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CONSTITUTIONAL LAW – I

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STUDY MATERIAL

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CONSTITUTIONAL LAW – I

UNIT I

Meaning and importance of Constitution:

Constitution is the supreme law of each State. It lays down rules regarding the organization, powers and functions of government. It also defines the basic features of the State and the relation between the citizens and the State. The basic, fundamental law of a state which sets out how that state will be organized and the powers and authorities of government between different political units and citizens.

Definition:

In simple words, we can say a Constitution is the Constitutional law of the state. Constitutional law enjoys the position of being the supreme and fundamental law of the state. It lays down the organization and functions of the government of state. The Government can use only those powers which the Constitution grants to it.

1. "Constitution is the collection of principles according to which the powers of the government, the rights of the governed and the relations between the two are adjusted." -**Woolsey**

2. "Constitution is a body of judicial rules which determine the supreme organs of state, prescribes their modes of creation, their mutual relations, their spheres of action and the fundamental place of each of them in relation to state." -**Jellinek**

3. "Constitution of a state is that body of rules or laws, written or unwritten which determine the organization of government, the distribution of powers to the various organs of government and the general principles on which these powers are to be exercised." -**Gilchrist**

On the basis of these definitions it can be said that the Constitution is the sum total of the Constitutional laws of the state.

It lies down:

(1) Organization and powers of the government;

(2) Principles and rules governing the political process;

(3) Relations between the people and their government; and

(4) Rights and duties of the people.

The government of state gets organized and works in accordance with the provisions of the Constitution. People get their rights protected from the Constitution. No one, not even the government, can violate the Constitution.

Types of Constitution:

I. Written Constitution:

A written Constitution means a Constitution written in the form of a book or a series of documents combined in the form of a book. It is a consciously framed and enacted Constitution. It is formulated and adopted by a constituent assembly or a council or a legislature.

Garner writes, "A written Constitution is a consciously planned Constitution, formulated and adopted by deliberate actions of a constituent assembly or a convention." It provides for a definite design of government institutions, their organizations, powers, functions and inter-relationships. It embodies the Constitutional

law of the state. It enjoys the place of supremacy. The government is fully bound by its provisions and works strictly in accordance with its provisions. A written Constitution can be amended only in accordance with a settled process of amendment written in the Constitution itself. It is a duly passed and enacted Constitution. The Constitutions of India, the USA, Germany, Japan, Canada, France, Switzerland and several other states, are written Constitutions.

II. Unwritten Constitution:

An unwritten Constitution is one which is neither drafted nor enacted by a Constituent Assembly and nor even written in the form of a book. It is found in several historical charters, laws and conventions. It is a product of slow and gradual evolution. The government is organised and it functions in accordance with several well settled, but not wholly written rules and conventions. The people know their Constitution. They accept and obey it, but do not possess it in a written form. An unwritten Constitution cannot be produced in the form of a book.

However, an unwritten Constitution is not totally unwritten. Some of its parts are available in written forms but these do not stand codified in the form of a legal document or a code or a book. According to Garner, "an unwritten Constitution is one in which most and not all, rules are unwritten and these are not found in any one charter or document."

The Constitution of the United Kingdom is an unwritten Constitution.

Difference between written and unwritten Constitution:

1. A written Constitution is written in the form of a book or document, whereas an unwritten Constitution is not written in such a form.
2. A written Constitution is a made and enacted by a constituent assembly of the people. An unwritten Constitution is the result of a gradual process of Constitutional evolution. It is never written by any assembly.
3. A written Constitution is usually less flexible than an unwritten Constitution. An unwritten Constitution depends mostly on unwritten rules or conventions which do not require any formal amendment.
4. A written Constitution is definite. Its provisions can be quoted in support or against any power exercised by the government. An unwritten Constitution cannot be produced in evidence. It has to be proved by quoting its sources and practices.

However, the difference between written and unwritten Constitutions is not organic. A written Constitution has written parts in majority. Along with these, it also has some unwritten parts in the form of conventions. In an unwritten Constitution, most of the parts are unwritten and are not written in the form of a book. However some of its parts are also found written in some charters and other documents.

III. Flexible Constitution:

A Flexible Constitution is one which can be easily amended. Several political scientists advocate the view that a flexible Constitution is one in which the Constitutional law can be amended in the same way as an ordinary law. Constitutional amendments are passed in the same manner by which an ordinary law is passed.

British Constitution presents a classic example of a most flexible Constitution. The British Parliament is a sovereign parliament which can make or amend any law or Constitutional law by a simple majority. Laws

aiming to affect changes in a Constitutional law or in any ordinary law are passed through the same legislative procedure i.e., by a simple majority of votes in the legislature. Similarly, a Constitution is flexible when the procedure of amending it is simple and the changes can be made easily.

(A) Merits of a Flexible Constitution:

- First, a major merit of the flexible Constitution is its ability to change easily in accordance with the changes in the social and political environment of the society and State.
- Secondly, it is very helpful in meeting emergencies because it can be easily amended.
- Thirdly, because of its dynamic nature, there are less opportunities for revolt. The Constitution has the ability to keep pace with the changing times. The people do not feel the need for revolutionary changes.
- Finally, since the flexible Constitution keeps on developing with times, it always continues to be popular and remains up-to-date.

(B) Demerits of a Flexible Constitution:

- First, a flexible Constitution is often, a source of instability. Flexibility enables the government in power to give it a desired dress and content.
- Secondly, it is not suitable for a federation. In a federation, a flexible Constitution can lead to undesirable changes in the Constitution by the federal government or by the governments of federating units.

IV. Rigid Constitution:

The Rigid Constitution is one which cannot be easily amended. Its method of amendment is difficult. For amending it, the legislature has to pass an amendment bill by a specific, usually big, majority of 2/3rd or 3/4th. For passing or amending an ordinary law, the legislature usually passes the law by a simple majority of its members.

A rigid Constitution is considered to be the most fundamental law of the land. It is regarded as the basic will of the sovereign people. That is why it can be amended only by a special procedure requiring the passing of the amendment proposal by a big majority of votes which is often followed by ratification by the people in a referendum.

(A) Merits of a Rigid Constitution:

- First, a rigid Constitution is a source of stability in administration.
- Secondly, it maintains continuity in administration.
- Thirdly, it cannot become a tool in the hands of the party exercising the power of the state at a particular time.
- Fourthly it prevents autocratic exercise of the powers by the government.
- Finally a rigid Constitution is ideal for a federation.

(B) Demerits of a Rigid Constitution:

- First, the chief demerit of a rigid Constitution is that it fails to keep pace with fast changing social environment.
- Secondly, because of its inability to change easily, at times, it hinders the process of social development.
- Thirdly, it can be a source of hindrance during emergencies.
- Fourthly, its inability to easily change can lead to revolts against the government.
- Fifthly, a rigid Constitution can be a source of conservativeness. It can grow becomes old very soon because it cannot Keep pace with times.

Thus, there are both merits and demerits of Flexible and Rigid Constitutions. The decision whether a state should have a flexible or a rigid Constitution, should be taken on the basis of the needs and wishes of society. No hard and fast rule can be laid down as to whether a state should have a flexible or a rigid Constitution.In fact, a Constitution must have both a certain degree of rigidity as well as an ability to change for keeping pace with the changing times. An excessive rigidity or excessive flexibility should be avoided. The Constitution of India is partly rigid and partly flexible. In several respects, it is a rigid Constitution but in practice it has mostly worked as a flexible Constitution.

V. Evolved Constitution:

An evolved Constitution is one which is not made at any time by any assembly of persons or an institution. It is the result of slow and gradual process of evolution. Its rules and principles draw binding force from the fact of their being recognised as ancient, historical, time-tested and respected customs and conventions.

Some of these conventions get recognised by law and hence become enforceable while others are followed because these are supported by public opinion, their practical utility and moral commitment in their favour. Evolved Constitutions is the product of historical evolution and of political needs and practical wisdom of the people. The Constitution of Great Britain presents a key example of an evolved Constitution.

VI. Enacted Constitution:

An Enacted Constitution is a man-made Constitution. It is made, enacted and adopted by an assembly or council called a Constituent Assembly or Constitutional Council. It is duly passed after a thorough discussion over its objectives, principles and provisions. It is written in the form of a book or as a series of documents and in a systematic and formal manner. The Constitutions of India the USA, Japan, China and most of other states are enacted Constitutions.

Qualities of a Good Constitution:

- Constitution must be systematically written.
- It should incorporate the Constitutional law of the state and enjoy supremacy.
- It should have the ability to develop and change in accordance with the changes in the environment and needs of the people.
- It should be neither unduly rigid nor unduly flexible.
- It must provide for Fundamental Rights and Freedoms of the people.

- It should clearly define the organisation, powers, functions inter-relations of the government of the state and its three organs.
- It must provide for the organisation of a representative, responsible, limited and accountable government.
- It must provide for:

o Rule of Law

o De-centralization of powers

o Independent and powerful Judiciary

o A system of Local self-government

o A Sound Method of Amendment of the Constitution

o Process and Machinery for the conduct of free and elections

- The Constitution must clearly reflect the sovereignty of the people.
- The language of the Constitution should be simple, clear and unambiguous

The Constitution must empower the judiciary with the power to interpret, protect and defend the Constitution and the fundamental rights and freedoms of the people against the possible legislative and executive excesses. These are the basic features which must be present in every good Constitution.

Significance:

Each state has a Constitution which lays down the organization, powers and functions of the Government of the State. The government always works according to the Constitution, no law or order of the government can violate the Constitution. Constitution is the supreme law and all government institutions and members are bound by it.

Constitution enjoys supreme importance in the state because:

- It reflects the sovereign will of the people.
- It lies down of the aims, objectives, values and goals which the people want to secure. .
- It contains description and guarantee of the fundamental rights of the people.
- It gives a detailed account of the organisation of the government. The organisation, powers and functions of its three organs of the and their inter-relationship.
- In a federation, the Constitution lays down the division of powers between the central government and the governments of the federating states/provinces. It is binding upon both the centre and the state governments.
- It specifies the power and method of amendment of the Constitution.
- It lays down the election system and political rights of people.
- It provides for independence of judiciary and rule of law.
- The Constitution governs all and no one can violate its rules.

Every democratic Constitution guarantees to the citizens a protection against arbitrary governmental actions. A democratic state, like India, has a written and supreme Constitution which binds its entire people and their government.

Constitutionalism:

Meaning:

The concept of Constitutionalism is that of a polity governed by or under a Constitution that ordains essentially limited government and rule of law as opposed to arbitrary authoritarian or totalitarian rule. Constitutional government, therefore, should necessarily be democratic government. In other words, Constitutionalism is a political philosophy in which the functions of government of a state must be in accordance with the provisions of the Constitution meaning thereby the actions of government must reflect Constitutionality.

As the Constitutionalism is a political spirit or philosophy, so it is not necessary that the states who have a Constitution must be embodied with the concept of Constitutionalism. According to Douglas Greenberg, Constitutionalism is a commitment to limitations on ordinary political power, it revolves around a political process, one that overlaps with democracy in seeking to balance state power and individual and collective rights, it draws on particular cultural and historical contexts from which it emanates and it resides in public consciousness.

Now to identify that whether Constitutionalism is present in India or not. It can be analyzed with the help of various provisions of Constitution that are:- Preamble, Judicial Review, Rule of law, Separation of power, Checks and balances and so on. There is no exhaustive list of features by which the validity or existence of Constitutionalism can be tested; but the every feature which limits the government and proves helpful to establish a position of sovereignty under fundamental principles of Constitutional jurisprudence may be a considerable point for Constitutionalism.

In Indian context, Preamble may be a point to check the presence of Constitutionalism. Our Constitution enacted on 26th November,1949, since then, a question always a matter of great concern that whether preamble is a part of Indian Constitution or not. However, in 1960, ***In Re Beru Beri case,*** it was held that preamble is not a part of Constitution but after a long time, In case of ***Keshavanand Bharti v State of Kerala*** (1973), 13 judges largest bench of Indian Constitutional history rejected previous contentions and declared that "Preamble is a part of Indian Constitution".

Preamble explains the objectives of Constitution in two ways, one about the composition of bodies of governance and other about the objectives sought to be achieved in independent India.

Objectives explained in preamble as follows:-

- To constitute India into Sovereign, Socialist, Secular, Democratic Republic (words Socialist and Secular inserted by 42nd Constitutional Amendment,1976) Other provisions of preamble that are;-
- Justice – Social, Economic, and Political;
- Liberty – of thought, expression, belief, faith and worship;
- Equality of status and opportunity;
- Fraternity assuring the dignity of the individual and the unity and integrity of the nation (word unity inserted by 42nd Constitutional Amendment,1976) may be invoked to determine the ambit of Fundamental rights and Directive principles of state policy.

According to ***Justice Subbarao***, Preamble is the soul of the Constitution, without which a body in the form of state cannot be survived. The objectives of Constitution ensure the dignified conditions for the people of India and provide them all rights and liberties within ambit of fundamental spirit of Constitutionalism embodied in entire body of the Constitution. E.g. Dr. Radhakrishnan, former President of India, has explained secularism in this country, as follows:-

When India is said to be a secular state, it does not mean that we reject the reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that secularism itself becomes a positive religion or that the state assumes divine prerogatives.....we hold that not one religion should be given preferential status...This view of religious impartiality, or comprehension and forbearance, has a prophetic role to play within the National and International life.

In other words, Secularism, which reflects no state religion, means every citizen has a right to profess religion of their own choice, which promotes automatically liberty of faith and worship. In this way, It can be surmised that preamble hold the spirit of Constitutionalism.

Judicial review:

Judicial Review, however, this doctrine is not clearly stated in Indian Constitution but its reflection is somewhere found in Article 13(2), Actually, this doctrine was firstly introduced in 1803 by ***Justice Marshall*** in ***Marbury v. Madison*** case, In USA where he clearly said that 'It is the duty of judge to annul the law made by the legislature which violated the Constitution or contrary to it.

The similar spirit found in Article 13(2) of Indian Constitution that the laws "which are inconsistent to part III of Constitution shall be declared null and void", but it is not clearly defined that if any contrary law made, then who will check its validity, then an answer comes into light in reference to Justice Marshall that Judiciary can check such contrary acts of legislature and also can review the laws made by legislature and also a concept of "Higher law" emerged from this doctrine, because a judge has to follow the mandates or directions of Higher law while checking the consistency of provision. In written Constitution, Higher law depicts Constitution as Supreme but where there is no written Constitution; there are some principles which can be regarded as Supreme or Higher law principle. In ***Gopalan v. State of Madras*** (1950) has upheld that it is difficult to restrict the sovereign legislative power by judicial interference except so far as the express provision of written Constitution. It is only the written provisions of Constitution which may restrain legislative power, but where there is no written Constitution, then, who restrain legislative power, and then its answer is judiciary by following various principles, precedents, customs, usages, and different statutes can check the consistency.

It clearly signifies that in absence of power of judicial review in hands of judiciary, judiciary is only a puppet of legislators. ***Justice Frankfurter*** said that judicial review, itself a limitation on popular government, is a fundamental part of our Constitutional system; means if there is no power of judicial review then the Constitution merely becomes a draft for the code of conduct for government as well as citizens, It also signifies as a

Law without Sanction:

However, this type of situation has been prevalent in India, till 2007, in different cases, such as ***Shankari Prasad*** case, ***Sajjan Singh*** case, ***Golak Nath*** case, ***Keshavanand Bharti*** case, ***N.Ramchandra*** case, traced a picture of conflict between legislature and judiciary, no clear cut demarcation of powers under which organs of government can overview the validity of their actions for upholding the true spirit of Constitutionalism in a political entity could be realized. But the ***Raja Ram Pal*** case and ***I.R.Coelho v State of Tamil Nadu*** case 2007 have reshaped the whole demarcation and establish superiority of principles

.such as Basic Structure Theory enhancing the spirit of Constitutionalism. In this way, by exercising Appellate and Advisory jurisdiction, judiciary can secure uniformity in the interpretation and application of the Constitution as amongst the states.

"Rule of law".

"Rule of Law", on its basis spirit of Constitutionalism can be present in a state. This doctrine is given by dicey (a well known Constitutionalist of England) in 1865 wrote a book titled '**An Introduction to the law of the Constitution**' in which the term "***Rule of Law***" was given a comprehensive amplitude. In reality, it is a doctrine of England where there is no written Constitution, so it is placed as a higher law there to check the validity of any law made by legislature. This doctrine shows that whatever law is present in our state, must be ruled over everyone, meaning thereby the law is supreme in all respect and in every sphere. It clarifies that '**No one above the law**'. Now a question arises, what the law is? The answer of this question resides in two principles that are-

- Due Process
- Procedure established by law.

Due Process is a doctrine of USA, and its ambit is not defined comprehensively, but its sphere is to be explained by judges as per the facts and circumstances of the case. It represents judicial supremacy and also there is a danger for judicial autocracy because the court if not self restrained may go beyond the limits set by the Constitution. But in India, there is a "Procedure established by law" doctrine prevails, adopted from Constitution of Japan and clearly enshrined in Article 21 of Indian Constitution. It shows parliamentary sovereignty because in India, law is made by the legislature, it restricts the judicial supremacy and only infers right to do literal interpretation not statutory construction of laws. There are also some other elements embedded in Rule of law, such as, Absence of arbitrary power on the part of government, which is undoubtedly present in form of judicial review in which judiciary always look after the actions of other organs of government. Equality of all persons in the eye of law, which can be justified on the basis of provisions of Article 14-18 with some reasonable restrictions. Rules of Constitutional law are the results of the ordinary law of the land means the laws made by legislature must not be contrary to the provisions of Constitution, otherwise it will be declared as null and void.

In England, Rule of Law flourished sovereignty of legislature, being unwritten Constitution there is no higher law to circumscribe the plenary powers of the sovereign legislature but in India, there is written Constitution and the concept of judicial review also present, so the doctrine of Rule of Law cannot be assigned a paramount place. But to promote the spirit of Constitutionalism, the shadow of this doctrine reflects in various provisions of Indian Constitution in the form of fundamental principles of natural justice.

Separation of power:

In India, under Article 245,246 and Schedule VII there is a clear demarcation of legislative power among union and state government, under Articles 256-263 administrative relations are also clearly defined, and under Article254 if there is any inconsistency between centre and state laws, then central law prevails, under Article 264-291 fiscal relation between centre and state is given, meaning thereby there is a rare chance of clash between union and states, so that public policies can be properly implemented as per the requirements of the people. As the powers of centre and state clearly divided, so there is no space to use arbitrary powers over any subject. Generally, subjects which have national importance vests in Union list and those have regional importance vests in State list and for the establishment of unity and integrity in the nation, Concurrent list is made in which for universalization of laws, central government made law but according to the requirements of a particular region, state legislature may make any amendment in the provision. In this way, this feature also promotes the spirit of Constitutionalism.

Case Laws where principle of 'Constitutionalism' is legally recognized by Supreme Court –

In ***I.R. Coelho (Dead) By LRs. v. State of Tamil Nadu and Ors.*** (1999) view taken by the Supreme Court - The Constitution is a living document. The Constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of the law.

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 principle of Constitutionalism underpins the principle of legality which requires the Courts to interpret legislation on the assumption that Parliament would not wish 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. Court described Common Law Constitutionalism in precise manner which may reveal our vehement exigencies. The protection of fundamental Constitutional rights through the common law is main feature of common law Constitutionalism.

In ***Rameshwar Prasad and Ors. v. Union of India and Anr.*** (2006) it was observed that "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."Moreover, when our theories have been glorified with such emblazonment why in execution part it is sterile. We are just enriching our theories with intellectual twists which can be exemplified as –

Constitutionalism is about limits and aspirations. According to Justice Brennan, interpretation of the Constitution as a written text is concerned with aspirations and fundamental principles. In his Article titled 'Challenge to the Living Constitution' by Herman Belz, the author says that the Constitution embodies aspiration to social justice, brotherhood and human dignity. It is a text which contains fundamental principles. Fidelity to the text qua fundamental principles did not limit judicial decision making. The tradition of the written Constitutionalism makes it possible to apply concepts and doctrines not recoverable under the doctrine of unwritten living Constitution.

Salient features of Indian Constitution:

The Constitution of India has some distinct and unique features as compared to other Constitutions to the world. As ***Dr. B.R. Ambedkar***, the Chairman of the Drafting Committee puts it, the framers had tried to accumulate and accommodate the best features of other Constitutions, keeping in view the peculiar problems and needs of our country.

The following are the salient features of the Constitution of India.

I. Longest written Constitution

Indian Constitution can be called the largest written Constitution in the world because of its contents. In its original form, it consisted of 395 Articles and 8 Schedules to which additions have been made through subsequent amendments. At present it contains 395 Articles and 12 Schedules, and more than 90 amendments. There are various factors responsible for the long size of the Constitution. One major factors was that the framers of the Constitution borrowed provisions form several sources and several other Constitutions of the world.

They have followed and reproduced the Government of India Act 1935 in providing matters of administrative detail. Secondly, it was necessary to make provisions for peculiar problems of India like scheduled castes, Scheduled Tribes and backward regions. Thirdly, provisions were made for elaborate centre-state relations in all aspects of their administrative and other activities. Fourthly, the size of the Constitution became bulky, as provisions regarding the state administration were also included. Further, a detail list of individual rights, directive principles of state policy and the details of administration procedure were laid down to make the Constitution clear and unambiguous for the ordinary citizen. Thus, the Constitution of India became an exhaustive and lengthy one.

II. Partly Rigid and Partly Flexible

The Constitution of India is neither purely rigid nor purely flexible. There is a harmonious blend of rigidity and flexibility. Some parts of the Constitution can be amended by the ordinary law-making process by Parliament. Certain provisions can be amended, only when a Bill for that purpose is passed in each house of Parliament by a majority of the total membership of that house and. by a majority of not less than two-third of the members of that house present and voting. Then there are certain other provisions which can be amended by the second method described above and are ratified by the legislatures of not less than one-half of the states before being presented to the President for his assent. It must also be noted that the power to initiate bills for amendment lies in Parliament alone, and not in the state legislatures.

