English antecedents & the American experience to 1875
- 1875 – 1930: the rise of regulation & the traditional model of administrative law
- The New Deal
- 1945 – 1965: the Administrative Procedure Act & the maturation of the traditional model of administrative law
- 1965 – 1985: critique and transformation of the administrative process
- 1985 – ?: retreat or consolidation

AGRICULTURE

The agricultural sector is one of the most heavily regulated sectors in the U.S., economy, as it is regulated in various ways at the international, federal, state, and local levels. Consequently, administrative law is a significant component of the discipline of Agricultural Law.

The United States Department of Agriculture and its myriad agencies such as the Agricultural Marketing Service are the primary sources of regulatory activity, although other administrative bodies such as the Environmental Protection Agency play a significant regulatory role as well.

ADMINISTRATIVE LAW IN CIVIL LAW COUNTRIES

Unlike most Common-law jurisdictions, the majority of civil law jurisdictions have specialized courts or sections to deal with administrative cases which, as a rule, will apply procedural rules specifically designed for such cases and different from that applied in private-law proceedings, such as contract or tort claims.

FRANCE

In France, most claims against the national or local governments are handled by administrative courts, which use the *Conseil d'État*(Council of State) as a court of last resort. The main administrative courts are the *tribunaux administratifs* and appeal courts are the*cours administratives d'appel*. The French body of administrative law is called "*droit administratif*".

GERMANY

Administrative law in Germany, called Deutschland, generally rules the relationship between authorities and the citizens and therefore, it establishes citizens' rights and obligations against the authorities. It is a part of the public law, which deals with the organization, the tasks and the acting of the public administration. It also contains rules, regulations, orders and decisions created by and related to administrative agencies, such as federal agencies, federal state authorities, urban administrations, but also admission offices and fiscal authorities, *etc.* Administrative law in Germany follows three basic principles.

- Principle of the legality of the authority, which means that there is no acting against the law and no acting without a law.
- Principle of legal security, which includes a principle of legal certainty and the principle of nonretroactivity
- Principle of proportionality, which says that an act of an authority has to be suitable, necessary and appropriate

Administrative law in Germany can be divided into general administrative law and special administrative law.

GENERAL ADMINISTRATIVE LAW

The general administration law is basically ruled in the Administrative Procedures Law. Other legal sources are the Rules of the Administrative Courts, the social security code and the general fiscal law.

SPECIAL ADMINISTRATIVE LAW

The special administrative law consists of various laws. Each special sector has its own law. The most important ones are the:

- Town and Country Planning Code
- Federal Control of Pollution Act

- Industrial Code
- Police Law
- Statute Governing Restaurants.

THE NETHERLANDS

In The Netherlands, administrative law provisions are usually contained in separate laws. There is however a single General Administrative Law Act ("Algemene wet bestuursrecht" or Awb) that applies both to the making of administrative decisions and the judicial review of these decisions in courts. On the basis of the Awb, citizens can oppose a decision ('besluit') made by a public body ('bestuursorgaan') within the administration and apply for judicial review in courts if unsuccessful.

Unlike France or Germany, there are no special administrative courts of first instance in the Netherlands, but regular courts have an administrative "chamber" which specializes in administrative appeals. The courts of appeal in administrative cases however are specialized depending on the case, but most administrative appeals end up in the judicial section of the Council of State (Raad van State).

Before going to court, citizens must usually first object to the decision with the administrative body who made it. This is called "bezwaar".

This procedure allows for the administrative body to correct possible mistakes themselves and is used to filter cases before going to court. Sometimes, instead of bezwaar, a different system is used called "administratief beroep" (administrative appeal).

The difference with bezwaar is that administratief beroep is filed with a different administrative body, usually a higher ranking one, than the administrative body that made the primary decision. Administratief beroep is available only if the law on which the primary decision is based specifically provides for it. An example involves objecting to a traffic ticket with the district attorney ("officier van justitie"), after which the decision can be appealed in court.

SWEDEN

In Sweden, there is a system of administrative courts that considers only administrative law cases, and is completely separate from the system of general courts.

This system has three tiers, with 12 county administrative courts (*förvaltningsrätt*) as the first tier, four administrative courts of appeal (*kammarrätt*) as the second tier, and the Supreme Administrative Court of Swedenas the third tier.

Migration cases are handled in a two-tier system, effectively within the system general administrative courts. Three of the administrative courts serve as migration courts (*migrationsdomstol*) with the Administrative Court of Appeal in Stockholm serving as the Migration Court of Appeal (*Migrationsöverdomstolen*).

BRAZIL

In Brazil, unlike most Civil-law jurisdictions, there is no specialized court or section to deal with administrative cases. In 1998, a constitutional reform, led by the government of the President Fernando Henrique Cardoso, introduced regulatory agencies as a part of the executive branch.

Since 1988, Brazilian administrative law has been strongly influenced by the judicial interpretations of the constitutional principles of public administration (art. 37 of Federal Constitution): legality, impersonality, publicity of administrative acts, morality and efficiency.

CHILE

The President of the Republic exercises the administrative function, in collaboration with several Ministries or other authorities with*ministerial rank*.

Each Ministry has one or more under-secretary that performs through public services the actual satisfaction of public needs. There is not a single specialized court to deal with actions against the Administrative entities, but instead there are several specialized courts and procedures of review.

PEOPLE'S REPUBLIC OF CHINA

Administrative law in the People's Republic of China was virtually non-existent before the economic reform era initiated by Deng Xiaoping. Since the 1980s, the People's Republic of China has constructed a new legal framework for administrative law, establishing control mechanisms for overseeing the bureaucracy and disciplinary committees for the Communist Party of China. However, many have argued that the usefulness of these laws is vastly inadequate in terms of controlling government actions, largely because of institutional and systemic obstacles like a weak judiciary, poorly trained judges and lawyers, and corruption.

In 1990, the Administrative Supervision Regulations and the Administrative Reconsideration Regulations were passed. Both regulations have since been amended and upgraded into laws. The 1993 State Civil Servant Provisional Regulations changed the way government officials were selected and promoted, requiring that they pass exams and yearly appraisals, and introduced a rotation system. In 1994, the State Compensation Law was passed, followed by the Administrative Penalties Law in 1996.

THE ADMINISTRATION OF A CONSTRUCTIVE TRUST

THE INDIAN TRUST ACT

1. The Law relating to Trust is contained in Act II of 1882.
2. It is an Act which defines and amends—that means that it does not introduce any new principle.

3. The Act does not consolidate the Law—That means that it is not an Exhaustive Code.
4. The object of the Act was to group in one to enact the legal provisions relating to trusts. Before the Act of 1882 the statutory law relating to trust was contained in 29 *Car II. C. 31 sections 7— II.*
   Act XXVII of 1866 Act XXVIII of l866: There were also few isolated provisions scattered through the Penal Code, Specific Relief, C. P. Code Stamp Act, Limitation, Government Securities Act, Companies Act, Presidency Banks Act.
5. As originally passed, the Act did not apply to the whole of British India. For instance, it did not apply to Bombay. But provision was made to extend it by notification by local Government.
6. It is unnecessary to discuss here whether the Hindu Law and Mohammedan Law recognised trust as defined in the Trust Act. That may be dealt with by others.

THE NATURE OF A TRUST

1. Trust is defined in section 3. A trust involves three things:
   (1) A person who is the *owner* of some property.
   (2) Ownership burden with an obligation.
   (3) Obligation to use the property for the benefit of another or of another and himself.
2. It is ownership without beneficial enjoyment. It involves separation of ownership and beneficial enjoyment.
3. A trust arises out of a confidence reposed in and accepted by the owner.
4. The owner in the eye of the law is the trustee. After the trust is created the author of the trust ceases to be the owner of the property.

What is a Trust

1. The terms Trust and Trustee are defined in various enactments of the Indian Legislature.
   (i) *Definition in Specific Relief Act I of 1877. Section 3:*
      (1) *Obligation* includes every duty enforceable by law.
      (2) *Trust* includes every species of express, implied or constructive fiduciary ownership.
      (3) *Trustee* includes every person holding expressly, by implication, or constructively a fiduciary ownership.
   (ii) *Definition in the Indian Trustees Act XXVII of 1866. Section* 2: "Trust shall not mean the duties incident to an estate conveyed by way of mortgage; but with this exception, the words *trust* and *trustee* shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of executor or administrator of a deceased person.

(iii) *Definition in Limitation Act IX of 1908. Section 2 (ii)— Trustee* does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied or a wrongdoer in possession without title.

(iv) *Indian Trusts Act II of 1872.*

(1) Section 3—"A trust is an obligation annexed to the ownership of property...

(2) Ingredients of a Trust (i) A Trust in an *obligation.* (ii) The obligation must be annexed to the *ownership* of property. (iii) The ownership must arise out of *confidence* reposed in and accepted by the owner. (iv) The ownership must be for the benefit of another (*i.e.*, a person other than the owner) or of another and the owner.

EXPLANATION OF TERMS

I. There must be obligation.

II. Obligation must be annexed to ownership property.

1. There may be an obligation to which a person is subject although there is no property to which it is annexed.
   E.g. Torts assault:
2. There may be property without there being any obligation attached to it. *E.g. Full* and *complete* ownership—sale of property.
   III. The ownership of property may befounded in confidence or it may not.
   Illus.: A person may transfer ownership to another with the intention of conferring upon him the right to enjoy the property. A person may transfer ownership to another without the intention of conferring upon him the right to enjoy the property. The difference between ownership founded in confidence and ownership not founded in confidence consists in this:
   (i) In the latter there is *a jus in re* (a complete and full right to a thing) *or jus ad rem* (an inchoate and imperfect right).
   (ii) In the former there is not. *E.g.* Bailment.
3. The nature of a trust can be better understood by contracting it with other transactions resembling a trust.

TRUST DISTINGUISHED FROM AGENCY

1. Where there is a trust, the ownership of the trust property is in the trustee. The trustee is personally liable on all contracts entered into by him in reference to the trust, although he may have a right of recourse against the trust funds or against the beneficiary.
2. An agent has no ownership in law in the goods entrusted to him. If an agent enters into a contract as agent, he is not personally liable. The contract is with the principal.

TRUST DISTINGUISHED FROM CONDITION

1. Cases of condition differ from cases of trust in two respects—
   First. A trust of property cannot be created by any one except the owner. But A may dispose of his property to B upon condition express or implied that B shall dispose of his own property in a particular way indicated by A.
   Second. The obligation of the person on whom the condition is imposed is not limited by the value of the property he receives, *e.g.*, if A makes a bequest to B, on condition of B paying A's debts, and B accepts the gift, he will be compelled in equity to discharge the debts although the exceed the value of the property.
2. But the words "upon condition" may create a real trust. Thus a gift of an estate to A on condition of paying the rents and profits to B constitutes a trust because it is clear that no beneficial interest was intended to remain in A.
   A may dispose of his property to B upon condition express or implied that B shall dispose of his property to C. There is a condition in favour of C.

IS THIS A TRUST? TRUST DISTINGUISHED FROM BAILMENT

1. Bailment is a deposit of chattel and may in a sense be described as a species of trust. But there is this great difference between a bailment and a trust, that the general property in the case of a trust, is in the trustee, whereas a bailee has only a special property, the general property remaining in the bailor.
2. The result of this difference is that an unauthorised sale by a trustee will confer a good title upon a *bonafide* purchaser who acquires the legal interest without notice of the trust, whereas such a sale by a bailee confers as a rule no title as against the bailor.
3. Bailee does not become the owner of the property as a result of the bailment. But a trustee does in law become the owner of the property as a result of the trust notwithstanding he is under an obligation to deal with the property in a certain specified manner.

TRUST DISTINGUISHED FROM GIFT

Ordinary contract differs from a trust. Contract which confers a benefit on a third party closely resembles a trust.

1. There is a similarity between a Trust and a Gift inasmuch as in both the transfer results in ownership. The Trustee and the Donee both become owners of the property.
2. But there is a difference between the two. In a gift the donee is free to deal with the property in any way he likes. In a Trust the trustee is under an obligation to use the property in a particular manner and for a particular purpose.

TRUST DISTINGUISHED FROM CONTRACT

1. *That there is a distinction between trust and contract is evident from the existence of differing legal consequences attached to a trust and to a contract:*
   (i) A trust, if executed, may be enforced by a beneficiary who is not a party to it whilst only the actual parties to a contract can, as a rule, sue upon it
   (ii) An executed voluntary trust is fully enforceable while a contract lacking consideration is not.
2. However, the determination of the question whether a given set of facts gives rise to a trust or a contract is not easy. What is the test?
   Keetan—-pp. 5-6 (1919) A. C. 801 |38 Bom. S. R. 610.
   (1926) A. C. 108
   It is a question of intention.

TRUST DISTINGUISHED FROM POWER

1. The term "power" in its widest sense includes every authority given to a person (called the donee of the power) to act on behalf of or exercise rights belonging to the person giving him the authority (called the donor of the power).
2. Powers are of many kinds *e.g.*
   (i) The common law power of an agent to act for his principal, given sometimes by a formal "power of attorney".
   (ii) Statutory power such as the power of sale given to a mortgagee.
   (iii) The various express and implied equitable powers possessed by trustees and executors.
   (iv) Powers to appoint trusts so as to create equitable interests.
3. The power of appointment is a transaction which resembles a trust and it is this which must be distinguished from a trust.

The word appointment means-pointing out, indicating-the act of declaring the destination of specific property, in exercise of an authority conferred for that purpose-the act of nominating to an office. The last class *termed, powers of appointment* are made use of where it is desired to make provision for the *creation* of future interests, but to postpone their complete declaration.

Thus in a marriage settlement, property may be given to trustees upon trust for the husband and wife for their lives and, after the death of the survivor upon trust for (i) *Such of the children* of the marriage as the survivor shall appoint, or (ii) *All the children* of the marriage in such shares as the survivors shall appoint.

In such a case, upon appointment being made, the child to whom it is made takes exactly as if a limitation to the same effect had been made in the original instrument. A power of this kind, where there is a restriction as to its objects (*i.e.*, persons in whose favour it may be exercised) is termed a *special power of appointment.* But there may be a *general power* of appointment when there is no such restriction, so that the donee may appoint to himself.

In such a case the donee having the same powers of disposition as an owner, is for most purposes treated as the owner of the property:

(i) A power may give a mere discretion and therefore is distinct from a trust, which creates an obligation or

(ii) A power may impose an obligation to exercise the discretion.

In the former case there is no trust. In the latter case there is. The former is called *mere power.* The latter is called power in the nature of a trust *or power coupled with trust.*

(iii) There is also a third category of cases which arc cases of a *trust coupled with a power.*

These are cases where a trustee of a property though under an obligation to apply it for the benefit of certain individuals or purposes, may have a *discretion* as to whether he will or will not do certain specified acts, or as to the amount to be applied for any one individual or purpose or as to the time and manner of its application. In such cases, the Court will prevent the trustee from exercising the power unreasonably, it will not compel him to do such acts or attempt to control the proper exercise of his discretion.

1. Power resembles a trust and also differs from it.
   (i) It resembles a trust inasmuch as a power is an authority to dispose of some interest in land, but confers no right to enjoyment of land.
   (ii) It differs from a trust inasmuch as a power is discretionary, whereas a trust is imperative; the trustee if he accepts must necessarily do as the settlor directs.

New Trustees:

(1) Survivorship of the office and estate or trustee on death.
(2) Devolution of the office and estate on Death of the survivor.
(3) Retirement or Removal of a Trustee.
(4) Appointment of New Trustees.

Appointment of a Judicial Trustee.

The Public Trustee.

(1) Nature and Function.
(2) Appointment of a Public Trustee as an ordinary Trustee.
(3) Appointment and Removal of the Public Trustee.
(4) Duties, Rights and Liability of the Custodian Trustee and Managing Trustee.
(5) Special Rules relating to the Public Trustee.

The Rights of the Trustee

(1) Right to Reimbursement and Indemnity.
(2) Right to discharge on completion of Trusteeship.
(3) Right to pay Trust Funds into Court.

Right of trustees and beneficiaries to seek the assistance of public trustee or court.

(1) Right of Official audit.
(2) Right to take direction of Court.
(3) Right to have Trust administered by Court.

(4) Right to take direction of Court.
(5) Right to have Trust administered by Court.

Consequences of a Breach of Trust.

Definition of Breach of Trusts: Breach of trust is defined in section 3, a breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called a breach of trust.

Under the English Law: Any act or neglect on the part of a trustee which is not authorised or excused by the terms of the trust instrument, or by law, is called a breach of trust.

Breach of Duty: A trustee has Duties, Right, Powers and disabilities. Only breach of duty is breach of trust.

1. The measure of liability is the loss caused to the trust property.
2. *Is he liable to pay interest? Only in the following cases:*
   (a) Where he has actually received interest.
   (b) Where the breach consists in unreasonable delay in paying trust-money to the beneficiary.
   (c) Where the trustee ought to have received interest, but has not done so.
   (d) Where he may be fairly presumed to have received interest.
   (e) Where the breach consists in failure to invest trust-money and to accumulate the interest or dividends.
   (f) Where the breach consists in the employment of trust property or the proceeds thereof in trade or business.
3. Is he entitled to set off a gain from breach of trust against a loss from breach of trust.

What is the nature of the Law of Limitation?

1. There are various ways in which a time-limit enters into a course of litigation: (1) Cases where the law says action shall be taken within a stated period:
   Illus.—Order 6 Rule 18.—Amendment of a Plaint. Party obtaining leave to amend must amend within the time fixed by the Court for amendment and if no time is fixed then within 14 days. (2) Cases where the law says action shall not be taken before a certain period has elapsed.
   Illus.—Section 80 of the C. P. C.—Suit against Secretary of State. No suit shall be instituted against the Secretary of State for India in Council or against any public officer in respect of any Act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been given. (3) Cases in which the law prescribes that action shall not be taken *after* a certain period has elapsed.
2. It is the *third* class of cases which strictly speaking constitute the subject-matter of the Law of Limitation.

Distinction between Limitation—Estoppel—Acquiescence and Laches: All these have the effect of denying to an aggrieved party a remedy for the wrong done to him. That being so it is necessary to distinguish them from Limitation as such.

LIMITATION AND ESTOPPEL

1. By Limitation a person is prevented from getting relief because of his having brought the action after the time prescribed for bringing his suit.
2. By Estoppel a person fails to get relief because he is prevented by law from adducing evidence to prove his case.

LIMITATION AND ACQUIESCENCE

1. Limitation defeats a suitor in the matter of obtaining relief for a wrong because he has *consented* to the doing of the wrong because his suit is beyond time.
2. Acquiescence defeats a suitor in the matter of obtaining relief for a wrong because he has *consented* to the doing of the wrong.

LIMITATION AND LACHES

1. Both have one common feature—relief is denied on the sole ground that action is not brought within time.
2. The distinction lies in this—In limitation time within which action shall not be brought is prescribed by Law. In laches there is no time prescribed and the Court, therefore, in granting relief works on the principle of unreasonable delay.
3. In India the doctrine of laches has not much scope because of the Law of Limitation which has prescribed a definite time limit for almost all actions. It does not, therefore, matter whether a man brings his suit on the first day or the last day of the period prescribed by law for his action.

The doctrine of laches applies in India only in the following cases:

(1) Where the relief to be granted by the Court is *discretionary.*
This is so (i) In cases falling under specific relief. (ii) In cases falling under interlocutory relief.

(2) Where the Law of Limitation does not apply *e.g.*, Matrimonial suits. Delay would mean that the offence was condoned.

THE OBJECT OF LIMITATION

1. Two things are necessary for a well-ordered community (i) Wrongs must be remedied. (ii) Peace must be maintained.
2. To secure peace of the community it is necessary that titles to property and matters of right in general should not be in a state of constant uncertainty, doubt and suspense.
3. Consequently, if persons are to be permitted to claim relief for what they think are wrongs done to them, then they must be compelled to seek relief within a certain time. There is nothing unjust in denying relief to a person who has tolerated the wrong done to him beyond a certain period.

4. The Law of Limitation is based upon this principle.
5. That being the underlying principle, the Law of Limitation is absolute in its operation and is not subject to agreement or conduct of the parties. That is to say it is not subject to (1) Waiver. (2) Custom. (3) Estoppel. (4) Variation in respect of enlargement or abridgement of time by agreement of parties sections 28 and 23 of the Contract Act.
6. In this respect the Law of Limitation differs from the Law of Negotiable Instruments.
7. Limitation and the onus of Proof.
    1. The onus of proof is upon the Plaintiff. He must prove that his suit is within time.
    37. Bom. S. R. 471-A.I.R.. 1935 September.
    A by a registered lease, dated 8th July 1922, gave certain lands to B on a rental for a period of 25 years. Subsequently, A dispossessed B alleging that the lease was taken by undue influence. B brought a suit against A for an injunction restraining A from interfering in any way with his possession and enjoyment and for possession of land.
    It was contended on behalf of B that A was precluded from challenging the validity of the lease, on the ground that if he had sued to have the lease set aside the suit would have been barred by Limitation. In other words, it was contended that the plea of the Defendant was barred of the Limitation.
    Question is: Is Defendant bound by the Law of Limitation?
    The answer is No. —Section 3 refers to Plaintiff and not to Defendant.

SUBJECT OF AMENDMENTS

FUNDAMENTAL RIGHTS

The most important and frequent reason for amendments to the Constitution is the curtailment of the Fundamental Rights charter. This is achieved by inserting laws contrary to the fundamental rights provisions into Schedule 9 of the Constitution. Schedule 9 protects such laws by making them open only to limited judicial review. The typical areas of restriction include laws relating to property rights, affirmative action in favour of minority groups such as "scheduled castes", "scheduled tribes" and other "backward classes". In a landmark ruling in January 2007 the Supreme Court of India confirmed that all laws (including those in Schedule 9) would be open to judicial review if they violate the basic structure of the constitution. Chief Justice Yogesh Kumar Sabharwal noted "If laws put in the Ninth Schedule abridge or abrogate fundamental rights resulting in violation of the basic structure of the constitution, such laws need to be invalidated".

TERRITORIAL CHANGES

Constitutional amendments have been made to facilitate changes in the territory of India due to incorporation of the former French Colony of Pondicherry, the former Portugese Colony of Goa and a minor exchange of territories with Pakistan. Amendments are also necessary with regard to littoral rights over the exclusive economic zone of 200 miles and the formation of new states and union territories by the reorganization of existing states.

TRANSITIONAL PROVISIONS

The constitution includes transitional provisions intended only to remain in force for a limited period. These need to be renewed periodically. Amendments to continue reservation in parliamentary seats for scheduled castes and tribes is extended every ten years. The President of India's rule was imposed in Punjab for an extended period of time in blocks of six months until the Khalistan Movement and insurgency subsided.

DEMOCRATIC REFORM

Amendments have been made with the intent of reform the system of government and incorporating new "checks and balances" in the constitution. These have included the:

- Creation of the National Commission for Scheduled Castes.
- Creation of the National Commission for Scheduled Tribes.
- Creation of mechanisms for *Panchayati Raj* (local self governance).
- Disqualification of members from changing party allegiance.
- Restrictions on the size of the cabinet.
- Restrictions on imposition of an internal emergency.

TEXT OF ARTICLE 368

The following is the full text of Part XX or Article 368 of the constitution, which governs constitutional amendments. The provisions in *italics* were inserted by the Forty-second Amendment Act but have been declared invalid by the Supreme Court in the *Minerva Mills* case. The text is up-to-date as of July 2008.

(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

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

thereupon the Constitution shall stand amended in accordance with the terms of the Bill: Provided that if such amendment seeks to make any change in:

(a) Article 54, article 55, article 73, article 162 or article 241, or
(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
(c) Any of the Lists in the Seventh Schedule, or
(d) The representation of States in Parliament, or
(e) The provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

(3) Nothing in article 13 shall apply to any amendment made under this article.

(4) *No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of section 55 of the Constitution (Fortysecond Amendment) Act, 1976 shall be called in question in any court on any ground.*

(5) *For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.*

The wording of Section (1) resembles Article 46 of the Constitution of Ireland, enacted in 1937, which states "Any provision of this Constitution may be amended, whether by way of variation, addition, or repeal, in the manner provided by this Article".

2

Revision of the Constitution of India

OUTSTANDING FEATURES OF THE INDIAN CONSTITUTION

Dr. Subhash Kashyap observes, "The Constitution of India is a most comprehensive document. It is unique in many ways. It cannot be fitted in any particular mould or model. It is a blend of the rigid and the flexible, federal and unitary and presidential and parliamentary. It attempts a balance between the fundamental rights of the individual on the one hand and the socio-economic interests of the people and security of the state on the other. Also, it presents a via-media between the principles of parliamentary sovereignty and judicial supremacy."

The following are the outstanding features of the Indian Constitution:

1. *A Written Constitution*: The Republic of India has a written and enacted Constitution, it contains 395 Articles (divided into 22 parts) twelve Schedules and three Appendices. In its present form it covers 319 octavo pages. "Like the Constitution of the United States of America, Canada and France, India too has a written Constitution, though it differs from those documents in many: respects."
2. *The longest known Constitution*: The Constitution of India has the' distinction of being the most lengthy and detailed constitutional document the world has so far produced. The original Constitution contained as many as 395 Articles and 8 Schedules (to which additions were made by subsequent amendments). Even after the repeal of several provisions it still contains 395 Articles and 12 Schedules.

It has been the endeavour of the framers of the Constitution to provide the solution of all the problems of administration and governance of the country. Even those matters that are subject of conventions in other countries have been put down in black and white. Thus, while the U.S., Constitution originally comprises only 7 Articles, the Australian 128 Articles, the Canadian 141-' Articles, the Constitution of India in original form consists of 395 Articles divided into 22 parts and 8 Schedules. As a result of some amendments made since then, some new Articles have been added and some old ones repealed. The number of Schedules has also risen. The bulk of the Constitution continues to be still increasing. This extraordinary bulk of the Constitution is due to several reasons:

(a) The Constituent Assembly wanted to incorporate in the Constitution the accumulated experience gathered from the working of all the constitutions of the world and to avoid all possible defects and loopholes thereof.
(b) In addition to the Union, it includes the Constitutions of the States also. The American Federal Constitution covers only the organisation, of national government leaving state constitutions to be framed by the states themselves.
(c) It has detailed distribution of legislative, administrative and financial powers between the Union and the States.
(d) The vastness of the country and the peculiar problems to be solved have also contributed towards the bulk of the Constitution. Thus, there is one entire part (Part XVI) relating to the scheduled castes and tribes and other backward classes; one part (Part XVIII) relating to official language and another (Part XVIII) relating to Emergency provisions.
(e) Since all the units of the Indian Union are not of the same type, the Constitution had to make provisions for all these distinct types. Special provisions have been inserted to meet the regional problems and demands in certain states, such as Nagalnd, Assam, Manipur, Sikkim and Mizoram.
(f) The Constitution carries an elaborate chapter on Fundamental Rights, each right being accompanied by a detailed statement of restrictions imposed thereon.
(g) It also includes a chapter on Fundamental Duties.
(h) Besides, a complete chapter of the Constitution deals with non-justicable Directive Principles of State Policy.

It is sometimes asked why the framers of the Indian Constitution deemed it necessary to draw up such a ponderous constitutional document and ignored what Sir Ivor Jennings has described as the golden rule for all constitution makers,viz., "never to put anything that can be safely left out." The answer, as Sir Ivor has himself pointed

out, is that the great volume of the Indian constitution is largely a legacy of the past. The British Government had set 'fashion by framing lengthy and detailed constitutions for India in enacting government of India Acts of 1919 and 1935. The 1935 Act was, in fact the longest measure ever passed by the British Parliament. The new Constitution of India is like the Act of 1935, "not merely a constitution but also a detailed legal code dealing with all important aspects of the constitutional and administrative system of the country."

3. *Popular Sovereignty*: The Constitution proclaims the sovereignty of the people m its opening words. The Preamble begins with the words, 'we the I people of India, having solemnly resolved to constitute India into a Sovereign socialist Secular Democratic Republic." The idea is reaffirmed in several places the Constitution, particularly in the chapter dealing with elections. Article 326 declares, "The elections to the House of People and to the Legislative assembly of every state shall be on the basis of adult suffrage." As a result, the governments at the Centre and in the States derive their authority from the people who choose their representatives for Parliament and the State Legislatures at regular intervals. Further, those who wield the executive power of the government are responsible to the legislature and through them to the people. Thus, in the affairs of the state, it is the will of the people that prevails ultimately and this is the principle of popular sovereignty.
4. *Sovereign Democratic Republic*: The Preamble of the Constitution 'declares India to be a Sovereign Democratic Republic. It is sovereign since India has emerged as a completely independent state. The Dominion Status of India established under the Independence Act of 1947 has been terminated and India is now a full-fledged state with all the characteristics of sovereignty. The word
Democratic' signifies that the real power emanates from the people. The Constitution introduces universal adult franchise and confers on the adult Population of the country the right to elect their representatives for the Union Parliament and State Legislatures at the time of periodical elections to be held every five years. The word 'Republic' is used to denote that the state is headed not by a permanent head like the Queen of Britain but by a President indirectly elected by the people.
5. *Both Rigid and Flexible*: The Indian Constitution is partly rigid and partly flexible. The procedure laid down by the Constitution for its amendment is neither very easy, as in England, nor very rigid as in the United States. In England which has no written Constitution, there is no difference between a constitutional law and an ordinary one. The constitutional law can be amended exactly in the same manner in which ordinary legislation is passed or amended. In the United States, however, the method of constitutional amendment is highly rigid. It can be carried out only with the agreement of the two-thirds majority

of the Congress and its subsequent ratification by at least three-fourths of the states. The Constitution of India strikes a golden mean, thereby avoiding the extreme flexibility of the English Constitution and the extreme rigidity of the American Constitution..

It is only the amendment of few of the provisions of the Constitution that' requires ratification by the State Legislatures and even then ratification by only 1/2 of them would suffice (while the American Constitution requires ratification' by 3/4 of the states).

The rest of the Constitution may be amended by a special majority of the Union Parliament, *i.e.*, a majority of not less than 2/3 of the members of each House present and voting, which, again, must be a majority of the total membership of the House.

On the other hand, Parliament has been given the power to alter or modify many of the provisions of the Constitution by a simple majority as it required for general legislation, by laying down in the Constitution that such change "shall not be deemed to be 'amendments' of the Constitution."

The very fact that within a period of 54 years the Constitution had been amended 86 times proves that the Constitution is flexible. It should, however, be noted that the basic structure of the Constitution cannot be amended.

6. *Cabinet Government*: The Constitution establishes Cabinet type of Government both at the Centre and in the Units. The most distinctive feature of a cabinet system of Government is the complete and continuous responsibility of the executive to the legislature. The Cabinet is composed of the Prime Minister, who is the Chief of the executive and his senior colleagues who share by. the responsibility with him for the formulation and execution of the policies of;' the government.