Pundit Nehru expressed in the Constituent Assembly, "While we want the Constitution to be as solid and permanent as we can make it, there is no permanence in Constitution. There should be certain flexibility. If you make anything rigid and permanent, you stop the nation's growth, the growth of a living, vital organic people."

III. Democratic Republic

India is a democratic republic. It means that sovereignty rests with the people of India. They govern themselves through their representatives elected on the basis of universal adult franchise. The President of India, the highest official of the state is elected for a fixed term. Although, India is a sovereign republic, yet it continues to be a member of the Commonwealth of Nations with the British Monarch as its head. Her membership of the Commonwealth does not compromise her position as a sovereign republic. The commonwealth is an association of free and independent nations. The British Monarch is only a symbolic head of that association.

IV. Parliamentary System of Government

India has adopted the Parliamentary system as found in Britain. In this system, the executive is responsible to the legislature, and remains in power only as long and it enjoys the confidence of the legislature. The president of India, who remains in office for five years is the nominal, titular or Constitutional head. The Union Council of Ministers with the Prime Minister as its head is drawn from the legislature. It is collectively responsible to the House of People (Lok Sabha), and has to resign as soon as it loses the confidence of that house. The President, the nominal executive shall exercise his powers according to the advice of the Union Council of Ministers, the real executive. In the states also, the government is Parliamentary in nature.

V. Federation

Article 1 of the Constitution of India says, "India, that is Bharat shall be a Union of States." Though the word 'Federation' is not used, the government is federal. A State is federal when (a) there are two sets of governments and there is distribution of powers between the two, (b) there is a written Constitution, which is the supreme law of the land and (c) there is an independent judiciary to interpret the Constitution and settle disputes between the centre and the states. All these features are present in India. There are two

sets of government, one at the centre, the other at state level and the distribution of powers between them is quite detailed in our Constitution. The Constitution of India is written and the supreme law of the land. At the apex of single integrated judicial system, stands the Supreme Court which is independent from the control of the executive and the legislature.

But in spite of all these essential features of a federation, Indian Constitution has an unmistakable unitary tendency. While other federations like U.S.A. provide for dual citizenship, the India Constitution provides for single citizenship. There is also a single integrated judiciary for the whole country. The provision of All India Services, like the Indian Administrative Service, the India Police Service, and Indian Forest Service prove another unitary feature. Members of these services are recruited by the Union Public Service Commission on an All-India basis. Because these services are controlled by Union Government, to some extent this constitutes a constraint on the autonomy of states.

A significant unitary feature is the Emergency provisions in the Indian Constitution. During the time of emergency, the Union Government becomes most powerful and the Union Parliament acquires the power of making laws for the states. The Governor placed as the Constitutional head of the state, acts as the agent of the centre and is intended to safeguard the interests of the centre. These provisions reveal the centralizing tendency of our federation.

Prof. K.C. Wheare has rightly remarked that Indian Constitution provides, "a system of government which is quasi-federal, a unitary state with the subsidiary unitary features". The framers of the Constitution expressed clearly that there exists the harmony of federalism and the unitary. ***Dr. Ambedkar*** said, "The political system adopted in the Constitution could be both unitary as well as federal according to the requirement of time and circumstances". We can say that India has a "Cooperative federalism" with central guidance and state compliance.

VI. Fundamental Rights

"A State is known by the rights it maintains", remarked ***Prof. H.J. Laski***. The Constitution of India affirms the basic principle that every individual is entitled to enjoy certain basic rights and part III of the Constitution deals with those rights which are known as fundamental rights. Originally there were seven categories of rights, but now they are six in number. They are (i) Right to equality, (ii) Right to freedom, (iii) Right against exploitation, (iv) Right to freedom of Religion, v) Cultural and Educational rights and vi) Right to Constitutional remedies. Right to property (Article-31) originally a fundamental right has been omitted by the 44th Amendment Act. 1978. It is now a legal right.

These fundamental rights are justifiable and the individual can move the higher judiciary, that is the Supreme Court or the High Courts, if there is an encroachment on any of these rights. The right to move to the Supreme Court straight for the enforcement of fundamental rights has been guaranteed under Article 32 (Right to Constitutional Remedies). However, fundamental rights in India are not absolute. Reasonable restrictions can be imposed keeping in view the security-requirements of the state.

VII. Directive Principles of State Policy

A novel feature of the Constitution is that it contains a chapter in the Directive Principles of State Policy. These principles are in the nature of directives to the government to implement them for establishing social and economic democracy in the country.

It embodies important principles like adequate means to livelihood, equal pay for both men and women, distribution of wealth so as to subserve the common good, free and compulsory primary education, right to work, public assistance in case of old age, unemployment, sickness and disablement, the organisation of village Panchayats, special care to the economically back ward sections of the people etc. Most of these

principles could help in making India welfare state. Though not justiciable these principles have been stated a; "fundamental in the governance of the country".

VIII. Fundamental Duties

A new part IV (A) after the Directive Principles of State Policy was incorporated in the Constitution by the 42nd Amendment, 1976 for fundaments duties. These duties are:

- To abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;
- To cherish and follow the noble ideals, which inspired our national struggle for freedom;
- To uphold and protect the sovereignty, unity and integrity of India;
- To defend the country and render national service when called upon to do so;
- To promote harmony and the spirit of common brotherhood amongst all the people of India . transcending religious, linguistic, regional or sec-tional diversities, to renounce practices derogatory to the dignity of woman;
- To value and preserve the rich heritage of our composite culture;
- To protect and improve the natural environments including forests, lakes, rivers and wild life and to have compassion for living creatures;
- To develop scientific temper, humanism and the spirit of inquiry and reform;
- To safeguard public property and to abjure violence;
- To strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of Endeavour and achievement.

The purpose of incorporating these duties in the Constitution is just to remind the people that while enjoying their right as citizens, should also perform their duties for rights and duties are correlative.

IX. Secular State

A secular state is neither religious nor irreligious, or anti-religious. Rather it is quite neutral in matters of religion. India being a land of many religions, the founding fathers of the Constitution thought it proper to make it a secular state. India is a secular state, because it makes no discrimination between individuals on the basis of religion. Neither it encourages nor discourages any religion. On the contrary, right to freedom of religion is ensured in the Constitution and people belonging to any religious group have the right to profess, practice or propagate any religion they like.

X. An Independent Judiciary

The judiciary occupies an important place in our Constitution and it is also made independent of the legislature and the executive. The Supreme Court of India stands at the apex of single integrated judicial system. It acts as protector of fundamental rights of Indian citizens and guardian of the Constitution. If any law passed by the legislature or action taken by the executive contravenes the provisions of the Constitution, they can be declared as null and void by the Supreme Court. Thus, it has the power of judicial review. But judicial review in India constitutes a middle path between the American judicial supremacy in one hand and British Parliamentary supremacy in the other.

XI. Single Citizenship

The Constitution of India recognises only single citizenship. In the United States, there is provision of dual citizenship. In India, we are citizens of India only, not of the respective states to which we belong. This provision would help in promoting unity and integrity of the nation.

Constitutional Convention and its importance:

The Constitution of a country comprises both written rules enforced by courts, and "unwritten" rules or principles necessary for Constitutional government. Written rules mandate that they be followed in a particular specified situation, while unwritten rules come into play when the situation at hand is not covered by the written rules. Constitutional conventions are rules of political practice, which are regarded as binding by those to whom they apply. However, they are not laws, as they are not enforced by courts or by the Houses of Parliament. Often Constitutional conventions are more important than written Constitutional provisions. For example, the President is empowered by the Constitution to appoint the Prime Minister, but the Constitution provides no guidance as to who should be appointed as Prime Minister. Here conventions regarding the appointment of the Prime Minister play an important role in guiding the President.

Conventions are an instrument of national cooperation and the spirit of cooperation is as necessary as the Constitution. They are rules elaborated for effecting that cooperation.

Constitutional conventions: A brief study

Following are some of the characteristics of the conventions:

Conventions are rules that define non-legal rights, powers and obligations of office-holders in the three branches of Government, or the relations between governments or government organs. Conventions in most cases can be stated only in general terms, their applicability in some circumstances being clear, but in other circumstances uncertain and debatable. They are distinguishable from rules of law, though they may be equally important, or more important. They may modify the application or enforcement of rules of law.

Constitutional conventions develop over time and are not outlined in any document. Conventions grow out of practices and precedents determine their existence. Such precedents are not authoritative like the precedents of a court of law. Every act is a precedent, but not every precedent creates a rule. Sir Ivor Jennings suggested that in order to establish a convention three questions must be asked: firstly, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, whether there is a good reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless the persons concerned regard themselves to be bound by it.

It is largely through Dicey's influence that the term "convention" has been accepted to describe a Constitutional obligation, obedience to which is secured despite the absence of the ordinary means of enforcing the obligation in a court of law. It must be noted that the obligations do not necessarily, or indeed usually, derive from agreement. It is more likely to originate from customs or practices arising out of sheer expediency. Conventions grow out of and are modified by practice. At any given time it may be difficult to say whether or not a practice has become a convention. Conventions do not come from a certain number of sources, their origins are amorphous and nobody has the function of deciding whether conventions exist or not.

The Choice of a Prime Minister

India has the bulkiest Constitution and yet certain aspects are left to conventions. One of them is the appointment of Prime Minister by the President. In England, it is the monarchy whereas in India it is the President who makes this choice. This choice demands independence of status and familiarity with political conditions, but no method of choice can altogether avoid bias. The nature of the monarch's choice necessarily depends upon the status of parties in the House of Commons. If a party has a clear majority, its recognised leader will be the Prime Minister.

A completely different situation arises where no party gets a majority in the legislature. Here two possibilities arise—the formation of a coalition government or the formation of a minority government, as another dissolution at that time is not practicable. It is an accepted rule that when a government is defeated, either in Parliament or at the polls, the monarch should send for the leader of the opposition. This rule is based on the assumption of impartiality of the crown.

It is the monarch's duty to find a government. It is no less the duty of political leaders to assist him. This duty is threefold—

A political leader must, if asked, place his views before the monarch. If the official opposition defeats the Government, it is the duty of its leaders to form a new government or to advise the monarch as to an alternative. It is the duty of the Government to remain in office as long as it can, without infringing Constitutional principles.

The position with respect to appointment of Prime Minister is similar in India since our Constitutional practices are to a large extent derived from English usages, customs and practices. Article 75(1) of the Indian Constitution gives the President the right to appoint the Prime Minister. In normal circumstances it is the leader of the majority in the House of the People (Lok Sabha). But, in circumstances where the Prime Minister dies in office or resigns, the President will have to exercise his personal judgment. The party may have no recognised leader, or either of the two parties may be able to form a government and command the support of the House of the People. In such circumstances the President may explore the possibility of finding a person who could form a coalition with the help of two or more parties and command the support of the Lok Sabha. It was such discretion that President Reddy exercised in 1979 after the fall of the Janta Ministry in inviting Charan Singh to form the ministry and also in not inviting Jagjivan Ram to do so after Charan Singh resigned and advised the dissolution of the House.

Options in a hung Lok Sabha

Article 75(1) of the Constitution states that the President shall appoint the Prime Minister. Clause (3) adds:"75. (3) The Council of Ministers shall be collectively responsible to the House of the People." Therefore, the Prime Minister must command a majority in the House at the time of the vote of confidence. However, in an uncertain situation, say in the case of hung Lok Sabha, how is the President to determine which of the party leaders will manage to secure majority support? Until they dropped it in the final stages of the proceedings of the Constituent Assembly on 11-10-1949, the framers of the Constitution had proposed instruments of instructions to guide the President and the Governors. Para two of the instructions to the President enjoined him to "appoint a person who has been found by him most likely to command a stable majority in Parliament as the Prime Minister". This is of little help except in that it explicitly permits the President to act on probabilities. A mistaken assessment will invite charges of partisanship.

In a letter dated 17-5-1967 to three former Chief Justices of India, Justices Mahajan, Sarkar and Gajendragadkar and eminent Constitutional experts like M.C. Setalvad and H.M. Seervai, the then Home Minister Y.B. Chavan mentioned three views on the appointment of the Chief Minister and sought their

legal opinion on it. The three views were: The leader of the largest party in the legislature should be invited to form the Government irrespective of whether or not such a party commands a stable majority.

If the party in power failed to secure an absolute majority in the newly- elected legislature, the leader of that party should not be invited to form the Government because the electoral verdict should be regarded as, in effect, disqualifying the party from holding office for another term.The Governor should make endeavour to appoint a person who is most likely to command a majority in the legislature.

There was complete agreement on the third, an obvious choice but of little practical value. The Sarkaria Commission's report did not agree with this and propounded its own rules. The subject was also discussed in the report of the Committee of Governors, 1971, appointed by the President to study and formulate norms and conventions on the role of the Governors. It rejected the rigid arithmetical test of the leader of the largest single party. Three British works on Constitutional and administrative law share this view. S.A. Smith speaks of a ministry "with a reasonable prospect of maintaining itself in office". Wade and Bradley opt for "that person who is in the best position to receive the support of the majority". Hood Phillips' formulation is "a ministry that can hold a majority in the House". The above authorities expose the absurdity of the then President R. Venkataraman's "objective" test of summoning the parties in the order of their numerical strength, that he propounded as a great contribution to Constitutional practice.

British precedent and the dicta of eminent authorities do not support any such arithmetical test. Another example of such absurdity is that of Dr. S.D. Sharma's decision to appoint Mr Vajpayee as the Prime Minister on 15-5-1996. The sole consideration behind Mr Sharma's decision seemed to be the "arithmetic" test that Mr Venkataraman talked about in his book, My Presidential Years. Such decisions lower the image of the high office of the President, more so, when the appointed Prime Minister fails to secure the majority in the House as it happened in the case of Mr Vajpayee, whose Government fell within 13 days of its appointment. Yet another example will be that of the case of Bihar where the Governor decided to ask Mr Nitish Kumar to form the Government despite the fact he was in no position to command majority in the House, and had to ultimately resign. Such decisions sully the image of the office of the President and Governors, and also go against the spirit of democracy.

Being leader of the single largest party does not necessarily mean being the leader of the majority members of the House. A person need not be the leader of the single largest party in the House to command the support of the House. The practice now more or less seems to be settled that the leader of the party who is able to secure the support of the House should be invited to form the Government. This again brings us back to the question, when and how does a practice become a convention? Ivor Jennings's three-stage test mentioned before might be helpful in deciding whether a practice has crystallised into a convention or not but that is not a conclusive test for determining the existence of a convention. There has been demand from several quarters to codify the convention with respect to the appointment of Prime Minister and Chief Ministers. The reason given is that having a written Constitution, we should not leave the appointments to these high offices on conventions. The controversy invariably surrounding every appointment (in cases where no one party has absolute majority) of the Prime Minister and Chief Ministers further strengthens the demand for codification of conventions. One of the suggestions that have been put forward is the amendment of Article 75 of the Constitution so as to have the following effect: "The Prime Minister shall be appointed by the President on the recommendation of the House of the People which recommendation shall be binding on the President". Thus the onus will be on the legislature to choose the Prime Minister, than on the President. Such a move is welcome since it will help in avoiding confusion and controversies in the appointment of the Prime Minister and Chief Ministers. However, at the same time it must also be kept in mind that a Constitution cannot contain all and sundry provisions concerning a matter including that for the appointment of Prime Minister. Moreover, the discretion to appoint the Prime Minister has

been vested in none other than the President who is the head of the republic. Hence, the presumption that he will act impartially should always weigh in his favour.

Dissolution of the House:

The Lok Sabha and the Vidhan Sabha of each State are dissolved at the end of their terms, every five years. However, this article only deals with irregular dissolutions, which occur before the term of a House is over. The theory behind the right to advise dissolution is that when the Government loses the confidence of the House, it may, instead of resigning, assert that the House itself has ceased to reflect the will of the electorate, which constitutes the political sovereign. Dissolution is thus an appeal to the electorate. Two major controversies in the dissolution of the House are first, whether the advice to dissolve the House should be tendered by the Prime Minister alone or the Cabinet as a whole and second, whether the President's discretion with respect to dissolution can override express advice to the contrary tendered by the council of Ministers. The former controversy had been raging among British jurists particularly in the last century, but has not been of much relevance in India, so the discussion here will be confined to the Presidential discretion in dissolving the House.

President's Discretion:

The question has often come up whether it is binding upon the President to follow the advice tendered by the Prime Minister, regarding dissolution of the House, when the Prime Minster has lost the confidence of the House. When the Prime Minister enjoys the support of the House, advice to dissolve the House would be binding, since no alternative government is possible. Article 74(1) provides that the President shall act in accordance with the advice tendered by the Council of Ministers with the Prime Minister at its head. However in the case of ***Samsher Singh v. State of Punjab***, ***Krishna Iyer,*** J. laid down certain exceptions in which the President was not obligated to act in accordance with the advice given by the Council of Ministers and was required to exercise his discretion. Such instances included situations regarding the dismissal of a government which had lost its majority in the House, but was refusing to quit office and the dissolution of the House of the People was required. However, the judgment also stated that even in cases regarding dissolution, the President should avoid getting involved in politics and act on the advice of the Prime Minister. Thus, the limits of the President's discretion are carefully circumscribed. However, the President, according to his oath of office, has to preserve, protect and defend the Constitution. So the President should not be bound by the unConstitutional advice of a ministry to dissolve the House. The House represents the will of the electorate, but the will of the electorate is subject to the Constitution. Hence the President will be bound to reject the advice if such advice is against the spirit of the Constitution.

As per ***Dr. Eugene Forsey***, in a multi-party system (as prevalent in India) it may be necessary for the President to refuse dissolution and consult the leaders of the Opposition parties or call on such persons to form a government. If all possible alternative Prime Ministers decline the task, then the only course left open is to allow the present government's proposal for dissolution.

President's independent initiative

There is a conflict of views regarding whether the head of the State can dissolve Parliament without such advice being given. There have been two instances in the history of Britain when the Crown dismissed a ministry that commanded the confidence of the House of Commons and dissolved the House.

The first instance was in 1784. The King, George III removed the Prime Minister from his office and installed Pitt as Prime Minister. He proceeded to dissolve the House of Commons and in the ensuing elections, Pitt won a decisive victory. But the question was raised whether the actions of George III were Constitutional. George III believed that the House of Commons no longer represented the wishes of the

nation. He was proved right in the elections. The authority of the House of Commons is derived from the fact that it represents the will of the nation. The chief object of dissolution should be to ensure that the will of Parliament comes in conformity with the nation's will. Hence, George III's actions are regarded as Constitutional. In India, such action will be regarded as Constitutional in exceptional cases, when the Council of Ministers acts in blatant disregard of Constitutional practices, such as when the Ministry refuses to resign or advise dissolution after losing the vote of confidence in the Lok Sabha.

The second such instance occurred in 1834 when George IV dismissed the Prime Minister and appointed Peel in his place and then went on to dissolve Parliament. The ensuing elections went against Peel. From a Constitutional point of view, the dissolution is regarded as a mistake as the belief that the House of Commons had stopped representing the will of the nation was wrong. However, the essential point to note is that both the dissolutions admit the principle that it is the verdict of the political sovereign (the people of the State), which ultimately determines the right of the Cabinet to remain in office. Dissolution is required when the wishes of the nation are presumed to be different from the wishes of the legislature. Hence dissolution has been described by Dicey as an appeal from the legal sovereign (the Crown) to the political sovereign.

In India, the question came up when the V.P. Singh government resigned in 1990, without advising the President to dissolve the Lok Sabha. The President, Mr R. Venkataraman held the view that Prime Ministerial advice was a must for dissolution. However, when Mr Chandrashekhar resigned as Prime Minister in 1991 and advised dissolution of the House, Mr Venkataraman said that the question of dissolution of the Lok Sabha would be considered separately. The President then waited a whole week before announcing the dissolution of the Lok Sabha on 13-3-1991 and stated that the advice of the Prime Minister was not the sole reason for taking the decision.

Dr. B.R. Ambedkar had told the Constituent Assembly on 4th November, 1948 that the President could do nothing contrary to the advice of the Ministers nor could he do anything without their advice. But, on 30-12-1948 Dr. Ambedkar stated that dissolution and the appointment of the Prime Minister are two prerogatives that the President will enjoy.

No instance has occurred in India where the President dissolved the legislature on his own initiative. It is believed that such wide power to dissolve the House without advice cannot be vested in a single individual, who has not even been elected directly by the people and is not responsible to Parliament either. Moreover, it is not possible to work out adequate safeguards to ensure that such power is not abused. Therefore, the President cannot, on his own initiative, dissolve the Lok Sabha, except under very exceptional cases, when the Council of Ministers acts in blatant disregard of Constitutional practices, as mentioned above. However, such situations are unlikely to arise in a parliamentary democracy where the Government goes to polls every 5 years.

Refusal to dissolution:

The second question regards the power of the President to refuse to dissolve the House on being advised to do so. The monarch has to act upon the advice of the Prime Minister unless prepared to dismiss him from office. Such refusals have been witnessed in former dominions of Britain. In 1926, the Governor-General of Canada, Lord Byng refused dissolution to the Liberal Prime Minister Mackenzie King and instead dismissed him and invited the Conservative leader Meighen to form the Government. In 1939, the Governor-General of South Africa, Sir Patrick Duncan refused dissolution to Prime Minister General Hertzog, whose proposal that South Africa remain neutral in the Second World War was defeated in Parliament, and invited General Smuts to form a government. Sir Ivor Jennings is of the opinion that the prerogative to refuse dissolution lies with the Crown in theory alone and cannot be exercised in practice.

Article 13.2.2 of the Irish Constitution allows the President to refuse dissolution only when the Government has lost majority support in the House. In 1994, the coalition government of Fianna Fail and the Labour Party collapsed. Instead of dissolving the House, the President invited another coalition government to assume office as it was better not to terminate Parliament and force fresh elections on people when an alternative government was possible.

The advice to dissolve the House should be refused if the following situations exist:

The existing Parliament is still viable and capable of doing its job. A general election would be detrimental to national economy.The President could find another Prime Minister who would carry on his government for a reasonable period with a working majority in the House.