   Under the Cabinet system, the Head of the state occupies a position of great dignity, but the Cabinet or the Ministry, which assumes full responsibility for acts performed in his name, exercises practically all authority, nominally vested in him. The unity and collective responsibility of the Cabinet are achieved through the Prime Minister, who is the key-stone of the Cabinet arch. The real merit of a cabinet system is that the executive being responsible o the legislature is always being watched. The moment it proves unequal to the task or it goes off the track or flouts the will of the legislature, it can be removed from office by a successful vote of no-confidence.
7. *Secular State*: By adding the word 'secular' to the existing description of the country as a 'Sovereign Democratic Republic', in the Preamble, the commitment to the goal of secularism has been spelled out in clear terms. A secular state has negative and positive aspects. Negatively, it is the antithesis of a communal or theocratic state, which officially identified itself with a particular religion. Pakistan, for instance, has

proclaimed itself an Islamic state. In a secular state, on the other hand, there is no official or state religion. In its positive aspect, secular states treat all its citizens alike and give them equal opportunities. According to Prof. Alexandrowicz, "India as a secular state guarantees, constitutionally, freedom of religion all persons, and does not assign a special position to any particular religion.,, The state has no official religion. No discrimination can be made on the basis of religion, faith, caste, colour and sex. Every citizen is equal before law. It guarantees to religious "minorities the right to maintain their own language and to establish educational institutions of their choice. An important manifestation of secularism in India is the abolition of communal electorates and the adoption of the provision that elections are to be held on the basis of universal franchise and joint-electorates.

8 *A Federal System with Unitary Bias*: "Perhaps the most remarkable achievement of the Indian Constitution is to confer upon a federal system the strength of a unitary government. Though normally the system of government is federal, the Constitution enables the federation to transform into a unitary state."

The Constitution of India establishes a federal polity, which has been created by dividing the country into states, and allocating them functions as specified in the Constitution. Like all other federations India has a written constitution, which is rigid to a large extent. There is a dual polity and division powers between the Centre and States. There is also a provision for Supreme court which is the guardian of our Constitution and decides all disputes which might arise between the Centre and the States.

These characteristics of the federal set-up notwithstanding, the Indian constitution has a unitary bias. For instance, after distributing the legislative powers three lists, residual subjects are left with the Union. Even in matters in the concurrent list, the Union government has the final say. Unlike other federations Parliament in India has a right to change the boundaries of then states. The heads of the States, *i.e.*, the Governors are appointed by the president and are his agents in the States. The Centre can, at any time, declare emergency in the States and with that declaration can take over the administration of that State in its own control.

The choice of federalism as a constitutional form and as the basis of a national government in India was not a sudden development upon the transfer of-power on August 15, 1947. It was there for many years and, in a limited form, it was already in operation in British India. For the solution of the constitutional problem of a multi-social, multi-lingual and multi-communal country like India with a vast area and huge 'population, federalism was only a natural choice. Nevertheless, the framers were cautious to ensure that the unity they sought to establish

through federalism was of an abiding nature, and in case of a future conflict between that unity and the diversity preserved under the Constitution, the former should prevail over the latter. In other words, it was their intention to create an indestructible Union and the supremacy of the Union over the States in a number of matters vitally affecting the interests of the nation.

9. *Universal Franchise without Communal Representation*: The adoption universal adult suffrage (Article 326), without any qualification either of sex, property, taxation or the like, is a 'bold experiment' in India, having regard to the vast extent of the country and its population, with an overwhelming illiteracy. The suffrage in India, it should be noted, is wider than that in England or the United States. The concept of popular sovereignty, which underlies the declaration in the Preamble that the Constitution is adopted and given by the people of India' upto themselves, would indeed have been hollow unless the franchise-the only effective medium of popular sovereignty in a modern democracy, were extended to the entire population which was capable of exercising the right and independent electoral machinery (under the control of the Election Commission) was set up to ensure the free exercise of it. No less creditable for the framers of the Constitution is the abolition of communal representation, which in its trail had brought in the bloody and lamentable partition of India. In the Constitution there was no reservation of seats except for the scheduled castes and tribes and for the Anglo-Indians and that only for a temporary period.
10. *Compromise between Judicial Review and Parliamentary Supremacy*: "Parliament in India is not as supreme as the British Parliament. At the same time judiciary in India is not as supreme as in the United States of America which recognises no limit on the scope of judicial review.
The Indian Constitution wonderfully adopts the via-media between the American system of judicial supremacy and the English principle of parliamentary supremacy, by endowing the judiciary with the power of declaring a law as unconstitutional if it is beyond the competence of the legislature according to the distribution of powers provided by the Constitution, or if it is in contravention of the fundamental rights guaranteed by the Constitution, but at the same time, depriving the judiciary of any power of ' Judicial review' of the, wisdom of legislative policy. Thus, it has avoided expressions like 'due process' and made fundamental rights such as that of liberty and property subject to regulation by the legislature. Further, the major portion of the Constitution is' liable to be amended by the Union Parliament by a special majority, if in any case the judiciary proves too obtrusive. The theory underlying the Indian Constitution in this respect can hardly be better expressed than in the word of Jawaharlal Nehru: "No Supreme Court, no judiciary, can stand in judgment: over the sovereign will of

Parliament, representing the will of the entire community. It can pull up that sovereign will if it goes wrong, but, in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way Ultimately, the fact remains that the Legislature must be supreme and must not be interfered with by the Courts of Law in such measures as social reform."

11. *Single Citizenship*: Although India has a federal government yet double citizenship, as provided for in the U. S. Constitution, has not been provided for All the Indians irrespective of their domicile, enjoy a single citizenship of India j whereas in United States all the citizens enjoy the right of double citizenship.

    Since Americans are considered to be the citizens of the State where they are domiciled and then they are the citizens of the U.S.A., as a whole. In both these capacities, they enjoy different rights and owe different obligations. The principle of single citizenship was provided for in the Indian Constitution in order to foster strong bond of social and political unity among the people of India, who are hitherto divided on account of racial discrimination, variety of languages and multiplicity of religious and cultural background.

12. *Independence of Judiciary*: The framers of the Constitution were aware that democratic freedoms were meaningless in the, absence of an independent machinery to safeguard them. No subordinate or agent of the Government could' be trusted to be just and impartial in judging the merits of a conflict in which the Government itself was a party. Similarly, a judiciary subordinate either to the Centre or the States could not be trusted as an impartial arbiter of conflicts and controversies between the Centre and the States. These were the compelling reasons for the creation of an independent judiciary as an integral part of the Constitution and for the adoption of judicial independence as a basic principle of the Constitution. In its bid to establish complete independence of the judiciary, the Constitution has first erected a wall of separation between the executive and the judiciary. After effecting such separation, it has created conditions that are conducive to making the judiciary independent.

    Thus, rigid qualifications are laid down for the appointment of judges and provision has been made for compulsory consultation of the Chief Justice of India in the appointment of every judge of the Supreme Court and the High Courts. They are given high salaries, their conditions of service cannot be altered to their disadvantage and their conduct is made a subject beyond the scope of discussion in the legislature. They can be removed from office only for proved misbehavior. For this purpose, both the Houses of Parliament will have to pass resolutions against a judge supported by a two-thirds majority of those who sit and vote and at least an absolute majority of the total membership of the House.

13. *Fundamental Rights*: Like the Constitution of the United States of America, the Constitution of India also includes a separate chapter guaranteeing fundamental rights to all the citizens. These rights are justiciable and inviolable. They are binding {)n the legislature as well as on the executive. If any of the rights is violated, a citizen has the right to seek the protection of the judiciary. Any act of the Legislature or order of the Executive can be declared null and void if it violates any of the Fundamental Rights guaranteed to the citizens by the Constitution.
14. *Fundamental Duties*: Another feature, which was not in the original constitution, has been introduced by the 42nd Amendment, 1976, by introducing Article 51A as Part IVA of the Constitution. The 42nd Amendment Act introduced' 'Fundamental Duties' to circumscribe the fundamental rights, even though the duties, as such, cannot be judicially enforced. The incorporation of fundamental duties in the Constitution was, thus, an attempt to balance the individual's civic 'freedoms' with his civic obligations and thus, to fill a serious gap in the Constitution.
15. *Directive Principles of State Policy*: The Directive Principles of State Policy is another distinctive feature of the Indian Constitution. This feature has been taken from the Irish Constitution. The philosophy behind the Directive Principles is that the state and every one of its agencies are commanded to follow certain fundamental principles while they frame their policies regarding the various fields of state activity. These principles, on the one hand, are assurances to the people as to what they can expect from the state and on the other, are directives to the Government, Central and State, to establish and maintain a new "social order in which justice, social, economic and political, shall inform all the institutions of national life."

The precepts of the Directive Principles are not justiciable-that is, they are not enforceable by a court as are the Fundamental Rights. They are designed rather to serve as a guide for the Union Parliament and the State Assemblies in framing new legislation. Taken together, they inscribe the objectives of a modern welfare state and as distinguished from a merely regulatory Or negative state.

They lay down the social and economic principles that the framers of the Constitution wanted free India to follow and "constitute a very comprehensive political, social and economic programme for a modern democratic state." If the Fundamental Rights of citizens declared in Chapter III of the Constitution lay the foundations of political democracy in India, the Directive Principles spell out the norms of social and economic democracy in the country.

IDEALS OF THE PREAMBLE

WE THE PEOPLE OF INDIA

It simply implies the people of India in their aggregate capacity. Its significance lies in the fact that the constitution eliminates the British King

externally and the Indian princes internally if you read the first and the last parts of the preamble we find that we the people of India have adopted enacted and given to ourselves this constitution. The preamble insists that the sovereignty in India vests in the people. The constitution has its source in the people.

The people are the source of constitution. Therefore it is the product of the will of the people. Hence the authority of framing constitution belongs to the people who are ultimate source of all power and authority in India. But the people did not enact it directly.

It has been adopted by the people in our constituent assembly. However the question has been repeatedly asked what is the actual role of the people in framing constitution?

Did the constituent Assembly actually reflect the will of the people. A member had tried to move resolution to the effect that the draft should not be discussed by a new constituent Assembly elected on the basis of universal adult franchise. But the resolution was not supported by anybody. The Assembly elected in 1946 in accordance with the Cabinet Mission Plan did adopt enact and give to ourselves.

The Constituent Assembly was elected by the members of the Provincial Legislative Assemblies Election of the Assembly directly on the basis of adult franchise would have delayed the setting up of Assembly. It would have involved preparation of fresh electoral rolls and many other problems. Moreover it would not have been possible to hold referendum in a vast country like India with a majority of illiterate people. The founding fathers convinced that the constitution had the full backing of the people. Dr. Ambedkar had himself asserted in the Assembly that the basis of the Constitution was the people and ultimate authority belonged to them.

The first general election was held on the basis of adult franchise in 1952. At that time several opposition parties told the people that if they came to power they could scrap the constitution and call a new Constituent Assembly. The opposition parties badly defeated. Most of the Members of the Constituent Assembly were elected by the people. Thus there was no ground to say that the constitution did not enjoy the popular support.

SOVEREIGN STATE

Till 26th January 1950, India was not a full fledged. We were governed by the act of 1947. The preamble proclaims that India is a sovereign state-India is externally free and independent. Therefore it is not subservient to any foreign country. It has adopted its own economic and political system. India is free to take any decision and formulate any policy without interference from any country.

Moreover it is internally supreme over all individuals and associations. India's membership of the commonwealth of Nations does not affect her sovereign character. She considers the British Crown as the symbol of friendship. Thus India's membership of the Commonwealth of nations is based on an extra-constitutional contractual arrangement entered into at will and terminable at will. It is well known that it is open to any member nation to go out of the commonwealth if it so chooses.

DEMOCRATIC

The constitution establishes representative democracy by ensuring universal adult franchise and free and far periodical elections. It also provides for the rule of law and independence of judiciary. The state has been forbidden to make any discrimination as the grounds of religion, race, colour, places of residence, sex, *etc.* however there is no provision for the agencies of direct democracy like initiative, referendum, recall and plebiscite.

The entire authority of conducting the Government has been placed in the hands of representatives chosen by the people in a democratic manner.

Thus we have indirect or representative form of Government largely on the linguistic model. The vast electorate of the country shares the political power. At the same time electorate can not directly exercise any political function. They can act only through their representatives. It is the representatives of the people who will exercise the legislative functions and administration will be carried on with the advice of ministers responsible to the legislative body.

REPUBLIC

The word republic has different meanings in the discipline of political science. For instance, Leacock says that it is simply opposition to Monarchy. According to Jellinek republic is a government by a collegial organization. Rourseau says that a republic is one that is based on the social contract. In America Madison said that Republic is a government which derives its powers directly or indirectly form the great body of the people.

In such governments, persons hold their offices during the pleasure of the people. Our founding fathers seem to have been guided by this statement. Accordingly India is Republic. Because the head of the state can not be a King. He can only be the President elected by the people indirectly. Therefore, republic means that the country has an elected President as head of the state. There is no monarch as head of the state.

SOCIALIST

The preamble also declares that India is a socialist state. This implies that socialistic pattern of society should be established under this system, the ownership and management of all the means of production will be in the hands of society. But this has not yet been materialized.

The Congress under Nehru's leadership had first declared Socialist pattern of society and then socialism as the basis of country's economy. The founding fathers themselves wanted to create a society on the basis of economic justice where distinction between the rich and the poor would be diminished. The limited Right to property and directive principles of state policy indicate socialist objective. The preamble itself had the phrase justice, social, economic and political.

Thus the addition of the word socialist has only psychological importance. Mr. Vasant Sathe member of the Swaran Singh committee agreed that the addition

of the word socialist was not going to make any material difference. Mr. Singh also said that the conclusion of the word socialist was only to give a positive direction to the Governments in the formulation of its policy.

SECULAR

Inclusion of the word Secular was also aimed at the creation of psychological impact. Even before 1976 there was ample emphasis in the constitution as Secularism. The preamble itself had assured liberty of factors, belief ad worship. Besides secularism is clearly provided in the part III dealing with fundamental rights Equality before law, equal Opportunity to secure a job without discrimination as the ground of religion, freedom of religion and worship and right of the minorities to maintain their educational institutions are enough guarantees of secularism. The inclusion of the word Secular simply emphasizes that we do not have any state religion. This implies that stare is neither religious not anti-religious.

It is neutral as far religious matters are concerned. It is not guided by any religion on the discharge of its functions. Therefore state is wholly detached by religions dogmas. It guarantees complete rights to all people to preach, propagate and practice any religion. No religion is to be given priority over the other. Hence India is a Secular state.

JUSTICE

Justice implies the attainment of common good. Since India is a democratic state, it aims at promoting social, economic and political justice to all the people. Social justice can he ensured if no discrimination is made by the society on the basis of caste of colour. The constitution has provided for abolition of untouchability. It has also made provisions for certain privileges for S.C and S.T so that they can rise upto the level of the rest of the community.

Economic justice can be assured by equitable distribution of wealth, abolition of beggar and forced labour and avoidance of concentration of property. These guideline have been provided in the directive principles of state policy. The introduction of adult franchise, abolition of separate communal electorate and provision for securing jobs without any discrimination aim at political justice. Thus the preamble has emphasized the goal of justice in all its dimensions.

LIBERTY

Liberty is an essential requirement of democratic and free society. Its aim is to ensure all round development of the individual and to ensure adequate rights to the people for this purpose. Liberty implies absence of arbitrary restrictions on the freedom of individual. It also implies the creation of conditions in which individual can freely develop his personality. The society is made up of individuals.

Hence the social progress depends on the development of the personality of individual in a free atmosphere. The preamble has underlined the importance

of liberty of thought and expression which is essential for the success of political democracy in the country. At the same time liberty of belief, faith and worship has been secured to provide religions freedom in our secular society.

EQUALITY

Equality is an equally important concept. Liberty is a shame without equality. It does not mean that all men are physically materially or intellectually alike. Infact no two person can be alike. Equality actually implies equal opportunities and equal status. Equality of status is ensured by abolition of untouchability. Moreover in order to secure equality of status, no discrimination on the ground of religion race, sex, colour or places of residence will be made. The equality of opportunity is secured by the principle of rule of law and non-discriminatior in the matter the matters of public appointments. All are equal in the eyes of law and all receive equal protection.

FRATERNITY

Fraternity is another ideal mentioned in preamble of the constitution. The concept of Fraternity was first emphasized during the French Revolution. Preamble says that all human beings are born fee and equal in dignity and rights. They should act towards on another in a spirit of brotherhood. Fraternity implies brotherhood. In a vast country like India where people have different faiths, customs and traditions speak different languages the ideal of fraternity is significant.

The preamble refers to fraternity assuring the dignity of the individual and unity of the nation. These two principles are of great importance no individual should feel that he is interior to other. No on should be compelled to live to that dignity. Thus dignity of the individual must be respected so that natural fraternity can develop. At the same time unity and integrity of the nation must be ensured.

A country with numerous diversities can flourish only if there is a feeling of oneness. Unity in diversity is the beauty of Indian culture. This must be preserved. Integrity of the nation is of vital importance. No individual can live with dignity if the integrity of the country itself is threatened. At times separatist tendencies in the country are very dangerous. They must be nipped in the bud and integrity of the nation must be preserved at all costs.

PREAMBLE OF THE CONSTITUTION

"We the People of India. Having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens;

Justice, social economic and political;

Liberty of though, expression, belief, faith and worship;

Equality of status and of opportunity; and to promote among them all;

Raternity assuring the dignity of the individual and the unit and integrity of the Nation;

In Our Constituent Assembly this twenty-sixth day of November,1949, do Hereby Adopt, Enact and Give to Ourselves this Constitution".

The Preamble to our Constitution serves, two purposes:

(a) It indicates the source from which the Constitution derives its authority;
(b) Its also states the objects which the Constitution seeks to establish and promote.

The Indian Constitution begins with a meaningful preamble. It contains a pledged by the founding fathers to establish political democracy based on social and economic justice, liberty of the individual equality of status and of opportunity and integrity and unity of the nation. These are noble ideals and all government are expected to work in accordance with the values mentioned in the preamble. The fundamental principles stated on the preamble are sought to be given legal form through the numerous provisions of the constitution. Our preamble does not seek to protect any particular class of people. It endeavors to protect the interest of the nation as whole. It is not covered by any article of the constitution. Moreover it does not give any authority to any organ of the Government either at the centre or in the states. Nevertheless, it is a precious part of the constitution. Because, it unambiguously points at the basic ideals of the constitution and the aspirations of the people in India.

In the preamble and constitution we can find the vibration of the Gandhian concept of Independent India. The opening words of the preamble emphasize the ultimate authority of the people whose will is very important to evolve constitution. The preamble is normally included in the constitution with three main objective. They are- (1) ideas of the founding fathers and ideals cherished by them at the time of adoption of the constitution (2) the type of government that is created by the constitution (3) sources of sovereign power in the country. Legally speaking the preamble has only limited purpose. It is not justifiable, but it helps in interpreting the text of the constitution.

The ideals of the preamble were first set out by Nehru in the first session of the Constituent Assembly in the form of the objectives Resolution. This was later adopted by the Assembly. The same resolution was given the shape of the preamble when the constitution was signed in November 1949. However some additions were made in the preamble by the 42nd amendment enacted in 1976. The Janatha party Government through the 44th amendment decided to retain the words socialist and secular in the preamble of the constitution. Thus the preamble declares India to be a Sovereign Socialist, Secular and Democratic Republic.

3

The Judicial and Executive Branches of India

The Judiciary of India is an independent body and is separate from the Executive and Legislative bodies of the Indian Government. The judicial system of India is stratified into various levels. At the apex is the Supreme Court, which is followed by High Courts at the state level, District Courts at the district level and Lok Adalats at the Village and Panchayat Level. The judiciary of India takes care of maintenance of law and order in the country along with solving problems related to civil and criminal offences. The judiciary system that is followed in India is based on the British Legal System that was prevalent in the country during pre-independence era. Very few amendments have been made in the judicial system of the country.

HISTORY

After the French Revolution, lawmakers stopped interpretation of law by judges, and the legislature was the only body permitted to interpret the law; this prohibition was later overturned by the Code Napoléon.

In civil law jurisdictions at present, judges interpret the law to about the same extent as in common law jurisdictions – however it is different than the common law tradition which directly recognizes the limited power to make law. For instance, in France, the *jurisprudence constante* of the Court of Cassation or the Council of State is equivalent in practice with case law. However, theLouisiana Supreme Court notes the principal difference between the two legal doctrines: a single court decision can provide sufficient foundation for the

common law doctrine of *stare decisis*, however, "a series of adjudicated cases, all in accord, form the basis for*jurisprudence constante*." Moreover, the Louisiana Court of Appeals has explicitly noted that *jurisprudence constante* is merely a secondary source of law, which cannot be authoritative and does not rise to the level of *stare decisis.*

VARIOUS FUNCTIONS

- In common law jurisdictions, courts interpret law, including constitutions, statutes, and regulations. They also make law (but in a limited sense, limited to the facts of particular cases) based upon prior case law in areas where the legislature has not made law. For instance, thetort of negligence is not derived from statute law in most common law jurisdictions. The term*common law* refers to this kind of law.
- In civil law jurisdictions, courts interpret the law, but are prohibited from *creating* law, and thus do not issue rulings more general than the actual case to be judged. Jurisprudence plays a similar role to case law.
- In the United States court system, the Supreme Court is the final authority on the interpretation of the federal Constitution and all statutes and regulations created pursuant to it, as well as the constitutionality of the various state laws; in the US federal court system, federal cases are tried in trial courts, known as the US district courts, followed by appellate courts and then the Supreme Court. State courts, which try 98% of litigation, may have different names and organization; trial courts may be called "courts of common plea", appellate courts "superior courts" or "commonwealth courts". The judicial system, whether state or federal, begins with a court of first instance, is appealed to an appellate court, and then ends at the court of last resort.
- In France, the final authority on the interpretation of the law is the Council of State for administrative cases, and the Court of Cassation for civil and criminal cases.
- In the People's Republic of China, the final authority on the interpretation of the law is the National People's Congress.
- Other countries such as Argentina have mixed systems that include lower courts, appeals courts, a cassation court (for criminal law) and a Supreme Court. In this system the Supreme Court is always the final authority, but criminal cases have four stages, one more than civil law does. On the court sits a total of nine justices. This number has been changed several times.

THE STATE JUDICIARY (ARTICLES 217-237)

217. Appointment and conditions of the office of a Judge of a High Court.

(1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal on the recommendation of the National Judicial Appointments Commission referred to in article 124A*, and shall hold

office, in the case of an additional or acting Judge, as provided in article 224, and in any other case, until he attains the age of sixty-two years:
Provided that:

(a) A Judge may, by writing under his hand addressed to the President, resign his office;
(b) A Judge may be removed from his office by the President in the manner provided in clause (4) of article 124 for the removal of a Judge of the Supreme Court;
(c) The office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and-
(a) Has for at least ten years held a judicial office in the territory of India; or
(b) Has for at least ten years been an advocate of a High Court or of two or more such Courts in succession.

Explanation: For the purposes of this clause:

(a) In computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate of a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law; (aa) in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate;
(b) In computing the period during which a person has held judicial office in the territory of India or been an advocate of a High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August, 1947, within India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area, as the case may be.

(3) If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.

218. APPLICATION OF CERTAIN PROVISIONS RELATING TO SUPREME COURT TO HIGH COURTS

The provisions of clauses (4) and (5) of article 124 shall apply in relation to a High Court as they apply in relation to the Supreme Court with the substitution of references to the High Court for references to the Supreme Court.

219. OATH OR AFFIRMATION BY JUDGES OF HIGH COURTS

Every person appointed to be a Judge of a High Court shall, before he enters upon his office, make and subscribe before the Governor of the State, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

220. RESTRICTION ON PRACTICE AFTER BEING A PERMANENT JUDGE

No person who, after the commencement of this Constitution, has held office as a permanent Judge of a High Court shall plead or act in any court or before any authority in India except the Supreme Court and the other High Courts.

Explanation- In this article, the expression "High Court" does not include a High Court for a State specified in Part B of the First Schedule as it existed before the commencement of the Constitution (Seventh Amendment) Act, 1956.

221. SALARIES, ETC, OF JUDGES

(1) There shall be paid to the Judges of each High Court such salaries as may be determined by Parliament by law and, until provision in that behalf is so made, such salaries as are specified in the Second Schedule.

(2) Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such allowances and rights as are specified in the Second Schedule:

Provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

222. TRANSFER OF A JUDGE FROM ONE HIGH COURT TO ANOTHER

(1) The President may, on the recommendation of the National Judicial Appointments Commission referred to in article 124A*, transfer a Judge from one High Court to any other High Court.

(2) When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix.

223. APPOINTMENT OF ACTING CHIEF JUSTICE

When the office of Chief Justice of a High Court is vacant or when any such Chief Justice is, by reason of absence or otherwise, unable to perform the duties

of his office, the duties of the office shall be performed by such one of the other Judges of the Court as the President may appoint for the purpose.

224. APPOINTMENT OF ADDITIONAL AND ACTING JUDGES

(1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may, in consultation with the National Judicial Appointments Commission, appoint* duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify.

(2) When any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may, in consultation with the National Judicial Appointments Commission, appoint* a duly qualified person to act as a Judge of that Court until the permanent Judge has resumed his duties.

(3) No person appointed as an additional or acting Judge of a High Court shall hold office after attaining the age of sixty-two years.

224A. APPOINTMENT OF RETIRED JUDGES AT SITTINGS OF HIGH COURTS

Notwithstanding anything in this Chapter, the National Judicial Appointments Commission on a reference made to it by the Chief Justice of a High Court for any State, may with the previous consent of the President*, request any person who has held the office of a Judge of that Court or of any other High Court to sit and act as a Judge of the High Court for that State, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that High Court:

Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that High Court unless he consents so to do.

225. JURISDICTION OF EXISTING HIGH COURTS

Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:

Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction.

226. POWER OF HIGH COURTS TO ISSUE CERTAIN WRITS

(1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without-

  (a) Furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

  (b) Giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

226A. CONSTITUTIONAL VALIDITY OF CENTRAL LAWS NOT TO BE CONSIDERED IN PROCEEDINGS UNDER ARTICLE 226

Repealed by the Constitution (Forty-third Amendment) Act, 1977, s. 8 (w.e.f. 13-4- 1978)

227. POWER OF SUPERINTENDENCE OVER ALL COURTS BY THE HIGH COURT

(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) *Without prejudice to the generality of the foregoing provision, the High Court may:*

(a) Call for returns from such courts;

(b) Make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) Prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:
Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.

228. TRANSFER OF CERTAIN CASES TO HIGH COURT

If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may:

(a) Either dispose of the case itself, or

(b) Determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.

228A. SPECIAL PROVISIONS AS TO DISPOSAL OF QUESTIONS RELATING TO CONSTITUTIONAL VALIDITY OF STATE LAWS

Repealed by the Constitution (Forty-third Amendment) Act, 1977, s. 10 (w.e.f. 13-4- 1978)

229. OFFICERS AND SERVANTS AND THE EXPENSES OF HIGH COURTS

(1) Appointments of officers and servants of a High Court shall be made by the Chief Justice of the Court or such other Judge or officer of the Court as he may direct:

Provided that the Governor of the State may by rule require that in such cases as may be specified in the rule no person not already attached to the Court shall be appointed to any office connected with the Court save after consultation with the State Public Service Commission.

(2) Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorised by the Chief Justice to make rules for the purpose:
Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State.

(3) The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the Court shall form part of that Fund.

230. EXTENSION OF JURISDICTION OF HIGH COURTS TO UNION TERRITORIES

(1) Parliament may by law extend the jurisdiction of a High Court to, or exclude the jurisdiction of a High Court from, any Union territory.

(2) *Where the High Court of a State exercises jurisdiction in relation to a Union territory:*
   (a) Nothing in this Constitution shall be construed as empowering the Legislature of the State to increase, restrict or abolish that jurisdiction; and
   (b) The reference in article 227 to the Governor shall, in relation to any rules, forms or tables for subordinate courts in that territory, be construed as a reference to the President.

231. ESTABLISHMENT OF A COMMON HIGH COURT FOR TWO OR MORE STATES

(1) Notwithstanding anything contained in the preceding provisions of this Chapter, Parliament may by law establish a common High Court for two or more States or for two or more States and a Union territory.

(2) In relation to any such High Court,-
   (a) Omitted by By 99th Amendment Act in 2014.
   (b) The reference in article 227 to the Governor shall, in relation to any rules, forms or tables for subordinate courts, be construed as a reference to the Governor of the State in which the subordinate courts are situate; and
   (c) The references in articles 219 and 229 to the State shall be construed as a reference to the State in which the High Court has its principal seat:

Provided that if such principal seat is in a Union territory, the references in articles 219 and 229 to the Governor, Public Service Commission, Legislature and Consolidated Fund of the State shall be construed respectively as references to the President, Union Public Service Commission, Parliament and Consolidated Fund of India.

232. ARTICLE 232 OMITTED IN 1956

CHAPTER VI – SUBORDINATE COURTS

233. APPOINTMENT OF DISTRICT JUDGES

(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

233A. VALIDATION OF APPOINTMENTS OF, AND JUDGMENTS, etc., DELIVERED BY, CERTAIN DISTRICT JUDGES

Notwithstanding any judgment, decree or order of any court,:

(a) (i) No appointment of any person already in the judicial service of a State or of any person who has been for not less than seven years an advocate or a pleader, to be a district judge in that State, and

(ii) No posting, promotion or transfer of any such person as a district judge, made at any time before the commencement of the Constitution (Twentieth Amendment) Act, 1966, otherwise than in accordance with the provisions of article 233 or article 235 shall be deemed to be illegal or void or ever to have become illegal or void by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions;

(b) No jurisdiction exercised, no judgment, decree, sentence or order passed or made, and no other act or proceedings done or taken, before the commencement of the Constitution (Twentieth Amendment) Act, 1966 by, or before, any person appointed, posted, promoted or transferred as a district judge in any State otherwise than in accordance with the provisions of article 233 or article 235 shall be deemed to be illegal or invalid or ever to have become illegal or invalid by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions.

234. RECRUITMENT OF PERSONS OTHER THAN DISTRICT JUDGES TO THE JUDICIAL SERVICE

Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

235. CONTROL OVER SUBORDINATE COURTS

The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

236. INTERPRETATION

In this Chapter-

(a) the expression "district judge" includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions Judge;

(b) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.

237. APPLICATION OF THE PROVISIONS OF THIS CHAPTER TO CERTAIN CLASS OR CLASSES OF MAGISTRATES

The Governor may by public notification direct that the foregoing provisions of this Chapter and any rules made thereunder shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of magistrates in the State as they apply in relation to persons appointed to the judicial service of the State subject to such exceptions and modifications as may be specified in the notification.

HIGH COURT: APPOINTMENTS, TRANSFER, POWERS, FUNCTIONS AND JURISDICTION

High Courts are the highest authority in terms of courts in a State. Article 214 to 237 deals with the provisions of High Courts. Article 214 deals with the establishment of the High Court in each state. A High Court consists of a Chief Justice and some other judges who are appointed by the President. There is no

fixed limit for the maximum number of judges in a High Court, they are appointed as per the necessity. There will be a separate High Court for each state but after the 7th Constitutional amendment, the same high court can be the court for more than one state. Under Article 241, Parliament has the power to constitute a High Court for a Union Territory and can also declare any Court to be a High Court for the purpose of the Constitution.

APPOINTMENT AND TRANSFER OF HIGH COURT JUDGES

Prior to the 99th Amendment, every judge of the High Court must be appointed by the President (Article 217). The Chief Justice of the High Court will be appointed by the President, after consultation with the Governor of that state and the Chief Justice of Supreme Court. For the appointment of Judges other than Chief Justice of the High Court President can consult the Chief Justice of that High Court.

In *S.P. Gupta & Others v. Union of India,* popularly known as Judges Transfer case, the question was raised whether in appointing the additional Judges of the High Courts the President was bound by the consult of Chief Justice of India. The majority held that the opinion of the Chief Justice of India had no primacy over the opinion of the Chief Justice of High Court under Article 217. Justice Bhagwati has stated that "*the Chief Justice of India, Chief Justice of High Court & Governor have equal importance in the consultation process and there is no superiority over the opinion of one another*." He suggested for the establishment of a Judicial Commission to make recommendations to the President in regard to the appointment of the Judges of Supreme Court and High Court.