Further, other considerations such as how long the House has been in existence may be taken into account. The President may be reluctant to grant dissolution to a newly constituted House.

Till date, the President has never refused to dissolve the legislature, on being advised to do so, but if the President is satisfied as to the existence of the above conditions, then the possibility of refusal cannot be ruled out. Dr. Ambedkar was of the opinion that when the President receives advice for dissolution, he should test the feelings of the House if it agrees that there should be dissolution or it agrees that the affairs should be carried on with some other leader.

The National Commission to review the working of the Constitution argued that one of the methods of restoring the stability and cohesion of functioning in the parliamentary system of government is to strengthen the institution of the Prime Minister and one of the ways of doing so is to empower the Prime Minister to advise dissolution of the House whenever he thinks that the House has exhausted its mandate and a fresh appeal to the electorate is called for. But, the proposition contemplates such a power in the Prime Minister even after he has lost confidence of the House. It is based on the view that the recognition of such power in the Prime Minister would impart much needed stability to the political system in the country and would enable the leader of the House to address determinedly issues of development, national security, etc. But, the Commission finally concluded that the present Constitutional position needs no modification.

Importance of Convention:

Notwithstanding the fact that ours is a detailed Constitution, the Constitution-framers left certain matters to be governed by conventions, thereby giving to the holders of Constitutional offices some degree of discretion in respect of such matters. Conventions lubricate the room left at the joints in the Constitutional structure and protect them against ossification. The main purpose of the Constitutional conventions is to ensure that the legal framework of the Constitution retains its flexibility to operate in tune with the prevailing Constitutional values of the period. Although conventions are not legally enforceable and the sanction behind them is moral and political, yet some conventions of the Constitution which set norms of behaviour of those in power or which regulate the working of the various parts of the Constitution and their relations to one another, may be as important, if not of greater significance, as the written word of the Constitution itself.

One unfortunate fact of the Indian situation is that enough attention has not been paid to the evolution and observance of the right codes of conduct and conventions. Even the codes and conventions evolved in the earlier years have been broken too lightly in the later years. There is an increasing tendency to resort to extra-Constitutional methods to force settlement of political or economic issues—imagined or real. This would be a cause for concern even in a small homogeneous country. In India, a heterogeneous country of huge dimensions, this cannot be a matter of grave anxiety. Hence, natural reaction would be that the loopholes in the Constitution which have permitted aberrant developments should be plugged. It is urged that, if conventions do not work, appropriate Constitutional safeguards should be provided. If appropriate

conventions are not followed and the discretion provided under certain circumstances is misused, the entire system may collapse. In order that appropriate conventions and codes of conduct get evolved, it is essential that incumbents of Constitutional offices are selected from among persons of admitted competence and integrity and provided with reasonable security of tenure.

The main purpose of conventions is to guide the use of Constitutional discretion. Thus, every time there is a general election or a request for dissolution of the House of People, the questions that start doing rounds are whom will the President invite to form the next government? What if the President invites someone to form a government who does not have a clear majority in the Lok Sabha? Will the President heed to the advice of the Cabinet to dissolve the House? These are some of the important questions to which the Constitution provides no answer to, and this is where conventions play their part as a catalyst.

Some conventions are well-established and may be relied upon absolutely, while some are vague and may lead to manipulation for political purposes. For example, appointment of the Prime Minister is to be done by the President and the prevailing convention is that the person enjoying support of the absolute majority of the House concerned is appointed to the respective office. The snag lies in ascertaining that support. The task of the President becomes difficult and open to criticism, as he has to often follow vague conventions and foreign precedents. The conventions being vague, the President may go on appointing the leader of the largest party in the Lok Sabha as the Prime Minister, despite the fact that the appointed Prime Minister is not in a position to secure majority in the Lok Sabha.

Hence if the conventions are codified and the effect of that codification is to give jurisdiction to the courts to enforce the codified conventions then in such a scenario the flexibility of the conventions will be lost. Moreover, codified laws cannot cover any and every situation that might arise. Hence, it makes more sense to leave the conventions uncodified.

Therefore, since the main purpose of the Constitutional Conventions is to ensure that the legal framework of the Constitution retains its flexibility to operate in tune with the prevailing Constitutional values of the period, it helps the Constitution to adapt and make amends according to the needs and desire of the changing times, as the Founders of our Constitution couldn't have foreseen and safeguarded the Constitution from future loopholes and hence left certain matters to be governed by conventions as they are as important, if not of greater significance, as the written word of the Constitution itself.

Parliamentary Supremacy:

The doctrine of 'sovereignty of Parliament' is associated with the British Parliament. Sovereignty means the supreme power within the State. That supreme power in Great Britain lies with the Parliament. There are no 'legal' restrictions on its authority and jurisdiction. Therefore, the sovereignty of Parliament (parliamentary supremacy) is a cardinal feature of the British Constitutional system. According to A.V. Dicey, the British jurist, this principle has three implications:

1. The Parliament can make, amend, substitute or repeal any law. De Lolme, a British political analyst, said, 'The British Parliament can do everything except make a woman a man and a man a woman'.

2. The Parliament can make Constitutional laws by the same procedure as ordinary laws.In other words, there is no legal distinction between the constituent authority and the legislative authority of the British Parliament.

3. The Parliamentary laws cannot be declared invalid by the Judiciary as being unconstitutional. In other words, there is no system of judicial review in Britain. The Indian Parliament, on the other hand, cannot be regarded as a sovereign body in the similar sense as there are 'legal' restrictions on its authority and jurisdiction.

Theory of Separation of power:

The three organs of the government—Legislature, Executive and Judiciary— perform the three essential functions of law-making, law-application and law- adjudication. This threefold division of governmental functions is universally accepted as the best way of organizing the government. These three functions are inter-related and inter-dependent. But these are performed by three different organs.

Central idea of the theory of Separation of Powers:

The Theory of Separation of Powers holds that the three organs of government must be separate and independent from one another. Any combination of these three functions into a single or two organs is harmful and dangerous for individual liberty. Separation of powers of the three organs is essential for the efficiency of the government and the liberty of the people. Government can work systematically and efficiently only when each of its organs exercises its own powers and functions. Similarly, the liberty of the people can be protected only when there is no concentration or combination of the three governmental powers in the hands of one or two organs.

The theory of Separation of Powers holds that for keeping the government limited, which is necessary for protecting the liberty of the people, the three functions of government should be separated and performed by three separate organs.

Meaning of Separation of Powers:

In simple words, the theory of Separation of Powers advocates that the three powers of the government should be used by three separate organs. Legislature should use only law making powers, Executive should undertake only law enforcement functions, and Judiciary should perform only adjudication/Judicial functions. Their powers and responsibilities should be clearly defined and kept separate. This is essential for securing the liberty of the people.

Separation of Powers: views of Montesquieu:

In his book The Spirit of The Laws' (1748), Montesquieu enunciated and explained his theory of Separation of Powers. He wrote,

- If the legislative and executive powers are combined in the same organ, the liberty of the people gets jeopardized because it leads to tyrannical exercise of these two powers.
- If the judicial and legislative powers are combined in the same organ, the interpretation of laws becomes meaningless because in this case the law-maker also acts as the law interpreter and he never accepts the errors of his laws.
- If the judicial power is combined with the executive power and is given to one-person or one organ, the administration of justice becomes meaningless and faulty because then the police (Executive) becomes the judge (judiciary).
- Finally if all the three legislative, executive and judicial powers are combined and given to one person or one organ, the concentration of power becomes so big that it virtually ends all liberty. It establishes despotism of that person or organ.

As such, the three powers should not be combined and given neither to a single organ nor to two organs. These three powers should be used by three separate organs of the government. It is essential for safeguarding the liberty of the people.

Latimer House Principles:

Objective:

The objective of these Principles is to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth's fundamental values.

I) The Three Branches of Government

Each Commonwealth country's Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.

II) Parliament and the Judiciary

(a) Relations between parliament and the judiciary should be governed by respect for parliament's primary responsibility for law making on the one hand and for the judiciary's responsibility for the interpretation and application of the law on the other hand.

(b) Judiciaries and parliaments should fulfill their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.

III) Independence of Parliamentarians

(a) Parliamentarians must be able to carry out their legislative and Constitutional functions in accordance with the Constitution, free from unlawful interference.

(b) Criminal and defamation laws should not be used to restrict legitimate criticism of Parliament; the offence of contempt of parliament should be narrowly drawn and reporting of the proceedings of parliament should not be unduly restricted by narrow application of the defence of qualified privilege.

IV) Independence of the Judiciary

An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national Constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.

To secure these aims:

- Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure: equality of opportunity for all who are eligible for judicial office; appointment on merit; and that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination;
- Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place;
- Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought;
- Interaction, if any, between the executive and the judiciary should not compromise judicial independence. Judges should be subject to suspension or removal only for reasons of incapacity or misbehavior that clearly renders them unfit to discharge their duties. Court proceedings should,

unless the law or overriding public interest otherwise dictates, be open to the public. Superior Court decisions should be published and accessible to the public and be given in a timely manner. An independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the judiciary.

V) Public Office Holders

a) Merit and proven integrity, should be the criteria of eligibility for appointment to public office;

b) Subject to (a), measures may be taken, where possible and appropriate, to ensure that the holders of all public offices generally reflect the composition of the community in terms of gender, ethnicity, social and religious groups and regional balance.

VI) Ethical Governance

Ministers, Members of Parliament, judicial officers and public office holders in each jurisdiction should respectively develop, adopt and periodically review appropriate guidelines for ethical conduct. These should address the issue of conflict of interest, whether actual or perceived, with a view to enhancing transparency, accountability and public confidence.

VII) Accountability Mechanisms

Executive Accountability to Parliament:

Parliaments and governments should maintain high standards of accountability, transparency and responsibility in the conduct of all public business. Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to Parliament.

Judicial Accountability:

Judges are accountable to the Constitution and to the law which they must applyhonestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies.

In addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the judiciary, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness. The criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions.

Judicial review

Best democratic principles require that the actions of governments are open to scrutiny by the courts, to ensure that decisions taken comply with the Constitution, with relevant statutes and other law, including the law relating to the principles of natural justice.

VIII) The law-making process

In order to enhance the effectiveness of law making as an essential element of the good governance agenda. There should be adequate parliamentary examination of proposed legislation; where appropriate, opportunity should be given for public input into the legislative process; Parliaments should, where relevant, be given the opportunity to consider international instruments or regional conventions agreed to by governments.

IX) Oversight of Government

The promotion of zero-tolerance for corruption is vital to good governance. A transparent and accountable government, together with freedom of expression, encourages the full participation of its citizens in the democratic process. Steps which may be taken to encourage public sector accountability include:

(a) The establishment of scrutiny bodies and mechanisms to oversee Government, enhances public confidence in the integrity and acceptability of government's activities. Independent bodies such as Public Accounts Committees, Ombudsmen, Human Rights Commissions, Auditors-General, Anti-corruption commissions, Information Commissioners and similar oversight institutions can play a key role in enhancing public awareness of good governance and rule of law issues. Governments are encouraged to establish or enhance appropriate oversight bodies in accordance with national circumstances,

(b) Government's transparency and accountability is promoted by an independent and vibrant media which is responsible, objective and impartial and which is protected by law in its freedom to report and comment upon public affairs.

X) Civil Society

Parliaments and governments should recognize the role that civil society plays in the implementation of the Commonwealth's fundamental values and should strive for a constructive relationship with civil society to ensure that there is broader opportunity for lawful participation in the democratic process.

Theory of Checks and Balances:

The concept of Constitutional checks arose as an outgrowth of the classical theory of separation of powers, by which the legislative, executive, and judicial powers of government were held properly to be vested in three different units. The purpose of this, and of the later development of checks and balances, was to ensure that governmental power would not be used in an abusive manner. However, in its original form the concept involved social classes rather than government departments.

Checks and balances is closely related to separation of powers. In the checks and balances configuration, each branch of government is limited by the other branches of government. Checks and balances ensures that one branch is not too powerful in the exercise of government power. In the construction of checks and balances, power is seen as something potent that has to be limited so that it is not abused. To balance out power, it is limited or checked by other branches.

In the ***Supreme Court Employees' Welfare Association v. Union of India*** (1990), it was held that no court can issue a direction to a legislature to enact a particular law neither it can direct an executive authority to enact a law which it has been empowered to do under the delegated legislative authority.

Further in ***Bandhuva Mukti Morcha v. Union of India*** (1984), Pathak J., said: "the Constitution envisages a broad division of the power of state between the legislature, the executive and the judiciary. Although the division is not precisely demarcated, there is general acknowledgment of its limits. The limits can be gathered from the written text of the Constitution, from conventions and Constitutional practice, and from an entire array of judicial decisions."

Judicial review:

The power of Judiciary to review and determine validity of a law or an order may be described as the power of "Judicial Review."

It means that the Constitution is the Supreme law of the land and any law in consistent there with is void. The term refers to "the power of a court to inquire whether a law executive order or other official action conflicts with the written Constitution and if the court concludes that it does, to declare it unconstitutional and void."Judicial Review has two prime functions:

(1) Legitimizing government action;

(2) to protect the Constitution against any undue encroachment by the government.

The most distinctive feature of the work of United States Supreme Court is its power of judicial review. As guardian of the Constitution, the Supreme Court has to review the laws and executive orders to ensure that they do not violate the Constitution of the country and the valid laws passed by the congress.

The power of judicial review was first acquired by the Supreme Court in Marbury vs. Madison case 1803.The Constitution of India, in this respect, is more a kin to the U.S. Constitution than the British. In Britain, the doctrine of parliamentary supremacy still holds goods. No court of law there can declare a parliamentary enactment invalid. On the contrary every court is constrained to enforce every provision" of the law of parliament.

Under the Constitution of India parliament is not Supreme. Its powers are limited in the two ways. First, there is the division of powers between the union and the states. Parliament is competent to pass laws only with respect to those subjects which are guaranteed to the citizens against every form of legislative encroachment.

Being the guardian Fundamental Rights and the arbiter of-Constitutional conflicts between the union and the states with respect to the division of powers between them, the Supreme Court stands in a unique position where from it is competent to exercise the power of reviewing legislative enactments both of parliament and the state legislatures.

This is what makes the court a powerful instrument of judicial review under the Constitution. As Dr. M.P. Jain has rightly observed: "The doctrine of judicial review is thus firmly rooted in India, and has the explicit sanction of the Constitution."In the framework of a Constitution which guarantees individual Fundamental Rights, divides power between the union and the states and clearly defines and delimits the powers and functions of every organ of the state including the parliament, judiciary plays a very important role under their powers of judicial review.

The power of judicial review of legislation is given to the judiciary both by the political theory and text of the Constitution. There are several specific provisions in the Indian Constitution, judicial review of legislation such as Act 13, 32, 131-136, 143, 226, 145, 246, 251, 254 and 372. Article 372 (1) establishes the judicial review of the pre-Constitutional legislation similarly. Article 13 specifically declares that any law which contravenes any of the provision of the part of Fundamental Rights shall be void. Even our Supreme Court has observed, even without the specific provisions in Article 13.

The Court would have the power to declare any enactment which transgresses a Fundamental Right as invalid. The Supreme and high courts are constituted the protector and guarantor of Fundamental Rights under Articles 32 and 226. Articles 251 and 254 say that in case of in consistent if between union and state laws, the state law shall be void.

The basic function of the courts is to adjudicate disputed between individuals and the state, between the states and the union and while so adjudicating, the courts may be required to interpret the provisions of the Constitution and the laws, and the interpretation given by the Supreme Court becomes the law honoured by all courts of the land. There is no appeal against the judgement of the Supreme Court.

In *Shankari Prasad v. Union of India* (1951) the first Amendment Act of 1951 was challenged before the Supreme Court on the ground that the said Act abridged the right to property and that it could not be done as there was a restriction on the amendment of Fundamental Rights under Article 13 (2).

The Supreme Court rejected the contention and unanimously held. "The terms of Article 368 are perfectly general and empower parliament to amend the Constitution without any exception whatever. In the context of Article 13 law must be taken to mean rules or regulations made in exercise of ordinary legislative power and amendments to the Constitution made in exercise of constituent power, with the result that Article 13 (2) does not affect amendments made under Article 368."

In ***Sajan Singh's case*** (1964), the corupetence of parliament to enact 17th amendment was challenged before the Constitution. Bench comprising of five judges on the ground that it violated the Fundamental Rights under Article 31 (A).The Supreme court reiterated its earlier stand taken in Shankari sad's case and held, "when article 368 confers on parliament the right to amend the Constitution the power in question can be exercised over all the provisions of the Constitution, it would be unreason about to hold that the word law' in article 13 (2) takes in amendment Acts passed under article 368." Thus, until 1967 the Supreme Court held that the Amendment Acts were not ordinary laws, and could not be struck down by the application of Article 13 (2).

The historic case of ***Golak Nath v. The State of Punjab*** (1967) was heard by a special bench of 11 judges as the validity of three Constitutional amendments (1st, 4th and 17th) was challenged. The Supreme Court by a majority of 6 to 5 reversed its earlier decision and declared that parliament under Article 368 has no power to take away or abridge the Fundamental Rights contained in Chapter II of the Constitution. The Court observed that:

- Article 368 only provides a procedure to be followed regarding amendment of the Constitution.
- Article 368 does not contain the actual power to amend the Constitution.
- The power to amend the Constitution is derived from Article 245, 246 and 248 and entry 97 of the union list.
- The expression 'law' as defined in Article 13 (3) includes not only the law made by the parliament in exercise of its ordinary legislative power but also an amendment of the Constitution made in exercise of its Constitution power. ,
- The amendment of the Constitution being a law within the meaning of Article 13 (3) would be void under Article 13 (2) of it takes away or abridges the rights conferred by part III of the Constitution.
- The First Amendment Act 1951, the fourth Amendment Act 1955 and the seventeenth Amendment Act. 1964 abridge the scope of Fundamental Rights and, therefore, void under Article 13 (2) of the Constitution.
- Parliament will have no power from the days of the decision to amend any of the provisions of part III of the Constitution so as to take away or abridge the Fundamental Rights enshrined there in.

The Constitutional validity of the 14th, 25th, and 29th Amendments was challenged in the Fundamental Rights case. The Govt. of India claimed that it had the right as a matter of law to change or destroy the entire fabric of the Constitution through the instrumentality of parliament's amending power.

In ***Minerva Mills case*** (1980) the Supreme Court by A majority decision has trunk down Section 4 of the 42nd Amendment Act which gave preponderance to the Directive Principles over Articles 24, 19 and 31 of part III of the Constitution, on the ground that part III and part IV of the Constitution are equally important

and absolute primacy of one over the other is not permissible as that would disturb the harmony of the Constitution. The Supreme Court was convinced that anything that destroys the balance between the two part will ipso facto destroy an essential element of the basic structure of our Constitution.

Judicial Review of Legislative Enactment and ordinances:

One of the first major case ***A.K. Gopalan v. State of Madras***. 1951 that came up before the Supreme Court in which the preventive Intention Act, 1950 was challenged as invalid. The court by a unanimous decision declared section 14 of the Act invalid and thus manifested its competence to declare void any parliamentary enactment repugnant to the provisions of the Constitution.

In ***Champakan Dorairajan's*** case, the Supreme Court held that the order of the state government fixing proportionate scales, for different communities for admission to medical colleges was unconstitutional. The presidential order de-recognizing privy purses was also challenged in the Supreme Court which declared the order as unconstitutional and void. Between 1950-1980 parliament passed as many as 1977 Acts and out of them, the Supreme Court invalidate laws passed on 22 occasions.

Principles of Judicial Review:

Justice ***V.S Deshpande*** in his book propounded a thesis that Judicial Review of legislation in India should rest merely on Article 245 (1) and not on Article 13. According to him, Article 245 (1) interpreted broadly would ensure the supremacy of the Constitution over all kinds of laws.

Thus, a law to be valid must conform with the Constitutional forms. The grave responsibility of deciding upon the validity of laws, is laid up on the judges of the Supreme Court. If a statue isn't within the scope of legislative authority or it offends some Constitutional restriction or prohibition, that statue is unconstitutional and hence invalid.

The Statue is not held unconstitutional by the court in a light vein. Both the 'felt necessities of the time' and 'Constitutional fundamentals' are balanced by the court. Accordingly, the Supreme Court has evolved certain canons, making and norms. H.M. Seervai has enumerated following rules in this regard.

- There is a presumption in favour of Constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt; and the on us to prove that it is unconstitutional lies upon the person who challenges it.
- Where the validity of a statue is questioned and there are two interpretations, one of which would make the law valid, and the other void, the former must be preferred and the validity of the law upheld.
- The court will not decide Constitutional questions of a case are capable of being decided on other grounds.
- The court will not decide a larger Constitutional question than is required by the case before it.
- The court will not hear an objection as to the Constitutionality of a law by a person whose rights are not affected by it.
- Ordinarily, 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.

Indian judiciary has been able to overcome the restrictions that were put on it by the 42nd amendment, with the help of the 43rd and 44th amendments. Now the redeeming quality of Indian judiciary is that no future governments could did its wings or dilute its right of Judicial Review. In fact, now the 'Judicial Review' is considered to be the basic feature of our Constitution.

Federal & Quasi federal:

India is not a true federation. It combines the features of a federal government and the features of a unitary government which can also be called the non-federal features. Because of this, India is regarded as a semi-federal state. . The Supreme Court of India also describes it as "a federal structure with a strong bias towards the Centre".

The Centre exercises control over the States. The States have to respect the laws made by the central government and cannot make any law on matters on which there is already a central law. The centre can also give directions to the States which they must carry out.

In a true federation, the upper house of the legislature has equal representation from the constituting units or the States. But in our Rajya Sabha, the States do not have equal representation. The populous States have more representatives in the Rajya Sabha than the less populous States.

The upper house of the Indian Parliament, that is, the Rajya Sabha is not properly representative of all the States of Indian union. In India, the existence of a State or a federating unit depends upon the authority of the Centre. The boundary of a State can be changed by created out of the existing States.