But, in *Supreme Court Advocate on Record Association v. Union of India,* a nine judges bench by a 7:2 majority has overruled the Judged Transfer case and held that in the matters of appointment and transfer of Judges the view of CJI has the greatest significance. The majority gave the primacy to the opinion of the Chief Justice of India formed in consultation with two senior-most judges of the Supreme Court in the matters of appointment and transfer of Judges.

In *re Presidential Reference case,* nine-judge-bench held that the recommendation made by the Chief Justice of India without following the consultation process for appointment of Supreme Court & High Court Judges were not binding on the government.

But after the 99th Amendment, every judge of the High Court will be appointed by the warrant and seal of the President on the recommendation of the National Judicial Appointments Commission (Article 124-A). There is no requirement to consult with the CJI and the State Governor and also the Chief Justice of High Court in appointment of judges other than Chief Justice.

Since, in *Supreme Court Advocate on Record Association v. Union of India*, The Court declared the 99th Amendment act as void and unconstitutional and the appointment of judges will be done through the collegium system. In other words, the Chief Justice of the High Court shall be appointed by the President of India with the consultation of Chief Justice of India and the State Governor.

Transfer

Prior to 99th Amendment President has the power to transfer a Judge from one High Court to another with the consultation of Chief Justice of Supreme Court. In *Union of India v. Sankalchand Sheth,* The Supreme Court by 3:2 majority held that a Judge of High Court could be transferred without his consent [Article 222 (1)]. The power to transfer the High Court Judge is in the *public interest*. After 99th Amendment a Judge can be transferred from one High Court to another on the recommendation of National Judicial Appointments Commission by the President.

But the 99th Amendment Act has been declared unconstitutional in 2015, so the Judge of a High Court can be transferred by the President after consultation with the Chief Justice of India.

QUALIFICATIONS FOR BEING A JUDGE OF HIGH COURT

The qualification for appointing a Judge of a High Court is defined under Article 217 (2). The qualifications are- Firstly, it must be a citizen of India; Secondly, it must have held a judicial office for not less than 10 years within the territory of India; Thirdly, it must have been an advocate of High Court for not less than 10 years.

The 44th Amendment Act, 1978 has amended the Explanation to clause 2. Under the present clause (a) of the Explanation- any period during which a person has, after becoming an advocate has held the judicial office or the office as a member of a tribunal or any post under the Union or a State requiring special knowledge of law will be included in computing the period during which he has been an advocate for the purpose of determining his eligibility for appointment as Judge of High Court.

POWERS AND FUNCTIONS OF THE HIGH COURT

The following are the powers and functions of the High Court:

- It has the power to control over all the courts and tribunals within its jurisdiction except in the matters of Armed Forces under Article 227.
- It has the power to withdraw a case pending before any subordinate court it involves the substantial question of law.
- It is a Court of Record as like the Supreme Court which involves recording of judgements, proceedings, *etc.* (Article 215).
- Under the Article 13 & 226 High Court has the power of judicial review. They have the authority to declare any law or ordinance as unconstitutional if it seems to be against the Constitution of India.
- It can appoint the administration staff according to the need and can decide their salaries, allowance, *etc.*
- It issues the rules and regulations for the working of subordinate courts.

To get the information there is a Right to Information Act under this one can get the information. But the judiciary does not fall under the ambit of this Act to

maintain the Independence of Judiciary. No court proceedings are questionable under the RTI. In the landmark verdict on 2010, the Delhi High Court had held that the office of the Chief Justice of the Supreme Court comes under the ambit of RTI law, by stating that the judicial independence was not a judge's privilege but a responsibility cast upon them.

JURISDICTION OF THE HIGH COURT

The jurisdiction of the High Court is divided into three parts:

Original or General Jurisdiction

Under Article 215, High Courts have to power to deal with the revenue matters under this jurisdiction. This power has been used in the following matters:

- Disputes relating to the Members of Parliament and the State Legislative Assembly.
- Disputes relating to marriage, law, contempt of court, *etc.*
- Cases which are transferred from other courts to itself as it involves a substantial question of law.

Writ Jurisdiction

Under Article 226 of the Constitution of India High Courts has the power to issue the writs for the enforcement of fundamental rights or for other purposes. The writs issued by the High Courts are in the nature of *Habeas Corpus, Mandamus, Prohibition, Certiorari and quo warranto.* The jurisdiction of the High Court is not limited for not only the protection of fundamental rights but also for other legal rights. The writ jurisdiction of the High Court is wider than the Supreme Court because High can also issue the writs for the enforcement of legal rights. A person can directly approach the High Court when there is a violation of fundamental right.

Supervisory Jurisdiction

Article 227 deals with the powers of the superintendence on High Court over all the subordinate courts and tribunals except the matters which are related to Armed Forces. Under this, the High Court issues the general rules and prescribes forms for the regulation of the proceedings and practices of subordinate courts.

The power of the Superintendence is a judicial and administrative power vested in the High Courts. The Supreme Court has no such power of superintendence in comparison with High Courts.

Appellate Jurisdiction

High Court is the primary court of appeal it means that it has the power to hear the appeals against the judgement of the subordinate courts within their territories.

1. *In Civil Cases:* An appeal can be made in the High Court only against the district court's decisions. An appeal can also be made directly from the subordinate court if there is a question of fact or law involve in it or the dispute involving the value higher than Rs. 5000/-.
2. *In Criminal Cases:* It extends to the cases which are decided by the Sessions and Additional Session Judges. The jurisdiction of the High Court extends to all matters related to State and federal laws. It the session judge has awarded capital punishment or imprisonment for 7 or more than 7 years.
3. *In Constitutional Cases:* If it is certified that the case or the matter involves a question of fact or law.

CONCLUSION

High Court is the Court which has a wider scope than the Supreme Court because High Court can issue the writs for the violation of fundamental rights as well as for legal right but the Supreme Court can only issue the writs when there is a violation of fundamental right. It is also a court or record like the Supreme Court. One can go to the High Court directly when there is a violation of Fundamental Right as well as legal right. High Court can control all the subordinate courts as well as tribunals except the matters of Armed Forces.

The High Court must fall in the ambit of the RTI but with some restrictions like information regarding the proceedings, confidential information will not come under RTI, *etc.* The restriction is necessary to maintain the Independence of Judiciary. So as to make the accountability and transparency in the appointment of judges, the pendency of cases, *etc.*, the Supreme must come under RTI.

EXTENT OF JUDICIAL REVIEW IN INDIA

The initial years of the Supreme Court of India saw the adoption of an approach characterised by caution and circumspection. Being steeped in the British tradition of limited judicial review, the Court generally adopted a pro-legislature stance. This is evident form the rulings such as A.K. Gopalan, but however it did not take long for judges to break their shackles and this led to a series of right to property cases in which the judiciary was loggerhead with the parliament. The nation witnessed a series of events where a decision of the Supreme Court was followed by a legislation nullifying its effect, followed by another decision reaffirming the earlier position, and so on. The struggle between the two wings of government continued on other issues such as the power of amending the Constitution. During this era, the Legislature sought to bring forth people-oriented socialist measures which when in conflict with fundamental rights were frustrated on the upholding of the fundamental rights of individuals by the Supreme Court. At the time, an effort was made to project the Supreme Court as being concerned only with the interests of propertied classes and being insensitive to the needs of the masses. Between 1950 and 1975, the Indian

Supreme Court had held a mere one hundred Union and State laws, in whole or in part, to be unconstitutional. After the period of emergency the judiciary was on the receiving end for having delivered a series of judgments which were perceived by many as being violative of the basic human rights of Indian citizens and changed the way it looked at the constitution.

The Supreme Court said that any legislation is amenable to judicial review, be it momentous amendments to the Constitution or drawing up of schemes and bye-laws of municipal bodies which affect the life of a citizen. Judicial review extends to every governmental or executive action - from high policy matters like the President's power to issue a proclamation on failure of constitutional machinery in the States like in *Bommai case*, to the highly discretionary exercise of the prerogative of pardon like in *Kehar Singh case* or the right to go abroad as in *Satwant Singh case*. *Judicial review* knows no bounds except the restraint of the judges themselves regarding justifiability of an issue in a particular case.

JUDICIAL REVIEW OF POLITICAL QUESTIONS

In the initial stages of the judicial adjudication Courts have said that where there is a political question involved it is not amenable to judicial review but slowly this changed, in Keshavananda Bharathi's case, the Court held that, "it is difficult to see how the power of judicial review makes the judiciary supreme in any sense of the word. This power is of paramount importance in a federal constitution…. Judicial Review of constitutional amendments may seem involving the Court in political question, but it is the Court alone which can decide such an issue. The function of Interpretation of a Constitution being thus assigned to the judicial power the State, the question whether the subject of law is within the ambit of one or more powers of the legislature conferred by the constitution would always be a question of interpretation of the Constitution."

Than it was in Special Courts Bill, 1978, In re, case where the majority opined that, "The policy of the Bill and the motive of the mover to ensure a speedy trial of persons holding high public or political office who are alleged to have committed certain crimes during the period of emergency may be political, but the question whether the bill or any provisions are constitutionally invalid is a not a question of a political nature and the court should not refrain from answering it." What this meant was that though there are political questions involved the validity of any action or legislation can be challenged if it would violate the constitution. This position has been reiterated in many other cases and in S.R. Bommai's case the Court held, "though subjective satisfaction of the President cannot be reviewed but the material on which satisfaction is based open to review…" the court further went on to say that, "The opinion which the President would form on the basis of Governor's report or otherwise would be based on his political judgment and it is difficult to evolve judicially manageable norms for scrutinising such political decisions. Therefore, by the very nature of things which would govern the decision-making under Article 356, it is difficult

to hold that the decision of the president is justiciable. To do so would be entering the political thicker and questioning the political wisdom which the courts of law must avoid. The temptation to delve into the President's satisfaction may be great but the courts would be well advised to resist the temptation for want of judicially manageable standards. Therefore, the Court cannot interdict the use of the constitutional power conferred on the President under Article 356 unless the same is shown to be male fide."

As Soli Sorabjee points out, "there is genuine concern about misuse by the Centre of Article 356 on the pretext that the State Government is acting in defiance of the essential features of the Constitution. The real safeguard will be full judicial review extending to an inquiry into the truth and correctness of the basic facts relied upon in support of the action under Article 356 as indicated by Justices Sawant and Kuldip Singh. If in certain cases that entails evaluating the sufficiency of the material, so be it."

What this meant was the judiciary was being cautious about the role it has to play while adjudicating matters of such importance and it is showing a path of restraint that has to be used while deciding such matters so that it does not usurp the powers given by the Constitution by way of the power of review at the same it is also minimising the misusing of the power given under Article 356 to the President.

JUDICIAL REVIEW AS A PART OF THE BASIC STRUCTURE

In the celebrated case of Keshavanda Bharathi v. State of Kerela, the Supreme Court of India the propounded the basic structure doctrine according to which it said the legislature can amend the Constitution, but it should not change the basic structure of the Constitution, The Judges made no attempt to define the basic structure of the Constitution in clear terms.

S.M. Sikri, C.J mentioned five basic features:

1. Supremacy of the Constitution.
2. Republican and democratic form of Government.
3. Secular character of the Constitution.
4. Separation of powers between the legislature, the executive and the judiciary.
5. Federal character of the Constitution.

He observed that these basic features are easily discernible not only from the Preamble but also from the whole scheme of the Constitution. He added that the structure was built on the basic foundation of dignity and freedom of the individual which could not by any form of amendment be destroyed. It was also observed in that case that the above are only illustrative and not exhaustive of all the limitations on the power of amendment of the Constitution. The Constitutional bench in Indira Nehru Gandhi v. Raj Narain (1975 Supp SCC 1.) held that Judicial Review in election disputes was not a compulsion as it is not a part of basic structure. In *S.P. Sampath Kumar* v. *Union of India* (1987) 1 SCC

124 at 128.), P.N. Bhagwati, C.J., relying on *Minerva Mills Ltd.* (1980) 3 SCC 625.) declared that it was well settled that judicial review was a basic and essential feature of the Constitution.

If the power of judicial review was absolutely taken away, the Constitution would cease to be what it was.

In *Sampath Kumar* the Court further declared that if a law made under Article 323-A(1) were to exclude the jurisdiction of the High Court under Articles 226 and 227 without setting up an effective alternative institutional mechanism or arrangement for judicial review, it would be violative of the basic structure and hence outside the constituent power of Parliament.

In *Kihoto Hollohan* v. *Zachillhu*r (1992 Supp (2) SCC 651, 715, para 120) another Constitution Bench, while examining the validity of para 7 of the Tenth Schedule to the Constitution which excluded judicial review of the decision of the Speaker/Chairman on the question of disqualification of MLAs and MPs, observed that it was unnecessary to pronounce on the contention whether judicial review is a basic feature of the Constitution and para 7 of the Tenth Schedule violated such basic structure.

Subsequently, in *L. Chandra Kumar* v. *Union of India (*(1997) 3 SCC 261) a larger Bench of seven Judges unequivocally declared:

> *"that the power of judicial review over legislative action vested in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure".*

Though one does not deny that power to review is very important, at the same time one cannot also give an absolute power to review and by recognising judicial review as a part of basic feature of the constitution Courts in India have given a different meaning to the theory of Check's and Balances this also meant that it has buried the concept of separation of powers, where the judiciary will give itself an unfettered jurisdiction to review any thing every thing that is done by the legislature.

EXPANSION OF JUDICIAL REVIEW THROUGH JUDICIAL ACTIVISM

After the draconian exposition of power by the Executive and the Legislature during Emergency the expectations of the public soared high and the demands on the courts to improve the administration by giving appropriate directions for ensuring compliance with statutory and constitutional prescriptions. Likewise the judiciary has taken an activist view the Beginning with the *Ratlam Municipality case* the sweep of Social Action Litigation had encompassed a variety of causes.

With the interpretation given by it in Menaka Gandhi case the Supreme Court brought the ambit of constitutional provisions to enforce the human rights of citizens and sought to bring the Indian law in conformity with the global trends in human-rights-jurisprudence. This was made possible in India, because of the

procedural innovations with a view to making itself more accessible to disadvantaged sections of society giving rise to the phenomenon of Social Action Litigation/Public Interest Litigation. During the Eighties and the first half of the Nineties, the Court have broken there shackle's and moved much ahead from being a mere legal institution, its decisions have tremendous social, political and economic ramifications.

Time and again, it has sought to interpret constitutional provisions and the objectives sought to be achieved by it and directed the executive to comply with its orders. SAL, a manifestation of judicial activism, has introduced a new dimension regarding judiciary's involvement in public administration. The sanctity of locus standi and the procedural complexities are totally side-tracked in the causes brought before the courts through SAL. In the beginning, the application of SAL was confined only to improving the lot of the disadvantaged sections of the society who by reason of their poverty and ignorance were not in a position to seek justice from the courts and, therefore, any member of the public was permitted to maintain an application for appropriate directions.

The new role of the Supreme Court has been criticized in some quarters as being violative of the doctrine of separation of powers; it is claimed that the Apex Court has, by formulating policy and issuing directions in respect of various aspects of the country's administration, transgressed into the domain of the executive and the legislature. As Justice Cardozo puts it, "A Constitution states or ought to state not rules for the passing hour but principles for an expanding future." It is with this view that innovations in the rules of standing have come into existence.

LIMITATION ON THE POWER OF REVIEW

The expansion of the horizon of judicial review is seen both with reverence and suspicion; reverence in as much as the judicial review is a creative element of interpretation, which serves as an omnipresent and potentially omnipotent check on the legislative and executive branches of government. But at the same time there is a danger that they may trespass into the powers given to the legislature and the executive.

One many say that if there is any limitation on judicial review other than constitutional and procedural that is a product of judicial self-restraint. As justice Dwivedi empathically observed, "Structural sociopolitical value choices involve a complex and complicated political process. This court is hardly fitted for performing that function. In the absence of any explicit Constitutional norms and for want of complete evidence, the court's structural value choices will be largely subjective. Our personal predilections will unavoidably enter into the scale and give colour to our judgment. Subjectivism is calculated to undermine legal certainty, an essential element of rule of law."

The above observations also reveal another assumption to support an attitude of self-restraint, viz., the element subjectiveness in judicial decision on issues having sociopolitical significance. When one looks at the decisions of the Supreme Court on certain questions of fundamental issues of constitutional

law one can see that there is a sharp division among the judges of the apex court on such basic questions of power of the Parliament to amend the Constitution, federal relations, powers of the President, *etc.* This aptly demonstrates the observation of the judge. This would mean that though there has been expansion of powers of judicial review one cannot also say that this cannot be overturned. Judicial self-restrain in relation to legislative power manifests itself in the form the there is a presumption of constitutionality when the validity of the statute is challenged. In the words of Fazl Ali, "…the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles"

In applying the presumption of constitutionality the Courts sometimes apply an interpretational device called 'reading down'. The essence of the device is that "if certain provisions of law construed in one way would make them consistent with the constitution, and another interpretation would render them unconstitutional, the court would lean in favour of the former construction." But all this depends on the outlook and values of the judge.

When it come judicial review of administrative action though the presumption of validity is not so strong in the case of administrative action as in the case of statutes. Still, when the legislature expressly leaves a matter to the discretion of an administrative authority the courts have adopted an attitude of restraint. They have said we cannot the question the legality of the exercise of discretionary power unless and until it is an abuse of discretionary power (which includes mala fide exercise of power, exercising the power for an improper motive, decision based on irrelevant considerations or in disregard of relevant consideration, and in some cases unreasonable exercise of power) and non-exercise of discretion (which come when power is exercised without proper delegation and when it is acted under dictation).

JUDICIARY-EXECUTIVE CONFRONTATIONS

LAND REFORM (EARLY CONFRONTATION)

After some of the courts overturned state laws redistributing land from *zamindar* (landlord) estates on the grounds that the laws violated the zamindars' fundamental rights, the Parliament of India passed the First Amendment to the Constitution in 1951 followed by the Fourth Amendment in 1955 to protect its authority to implement land redistribution. The Supreme Court countered these amendments in 1967 when it ruled in *Golaknath v. State of Punjab* that Parliament did not have the power to abrogate fundamental rights, including the provisions on private property.

OTHER LAWS DEEMED UNCONSTITUTIONAL

- On February 1, 1970, the Supreme Court invalidated the government-sponsored Bank Nationalization Bill that had been passed by Parliament in August 1969.

- The Supreme Court also rejected as unconstitutional a presidential order of September 7, 1970, that abolished the titles, privileges, and privy purses of the former rulers of India's old princely states.

RESPONSE FROM PARLIAMENT

- In reaction to the decisions of the Supreme Court, in 1971 the Parliament of India passed an amendment empowering itself to amend any provision of the constitution, including the fundamental rights.
- The Parliament of India passed the 25th Amendment, making legislative decisions concerning proper land compensation non-justiciable.
- The Parliament of India passed an amendment to the Constitution of India, which added a constitutional article abolishing princely privileges and privy purses.

COUNTER-RESPONSE FROM THE SUPREME COURT

The Court ruled that the basic structure of the constitution cannot be altered for convenience. On April 24, 1973, the Supreme Court responded to the parliamentary offensive by ruling in *Kesavananda Bharati v. The State of Kerala* that although these amendments were constitutional, the court still reserved for itself the discretion to reject any constitutional amendments passed by Parliament by declaring that the amendments cannot change the constitution's "basic structure", a decision piloted through by Chief Justice Sikri.

EMERGENCY AND GOVERNMENT OF INDIA

The independence of judiciary was severely curtailed on account of powerful central government ruled by Indian National Congress. This was during the Indian Emergency (1975-1977) of Indira Gandhi. The constitutional rights of imprisoned persons were restricted under Preventive detention laws passed by the parliament. In the case of Shiva Kant Shukla *Additional District Magistrate of Jabalpur v. Shiv Kant Shukla*, popularly known as the *Habeas Corpus case*, a bench of five seniormost judges of Supreme court ruled in favour of state's right for unrestricted powers of detention during emergency. Justices A.N. Ray, P. N. Bhagwati, Y. V. Chandrachud, and M.H. Beg, stated in the majority decision:

(under the declaration of emergency) no person has any locus to move any writ petition under Art. 226 before a High Court for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention.

The only dissenting opinion was from Justice H. R. Khanna, who stated:

detention without trial is an anathema to all those who love personal liberty... A dissent is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possible correct the error into which the dissenting Judge believes the court to have been betrayed.

It is believed that before delivering his dissenting opinion, Justice Khanna had mentioned to his sister: *I have prepared my judgment, which is going to cost me the Chief Justice-ship of India."* When the central Government is to recommend one of Supreme court Judges for the post of Chief Justice in January

1977,Justice Khanna was superseded despite being the most senior judge at the time and thereby Government broke the convention of appointing only the senior most judge to the position of Chief Justice of India. In fact, it was felt that the other judges may have gone along for this very reason. Justice Khanna remains a legendary figure among the legal fraternity in India for this decision.

The New York Times, wrote of this opinion: "The submission of an independent judiciary to absolutist government is virtually the last step in the destruction of a democratic society; and the Indian Supreme Court's decision appears close to utter surrender."

During the emergency period, the government also passed the 39th amendment, which sought to limit judicial review for the election of the Prime Minister; only a body constituted by Parliament could review this election. The court tamely agreed with this curtailment (1975), despite the earlier Keshavanand decision. Subsequently, the parliament, with most opposition members in jail during the emergency, passed the 42nd Amendment which prevented any court from reviewing any amendment to the constitution with the exception of procedural issues concerning ratification. A few years after the emergency, however, the Supreme court rejected the absoluteness of the 42nd amendment and reaffirmed its power of judicial review in the *Minerva Mills* case (1980).

As a final act during the emergency, in what Justice V. R. Krishna Iyer has called "a stab on the independence of the High Court", judges were moved helter-skelter across the country, in concurrence with Chief Justice Beg.

POST-1980: AN ASSERTIVE SUPREME COURT

Fortunately for Indian jurisprudence, the "brooding spirit of the law" referred to by Justice Khanna was to correct the excesses of the emergency soon enough.

After Indira Gandhi lost elections in 1977, the new government of Morarji Desai, and especially law minister Shanti Bhushan (who had earlier argued for the detenues in the Habeas Corpus case), introduced a number of amendments making it more difficult to declare and sustain an emergency, and reinstated much of the power to the Supreme Court. It is said that the Basic Structure doctrine, created in *Kesavananda*, was strengthened in *Indira Gandhi's* case and set in stone in *Minerva Mills*. The Supreme Court's creative and expansive interpretations of Article 21 (Life and Personal Liberty), primarily after the Emergency period, have given rise to a new jurisprudence of public interest litigation that has vigorously promoted many important economic and social rights (constitutionally protected but not enforceable) including, but not restricted to, the rights to free education, livelihood, a clean environment, food and many others. Civil and political rights (traditionally protected in the Fundamental Rights chapter of the Indian Constitution) have also been expanded and more fiercely protected. These new interpretations have opened the avenue for litigation on a number of important issues. It is interesting to note that the pioneer of the expanded interpretation of Article 21, Chief Justice P N Bhagwati, was also one of the judges who heard the ADM Jabalpur case, and held that the Right to Life could not be claimed in Emergency

RECENT IMPORTANT CASES

Among the important pronouncements of the Supreme Court post 2000 is the Coelho case (I.R. Coelho v. State of Tamil Nadu (Judgment of 11the January, 2007). A unanimous Bench of 9 judges reaffirmed the basic structure doctrine. An authority on the Indian Constitution, former Attorney-General Soli Sorabjee commented on the judgment, "The judgment in I.R. Coelho vigorously reaffirms the doctrine of basic structure.

Indeed it has gone further and held that a constitutional amendment which entails violation of any fundamental rights which the Court regards as forming part of the basic structure of the Constitution then the same can be struck down depending upon its impact and consequences.

The judgment clearly imposes further limitations on the constituent power of Parliament with respect to the principles underlying certain fundamental rights. The judgment in Coelho has in effect restored the decision in Golak Nath regarding non-amendability of the Constitution on account of infraction of fundamental rights, contrary to the judgment in Kesavananda Bharati's case. With the utmost respect the judgment is not conducive to clarity. It has introduced nebulous concepts like 'the essence of the rights' test. Besides apart from the express terms of Articles 21, 14 and 19, what are the 'the principles underlying thereunder'? One does not have to be a prophet to visualize further litigation to explain the Coelho judgment which is sure to add to the prevailing confusion." This comment was made in a lecture in Oslo, as reported on the reputed Indian blog 'Law and Other Things'.

Another important decision was of the five-judge Bench in Ashoka Kumara Thakur v. Union of India; where the constitutional validity of Central Educational Institutions (Reservations in Admissions) Act, 2006 was upheld, subject to the "creamy layer" criteria. Importantly, the Court refused to follow the 'strict scrutiny' standards of review followed by the United States Supreme Court. At the same time, the Court has applied the strict scrutiny standards in Anuj Garg v. Hotel Association of India (2007) ([1])

In Aravalli Golf Course and other cases, the Supreme Court (particularly Justice Markandey Katju) has expressed reservations about taking on an increasingly activst role.

CORRUPTION AND MISCONDUCT OF JUDGES

The year 2008 has seen the Supreme Court in one controversy after another, from serious allegations of corruption at the highest level of the judiciary, expensive private holidays at the tax payers expense, refusal to divulge details of judges' assets to the public, secrecy in the appointments of judges', to even refusal to make information public under the Right to Information Act. The Chief Justice of India K.G.Balakrishnan invited a lot of criticism for his comments on his post not being that of a public servant, but that of a constitutional authority. He later went back on this stand. The judiciary has come in for serious criticisms from both the current President of India Pratibha Patil and the former

President APJ Abdul Kalam for failure in handling its duties. The Prime Minister, Dr.Manmohan Singh, has stated that corruption is one of the major challenges facing the judiciary, and suggested that there is an urgent need to eradicate this menace.

The Union Cabinet of the Indian Government has recently introduced the Judges Inquiry (Amendment) Bill 2008 in Parliament for setting up of a panel called the National Judicial Council, headed by the Chief Justice of India, that will probe into allegations of corruption and misconduct by High Court and Supreme Court judges. However, even this bill is allegedly a farce, just meant to silence and suppress the public. As per this Bill, a panel of judges themselves will be judging the judges, no inquiry can be initiated against the Chief Justice of India or against retired judges, which is against the principles of natural justice, and a citizen can be punished and fined for any complaint that the judges find "frivolous" or "vexatious", which would discourage genuine complaints against judges.

SENIOR JUDGES

- Supreme Court Bench, Justice B N Agrawal, Justice V S Sirpurkar and Justice G S Singhvi : "We are not giving the certificate that no judge is corrupt. Black sheep are everywhere. It's only a question of degree."
- Supreme Court Judge, Justice Agarwal: "What about the character of politicians, lawyers and the society? We come from the same corrupt society and do not descend from heaven. But it seems you have descended from heaven and are, therefore, accusing us."
- Supreme Court Bench, Justice Arijit Pasayat, Justice V S Sirpurkar and Justice G S Singhvi : "The time has come because people have started categorising some judges as very honest despite it being the foremost qualification of any judge. It is the system. We have to find the mechanism to stem the rot" "Has the existing mechanism become outdated? Should with some minor modification, the mechanism could still be effective?"
- Supreme Court Bench, Justice Justice G S Singhvi : "The rot has set in." The judges appeared to be in agreement with senior advocate Anil Devan and Solicitor General G. E. Vahanvati who, citing the falling standards, questioned the desirability of keeping the immunity judges have from prosecution.

SENIOR GOVERNMENT OFFICIALS

- Former President of India, APJ Abdul Kalam: "If longevity of cases continued, people would resort to extra-judicial measures."
- President of India, Pratibha Patil: *At a seminar on judicial reforms* "Judiciary cannot escape blame for delayed justice that is fraught with the risk of promoting the lynch mob phenomenon." "Time has come

when we need to seriously introspect whether our judicial machinery has lived up to its expectations of walking the enlightened way by securing complete justice to all and standing out as (a) beacon of truth, faith and hope." "Admittedly, the realm of judicial administration is not without its own share of inadequacies and blemishes."

- Former Chief Justice of India, Y. K. Sabharwal: "The justice delivery system has reached its nadir"
- Speaker of Lok Sabha, Somnath Chatterjee: "As a citizen of this country and as a lawyer who had practiced for many decades, it is a matter of agony if there is even a whisper of an allegation against a judicial officer … But the fact is that allegations against judicial officers are becoming a reality. One Chief Justice has said that only 20 per cent of the judges are corrupt. Another judge has lamented that there are no internal procedures to look into the allegations. Therefore, the necessity of a mechanism is being emphasized by the judges themselves. Then the question arises as to how this mechanism would be brought about and as to who would bring it. The fact of the matter is that the judiciary is the only unique institution that has no accountability to the people in a democracy. In this overall context, it is absolutely essential to involve outside elements in the process of judicial accountability."
- Additional Solicitor General, G. E. Vahanvati: *At a Delhi High Court hearing* "Declaration of assets by judges to the CJI are personal information which cannot be revealed under the present RTI and the same should be amended accordingly." "It is submitted that the information which is sought (pertaining to judges assets) is purely and simply personal information, the disclosure of which has no relationship to any public activity"

Pranab Mukherjee: "Constructive criticism should be encouraged." He joined the chorus on judicial delays that has resulted in people taking law into their own hands. He underlined the need for strengthening judicial infrastructure.

JUDICIAL REVIEW

The judicial review in India can be classified under the following categories:

Primary and secondary review: The doctrine of primary review is applicable in relation to the statutes, statutory rules, or any order, which has force of statute. The secondary review is applicable inter alia in relation to the action in a case where the executive is guilty of acting arbitrarily.

In such a case Article 14 of the Constitution of India would be attracted. In relation to other administrative actions, as for example punishment in a departmental proceeding, the doctrine of proportionality is equated with Wednesbury's unreasonable.

Direct and indirect review: This w is most important and frequently used by the courts in India while judging the constitutionality of various statutes.

In the "direct review" the court overrides or annuls an "enactment" or act of "executive" on the ground that it is inconsistent with the Constitution. In the "indirect review", while considering constitutionality of a statute, the court interprets the statutory language in such a manner that the element of unconstitutionality attached with it is eliminated and the statute survive the attack of unconstitutionality. This may be done in the following two manners:

(a) *Reading down:* An effective tool in the hands of judiciary, to test the validity of legislation, is to invoke the principle of "reading down". The rule of reading down a provision of the law is now well established and recognised. It is a rule of harmonious construction in a different name. It is resorted to smoothen the crudities or ironing the creases found in a statute to make it workable. In the garb of reading down, however, it is not open to read words or expressions not found in it and thus venture into a kind of judicial legislation. The rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute. It is to be used keeping in view the scheme of the statute and to fulfill its purposes. In B.R.Enterprises v State of U.P the Supreme Court observed: "First attempt should be made by the courts to uphold the charged provisions and not to invalidate it merely because one of the possible interpretation leads to such a result, howsoever attractive it may be. Thus, where there are two possible interpretations, one invalidating the law and the other upholding, the latter should be adopted. For this, the courts have been endeavouring, sometimes to give restrictive or expansive meaning keeping in view the nature of the legislation. Cumulatively, it is to sub serve the object of the legislation. Old golden rule is of respecting the wisdom of the legislature, that they are aware of the law and would never have intended for an invalid legislation. This also keeps the courts within their track and checks. Yet inspite of this, if the impugned legislation cannot be saved, the courts shall not hesitate to strike it down. Here the courts have to play a cautious role of weeding out the wild from the crop, of course, without infringing the Constitution. The principle of reading down, however, will not be available where the plain and literal meaning from a bare reading of any impugned of any impugned provision clearly shows that it confers arbitrary or unbridled power"

(b) *Severability:* The doctrine of severability separates the unconstitutional part and keeps the statute alive. If, however, the offensive portion cannot be separated then the entire statute has to be struck down as unconstitutional. It is further trite that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation. These changed circumstances may also create a vacuum in the legal system, which has to be suitably filled up by the legislature. If the legislature

fails to meet the need of the hour, the courts may interfere and fill-in the vacuum by giving proper directions. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. These directions may also include a direction to severe the offending portion of the statute which was originally constitutional to keep it alive.