In a true federal state, citizens are given dual citizenship. First, they are the citizens of their respective provinces or States and then they are the citizens of the federation. In India however, the citizens enjoy single citizenship, i.e., Indian citizenship or citizenship of the country as a whole.

Cooperative Federalism: Although the Constitution of India has nowhere used the term 'federal', it has provided for a structure of governance which is essentially federal in nature. First of all, Constitution has provided separate governments at the Union and the States with separate legislative, executive and judicial wings of governance. Secondly, Constitution has clearly demarcated the jurisdictions, powers and functions of the Union and the State Governments. Third, Constitution has spelt out in detail the legislative, administrative and financial relations between the Union and the States. Within this basic framework of federalism, the Constitution has given overriding powers to the Central government. States must exercise their executive power in compliance with the laws made by the Central government and must not impede on the executive power of the Union within the States. Governors are appointed by the Central government to oversee the States. The Centre can even take over the executive of the States on the issues of national security or breakdown of Constitutional machinery of the State. Considering the overriding powers given to the Central government, Indian federation has often been described as 'quasi-federation', 'semi-federation', 'pragmatic federation' or a 'federation with strong unitary features'. Indian federation should be seen in the context of its democratic system of governance at the national, state and local levels and the pluralities of its culture in terms of ethnic, linguistic, religious and other diversities which cut through the States. India is the largest democratic country as also the largest federal and the largest pluralist country of the world. While democracy provides freedom to everybody, federation ensures that governance is distributed spatially and a strong central government enables that the 'unity amidst diversity' is maintained and the country mobilizes all its resources to maintain its harmony and integrity and marches ahead to progress. A strong Centre in India is therefore necessary for strong States and vice versa. This is the essence of cooperative federalism. So long as the central and governments were ruled by the same political party, the cooperative framework worked very well. Since the seventies when different political parties are in power in the centre and the states and more recently when coalition governments of national and regional parties are in power in the Centre, there are signs of stresses and tensions in intergovernmental relations between the Centre and the States. Article 263 of the Constitution has provided for the setting up of an Inter-State Council for investigation, discussion and recommendation for better coordination of relation between the Centre and the States. The Zonal Councils set up under the State Reorganization Act

1956 provide another institutional mechanism for centre- state and inter-state cooperation to resolve the differences and strengthen the framework of cooperation. The National Development Council and the National Integration Council are the two other important forums that provide opportunities for discussion to resolve differences of opinion. Central councils have been set up by various ministries to strengthen cooperation. Besides Chief Ministers, Finance and other Ministers have their annual conferences in addition to the regular meetings and discussions of the officials of the Centre and the States to share mutual concerns on various issues. One of the challenges of Indian federation would be how best these mechanisms of cooperative federalism can be strengthened further to promote better coordination and cooperation between the Centre and the States.**Panchayat Raj System 73rd and 74th Constitutional Amendment Act:** In 1992 was the most significant year in the history of Panchayats in India as the 73rd amendment of the Constitution (amendment of Article 243) was passed by the Indian Parliament that declared Panchayats as institutions of self government. (The 74th amendment done at the same time relate to urban local bodies). These amendments came into force from April 24 1993. The major features of the 73rd amendment can be enumerated as under: There should be three tiers of Panchayats (District Panchayats, Block Panchayats i.e. intermediary Panchayats and Village or Gram Panchayats) in states with over 25 lakh of population. States with less than this population will have only two tiers omitting the intermediary tier. Panchayats declared as institutions of self governments (signifying that the status of Panchayats is same in their respective areas, as that of the Union Government at the national and State Governments at the state level). States were mandated to devolve functions relating to 29 subjects (including agriculture, land reforms, minor irrigation, fisheries, cottage and small scale industries, rural communication, drinking water, poverty alleviation programmes etc.) to the Panchayats. Panchayats were mandated to prepare plan(s) for economic development and social justice and implement them. States were asked to constitute a State Finance Commission every five years to determine the Panchayats' share of state's financial resources as a matter of entitlement (just as the Central Finance Commission determines how resources of the Central government should be shared between the union and state governments).Panchayat bodies must have proportionate representation of Scheduled Caste, Scheduled Tribes and women. Such reservation should also apply in the cases of Chairpersons and Deputy Chairpersons of these bodies.There shall be State Election Commission in each state which shall conduct elections to the local bodies in every five years.**The key mandatory provisions are:**The establishment in every state (except those with populations below 2 million) of rural local bodies (panchayats) at the village, intermediate and district levels (Article 243B)· Direct elections to all seats in the panchayats at all levels (Article 243C)·

Compulsory elections to panchayats every five years with the elections being held before the end of the term of the incumbent panchayat in the event that a panchayat is dissolved prematurely, elections must be held within six months, with the newly elected members serving out the remainder of the five year term (Article 243E)·

Mandatory reservation of seats in all panchayats at all levels for Davits and Advises in proportion to their share of the panchayat population (Article 243D)·

Mandatory reservation of one-third of all seats in all panchayats at all levels for women, with the reservation for women applying to the seats reserved for Davits and Advises as well (Article 243D)· Indirect elections to the position of panchayat chairperson at the intermediate and district levels (Article 243C)·

Mandatory reservation of the position of panchayat chairperson at all levels for Davits and Advises in proportion to their share in the state population (Article 243D)·

Mandatory reservation of one-third of the positions of panchayat chairperson at all three levels for women (Article 243D)·

In addition, the act mandates the Constitution of two state-level commissions: an independent election commission to supervise and manage elections to local bodies, much as the Election Commission of India manages state assembly and parliamentary elections (Article 243K); and a state finance commission,

established every five years, to review the financial position of local bodies and recommend the principles that should govern the allocation of funds and taxation authority to local bodies (Article 2431). The 74th Amendment act deals with urban local bodies, a key article contained in that amendment applies to rural local bodies as well.The article in question, Article 243ZD, mandates the Constitution of District Planning Committees to consolidate the plans prepared by both rural and urban local bodies.In order to facilitate a well-planned husbanding of available resources, Panchayats and municipalities should be informed as early as possible of what they might be expected to receive by way of tied and untied funds under various budgetary heads for implementing various schemes. This is an essential pre-requisite for each tier of the Panchayati Raj system to prepare plans for its areas of responsibility, as defined through Activity Mapping, and then for all these plans, along with plans of municipalities, to be "consolidated" by the District Planning Committees (DPC) as mandated by Article 243 ZD of the Constitution. It needs to be underlined that the Constitution does not provide for DPCs to prepare district plans on their own, but to "consolidate" local area plans drawn up at lower tiers in both rural and urban areas of each district (A different provision of the Constitution covers district planning for Metropolitan areas).

UNIT - II

PREAMBLE:

The Preamble to a Constitution embodies the fundamental values and the philosophy, on which the Constitution is based, and the aims and objectives, which the founding fathers of the Constitution enjoined the polity to strive to achieve. The importance and utility of the Preamble has been pointed out in several decisions of the Supreme Court of India. Though, by itself, it is not enforceable in Court of law, the Preamble to a written Constitution states the objects which the Constitution seeks to establish and promote and also aids the legal interpretation of the Constitution where the language is found to be ambiguous.

Purpose:·

- It indicates the source from which the Constitution derives its authority:·
- It also states the objects which the Constitution seeks to establish and promote.

The words- 'We, the people of India' adopt enact and give to ourselves this Constitution. It declares that the ultimate sovereignty of the people of India and that the Constitution rests on their authority. '**Sovereign**' means the independent authority of a state. It means that it has the power to legislate on any subject; and that is not subject to the control of any other state or external power. The term '**Socialist**' was added by the 42nd Amendment in 1976, it means in the achievement of mixed economy both Public sector and Private sector run together as two wheels of economic development. The term 'Secularism' denotes the relationship between the government and the people which is determined according to constitution and law. By the 42nd Amendment, the term '**Secular**' was also incorporated in the Preamble. Secularism is the basic structure of the Indian constitution. The Government respects all religions. It does not uplift or degrade any particular religion. There is no such thing as a state religion for India. In *S.R. Bommai v. Union Of India* (1994) the Supreme Court of India held "*A state which does not recognize any religion as the state religion, it treats all religions equally*". Positively, Indian secularism guarantees equal freedom to all religion. it stands for the right to freedom of religion for all citizens. Explaining the meaning of secularism as adopted by India, Alexander Owics has written, *"Secularism is a part of the basic of the Indian Constitution and it means equal freedom and respect for all religions"*. The term 'democracy' refers the government as democratically elected, head of the government (Prime Minister) is elected by the people. In a '**Republic**' form of government the head of the state is an elected person and not a heredity monarch. This word denotes a government where no one holds a public power as proprietary right. As opposed to a monarchy, in which the head of state is appointed on hereditary basis for a lifetime or until he abdicates from the throne, a democratic republic is an entity in which the head of state is elected, directly or indirectly, for a fixed tenure. The President of India is elected by an electoral college for a term of five years. The post of the President of India is not hereditary. Every citizen of India is eligible to become the President of the country. The leader of the state is elected by the people

Scope:

Unlike the Constitution of Australia, Canada or the U.S.A., the Constitution of India has an elaborate Preamble. The purpose of the Preamble is to clarify who has made the Constitution , what is its source, what is ultimate sanction behind it; what is the nature of the polity which is sought to be established by the Constitution and what are its goals and objective?.The Preamble does not grant any power but it gives direction and purpose to the Constitution .It outlines the objective of the whole Constitution. The Preamble contains the fundamental of Constitution. It serves several important purposes, as for example:

- It contains the enacting clause which brings the Constitution into force.
- It declares the basic type of government and polity which is sought to be established in the country.
- It declares the great rights and freedom which the people of India intended to secure to its entire citizen.
- It throws light on the source of the Constitution, viz, the people of India.

Objectives of the preamble:

The basic objectives of the preamble is to secure all its citizens social, economic and political justice; liberty of thought; equality of status and opportunity, and to promote among them fraternity so as to secure the dignity of the Individual and the unity and integrity of the Nation.

Importance:

1. The Preamble is a key to open the mind of the makers as to the mischief s, which are to be remedied;
2. That it is properly resorted to, where doubts or ambiguities are arise upon the words of the enacting part;
3. Even where the words are clear and unambiguous ,it can be used to prevent an obvious absurdity or to a direct overthrow of the intention expressed in the Preamble ,and it would be much more so, if they were ambiguous;
4. There is no reason why, in fundamental law or Constitution of the government, an equal attention should not be given to the intention of the framers, as stated in the Preamble.
5. The Preamble can never be resorted to, to enlarge the powers expressly given, nor to substantively create any power or to imply a power which is otherwise withdrawn from the Constitution, and
6. Its true function is to expound the nature, extent and application of the powers, actually conferred by the Constitution.

Union and its territories:

- India, that is Bharat, shall be a Union of States.
- The States and the territories thereof shall be as specified in the First Schedule.
- The territory of India shall comprise-
- The territories of the States; the Union territories specified in the First Schedule; and such other territories as may be acquired.
- Originally the schedule holds four Categories of State and its territories as follows:

Part A – includes the nine provinces which were under British India

Part B – princely states consisted of this category

Part C – centrally administered five states

Part D – Andaman and Nicobar Islands

In the seventh amendment of the Constitution in 1956 the distinction between the Part A and Part B states was abolished. Subsequently states were reorganized on linguistic basis. As a result several new states were formed, eg. Haryana, Goa, Nagaland, Mizoram etc. At present there are 29 States and 7 union territories.

Article 1 of Indian Constitution describes India as the 'Union of States' rather than Federal State. Infact Federation has nowhere been used in the Constitution. Union of States implies that "Indian federation is not the result of an agreement by the states" and "No state has right to secede from the federation" The Article 2 says that the **Parliament may by law admit** into the union, or establish new states, on such terms and conditions as it thinks fit. the phrase **"Parliament may by law admit".**

This expression further means that a new state may be admitted in the Union in the following means and ways:

- A Union Territory may be raised to the status of full state
- A Foreign territory acquired by India may be made a state of India and admitted into the union.
- A territory separated from an existing state can be reorganized into a full-fledged new state.

Article 2 confers full discretion on the Parliament as to what terms should be imposed on the new states so admitted to the union. **Parliament may by law** means that whenever a new state is established, legislation will require to be enacted. Now, we can derive two conclusions here:

- There is no need of any law by parliament to acquire a new territory
- There is a need of legislation by parliament to establish a new state.

Formation of New State:

The authors of Indian Constitution, unlike the current generation of Indians, did not believe that the states, districts and mandals within India are static, unchanging, and permanent. They had the maturity to accept that states would evolve and change, and hence made provisions for creation of new states in Indian Union. Article 3 of Indian Constitution addresses the topic of 'Formation of new States and alteration of areas, boundaries or names of existing States'. It says; Parliament may by law

a. form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;

b. increase the area of any State;

c. diminish the area of any State;

d. alter the boundaries of any State;

e. alter the name of any State; Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired.

Explanation I In this Article, in clauses (a) to (e), State includes a Union territory, but in the proviso, State does not include a Union territory Explanation II The power conferred on Parliament by clause (a) includes the power to form a new State or Union territory by uniting a part of any State or Union territory to any other State or Union territory.

Creation of New State:

The steps for creating a new state are as follows: A bill on a new state has to be recommended by the President. In India it is usually the Cabinet which requests the President to do that. Article 3 makes it clear that the Parliament is the sole authority on making a decision on a new state. President refers the bill to the State Assembly for its views giving it a certain period of time. Parliament is not obligated to follow on the views of State Assembly. If the State Assembly does not express its opinion within the specified period of time, the bill could be introduced in the Parliament after the expiry of the specified period.

When the Constituent Assembly was deliberating in November 1948 on the scope and content of Article 3, there was a proposal by *Prof. KT Shah* that the legislation constituting a new State from any region of a State should originate from the legislature of the State concerned.

If this procedure had been approved, the power to decide the statehood of a region seeking separation would have been vested with the State legislature dominated by the elite of developed regions. Opposing the same and using the then demand for an Andhra Province as an example, *Shri K Santhanam* stated as under: "*I wonder whether Professor Shah fully realises the implications of his amendment. If his amendment is adopted, it would mean that no minority in any State can ask for separation of territory...unless it can get a majority in that State legislature. Take the case of Madras Province for instance. The Andhra want separation. They bring up a resolution in the Madras Legislature. It is defeated by a majority. There ends the matter. The way of the Andhra is blocked altogether. They cannot take any further step to constitute an Andhra province.*"

It is the Constitutional intent that the will of the people of a region to form a separate State be the sole criterion for the Centre to initiate the process of State formation. This is the Constitutional benchmark for creating a new State for a region, as amply demonstrated in the deliberations of the Constituent Assembly and as reflected in the current phraseology of Article 3 of the Constitution of India. This interpretation of Article 3 prevailed over creation of many new states in modern India thereby nearly doubling the number of states in the last fifty years. If not for this interpretation, Andhra State would never have formed. If India had not honored the 'will of the people of a region to form a separate state', there wouldn't have been states like Mizoram, Nagaland, and Tripura, some of them composed of only two districts.

In this case, *Babulal Parante v. State of Bombay*, the court explains the provisions of Article 3 of Indian Constitution: The period within which the State Legislature must express its views has to be specified by the President; but the President may extend the period so specified. If, however, the period specified or extended expires and no views of the State Legislature are received, the second condition laid down in the proviso is fulfilled in spite of the fact that the views of the State Legislature have not been expressed. The intention seems to be to give an opportunity to the State Legislature to express its views within the time allowed; if the State Legislature fails to avail itself of that opportunity, such failure does not invalidate the introduction of the Bill. Nor is there anything in the proviso to indicate that Parliament must accept or act upon the views of the State Legislature. Clearly, Indian Constitution envisioned a situation where a state may refuse to provide its view or provide negative views about a formation of a new state, and therefore gave full powers to Indian Parliament to go ahead with its decisions irrespective of opposition from the State Assembly.

Citizenship:

A citizen of a state is a person who enjoys full civil and political rights. citizenship carries certain advantages conferred by the Constitution. Part II of the Indian Constitution describes classes of persons who would be deemed to be the citizens of India at the commencement of Indian Constitution, 26th January, 1950, and leaves the entire law of the citizenship to be regulated by the law made by parliament. In exercise of its

power the parliament has enacted the Indian Citizenship Act, 1955. This Act provides for the acquisition and termination of citizenship subsequent to the commencement of the Constitution.

The nature of provisions from Article 5 to 9 show that the objective of the constituent assembly was not to make a permanent law for citizenship. Ours is a Republic Country and various offices are to be occupied by the persons who are elected by the citizens. So, keeping this in view, it was necessary for the Constituent Assembly to make some provisions which could precisely determine that who is a Citizen of Independent Indian Dominion and who is not, at the time of the commencement of the Constitution.

The following persons under Article 5 to 8 of the Constitution of India shall become citizens of India at the commencement of the Constitution:

1. Citizenship by domicile (Article 5).
2. Citizenship of migrants from Pakistan (Article 6).
3. Citizenship of migrants to Pakistan (Article 7).
4. Citizenship of Indians abroad (Article 8).

Article 5 deals with this matter. A person is entitled to citizenship by domicile if he fulfils two conditions laid down by Article 5 First, he must at the commencement of the Constitution, have his domicile in the territory of India. Secondly such a person must fulfill any one of the three conditions laid down in the Article, namely,

1. He/She was born in India,
2. Either of his/her parents were born in India,
3. He/She must have been ordinarily resident in the territory in India for not less then five years immediately before the commencement of the Constitution.

Domicile in India is considered an essential requirement for acquiring the status of Indian Citizenship. But the term 'domicile' is not defined in Constitution. Ordinarily, it means permanent home, or place where a person resides with the intention of remaining there for an indefinite period. Two elements are necessary for the existence of domicile-

1) A resistance of a particular kind and
2) An intention of particular kind.

Domicile is of two kinds: domicile of origin and domicile of choice. Every person is born with domicile or origin. It is domicile received by him at his birth. The domicile or origin of every person is the country in which at the time of his birth his father was domiciled. Thus the domicile of origin is a concept of law. It clinges to a man till he abandons it and acquires a new domicile. Every independent person can acquire a domicile of choice by a combination of (a) actual residence in particular place and (b) intention to remain there permanently or for an indefinite period.

In *Pradeep Jain v. Union of India*, it is clear on a reading of the Constitution that it recognizes only one domicile namely, domicile in India. Article 5 of the Constitution is clear and explicit on this point and it refers only to one domicile, namely, "domicile in the territory of India." Moreover, it must be remembered that India is not a federal state in the traditional sense of that term. It is not a compact of sovereign states which have come together to form a federation by ceding a part of their sovereignty to the federal states. It has undoubtedly certain federal features but it is still not a federal state and it has only one citizenship,

namely, the citizenship of India. It has also one single unified legal system which extends throughout the country. It is not possible to say that a distinct and separate system of law prevails in each State forming part of the Union of India. The legal system which prevails through-out the territory of India is one single indivisible system with a single unified justicing system having the Supreme Court of India at the apex of the hierarchy, which lays down the law for the entire country.

The concept of 'domicile' has no relevance to the applicability of municipal laws, whether made by the Union of India or by the States. It would not, therefore, in our opinion be right to say that a citizen of India is domiciled in one state or another forming part of the Union of India. The domicile which he has is only one domicile, namely, domicile in the territory of India. When a person who is permanently resident in one State goes to another State with intention to reside there permanently or indefinitely, his domicile does not undergo any change: he does not acquire a new domicile of choice. His domicile remains the same, namely, Indian domicile.

Citizenship of Migrants from Pakistan:

Article 6 provides citizenship rights to migrants from Pakistan before commencement of Constitution. A person who migrated from Pakistan to India before 19 July 1948 shall be considered a citizen of India, provided either of the person's parents or any of his grandparents were born in India as stated in the Government of India act, 1935 and has been residing since the date of migration. For person/s migrated after 19 July 1948, the person should be registered as a citizen of India by an officer from the Government of India, but for registration the subjected person has to be a resident of India for at least six months, at the date of his application.

Citizenship of Migrants to Pakistan:

Article 7 makes special provisions regarding the citizenship of persons who migrated to Pakistan after 1st March, 1947 but returned to India subsequently. Such person/s becomes entitled to citizenship of India, provided they fulfill the conditions stated for migrants from Pakistan stated in Article 6. It is necessary that in such cases to the visits of the migrants must not be for short/limited periods or be of a temporary nature or on purposes of business or otherwise. It has to be noted that such cases are subjected to this Article, as they were before the commencement of the Constitution cases pertaining to the period thereafter are to be governed by the Citizenship Act, 1955.

Migration into the territory of India which conferred the status of citizenship under Article 6 and migration from India which disqualify a person from claiming citizenship under Article 7 must be complete before the date of the commencement of the Constitution. If therefore intention to settle permanently in the country in which a person has moved is a necessary component of migration, such intention must have been formed before the commencement of the Constitution, and many persons who were compelled to move from their homes on account of a sense of insecurity resulting from riots and civil commotion still hoping that they would be going back to the abodes of their ancestors when the situation returned to normal, may not be deemed to have migrated at all. This, in my judgment, would introduce an element of uncertainty in the determination of citizenship and involve great hardship to the migrants.

Persons of origin residing outside India:

Article 8 provides that any person who or either of whose parents or grandparents was born in India as defined in Government of India Act 1955 and who is ordinarily residing in any country outside India shall be deemed to be a citizen of India if he has registered as an Indian Citizen by the diplomatic or consular representative of India in that country on an application made by him/her in the prescribed form to such diplomatic or consular representative, whether before or after the commencement of the Constitution.

Indian Citizenship Act, 1955:

The Citizenship Act, 1955 that came into force with effect from 30th December 1955 deals with matters relating to the acquisition, determination and termination of Indian citizenship. It provides for the acquisition of Indian citizenship by birth, by descent, by registration and by naturalization. The act has been amended by the Citizenship (Amendment) Act 1986, the Citizenship (Amendment) Act 1992, the Citizenship (Amendment) Act 2003, and the Citizenship (Amendment) Act, 2005.

The Original Act provides as follows:

- a person born in India after 26 January 1950 would, subject to certain exceptions be a citizen of India by Birth
- anyone born outside India after 26 January 1950, subject to certain requirements, would be a citizen of India if his/her father was an Indian citizen at the time of his/her birth
- under certain conditions, certain category of persons could acquire Indian citizenship by registration in prescribed manner
- foreigners could acquire Indian citizenship on application for naturalization on certain conditions
- if any territory became part of India, the Government of India could by order specify the persons who would become citizens of India as a result thereof
- citizenship could be lost by termination, renunciation or deprivation on certain grounds
- a citizen of commonwealth country would have the status of commonwealth citizen of India. Government could make suitable provisions on the basis of reciprocity.

Acquisition of Indian citizenship:

Indian citizenship can be acquired by birth, descent, registration and naturalization. The conditions and procedure for acquisition of Indian citizenship as per the provision of the Citizenship Act, 1955 are given below:

By Birth (Section 3)

1. A person born in India on or after 26th January 1950 but before 1st July, 1987 is citizen of India by birth irrespective of the nationality of his parents.
2. A person born in India on or after 1st July,1987 but before 3rd December, 2004 is considered citizen of India by birth if either of his parents is a citizen of India at the time of his birth.
3. A person born in India on or after 3rd December, 2004 is considered citizen of India by birth if both the parents are citizens of India or one of the parents is a citizen of India and the other is not an illegal migrant at the time of his birth.

An 'illegal migrant' as defined in section 2(1)(b) of the Act is a foreigner who entered India.

1. Without a valid passport or other prescribed travel documents.
2. With a valid passport or other prescribed travel documents but remains in India beyond the permitted period of time.

By Descent: (Section 4)

1. A person born outside India on or after 26th January 1950 but before 10th December 1992 is a citizen of India by descent, if his father was a citizen of India by birth at the time of his birth. In case the father was a citizen of India by descent only, that person shall not be a citizen of India, unless his birth is registered at an Indian Consulate within one year from the date of birth or with the permission of the Central Government, after the expiry of the said period.

2. A person born outside India on or after 10th December 1992 but before 3rd December, 2004, is considered as a citizen of India if either of his parents was a citizen of India by birth at the time of his birth. In case either of the parents was a citizen of India by descent, that person shall not be a citizen of India, unless his birth is registered at an Indian Consulate within one year from the date of birth or with the permission of the Central Government, after the expiry of the said period.

3. A person born outside India on or after 3rd December, 2004 shall not be a citizen of India, unless the parents declare that the minor does not hold passport of another country and his birth is registered at an Indian consulate within one year of the date of birth or with the permission of the Central Government, after the expiry of the said period.

By Registration: (Section 5(1))

Indian Citizenship by registration can be acquired (not illegal migrant) by: –

1. Persons of Indian origin who are ordinarily resident in India for SEVEN YEARS before making application under section 5(1)(a) (throughout the period of twelve months immediately before making application and for SIX YEARS in the aggregate in the EIGHT YEARS preceding the twelve months).

2. Persons of Indian origin who are ordinarily resident in any country or place outside undivided India under section 5(1)(b).

3. Persons who are married to a citizen of India and who are ordinarily resident in India for SEVEN YEARS (as mentioned at (a) above) before making application under section 5(1)(c).

4. Minor children whose both parents are Indian citizens under section 5(1)(d)

5. Persons of full age whose both parents are registered as citizens of India under section 5(1)(a) or section 6(1) can acquire Indian citizenship under section 5(1)(e).

6. Persons of full age who or either of the parents were earlier citizen of Independent India and residing in India for ONE YEAR immediately before making application under section 5(1)(f).

7. Persons of full age and capacity who has been registered as an OVERSEAS CITIZEN OF INDIA (OCI) for five years and residing in India for ONE YEAR before making application under section 5(1)(g).

By Registration (Section 5(4)):

Any minor child can be registered as a citizen of India under Section 5(4), if the Central Government is satisfied that there are ?special circumstances? justifying such registration. Each case would be considered on merits.

By Naturalization (Section 6):

Citizenship of India by naturalization can be acquired by a foreigner (not illegal migrant) who is ordinarily resident in India for TWELVE YEARS (throughout the period of twelve months immediately preceding the date of application and for ELEVEN YEARS in the aggregate in the FOURTEEN YEARS preceding the twelve months) and other qualifications as specified in Third Schedule to the Act.

Loss of Citizenship of India:

The Citizenship Act, 1955, prescribes three ways of losing citizenship whether acquired under the Act or prior to it under the Constitution, viz, renunciation, termination and deprivation:
1. By Renunciation

Any citizen of India of full age and capacity can make a declaration renouncing his Indian citizenship. Upon the registration of that declaration, that person ceases to be a citizen of India. However, if such a declaration is made during a war in which India is engaged, its registration shall be withheld by the Central Government. Further, when a person renounces his Indian citizenship, every minor child of that person also loses Indian citizenship. However, when such a child attains the age of eighteen, he may resume Indian citizenship.

2. By Termination

When an Indian citizen voluntarily (consciously, knowingly and without duress, undue influence or compulsion) acquires the citizenship of another country, his Indian citizenship automatically terminates. This provision, however, does not apply during a war in which India is engaged.

3. By Deprivation

It is a compulsory termination of Indian citizenship by the Central government, if:

a. the citizen has obtained the citizenship by fraud

b. the citizen has shown disloyalty to the Constitution of India

c. the citizen has unlawfully traded or communicated with the enemy during a war;

d. the citizen has, within five years after registration or naturalization, been imprisoned in any country for two years; and

e. the citizen has been ordinarily resident out of India for seven years continuously.

Plenary power of the Parliament:

Continuance of the rights of citizenship: Every person who is or is deemed to be a citizen of India under any of the foregoing provisions of this Part shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen **(Article 10)**

Article 11: Parliament to regulate the right of citizenship by law.

Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship. The nature of provisions from Article 5 to 9 show that the objective of the constituent assembly was not to make a permanent law for citizenship. Ours is a Republic Country and various offices are to be occupied by the persons who are elected by the citizens. So, keeping this in view, it was necessary for the Constituent Assembly to make some provisions which could precisely determine that who is a Citizen of

Independent Indian Dominion and who is not, at the time of the commencement of the Constitution. Further, the constituent also gave plenary power to the parliament of India to deal with the question of nationality. Article 10 and more precisely Article 11 give the power to the parliament to make law in this connection as and when it suits to the demands of the circumstances. The power in parliament vested by Article 11 embraced not only acquisition but also the termination or any other matter related to Citizenship. Using the power vested in parliament by Article 11 of the Constitution of India, a comprehensive law "The Citizenship Act, 1955" was passed by the parliament. This act has been amended from time to time to make space for provisions as and when required.

UNIT III

STATE

Definition of State:

Article 12 defines the "state". The state includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Thus, Article 12 is an interpretative Article and has been interpreted by the Supreme Court at various times in various ways. According to various interpretations of the term state as given by Supreme Court, the State includes the following:

Executive and Legislature of Union and States:

It would obviously include; Union and State government and parliament and state legislatures. The acting president of India and governors of states, which form part of the executive. The term government includes a department of government or any institution under the control of a government department e.g. the I.T. or Excise department; the Forest Research Institute, Dehradun etc.

Local authorities:

The expression as defined in Sec. 3 of the General Clauses Act refers to authorities like Municipalities, District Boards, Panchayats etc.

Other authorities:

The expression other authorities in Article 12 is used after mentioning the executive and legislature of union and states, and all local authorities. Thus, it was held that it could only indicate authorities exercising governmental or sovereign functions. It cannot include persons, natural or juristic e.g. University unless it is maintained by the state. But, later it was held that *ejusdem generis* rule could not be resorted to in interpreting this expression, as there is no common genus running through these named bodies (in Art. 12), nor can these bodies so placed in one single category on any rational basis. This leads us to dig into various cases in which some bodies were declared other authorities. Here is a summary of what has been judged as authority and what has been not judged as other authority by the Court.

Meaning of the State:

The term "State" is defined under Article 12 of Part III (Fundamental Rights) of the Constitution of India. It states that: In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each States and all local or other authorities within the territory of India or under the control of the Government of India. The definition in Article 12 is only for the purpose of application of the provisions contained in Part III. Hence, even though a body of persons may not constitute 'State' within the instant definition, a writ under Article 226 may lie against it on non-Constitutional grounds or on grounds of contravention of some provision of the Constitution outside Part III, e.g., where such body has a public duty to perform or where its acts are supported by the State or public officials.

In *Ujjain Bai v. State of U.P.*, the Supreme Court observed that Article 12 winds up the list of authorities falling within the definition by referring to "other authorities" within the territory of India which cannot, obviously, be read as *ejusdem generis* with either the Government or the Legislature or Local authorities. The word "State" is of wide amplitude and capable of comprehending every authority created under the statute and functioning within the territory of India. There is no characterization of the nature of authority

set up under a statute for the purpose of administering laws enacted by the Parliament or by the State including those vested with the duty to make decisions in order to implement those laws.

The preponderant considerations for pronouncing an entity as State agency or instrumentality are: (1) financial resources of the state being the Chief finding source; (2) functional character being governmental in essence; (3) plenary control residing in government; (4) prior history of the same activity having been carried on by government and made over to the new body; (5) some element of authority or command.

Whether State includes Judiciary?

The definition of State under Article 12 of the Constitution does not explicitly mention the Judiciary. Hence, a significant amount of controversy surrounds its status vis-a-vis Part III of the Constitution. Bringing the judiciary within the scope of Article 12 would mean that it is deemed capable of acting in contravention of Fundamental Rights. It is well established that in its non-judicial functions, the judiciary does come within the meaning of State. However, challenging a judicial decision which has achieved finality, under the writ jurisdiction of superior Courts on the basis of violation of fundamental rights, remains open to debate.

On the one hand, the Judiciary is the organ of the State that decides the contours of the Fundamental Rights. Their determination, of whether an act violates the same, can be right or wrong. If it is wrong, the judicial decision cannot ordinarily be said to be a violation of fundamental rights. If this were allowed, it would involve protracted and perhaps unnecessary litigation, for in every case, there is necessarily an unsatisfied party. On the other hand, not allowing a decision to be challenged could mean a grave miscarriage of justice, and go unheeded, merely because the fallibility of the Judiciary is not recognized.

The erroneous judgment of subordinate Court is subjected to judicial review by the superior Courts and to that effect, unreasonable decisions of the Courts are subjected to the tests of Article 14 of the Constitution. The Bombay High Court expressed the view that the Judgment of the Court cannot be challenged for violation of Fundamental Rights. In the case of *Naresh v. State of Maharashtra*, the issue posed before the Supreme Court for consideration whether judiciary is covered by the expression 'State' in Article 12 of the Constitution. The Court held that the fundamental right is not infringed by the order of the Court and no writ can be issued to High Court. However in yet another case, it was held that High Court Judge is as much a part of the State as the executive.

Doctrine of Eclipse:

The Doctrine of Eclipse provides for the validation of Pre-Constitution laws that violate fundamental rights upon the premise that such laws are not null and *void ab initio* but become unenforceable only to the extent of such inconsistency with the fundamental rights. The Doctrine of eclipse was enunciated by the Supreme Court in the case of *Bhikaji v. State of M.P* (1955). Article 13(1) by reason of its language cannot be read as having obliterated the entire operation of the inconsistent law or having wiped it out altogether the statute book. Such law existed for all past transactions and for enforcement of rights and liabilities accrued before the date of the Constitution. The law continued in force, even after the commencement of the Constitution, with respect to persons who were not citizens and could not claim the fundamental right. The doctrine of eclipse provides for the validation of pre-Constitution laws that violate fundamental rights upon the premise that such laws are not null and *void ab initio* but become unenforceable only to the extent of such inconsistency with the fundamental rights. If any subsequent amendment to the Constitution removes the inconsistency or the conflict of the existing law with the fundamental rights, then the Eclipse vanishes and that particular law again becomes active again.

This reasoning was also adopted in the case of *Bhikaji Narain Dhakras and Others v. The State of Madhya Pradesh & another.* It was held that "*on and after the commencement of the Constitution, the existing law, as a result of its becoming inconsistent with the provisions of Article 19(1)(g) read with clause (6) as it then stood, could not be permitted to stand in the way of the exercise of that fundamental right. Article 13(1) by reason of its language cannot be read as having obliterated the entire operation of the inconsistent law or having wiped it out altogether the statute, book. Such law existed for all past transactions and for enforcement of rights and liabilities accrued before the date of the Constitution. The law continued in force, even after the commencement of the Constitution, with respect to persons who were not citizens and could not claim the fundamental right*".

The Court also said that Article 13(1) had the effect of nullifying or rendering the existing law which had become inconsistent with fundamental right as it then stood, ineffectual, nugatory and devoid of any legal force or binding effect, only with respect to the exercise of the fundamental right on and after the date of the commencement of the Constitution. Finally the Court said something that we today know of as the crux of doctrine of eclipse. "*The true position is that the impugned law became, as it were, eclipsed, for the time being, by the fundamental right.*" We see that such laws are not dead for all purposes. They exist for the purposes of pre-Constitution rights and liabilities and they remain operative, even after the commencement of the Constitution, as against non-citizens. It is only as against the citizens that they remain in a dormant or moribund condition.

Thus the doctrine of eclipse provides for the validation of Pre-Constitution Laws that violate fundamental rights upon the premise that such laws are not null and *void ab initio* but become unenforceable only to the extent of such inconsistency with the fundamental rights. If any subsequent amendment to the Constitution removes the inconsistency or the conflict of the existing law with the fundamental rights, then the Eclipse vanishes and that particular law again becomes active again.

Doctrine of Severability:

The doctrine of severability or separability means that if an offending provision can be separated from that which is Constitutional then only that part which is offending is to be declared as void and not the entire statute. This is related to Article 13 of the Constitution of India. Article 13(1) of the Constitution says that: "*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.*" The words "*to the extent of such inconsistency be void*": in the above Articles means that only the repugnant provisions of the law in questions shall be treated by Courts as void and not the entire statute. Doctrine of severability provides that if an enactment cannot be saved by construing it consistent with its Constitutionality, it may be seen whether it can be partly saved

In *R.M.D.C v. The Union of India* (1957) is considered to be one of the most important cases on the Doctrine of Severability. In this case, the Court observed that: "*The* doctrine of severability rests, as will presently be shown, on a presumed intention of the legislature that if a part of a statute turns out to be void, that should not affect the validity of the rest of it, and that that intention is to be ascertained from the terms of the statute. It is the true nature of the subject-matter of the legislation that is the determining factor, and while a classification made in the statute might go far to support a conclusion in favour of severability, the absence of it does not necessarily preclude it."

Article 13:

The Article 13 not only asserts the supremacy of the Indian Constitution but also makes way for judicial review. This legislation creates scope for reviewing pre-Constitutional and existing laws. Although the legitimacy of judicial interventions in Constitutional matters has sparked debates, yet in most cases, the power of judicial review is evoked to protect and enforce the fundamental rights guaranteed in Part III of the Constitution.

Meaning and scope of Article 13:

It is through Article 13 that the Constitution prohibits the Parliament and the state legislatures from making laws that "may take away or abridge the fundamental rights" guaranteed to the citizens of the country. The provisions under Article 13 ensure protection of the fundamental rights and consider any law "inconsistent with or in derogation of the fundamental rights" as void.

The Article 13 provides a Constitutional basis to judicial review since it gives the Supreme Court or High Courts the authority to interpret the pre-Constitutional laws and decide whether they are in sync with the principles and values of the present Constitution. If the provisions are partly or completely in conflict with the legal framework, they are deemed ineffective until an amendment is made. Similarly, the laws made after the adoption of the Constitution must prove their compatibility, otherwise they will be deemed as void.

Judicial Review as mentioned in Article 13:

It is to be noted that judicial review as a norm has evolved over the years to uphold the principles of 'natural justice.' The Supreme Court of India and the High Courts are vested with the power to rule on the Constitutionality of both legislative and administrative actions. In most cases, the power of judicial review is exercised to protect and enforce the fundamental rights.

The Article 13 has expanded the scope of judicial review. The Indian judiciary is approached not just to ensure fairness in administrative action but also to rule on questions of legislative competence, mainly in the context of Center-state relations.

Amendment in Article 13:

The 24th Constitutional Amendment Act to the Indian Constitution was enacted by the then Indira Gandhi government in November 1971. The objective was to nullify the Supreme Court's ruling that had left the Parliament with no power to curtail the Fundamental Rights. Clause (4) was inserted in Article 13, which states: "Nothing in this Article shall apply to any amendment of this Constitution made under Article 368." This provision added more power to the Parliament when it comes to amending the Constitution. It brought Fundamental Rights within the purview of amendment procedure and judicial intervention or review of those amendments was prohibited.

The amendment evoked sharp reactions from the media fraternity and they explained this move as "too sweeping." The amendment faced equal criticism from the jurists and the members of the Constituent Assembly. The draconian nature of the amendment was further reflected in the fact that the new provision made it obligatory for the President to give his assent when a Constitution Amendment Bill is submitted to him.

Extensive concept of judicial review in India:

The Supreme Court has been vested with the power of judicial review. It means that the Supreme Court may review its own Judgment order. Judicial review can be defined as the competence of a Court of law to declare the Constitutionality or otherwise of a legislative enactment.

Being the guard-ian of the Fundamental Rights and arbiter of the Constitutional conflicts between the Union and the States with respect to the division of powers between them, the Supreme Court enjoys the competence to exercise the power of reviewing legislative enactments both of Parliament and the State's legislatures.

The power of the Court to declare legislative enactments invalid is expressively pro-vided by the Constitution under Article 13, which declares that every law in force, or every future law inconsistent with or in

derogation of the Fundamental Rights, shall be void. Other Articles of the Constitution (131-136) have also expressively vested in the Supreme Court the power of reviewing legislative enactments of the Union and the States.

The jurisdiction of the Supreme Court was curtailed by the 42nd Amendment of the Constitution (1976), in several ways. But some of these changes have been repealed by the 43rd Amendment Act, 1977. But there are several other provisions which were introduced by the 42nd Amendment Act 1976 not repealed so far.

They are:

1. Arts. 323 A-B. The intent of these two new Articles was to take away the jurisdiction of the Supreme Court under Art. 32 over orders and decisions of Adminis-trative Tribunals. These Articles could, however, be implemented only by legislation. Art. 323A has been implemented by the Administrative Tribunals Act, 1985 (ii) Arts. 368 (4)-(5). These two Clauses were inserted in Art. 368 with a view to preventing the Supreme Court to invalidate any Constitutional Amendment Act on the theory of 'basic features' of the Constitution. These Clauses have been emasculated by the Supreme Court itself, striking them down on the ground that they are violative in the two 'basic features' of the Constitution:

(a) the limited nature of the amending power under Art. 368 and

(b) judicial review in the *Minerva Mills case.*

The Court was very reluctant and cautious to exercise its power of Judicial Review, during the first decade, when the Supreme Court declared invalid only one of total 694 Acts passed by the Parliament. During the second decade the Court asserted its authority without any hesitation which is reflected in the famous *Golak Nath case* and *Kesavananda Barti case.* In these cases the Supreme Court assumed the role of Constitution making. Indian Judiciary has been able to overcome the restriction that was put on it by the 42nd amendment, with the help of the 43rd and 44th amendments. Now the redeeming quality of Indian judiciary is that no future governments could clip its wings or dilute its right of Judicial Review. In fact, now the 'Judicial Review' is considered to be the basic feature of our Constitution.

Constitutional provisions for judicial review:

The Indian Constitution adopted the Judicial Review on lines of U.S. Constitution. Parliament is not supreme under the Constitution of India. Its powers are limited in a manner that the power is divided between centre and states. Moreover the Supreme Court enjoys a position which entrusts it with the power of reviewing the legislative enactments both of Parliament and the State Legislatures. This grants the Court a powerful instrument of judicial review under the Constitution. Both the political theory and text of the Constitution has granted the judiciary the power of judicial review of legislation. The Constitutional Provisions which guarantee judicial review of legisla-tion are Articles 13, 32, 131-136, 143, 226, 145, 246, 251, 254 and 372.

- Article 372 (1) establishes the judicial review of the pre-Constitution legislation.
- Article 13 declares that any law which contravenes any of the provisions of the part of Funda-mental Rights shall be void.
- Articles 32 and 226 entrusts the roles of the protector and guarantor of fundamental rights to the Supreme and High Courts.
- Article 251 and 254 states that in case of inconsistency between union and state laws, the state law shall be void.

- Article 246 (3) ensures the state legislature's exclusive powers on matters pertaining to the State List.
- Article 245 states that the powers of both Parliament and State legislatures are subject to the provisions of the Constitution.

The legitimacy of any legislation can be challenged in the Court of law on the grounds that the legislature is not competent enough to pass a law on that particular subject matter; the law is repug-nant to the provisions of the Constitutions; or the law infringes one of the fundamental rights.

Articles 131-136 entrusts the Court with the power to adjudicate disputes between individuals, between individuals and the state, between the states and the union; but the Court may be required to interpret the provisions of the Constitution and the interpretation given by the Supreme Court becomes the law honoured by all Courts of the land. There is no express provision in our Constitution empowering the Courts to invalidate laws, but the Constitution has imposed definite limitations upon each of the organs, the transgression of which would make the law void. The Court is entrusted with the task of deciding whether any of the Constitutional limitations has been transgressed or not.

The procedure of amending the Constitution is given in Article 368. It says that the parliament can amend the Constitution under its constituent power. A bill must be presented in either house of the parliament and must be approved by a majority of each houses and not less than 2/3 majority of each house present and voting. After such approval the bill is presented to the president for his assent, upon whose assent the Constitution shall stand amended as per the provisions of this Article. However, if the amendment seeks to make a change in Articles 54, 55, 73, 162, or 241 Chapter 4 of part 5, chapter 5 of chapter 6, or chapter 1 of part 11 any of the lists in the 7th schedule representation of the states in the parliament in this Article itself the bill must also be ratified by not less than half of the states before it is presented to the president for his assent. For amending Articles 5, 169, or 239-A, only a simple majority of both the houses of the parliament is required. Power of the parliament to amend the Constitution.