The Constitution of India envisages separation of power between the three organs of the Constitution so that the working of the constitution may not be hampered or jeopardised.

This thin and fine line of distinction should never be ignored and transgressed upon by any of the organ of the Constitution, including the judiciary.

This rigid perception and practice can be given a go by in cases of "abdication of duties" by one of the organ of the Constitution.

Thus, the judiciary can interfere if there is an abdication of duties by the legislature or the executive. For instance, if the legislature delegates its essential and constitutional functions to the executives, it would amount to "excessive delegation" and hence abdication of the legislative functions by the legislature. In such cases, the theory of separation of powers would not come in the way of judiciary while exercising the power of judicial review. Thus, the judicial review powers of the Constitutional Courts in India are very wide and flexible in nature.

SUPREME COURT IN INDIA

The Supreme Court is the highest judicial body in India. The Supreme Court came into power on 28th January 1950; just two days after the Constitution of India came to effect. In the initial stages, it had its office in a part of the Parliament House. The Supreme Court is endowed with many duties and responsibilities. The biggest responsibility is that it is the highest court of appeal and is also the protector of the Constitution in the country. The Chief Justice of India and 25 other judges make up the Supreme Court of India. The appointments are done directly by the President of India. There are certain criteria that have to be fulfilled by the advocates to become a judge of the Supreme Court. Being a citizen of India is one of the most important criteria. Apart from this, the person has to have an experience of minimum five years as a judge in the High Court or any other two courts one after another. He should also be a prominent jurist as per the President of the country, so that he can take up responsibilities well. The Chief Justice is also consulted at the time of appointment of the judges in the Supreme Court.

The Judges of the Supreme Court are free to exercise their power as and when required. The process of removal of the Supreme Court judges is quite an interesting but lengthy process. An order from the President is mandatory in case of removal of the judges. A two-thirds majority has to be obtained from both the houses for the removal of the judges.

The jurisdiction of the Supreme Court is divided into original jurisdiction, advisory jurisdiction and appellate jurisdiction. Original jurisdiction is required

when there is a dispute between the Government and the states of India or any one state of India. The Supreme Court can also enforce fundamental Rights according to the Article 32 of the Constitution of India.

The appellate jurisdiction is mentioned in Articles 132(1), 133(1) or 134 of the Constitution. The decision of the High Court can be questioned in the Supreme Court of the country. One can appeal to the Supreme Court, if he or she is not satisfied with the decision of the High Court. The Supreme Court has the provision of accepting or rejecting the case at its own discretion. There are also provisions of pardoning criminals and canceling their lifetime imprisonment or death sentence by the Supreme Court.

Apart from the original and appellate jurisdiction of the Supreme Court, there is an advisory jurisdiction that needs special mention. There are many cases that are directly referred by the President of India and the Supreme Court has to look into those matters. This provision is mentioned in Article 143 of the Indian Constitution. The Supreme Court in India acts as an independent body and is free from any outer control. The contempt of law court in India is a punishable offence and the Supreme Court takes care of this immaculately.

JUDICIAL SYSTEMS

Japan's process for selecting Judges is longer and more stringent than the process in the United States and in Mexico. Assistant judges are appointed from those who have completed their training at the "Legal Training and Research Institute" located in *Wako City*. Once appointed, assistant judges still may not qualify to sit alone until they have served for five years, and have been appointed by the Supreme Court. Judges require ten years of experience in practical affairs, public prosecutor, or practicing attorney. In the Japanese Judicial Branch there is the Supreme Court located in Japan, eight high courts, fifty district courts, fifty family courts, and 438 summary courts. In difference, Mexican Supreme Court Justices are appointed by the president, and then are approved by the Senate to serve for a life term. Other justices are appointed by the Supreme Court and serve for six years. Federal courts consist of the Supreme Courtwith 21 magistrates, 32 circuit tribunals and 98 district courts. The Supreme Court of Mexico is located in "Mexico City. *Supreme Court Judges must be of ages 35 to 65 and hold a law degree during the five years preceding their nomination.* In the United States Supreme Court, justices are appointed by the president and approved by the Senate. As in Mexico, justices serve for a life term or until retirement. The Supreme Court of the United States is located in "Washington D.C". The Federal court system consists of 94 federal judicial districts. The 94 districts are then divided into twelve regional circuits. The United States consist of five different types of courts that are considered subordinate to the Supreme Court, U.S bankruptcy courts, U.S Courts of Appeal for the federal circuit, U.S Court of International Trade, U.S Courts of Appeal, and U.S District Courts.

UNION JUDICIARY: AN INTRODUCTION

1. The division of powers between 2 wings is made by a written Constitution, which is the Supreme Law of the Land. Since language of the constitution is not free form ambiguities, its meaning is likely to be interpreted differently by different authorities at different times; it is but natural that disputes might arise between the Centre and its constituent units regarding their respective powers. Therefore, in order to maintain the Supremacy of the Constitution, there must be an independent and impartial authority to decide disputes between the Centre and the States or the States inter se. This function can only be entrusted to a judicial body.
2. *Composition:* Originally 7-now 25 (from 1986) + Chief Justice
3. *Appointment:* Art 124 – Position before case of S.C. Bar Association Vs Union and after – By President – Eligibility – 5 Years Judge in High Court – 0r 10 years as advocate in H.C. – eminent jurist
4. *Chief Justice/Seniority:*
   (1) Art 124 executive power of President and he has full discretion
   (2) Law Commission recommendation
   (3) Executive to consider mental outlook or the social philosophy of judges. All relevant in todays context.
5. *Guidelines of Supreme Court:* In appointment and transfer of Judges
   (1) Individual initiation of high constitutional functionaries in the matter of Judges appointments reduced to minimum. It gives primacy to Chief Justice of India but puts a rider that he must consult his two colleagues.
   (2) Constitutional functionaries must act collectively in judicial appointments.
   (3) Chief Justice of India has the final say in transfer of Chief Justice and judges of High Courts.
   (4) Transfers of Chief Justices and Judges of High Courts cannot be challenged.
   (5) Appointment of the Chief Justice of India by seniority.
   (6) No judge can be appointed by the Union Government without consulting the Chief Justice of India.
   (7) Fixation of the strength in High Courts is justiciable.
   (8) Supreme Court decision in S. P.Gupta v. Union of India, case overruled. The majority judgment of the Supreme Court on the appointment and transfer of the judges have undone the serious injustice, which was done to the judiciary in the S. P.Gupta's case and restores to it the rightful place for its freedom an independent functioning.
6. *Removal of Judge:* Procedure – proved misbehavior or incapacity. Judge Ramaswami case 50% total membership present and 2/3 voting.
7. *Jurisdiction of the Supreme Court:*

(a) *Court of Record:* Article 129 makes the Supreme Court a court of record and confers all the powers of such court including the power to punish for its contempt. A court of Record is a Court whose records are admitted to be of evidentiary value and they are not to be questioned when they are produced before the Court. Once a court is made a Court of record, its power to punish for contempt necessarily follows from that position. The power to punish for contempt of court has been expressly conferred on the Supreme Court by our Constitution. This extraordinary power must be sparingly exercised only when the public interest demands.

(b) *Original Jurisdiction:* Article 131 – The Supreme Court has original jurisdiction in any dispute: (a) between the Government of India and one or more States; (b) between the Government of India and any state or States on one side and one or more other States on the other; (c) between two or more states – not for treaty or agreement prior to independence and water disputes.

(c) *Appellate jurisdiction:* The Appellate jurisdiction of the Supreme Court can be divided into four main categories:-

(a) Constitutional matters (b) Civil Matters (c) Criminal matters (d) Special leave to appeal – Art.136.

8. Advisory Jurisdiction – Art.143: Two matters – treaty, *etc.*, bound – general S.C. not bound.
9. Law declared by Supreme Court-is binding on all the counts–Art 141.
10. S.C. not bound by its own decision-Bengal Immunity case.
    The Allahabad Bombay and Karnataka High Courts have held that the Obiter Dicta of the Supreme Court is also "Law" within the meaning of Artr.141 and hence binding on all courts. It can review its own decisions (137).
11. *Miscellaneous:*
    (a) Acting Chief Justice to be appointed by President from Supreme Court Judges – 126
    (b) Adhoc judges by Chief Justice with previous consent of President C.J. of High Court from Judges of High Court who is qualified Art 127.
    (c) Attendance of retired Judges in Supreme Court by C.J. with consent of President – any retired Supreme Court or High Court Judge – Art 128.
    (d) Seat of Supreme Court at Delhi or any other – Art 130.
    (e) Enlargement of Jurisdiction of Supreme Court and more units of Parliament law – Art 138 & 139.
    (f) Transfer of cases from High Court to Supreme Court or between two High Courts by Supreme Court – Art 138 A.
    (g) Age of Supreme Court Judge should be determined by such authorities and such manner Parliament may provide –15th amendment.

12. *How Independence of Judiciary Maintained:*
   (1) Security of tenure
   (2) Salary of Judges fixed, not subject to vote of Legislature
   (3) Parliament can extend, but cannot curtail the jurisdiction and power of the Supreme Court.
   (4) No discussion in Legislature on the conduct of the Judges
   (5) Power to punish for its contempt.
   (6) Separation of Judiciary from Executive
   (7) The Executive with the consultation of Legal experts appoints Judges of the Supreme Court.
   (8) Prohibition on Practice after Retirement.

THE UNION JUDICIARY IN INDIA

124. *Establishment and constitution of Supreme Court:*

(1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years: Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted: Provided further that-
   (a) A Judge may, by writing under his hand addressed to the President, resign his office;
   (b) A Judge may be removed from his office in the manner provided in clause (4).

(2A) The age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide.

(3) *A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and:*
   (a) Has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or
   (b) Has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or
   (c) Is, in the opinion of the President, a distinguished jurist.

Explanation I.-In this clause "High Court" means a High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India.

Explanation II.-In computing for the purpose of this clause the period during which a person has been an advocate, any period during which a person has held judicial office not inferior to that of a district judge after he became an advocate shall be included.

(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4).

(6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(7) No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India.

125. *Salaries, etc., of Judges:*

(1) There shall be paid to the Judges of the Supreme Court such salaries as may be determined by Parliament by law and, until provision in that behalf is so made, such salaries as are specified in the Second Schedule.

(2) Every Judge shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such privileges, allowances and rights as are specified in the Second Schedule: Provided that neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

126. *Appointment of acting Chief Justice:* When the office of Chief Justice of India is vacant or when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the Court as the President may appoint for the purpose.

127. *Appointment of ad hoc Judges:*

(1) If at any time there should not be a quorum of the Judges of the Supreme Court available to hold or continue any session of the Court, the Chief Justice of India may, with the previous consent of the President and after consultation with the Chief Justice of the High Court concerned, request in writing the attendance at the sittings of the Court, as an ad hoc Judge, for such period as may be necessary, of a Judge of a High Court duly qualified for appointment as a Judge of the Supreme Court to be designated by the Chief Justice of India.

(2) It shall be the duty of the Judge who has been so designated, in priority to other duties of his office, to attend the sittings of the Supreme Court at the time and for the period for which his attendance is required, and while so attending he shall have all the jurisdiction, powers and privileges, and shall discharge the duties, of a Judge of the Supreme Court.

128. *Attendance of retired Judges at sittings of the Supreme Court:* Notwithstanding anything in this Chapter, the Chief Justice of India may at any time, with the previous consent of the President, request any person who has held the office of a Judge of the Supreme Court or of the Federal Court or who has held the office of a Judge of a High Court and is duly qualified for appointment as a Judge of the Supreme Court to sit and act as a Judge of the Supreme Court, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that Court: Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that Court unless he consents so to do.

129. *Supreme Court to be a court of record:* The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

130. *Seat of Supreme Court:* The Supreme Court shall sit in Delhi or in such other place or places, as the Chief Justice of India may, with the approval of the President, from time to time, appoint.

131. *Original jurisdiction of the Supreme Court:* Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute-

(a) Between the Government of India and one or more States; or

(b) Between the Government of India and any State or States on one side and one or more other States on the other; or

(c) Between two or more States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends: Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.

131A. [Exclusive jurisdiction of the Supreme Court in regard to questions as to constitutional validity of Central laws.] Rep. by the Constitution (Forty-third Amendment) Act, 1977, s. 4 (w.e.f. 13-4-1978).

132. *Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases:*

(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies under article 134A that the case involves a substantial question of law as to the interpretation of this Constitution.

(2) Where such a certificate is given, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided.

Explanation: For the purposes of this article, the expression "final order" includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case.

133. *Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters:*

(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies under article 134A-

(a) That the case involves a substantial question of law of general importance; and

(b) That in the opinion of the High Court the said question needs to be decided by the Supreme Court.

(2) Notwithstanding anything in article 132, any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.

(3) Notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.

134. *Appellate jurisdiction of Supreme Court in regard to criminal matters:*

(1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court-

(a) Has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or

(b) Has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or

(c) Certifies under article 134A that the case is a fit one for appeal to the Supreme Court: Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1)of article 145 and to such conditions as the High Court may establish or require.

(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence

in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law.

134A. *Certificate for appeal to the Supreme Court*: Every High Court, passing or making a judgment, decree, final order, or sentence, referred to in clause (1) of article 132 or clause (1) of article 133, or clause (1) of article 134,-

(a) May, if it deems fit so to do, on its own motion; and

(b) Shall, if an oral application is made, by or on behalf of the party aggrieved, immediately after the passing or making of such judgment, decree, final order or sentence, determine, as soon as may be after such passing or making, the question whether a certificate of the nature referred to in clause (1) of article 132, or clause (1) of article 133 or, as the case may be, sub-clause (c) of clause (1) of article 134, may be given in respect of that case.

135. *Jurisdiction and powers of the Federal Court under existing law to be exercisable by the Supreme Court*: Until Parliament by law otherwise provides, the Supreme Court shall also have jurisdiction and powers with respect to any matter to which the provisions of article 133 or article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law.

136. *Special leave to appeal by the Supreme Court:*

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

137. *Review of judgments or orders by the Supreme Court:* Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

138. *Enlargement of the jurisdiction of the Supreme Court:*

(1) The Supreme Court shall have such further jurisdiction and powers with respect to any of the matters in the Union List as Parliament may by law confer.

(2) The Supreme Court shall have such further jurisdiction and powers with respect to any matter as the Government of India and the Government of any State may by special agreement confer, if Parliament by law provides for the exercise of such jurisdiction and powers by the Supreme Court.

139. *Conferment on the Supreme Court of powers to issue certain writs*: Parliament may by law confer on the Supreme Court power to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for any purposes other than those mentioned in clause (2) of article 32.

139A. *Transfer of certain cases:*

(1) Where cases involving the same or substantially the same questions of law are pending before the Supreme Court and one or more High Courts or before two or more High Courts and the Supreme Court is satisfied on its own motion or on an application made by the Attorney-General of India or by a party to any such case that such questions are substantial questions of general importance, the Supreme Court may withdraw the case or cases pending before the High Court or the High Courts and dispose of all the cases itself:

Provided that the Supreme Court may after determining the said questions of law return any case so withdrawn together with a copy of its judgment on such questions to the High Court from which the case has been withdrawn, and the High Court shall on receipt thereof, proceed to dispose of the case in conformity with such judgment.

(2) The Supreme Court may, if it deems it expedient so to do for the ends of justice, transfer any case, appeal or other proceedings pending before any High Court to any other High Court.

140. *Ancillary powers of Supreme Court:* Parliament may by law make provision for conferring upon the Supreme Court such supplemental powers not inconsistent with any of the provisions of this Constitution as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under this Constitution.

141. *Law declared by Supreme Court to be binding on all courts*: The law declared by the Supreme Court shall be binding on all courts within the territory of India.

142. *Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc:*

(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

143. *Power of President to consult Supreme Court:*

(1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the

Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

(2) The President may, notwithstanding anything in the proviso to article 131, refer a dispute of the kind mentioned in the said proviso to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon.

144. *Civil and judicial authorities to act in aid of the Supreme Court:* All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.

144A. [Special provisions as to disposal of questions relating to constitutional validity of laws.] Rep. by the Constitution (Forty-third Amendment) Act, 1977, s. 5 (w.e.f. 13-4-1978).

145. *Rules of Court, etc.:*

(1) Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including-

(a) Rules as to the persons practising before the Court;

(b) Rules as to the procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Court are to be entered;

(c) Rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III;

(cc) rules as to the proceedings in the Court under article 139A;

(d) Rules as to the entertainment of appeals under sub-clause (c) of clause (1) of article 134;

(e) Rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court for such review are to be entered;

(f) Rules as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged in respect of proceedings therein;

(g) Rules as to the granting of bail;

(h) Rules as to stay of proceedings;

(i) Rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay;

(j) Rules as to the procedure for inquiries referred to in clause (1) of article 317.

(2) Subject to the provisions of clause (3), rules made under this article may fix the minimum number of Judges who are to sit for any purpose, and may provide for the powers of single Judges and Division Courts.

(3) The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under article 143 shall be five: Provided that, where the Court hearing an appeal under any of the provisions of this Chapter other than article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion.

(4) No judgment shall be delivered by the Supreme Court save in open Court, and no report shall be made under article 143 save in accordance with an opinion also delivered in open Court.

(5) No judgment and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion.

146. *Officers and servants and the expenses of the Supreme Court:*

(1) Appointments of officers and servants of the Supreme Court shall be made by the Chief Justice of India or such other Judge or officer of the Court as he may direct: Provided that the President may by rule require that in such cases as may be specified in the rule, no person not already attached to the Court shall be appointed to any office connected with the Court, save after consultation with the Union Public Service Commission.

(2) Subject to the provisions of any law made by Parliament, the conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of India or by some other Judge or officer of the Court authorised by the Chief Justice of India to make rules for the purpose: Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the President.

(3) The administrative expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of India, and any fees or other moneys taken by the Court shall form part of that Fund.

147. *Interpretation:* In this Chapter and in Chapter V of Part VI, references to any substantial question of law as to the interpretation of this Constitution shall be construed as including references to any substantial question of law as

to the interpretation of the Government of India Act, 1935 (including any enactment amending or supplementing that Act), or of any Order in Council or order made thereunder, or of the Indian Independence Act, 1947, or of any order made thereunder.

POWER OF JUDICIARY

Judicial Review is the power of judiciary to review any act or orders of the Legislative and Executive wings and to pronounce upon the constitutional validity when challenged by the affected person. While reviewing such enactment, the Supreme Court will examine whether jurisdictional limits have been transgressed. This power is based upon a simple rationale that the constitution is the supreme law of land and any authority, if it ventures to go beyond the limitation laid down by the constitution, will be curbed.

The doctrine of judicial review is a contribution of American constitutional system. This was acquired by the American Supreme Court in Marbury v. Madison case of 1803 when Chief Justice Marshall announcing the verdict remarked that any law violating the constitutional provision is null and void. Since then it got strongly embedded in the constitution and judicial supremacy got established.

In India, the Government of India Act, 1935, gave the power of judicial review to the federal Court, but its scope was limited to the extent that it could review only the provisions of the act which provided for distribution of powers between the Union and Provinces. The Constitution provides for distribution of power among states and the centre, separation of powers among governmental organs and Fundamental Rights, which has widened the scope of judicial review.

The constitution does not refer to the concept of judicial review because the framers realized that there were inherent drawbacks of this doctrine. In the first place, it may set at naught the will of the people expressed through the Parliament: Secondly, judicial review inevitably opens the floodgates litigation involving huge expenditure and loss of time and consequent delay in the implementation of government programmes, and, thirdly, the judiciary is responsible to none and is not answerable for consequences of its decisions.

Justice Patanjali Shastli states: "our constitution contains express provision for judicial review of legislation as to its conformity with the constitution, unlike in America, where the Supreme Court has assumed extensive powers of reviewing legislative acts under 'due process' clause in the Fifth and Fourteenth Amendments". This is especially true as regards the Fundamental Rights as to which this court has been assigned the role of sentinel; while the court naturally attaches great weight to the legislative judgement, it cannot desert its own duty to determine finally the constitutionality of an impugned statute.

There are specific provisions in the constitution which provide for judicial review, though the Supreme Court has enumerated certain rules for applying this doctrine. According to H.M. Seervai, they are:

(1) There is a presemption in favour of constitutionality and a law will not be declared unconstitutional unless the case is free from all doubts and onus to prove that it is unconstitutional lies with the petitioner who has challenged it.
(2) When the validity of law is questioned, it should be upheld to protect parliament sovereignty.
(3) The court will not constitutional questions if a case is capable of being decided on other grounds.
(4) The court will not decide a larger constitutional question when is required by the case before it.
(5) The court will not hear an objection as to the constitutionality of a law by a person whose rights are not affected by it.
(6) A statute cannot be declared unconstitutional merely because it is not consistent with the split of the constitution.
(7) In assessing the constitutionality of a statute the court Is not concerned with the motives-bonafides or malafides-of the legislature but the law must be upheld whatever a court may think of it.
(8) Courts should not pronounce on the validity of an Act or part of an Act which has not been brought into force because till then the question of validity would be merely academic.

The independent India had to go through many controversies leading to institutional rivalry between the legislature and judiciary. Though the power of judicial review had its limitations, it was viewed as a challenge to the supremacy of legislature leading to may constitutional amendments. Dr. Ambedkar had earlier remarked, "The Constituent Assembly In making the constitution has no partisan motive. Beyond securing a good and workable constitution, it has no axe to grind. In considering the articles of the constitution, it has an eye on getting through a particular measure. The future Parliament, if it met as a Constituent Assembly, its members will be acting as partisans seeking to carry amendments to the constitution to facilitate the passing of party measures which they have failed to get through in Parliament by reason of some article of the constitution which has acted as an obstacle in their way. Parliament will have an axe to grind while the Constituent Assembly has none".

But Pandit Nehru, a staunch supporter of parliamentary sovereignty has remarked with a different tone, "No Supreme Court and no judiciary can stand in judgement over the sovereign will of Parliament, representing the will of the entire community…Ultimately, the whole constitution is a creation of Parliament.

By interpretation and amendment, the constitution underwent many vital changes. The process got started with the First Amendment Act, 1951, which abolished the zamindari system. This act was challenged in the Shankari Prasad case on the ground that this has infringed Fundamental Rights. The Court rejected the petition and stated that Parliament is authorized to amend any part of the constitution including the chapter on Fundamental Rights. This was upheld by

a majority judgement in the Sqjjan Singh case where the 17th Amendment Act 1964 was challenged on the ground that it violated Fundamental Rights under article 31A. The landmark judgement professing judicial activism came in 1967, when the 1st, 4th and 17th amendments were challenged in the Golaknath case. The court by majority of 6-5 held that Parliament does not possess the authority, to amend the chapter on Fundamental Rights with respect to Article 13(2) embedding the doctrine of judicial review and giving way to due process of law.

In fear of non-implementation of its social legislations, the Parliament through an ordinance in 1969 nationalized 14 banks under Banking Companies (Acquisition and Transfer of Undertakings) Ordinance. This Act was challenged by R. C. Cooper on the ground that it violated Article 14 and 31(2). Once again in 1970, the President by an executive order abolished-the institution of ruler's privy purses. This was challenged by Madhav Rao Scindia. Both these ordinances were declared unconstitutional by the court.

In response to these setbacks the Parliament framed the Constitution (Twenty Fourth) Amendment Act, 1971, and due amendments were made in articles 13 and 368 to provide the authority to Parliament to amend any part of the constitution. By the (Twenty-Fifth) Amendment Act, 1971, Article 31 was amended to remove obstacles laid down by the court in the Bank Nationalization case. Further, the Tewenty-Sixth Amendment Act, 1971, was made to abolish the institution of rulers privy purses. The government defended its action by stating that these were necessary amendments which would transform socioeconomic structures of the society.

In the Keshvanand Bharati case, the constitutional validity of the twenty-fourth, twenty-fifth and twenty-ninth amendments-came up for judicial review. The court by limiting the power of amendment, held that Parliament does not possess the authority to amend the basic structure of the constitution though the concept of basic structure was not explained. The Supreme Court was moved to review its decision but the bench was abruptly dissolved by the chief justice. In 1975, the Thirty-Ninth Amendment Act, relating to electoral matter, was challenged in the historic election case. The court dismissed the petition and it was held that they had adhered to the theory of basic structure.

The 42nd amendment of the constitution placed limitations upon the exercise of the power of judicial review. They were:

(1) The power of centre was increased by transferring certain provisions from State List to the Concurrent List.
(2) The power of the Supreme Court and High Courts were curtailed. With respect to Article 14, 19 and 31, Parliament can make any law to implement Directive Principles of State Policy.
(3) The powers of the Supreme Court was further curtailed by stating that no amendment of this constitution made or purporting to have been made under this article shall be called in question in any court on any ground.

(4) The validity of central law was to be decided by the Supreme Court (Art. 141A) and not by High Courts (Art. 228A) and subsequently the validity of the state law could be decided only by High Courts.
(5) The power of issuing writs for implementation of Fundamental Rights were curtailed to the effect that these writs will not be issued unless substantial injury has taken place and also if alternative remedy is provided under any law;
(6) Minimum seven judges of the Supreme Court should sit for the purposes of determining constitutional validity of central law and it cannot be declared unconstitutional unless two-thirds majority of judges decide and for the High Court there had to be five judges to determine the constitutional validity of a law.
(7) Further, the appointment procedure of High Court were dealt extensively.
(8) It was also stated that the decisions of any administrative tribunals can be questioned or challenged only in the Supreme Court under Article 323B.

The subsequent amendments, the 43rd and 44th amendments, did restore the lost glory of judiciary and the threat of judicial supremacy got lessened, the judiciary was forced to look into the democratic values of the constitution and interpret them more generously. The 44th amendment:

(1) Deleted Right to Property from the chapter as Fundamental Rights and placed it under article 300A.
(2) Fundamental Rights were to be duly protected.
(3) The powers of judiciary were partially restored by repealing article 131A and 226A and restored the power of judicial review to the courts.

In the Minerva Mills case the court struck a balance between Fundamental Rights and Directive Principles of State Policy by placing Article 39B and C above the chapter on Fundamental Rights. It was further held by Justice Bhagwati that, "It is for the judiciary to uphold the constitutional values and, to enforce constitutional limitations". The court has also been called upon to exercise its power of judicial review in cases relating to presidential rejection of clemency for sentence of death. The court has upheld the decisions of the President. Justice Krishna Iyer, spoke of judicial review in the following words, "No power in the republic is irresponsible or irresponsive, the people in the last resort being the repositories and beneficiaries of public power. But two constitutional limitations exist in our constitutional system. The court cannot intervene everywhere as an omniscient, omnipotent or omnipresent being. And when the constitution has empowered the nation's executive, excluding by implication judicial review it is presumptuous this court to be a super power unlimited. The second limitation conditions all public power, whether a court oversees it or not. That trust consists in the plurality of public authorities. All power, howsoever, majestic and dignified weilding it, shall be exercised in good faith with intelligent and informed care and honestly for public well being".

Further he held that the magnificent concept of judicial review is at its best when kept within the framework of broad principles of public policy and tested

by the intentionability of the statute. The working of the Supreme Court during the first three decades can be described as an arena of struggle between the legislature and the judiciary in relation to Fundamental Rights and power of amendment. The Maneka Gandhi case gave new impetus to the concept of liberty. During this period the court adopted a strategy of coordination enhancing the glory of the institution and practised self-restraint. Many political observers and jurists have held that judiciary will always avoid a confrontation between popular sovereignty and independent judiciary.

The institutional rivalry dominated the Indian political process and judiciary till 1980s and the advocates of parliamentary sovereignty blamed the judiciary for non--implementation of their programmes aimed at weaker sections of the society-the poor and distressed. This led to the outflow of new ideas and dimensions in the minds of the socially progressive judges like Justice Krishna Iyer and Justice P.N. Bhagwati. They led the movement to protect the socially oppressed with programmes like legal aid as provided in article 39A of the constitution inserted by the 42nd amendment and institutions like Lok Adalat and public interest litigation. This added a new dimension in an already existing jurisdiction and power of the judiciary.

LOK ADALAT

Lok Adalat is a voluntary agency. It settles disputes' between the parties outside the courts with the hip of public spirited lawyers and like-minded citizens. It was established by Legal Services and Authorities Act, 1987. It has been given the widest possible jurisdiction and it and take up and any matter, pending in any court including the apex court. The Lok Adalat is guided by legal principles including principles of justice, equality and fair play. The judicial officers of the area and other such members possessing such qualifications conduct the affairs of Lok Adalat. It is being urged by many that Lok Adalat has therapeutic role to fulfil in aid of justice. So the legal system must encourage the government and voluntary agencies should reach out to aid them and the parties must trust them so that it can share the burden of accumulated litigation of the courts.

PUBLIC INTEREST LITIGATION

PIL, or Social Action Interest Litigation as termed by Upendra Baxi, is an offshoot of liberalized rule of locus standi. The traditional rule of locus standi was based on the fact that judicial remedy can be sought only by those who have suffered an injury on account of violation of a legal right by some public authority. The PIL chose to liberalize this rule by making it clear that any person who suffers an injury but is unable to reach the court is helped by public-minded citizens to reach the court to seek justice. The institution of PIL originated in the U.S., in mid-1960s and legal aid to these litigations were provided by private foundations. The PIL cases centered around issues relating to civil rights, liberties and problems of the distressed and this provided representation to those previously unrepresented groups.

The PIL is considered to be an off shoot of social forces where freedom suffered in the cruel hands and public participation was required to check the system. It was an opportunity for like-minded citizens to participate and reaffirm their faith in the legal process. The petition can be filed by any voluntary agency or a member of the public. However, the court must satisfy itself while accepting the petition and see that the person is acting bona fide and not for personal gain or profit. The PIL involves issues connected with environmental protection, and a set of evolved fundamental rights like right to free legal aid, right against torture, right to humane treatment in prison, *etc.*, reflecting the human dimension of the PIL. Further, it extended its domain in a delicate task of mediating between social actualities and social change. Issues like degraded bonded labour, humiliated inmates of protective homes, women prisoners, custodial violence, and other victimised groups are attracting remedial attention of the courts. For this, article 32 emerged as a forum of PIL in recent years and it has become a byword for judicial involvement in social, political and economic affairs of the society.

The movement of liberalization of locus standi started with the Bar Council of Maharashtra v. M. V. Dabholkar where the Bar Council was stated to be an aggrieved party. Further, the judiciary directed the government agencies to be responsive to public grievances. In the Fertilizer Corporation Case it was held that, 'in a society where freedom suffers from atrophy activism is essential for participative public justice. Some risks have to be taken and more opportunities opened for the public-minded citizen to rely on the legal process and not be repelled from it by narrow pendantry now surrounding locus standi.

As litigations became very expensive the affected persons joined together to fight for a common cause. Justice Krishna Iyer has observed in Akhil Bhartiya Shoshit Karmachari Sangh (Railway) case that our current processual jurisprudence is not of individualistic Anglo-Indian mould. It is people-oriented and envisions access to justice through class actions, PIL and representative proceedings. Indeed, little Indians in large numbers seeking remedies in courts through collective proceedings instead of being driven to an expensive plurality of litigations is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept of cause of action and person aggrieved and individual litigation is becoming obsolescent in some jurisdiction.

The PIL got the required recognition in S.P. Gupta case who was not an aggrieved person. The court observed that the basis of judicial redressal was personal injury but today where there is public wrong or injury caused by an act or omission of the state or a public authority which is contrary to the constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such public wrong or public injury.

The Asiad workers case further strengthened the rule of locus standi in the PIL. The PUDR was an organization for the protection of human rights which sought to enforce labour laws for the unorganised construction workers of

projects concerning Asiad Games. Justice Bhagwati held that strategy has to be evolved for relaxing the traditional rule of locus standi so that justice becomes, easily available to the lowly and the lost. Judicial activism has become the root of PIL and this was reflected in various other cases.

The Supreme Court with its wide jurisdiction and powers reflects the concern with providing social equality and rule of law. In India, the apex court has acted judiciously in changing socioeconomic structure and the progress of a nation has been dependent on its decisions.

The existence of this court gives a feeling of security among the citizens. It acts as an independent authority which puts check on extreme actions and upholds the constitutional values. It has adhered to values enshrined in the minds of the framers of the constitution.

Unfortunately, the apex court has not escaped controversy because of various reasons. Lately, the contempt of court cases have shown the sensitivity or the highhandedness of the Judges. The court has at last woken up to the repeated charges of human rights violations by law-enforcing agencies. Further, loads of cases and delays in judgement have reflected the loopholes of the judicial system.

As a democratic institution, the judiciary is answerable to the people. As Justice Krishna Iyer observed that all public power is people's trust and so even judicial power has a fiduciary component... Executive power is accountable to the Parliament and Parliament to the people, judicial power is not accountable to the executive nor to the Parliament in any direct sense.

The judiciary by deriving its power from the constitution, its accountability to people cannot be negated. Unfortunately, these ethnics have not been adhered to by judiciary and therefore whenever natural calamities struck the different parts of the nation it remained a spectator and could not reach the people at the grassroots level, be it Bhopal tragedy or Narmada andolan.

Many areas of the court need to be reformed like the code of conduct of judges, transfer of judges, and rigidity of the system to ensure and preserve its position as the guardian of the constitution and the protector of the basic rights of the individual and society at large.

There is a great need to revamp the judicial system so that people can get access to justice and speedy justice. The experiment of Lok Adalat has met only with a limited success. Most cases referred to Lok Adalat are those where the state has to pay and it agrees to pay for an early settlement. The Supreme Court of India should inspire alternate dispute settlement machinery where public can redress its grievances and not burden it with special leave petitions. The Judges should write brief judgements and give early decisions. In a few cases judgments are pronounced only when a judge is to, retire, otherwise they remain reserved for unlimited period. Quality of judges and ability to handle cases with speed and honesty should be the criterion in selection. Unfortunately, politics has entered even in appointments.

One finds that judges like ministers also come from different High Courts representing different castes, class, or religious backgrounds. It would be

worthwhile to restrict the time for arguments. It need not be stressed that a lot of time is wasted by a few senior lawyers who keep arguing for days and many other cases suffer. There is need to reform even the legal profession, which has made access to Supreme Court virtually impossible for millions in this country. Long and tardy procedure with further uncertainty whether the matter would be taken up or not on a particular day keeps the poor away from approching the Supreme Court.

Time has come when either we reduce the cases that can come up before the Supreme Court or have its benches in different regions. The sitting judges should not be appointed for commissions of inquiry. There is need to have a fresh took at Advisory jurisdiction also. The recent reference on Ram Janam Bhumi-Babri Masjid dispute will not end the controversy even after the decision.

4

Indian Constitution Parts and Articles

Original Indian Constitution had 22 parts and 395 articles. Later 3 parts were added to it as amendments (9A – Muncipalities, 9B – co-operative societies and 14A tribunals). Various articles were also added under these 25 parts of Indian constitution as amendments. At present the total article count is around 444. An overview of Indian Constitution Parts and Articles is provided in this post. Take the best out of it!

Parts of Indian Constitution

The 22 parts of the Indian Constitution along with Subject and Articles they cover are given below.

Part	Subject	Articles
Part I	The Union and its territory	Art. 1 to 4
Part II	Citizenship	Art. 5 to 11
Part III	Fundamental Rights	Art. 12 to 35
Part IV	Directive Principles	Art. 36 to 51
Part IVA	Fundamental Duties	Art. 51A
Part V	The Union	Art. 52 to 151
Part VI	The States	Art. 152 to 237
Part VII	Repealed by Const. (7th Amendment) Act, 1956	
Part VIII	The Union Territories	Art. 239 to 242
Part IX	The Panchayats	Art. 243 to 243O
Part IXA	The Muncipalities	Art. 243P to

		243ZG
Part IXB	Co-operative Societies	Art. 243H to 243ZT
Part X	The Scheduled and Tribal Areas	Art. 244 to 244A
Part XI	Relations between the Union and the States	Art. 245 to 263
Part XII	Finance, Property, Contracts and Suits	Art. 264 to 300A
Part XIII	Trade, Commerce and Intercourse within the Territory of India	Art. 301 to 307
Part XIV	Services under the Union and the States	Art. 308 to 323
Part XIVA	Tribunals	Art. 323A to 323B
Part XV	Elections	Art. 324 to 329A
Part XVI	Special provisions relation to certain classes	Art. 330 to 342
Part XVII	Official Language	Art. 343 to 351
Part XVIII	Emergency Provisions	Art. 352 to 360
Part XIX	Miscellaneous	Art. 361 to 367
Part XX	Amendment of the Constitution	Art. 368
Part XXI	Temporary, Transitional and Special Provisions	Art. 369 to 392
Part XXII	Short title, commencement, authoritative text in Hindi and repeals	Art. 393 to 395

FUNDAMENTAL RIGHTS: PART III (ARTICLES 12-35)

Part III of the Indian Constitution talks about Fundamental Rights. The fundamental rights were included in the constitution because they were considered essential for the development of the personality of every individual and to preserve human dignity. All people, irrespective of race, religion, caste or sex, have been given the right to move the Supreme Court and the High Courts for the enforcement of their fundamental rights. There are seven categories of Fundamental rights which are covered from Articles 12-35.

Article 12: Definition

In this Part, unless the context otherwise required, "the State" includes the Governmental 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 13: Laws Inconsistent with or in Derogation of the Fundamental Rights

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise required, – (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
(b) "Laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

Article 14: Equality before Law

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15: Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Place of Birth

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
(2) No citizen shall, on ground only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to –
  (a) Access to shops, public restaurants, hotels and places of public entertainment; or
  (b) The use of wells, tanks, bathing ghats, roads and places of public resort maintained whole or partly out of State funds or dedicated to the use of general public.
(3) Nothing in this article shall prevent the State from making any special provision for women and children.
(4) Nothing in this article or in clause (2) or article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

Article 16: Equality of Opportunity in Matters of Public Employment

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other

authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Article 17: Abolition of Untouchability

"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

Article 18: Abolition of Titles

(1) No title, not being a military or academic distinction, shall be conferred by the State.

(2) No citizen of India shall accept any title from any foreign State.

(3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

(4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

Article 19: Protection of Certain Rights Regarding Freedom of Speech, Etc.

(1) *All citizens shall have the right:*

- (a) To freedom of speech and expression;
- (b) To assemble peaceably and without arms;
- (c) To form associations or unions;
- (d) To move freely throughout the territory of India;
- (e) To reside and settle in any part of the territory of India; and
- (f) To practice any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far

as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interest of the sovereignty and integrity of India or public order, reasonable restrictions on the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clause (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Schedule Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, –

   (i) The professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business, or

   (ii) The carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

Article 20: Protection in Respect of Conviction for Offenses

(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, not be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

Article 21: Protection of Life and Personal Liberty

No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 21A: Right to Education

The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

Article 22: Protection Against Arrest and Detention in Certain Cases

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) *Nothing in clauses (1) and (2) shall apply:*
   (a) To any person who for the time being is an enemy alien; or
   (b) To any person who is arrested or detained under any law providing for preventive detention.

(4) *No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless:*
   (a) An Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:
   Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or
   (b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) *Parliament may by law prescribe:*
   (a) The circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);
   (b) The maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and
   (c) The procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

Article 23: Prohibition of Traffic in Human Beings and Forced Labour

(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on ground only of religion, race, caste or class or any of them.

Article 24: Prohibition of Employment of Children in Factories, Etc

No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Article 25: Freedom of Conscience and Free Profession, Practice and Propagation of Religion

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.
(2) *Nothing in this article shall affect the operation of any existing law or prevent the State from making any law:*
   (a) Regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
   (b) Providing for social welfare and reform or the throwing open of Hindu reli- gious institutions of a public character to all classes and sections of Hindus.

Explanation I: The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II: In sub-Clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Article 26: Freedom to Manage Religious Affairs

Subject to public order, morality and health, every religious denomination or any section thereof shall have the right:

(a) To establish and maintain institutions for religious and charitable purposes;
(b) To manage its own affairs in matters of religion;
(c) To own and acquire movable and immovable property; and
(d) To administer such property in accordance with law.

Article 27: Freedom as to Payment of Taxes for Promotion of any Particular Religion

No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Article 28: Freedom as to Attendance at Religious Instruction or Religious Worship in Certain Educational Institutions

(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.
(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.
(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is minor, his guardian has given his consent thereto.

Article 29: Protection of Interests of Minorities

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Article 30: Right of Minorities to Establish and Administer Educational Institutions

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.
(1A) In making any law providing for the compulsory acquisition of

any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Article 31: Compulsory Acquisition of Property {…}

Article 31a: Saving of Laws Providing for Acquisition of Estates, Etc.

(1) *Notwithstanding anything contained in article 13, no law providing for:*
   (a) The acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or
   (b) The taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or
   (c) The amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or
   (d) The extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of share-holders thereof, or
   (e) The extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of and such agreement, lease or licence, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19: Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent:

   Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.

(2) *In this article:*

(a) The expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenure in force in that area and shall also include –

(i) Any jagir, inam or muafi or other similar grant and in the States of Tamil Nadu and Kerala, any janmam right;

(ii) Any land held under ryotwari settlement;

(iii) Any land held or let for purposes of agriculture of for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans;

(b) The expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, raiyat, under-raiyat or other intermediary and any rights or privileges in respect of land revenue.

Article 31b: Validation of Certain Acts and Regulations

Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provision thereof shall be deemed to be void, or even to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

Article 31c: Saving of Laws Giving Effect to Certain Directive Principles

Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

Article 31d: Saving of Laws in Respect of Anti-national Activities {…}

Article 32: Remedies for Enforcement of Rights Conferred by this Part

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

Article 32a: Constitutional Validity of State Laws not to be Considered in Proceedings under Article 32

Article 33: Power of Parliament to Modify the Rights Conferred by this Part in their Application to Forces, Etc.

Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to:

(a) The members of the Armed Forces; or
(b) The members of the Forces charged with the maintenance of public order; or
(c) Persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or
(d) Persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in clauses (a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

Article 34: Restriction on Rights Conferred by this Part while Marital Law is in Force in any Area

Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any person in respect of any act done by him in connection with the maintenance or restoration or order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

Article 35: Legislation to give Effect to the Provisions of this Part

Notwithstanding anything in this Constitution:
(a) *Parliament shall have, and the Legislature of a State shall not have, power to make laws:*

(i) With respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law made by Parliament; and

(ii) For prescribing punishment for those acts which are declared to be offences under this part, and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii);

(b) Any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by Parliament.

Explanation: In this article, the expression "law in force" has the same meaning as in article 372.

CENTRAL GOVERNMENT ACT OF ARMS

Section 25 in Arms Act

25. *Punishment for certain offences:*

(1) *Whoever:*

(a) Manufactures, sells, transfers, converts, repairs, tests or proves, or exposes or offers for sale or transfer, or has in his possession for sale, transfer, conversion, repair, test or proof, any arms or ammunition in contravention of section 5; or

(b) Shortens the barrel of a firearm or converts an immitation firearm into a firearm in contravention of section 6; or

(c) Bring into, or takes out of, India, any arms or ammunition of any class or description in contravention of section 11, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

(1AA) Whoever manufactures, sells, transfers, converts, repairs, tests or proves, or exposes or offers for sale or transfer or has in his possession for sale, transfer, conversion, repair, test or proof, any prohibited arms or prohibited ammunition in contravention of section 7 shall be punishable with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine.]

(1B) *Whoever:*

(a) Acquires, has in his possession or carries any firearm or ammunition in contravention of section 3; or

(b) Acquires, has in his possession or carries in any place specified by notification under section 4 any arms of such class or description as has been specified in that notification in contravention of that section; or

(c) Sells or transfers any firearm which does not bear the name of the maker, manufacturer's number or other identification mark stamped or otherwise shown thereon as required by sub-section (2) of section 8 or does any act in contravention of sub-section (1) of that section; or

(d) Being a person to whom sub-clause (ii) or sub-clause (iii) of clause (a) of sub-section (1) of section 9 applies, acquires, has in his possession or carries any firearm or ammunition in contravention of that section; or

(e) Sells or transfers, or converts, repairs, tests or proves any firearm or ammunition in contravention of clause (b) of sub-section (1) of section 9; or

(f) Brings into, or takes out of, India, any arms or ammunition in contravention of section 10; or

(g) Transports any arms or ammunition in contravention of section 12; or

(h) Fails to deposit arms or ammunition as required by sub-section (2) of section 3, or sub-section (1) of section 21; or

(i) Being a manufacturer of, or dealer in, arms or ammunition, fails, on being required to do so by rules made under section 44, to maintain a record or account or to make therein all such entries as are required by such rules or intentionally makes a false entry therein or prevents or obstructs the inspection of such record or account or the making of copies of entries therefrom or prevents or obstructs the entry into any premises or other place where arms or ammunition are or is manufactured or kept or intentionally fails to exhibit or conceals such arms or ammunition or refuses to point out where the same are or is manufactured or kept, shall be punishable with imprisonment for a term which shall not be less than [one year] but which may extend to three years and shall also be liable to fine: Provided that the Court may for any adequate and special reasons to be recorded in the judgment impose a sentence of imprisonment for a term of less than 6[one year].

(2) Whoever being a person to whom sub-clause (i) of clause (a) of sub-section (1) of section 9 applies, acquires, has in his possession or carries any firearm or ammunition in contravention of that section shall be punishable with imprisonment for a term which may extend to one year, or with fine or with both.

(i) Without informing the district magistrate having jurisdiction or the officer in charge of the nearest police station, of the intended sale or transfer of that firearm, ammunition or other arms; or

(ii) Before the expiration of the period of forty-five days from the date of giving such information to such district magistrate or the officer in charge of the police station, in contravention of the provisions of clause (a) or clause (b) of the proviso to sub-section (2) of section 5, shall be punishable with imprisonment for a term which may extend to six months, or with fine of an amount which may extend to five hundred rupees, or with both.]

(4) Whoever fails to deliver-up a licence when so required by the licensing authority under sub-section (1) of section 17 for the purpose of varying the conditions specified in the licence or fails to surrender a licence to the appropriate authority under sub-section (10) of that section on its suspension or revocation shall be punishable with imprisonment for a term which may extend to six months, or with fine of an amount which may extend to five hundred rupees, or with both.

(5) Whoever, when required under section 19 to give his name and address, refuses to give such name and address or gives a name or address which subsequently transpires to be false shall be punishable with imprisonment for a term which may extend to six months, or with fine of an amount which may extend to two hundred rupees, or with both.

THE CONSTITUTION (FIRST AMENDMENT) ACT, 1951

Statement of Objects and Reasons appended to the Constitution (First Amendment) Bill, 1951 which was enacted as the Constitution (First Amendment) Act, 1951

Statement of Objects and Reasons

During the last fifteen months of the working of the Constitution, certain difficulties have been brought to light by judicial decisions and pronouncements specially in regard to the chapter on fundamental rights. The citizen's right to freedom of speech and expression guaranteed by article 19(1)(a) has been held by some courts to be so comprehensive as not to render a person culpable even if he advocates murder and other crimes of violence.

In other countries with written constitutions, freedom of speech and of the press is not regarded as debarring the State from punishing or preventing abuse of this freedom. The citizen's right to practise any profession or to carry on any occupation, trade or business conferred by article 19(1)(g) is subject to reasonable restrictions which the laws of the State may impose "in the interests of general public".

While the words cited are comprehensive enough to cover any scheme of nationalisation which the State may undertake, it is desirable to place the matter beyond doubt by a clarificatory addition to article 19(6). Another article in regard to which unanticipated difficulties have arisen is article 31. The validity of agrarian reform measures passed by the State Legislatures in the last three years has, in spite of the provisions of clauses (4) and (6) of article 31, formed

the subject-matter of dilatory litigation, as a result of which the implementation of these important measures, affecting large numbers of people, has been held up.

The main objects of this Bill are, accordingly to amend article 19 for the purposes indicated above and to insert provisions fully securing the constitutional validity of zamindari abolition laws in general and certain specified State Acts in particular. the opportunity has been taken to propose a few minor amendments to other articles in order to remove difficulties that may arise.

It is laid down in article 46 as a directive principle of State policy that the State should promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice.

In order that any special provision that the State may make for the educational, economic or social advancement of any backward class of citizens may not be challenged on the ground of being discriminatory, it is proposed that article 15(3) should be suitably amplified. Certain amendments in respect of articles dealing with the convening and proroguing of the sessions of Parliament have been found necessary and are also incorporated in this Bill. So also a few minor amendments in respect of articles 341, 342, 372 and 376.

New Delhi; JAWAHARLAL NEHRU. The 10th May, 1951.

The Constitution (First Amendment) Act, 1951

[18th June,1951.]

An Act to amend the Constitution of India.

BE it enacted by Parliament as follows:

1. *Short title:* This Act may be called the Constitution (First Amendment) Act, 1951.
2. *Amendment of article 15:* To article 15 of the Constitution, the following clause shall be added:-
   "(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.".
3. *Amendment of article 19 and validation of certain laws:* (1) In article 19 of the Constitution,-
   (a) *For clause (2), the following clause shall be substituted, and the said clause shall be deemed always to have been enacted in the following form, namely:*
   "(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.";

(b) In clause (6), for the words beginning with the words "nothing in the said sub-clause" and ending with the words "occupation, trade or business", the following shall be substituted, namely:-
"Nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to:
(i) The professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
(ii) The carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise".

(2) No law in force in the territory of India immediately before the commencement of the Constitution which is consistent with the provisions of article 19 of the Constitution as amended by sub-section (1) of this section shall be deemed to be void, or over to have become void, on the ground only that, being a law which takes away or abridges the right conferred by sub-clause (a) of clause (1) of the said article, its operation was not saved by clause (2) of that article as originally enacted.

Explanation: In this sub-section, the expression "law in force" has the same meaning as in clause (1) of article 13 of the Constitution.

4. *Insertion of new article 31A.-After article 31 of the Constitution, the following article shall be inserted, and shall be deemed always to have been inserted, namely:*

"31A. Saving of laws providing for acquisition of estates, etc.:

(1) Notwithstanding anything in the foregoing provisions of this Part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

(2) *In this article:* (a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any jagir, inam or muafi or other similar grant; (b) the expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder or other intermediary and any rights or privileges in respect of land revenue.".

5. *Insertion of new article 31B:* After article 31A of the Constitution as inserted by section 4, the following article shall be inserted, namely:-
"31B. Validation of certain Acts and Regulations: Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.".
6. *Amendment of article 85:* For article 85 of the Constitution, the following article shall be substituted, namely:-
"85. Sessions of Parliament, prorogation and dissolution:
(1) The President shall from time to time summon each House of Parliament to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.
(2) The President may from time to time- (a) prorogue the Houses or either House; (b) dissolve the House of the People.".
7. *Amendment of article 87:* In article 87 of the Constitution-
(1) In clause (1), for the words "every session", the words "the first session after each general election to the House of the People and at the commencement of the first session of each year" shall be substituted;
(2) In clause (2), the words "and for the precedence of such discussion over other business of the House" shall be omitted.
8. *Amendment of article 174:* For article 174 of the Constitution, the following article shall be substituted, namely:-
"174. Sessions of the State Legislature, prorogation and dissolution:
(1) The Governor shall from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.
(2) *The Governor may from time to time:*
(a) Prorogue the House or either House;
(b) Dissolve the Legislative Assembly.".
9. *Amendment of article 176:* In article 176 of the Constitution,-
(1) In clause (1), for the words "every session", the words "the first session after each general election to the Legislative Assembly and at the commencement of the first session of each year" shall be substituted;

(2) In clause (2), the words "and for the precedence of such discussion over other business of the House" shall be omitted.

10. *Amendment of article 341:* In clause (1) of article 341 of the Constitution, for the words "may, after consultation with the Governor or Rajpramukh of a State,", the words "may with respect to any State, and where it is a State specified in Part A or Part B of the First Schedule, after consultation with the Governor or Rajpramukh thereof," shall be substituted.
11. *Amendment of article 342:* In clause (1) of article 342 of the Constitution, for the words "may, after consultation with the Governor or Rajpramukh of a State,", the words "may with respect to any State, and where it is a State specified in Part A or Part B of the First Schedule, after consultation with the Governor or Rajpramukh thereof," shall be substituted.
12. *Amendment of article 372:* In sub-clause (a) of clause (3) of article 372 of the Constitution, for the words "two years", the words "three years" shall be substituted.
13. *Amendment of article 376:* At the end of clause (1) of article 376 of the Constitution, the following shall be added, namely:
"Any such Judge shall, notwithstanding that he is not a citizen of India, be eligible for appointment as Chief Justice of such High Court, or as Chief Justice or other Judge of any other High Court.".
14. *Addition of Ninth Schedule:* After the Eighth Schedule to the Constitution, the following Schedule shall be added, namely:-
"Ninth Schedule
[Article 31B]
    1. The Bihar Land Reforms Act, 1950 (Bihar Act XXX of 1950).
    2. The Bombay Tenancy and Agricultural Lands Act, 1948 (Bombay Act LXVII of 1948).
    3. The Bombay Maleki Tenure Abolition Act, 1949 (Bombay Act LXI of 1949).
    4. The Bombay Taluqdari Tenure Abolition Act, 1949 (Bombay Act LXII of 1949).
    5. The Panch Mahals Mehwassi Tenure Abolition Act, 1949 (Bombay Act LXIII of 1949).
    6. The Bombay Khoti Abolition Act, 1950 (Bombay Act VI of 1950).
    7. The Bombay Paragana and Kulkarni Watan Abolition Act, 1950 (Bombay Act LX of 1950).
    8. The Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (Madhya Pradesh Act I of 1951).
    9. The Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Madras Act XXVI of 1948).

10. The Madras Estates (Abolition and Conversion into Ryotwari) Amendment Act, 1950 (Madras Act I of 1950).
11. The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (Uttar Pradesh Act I of 1951).
12. The Hyderabad (Abolition of Jagirs) Regulation, 1358F. (No. LXIX of 1358, Fasli).
13. The Hyderabad Jagirs (Commutation) Regulation, 1359F. (No. XXV of 1359, Fasli).".

5

The Law of Specific Relief

Introductory

I. The enactment which defines Specific Relief.
   1. The law as to specific relief is contained in the Specific Relief Act I of 1877.
   2. Before the passing of the Specific Relief Act the law as to Specific Relief was contained in Sections 15 and 192 of the Civil Procedure Code (Act VIII) of 1859.
   3. The law was fragmentary. Section 15 dealt with declaratory decrees and Section 192 dealt with Specific performance of contracts.
   4. The Act aims to *define* and *amend* the law relating to Specific Relief obtainable in Civil Court.

II. The nature of the Law of Specific Relief.
   1. *Laws fall into three categories:* (a) Those which define Rights. (b) Those which define Remedies. (c) Those which define Procedure.
   2. *Illustrations.*
   3. The Law of Specific Relief belongs to the second category. It is a law which deals with Remedies.
   4. The term '*relief* is only another word for remedy which a Court is allowed by law to grant to suitors.

III. What is meant by Specific Relief?
   1. Specific Relief is one kind of remedy recognised by law. Its nature can be best understood by distinguishing the different remedies which the law allows to a person whose right has been invaded.

2. A right to be real must have a remedy. No right can give protection if there is no remedy provided for its vindication. Law therefore invariably provides a remedy for a breach of a right.
3. The general remedy provided by law for a breach of a right is *monetary reparation* called compensation or damages.
4. This remedy of money compensation is not an adequate remedy in *all* cases. The loss of some things can be compensated by payment of money. The loss of others cannot be compensated by money. Their loss can be made good by the *return* of the very *same* article. Similarly, the refusal to perform an obligation may be compensated by money. In other cases, the only adequate remedy is to compel the performance of the very *same* obligation.
5. Thus there are two kinds of remedies provided by law: (a) those under which the suitor is granted the *very same* things to which he is entitled, by virtue of the right he has acquired against his opponent; and (b) those under which the suitor is granted not the very same thing to which he was entitled, but money compensation or damages in lieu thereof.
6. Specific Relief is the name given to the first kind of remedy.
7. The relief is called specific because it is relief in *specie, i.e.*, in terms of the very thing to which a suitor is entitled.

IV. What Specific Reliefs are provided for in the Specific Relief Act.

1. *The forms of Specific Reliefs provided for in the Specific Relief Act form under four divisions:* (1) Taking possession of property and delivering it to the claimant who is out of possession. (2) Requiring Performance of Contract. (3) Compelling the Performance of a Statutory Duty. (4) Preventing the doing of a wrong.
2. *The subdivisions of the 4th category are:* (i) Rectification of an instrument. (ii) Rescission of an instrument. (iii) Cancellation of an instrument. (iv) Declaration of status. (v) Receivers—appointment of— (vi) Injunctions.

V. Other Laws defining Specific Reliefs.

1. These are not the only specific remedies administered by courts in India. There are other specific remedies recognised by the Indian Law and which are enforced by courts in India.
2. These specific remedies outside the Specific Relief Act are: (i) Taking an account of the property of a deceased person and administering the same. (ii) Taking accounts of a trust and administering the trust property. (iii) The foreclosure of the right to redeem or sale of the mortgaged property. (iv) Redemption and reconveyance of mortgaged property. (v) Dissolution of partnership, taking partnership accounts, realising assets; discharging debts of partnership, *etc.*
3. We are not concerned with these. Consideration of the Different Kinds of Specific Reliefs Recognised by the Act.

Division I

Recovery of possession of Property Sections 8, 9, 10 and 11
Recovery of Possession of immovable property—Sections 8,9.
Recovery of Possession of movable property—Sections 10, II.
Recovery of Possession of Immovable Property.

1. The Question is—When can a person, who has lost possession of immovable property and sues to recovery possession thereof—be granted possession thereof instead of damages or compensation for the loss of possession.
2. The emphasis is on the nature of the relief—*i.e.*, the recovery of the specific piece of property of which possession is lost. The relief by way of damages or compensation is always open under the general law. Question is when can an injured person insist upon specific relief for the recovery of property.
3. The cases in which a person has lost possession of immovable property fall under two classes—(i) The case of a person who is entitled to possession but who has lost possession. (ii) The case of a person who had possession but who has lost possession.
4. The difference consists in *being entitled to possession* and *being in possession.*
5. These two cases are dealt with in Sections 8 and 9. Both provide that in either case the Plaintiff shall be entitled to Specific Relief by way of recovery of property.
6. Requirements of Section 8. (i) Prove that you have a title to possession and you will succeed in recovering possession by way of specific relief.
7. Requirements of Section 9. 1. Prove that you were in possession with in six months prior to the date of suit. 2. Prove that you were dispossessed *without your consent or otherwise* than in due course of law.

   A *in possession is dispossessed by* B

   I. A with title "is" without title
   II. A without title "is" with title
   III. A without title "is" without title

1. In *all* three cases A can recover possession if he brings suit under Section 9 *i.e.*, within six months—irrespective of the question of title.
2. If he brings a suit after six months, he must rely on title so that A can recover possession in (i) because he has a title. (ii) because he has a possessory title.

But cannot recover in (ii) because B has title and A has not.
Who can maintain a suit under Section 10

1. According to Section 10, only a person *entitled to* the possession of the suit property can sue.
2. Meaning of "entitled to possession"

3. *Title to possession may arise:*
   (i) As a result of ownership or
   (ii) Independently of ownership, as a temporary or special right to present possession
4. *Title to possession as a result of ownership:*
   (i) Ownership may be bare legal ownership or it may be legal ownership coupled with beneficial interest.
   (ii) It is not necessary that a legal owner must have also a beneficial interest in the properly to have a right to maintain a suit under Section 10.
   (iii) This is made explicit in Explanation I, where a trustee is permitted to sue for the possession of the trust properly although he has no beneficial interest in it.
5. *Title to possession independently of ownership:*
   1. *Title to possession independently of ownership may arise in two ways:* (i) By the act of owner. (ii) Otherwise than by the act of the owner.
      Title to Possession by the Act of the Owner:
      (i) The owner may by his own act create in another person a right to the possession of the thing which belongs to him as *owner.*
      (ii) Illustrations of such a right to possession are to be found in Bailment and lien. (1) Simple bailment cover the cases of: (i) loan, (ii) custody, (iii) carriage, (iv) agency. (2) Other Bailments: 1. Pawn, 2. Hire.
   2. *Difference between Simple Bailment and other Bailments of Pawn or Hire:*
      (i) In Simple Bailment the owner (Bailer) has a right to possession and the Bailee has legal possession. The Bailee being entitled to possession can maintain a suit to recover possession. The Bailer having a right to possession can also maintain a suit to recover possession against any person other than a Bailee.
      (ii) *In other Bailments of Pawn or Hire:* The Bailer has no right to possession. The right to possession is vested in the Pawnee or Hirer during the continuance of the Bailment and it is only the Bailee (Pawnee or Hirer) who can maintain a suit for the recovery of possession.
   3. Lien is an illustration of a right to possession arising out of the act of the owner.
      (1) Lien is a right to possession of a thing which arises out of debt due by the owner.
      (2) The right to possession of the owner is thus temporarily vested in another.

4. *All that is necessary to maintain a suit is a right to present possession:*
   (i) The right of present possession may arise out of ownership or may not. (ii) Right to present possession may be special or temporary.
   (ii) Right to possession otherwise than by the act of the owner. (1) The founder of lost goods has a right to possession. (2) It is not the result of the act of the owner. (3) But it is good against all the world except the true owner.

Against whom can such a Suit be Maintained

1. A suit under Section 10 can be maintained against any one and can be maintained even against the true owner.
2. All that is necessary is that the Plaintiff must be entitled to possession.

Section 11. Movable Property

Q. 1.—Who can maintain a suit under Section 11.

A.—The person entitled to *immediate possession.*

Q. 2.—Against whom can such a suit be maintained?

A.—Against any person if he is not owner.

The Defendant must not be the owner. If he is, then Section 10 would apply.

Q. 3.—In what case will there be specific relief by way of recovery of possession?

A—(i) Where the person who holds the thing is the agent or trustee of the claimant. (ii) Where compensation for money would not be adequate compensation to the claimant for the loss. (iii) Where it is extremely difficult to ascertain actual damage caused by its loss. (iv) Where the possession of the person is the result of a wrongful transfer from the claimant.

Specific Relief regarding Possession of Property

They are dealt with in Sections 8—II.

Section 8. Recovery of specific immovable property by a person entitled to the possession thereof.