There has been a lot of controversy on the power of the parliament to amend the Constitution. Article 13 of the original Constitution said that the state shall not make any law that takes away or abridges the rights given to the citizens in Part III and any such law made in contravention of this Article shall be deemed void to the extent of contravention. Thus, it seemed that parliament cannot amend the Constitution in a way that takes away the fundamental rights of the citizens.

This logic was first tested by the Supreme Court in the case of *Shankari Prasad v. Union of India* (1951). In this case, an amendment to add art 31 A and 31 B to the Constitution was challenged on the ground that they take away fundamental right of the citizens and therefore not allowed by Article 13. It was argued that "State" includes parliament and "Law" includes Constitutional Amendments. However, SC rejected the arguments and held that power to amend the Constitution including fundamental rights is given to the parliament by art 368 and that "Law" is art 13 refers only to ordinary law made under the legislative powers.

In the case of *Sajjan Singh v. State of Raj.* (1965), followed the judgment given in the case of Shankari Prasad and held that the words "amendment of the Constitution" means amendment of all provisions of the Constitution. However, in the case *of Golak Nath v. State of Punjab,* (1971) reversed its previous judgement and held that parliament has no power from the date of this judgment to amend part III of the Constitution so as to take away any fundamental right. It held that "amendment" is a law as meant under Article 13 and so is limited by Article 13(2). To overcome the judgement in the case of Golak Nath, the parliament added another clause in art 13by the 24th amendment in 1971. It says that this Article does not apply to the amendment of the Constitution done under Article 368. A similar clause was added in Article 368 for clarity in the same amendment, which says that amendment done under Article 368 shall not come under the purview of Article 13.

This amendment itself was challenged in the case of *Keshavanand Bharati v. State of Kerala* (1973). In this case, Supreme Court reversed its judgement again and held that "Law" in Article 13 only means ordinary law made under legislative power, The 24th Constitutional Amendment is only clarifying that position and so it is valid. However, it further held that "amendment" means that the original spirit of the Constitution must remain intact after the amendment. Thus, the basic structure or features of the Constitution cannot be changed. According to *C J Sikri,* the basic structure of the Constitution includes - Supremacy of the Judiciary, democratic republic, secularism, separation of powers among judiciary, legislative, and the executive, and the federal character of the Constitution. This judgement was delivered by 7:6 majority and is one of the most important judgements in the history of independent India. The effect of this judgement can be seen in the case of *Indra Sawhney v. Union of India* (1993), where Supreme Court prevented the politicians from running amok in the matter of reservation. It this case it held that inclusion of creamy layer violates the fundamental right of equality, which is a basic feature of the Constitution and so its inclusion cannot be permitted even by Constitutional Amendment.

Procedure of amendment of the Constitution:

To evolve and change with all changes in the society and environment is a necessity for every Constitution. The makers of the Constitution of India were fully aware of this need. As such, while writing the Constitution, they also provided for a method of its amendment. Further they of decided, to make the Constitution both rigid as well as flexible. They laid down a flexible amendment method in respect of its some parts and for several others they provided for a rigid method.

Method of Amendment:

Part XX of The Constitution of India contains only one Article 368. It deals with the power of the Parliament to amend the Constitution. It lays down two special methods for the amendment of various parts of the Constitution. Along with it the Union Parliament has the power to change some specified features/parts of the Constitution by passing an ordinary law.

Two Special Methods of Amendment under Art 368:

A. <u>Amendment by 2/3rd Majority of Parliament</u>:

Most parts of the Constitution (with exception of some specific provisions) can be amended by this method. Under this method, the Constitution can be amended by the Union Parliament alone. For this purpose an amendment bill can be passed by each of the two Houses of Union Parliament by a majority of its total membership (i.e. absolute majority) and by a two-third majority of members present and voting in each House. It is a rigid method in so far as it prescribes a special majority for amending the Constitution but it is considered to be a flexible method because under it the Union Parliament alone can pass any amendment.

B. <u>Amendment by 2/3rd Majority of the Parliament plus Ratification by at least half of the several State Legislatures</u>:

In respect of some specified provisions of the Constitution, a very rigid method of amendment has been prescribed.In respect of these the amendment-making involves two stages:

- First, the amendment bill is to be passed by both the Houses of the Union Parliament by a majority of total membership and a 2/3rd majority of members present and voting in each House.
- Secondly, after this the amendment bill has to secure ratification from at least half of the several State Legislatures (now at least 14 state legislatures).Only then it gets finally passed and incorporated as a part of the Constitution when the President puts his signatures on the bill.

The following provisions of the Constitution can be amended by this rigid method:

- Election of the President.
- Scope of the executive power of the Union.
- Scope of the executive power of a State.
- Provisions regarding High Courts in Union Territories.
- Provisions regarding Supreme Court of India.
- Provisions regarding High Courts in States.
- Legislative Relations between the Union and States.
- Any of the Lists in the Seventh Schedule. (Division of Powers between the Union and States)
- Representation of States in the Parliament.
- The Provisions of Article 368. (Method of Amendment)

C. Additional Amendment-making by A Simple Majority in the Two Houses of Parliament:

In respect of some provisions of the Constitution the Parliament has been given the power to make necessary changes by passing as a law in the normal way i.e. by simple majority of members of both of its Houses. It is, indeed, an easy method of amendment.

It applies to the following provisions of the Constitution:

- A Admission/ formation of new States and alteration of areas, boundaries or names of existing States.
- Citizenship provision.
- Provision regarding delimitation of constituencies.
- Quorum of the two Houses of Parliament.
- Privileges and Salaries and allowances of the MPs.
- Rules of procedure in each House of the Parliament.
- English as a language of the Parliament.
- Appointment of Judges and jurisdiction of Supreme Court.
- Creation or abolition of Upper Houses in any state.
- Legislatures for Union Territories.
- Elections in the country.
- Official language of India.
- Second, fifth and sixth Schedules of the Constitution.

These methods of amendment reflect a mixture of rigidity and flexibility in the Indian Constitution.

Basic structure:

Article 245 of the Constitution invests the Parliament with the power to make laws subject to the provisions of the Constitution. Article 368 provides the Parliament with a special type of power, i.e., to amend Constitutional provisions. This power can be exercised through a two-thirds majority in both Houses of Parliament and, in some cases, with the additional consent of half the number of State legislatures. The Article remains silent, however, upon the exact nature, scope and limitations (if any) of the amending power. The question, therefore, arises: is the Parliament's power to amend the Constitution unfettered and free from all restraints? For example, can the Parliament, if it so desires, repeal the Constitution entirely, and convert India from a secular democratic republic to a theocratic despotic monarchy, subject to fulfilling the procedural requirements of Article 368?

In the case of *Kesavananda Bharati v. State of Kerala*, a thirteen-judge bench of the Indian Supreme Court, by a majority of 7:6, answered that question in the negative. It was held that the Parliament could only amend the Constitution to the extent that it did not "damage or destroy the basic structure of the Constitution." By subjecting Constitutional amendments to judicial review, the Court essentially placed a substantive non-legislative check upon the Parliament's amending power.

An inquiry into the legitimacy of the basic structure doctrine must therefore answer three fundamental questions:

First, in democracies that follow the principle of separation of powers, can any form of restriction upon the Parliament's law-making powers be justified? (Or, in States such as India, that have a written Constitution, the question is slightly modified: is any restriction upon the Parliament's power to change, alter or even abrogate the Constitution, through the means of a Constitutional amendment, justified?) Secondly, if yes, then is the judiciary the correct organ to impose such a restriction? and Thirdly, if yes again, then what is the content of the basic structure doctrine to make it avalid restriction, keeping in mind the separation of powers, upon the amending power? The basic structure doctrine was crystallized in three further decisions of the decade. In *Indira Nehru Gandhi v. Raj Narain*, a Constitutional amendment dealing with the election of the Prime Minister and the Speaker was struck down for violating the basic features of democracy (Mathew and Khanna JJ.), the rule of law (Ray C.J.) and equality (Chandrachud J.).

In *Minerva Mills v. Union of India*, the Parliament attempted to overturn *Kesavananda* by inserting the 42nd Amendment, which expressly stated that the amending power was unlimited, and not open to judicial review. The Amendment was struck down by the Court on the ground that the limited amending power of the Parliament was itself part of the basic structure. Lastly, in *Waman Rao v. Union of India*, it was held that laws placed in the 9th Schedule, and thus beyond the pale of fundamental rights review, would nevertheless have to be tested on the touchstone of the basic structure before they were given immunity.It is also important to note certain other landmark judgments where basic structure challenges were rejected. In *Kuldip Nayar v. Union of India*, both secret ballots, and domicile requirements for election to State legislative Assemblies were held not to be basic features. In *M. Nagaraj v. Union of India*, the Constitutional amendment introducing Articles 16(4A) and 16(4B), was impugned. These Articles dealt with certain specifics of affirmative action. Rejecting the contention that these provisions damaged equality, the Court observed that they only enunciated certain specific rules of "service jurisprudence", not affecting the basic feature of equality under Articles 14, 15 and 16 of the Constitution.

UNIT IV

History of introduction of Fundamental Rights:

The Fundamental Rights are considered as one of the integral part of Indian Constitution. The Fundamental Rights are defined as the basic human freedoms which every individual has a right to enjoy for a proper and harmonious development of personality. Although many rights are considered as human rights a specific legal test is used by courts to determine the limitations which can be imposed on them. These rights find their origin in many places such as England Bill of Rights, United States Bill of Rights and France Declaration of Bill of Rights of Man. The framing of Indian Constitution can be best known by browsing transcripts of Constituent Assembly debate. The Constituent Assembly was composed of members elected from various British Indian Provinces and nominated by the princely states.

The framers if Indian Constitution had three things in mind – ensuring unity, democracy and creating social revolution. The Constitution of India took nearly three years in its formation and finally came into force on 26th January 1950. The biggest challenge before the Constituent Assembly was to evolve a document that would address the diversity amongst the population, create accountable governance and an independent republic. The development of fundamental human rights in India was due to exposure of students to the ideas of democracy, working of parliamentary democracy and British political parties and was also inspired by the:-

- England Bill of Rights
- US Bill of Rights
- France Declaration of the Rights of Man and
- Development of Irish Constitution.

The inclusion of a set of Fundamental Rights had its genesis in the forces that operated in the national struggle during British rule. Ms. Annie Besant described the Constitution of India Bill as 'home rule bill' in 1985. This bill envisaged for India a constitution guaranteeing to every of her citizen freedom of expression , inviolability of ones house, right to property, quality before law and in regard to public offences right to present claims, petition and complains and rights to personal liberty. The Indian National Congress at its Bombay session in August 1918 demanded the inclusion of declaration of rights of the people of India as the British citizens in the new Government of India Act. The Declaration Included amongst other things guarantees in regard to equality before the law, protection in respect to liberty, life and property, freedom of speech and press and right of association. In its December 1918 session the Indian National Congress passed another resolution demanding for immediate repeal of all the laws, regulations and ordinances restricting all the laws, regulations and ordinances restricting the free discussion of political questions and conferring to the executive the power to arrest, detain or arrest any British subject in India outside the process o f ordinary civil or criminal law. The Common Wealth of India Bill finalized by the National Convention of 1925 embodied a specific declaration of rights. The resolution passed by Indian National Congress in 1927 at its Madras Session lay down that the declaration of Fundamental Rights should be the basis of future Constitution of India. The problems faced by the minorities in India further strengthened the argument.

The Nehru Committee observed that the first care should be to have Fundamental Rights guaranteed in such a manner which will not permit its withdrawal under any circumstances. The Indian Statutory Commission refused to enumerate and guarantee the demand of Fundamental Rights in the Constitution Act. Their refusal was based on Simons Commission argument that abstract definition of such rights is

useless unless there existed the will and means to make them effective. The Indian National Congress at its Karachi session in 1931 again demanded for a written guarantee for Fundamental Rights in any future Constitutional setup in India. This demand was also emphasized at the round table conference at London. A memorandum circulated by the Mahatma Gandhi at the second session of round table conference demanded that the new constitution should include a guarantee to the communities concerned to the protection of their cultures, language, scripts, profession, education and practice of religion and religious endowments and protect personal laws and protection of other rights of minority communities. The Joint Select Committee of the British Parliament did not accept the demand for the constitutional guarantee of Fundamental Rights to British subjects in India. The Committee observed that:-

"*....there are also strong practical arguments against the proposal which may be put in the form of a dilemma: for either the declaration of rights is of so abstract a nature that it has no legal effect of any kind or its legal effect will be to impose an embarrassing restrictions on the powers of the legislatures and to create a grave risk that a large number of laws will be declared invalid or inconsistent with one or other of the rights so declared....There is this further objection that the state has made it abundantly clear that no declaration of fundamental rights is to apply to state territories and it would be anomalous if such a declaration had legal force in part only of the area of the federation.*"

The Committee conceded that there were some legal principles which could approximately be incorporated in the new constitution. Accordingly Sections 295, 297-300 of Government of India Act 1935 conferred certain rights and forms of protection on British subjects in India. By the Objective Resolution adopted on January 22, 1947 the Constituent assembly solemnly pledged itself to draw up for future governance a constitution wherein "shall be guaranteed and secure to all the people of India justice, social, economical and political, equality of status, of opportunity and before the law : freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality" and wherein adequate safeguards would be provided for minorities, backward and tribal areas and depressed and other classes. Two days after the adoption of the resolution the assembly elected Advisory Committee for reporting on minorities fundamental rights and on the tribal and excluded areas. The advisory committee in turn constituted on Feb27, 1947 five sub-committees which would deal with fundamental rights. The sub-committee on Fundamental Rights at its first meeting on February 27, 1942 had before it proposal of B.N.Rau to divide Fundamental Rights into two classes i.e. justifiable and non justifiable.

An important question that faced the sub-committee was that of distributing such rights between the Provincial, the Group and the Union Constitution. In the early stages of its deliberation the sub-committee proceeded on the assumption of this distribution and adopted certain rights as having reference only to union and certain rights as having reference both to the union and to the constitutional units. However later it was felt that if Fundamental Rights differed from group to group and from unit to unit or were for that reason not uniformly enforceable, it was felt the Fundamental Rights of citizens of the union had no value. This reorganization leads to the realization that certain Fundamental Rights must be guaranteed to every resident. The sub committee recommended that all the rights incorporated must be binding upon all the authorities whether of the union or of the units. This was thought to be achieved by providing definition in the first clause. The expression the state included the legislature, the government of the union and the units of all local or other authorities within the territories of the union that the law of union included any law made by the union legislature and any existing Indian law as in force within the union or any part thereof.

The sub-committee fully discussed various drafts submitted by its members and others before formulating the list of Fundamental Rights. Dr. Ambedkar pointed out that the rights incorporated in the draft were borrowed from constitution of various countries where the conditions are more or less analogous to those existing in India. The draft submitted on April 3, 1947 was circulated to its members with the explanatory

notes on various clauses. The clauses contained in the draft report were thereafter discussed in the sub-committee in the light of the comments offered by the members and the final report was submitted to the chairman of the advisory committee on April 16, 1947. Three days later the sub-committee on the minority examined the draft clauses prepared by the fundamental rights sub-committee and reported on the subject of such rights from the point of view of the minorities. The advisory committee deliberated on the recommendations made by the two sub-committee and accepted the recommendations for:

a. Classification of rights into justifiable or non justifiable.

b. Certain rights being guaranteed to all persons and certain other only to citizens

c. All such rights being made uniformly applicable to the union and the units.

The committee also accepted the drafts of clauses 1 and 2, the former providing the definition of the state, the unit and the law of the union and latter for the laws or usages inconsistent with the fundamental rights being void in the form recommended by the sub-committee also the word constitution was replaced by the word this part of the constitution. The advisory committee incorporated these recommendations in its interim report to the constituent assembly submitted on April 23, 1947. The interim report dealt only with justifiable rights i.e fundamental rights. Later on August 25, 1947 the advisory committee submitted a supplementary report mainly dealing with non-justifiable rights i.e. the Directive Principles of State Policy or the Fundamental Principles of Governance. A notable development took place on 10 December 1948 when the United Nations General Assembly adopted the Universal Declaration of Human Rights and called upon all member states to adopt these rights in their respective constitutions.

The various stages through which the various clauses on fundamental rights passed were similar to other parts of the constitution. Firstly- the constitutional adviser prepared a draft embodying a decision of the constituent assembly. This draft was considered exhaustively and in detail by the drafting committee, which prepared a revised draft and published it in February 1948. The revised draft was then widely circulated. The comments and suggestions received from all quarters were again considered by the drafting committee and in light of these the committee proposed certain amendments. Discussions in constituent assembly of the draft provisions took place in November and December 1948 and August, September and October 1949. During these meetings the committee considered the various suggestions for amendment made on behalf of Drafting Committee as well as those proposed by the individual members of the assembly. The provisions as passed by the assembly were again scrutinized by the Drafting Committee and incorporated by the drafting changes wherever necessary in the revised draft constitution. The revised draft was again placed before the assembly at its final session held in November 1949. The fundamental rights were included in the First Draft Constitution (February 1948), the Second Draft Constitution (17 October 1948) and final Third Draft Constitution (26 November 1949) prepared by the Drafting Committee.

Meaning of Fundamental Rights:

Fundamental Rights fulfill some basic and essential conditions of good life for human progress. These are fundamental in the sense that in the absence of these rights citizens cannot develop their personality and their own self. These rights are not the same as ordinary rights of citizen. Fundamental Rights are enshrined in the Constitution. These are constitutionally protected and guaranteed to the citizens while ordinary rights are protected by the ordinary law of the country. Fundamental Rights are inviolable in ordinary situation. Only under reasonable circumstances, these rights are suspended temporarily. Right to Life, Freedom of Speech and Expression, Right to Equality, Right to Religion, Right to Personal Liberty, Right to Education are some important Fundamental Rights of Indian citizen .Every state incorporates these Fundamental Rights in their own Constitution and citizens can enjoy them . If anybody's Fundamental Rights are violated by force he or she can go to the Court seeking legal assistance. Democratic countries

like India, Japan, France, Switzerland and many other countries individuals without which democracy becomes meaningless. The Constitution of India has embodied a number of Fundamental Rights in Part III. Citizens can enjoy these rights within some definite limitations.

Features of Fundamental Rights:

Fundamental Rights are an indispensable part of our Constitution. Twenty-four Articles are enjoined with these Fundamental Rights. Parliament can amend Fundamental Rights by a special procedure. Fundamental Rights are only for Indian citizens. No alien is permitted to enjoy these rights except right to life, liberty and personal property. Fundamental Rights are not absolute. Therefore within some reasonable restrictions citizens can enjoy them. Fundamental Rights without prescribed conditions may disrupt public order. Fundamental Rights are suspend able during the time of emergency and rights of the citizen are curtailed temporarily except right to life and personal liberty (Article-20-21)

Fundamental Rights are justifiable also. A citizen can go to the Court for enforcement of his Fundamental Rights if some one violates them. Under Article 32 and Article 226 of the Indian Constitution, a citizen can approach the Supreme Court and High Court respectively in this regard. Fundamental Rights are amendable also. Parliament can amend these rights by a special procedure. Some Fundamental Rights are positive while some others are negative in nature. Fundamental Rights aim at restoring collective interest along with individual interest.

Fundamental Rights are superior to ordinary law of the land. They are conferred a special sanctity. Some Fundamental Rights are limited to citizens only, such as freedom of speech, assembly, and cultural and educational rights, but other rights like equality before the law, religious freedom etc are available to both citizens and aliens

Some provisions of Chapter-III of the Indian Constitution are of the nature of prohibitions and place Constitutional limitations on the authority of the state. For instance, no authority of the state can deny to any person equality before the law or the equal protection of the laws

Types of Fundamental Rights:

There are six types of Fundamental Rights in our Constitution

I. Right to Equality (Article 14 – Article 18)

II. Right to Freedom (Articles 19 – Article 22)

III. Right against Exploitation (Articles 23 – Article 24)

IV. Right to Religion (Articles 25 – Article 28)

V. Right to Culture and Education (Articles 29 – Article 30)

VI. Right to Constitutional Remedies (Article 32)

Though the Constitution of India guarantees all these Fundamental rights for the citizen, yet there are some limitation and exceptions of these rights also. A citizen cannot enjoy Fundamental Rights absolutely or at will. Within some Constitutional limitation citizen can enjoy their Rights. The Constitution of India imposes some reasonable restrictions upon enjoyment of these Rights so, that public order, morality and health remain intact. The Constitution always aims at restoration of collective interest along with individual interest .For example, right to religion is subject to restrictions imposed by the state in the interest of public order, morality and health so, that the freedom of religion may not be abused to committee crimes or anti-social activities. Similarly Rights guaranteed by Article-19 does not mean absolute liberty. Absolute individual rights cannot be guaranteed by any modern state.

Therefore our Constitution also empowered the state to impose reasonable restrictions as may be necessary in the larger interest of the community. our Constitution always attempts " to strike a balance between individual liberty and social control ." and to establish a welfare state where collective interest got prominence over individual interest .Freedom of speech and expression (Art.19-1-A) is also subject to reasonable restrictions imposed by the state relating to defamation, contempt of Court, decency or morality, security of the state, friendly relations with foreign states , incitement to an offence, public order, maintenance of the sovereignty and integrity of India . Freedom of assembly (Art.19-1-B) is also subject to reasonable restrictions imposed by the state that the assembly must be peaceful and without arms in the interest of public order. Freedom of press which is included in the wider freedom of expression is also subject to reasonable limitations and the state can impose restriction upon freedom of press in the larger interest of the state or for the prevention of contempt of Court, defamation or incitement to an offence

Article 14:

Equality before law "The state shall not deny to any person equality before the law. This means that every person, who lives within territory of India, has the equal right before the law. The meaning of this all are equal in same line. No discrimination based on religion, race, caste, sex and place of birth. It mean that all will be treated as equality among equal .and there will be no discrimination based on lower or higher class.

Article-14 of Constitution states that "***the state not deny to any person equality before the law or the equal protection of the laws within the territory of India.***"

. Prof. Dicey, explaining the concept of legal equality as it operated in England, said: *"with us every official, from the prime minister down to a constable or a collector of taxes, is under the same responsibility for every act done without any legal justification as any other citizen."*

The phase "equality before the law" finds a place in all written Constitutions that guarantees fundamental rights. All citizens irrespective of birth, religion, sex, or race are equal before law; that is to say, there Shall not be any arbitrary discrimination between one citizen or class of citizens and another. All citizens shall, as human persons he held equal before law. All inhabitants of the republic are assured equality before the laws."

Pantanjali Sastri, C.J., has expressed that "*the second expression is corollary of the first and it is difficult to imaging a situation in which the violation of laws will not be the violation of equality before laws thus, in substance the two expression mean one and same thing."*

According to Dr. Jennings said that: "*Equality before the law means that equality among equals the law should be equal for all. And should be equally administered, that like should treated alike. The right to sue and be sued, to prosecute and prosecuted for the same kind of action should be same for all citizens of full age and understanding without distinctions of race, religion, wealth, social status or political influence."*

Equal Protection of Law "Equal protection of law" has been given in Article 14 of our Indian Constitution which has been taken from Section 1 of the 14th Amendment Act of the US Constitution. Meaning of equal protection of law: here, it means that each person within the territory of India will get equal Protection of laws.

In *Stephen's college v. University of Delhi*, the Court held that the expression "Equal protection of the laws is now being read as a positive Obligation on the state to ensure equal protection of laws by bringing in necessary social and economic changes so that everyone may enjoy equal protection of the laws and nobody is denied such protection. If the state leaves the existing inequalities untouched laws d by its laws, it fails in its duty of providing equal protection of its laws to all persons. State will provide equal protection to all the people of India who are citizen of India and as well as non citizen of India.

Exceptions to Rule of law:

In the case of *Indra Sawhney* the Court held that the right to equality is recognized as one of basic features of Indian Constitution. Article 14 applies to all persons and is not limited to citizens. A corporation, which is a juristic person, is also entailed to the benefit of this Article. This concept implied equality for equals and aims at striking down hostile discrimination or oppression of inequality.

In the case of *Ramesh Prasad v. State of Bihar* (1978), it is to be noted that aim of both the concept, 'Equality before law' and 'Equal protection of the law' is the equal Justice.

Underlying principle: - The Principle of equality is not the uniformity of treatment to all in all respects. It only means that all persons similarly circumstanced shall be treated alike both in the privileges conferred and liabilities imposed by the laws.

Rule of Law in India:

1. Supremacy of Law:

The First meaning of the Rule of Law is that 'no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. It implies that a man may be punished for a breach of law but cannot be punished for anything else. No man can be punished except for a breach of law. An alleged offence is required to be proved before the ordinary Courts in accordance with the ordinary procedure.

2. Equality before Law:

The Second meaning of the Rule of Law is that no man is above law. Every man whatever be his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. Everybody under Article 14 is equal before law and have equal protection.

3. Individual Liberty:

A lot of individual liberty is mention like fundamental right in Article 21- protection of life and personal liberty, Article 19- Right to freedom etc. and Courts are their to protect individual liberty. The first and second aspect apply to Indian system but the third aspect of the Dicey's rule of law does not apply to Indian system as the source of right of individuals is the Constitution of India. The Constitution is the supreme law of the land and all laws passed by the legislature must be consistent with provisions of the Constitution. The rule of law imposes a duty upon state to take special measure to prevent and punish brutality by police methodology. The rule of law embodied in Article 14 is the basic feature of the Indian Constitution and hence it can't be destroyed even by an amendment of the Constitution under Article 368 of the Constitution.

Exception to Rule of Law:

The above rule of equality is however not an absolute rule and there are number exception to it 'Equality of Law' does not mean the power of the private citizens are the same as the power of the public officials. Thus a police officer has the power to arrest you while no other private person has this power. This is not violation of rule of law. But rule of law does require that these powers should be clearly defined by law and that abuse of authority by public officers must be punished by ordinary Courts. The rule of law does not prevent certain class of persons being subject to special rules. Thus members of armed forces are controlled by military rules. Similarly medical practitioners are controlled by medical council of India. Certain members of society are governed by special rules in their profession i.e. lawyers, doctors, nurses, members of armed forces and police. Such classes of people are treated differently from ordinary citizens.

Article 14 permits classification but prohibits class legislation. The equal protection of laws guaranteed by Article 14 does not mean that all laws must be general in character. It does not mean that the same laws should apply to all persons. It does not attainment or circumstances in the same position. The varying needs of different classes of persons often require separate treatment. From the very nature of society there should be different laws in different places and the legitimate controls the policy and enacts laws in the best interest of the safety and security of the state. In fact identical treatment in unequal circumstances would amount to inequality. So a reasonable classification is only not permitted but is necessary if society is to progress. Thus what Article 14 forbids is class-legislation but it does not forbid reasonable classification. The classification however must not be "arbitrary, artificial or evasive" but must be based on some real and substantial bearing a just and reasonable relation to the object sought to be achieved by the legislation. Article 14 applies where equals are treated differently without any reasonable basis. But where equals and unequals are treated differently, Article 14 does not apply. Class legislation is that which makes an improper discrimination by conferring particular privileges upon a class of persons arbitrarily selected from a large number of persons all of whom stand in the same relation to the privilege granted that between whom and the persons not so favored no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from such privilege.

Test of Reasonable Classification:

While Article 14 forbids class legislation it does not forbid reasonable classification of persons, objects, and transactions by the legislature for the purpose of achieving specific ends. But classification must not be "arbitrary ,artificial or evasive". It must always rest upon some real upon some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislation. Classification to be reasonable must fulfill the following two conditions.

Firstly the classification must be founded on the intelligible differentia which distinguishes persons or thing that are grouped together from others left out of the group Secondly the differentia must have a rational relation to the object sought to be achieved by the act.

The differentia which is the basis of the classification and the object of the act are two distinct things. What is necessary is that there must be nexus between the basis of classification and the object of the act which makes the classification. It is only when there is no reasonable basis for a classification that legislation making such classification may be declared discriminatory. Thus the legislature may fix the age at which persons shall be deemed competent to contract between themselves but no one will claim that competency. No contract can be made to depend upon the stature or colour of the hair. Such a classification will be arbitrary.

The true meaning and scope of Article 14 have been explained in a number of cases by the Supreme Court. In view of this the propositions laid down in *Damia case* still hold good governing a valid classification and are as follows.

1. A law may be Constitutional even though it relates to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by itself

2. There is always presumption in favour of the Constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of Constitutional principles.

3. The presumption may be rebutted in certain cases by showing that on the fact of the statue, there is no classification and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class. It must be assumed that

Legislature correctly understand and appreciates the need of its own people that its law are directed to problem made manifest by experience and that its discrimination are based on adequate grounds. In order to sustain the presumption of Constitutionality the Court may take into consideration maters of common knowledge, matters of report, the history of the times and may assume every state of facts which can be conceived existing at the time of the legislation. Thus the legislation is free to recognize degrees of harm and may confine its restriction to those cases where the need is deemed to be the clearest.

4. While good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonable be regarded as based, the presumption of Constitutionality cannot be carried to extent always that there must be some undisclosed and unknown reason for subjecting certain individuals or corporation to be hostile or discriminating legislation. The classification may be made on different bases e.g. geographical or according to object or occupation or the like.

5. The classification made by the legislature need not be scientifically perfect or logically complete. Mathematical nicety and perfect equality are not required. Equality before the law does not require mathematical equality of all persons in all circumstances. Equal treatment does not mean identical treatment. Similarly not identity of treatment is enough.There can be discrimination both in the substantive as well as the procedural law. Article 14 applies to both. If the classification satisfies the test laid down in the above propositions, the law will be declared Constitutional. The question whether a classification is reasonable and proper and not must however, be judged more on commonsense than on legal subtitles.

In *D.S. Nakara v. Union Of India,* the Government issued an office memorandum announcing a liberalized pension scheme for retired government servants but made it applicable to those who had retired after 31 March 1979. The Supreme Court held that the fixing of the cutoff date to be discriminatory as violating Article 14. The division of pensioners into two classes on the basis of the date of retirement was not based on any rational principle because a difference of two days in the matter of retirement could have a traumatic effect on the pensioner. Such a classification held to be arbitrary and unprincipled as there was no acceptable or persuasive reason in its favour. The said classification had no rational nexus with the object sought to achieved.

Meaning and Background of Protective Discrimination:

Protective discrimination is the policy of granting special privileges to the downtrodden and the underprivileged sections of society, most commonly women. These are affirmative action programs, most visible in both the United States and India, where there has been a history of racial and caste discrimination. The practice is most prominent in India, where it has been enshrined in the Constitution and institutionalized.

The need to discriminate positively in favour of the socially underprivileged was felt for the first time during the nationalist movement. It was Mahatma Gandhi, himself a devout Hindu and a staunch believer in the caste system, who was the first leader to realize the importance of the subject and to invoke the conscience of the upper castes to this age-old social malady of relegating whole communities to the degrading position of "untouchables". He also understood the political logic of inducting this large body of people into the political mainstream in order to make the freedom movement more broad based. By renaming these untouchables as "Harijans" (people of God) he tried to give this policy a religious sanction so as not to disturb the traditional sensitivities of the caste Hindus more than was really necessary.

The Constitution of independent India which largely followed the pattern of the Government of India Act, 1935, made provisions for positive discrimination in favour of the Scheduled Castes and Scheduled Tribes (SCs & STs) which constituted about 23% of the divided India's population. Besides reserving parliamentary seats for them they were given advantages in terms of admission to schools and colleges, jobs in the public sector, various pecuniary benefits for their overall development, and so on. The Constitution indeed guaranteed the fundamental right of equality of all citizens before the law but it also categorically laid down that nothing in the Constitution "shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Schedules Castes and the Scheduled Tribes". Some of the Constitutional provisions which aimed at positive discrimination are:

a. Article 17: Abolition of "untouchability" and making its practice in any form a punishable offence.

b. Article 46: Promotion of educational and economic interests.

c. Article 16 and 335: Preferential treatment in matters of employment in public services.

d. Article 330 and 332: Reservation of seats in the Lok Sabha and State Assemblies.

Part III of the Constitution in relation to reservation in public services Article 14 is in general terms whereas Arts. 15 and 16 are of specific nature. Shortly put the combined effect of Arts. 14, 15 and 16 as far as public employment is concerned, is that they guarantee non-discriminatory treatment of citizens in matters relating to public employment. Religion, race, caste, sex, descent, place of birth, residence or any of them cannot be the basis for discrimination against a citizen in matters relating to public employment or office under the state. Reservation in favour of backward classes of citizens is dealt with by cl. (4) of Art.16. It is an enabling provision and is in the nature of a provision or an exception to cl. (1) of Article 16 of the Constitution.

The term 'justice' in the Preamble embraces three distinct forms- social, economic and political, secured through various provisions of Fundamental Rights and Directive Principles. Social justice denotes the equal treatment of all citizens without any social distinction based on caste, colour, race, religion, sex and so on. It means absence of privileges being extended to any particular section of the society, and improvement in the conditions of backward classes (SCs, STs, and OBCs) and women. Economic justice denotes on the non- discrimination between people on the basis of economic factors. It involves the elimination of glaring in equalities in wealth, income and property. A combination of social justice and economic justice denotes what is known as 'distributive justice'. Political justice implies that all citizens should have equal political rights, equal voice in the government. The ideal of justice- social, economic and political- has been taken from the Russian Revaluation (1917).

The term 'equality' means the absence of special privileges to any section of the society, and provision of adequate opportunities for all individuals without any discrimination. The Preamble secures at all citizens of India equality of status an opportunity. This provision embraces three dimensions of equality- civic, political and economic.

The following provisions of the chapter on Fundamental Rights ensure civic equality:

a. Equality before the Law (Article 14).

b. Prohibition of discrimination on grounds of religion, race, caste, sex of place of birth (Article 15).

c. Equality of opportunity in matters of public employment (Article 16).

d. Abolition of Untouchability (Article 17).

e. Abolition of titles (Article 18).

Social justice found useful for everyone in its kind and flexible form. Although social justice is not defined anywhere in the Constitution but it is an ideal element of feeling which is a goal of Constitution. Feeling of social justice is a form of relative concept which is changeable by the time, circumstances, culture and ambitions of the people.

Social inequalities of India expect solution equally. Under Indian Constitution the use of social justice is accepted in wider sense which includes both social and economical justice. According to *Chief Justice Gajendragadkar* the social justice aims for equal opportunity to every citizen in the matter of social and economical equalities and prevent inequality.

The Constitution of India does not completely dedicated to any traditional ideology as – equalitarian, Utilitarian, Contractarian or Entitlement theory. Dedication of Constitution is embedded in progressive concept of social justice and various rules of justice such as- Quality, Transaction, Necessity, Options etc are its helping organs. In fact dedication of the Constitution is in such type of social justice which can fulfill the expectations of welfare state according to Indian conditions. So that in one way it has been told about the value of Equality which is known as the declaration of equal behavior of equals to Aristotle, directs the state "The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India" that is distributive justice. In the other way it has been told the protective discrimination by special provision for other backwards of the society such as – SC, ST & Socially and educationally back ward classes, which is the attribute (symbol) of corrective and compensatory justice.

Original Principle of equalitarian justice is propounded by Aristotle that is equal behavior in equal matter. If there is unequal behavior between equal, there will be injustice. In *State of U.P. v. Pradeep Tandon*, the Supreme Court accepted reasonable classification justiciable on the basis of unequal behavior between unequal people. In *Chiranjeet Lal v. Union Of India* and *State of J.K. v. Bhakshi Gulam Mohammad* it was held by the Supreme Court that due to some special circumstances one person or one body can be treated as one class. But the question is how to determine inequality? In India it is not easy to determine inequality.

In *Air India v. Nergis Mirza,* the Supreme Court declared the rule of Air India unreasonable and discriminatory. But accepting justiciable element in equality, it is try to make equality more effective and progressive. In *E.P. Royappa v. State of Tamilnadu,* Justice Bhagwati has held that equality is movable concept which has many forms and aspects . It cannot be tightened in traditional and principlized circle. Equality with equal behavior prohibits arbitrariness in action, inequality is surely be there.

To accept right to equality as an essential element of Justice, India Constitution prohibits unequal behavior on the grounds of religion, race, caste, sex. But Constitution accepts that strict compliance of formal equality will make up equality. But the system of special provision for backward classes of society, it is to try to make the principle of equality more effective. Under Article 15(4) the state shall make any special provision for the advancement of any socially and educationally backward classes of citizen or for the scheduled castes, and the Scheduled tribes and in the same manner by accepting the opportunity of equality to employment under state in Article 16 (1), it has excepted the principle of equalization under Article 16(4). If it is in the opinion of the state that any class of the citizens has not adequately representation under state employment, state shall make any provision for the reservation of appointments. According to Art 46 the State shall promote with special care the educational and economic interests of weaker sections of the people, and in particular, of the scheduled castes and the scheduled tribes, and shall protect them from social injustice and all forms of exploitation.

In a very important case of *Indra Shahani v. Union of India* the Supreme Court declared 27% reservation legal for socially and economically backward classes of the society under central services.

Basically protective discrimination is used to fulfill those lacks which arise due to a long time deprivation. It is a part of corrective and compensatory justice. It has been told that peoples of backward class of society have been bearing injustice for generation to generation. Some peoples of the society made supremacy on the benefits of the society and made deprived to others. So this provision of protective discrimination has been made for those deprived people who are living in unbeneficial circumstances.

Through equal opportunity on the basis of quality the Supreme Court has tried to make a reasonable balance between distribution of benefits and distributive justice. In *M.R. Balaji v. State of Mysore*, the Supreme Court has held that for the object of compensatory justice, limit of reservation should not be more than 50%. In *Indra Swani v. Union of India*, a full bench of nine judges approved this balance between distributive justice through quality and compensatory justice. There is a very wide planning of justice according to necessity in the Constitution. It expects distribution of social benefits according to necessity by which more needy person can get benefits. It is expected to the state that the state shall in particular, direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Under Article 41, it is expected to the state that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in case of unemployment, old age, sickness and disablement, and in other cases of underserved want. It is provided under Article 42 that the state shall make provision for securing just and humane conditions of work and for maternity relief. In Article 43 it is expected that the State shall endeavor to secure, by suitable legislation or economic organization or in any other way, to all workers agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the state shall endeavor to promote cottage industries on an individual or co-operative basis in rural areas. In PUDR vs. Union of India, the Supreme Court has held that minimum wages must be given and not to pay minimum wages is the violation of human dignity and it is also known as exploitation.

In India, the Courts have performed a great role to make the social justice successful. In the field of *distributive* Justice, Legislature and Judiciary both are playing great role but Courts are playing more powerful role to deliver compensatory or corrective justice but these principles are known as mutually relatives not mutually opposites. Ideals and goals are to deliver social justice. Medium may be distributive or compensatory justice. The adopted type may be of quality, Necessity, Equality, Freedom, Common interest or other. Although the Supreme Court has not found any possible definition of Social Justice but has accepted it as an essential and an organ of legal system.

The Supreme Court of India has given a principal and dynamic shape to the concept of social justice. Social justice has been guiding force of the judicial pronouncements. In *Sadhuram v. Pulin*, the Supreme Court ruled that as between two parties, if a deal is made with one party without serious detriment to the other Court would lean in favour of weaker section of the society. The judiciary has given practical shape to social justice through allowing affirmative governmental actions are held to include compensatory justice as well as distributive justice which ensure that community resources are more equitably and justly shared among all classes of citizens. The concept of social justice has brought revolutionary change in industrial society by charging the old contractual obligations. It is no more a narrow or one sided or pedantic concept. It is founded on the basic ideal of socio-economic equality and its aim is to assist the removal of socio-economic disparities and inequalities. In *J.K.Cotton Spinning and Weaving. Co. Ltd. v. Labour Appellate Tribunal*, the Supreme Court of India pointed out that in industrial matters doctrinaire and abstract notions of social justice are avoided and realistic and pragmatic notions are applied so as to find a solution between the employer and the employees which is just and fair.

Despite the well intentioned commitment of ensuring social justice through equalization or protective discrimination policy, the governmental efforts have caused some tension in the society. In the name of social justice even such activities are performed which have nothing to do with social justice. The need of hour is to ensure the proper and balanced implementation of policies so as to make social justice an effective vehicle of social progress.

Equality of Opportunity of Public Employment:

There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The rule applies only in respect of employments or offices which are held under the state. i.e., person holding office as subordinate to state. The clause accordingly, does not prevent the state from laying down the requisite qualifications for recruitment for government services, and it is open to the authority to lay down such other conditions of appointment as would be conducive to the maintenance of proper discipline among the servants. The qualification pointed may, besides mental excellence, include physical fitness, sense of discipline, moral integrity and loyalty to state. The expression ' Matters relating to employment and appointment' must include all matters in relation to employment both prior and subsequent to the employment which are incidental to the employment and form parts of the terms of the conditions of the such employment .

Thus the guarantee in Clause (1) will cover the (a) initial appointments, (b) Promotions, (c) Termination of employment, (d) Matters relating to the salary, periodical increments, leave, gratuity, pension, Age of superannuation etc. Principle of equal pay for equal work is also covered in section 16(1). In the light of the case of N.*M Thomas v. State of Kerala,* Justice V.R Krishna Iyer, rightly pointed out that the experience of reservation in practice showed that the benefits were, by and large, snatched away by the top creamy layer of the backward classes or classes, thus keeping the weakest amongst weak always weak and leaving the fortunate layers to consume the whole cake. Substantially lightened by the march of time, measures of better education and more opportunities of employment. Clause (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. The prohibited grounds of discussions are religion, race, caste, sex, descent, place of birth, residence, or any of them. Thewords, any employment or office under the State make it clear that Article 16(2) also applies only to public employment.

In *K.C. Vasanth Kumar v. State of Karnataka,* (1985), the Supreme Court has suggested that the reservations in favor of backward classes must be based on mean test. It has been further suggested that the policy of reservations should be reviewed every five years or so and if a class has reached up to that level where it does not need reservation. Its name should be deleted from the list of backward classes. The Supreme Court in *Indira Sawhney & orthers v. Union of India,* upheld the implementation of separate reservation for other backward classes in central government jobs. Further the Court ordered to exclude creamy layer of other backward classes from enjoying reservation facilities. Also it restricts reservations within 50% limit. Moreover the Court invalidate the separate reservations for economically poor among forward castes people and it as invalid.

(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. *M R Balaji v Mysore* (1963) the Court put 50% cap on reservations in almost all states except Tamil Nadu (69%, under 9th schedule) and Rajasthan (68% quota including 14% for forward castes, post gujjar violence 2008) has not exceeded 50% limit. Tamil Nadu exceeded limit in 1980. Andhra Pradesh tried to exceed limit in 2005 which was again stalled by high Court.

Article 16 Clause (4) "*Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.*"

The scope of Article 16 (4) was considered by the Supreme Court in *Devadasan v. Union of India*, (1964). In this case "carry forward rule" made by the Government to regulate appointment of persons of backward classes in government services was involved.

The Supreme Court struck down the "carry forward rule" as unconstitutional on the ground that the power vested in the government cannot be so exercised so as to deny reasonable equality of opportunity in matters of public employment for the members of classes other than backward classes. In this case reservation of posts to the members of backward classes had exceeded 50% and had gone up to 68% due to "carry forward rule."

The Supreme Court held that each year of recruitment must be considered by itself and the reservation for each year should not be excessive so as to create monopoly or interfere unduly with the legitimate claims of the rest of the society. So the Court held that reservation should be less than 50%, but how much less than 50% should depend upon the prevailing situations. In *Southern Rail way v. Rangachari* (1962), *State of Punjab v. Hiralal, Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India* the Court held that reservation of appointments or posts under Article 16(4) includes promotions also. This was overruled in *Indira Sawhney & Ors v. Union of India* and held that the reservations cannot be applied in promotions.