Section 9. Recovery of possession of specific immovable property by a person who is dispossessed.

Section 10. Recovery of possession of specific movable property by a person *entitled to its possession.* (1) By reason of ownership (2) By reason of temporary or special rights (Trustee) Bailment Pawn.

Section II. Recovery of possession of Specific immovable property by a person who is entitled to its *immediate possession.* This applies when the person having possession is not owner

What is meant by possession in Law?

Legal possession is a compound of two ingredients: *Corpus and animus domini.*

Note:

(i) Legal Possession does not involve the element of title or right. Legal Possession is wholly independent of right or title. Legal Possession

may be *lawful* or *unlawful*. If a possessor acquired his *de facto* possession by a means of acquisition recognised by the Law *(Justis fitulus)* he has a lawful possession; if he did not so acquire it (as in the case of a thief) he has legal possession, but it is an unlawful one.

(ii) *Legal Possession* confers more than a personal right to be protected against wrong-doers: it confers a qualified *right* to possess, a right in the nature of property, which is valid against every one, who cannot show a prior and-better title.

There are two elements in legal possession. (i) Corpus, *i.e.*, the physical relation. (ii) Animus, *i.e.*, the mental relation.

Corpus or physical relation does not mean physical contact only. It also includes physical contact resumable at pleasure.

The essence of corpus is the power, to exclude others from the use of a thing, *i.e.*, an effective occupation or control according to the nature of the thing possessed.

Animus is the intention of exercising such power of dealing with a thing at pleasure and excluding others—*animus domini.*

Three Forms of Animus

The mental attitude of the physical possessor in regard to the object of his possession may assume three degrees:

First: His intention may be merely to protect the thing. There is no assertion of right—Servant's possession of masters goods.

Second: Intention to control for certain limited purposes—*e.g.*, tenant—intention to exclude every one except the owner.

Thirdly: Intention amounting to a denial of the right of every other person—This is the real *animus domini.*

Distinction between Possession and Trespass:

1. *What the plaintiff is to prove in such cases is possession of the disputed property and not mere isolated acts of trespass over that property. He must prove:*
   (i) That he exercised acts which amounted to dominion, the nature of these acts of dominion varies with the nature of the property.
   (ii) That the act of dominion was exclusive.
2. If the occupation of the piff., as indicated by those acts, has been peaceable and uninterrupted and has extended over a sufficient length of time, the inference may properly be drawn that the plaintiff was in possession.

Objects of Section 8 and 9:

(i) Section 8 of the Act provides that the person entitled to the possession of specific immovable property may recover it in the manner prescribed by the C. P. C., *i.e.*, by a suit for ejectment on the *basis of title.*

(ii) Section 9 gives a summary remedy to a person, who has, without his consent been dispossessed of immovable property otherwise than *in due course of Law* for recovery of possession without *establishing title.*

Section 9:

This Section deals with the subject of unlawful dispossession, and gives to the person dispossessed the alternative of two remedies:

(i) He may simply prove the fact of his unlawful dispossession, in a suit instituted by him within six months thereof, recover possession of the property. The question of his *title* to the property is quite immaterial.

(ii) He may recover possession by relying on his title in a suit brought by him for that purpose. Here his success depends upon his proof of title.

The former remedy is called remedy by way of a possessory suit and is enacted in Section 9. The latter is the ordinary remedy of a suit based on title and is embodied in Section 8.

Nature and Object of Section 9:

(i) To prevent people from taking the law into their own hands, however good their title may be.

(ii) *To prevent the shifting of the burden of proof owing to dispossession:* Possession being *prima facie* evidence of title.

Anterior possession *per se* constitutes a perfect title to property as between the *dispossessed* and the *dispossessor,* in a suit under Section 9, *i.e.*, within six months of the dispossession.

Question: What is the effect of anterior possession in a suit for possession by a person, who is dispossessed after 6 months have elapsed and a suit under Section 9 is barred?

The following propositions have been judicially established:

(i) Possession for a period of sixty years and upwards is sufficient to create a title in the possessor which no one can question.—8 D.R. 386.

(ii) Adverse possession for 12 years under article 142 is itself title even against the rightful owner himself.
Consequently, where in a suit for possession, a plea of adverse possession during the prescribed period of limitation is set up by the Defat the question of limitation becomes a question of title, and the Plff. must furnish *prima fade* proof of subsisting title at the dale of his suit, before the Defat is required to establish his adverse possession.

(iii) Prior possession, however short, is itself a title against a *mere wrong-doer* and a bare plea of anterior possession, and dispossession, is in fact a good ground for recovery of possession, (1) Where the dispossessor can Drove no title, or (2) Where neither party can prove a title.

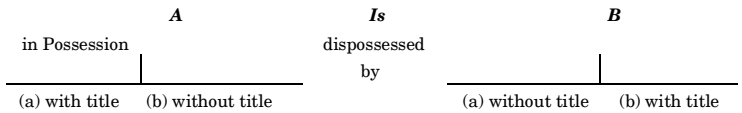

Fig. Statement of the Position.

Entitled to Possession: A right to possession exists either.

(i) As a part of ownership or

(ii) Independently of ownership, as a temporary or special right.

These special rights arise either:

(i) By the act of the owner or,

(ii) Otherwise than by the act of the owner.

By Act of the Owner:

(1) Bailment and (2) Lien

Bailment is (1) simple and (2) special of *Pawn* and *Hire* (i) *Simple Bailments e.g.*, loan, custody, carriage and agency.

In simple Bailments, the Bailor has a *right to Possession* and the Bailee has legal possession.

A is Bailor and B is Bailee. Both can recover possession against C. A can recover possession as against B.

Special Bailment: Pawn and Hire

Bailor has no right to possession during the continuance of the bailment and he only can recover possession.

Lien: Arises out of debt—the Vendor having the right to possession of the thing sold, until the purchaser has paid the purchase money.

Right to possession otherwise than by act of owner

Finder of lost goods—entitled to possession as against all the world except the owner.

Division II

Performance of Contract

Specific Performance of a Contract is "its actual execution according to its stipulations and terms; and is contrasted with damages or compensation for the non-execution of the contract.

It is a species of Specific Relief, afforded by ordering a party to *do* the very act which he is under an obligation *ex-contractor* to do.

Specific Performance of a Contract

Sections 12 and 21 deal with Specific Performance of a Contract.

Section 21.—Defines contracts which *cannot* be specifically enforced.

Section 12.—Defines contracts which *may* be specifically enforced.

Section 27.—There are eight sorts of contracts which *are not* specifically enforceable.

(i) Contracts for the non-performance of which money compensation is an adequate relief.

(ii) Contracts (i) running into minute details. (ii) dependent on personal qualifications or volition of parties. (iii) is such that Court cannot enforce Specific Performance of its material terms.

(iii) Contracts the terms of which the Court cannot find with reasonable certainty—*e.g.*, necessary appliances.
(iv) Contracts which in its nature is revocable *e.g.*, Partnership without duration.
(v) Contracts by trustees in excess of their powers, or in breach of their trust.
(vi) Contracts by company in excess of its powers.
(vii) Contracts the performance of which involves the performance of a continuous duty extending over a longer period than 3 years from its date.
(viii) Contracts material part of the subject-matter supposed by both to exist has ceased to exist.
(ix) Contracts to refer a controversy to arbitration.

Note: Practically Specific Performance because no right of suit is given.

Specific Performance of Contracts

Section 12

1. There are four cases in which Specific Performance may be enforced.
   (i) Where act promised is in performance of a trust.
   (ii) Where there is no standard to ascertain actual damage.
   (iii) Damages, no adequate relief.
   (iv) Compensation for non-performance cannot be got.

Contract

The first question to be determined by the Court in a suit for Specific Performance of an agreement is, whether the agreement in question is a contract or not. Section 4 (a)—right to relief unless agreement is a contract.

The following agreements are not contracts because they are not enforceable and are therefore excluded:

(i) Incomplete agreements—Parties not gone beyond the stage of negotiations;
(ii) Agreements which are void.
(iii) Contingent agreement—until the contingency has applied... should be "arisen".

Voidable contracts are not excluded.

There must always be a contract before the Court which has been unperformed.

Mutuality: The remedy by way of specific performance is *mutual, i.e.*, the vendor may bring his action in all cases where the purchaser can be sure for specific performance.

This principle of mutuality applies both in the case of immovables and movable.

Doctrine of Mutuality: This means, that at the time of making of the contract, there must have been consideration on both sides or promises mutually

enforceable by the parties. Hence specific of performance of a gratuitous promise under Seal will not be granted nor can an infant enforce a contract by this remedy. His promise is not enforceable against himself and it is a general principle of Courts of equity to interfere, only where the remedy is mutual.

Section 13

Specific performance of con tract and impossibility of performance. *Section 56* of the Contract Act.

Section 56 clause 2 enacts a general rule. It lays down when a contract becomes void.

This rule covers every ground of impossibility and is based on the assumption, that there is, in all cases of contract, an implied condition that performance shall be possible.

Impossibility in relation to contract.

Impossibility: (1) at the time or (2) subsequently

Physically or legally impossible. Or subject matter of contract not existent.

Subsequent Impossibility: Whether a party can be relieved upon discovery, subsequent impossibility depends upon—

Whether the contract is conditional or unconditional.

(I) If unconditional— must perform

(II) If conditional— on three circumstances

(i) Continuing legality.

(ii) Conditional by express terms.

(iii) Conditional by implication— continued existence of the subject-matter of the thing in Sec. 56 Contract Act.— subsequent in possibility— the Contract is *void.*

Might on two grounds.

(i) The thing agreed to is physically or legally impossible.

(ii) The subject matter of the contract is nonexistent.

Such Impossibility might be either

Initial or Subsequent: If impossible, the contract is void and no question of Specific Performance arises whether the impossibility is initial or subsequent.

Section 13 of the Specific Relief Act establishes an exception to Section 56 of the Contract Act in respect of one species of impossibility *i.e.*, *impossibility by reason of nonexistence of the subject-matter.*

Section 13 says that Specific Performance of a contract may be enforced even though the subject-matter is partly destroyed.

Sale of a house— Destruction by cyclone— purchaser may be compelled to perform.

Section 13 enacts an exception

It deals with the case where a *portion* of the subject matter ceases to exist.

The rule shortly expressed.

Because A, owing to special inevitable circumstances, is unable to perform his promise, it is no reason why B should not perform his, especially as he

might have protected himself by making the performance of his promise conditional upon performance by A. Having made an unqualified promise he must stand by it.

Specific Performance of a Part of a Contract

Can the Court decree the performance of a part of the contract? This question is dealt-with in Section 14-17.

Section 17 enacts a general rule. It lays that the Court will not, as a general rule, compel specific performance of a Contract, unless it can execute the whole contract. Specific performance must be of the whole or nothing.

Sections 14, 15, 16 form exceptions to the rule.

Exceptions: The promises undertaken— may be divisible or indivisible.

1. *Divisible promises i.e.*, promises— one part stands on a separate and independent footing from another part. If the former can and might be specifically performed it will be so enforced, although the latter cannot or ought not to be specifically enforced— Section 16.

II. *Indivisible promisers.*— The part which cannot be performed may— (i) Admit of compensation by money or, (ii) It may not.

(A) Admits of compensation— Two cases.

It may bear— (i) A small proportion to the whole undertaking, (ii) A large proportion to the whole undertaking.

If— (i) it bears *a small proportion,* then a party sue for specific performance of either part and for damages for non-performance of the balance— Section 14.

If—(ii) *itbesrs a large proportion, then* the promise may sue for Specific Performance of the remaining part, if he relinquishes all claim to further performance and all right to damages.

(B) Part which cannot be performed, does not admit of compensation.

Then the promisee may sue for Specific Performance of the remaining part, if he relinquishes all claim to further performance and all right to damages— Section 15.

Illustration: A contracts to sell to B an estate with a house and garden for 1 lakh. The garden is important for the enjoyment of the house. It turns out that A is unable to convey the garden.

Can B obtain specific performance to the contract?—Yes, if B is willing to pay the price agreed upon and to take the estate and house without garden, waiving all rights to compensation either for the deficiency or for loss sustained by him through A's neglect or default.

There are thus four exceptions to the rule:

1. Where parts are divisible— Specific Performance can be decreed of one part though not of all parts— Section 16.
2. Where parts being in divisible part which *cannot* be performed admits of compensation and bears a small proportion to the whole, the party may sue for Specific Performance — Section 14.

3. Where parts being indivisible, part which *cannot* be performed admits of compensation and bears a large proportion to the whole undertaking, the promisee may sue for Specific Performance of the remaining *i.e.*, of the part which can be performed provided he relinquishes all claim to further performance and all right to damages— Section 15.
4. Where parts being indivisible, the part which cannot be performed does not admit of compensation and bears a large Specific Performance of the part which can be performed may be decreed within the terms mentioned in Section 15.

Specific Performance of a Contract

Where the Vendor or Lessor has an Imperfect Title:

1. The rule as to this is contained in Section 18. This Section deals with four clauses: (i) Where Vendor/Lessor has acquired good title after the contract. (ii) Where procuring of the consent of other persons is necessary. (iii) Where encumbered property is sold as though it was unencumbered. (iv) Where *deposit* has been paid and the suit for Specific Performance has been dismissed.

Clause (a): Is based on the undeniable proposition that when a person enters into a contract without the power of performing that contract, and subsequently acquires the power of performing that contract, he is bound to do so.

Illus: An heir apparent, who contracts to sell the property to which he is heir, will be compelled to specifically perform such contract if and when he succeeds to the property.

Whatever interest the seller acquires in the property subsequently to the contract, he will be compelled to convey to the purchaser.

Clause (b): Is based upon the proposition that where the validity of a contract is dependent upon the concurrence of a stranger to the contract, and the stranger to the contract is bound to convey at the request of the Vendor or lessor, the Vendee and the lessee can compel him to obtain such concurrence.

Clause (c): Is based upon the proposition that where the property sold or leased is represented as being free from encumbrance but is *encumbered*, the Vendor shall be compelled to free it from encumbrance sale of property which is mortgaged— Provided the price is not above the mortgage money.

Clause (d): Clauses (a), (b) and (c) cover cases where the purchaser or lessee is the plaintiff suing for perfection of title.

Clause (d) covers a case, where the suit is brought by the Vendor or lessor for Specific Performance and it fails because of his not being able to perfect the title.

In such a case the Court cannot only dismiss the suit with costs, but proceeds to award to the defendant purchaser a special relief *viz*—the return of his deposit with interest and his cost and a lien for all these on the property agreed to be sold or let.

General Rule Regarding Deposit: Deposit is paid as a guarantee for the performance of the contract and where the contract fails by reason of the default of the purchaser, the vendor is entitled to retain the deposit. Rights of Parties to a Contract to sue for Specific Performance

Four cases to be considered:

For whom Contracts may be Specifically Enforced

Section 23 deals with the question Who may obtain *Specific Performance?* Clause (a) any party thereto. Clause (b) (i) an assignee from a promisee. (ii) Legal representative of a promisee after his death. (iii) an undisclosed principal of a promisee. Each of these may obtain Specific Performance of a contract in which he is interested, but each is subject to the proviso that the contract must not be a personal one, nor must the contract prohibit the assignment of the interest of the Promisee. (c) Persons entitled to the benefit of a marriage contractor compromise of doubtful rights between members of the same family. (d) Remainder man on a contract made by a tenant for life. (e) Reversioner in possession. (f) Reversioner in remainder. (g) New company on amalgamation. (h) Company on a contract made by the promoters.

Cases where contract cannot be specifically enforced except by varying it—Sec. 76.

(1) By mistake or fraud the contract is in terms different from that which the Deft. supposed it to be.
(2) Deft. entered into contract under a reasonable misapprehension as to its effect between Deft. and Plff.
(3) Enters into a contract relying upon some misrepresentation by the Plff.
(4) Where the object is to produce a certain result which the contract fails to produce,
(5) Where Parties have agreed to vary it. *Comment.*

Sections 91, 92. Evidence Act.—A plff. cannot give oral evidence to make out a variation. It does not debar a deft. from showing that by reason of fraud or misrepresentation, the writing does not contain the whole contract; he can under provision I to S. 92 give oral evidence to prove that there is variation. Plff. in that case cannot have a decree unless he submits to the variation; the Plff. is put on his election either (1) to have his action for Specific Performance dismissed or (2) have it subject to variation. If he elects not to accept the variation, he does not lose his remedy of damages.

Persons for whom contracts *cannot* be specifically enforced. This is dealt with in Sections 24 and 25.

Section 24: (i) Who could not recover compensation for its breach. (ii) Who has become incapable of performing or voilates any essential term of the contract. (iii) Who has already chosen his remedy and obtain satisfaction for the alleged breach. (iv) Who, previously to the contract had notice that a settlement had been made and was in force.

This Section is distinguishable from Section 23 in that the defence to Specific Performance is not founded on anything *in the contract itself* but is based solely upon the *acts* or *conduct* of the Plff.

Section 24 is a general Section. While Section 25 is a Section which is a particular one and is limited in its application to two kinds of contracts only:— (i) Contract to sale and (ii) Contract to let property whether movable and immovable,

Sec. 25 says that such a contract cannot be specifically enforced in favour a Vendor or Lessor, i.e., in the following cases:

(i) Knowing not to have any title to the property, has contracted to sell or let the same.
(ii) Who cannot give a title free from reasonable doubt at the date fixed by parties or Court.
(iii) Who, previous to entering into the Contract has made a settlement of the subject-matter of the contract.

Settlement is defined in Section 3 and means any instrument— where by the destination or devolution. Successive interests in movable and immovable property is disposed of or is agreed to be disposed of.

Persons against whom contract may be enforced *Section 27.*

(i) Either party.
(ii) Any other person claiming under a party by a title arising subsequently to the Contract, [except a transferee for value without notice].
(iii) Any person claiming under a title which prior to the contract voidable and known to the plantiff, and might have been displaced by the defendant.
(iv) New company after amalgamation.
(v) Company in respect of the contract made by promoters.

Against whom contract cannot be enforced *Section 28.*

(i) Where consideration is grossly inadequate as to be evidence of fraud.
(ii) Where assent is obtained through misrepresentation; unfair practice or other promise not fulfilled.
(iii) Where assent is given under the influence of mistake of fact, misapprehension or surprise.

Specific Performance and Discretion of the Court: In granting Specific Relief, the important point is—When is the Court bound to grant Specific Performance Relief? Obviously the Court cannot grant Specific Performance Relief in cases where the law provides that no Specific Performance Relief shall be granted. Such cases fall under three classes:

(i) Where the nature of the contract is such that law does not allow it to be specifically enforced.
(ii) Where the Plff. is a person in whose favour a contract cannot be specifically enforced.
(iii) Where the Deft. is a person against whom a contract cannot be specifically enforced.

Liabilities of the Parties

Liabilities of the Seller

Before Conveyance

1. Aection 55 (1) (A)—To Disclose Material Defects.
   (1) A contract for the sale of land is not a contract uberrimal fidei: The duty of disclosure is not absolute. The duty to disclose is an obligation to disclose latent defects.
   (2) A latent defect is a defect which the buyer could not with ordinary care discover for himself. There is no duty to disclose defects of which the buyer has actual or constructive notice.
   (3) As to patent defects of which the seller is unaware, the maxim *caevat emptor* applies. But a mutual mistake as to a matter of fact essential to the agreement will render the agreement void.
   (4) A latent defect whether of property or of title must be material. A defect to be material must be of such a nature that it might be reasonably supposed that if the buyer had been aware of it, he might not have entered into the contract at all, for he would be getting something different from what he contracted to buy.
   (5) Whether a defect is material or not must depend upon the circumstances of each case. When land was sold for building purposes, an underground drain was held to be a material defect, but not when a house or land were sold mainly for residence.
   (6) Defects may be Defects in property or Defects in title.
2. Section 55(1)—(B)—Production of Title Deeds
   (1) The obligation is to produce title-deeds for inspection and not for delivery.
   (2) The documents of title required to be produced for inspection are not only documents which are in the possession of the seller, but also includes documents which are in his power to produce.
   (3) There is no obligation *to produce* title deeds unless the buyer makes a requisition.
   (4) The Buyer however must not omit to take inspection, otherwise he will be held to have constructive notice of matters which he would have discovered if he had investigated the title.
3. Section 55(1)(C)—Sellers Duty to Answer Questions
   (1) When the documents of title are produced, the buyer examines them and if he is not satisfied makes requisitions. These requisitions are.— (i) Requisitions relating to title. (ii) Requisitions relating to Conveyance. (iii) Other enquiries.
   (2) Requisitions on title are objections that the documents do not show the agreed title or that the documents are not efficacious *i.e.*, not duly attested.

(3) Requisitions on matters relating to conveyance refer to such matters as the joinder or concurrence of parties to the conveyance.
(4) Inquiries are for the protection of the buyer, and call attention to possible omissions of disclosure by the seller, and seek information on such points as easements, party walls and insurance.
(5) The Seller is bound to answer all requisitions which are relevant to the title and which are specific.
(6) The duty to answer requisitions is altogether distinct from the duty of disclosure under Section 55 (1) (a) of a defect, for, the omission of the buyer to make a requisition will not absolve the seller if he has not made a full disclosure.
(7) A buyer may waive requisitions. Waiver may be express or may be implied.
(8) Waiver is implied from conduct. (i) When a buyer does not press a requisition that has been made. (ii) When a buyer asks for time to pay the price. (iii) When a buyer enters into possession. (iv) When a buyer pays the whole or part of the price.

4. Section 55(1) (D)—Execution of Conveyance
(1) The execution may be to the purchaser or to such person as the purchaser shall direct. Consequently, on a resale by the buyer before conveyance, the conveyance may be direct to the sub-purchaser. The seller may require the original buyer to be a party to the Conveyance if there is a difference of price but not otherwise.
(2) It is the duty of the buyer to tender to the seller a proper draft—*31 Cal.L.J. 87.*
(3) This duty of the buyer is subject to a contract to the contrary.
(4) The execution of the conveyance and the payment of price are reciprocal duties to be performed simultaneously. They are concurrent promises. If either party sues for specific performance, he must show that he was ready and willing to perform his part.
(5) Proper time for execution:— (i) The section is silent as to what is proper time. (ii) The time is usually settled by the contract of sale. (iii) If time is fixed, and an unreasonable delay occurs, the proper course is to give notice making time the essence of the contract (iv) If time is not settled, the proper time is the date when the seller makes out his title.
(6) Proper place for execution:— (i) The Section is silent. (ii) Since it is the buyer who has to tender the draft conveyance to the seller, the proper place for execution would be the Seller's residence or his Solicitor's office.
(7) Cost of Conveyance:— (i) The Section is silent. (ii) This is usually settled by the terms of the contract. (iii) In the absence of any express term, the buyer has to pay the cost of the Stamp—Section 29 (c) Indian Stamp Act.

5. Section 55 (1) (e)—Care of Property
   (1) The contract of sale does not give to the buyer any interest in property. But it imposes upon the seller a personal obligation to take care of the property.
   (2) The seller must also take care of the title deeds. The loss of title deeds depreciates the value of the property and damage done to the estate.
   (3) To take care means to do what a prudent owner ought to and keep the property in reasonable repair and protect it from injury by trespassers.
   (4) The obligation to take care is one collateral to the contract and does not merge in the conveyance. The duty to take care continues even after completion of the sale and the buyer is not responsible for any loss caused by the seller. If the seller neglects his duty, the buyer is entitled to compensation to be deducted from the purchase money; after the completion the buyer may recover damages.
6. Section 55(1) (G)—Meet Outgoings
   (1) It is the duty of the seller to pay what are called under England Law outgoings. In India they include—(i) Public Charges, (ii) Rent, (iii) Interest, (iv) Encumbrances.
   (A) *Public charges over:* (i) Government Revenue. (ii) Municipal Taxes. (iii) Payment charged upon land by Statute either expressly or implied by reason of their being recoverable by distress or other process against the land.
   (B) *Rent:* The payment of rent is a question which arises when the property sold is leasehold property. The seller of the leasehold property is bound to pay rents accruing due up to the date of the sale.
   (C) *Interest:* (i) Encumbrance means—a claim, lien, or liability attached to the property. (ii) The seller's duty is to discharge all Encumbrances. It is immaterial that the buyer was aware of the Encumbrances when he contracted to buy. (iii) The sale is not subject to Encumbrances, unless there is an express provision to that effect. (iv) If the Encumbrance is a common charge on the property sold and other properties of the seller, the buyer may insist on its being discharged out of the other property.
   This liability imposed upon the seller is collateral to the contract and may be enforced even after conveyance.

Seller's Liabilities

After Conveyance

1. Section 55(1)(b)—To give Possession.
   1. It is the duty of the seller to give possession after conveyance and not to leave the buyer to get possession for himself.

2. This liability may be enforced by a suit for Specific Performance.
3. Time for giving possession— (i) The Section does not say when the seller should give possession. (ii) Reference to Section 55 (4) (a) shows that possession be given when ownership passes to the buyer. This would be at the time of the execution of the sale-deed—*6 Lah. 308.* (iii) The seller cannot refuse possession because price has not been paid unless there was intention to the contrary. (iv) The buyer's right to possession and the seller's right to unpaid price may be enforced in the same suit.
4. Nature of Possession— (i) Possession does not mean actual occupation. (ii) Physical possession in the case of tangible and symbolical possession in the case of intangible properly is enough. (iii) Symbolical possession is enough in the case of property which is in the possession of tenants or mortgagees.

2. Section 55 (2)—To Assure that the Interest Subsists.
   1. There are two views as to whether this liability of the seller is one which arises before conveyance or after conveyance.

   (i) *Calcutta View:* This clause contemplates a completed contract and corresponds to covenant for title in an English conveyance. 57 Cal. 1189.

   (ii) *Madras View:* This clause contemplates cases, where the transaction has not progressed beyond the stage of contract. 40 Mad. 338 (350):
   38 Mad. 1171.

   (iii) Lahore view. Follows Madras.
   6 Lah. 308.

   (iv) *Bombay View:* It pertains to liability after conveyance
   18 Bom. S. R. 292: 52 Bom. 883: 31 Bom. LR. 658.
      (a) The provisions of Section 55(1) enable the buyer before completion, to ascertain if the title offered is free from reasonable doubt. Once he has accepted the conveyance and the sale is completed, he has no remedy on the contract except for fraud.
      (b) The covenant for title implied by Section 55 (2) gives the buyer a further remedy in case of defects discovered after conveyance.

   (v) Another view which probably is the correct view. (a) In the matter of Title, the liability of the seller is twofold. (i) He must pass to the buyer a title free from reasonable doubt. (ii) He must pass to the buyer a title which he professes to pass and nothing less. He must make good his representation.
   Under (i) he must prove that he has acquired his title in any one of the recognised ways: such as prescription, possession, inheritance, purchase, *etc.*

Under (ii) if he professes to transfer a full proprietary interest, then interest transferred must be full proprietary interest and not merely occupancy interest: Sale of free from Encumbrances land which is subject to Encumbrance:

Sale of non-transferable land as transferable. (c) Section 55(1) relates to liability for a title free from reasonable doubt: Section 55 (2) relates to liability for passing title which he professed to pass.

Section 55 (2) relates to misrepresentation or misdescription as to title. A distinction must be made between misdescription of title and misdescription of property.

(i) Misdescriplion of title is a breach of the covenant for title under Section 55 (2) and gives right to damages.
(ii) Covenant for title does not extend to misdescription of property *i.e.*, as to the extent of the land sold.
(iii) A covenant for title is not a covenant that the land purported to be conveyed is of the extent stated in the sale-deed. It is merely a contract with the purchaser of the validity of the sellers' title. Consequently if the purchaser finds a deficiency in area his, suit must be based not on the covenant for title, but for part failure of consideration.

3. Express covenant for title. Every conveyancer has an implied covenant for title. But parties may enter into an express covenant relating to title. The points to be noted in regard to an express covenant are:
   (a) If overrides and does away with the effect of all implied covenants.
   (b) Although an express covenant alone can govern the rights of the parties, yet an implied covenant cannot be got rid of except by *clear* and *unambiguous* expression.
4. *Who can Claim the Benefit of the Covenant:* The benefit of a covenant for title can be enjoyed not only by the purchaser and his representatives, but also subsequent alienees, who claim under the purchaser, can enforce it as against the seller.
5. Under this clause the vendor is presumed to guarantee his title absolutely to the property. If he wishes to contact himself out of the covenant he must do so expressly or by necessary implication.
6. The implied covenant for title has nothing to do with the question, whether the buyer has or has not notice of the defect of title and the buyer's knowledge of the defect does not deprive him of the right to sue for damages and can claim a return of the purchase-money if he is dispossessed by reason of a defect in title.
7. *Covenant for Title—what does it Include:* The covenants for title implied in an English conveyance, include:
   (i) Right to convey,
   (ii) Right to quiet enjoyment,

(iii) Right to hold free from Encumbrances,
(iv) Right to further assurance.

Under the covenant for further assurance, the seller is bound to do such further acts for perfecting the buyer's title as the latter may reasonably require. Thus, if a seller has, after the sale perfected an imperfect title by the purchase of an outstanding interest, he can under this covenant, be compelled to convey it to the buyer.

The English covenants are more extensive as they include the covenant for quiet enjoyment, for freedom from Encumbrances and for further assurance. Under Indian Law they are not included.

8. Covenant for title is a covenant for a title free from reasonable doubt. It has been held by the Privy Council that an absolute warranty of title cannot be insisted upon by the purchaser. *9 I.A. 700 (713).*
9. The implied covenant for title does not apply in the case of a trustee:
   (i) A trustee is only deemed to covenant that he has done no act whereby the property is encumbered, or that whereby he is hindered from transferring.
   (ii) If a trustee conveys without disclosing his fiduciary character, he could no doubt be required to convey "as beneficial owner" so as to become subject to the usual covenants for title.
10. The implied covenant for title does not apply in the case of a guardian selling on behalf of the minor.

The Law of Trusts Outline

What is a Trust and to what the act applies?

To what Kinds of Trusts the act Applies?

I. *Section I says in what cases the Act shall not apply. They are:*
   (i) Wakfs created by a Mohammedan.
   (ii) Mutual relations of the members of an undivided family as determined by any customary or personal law.
   (iii) Trusts to distribute prises taken in war among the captors.
   (iv) Public or Private religious or Charitable Endowments.

Explanations.

1. *Wakf:* Permanent dedication by a person professing the Musalman faith of any property for any purpose recognised by the Musalman Law as religious, pious or charitable.

   Two classes of Wakfs:

   (i) Where benefit is reserved to the settlor and his family— Act VI of 1913 applies.
   (ii) Where no benefit is reserved—Act 42 of 1923 applies.

II. Mutual Relations of Members of an Undivided Family
Illus:
1. The manager of a joint Hindu family and other members of the family.
2. A Hindu widow and a reversioner.

Their relations are not governed by the Trust Act. They are governed by customary law or personal law.

III. Distribution of Prises taken in War.
1. *Prise,*—A term applied to a ship or goods captured *jure belli* by the maritime force of a belligerent at sea or seized in port.
2. All prises taken in war vest in the sovereign, and are commonly by the royal warrant granted to trustees upon trust to distribute in a prescribed manner amongst the captors.
3. To such a trust created for the purpose of distributing prises the Trust Act does not apply.

IV. Public Trusts and Private, Religious or Charitable Endowments.
Trusts are either *Public* or *Private Trusts.*

I. *Public Trusts:* A trust is a Public Trust when it is constituted for the benefit either of the public at large or some considerable portion of it answering a particular description. A Public Trust is for an unascertained body of people though capable of ascertainment.

II. *Private Trust:* A Private Trust is a trust created only for the benefit of certain individuals who must be ascertained or ascertainable within a limited time.

III. *The Purposes of a Public Trust:* They fall under three heads:— (i) Public purposes. (ii) Charitable purposes. (iii) Religious purposes.
(1) The phrase public purposes is used in two senses: (a) In its ordinary sense—it includes purposes. Such as mending or repairing of roads, a parish supplying water for the inhabitants of a parish, making or repairing of bridges over any stream or culvert that may be required in a parish.
(2) The Phrase Charitable Purposes—includes alms-giving, building alms-houses, founding hospitals and the like.
(3) The Phrase Religious Purpose—includes relating to religious teaching or worship—purchase or distribution of religious books, upkeep of Churches, Temples, *etc.*

If a Trust is a Public Trust—The Trust Act does not apply. If a Trust is a Private Trust—Does the Trust Act apply?

The Act applies only if the Private Trust is a trust which is not a Charitable or Religious Trust.

What is the Law that applies to a Public Trust or a Private Trust which is Charitable and Religious? There are various enactments which apply.

1. Section 92, C. P. C.
2. The Religious Endowments Act, 1863.
3. The Religious Society's Act I of 1880.
4. The Official Trustee Act II of 1913.
5. The Charitable Endowments Act VI of 1890.
6. The Charitable and Religious Trusts Act XIV of 1920.

6

Amendment of the Constitution of India

Amendment of the Constitution of India is the process of making changes to the Indian constitution. Such changes are made by the Parliament of India. They must be approved by a super-majority in each house of Parliament, and certain amendments must also be ratified by the states. The procedure is laid out in Part XX, Article 368 of the constitution.

Despite these rules there have been over ninety amendments to the constitution since it was enacted in 1950. The Indian Supreme Court has ruled, controversially, that not every constitutional amendment is permissible. An amendment must respect the "basic structure" of the constitution, which is immutable.

PROCEDURE

A proposed amendment begins in Parliament where it is introduced as a bill. It must then be approved by each House of Parliament. In each house it must be supported by (1) a two-thirds majority of those present and voting, and (2) a simple majority of all members (present or not). Certain amendments must then also be ratified by the legislatures of at least one-half of the states. Once all other stages have been completed an amendment receives the assent of the President of India, but this final stage is a formality.

Despite the super-majority requirement in the constitution it is one of the most frequently amended governing documents in the world; amendments have averaged about two a year. This partly because of length and detail of the

constitution. It is the longest of any sovereign nation in the world, consisting of over 390 articles and 117,000 words. The document is very specific in spelling out government powers and so amendments are often required to deal with matters that could be addressed by ordinary statutes in other countries.

Another reason is that the Parliament of India is elected by means of single seat districts, under the plurality (or "first past the post") system used in the United Kingdom and the U.S., This means that it is possible for a group of MPs to win two-thirds of the seats in Parliament without securing two-thirds of the vote.

For example in the first two elections held under the constitution the Indian National Congress party won less than one half of the national vote but roughly two-thirds of seats in the Lok Sabha (lower house). In India every constitutional amendment is formulated as a statute. The first amendment is called the "Constitution (First Amendment) Act", the second, the "Constitution (Second Amendment) Act", and so forth. Each usually has the long title "An Act further to amend the Constitution of India".

GOVERNMENT OF INDIA ACT 1858

The Government of India Act 1858 is an Act of the Parliament of the United Kingdom (21 & 22 Vict. c. 106) passed on August 2, 1858. Its provisions called for the liquidation of the British East India Company (who had up to this point been ruling British India under the auspices of Parliament) and the transference of its functions to the British Crown. Lord Palmerston, then-Prime Minister of the United Kingdom, introduced a bill for the transfer of control of the Government of India from the East India Company to the Crown, referring to the grave defects in the existing system of the government of India.

The main provisions of the bill were:

- The Company's territories in India were to be vested in the Queen, the Company ceasing to exercise its power and control over these territories. India was to be governed in the Queen's name.
- The Queen's Principal Secretary of State received the powers and duties of the Company's Court of Directors. A council of fifteen members was appointed to assist the Secretary of State for India. The council became an advisory body in India affairs. For all the communications between Britain and India, the Secretary of State became the real channel.
- The Secretary of State for India was empowered to send some secret despatches to India directly without consulting the Council. He was also authorised to constitute special committees of his Council.
- The Crown was empowered to appoint a Governor-General and the Governors of the Presidencies.
- Provision for the creation of an Indian Civil Service under the control of the Secretary of State.
- All the property of the East India Company was transferred to the Crown. The Crown also assumed the responsibilities of the Company as they related to treaties, contracts, and so forth.

The Act ushered in a new period of Indian history, bringing about the end of Company rule in India. The era of the new British Raj would last until Partition of India in August 1947, at which time all of the territory of the Raj was granted dominion status within the Dominion of Pakistan and the Union of India.

INDIAN COUNCILS ACT 1861

The Indian Councils Act 1861 was an Act of the Parliament of the United Kingdom that transformed the Viceroy of India's executive council into a cabinet run on the portfolio system. This cabinet had six "ordinary members" who each took charge of a separate department in Calcutta's government: home, revenue, government, law, finance, and (after 1874) public works. The military Commander-in-Chief sat in with the council as an extraordinary member. The Viceroy was allowed, under the provisions of the Act, to overrule the council on affairs if he deemed it necessary - as was the case in 1879, during the tenure of Lord Lytton. The Secretary of State for India at the time the Act was passed, Sir Charles Wood, believed that the Act was of immense importance: "the act is a great experiment. That everything is changing in India is obvious enough, and that the old autocratic government cannot stand unmodified is indisputable." The 1861 Act restored the legislative power taken away by the Charter Act of 1833. The legislative council at Calcutta was given extensive authority to pass laws for British India as a whole, while the legislative councils at Bombay and Madras were given the power to make laws for the "Peace and good Government" of their respective presidencies.

INDIAN COUNCILS ACT 1892

The Indian Councils Act 1892 was an Act of the Parliament of the United Kingdom that authorised an increase in the size of the various legislative councils in British India. Enacted due to the demand of the Indian National Congress to expand legislative council, the number of non-official members was increased both in central and provincial legislative councils. The universities, district board, municipalities, zamindars and chambers of commerce were empowered to recommend members to provincial councils. Thus was introduced the principle of representation. It also relaxed restrictions imposed by the Indian Councils Act 1861, thus allowing the councils to discuss each year's annual financial statement. They coud also put questions within certain limts to the government on the matter of public interest after giving six days' notice. Thus it prepared the base of Indian Democracy.

GOVERNMENT OF INDIA ACT 1935

The Government of India Act 1935 was originally passed in August 1935 (25 & 26 Geo. 5 c. 42), and is said to have been the longest (British) Act of Parliament ever enacted by that time. Because of its length, the Act was retroactively split by the Government of India (Reprinting) Act 1935 (26 Geo. 5 & 1 Edw. 8 c. 1) into two separate Acts:

1. The Government of India Act 1935 (26 Geo. 5 & 1 Edw. 8 c.
2. The Government of Burma Act 1935 (26 Geo. 5 & 1 Edw. 8 c. References in literature on Indian political and constitutional history are usually to the shortened Government of India Act 1935 (*i.e.*, 26 Geo. 5 & 1 Edw. 8 c. 2), rather than to the text of the Act as originally enacted.

OVERVIEW

The most significant aspects of the Act were:

- The grant of a large measure of autonomy to the provinces of British India (ending the system of dyarchy introduced by the Government of India Act 1919)
- Provision for the establishment of a "Federation of India", to be made up of both British India and some or all of the "princely states"
- The introduction of direct elections, thus increasing the franchise from seven million to thirty-five million people
- *A partial reorganization of the provinces:*
  - Sind was separated from Bombay
  - Bihar and Orissa was split into the separate provinces of Bihar and Orissa
  - Burma was completely separated from India
  - Aden was also detached from India, and established as a separate colony
- Membership of the provincial assemblies was altered so as to include more elected Indian representatives, who were now able to form majorities and be appointed to form governments
- The establishment of a Federal Court.

However, the degree of autonomy introduced at the provincial level was subject to important limitations: the provincial Governors retained important reserve powers, and the British authorities also retained a right to suspend responsible government.

The parts of the Act intended to establish the Federation of India never came into operation, due to opposition from rulers of the princely states. The remaining parts of the Act came into force in 1937, when the first elections under the Act were also held.

THE ACT

BACKGROUND TO THE ACT

Indians had increasingly been demanding a greater role in the government of their country since the late 19th century. The Indian contribution to the British war effort during the First World War meant that even the more conservative elements in the British political establishment felt the necessity of constitutional change, resulting in the Government of India Act 1919. That Act introduced a novel system

of government known as provincial "dyarchy", *i.e.*, certain areas of government (such as education) were placed in the hands of ministers responsible to the provincial legislature, while others (such as public order and finance) were retained in the hands of officials responsible to the British-appointed provincial Governor. While the Act was a reflection of the demand for a greater role in government by Indians, it was also very much a reflection of British fears about what that role might mean in practice for India (and of course for British interests there).

The experiment with dyarchy proved unsatisfactory. A particular frustration for Indian politicians was that even for those areas over which they had gained nominal control, the "purse strings" were still in the hands of British officialdom.

The intention had been that a review of India's constitutional arrangements and those princely states that were willing to accede to it. However, division between Congress and Muslim representatives proved to be a major factor in preventing agreement as to much of the important detail of how federation would work in practice. Against this practice, the new Conservative-dominated National Government in London decided to go ahead with drafting its own proposals (the white paper). A joint parliamentary select committee, chaired by Lord Linlithgow, reviewed the white paper proposals at great length. On the basis of this white paper, the Government of India Bill was framed. At the committee stage and later, to appease the diehards, the "safeguards" were strengthened, and indirect elections were reinstated for the Central Legislative Assembly (the central legislature's lower house). The bill duly passed into law in August 1935.

As a result of this process, although the Government of India Act 1935 was intended to go some way towards meeting Indian demands, both the detail of the bill and the lack of Indian involvement in drafting its contents meant that the Act met with a lukewarm response at best in India, while still proving too radical for a significant element in Britain.

SOME FEATURES OF THE ACT

NO PREAMBLE – THE AMBIGUITY OF THE BRITISH COMMITMENT TO DOMINION STATUS

While it had become uncommon for British Acts of Parliament to contain a preamble, the absence of one from the Government of India Act 1935 contrasts sharply with the 1919 Act, which set out the broad philosophy of that Act's aims in relation to Indian political development. The 1919 Act's preamble quoted, and centered on, the statement of the Secretary of State for India, Edwin Montagu (17 July 1917 – 19 March 1922) to the House of Commons on 20 August 1917, which pledged: …the gradual development of self-governing institutions, with a view to the progressive realization of responsible government in India as an integral Part of the British Empire.

Indian demands were by now centering on British India achieving constitutional parity with the existing Dominions such as Canada and Australia, which would have meant complete autonomy within the British Commonwealth.

A significant element in British political circles doubted that Indians were capable of running their country on this basis, and saw Dominion status as something that might, perhaps, be aimed for after a long period of gradual constitutional development, with sufficient "safeguards".

This tension between and within Indian and British views resulted in the clumsy compromise of the 1935 Act having no preamble of its own, but keeping in place the 1919 Act's preamble even while repealing the remainder of that Act. Unsurprisingly, this was seen in India as yet more mixed messages from the British, suggesting at best a lukewarm attitude and at worst suggesting a "minimum necessary" approach towards satisfying Indian desires.

NO BILL OF RIGHTS

In contrast with most modern constitutions, but in common with Commonwealth constitutional legislation of the time, the Act does not include a "bill of rights" within the new system that it aimed to establish. However, in the case of the proposed Federation of India there was a further complication in incorporating such a set of rights, as the new entity would have included nominally sovereign (and generally autocratic) princely states. A different approach was considered by some, though, as the draft outline constitution in the Nehru Report included such a bill of rights.

RELATIONSHIP TO A DOMINION CONSTITUTION

In 1947, a relatively few amendments in the Act made it the functioning interim constitutions of India and Pakistan.

SAFEGUARDS

The Act was not only extremely detailed, but it was riddled with 'safeguards' designed to enable the British Government to intervene whenever it saw the need in order to maintain British responsibilities and interests. To achieve this, in the face of a gradually increasing Indianization of the institutions of the Government of India, the Act concentrated the decision for the use and the actual administration of the safeguards in the hands of the British-appointed Viceroy and provincial governors who were subject to the control of the Secretary of State for India.

'In view of the enormous powers and responsibilities which the Governor-General must exercise in his discretion or according to his individual judgment, it is obvious that he (the Viceroy) is expected to be a kind of superman. He must have tact, courage, and ability and be endowed with an infinite capacity for hard work. "We have put into this Bill many safeguards," said Sir Robert Horne… "but all of those safeguards revolve about a single individual, and that is the Viceroy. He is the linch-pin of the whole system…. If the Viceroy fails, nothing can save the system you have set up." This speech reflected the point of view of the die-hard Tories who were horrified by the prospect that some day there might be a Viceroy appointed by a Labour government.'

REALITY OF RESPONSIBLE GOVERNMENT UNDER THE ACT

A close reading of the Act reveals that the British Government equipped itself with the legal instruments to take back total control at any time they considered this to be desirable. However, doing so without good reason would totally sink their credibility with groups in India whose support the act was aimed at securing. Some contrasting views:

"In the federal government… the semblance of responsible government is presented. But the reality is lacking, for the powers in defence and external affairs necessarily, as matters stand, given to the governor-general limit vitally the scope of ministerial activity, and the measure of representation given to the rulers of the Indian States negatives any possibility of even the beginnings of democratic control. It will be a matter of the utmost interest to watch the development of a form of government so unique; certainly, if it operates successfully, the highest credit will be due to the political capacity of Indian leaders, who have infinitely more serious difficulties to face than had the colonial statesmen who evolved the system of self-government which has now culminated in Dominion status."

Lord Lothian, in a talk lasting forty-five minutes, came straight out with his view on the Bill: "I agree with the diehards that it has been a surrender. You who are not used to any constitution cannot realise what great power you are going to wield. If you look at the constitution it looks as if all the powers are vested in the Governor-General and the Governor. But is not every power here vested in the King? Everything is done in the name of the King but does the King ever interfere? Once the power passes into the hands of the legislature, the Governor or the Governor-General is never going to interfere. …The Civil Service will be helpful.

You too will realise this. Once a policy is laid down they will carry it out loyally and faithfully… We could not help it. We had to fight the diehards here. You could not realise what great courage has been shown by Mr. Baldwin and Sir Samuel Hoare.

We did not want to spare the diehards as we had to talk in a different language… These various meetings — and in due course G.D. (Birla), before his return in September, met virtually everyone of importance in Anglo-Indian affairs — confirmed G.D.'s original opinion that the differences between the two countries were largely psychological, the same proposals open to diametrically opposed interpretations. He had not, probably, taken in before his visit how considerable, in the eyes of British conservatives, the concessions had been… If nothing else, successive conversations made clear to G.D. that the agents of the Bill had at least as heavy odds against them at home as they had in India.

FALSE EQUIVALENCES

"The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." Under the Act, British citizens resident in the UK and British companies registered in the UK must be

treated on the same basis as Indian citizens and Indian registered companies unless UK law denies reciprocal treatment. The unfairness of this arrangement is clear when one considers the dominant position of British capital in much of the Indian modern sector and the complete dominance, maintained through unfair commercial practices, of UK shipping interests in India's international and coastal shipping traffic and the utter insignificance of Indian capital in Britain and the non-existence of Indian involvement in shipping to or within the UK. There are very detailed provisions requiring the Viceroy to intervene if, in his unappealable view, any India law or regulation is intended to, or will in fact, discriminate against UK resident British subjects, British registered companies and, particularly, British shipping interests.

"The Joint Committee considered a suggestion that trade with foreign countries should be made by the Minister of Commerce, but it decided that all negotiations with foreign countries should be conducted by the Foreign Office or Department of External Affairs as they are in the United Kingdom. In concluding agreements of this character, the Foreign Secretary always consults the Board of Trade and it was assumed that the Governor-General would in like manner consult the Minister of Commerce in India. This may be true, but the analogy itself is false. In the United Kingdom, both departments are subject to the same legislative control, whereas in India one is responsible to the federal legislature and the other to the Imperial Parliament."

BRITISH POLITICAL NEEDS VS. INDIAN CONSTITUTIONAL NEEDS

From the moment of the Montagu statement of 1917, it was vital that the reform process stay ahead of the curve if the British were to hold the strategic initiative. However, imperialist sentiment, and a lack of realism, in British political circles made this impossible. Thus the grudging conditional concessions of power in the Acts of 1919 and 1935 caused more resentment and signally failed to win the Raj the backing of influential groups in India which it desperately needed. In 1919 the Act of 1935, or even the Simon Commission plan would have been well received. There is evidence that Montagu would have backed something of this sort but his cabinet colleagues would not have considered it. By 1935, a constitution establishing a Dominion of India, comprising the British Indian provinces might have been acceptable in India though it would not have passed the British Parliament. 'Considering the balance of power in the Conservative party at the time, the passing of a Bill more liberal than that which was enacted in 1935 is inconceivable.'

PROVINCIAL PART OF THE ACT

The provincial part of the Act, which went into effect automatically, basically followed the recommendations of the Simon Commission. Provincial dyarchy was abolished; that is, all provincial portfolios were to be placed in charge of ministers enjoying the support of the provincial legislatures. The British-

appointed provincial governors, who were responsible to the British Government via the Viceroy and Secretary of State for India, were to accept the recommendations of the ministers unless, in their view, they negatively affected his areas of statutory "special responsibilities" such as the prevention of any grave menace to the peace or tranquility of a province and the safeguarding of the legitimate interests of minorities. In the event of political breakdown, the governor, under the supervision of the Viceroy, could take over total control of the provincial government. This, in fact, allowed the governors a more untrammeled control than any British official had enjoyed in the history of the Raj. After the resignation of the congress provincial ministries in 1939, the governors did directly rule the ex-Congress provinces throughout the war. It was generally recognized, that the provincial part of the Act, conferred a great deal of power and patronage on provincial politicians as long as both British officials and Indian politicians played by the rules. However, the paternalistic threat of the intervention by the British governor rankled.

FEDERAL PART OF THE ACT

Unlike the provincial portion of the Act, the Federal portion was to go into effect only when half the States by weight agreed to federate. This never happened and the establishment of the Federation was indefinitely postponed after the outbreak of the Second World War.

TERMS OF THE ACT

The Act provided for Dyarchy at the Centre. The British Government, in the person of the Secretary of State for India, through the Governor-General of India – Viceroy of India, would continue to control India's financial obligations, defence, foreign affairs and the British Indian Army and would make the key appointments to the Reserve Bank of India (exchange rates) and Railway Board and the Act stipulated that no finance bill could be placed in the Central Legislature without the consent of the Governor General. The funding for the British responsibilities and foreign obligations (*e.g.*, loan repayments, pensions), at least 80 percent of the federal expenditures, would be non-votable and be taken off the top before any claims could be considered for (for example) social or economic development programmes. The Viceroy, under the supervision of the Secretary of State for India, was provided with overriding and certifying powers that could, theoretically, have allowed him to rule autocratically.

OBJECTIVES OF THE BRITISH GOVERNMENT

The federal part of the Act was designed to meet the aims of the Conservative Party. Over the very long term, the Conservative leadership expected the Act to lead to a nominally dominion status India, conservative in outlook, dominated by an alliance of Hindu princes and right-wing Hindus which would be well disposed to place itself under the guidance and protection of the United Kingdom. In the medium term, the Act was expected to (in rough order of importance):

- Win the support of moderate nationalists since its formal aim was to lead eventually to a Dominion of India which, as defined under the Statute of Westminster 1931 virtually equalled independence;
- Retain British of control of the Indian Army, Indian finances and India's foreign relations for another generation;
- Win Muslim support by conceding most of Jinnah's Fourteen Points;
- Convince the Princes to join the Federation by giving the Princes conditions for entry never likely to be equaled. It was expected that enough would join to allow the establishment of the Federation. The terms offered to the Princes included:
  - The Princes would select their state's representatives in the Federal Legislature. There would be no pressure for them to democratize their administrations or allow elections for state's representatives in the Federal Legislature;
  - The Princes would enjoy heavy weightage. The Princely States represented about a quarter of the population of India and produced well under a quarter of its wealth. Under the Act:
    - The Upper House of the Federal Legislature, the Council of State, would consist of 260 members (156 (60%) elected from the British India and 104 (40%) nominated by the rulers of the princely states) and,
    - The Lower House, the Federal Assembly, would consist of 375 members (250 (67%) elected by the Legislative Assemblies of the British Indian provinces; 125 (33%) nominated by the rulers of the princely states.)
- Ensuring that the Congress could never rule alone or gain enough seats to bring down the government

This was done by over-representing the Princes, giving every possible minority, the right to separately vote for candidates belonging to their respective communities, and by making the executive theoretically, but not practically, removable by the legislature.

GAMBLES TAKEN BY THE BRITISH GOVERNMENT

- Viability of the proposed Federation. It was hoped that the gerrymandered federation, encompassing units of such hugely different sizes, sophistication and varying in forms of government from autocratic Princely States to democratic provinces, could provide the basis for a viable state. However, this was not a realistic possibility. In reality, the Federation, as planned in the Act, almost certainly was not viable and would have rapidly broken down with the British left to pick up the pieces without any viable alternative.
- Princes Seeing and Acting in Their Own Long-Range Best Interests - That the Princes would see that their best hope for a future would lie in rapidly joining and becoming a united block without which no group

could hope, mathematically, to wield power. However, the princes did not join, and thus exercising the veto provided by the Act prevented the Federation from coming into existence. Among the reasons for the Princes staying out were the following:

— They did not have the foresight to realize that this was their only chance for a future.

— Congress had begun, and would continue, agitating for democratic reforms within the Princely States. Since the one common concern of the 600 or so Princes was their desire to continue to rule their states without interference, this was indeed a mortal threat. It was on the cards that this would lead eventually to more democratic state regimes and the election of states' representatives in the Federal Legislature. In all likelihood, these representatives would be largely Congressmen. Had the Federation been established, the election of states' representatives in the Federal Legislature would amount to a Congress coup from the inside. Thus, contrary to their official position that the British would look favourably on the democratization of the Princely States, their plan required that the States remain autocratic. This reflects a deep contradiction on British views of India and its future.

'At a banquet in the princely state of Benares Hailey observed that although the new federal constitution would protect their position in the central government, the internal evolution of the states themselves remained uncertain. Most people seemed to expect them to develop representative institutions. Whether those alien grafts from Westminster would succeed in British India, however, itself remained in doubt. Autocracy was "a principle which is firmly seated in the Indian States," he pointed out; "round it burn the sacred fires of an age-long tradition," and it should be given a fair chance first. Autocratic rule, "informed by wisdom, exercised in moderation, and vitalized by a spirit of service to the interests of the subject, may well prove that it can make an appeal in India as strong as that of representative and responsible institutions." This spirited defence brings to mind Nehru's classic paradox of how the representatives of the advanced, dynamic West allied themselves with the most reactionary forces of the backward, stagnant East.'

Under the Act, 'There are a number of restrictions on the freedom of discussion in the federal legislature. For example the act forbids... any discussion of, or the asking of questions about, a matter connected with an Indian State, other than a matter with respect to which the federal legislature has power to make laws for that state, unless the Governor-General in his discretion is satisfied that the matter affects federal interests or affects a British subject, and has given his consent to the matter being discussed or the question being asked.'

- They were not a cohesive group and probably realized that they would never act as one.

- Each Prince seemed consumed by the desire to gain the best deal for himself were his state to join the Federation: the most money, the most autonomy.
- That enough was being offered at the Centre to win the support of moderate nationalist Hindu and Muslim support. In fact, so little was offered that all significant groups in British India rejected and denounced the proposed Federation. A major contributing factor was the continuing distrust of British intentions for which there was considerable basis in fact. In this vital area the Act failed Irwin's test:

'I don't believe that… it is impossible to present the problem in such a form as would make the shop window look respectable from an Indian point of view, which is really what they care about, while keeping your hand pretty firmly on the things that matter.' (Irwin to Stonehaven, 12 November 1928).

- That the wider electorate would turn against the Congress. In fact, the 1937 elections showed overwhelming support for Congress among the Hindu electorate.
- That by giving Indian politicians a great deal of power at the provincial level, while denying them responsibility at the Centre, it was hoped that Congress, the only national party, would disintegrate into a series of provincial fiefdoms. In fact, the congress High Command was able to control the provincial ministries and to force their resignation in 1939. The Act showed the strength and cohesion of Congress and probably strengthened it. This does not imply that Congress was not made up of and found its support in various sometimes competing interests and groups. Rather, it recognizes the ability of Congress, unlike the British Raj, to maintain the cooperation and support of most of these groups even if, for example in the forced resignation of Congress provincial ministries in 1939 and the rejection of the Cripps Offer in 1942, this required a negative policy that was harmful, in the long run, to the prospects for an independent India that would be both united and democratic.

INDIAN REACTION TO THE PROPOSED FEDERATION

No significant group in India accepted the Federal portion of the Act. A typical response was: 'After all, there are five aspects of every Government worth the name: (a) The right of external and internal defence and all measures for that purpose; (b) The right to control our external relations; (c) The right to control our currency and exchange; (d) The right to control our fiscal policy; (e) the day-to-day administration of the land…. (Under the Act) You shall have nothing to do with external affairs. You shall have nothing to do with defence. You shall have nothing to do, or, for all practical purposes in future, you shall have nothing to do with your currency and exchange, for indeed the Reserve Bank Bill just passed has a further reservation in the Constitution that no legislation may be undertaken with a view to substantially alter the provisions

of that Act except with the consent of the Governor-General…. there is no real power conferred in the Centre.' (Speech by Mr Bhulabhai DESAI on the Report of the Joint Parliamentary Committee on Indian Constitutional Reform, 4 February 1935.

However, the Liberals, and even elements in the Congress were tepidly willing to give it a go: "Linlithgow asked Sapru whether he thought there was a satisfactory alternative to the scheme of the 1935 Act. Sapru replied that they should stand fast on the Act and the federal plan embodied in it. It was not ideal but at this stage it was the only thing…. A few days after Sapru's visit Birla came to see the Viceroy. He thought that Congress was moving towards acceptance of Federation. Gandhi was not over-worried, said Birla, by the reservation of defence and external affairs to the centre, but was concentrating on the method of choosing the States' representatives. Birla wanted the Viceroy to help Gandhi by persuading a number of Princes to move towards democratic election of representatives. …Birla then said that the only chance for Federation lay in agreement between Government and Congress and the best hope of this lay in discussion between the Viceroy and Gandhi."

THE WORKING OF THE ACT

The British government sent out Lord Linlithgow as the new viceroy with the remit of bringing the Act into effect. Linlithgow was intelligent, extremely hard working, honest, serious and determined to make a success out of the Act. However, he was also unimaginative, stolid, legalistic and found it very difficult to "get on terms" with people outside his immediate circle. In 1937, after a great deal of confrontation, Provincial Autonomy commenced. From that point until the declaration of war in 1939, Linlithgow tirelessly tried to get enough of the Princes to accede to launch the Federation. In this he received only the weakest backing from the Home Government and in the end the Princes rejected the Federation *en masse*. In September 1939, Linlithgow simply declared that India was at war with Germany. Though Linlithgow's behaviour was constitutionally correct it was also offensive to much of Indian opinion. This led directly to the resignation of the Congress provincial ministries which undermined Indian unity. From 1939, Linlithgow concentrated on supporting the war effort.

7

Constitutionalism Rule of Law

Rule of law refers to the supremacy of law: that society is governed by law and this law applies equally to all persons, including government and state officials. Following basic principles of constitutionalism, common institutional provisions used to maintain the rule of law include the separation of powers, judicial review, the prohibition of retroactive legislation and habeas corpus. Genuine constitutionalism therefore provides a minimal guarantee of the justice of both the content and the form of law. On the other hand, constitutionalism is safeguarded by the rule of law. Only when the supremacy of the rule of law is established, can supremacy of the constitution exist. Constitutionalism additionally requires effective laws and their enforcement to provide structure to its framework.

CONSTITUTIONALISM AND CONSTITUTIONAL CONVENTION

The idea of constitutionalism is usually thought to require legal limitation on government power and authority. But according to most consti-tutional scholars, there is more to a constitution than constitutional law. But there is a long-standing tradition of conceiving of constitutions as containing much more than constitutional law.

Dicey is famous for proposing that, in addition to constitutional law, the British constitutional system contains a number of "constitutional conventions" which effectively limit government in the absence of legal limitation. These are, in effect, social rules arising within the practices of the political community and which impose important, but non-legal, limits on government powers.

APPLICATION OF THE PRINCIPLES CONTAINED UNDER

DIRECTIVE PRINCIPLES OF THE STATE POLICY

The Directive principles of the policy lay down fundamental principles for governance of the Country. It controls material resources of the community are well distributed to serve common welfare thereby economic system does not result in an economic concentration of power.

Article 47 states that the State has power to completely prohibit the manufacture, sale possession, distribution and consumption of liquor since it is dangerous.

Citizen does not have fundamental right to trade or business of liquor.

FUNDAMENTAL DUTIES

It is important to note that the fundamental duties cannot be enforced by writ jurisdiction. The fundamental duties can be enforced only and only by constitutional methods.

THE UNION

Article 72 is of key importance to Indian judicial system. During the process of examination of mercy petition, the judicial review power given to the Courts is very limited. Only where the court can interfere is when the application of mind is not done during arriving at the judgement. The intention of keeping Article 72 was to secure the power of sovereign to grant remission within its exclusive domain. Unbridled power of reprieve: as this was preserved power, it was intended to be unrestrained.

ARTICLE 76: ATTORNEY GENERAL OF INDIA (AGI)

The power to appoint Attorney General of India is vested with the President. The primary qualification is that the person to be appointed as AGI should be eligible to be appointed as a judge of Supreme Court. The primary duty of the AGI is to tender advice to the Government of India upon legal matters and secondary duty is to perform other duties as may be from time to time delegated to the AGI. AGI has the right to the audience in all the territories spread across India. The office shall remain in force till the office of President and the remuneration of the AGI shall be as determined by the President.

ARTICLE – 79: PARLIAMENT

- The Parliament of India has two houses namely Councils of the State (Rajya Sabha) and House of the People (Lok Sabha).
- The Composition of the Councils of the State consist 12 members nominated by the President and 238 members shall be elected as representatives of all the States.

- The description is given in Schedule IV
- The representatives of the State Councils shall be elected by the elected members of the Legislative Assembly.

ARTICLE 107 & 108 LEGISLATIVE PROCEDURE

- With respect to Money Bills and other financials bills, a Bill may originate in either House of Parliament
- Unless it has been agreed to by both the houses, a bill shall not be deemed to have been passed by the Houses of Parliament either without amendment or with such amendment only as are agreed to by both houses.
- The bill pending in parliament shall not lapse only reason of prorogation of the houses.
- Any bill pending in the Councils of the States which has not been passed by the houses of the people shall not lapse on a dissolution of the house of the people.
- A bill which is pending in the house of people, or which having been passed by the house of people is pending in the councils of the state shall lapse on a dissolution of the house of the people.

ARTICLE 108

There is the provision where the joint sitting of the both the houses are required:

- *When a bill has been passed by one house and transmitted to another house:*
  - The bill is rejected by other house
  - Houses have finally disagreed
  - More than 6 months elapsed from the date of its received.
- However, the President may, unless the bill has lapsed on account of dissolution of the house of the people, notify to the houses by message if they are sitting and may summon them to jointly meet.

SPECIAL PROCEDURE FOR MONEY BILLS

- The money bill can be placed before the councils of the states.
- First the house of people passes the money bills
- Then it is forwarded to council of states for its recommendations
- The councils of states is duty bound to revert within 14 days
- The house of people thereafter accepts or rejects
- If the house of the people accepts any of the recommendations of the councils of states the money bill shall be deemed to have been passed by both houses

LANGUAGE TO BE USED IN THE PARLIAMENT

- Business in Parliament shall be conducted in Hindi or in English
- However, the member who can't adequately express in said languages may address the house in his mother tongue.

RESTRICTION ON DISCUSSION PARLIAMENT & COURTS CAN'T INQUIRE INTO PROCEEDINGS OF THE PARLIAMENT

- There is no possibilities of taking place the conduct of any judge of the Supreme Court or the High Court except his removal
- The acute law is that the validity of any proceedings in the Parliament shall not be questioned on the grounds of any alleged irregularities.

What is the Legislative Power of the President of India?

- President has the power to promulgate Ordinances if circumstances appears to him
- The Ordinance shall have the same effect as an Act of Parliament.
- The life of 6 months or the President may withdraw the same at any time.

UNION JUDICIARY

Article 124: The Supreme Court of India is the highest judicial court in India. The chief of the Supreme Court is the Chief Justice of India. The other judges can be upto 30. Every judge of the Supreme Court shall be appointed by the President of India under his hand and seal.

The qualification for being appointed as a judge of the Supreme Court is:

1. Citizen of India
2. 5 years judge in High court or of two or more such Courts in Sessions
3. 10 years as an advocate of a High Court
4. In the opinion of the President of India is an extinguished jurist.

Salary of judges of the Supreme Court shall be determined by Parliament by law and otherwise as prescribed in Schedule II.

ARTICLE 132: APPELLATE JURISDICTION OF

Supreme Court in Appeals from High Courts

- A judgement, decree or order passed by High Court can be challenged only in Supreme Court where there persists some substantial question of law as to the interpretation of this constitution
- This includes criminal as well as civil suits.

ARTICLE 136: SPECIAL LEAVE TO APPEAL BY THE SUPREME COURT

- Article 136 specifies no right of appeal on any party but it confers discretionary power of the Supreme Court to interfere is suitable cases. There is a non-obstante clause in the words are overriding effect and clearly indicate the intention of the framers of the constituent that it is a special jurisdiction and residuary power unfettered by any statue or other provisions.
- Article 136 is not a regular appeal. It is a residual provision which enables the Supreme Court interferes with any order of any court.

- Article 136 has the widest possible term, this extraordinary jurisdiction vested by in the Supreme Court
- This is not a right vested to a party and its upto absolute independent discretion of the Supreme Court to entertain a case.

ARTICLE 141: LAW DECLARED BY

Supreme Court to be Binding on All Courts in India

- The subsequent co-ordinate bench shall not consider the whole judgement but will focus only on ratio decidendi applied in said judgement.
- Obiter dicta has been considered of no value
- While interpreting the status of the constitution shall be followed.

ARTICLE 148 – COMPTROLLER AND AUDITOR – GENERAL OF INDIA

- The Comptroller and Auditor-General of India is appointed by the President
- He acts at par with a Judge of the Supreme Court.
- Oath is required before he assumes the office.
- Salary shall be determined by the Parliament by a law
- Not eligible for further office
- His salary is charged from the Consolidated Fund of India

ARTICLE – 245

Legislative Relations – Distribution of legislative powers

Laws made by one state can't have operation in another state. A law which has extra territorial operation can't be directly enforced in another State, but such a law is not held invalid. Article 242(2) provides that no law made by the Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation. There is three fold distribution of legislative power between the Union and the States made by the three lists in the Seventh Schedule of the constitution of India. When repugnancy arises, it happens when both the pieces of legislation deal with the same matter but not where they deal with separate and distinct matter, through cognate and allied character.

ARTICLE 254

Inconsistency between Laws made by the Parliament and Laws made by the Legislature of the Statues

For repugnancy of the provisions, there is twin side requirement to be fulfilled. The Central Act and State Act- there should persists some repugnancy and

Presidential ascent has to be held as being non-existent.

ARTICLE – 368

Power of the Parliament of India to amend the Constitution

The Constitution of India provides constituent power to make amendments and empowers Parliament to which is different from the procedure for ordinary legislation to amend the Constitution by way of addition, variation or repeal of any provision according to the procedure laid down therein,

Concepts like Power of judicial separation of Powers, review secularism, democracy, and drop separate the scope of amendatory power of the Parliament.

POWER TO MAKE CHANGE IN THE BASIC STRUCTURE OF THE CONSTITUTION OF INDIA

The power to make changes to the Basic Structure of the Constitution of India vests only in the People sitting as a nation, through its representative in constituent assembly. If anyone of these were to be deleted, it would amount to have changes made not only in Part II of the Constitution but also in the Article 245 of the Constitution of India.

Conclusion

With the finding the above mentioned significant provisions, it is imperative to draw some conclusion. Since subject is what every India should know about the Constitutional Laws, it is imperative to list down the key areas of benefits that the reader should be benefitted out of this report.

The important interesting facts about Constitution of India:

1. Indian Constitution is the longest Constitution in the World.
2. Objective Resolution was moved by Pt. Jawaharlal Lal Nehru on 13/12/1946.
3. Mr. B.R. Ambedkar was appointed the Chairman of the Parliamentary Committee.
4. *Good Omen:* The day when the Constitution was signed, it was raining outside. It is considered by many as a good Omen.
5. It took 2 years 11 months and 17 days to pass the Constitution.
6. Total of 284 members signed the Constitution of India.
7. The Constitution of India contains a total of 146,385 words.

The Constitution of India is the Charter law of the nation India and derives various powers, enriches with fundamental rights and vests certain duties on every Citizen of India. The Constitution of India defines the three functions, Legislature, Judiciary and Executive and mark a balance between all the three. It delegates powers to CAG, Supreme Court, and High Courts of various State Judicature. It provides powers to the President of India.

Therefore, it is the duty of every citizen to understand and respect the importance of this legendary piece of legislation.

For lawyers, while interpreting any statute, it is imperative to understand and connect provisions of such other legislation with those of Constitution of India.

CONSTITUTION AND CONSTITUTIONALISM: A STUDY PERSPECTIVE IN INDIA

Constitutionalism is a philosophy which is essential for a democratic setup. It ensures that the freedoms of the individual are given primacy and the State does not encroach upon the liberty of the citizen. It ensures that the government is limited and prevents it from turning the democratic setup into dictatorial and authoritative.

MEANING

Constitutionalism is a philosophy which is evolutionary in nature. But the central point of Constitutionalism is a "Limited Government". Constitutionalism recognises the need for a government but at the same time also insists upon restraining its (government's) power.

According to Michel Rosenfeld, there is "*no accepted definition of constitutionalism but, broadly, modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights"*.

According to Giovani Sartori, constitutionalism calls for restriction on the arbitrary power of the State.

Similarly according to McIlwain, constitutionalism means "*legal limitation on government. It is the antithesis of arbitrary rule. Its opposite is a despotic government, the government of will instead of the law.*

Thus constitutionalism means the limitation of government by law. Magna Carta (1215) implies Constitutionalism. It placed a restriction on the power of England's King John. Carl Friedrich writes in his *Constitutional Government and Democracy* that Constitutionalism is built on a simple idea, that the government is organised by people and operated on behalf of the people, but is subject to a series of restraints which attempt to ensure that the power which is needed for such governance is not abused by those who are called upon to do the governing.

ELEMENTS OF CONSTITUTIONALISM

According to Louis Henkin Constitutionalism implies:

1. Popular sovereignty
2. The supremacy of the Constitution and Rule of Law
3. Political Democracy
4. Representative Limited Government
5. Separation of Power
6. Civilian Control of the Military force
7. Police governed by Law and Judicial Control
8. An Independent Judiciary

All these elements restrict the power of the State in a particular way.

According to Michel Rosenfield, modern Constitutionalism requires limits on the power of the government along with the adherence to the Rule of Law and protection of Fundamental Rights.

NEGATIVE AND POSITIVE CONSTITUTIONALISM

Negative Constitutionalism

It is to be noted that the traditional idea of Constitutionalism (as stated above) is a Negative notion of Constitutionalism. Nick Barber calls it "negative Constitutionalism". In law, a negative understanding of an idea means when it prevents an entity from doing a certain act.

The traditional understanding of Constitutionalism fails to explain the positive role that the States play. The common understanding of Constitutionalism is negative in nature because it considers Constitutionalism as only restricting and limiting the power of the state. From the prism of negative Constitutionalism, a State is a danger that needs to be constrained. The role of law is to limit the dangerous capacities of the executive and legislative branches. For instance, the purpose of Separation of power is to protect the liberty of citizens, by restricting the arbitrary action of the state.

Negative Constitutionalism requiring a constitutional structure which prevents the State action is not always desirable. This understanding of Constitutionalism makes it harder for the state to provide health-care and poverty alleviation schemes, which requires government intervention. Thus it is not desirable especially in India which is a welfare state and which aspires to social and economic justice as well along with political justice.

It is because of this that Jeremy Waldron criticises negative Constitutionalism as being anti-democratic. For Waldren, this understanding of Constitutionalism is fundamentally flawed. For him, this understanding of Constitutionalism is against the notion of Egalitarianism which for Waldron is at the core of a Democracy.

Positive Constitutionalism

Positive Constitutionalism challenges the understanding of seeing Constitutionalism entirely in terms of limits upon the State. The positive aspect of Constitutionalism requires the State to be seen in the light of a "Welfare State". The positive version of Constitutionalism requires the creation of effective and competent state institutions to ensure the well being of its citizens.

According to M.P. Singh if a Constitution ignores accommodation and respect for diversity and plurality in a society then it fails to meet the requirement of constitutionalism. Several older constitutions that have ignored this aspect of constitutionalism have introduced it either through judicial interpretations, amendments, appropriate legislation and constitutional application.

NEED FOR CONSTITUTIONALISM

The requirement of Constitutionalism as a limitation on the power of the state has been explained by Prof. B. O. Nwabueze in his book "Constitutionalism in the Emergent States, 1973. According to him " *the last 30 years (starting*

from 1973) has demonstrated that the greatest danger to constitutional government in emergent states arises from the human factor in politics", specifically *"from the capacity of politicians to distort and vitiate whatever governmental forms may be devised".*

According to him, *"a lot depends upon the actual behaviour of these individuals and upon their willingness to observe the rules.*

He says that *"the successful working of a constitution depends upon the 'democratic spirit', that is, a spirit of, fair play, self-restraint and mutual accommodation of differing interests and opinions. There can be no constitutional government unless the wielders of power are prepared to observe the limits upon governmental powers".*

In *S.R. Chaudhuri v. State of Punjab (2001*), constitutional restraints must not be ignored or bypassed if found inconvenient or bent to suit "political expediency". We should not allow the erosion of principles of constitutionalism.

In *New India Assurance Company Ltd. v. Nusli Neville Wadia (2007)*, the Court said that "For proper interpretation of Constitutional provisions not only the basic principles of natural justice have to be borne in mind, but also principles of constitutionalism involved therein."

A CONSTITUTION IS NO GUARANTEE FOR CONSTITUTIONALISM

A written Constitution is no guarantee for Constitutionalism. Even Nazi Germany had a constitution but that does not mean that it adhered to the philosophy of Constitutionalism be it a negative or positive aspect of it.

As the Supreme Court said in *S.R. Chaudhuri v. State of Punjab (2001)* "the mere existence of a Constitution, by itself, does not ensure constitutionalism. What is important is the political traditions of the people and its spirit and determination to work out its constitutional salvation through the chosen system of its political organisation."

Unless primacy to democratic policies and individual rights is not given Constitutionalism cannot survive. Subtle assaults to individual rights especially freedom of Speech and Expression and privacy, such as sedition laws, surveillance laws, undermine Constitutionalism.

Agin in *R.C. Poudyal v. Union of India (1994)* court said that,

"*Mere existence of a Constitution, by itself, does not ensure constitutionalism or a constitutional culture. It is the political maturity and traditions of people that give meaning to a Constitution which otherwise would merely embody the political hopes and ideals".* For constitutionalism, a constitution needs to have some qualities which would either restrain the government from acting against its citizens or compel it to act for securing a dignified life to each one of them

CONSTITUTIONALISM IN INDIA

Various Constitutional provisions contain in itself, *inter-alia* the philosophy of Constitutionalism.

A state by the Constitution

The Indian State is a result of the Constitution of India. Indian Constitution not just provides the rights and immunities to the citizen, but it also delineates the character and structure of the Indian State. Therefore it can also be said that the powers and extent of the Indian State are limited by the Constitution. Its actions are guided by the Directive Principle of State Policy. The Indian State cannot function beyond what the Constitution provides.

Article 21 and Due Process of Law

Article 21 of the Indian Constitution provides that life and liberty cannot be deprived except by a procedure established by law. This means that there has to be a legal justification for the deprivation of life and liberty of a person. The requirement of law for deprivation acts as a limitation on the arbitrary exercise power of the legislature as well as the executive.

Further such a law should not be just a mere prescription, it must conform to the American Due Process which involves law to have the element of "Fundamental Fairness".

In *Swaran Singh v. State of U. P. (1998)* the Court observed that public power, including constitutional power, must never be exercised arbitrarily or malafide, and ordinarily guidelines for fair and equal execution are guarantees of valid use of power. The power being of the greatest moment, cannot be a law unto itself but it must be informed by the finer canons of constitutionalism.

These requirements of Law and of Due process restrict the power of the state. Any violation of these principles would enable the courts to strike down the law.

Fundamental Rights

Fundamental rights are the most basic bulwark against the arbitrary exercise of the power of the state. Fundamental Rights act as restraints on the states, directing states what not to do. They serve as negative covenants for the state.

In *IR Coelho v. State of Tamil Nadu and Ors (2007)* court observed that the principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles and these democratic principles include protection of Fundamental Rights. The principle of constitutionalism is based on the principle of legality which requires the Courts to interpret the legislations on the presumption that the Parliament would not intend to legislate contrary to fundamental rights. The Legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes.

For instance, no law can be made by the state which treats two people who are situated in equal circumstance unequally since it will amount to a violation of Article 14 of the Indian Constitution. Similarly, Freedom of Speech and expression under Article 19(1)(a) can be restricted only on the ground mentioned

in Article 19(2) only *i.e.*, It can be restricted only if the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, or public order, decency or morality is threatened or if the speech is in relation to contempt of court, defamation or incitement to an offence. The freedom of speech cannot be restricted by the state on any other grounds. Thus, these restrictions on speech act as limits on the power of the state in the sense that it delineates the extent to which the state can curb freedom of speech.

Written Constitution

Indian Constitution being written, codified and regarded as supreme law of the land, the Indian State is thus controlled and restricted. Restricted in the sense that it cannot go beyond the limits and mandate of the Indian Constitution. The mandate of the state cannot go beyond the Directive Principles of State Policy, enshrined in Part IV of the Indian Constitution.

Being a written Constitution it firstly provides for a limited government, which is the core of Constitutionalism. The sovereign powers are divided among 3 organs of the government. Powers of each organ are defined by the constitution and no organ or its instrumentalities can transgress its limits.

Further, a written Constitution provides for fundamental law of the land and thus the legislature is bound by the Constitutional principles. The legislature cannot make a law which violates the Constitution. Thus the power of the Constitution is restricted.

In the *State (NCT of Delhi) v. Union of India (2018), the* court said that:

"*The constitutional functionaries owe a greater degree of responsibility towards this eloquent instrument for it is from this document that they derive their power and authority and, as a natural corollary, they must ensure that they cultivate and develop a spirit of constitutionalism where every action taken by them is governed by and is in strict conformity with the basic tenets of the Constitution"*.

Separation of Power

Separation of powers means that the powers of the state are divided among the three principal organs of the government, which are "the Executive", "the Legislature", and "the Judiciary". Each of the organs is restricted to transgress its limits and this system ensures a check on the power of the other, thus restraining them from acting arbitrarily and unreasonably, without due regard to due process.

In the *State (NCT of Delhi) v. Union of India (2018)*, Chief Justice Mishra observed that "*The essence of constitutionalism is the control of power by its distribution among several state organs or offices in such a way that they are each subjected to reciprocal controls and forced to cooperate in formulating the will of the state.*

The design and character of the Indian Constitution ensure that the powers of the Executive and the Legislature is limited so that the discretion given to

these organs does not turn into arbitrariness, an arbitrary exercise. The Fundamental Rights, the basic structure, federal setup of the administration, the amendment procedure all limit the State in a particular way.

CONSTITUTIONALISM

For genuine democracies, constitutions consist of overarching arrangements that determine the political, legal and social structures by which society is to be governed. Constitutional provisions are therefore considered to be paramount or fundamental law. Under these circumstances, if constitutional law itself is inadequate, the nature of democracy and rule of law within a country is affected. The structure of modern nations has been shaped with government being divided into executive, legislative and judicial bodies, with the commonly accepted notion that these bodies and their powers must be separated. Of course, the separation of powers does not mean these bodies function alone, rather they work interdependently, but maintain their autonomy. Other tenets include the idea of limited government and the supremacy of law. Together, these can be termed the concept of constitutionalism. In other words, constitutionalism is the idea that government should be limited in its powers and that its authority depends on its observation of these limitations. A constitution is the legal and moral framework setting out these powers and their limitations. This framework must represent the will of the people, and should therefore have been arrived at through consensus.

MEANING OF CONSTITUTIONALISM

Constitutionalism has a variety of meanings. Most generally, it is "a complex of ideas, attitudes, and patterns of behaviour elaborating the principle that the authority of government derives from and is limited by a body of fundamental law".

A political organization is constitutional to the extent that it "contain[s] institutionalized mechanisms of power control for the protection of the interests and liberties of the citizenry, including those that may be in the minority". As described by political scientist and constitutional scholar David Fellman: It may be said that the touchstone of constitutionalism is the concept of limited government under a higher law.

Constitutionalism' means limited government or limitation on government. It is antithesis of arbitrary powers. Constitutionalism recognizes the need for government with powers but at the same time insists that limitation be placed on those powers. The antithesis of constitutionalism is despotism. A government which goes beyond its limits loses its authority and legitimacy. Therefore, to preserve the basic freedoms of the individual, and to maintain his dignity and personality, the Constitution should be permeated with 'Constitutionalism'; it should have some inbuilt restrictions on the powers conferred by it on governmental organs.

CONSTITUTIONALISM-IN MINIMAL AND IN RICHER SENSE

In some minimal sense of the term, a "constitution" consists of a set of rules or norms creating, structuring and defining the limits of, government power or authority. Take the extreme case of an absolute monarchy, Rex, who combines unlimited power in all three domains. If it is widely acknowledged that Rex has these powers, as well as the authority to exercise them at his pleasure, then the constitution of this state could be said to contain only one rule, which grants unlimited power to Rex. Whatever he decrees is constitutionally valid. When scholars talk of constitutionalism, however, they normally mean something that rules out Rex's case. They mean not only that there are rules creating legislative, executive and judicial powers, but that these rules impose limits on those powers.

Constitutionalism in this richer sense of the term is the idea that government can/should be limited in its powers and that its authority depends on its observing these limitations. In this richer sense of the term, Rex's society has not embraced constitutionalism because the rules defining his authority impose no constitutional limits.

USAGE OF CONSTITUTIONALISM

Constitutionalism has prescriptive and descriptive uses. Law professor Gerhard Casper captured this aspect of the term. Used descriptively, it refers chiefly to the historical struggle for constitutional recognition of the people's right to 'consent' and certain other rights, freedoms, and privileges…. Used prescriptively … its meaning incorporates those features of government seen as the essential elements of the … Constitution."

Descriptive use

One example of constitutionalism's descriptive use is law professor Bernard Schwartz's seeks to trace the origins of the U.S., Bill of Rights. While hardly presenting a "straight-line," the account illustrates the historical struggle to recognize and enshrine constitutional rights and principles in a constitutional order.

Prescriptive use

In contrast to describing what constitutions are, a prescriptive approach addresses what a constitution should be. As presented by Canadian philosopher Wil Waluchow, constitutionalism embodies "the idea … that government can and should be legally limited in its powers, and that its authority depends on its observing these limitations.

HISTORY OF CONSTITUTIONALISM

In discussing the history and nature of constitutionalism, a comparison is often drawn between Thomas Hobbes and John Locke who are thought to have defended, respectively, the notion of constitutionally unlimited sovereignty (*e.g.*, Rex) versus

that of sovereignty limited by the terms of a social contract containing substantive limitations (*e.g.*, Regina). But an equally good focal point is the English legal theorist John Austin who, like Hobbes, thought that the very notion of limited sovereignty is incoherent. For Austin, all law is the command of a sovereign person or body of persons, and so the notion that the sovereign could be limited by law requires a sovereign who is self-binding, who commands him/her/itself. But no one can "command" himself, except in some figurative sense, so the notion of limited sovereignty is, for Austin (and Hobbes), as incoherent as the idea of a square circle. Austin says that sovereignty may lie with the people, or some other person or body whose authority is unlimited. Government bodies - *e.g.*, Parliament or the judiciary - can be limited by constitutional law, but the sovereign - *i.e.*, "the people" - remains unlimited. But if we identify the commanders with "the people", then we have the paradoxical result identified by H.L.A. Hart - the commanders are commanding the commanders.

IMPORTANT FEATURES OF CONSTITUTIONALISM

Entrenchment

According to most theorists, one of the important features of constitutionalism is that the norms imposing limits upon government power must be in some way be entrenched, either by law or by way of constitutional convention. Entrenchment not only facilitates a degree of stability over time, it is arguably a requirement of the very possibility of constitutionally limited government. Were a government institution entitled, at its pleasure, to change the very terms of its constitutional limitations, we might begin to question whether there would, in reality, be any such limitations.

Written ness

Some scholars believe that constitutional rules do not exist unless they are in some way enshrined in a written document. Others argue that constitutions can be unwritten, and cite, as an obvious example of this possibility, the constitution of the United Kingdom. Though the UK has nothing resembling the American Constitution and its Bill of Rights, it nevertheless contains a number of written instruments which arguably form a central element of its constitution. Magna Carta (1215 A.D.) is perhaps the earliest document of the British constitution, while others include The Petition of Right (1628) and the Bill of Rights (1689).

ELEMENTS OF CONSTITUTIONALISM

Written constraints in the constitution, however, are not constraining by themselves. Tyrants will not become benevolent rulers simply because the constitution tells them to. In order to guard against violations against the letter and spirit of the constitution, there needs to be a set of institutional arrangements. Louis Henkin defines constitutionalism as constituting the following elements:

(1) government according to the constitution; (2) separation of power; (3) sovereignty of the people and democratic government; (4) constitutional review; (5) independent judiciary; (6) limited government subject to a bill of individual rights; (7) controlling the police; (8) civilian control of the military; and (9) no state power, or very limited and strictly circumscribed state power, to suspend the operation of some parts of, or the entire, constitution.

Broadly speaking, Henkin's nine elements of constitutionalism can be divided into two groups, one concerns power construction and power lodging; and the other deals with rights protection. These two groups of institutional arrangements work together to ensure the supremacy of the constitution, the existence of limited yet strong government, and the protection of basic freedom.

CONSTITUTIONALISM AND DEMOCRACY

Authoritarian governments are by their very nature unconstitutional. Such governments think of themselves as above the law, and therefore see no necessity for the separation of powers or representative governance. Constitutionalism however, is primarily based on the notion of people's sovereignty, which is to be exercised—in a limited manner—by a representative government. The only consensual and representative form of governance in existence today, is democratic government. In this way, there is a very important and basic link between democracy and constitutionalism. Just as mere constitutions do not make countries constitutional, political parties and elections do not make governments democratic. Genuine democracies rest on the sovereignty of the people, not the rulers. Elected representatives are to exercise authority on behalf of the people, based on the will of the people. Without genuine democracy, there can be no constitutionalism.

CONSTITUTIONALISM IN DIFFERENT COUNTRIES

United States

American constitutionalism has been defined as a complex of ideas, attitudes, and patterns of behaviour elaborating the principle that the authority of government derives from the people, and is limited by a body of fundamental law. These ideas, attitudes and patterns of behaviour, according to one analyst, derive from "a dynamic political and historical process rather than from a static body of thought laid down in the eighteenth century". In U.S., history, constitutionalism—in both its descriptive and prescriptive sense—has traditionally focused on the federal Constitution. Indeed, a routine assumption of many scholars has been that understanding "American constitutionalism" necessarily entails the thought that went into the drafting of the federal Constitution and the American experience with that constitution since its ratification in 1789. There is a rich tradition of state constitutionalism that offers broader insight into constitutionalism in the United States.

United Kingdom

The United Kingdom is perhaps the best instance of constitutionalism in a country that has an uncodified constitution. A variety of developments in seventeenth-century England, including "the protracted struggle for power between king and Parliament was accompanied by an efflorescence of political ideas in which the concept of countervailing powers was clearly defined," led to a well-developed polity with multiple governmental and private institutions that counter the power of the state.

POLISH–LITHUANIAN COMMONWEALTH

From the mid-sixteenth to the late eighteenth century, the Polish–Lithuanian Commonwealth utilized the liberum veto, a form of unanimity voting rule, in its parliamentary deliberations. The "principle of liberum veto played an important role in [the] emergence of the unique Polish form of constitutionalism." This constraint on the powers of the monarch were significant in making the "[r]ule of law, religious tolerance and limited constitutional government ... the norm in Poland in times when the rest of Europe was being devastated by religious hatred and despotism."

CONSTITUTIONALISM IN INDIA

India is a democratic country with a written Constitution. Rule of Law is the basis for governance of the country and all the administrative structures are expected to follow it in both letter and spirit. It is expected that Constitutionalism is a natural corollary to governance in India. But the experience with the process of governance in India in the last six decades is a mixed one. On the one hand, we have excellent administrative structures put in place to oversee even the minutest of details related to welfare maximization but crucially on the other it has only resulted in excessive bureaucratization and eventual alienation of the rulers from the ruled. Since independence, those regions which were backward remained the same, the gap between the rich and poor has widened, people at the bottom level of the pyramid remained at the periphery of developmental process, bureaucracy retained colonial characters and overall development remained much below the expectations of the people.

Case Laws where Principle of 'Constitutionalism' is Legally Recognized by Supreme Court

In I.R. Coelho (Dead) By LRs. vs. State of Tamil Nadu and Ors. view taken by the Supreme Court - The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent

centers of decision making. The protection of fundamental constitutional rights through the common law is main feature of common law constitutionalism.

In Rameshwar Prasad and Ors. Vs. Union of India (UOI) and Anr. "The constitutionalism or constitutional system of Government abhors absolutism - it is premised on the Rule of Law in which subjective satisfaction is substituted by objectivity provided by the provisions of the Constitution itself." Constitutionalism is about limits and aspirations.

As observed by Chandrachud, CJ, in Minerva Mills Ltd. – "The Constitution is a precious heritage and, therefore, you cannot destroy its identity'"

On one hand, our judiciary elicit such intellectual responses that "Faith in the judiciary is of prime importance. Ours is a free nation. Among such people respect for law and belief in its constitutional interpretation by courts require an extraordinary degree of tolerance and cooperation for the value of democracy and survival of constitutionalism" said in Indra Sawhney and Ors. vs.Union of India (UOI) and Ors.

Criticisms

Constitutionalism has been the subject of criticism by numerous anarchist thinkers. For example, Murray Rothbard, who coined the term "anarcho-capitalism", attacked constitutionalism, arguing that constitutions are incapable of restraining governments and do not protect the rights of citizens from their governments. Legal scholar Jeremy Waldron contends that constitutionalism is often undemocratic: Constitutions are not just about retraining and limiting power; they are about the empowerment of ordinary people in a democracy and allowing them to control the sources of law and harness the apparatus of government to their aspirations. Of course, it is always possible to present an alternative to constitutionalism as an alternative form of constitutionalism: scholars talk of "popular constitutionalism" or "democratic constitutionalism." But I think it is worth setting out a stark version of the antipathy between constitutionalism and democratic or popular self-government, if only because that will help us to measure more clearly the extent to which a new and mature theory of constitutional law takes proper account of the constitutional burden of ensuring that the people are not disenfranchised by the very document that is supposed to give them their power.

CONCLUSION

Rothberg wrote that is true that, in the United States, at least, we have a constitution that imposes strict limits on some powers of government. But, as we have discovered in the past century, no constitution can interpret or enforce itself; it must be interpreted by men. And if the ultimate power to interpret a constitution is given to the government's own Supreme Court, then the inevitable tendency is for the Court to continue to place its imprimatur on ever-broader powers for its own government. Furthermore, the highly touted "checks and balances" and "separation of powers" in the American government are flimsy

indeed, since in the final analysis all of these divisions are part of the same government and are governed by the same set of rulers. Criminalization of politics is a bane for democracy and unless urgent steps are taken to counter it, might see the eventual failings of it. Political and administrative corruption is a sad reality of Indian administration and this cancer should be removed from the body politic of Indian democracy on an emergency basis. Aspirations of people at the local level are increasing at an exponential manner and if they are fulfilled, the mounting frustrations are extremely dangerous for functioning of democratic system.

FUNDAMENTALS OF CONSTITUTIONAL LAW OF INDIA

The fundamentals of constitutional law in India are grounded in the Constitution of India, which serves as the supreme legal document guiding the governance of the country. Enacted on January 26, 1950, the Indian Constitution embodies the principles of democracy, republicanism, secularism, and federalism. It establishes the structure of government, delineates the powers and functions of various branches, and guarantees fundamental rights to citizens. Key features of India's constitutional law include a parliamentary form of government, with a President as the ceremonial head of state and a Prime Minister as the head of government. The Constitution also provides for a bicameral legislature, consisting of the Lok Sabha (House of the People) and the Rajya Sabha (Council of States), which enact laws and oversee the functioning of the government. Fundamental rights guaranteed by the Indian Constitution include the right to equality, freedom of speech and expression, freedom of religion, and the right to constitutional remedies. These rights are enforceable through the judiciary, which serves as the guardian of the Constitution and has the power of judicial review to ensure that laws and governmental actions are consistent with constitutional principles. Overall, the fundamentals of constitutional law in India embody the principles of democracy, rule of law, and protection of individual rights, providing the foundation for the functioning of the country's legal and political system. In 'Fundamentals of Constitutional Law in India,' readers explore the cornerstone principles and structures underpinning the country's legal and governance framework.

Dr. Atul Kumar Sahuwala is associated with academics for more than 6 years. He holds the degree of B.Com, LL.B., PGDCA, DFS, MBA in (International Business Management), LL.M. and Doctor of Philosophy in Law From Tantia University, Sri Ganganagar (Rajasthan). He is a National Award winner-Business Solution Expert and National Award-IP Attorney in India. He is supervising research work in the field of Law, Assistant Professor in Faculty of Law, Tantia University, Sri Ganganagar. He has been continuously involved in research work with a bulk of publication in renowned Journals and attended various conferences and seminars and workshops to share and impart his knowledge and view. He is socially active and has contribution in nation, He is a Member of many international and national association in field of law, He is International Quality Management System Auditor.

ACADEMIC UNIVERSITY PRESS

4378/4-B, Murarilal Street, Ansari Road, Daryaganj, New Delhi-110002
Phone : +91-11-23281685, 41043100, Fax: +91-11-23270680
E-Mail: academicuniversitypress@gmail.com

ISBN-978-93-6284-329-6