Article 16, Clause (4A) Nothing in this Article shall prevent the State from making Provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favor 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. This clause does not affect the decision as regards other backward classes but makes it inapplicable to the scheduled castes and the Scheduled Tribes. Justifying reservations for the Scheduled castes and Scheduled Tribes candidates in promotion, the Court had at one point held that even their seniority acquired by promotion of the general class candidates could not be affected by subsequent promotion of the general class candidates. S. *Vinodkumar vs. Union of India* (1996). Relaxation of qualifying marks and standard of evaluation in matters of reservation in promotion was not permissible.

Article 16, Clause (4B) Nothing in this Article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. Reservation on total number of vacancies of that year.

Article 16 Clause (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.*" In *Union of India v. S. Kalugasalamoorthy* the Court held that when a person is selected on the basis of his own seniority, the scope of considering and counting him against reserved quota does not arise. In *T.M.A. Pai Foundation v. State of Karnataka, P.A.Inamdar v. State of Maharashtra*, the Supreme Court ruled that reservations cannot be enforced on private unaided educational institutions.

Abolition of Untouchability:

The Article abolishes practice of untouchability in any form. According to the provision of Article 17, "enforcement of any disability arising out of untouchability" is a punishable offence in accordance with law.

Purpose of Article 17:

Article 17 is considered one of the earliest manifestations of India's effort towards bringing social reforms. By enacting this Article, the government of independent India acted earnestly to abolish the scourge of caste discrimination. The purpose behind this legislation is the liberation of society from orthodox beliefs and rituals that have lost both legal and moral base. The Constitution-makers not only provided for criminalizing any form of social discrimination but also punishing those who practice such discriminations.

The ostensible objective was to put an end to humiliation and harassment faced by the dalits and backward classes and ensures that their fundamental rights are preserved. Although Article 17 doesn't define the term 'untouchability', it generally means the "social restrictions" imposed on certain sections of society when it comes to accessing public places, offering prayers and performing religious services, and getting to enjoy fundamental rights.

Legislations that further strengthen Article 17

In order to strengthen the Constitutional provision in Article 17, the Parliament enacted the Protection of Civil Rights Act, 1955 (formerly known as Untouchability Offences Act). Within five years of the adoption of the Constitution, the government came up with this Act that penalizes manifestations of untouchability in any form which include enforcing religious and social disabilities, refusing to admit persons to hospitals, and unlawful compulsory labour. As per the Act, the offender "shall be punishable with imprisonment for a term of not less than one month and not more than six months."

Someone had rightly said that legislations can't be a remedy for prejudices. Apart from being confined to cases of caste prejudice and discrimination, the legal instrument had glaring loopholes that compelled the government to opt for a major overhaul. Expansion of Article 17 – Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989, to expand the ambit of Article 17, the Rajiv Gandhi government came up with the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989. The new legislation was enacted to deal with more violent caste-driven atrocities against scheduled castes and scheduled tribes. Although these legislations have a dismal record of enforcement, they carry a symbolic value – India treats caste discrimination as a serious form of human rights violations.

Right to Freedom:

Article 19: Protection of certain rights regarding freedom of speech, etc Article 19 is the most important and key Article which embodies the "basic freedoms". Article 19(1) provides that all citizens shall have the right- (originally 7, now 6) to freedom of speech and expression; to assemble peaceably and without arms; to form associations or unions; to move freely throughout the territory of India; to reside and settle in any part of the territory of India; omitted by 44thamendment act. (It was right to acquire, hold and dispose of property) to practice any profession, or to carry on any occupation, trade or business.

Freedom of Speech:

The Freedom of speech and expression is not absolute. As of now, there are 8 restrictions on the freedom of speech and expression. These are in respect of the sovereignty and integrity of the country. These 8 restrictions were: Security of the state Friendly relations with foreign states Public Order Decency or morality Contempt of Court Defamation Incitement to offence Sovereignty and integrity of India. These 8 restrictions were

embodied in their current form in the Constitution First Amendment Bill 1951, this was necessitated by *Romesh Thapar v. State of Madras* (1950).

In this case the entry and circulation of the English journal "Cross Road", printed and published in Bombay, was banned by the Government of Madras. The Supreme Court held in this case that, unless a law restricting the freedom of speech and expression were directed solely against the undermining of the security of the state or its overthrow, the law could not be held a reasonable restriction though it sought to impose a restraint for the maintenance of public order. When a proclamation of emergency is made under Article 352, Article 19 itself remains suspended. Freedom of Speech and Expression Article 19 of the Constitution provides freedom of speech which is the right to express one's opinion freely without any fear through oral / written / electronic/ broadcasting / press. The Constitution does not make any special / specific reference to the Freedom of Press. The protagonists of the "free Press" called it a serious lapse of the Drafting committee.

However, the freedom of expression includes freedom of press. Dr. Ambedkar in this context had said on speaking behalf of the Drafting Committee that the press had no special rights which are not to be given to an individual or a citizen. Dr. Ambedkar further said that the *"editors or managers of press are all citizens of the country and when they chose to write in newspapers they are merely expressing their right of expression"*. So, the word expression covers the Press. In modern times it covers the blogs and websites too. Article 19(1) (a) of the Constitution of India guarantees to all its citizens the right to freedom of speech and expression. The law states that, *"all citizens shall have the right to freedom of speech and expression"*. Under Article 19(2) reasonable restrictions can be imposed on the exercise of this right for certain purposes. Any limitation on the exercise of the right under Article 19(1) (a) not falling within the four corners of Article 19(2) cannot be valid.

The freedom of speech under Article 19(1) (a) includes the right to express one's views and opinions at any issue through any medium, e.g. by words of mouth, writing, printing, picture, film, movie etc. It thus includes the freedom of communication and the right to propagate or publish opinion. But this right is subject to reasonable restrictions being imposed under Article 19(2). Free expression cannot be equated or confused with a license to make unfounded and irresponsible allegations against the judiciary.

It is important to note that a restriction on the freedom of speech of any citizen may be placed as much by an action of the State as by its inaction. Thus, failure on the part of the State to guarantee to all its citizens irrespective of their circumstances and the class to which they belong, the fundamental right to freedom of speech and expression would constitute a violation of Article 19(1)(a).

The fundamental right to freedom of speech and expression is regarded as one of the most basic elements of a healthy democracy for it allows its citizens to participate fully and effectively in the social and political process of the country. In fact, the freedom of speech and expression gives greater scope and meaning to the citizenship of a person extending the concept from the level of basic existence to giving the person a political and social life.

This right is available only to a citizen of India and not to foreign nationals. This right is, however, not absolute and it allows Government to frame laws to impose reasonable restrictions in the interest of sovereignty and integrity of India, security of the state, friendly relations with foreign states, public order, decency and morality and contempt of Court, defamation and incitement to an offence.

In the Preamble to the Constitution of India, the people of India declared their solemn resolve to secure to all its citizen liberty of thought and expression. The Constitution affirms the right to freedom of expression, which includes the right to voice one's opinion, the right to seek information and ideas, the right to receive information and the right to impart information. The Indian State is under an obligation to create conditions

in which all the citizens can effectively and efficiently enjoy the aforesaid rights. In *Romesh Thappar v State of Madras* (1950), the Supreme Court held that the freedom of speech and expression includes freedom to propagate ideas which is ensured by freedom of circulation of a publication, as publication is of little value without circulation.

Patanjali Sastri, J., rightly observed that- "*Freedom of Speech and of Press lat at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the process of Government, is possible.*" However Article 19(2) of the Constitution provides that this right is not absolute and 'reasonable restrictions' may be imposed on the exercise of this right for certain purposes. The right to freedom of expression includes the right to express ones views and opinions on any issue and through any medium whether it be in writing or by word of mouth. The phrase "speech and expression" used in Article 19(1) (a) has a broad connotation. This right includes the right to communicate, print and advertise the information. In India, freedom of the press is implied from the freedom of speech and expression guaranteed by Article 19(1) (a). The freedom of the press is regarded as a "species of which freedom of expression is a genus". On the issue of whether 'advertising' would fall under the scope of the Article, the Supreme Court pointed out that the right of a citizen to exhibit films is a part of the fundamental right of speech and expression guaranteed by Article 19(1)(a) of the Constitution.

Indian law does not expressly refer to commercial and artistic speech. However, Indian Law is developing and the Supreme Court has ruled that 'commercial speech' cannot be denied the protection of Article 19(1) (a) of the Constitution. The Court has held that 'commercial speech' is a part of the 'right of freedom of speech and expression' as guaranteed by our Constitution. The citizens of India have the right to receive 'commercial speech' and they also have the right to read and listen to the same. This protection is available to the speaker as well as the recipient. Freedom of Speech and Expression also includes artistic speech as it includes the right to paint, sign, dance, write poetry, literature and is covered by Article 19(1) (a) because the common basic characteristic of all these activities is freedom of speech and expression.

Under the provisions of the Constitution, an individual as well as a corporation can invoke freedom of speech arguments and other fundamental rights against the State by way of a writ petition under Articles 32 and 226 of the Constitution of India subject to the State imposing some permissible restrictions in the interests of social control. The cases of *Bennet and Coleman & Co. v. Union of India* (1973), *Indian Express Newspapers (Bombay) P. Ltd v. Union of India* (1986), are of great significance. In these cases, the corporations filed a writ petition challenging the Constitutional validity of notifications issued by the Government. After much deliberation, the Courts held that the right to freedom of speech cannot be taken away with the object of placing restrictions on the business activities of citizens. However, the limitation on the exercise of the right under Article 19(1)(a) not falling within the four corners of 19(2) is not valid.

Grounds of Restriction:

It is necessary to maintain and preserve freedom of speech and expression in a democracy, so also it is necessary to place some restrictions on this freedom for the maintenance of social order, because no freedom can be absolute or completely unrestricted. Accordingly, under Article 19(2) of the Constitution of India, the State may make a law imposing "reasonable restrictions" on the exercise of the right to freedom of speech and expression "in the interest of" the public on the following grounds: Clause (2) of Article 19 of Indian Constitution contains the grounds on which restrictions on the freedom of speech and expression can be imposed:-

1. Security of State: Security of state is of vital importance and a government must have power to impose restriction on the activity affecting it. Under Article 19(2) reasonable restrictions can be imposed on freedom of speech and expression in the interest of security of State. However the term

"security" is very crucial one. The term "security of state" refers only to serious and aggravated forms of public order e.g. rebellion, waging war against the State, insurrection and not ordinary breaches of public order and public safety, e.g. unlawful assembly, riot, affray. Thus speeches or expression on the part of an individual, which incite to or encourage the commission of violent crimes, such as, murder are matters, which would undermine the security of State.

2. Friendly relations with foreign states: In the present global world, a country has to maintain good and friendly relationship with other countries. Something which has potential to affect such relationship should be checked by government. Keeping this thing in mind, this ground was added by the Constitution (First Amendment) Act, 1951. The object behind the provision is to prohibit unrestrained malicious propaganda against a foreign friendly state, which may jeopardize the maintenance of good relations between India, and that state.

No similar provision is present in any other Constitution of the world. In India, the Foreign Relations Act, (XII of 1932) provides punishment for libel by Indian citizens against foreign dignitaries. Interest of friendly relations with foreign States, would not justify the suppression of fair criticism of foreign policy of the Government. However it is interesting to note that member of the commonwealth including Pakistan is not a "foreign state" for the purposes of this Constitution. The result is that freedom of speech and expression cannot be restricted on the ground that the matter is adverse to Pakistan.

3. **Public Order**: Next restriction prescribed by Constitution is to maintain public order. This ground was added by the Constitution (First Amendment) Act. 'Public order' is an expression of wide connotation and signifies "that state of tranquility which prevails among the members of political society as a result of internal regulations enforced by the Government which they have established."

Here it is pertinent to look into meaning of the word "Public order. Public order is something more than ordinary maintenance of law and order. 'Public order' is synonymous with public peace, safety and tranquility. Anything that disturbs public tranquility or public peace disturbs public order. Thus communal disturbances and strikes promoted with the sole object of accusing unrest among workmen are offences against public order. Public order thus implies absence of violence and an orderly state of affairs in which citizens can peacefully pursue their normal avocation of life. Public order also includes public safety. Thus creating internal disorder or rebellion would affect public order and public safety. But mere criticism of government does not necessarily disturb public order.

The words 'in the interest of public order' includes not only such utterances as are directly intended to lead to disorder but also those that have the tendency to lead to disorder. Thus a law punishing utterances made with the deliberate intention to hurt the religious feelings of any class of persons is valid because it imposes a restriction on the right of free speech in the interest of public order since such speech or writing has the tendency to create public disorder even if in some case those activities may not actually lead to a breach of peace. But there must be reasonable and proper nexus or relationship between the restrictions and the achievements of public order.

4. **Decency or Morality**: The way to express something or to say something should be decent one. It should not affect the morality of the society adversely. Our Constitution has taken care of this view and inserted decency and morality as a ground. The words 'morality or decency' are words of wide meaning. Sections 292 to 294 of the Indian Penal Code provide instances of restrictions on the freedom of speech and expression in the interest of decency or morality. These sections prohibit the sale or distribution or exhibition of obscene words, etc. in public places. No fix standard is laid down till now as to what is moral and indecent. The standard of morality varies from time to time and from place to place.

5. **Contempt of Court:** In a democratic country Judiciary plays very important role. In such situation it becomes essential to respect such institution and its order. Thus, restriction on the freedom of speech and expression can be imposed if it exceeds the reasonable and fair limit and amounts to contempt of Court. According to the Section 2 'Contempt of Court' may be either 'civil contempt' or 'criminal contempt.' But now, Indian contempt law was amended in 2006 to make "truth" a defence. However, even after such amendment a person can be punished for the statement unless they were made in public interest. Again in Indirect Tax Practitioners Assn. vs R.K.Jain, it was held by Court that, "Truth based on the facts should be allowed as a valid defence if Courts are asked to decide contempt proceedings relating to contempt proceeding relating to a speech or an editorial or Article". The qualification is that such defence should not cover-up to escape from the consequences of a deliberate effort to scandalize the Court.

6. **Defamation:** Ones' freedom, be it of any type, must not affect the reputation or status another person. A person is known by his reputation more than his wealth or any thing else. Constitution considers it as ground to put restriction on freedom of speech. Basically, a statement, which injures a man's reputation, amounts to defamation. Defamation consists in exposing a man to hatred, ridicule, or contempt. The civil law in relating to defamation is still uncodified in India and subject to certain exceptions.

7. **Incitement to an offence:** This ground was also added by the Constitution (First Amendment) Act, 1951. Obviously, freedom of speech and expression cannot confer a right to incite people to commit offence. The word 'offence' is defined as any act or omission made punishable by law for the time being in force.

8. **Sovereignty and integrity of India-** To maintain sovereignty and integrity of a state is prime duty of government. Taking into it into account, freedom of speech and expression can be restricted so as not to permit any one to challenge sovereignty or to permit any one to preach something which will result in threat to integrity of the country.

From above analysis, it is evident that Grounds contained in Article 19(2) show that they are all concerned with the national interest or in the interest of the society. The first set of grounds i.e. the sovereignty and integrity of India, the security of the State, friendly relations with foreign States and public order are all grounds referable to national interest, whereas, the second set of grounds i.e. decency, morality, contempt of Court, defamation and incitement to an offence are all concerned with the interest of the society.

Reasonableness demands proper balancing:

The phrase reasonable restrictions connotes that the limitation imposed upon a person in the enjoyment of a right should not be arbitrary or of an excessive nature. A legislation arbitrarily invading the right of a person cannot be regarded as reasonable. A restriction to be valid must have a direct and proximate nexus with the object which the legislation seeks to achieve and the restriction must not be in excess of that object i.e., a balance between the freedoms guaranteed under Art. 19(1)(a) to (g) and the social control permitted by clauses (2) to (6) of Art. 19. It is the substance of legislation and not its appearance or form which is to be taken into consideration while assessing its validity. This introduces the principle of 'proportionality'. This means the Court would consider whether the restriction imposed by legislation on the Fundamental Rights are disproportionate to the situation and are "not the least restrictive of the choices". It is the direct, inevitable and the real, not the remote, effect of the legislation on the Fundamental Right which is to considered. A restriction to be reasonable must also be consistent with Art. 14 of the Constitution since the restrictions cannot be arbitrary or excessive. Reasonableness, both Substantive and Procedural: To determine the reasonableness of the restriction, the Court should also consider the nature of the restriction and procedure prescribed by the Statute for enforcing the restriction on the individual freedom. Not only substantive, but 'procedural provisions of a statute also enter into the verdict of its reasonableness'. Retrospectively of a

law may be also be a relevant factor although retrospectivity of a law does not make it automatically unreasonable. A statute imposing a restriction with retrospective effect is not prima facie unreasonable, but retrospectivity is an element to be taken into consideration in determining whether the restriction is reasonable or not.

Reasonableness and objective concept: The reasonability of a restriction has to be determined in an objective manner. It should be from the standpoint of the general public and not from the view of the persons upon which the restrictions are imposed or upon abstract considerations. This concept of objectivity prompted the Supreme Court to warn Judges from bringing their own personal predilections in ascertaining the reasonableness of the restrictions.

Reasonableness of restriction and not of law: The Court is called upon to ascertain the reasonableness of the restriction and not of the law which permits the restriction. A law may be reasonable, but the restriction imposed by it on the exercise of freedom may not be reasonable.

Reasonableness and Directive Principles of State Policy: The Directive Priniciples of State Policy are also relevant in considering whether a restriction on a Fundamental Right is reasonable or not. A restriction which generally promotes a Directive Principle is regarded as reasonable. The Supreme Court observed in Kasturi Lal v. State of Jammu &Kashmir, "Any action taken by the Government with the view to giving effect to any one or more of the Directive Principles would ordinarily qualify for being regarded as reasonable."

It is the Courts and not the Legislature which has to judge finally whether a restriction is reasonable or not. There is no exact standard or general pattern of reasonableness that can be laid down in all cases. Each case is to be judged on its own merit. The standard varies with the nature of the right infringed, the underlying purpose of the restrictions imposed, the extent and the urgency of the evil sought to be remedied, the disproportion, of the imposition, the prevailing condition at the time. These factors have to be taken into consideration for any judicial verdict.

Right to Strike (Judicial Interpretation):

The right to strike in the Indian Constitution set up is not absolute right but it flow from the fundamental right to form union. As every other fundamental right is subject to reasonable restrictions, the same is also the case to form trade unions to give a call to the workers to go on strike and the state can impose reasonable restrictions. In All India Bank Employees' Association v. National Industrial Tribunal and others29 , the Court specifically held that even very liberal interpretation of sub-clause (C)30 of clause (1) of Article 19 cannot lead to the conclusion that trade unions have a guaranteed right to an effective collective bargaining or to strike, either as part of collective bargaining or otherwise. Thus, there is a guaranteed fundamental right to form association or Labour unions but there is no fundamental right to go on strike. Under the Industrial Dispute Act, 1947 the ground and condition are laid down for the legal strike and if those provisions and conditions are not fulfilled then the strike will be illegal.

Right to Information as a fundamental right:

At this juncture, it is imperative to note that the Supreme Court, in *State of U.P v. Raj Narain* - a 1974 case, recognized the 'right to know' as a right inherent in Fundamental Right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. Following this, a plethora of cases the right to information was recognized as a right implicit in the Article 19(1) (a) and in Article 21 (fundamental right to life and personal liberty). *In Peoples Union for Civil Liberties v. Union of India*, the Supreme Court observed that in Right of information is a facet of the freedom of 'speech and expression' as contained in Article 19(1)(a) of the Constitution of India. Right of information, thus, indisputably is a fundamental right.

However, every time the Constitution is amended, the 'basic structure' test laid down in *Keshavanada Bharti case* has to be satisfied. The test provides that a Constitutional amendment should not be in derogation of the basic features of the Constitution like judicial review, democracy or Rule of Law. While including the right to information is as a fundamental right, if at all there is any effect on any of the basic structure it would be in the nature of strengthening the democracy and making it progressive, as envisaged by the makers of our Constitution.

Freedom of Religion:

- Article 25. Freedom of conscience and free profession, practice and propagation of religion. Article 26. Freedom to manage religious affairs.
- Article 27. Freedom as to payment of taxes for promotion of any particular religion.
- Article 28. Freedom as to attendance at religious instruction or religious worship in certain education institutions.

Freedom of religion and Secularism in Indian Constitution:

Though the Right to freedom of speech and expression (Article 19) envisages the philosophy of freedom of religion in India because despite of the creation of Pakistan, a lot of Muslims were scattered all over India, part from Sikhs, Parsees, Christians and others. Yet the Constituent Assembly made it explicit by incorporating a separate group of Articles as per a agreement with / recommendation of Advisory Committee on Fundamental Rights, Minorities, Tribal and Excluded Areas (Chairman: Vallabhbhai Patel) and Minorities Sub-Committee (Chairman: H.C. Mookherjee). Before the 42nd Constitutional Amendment Act, 1976 added the word "secular" in the Constitution of India, the word "secular" appeared only in "Article 25". India is a secular country and there is no state religion. India also does not patronize any religion. The Constitution 42nd amendment Act made the above thought "explicit" in the Constitution.

The Preamble of Indian Constitution aims to constitute India a Sovereign, Socialist, Democratic Republic. The terms Socialist and Secular were added to it by the 42nd amendment. The whole Constitution is summarized in the preamble. It is the mirror to the spirit of the Constitution. The arrangement of the words in the preamble is also very significant. Indian society is a multi – religious society, it is having different caste, religion along with several religion diversification. So, all these are the divisive factor in some way or the other and if not handled carefully then can cause a threat to the unity and integrity of the nation.

The Constituent Assembly has visualized the peculiar situations of the country and a very deliberate sequence has been followed while arranging the preamble. It aims to secure to citizens justice, equality and liberty. The basic aim is to promote fraternity while assuring unity and integrity of the nation along with individual dignity. So, it is a cause and effect relationship .Justice is also a subjective and circumstantial concept. It implies the balancing of rights. These concepts of justice, liberty and equality revolves around fraternity which is the prime goal of the country has to achieve through these Constitutional provisions. Regarding the concept of justice social justice is given prime importance because without social justice economic justice cannot be achieved and without economic political would be futile. So all these terms given in the Preamble are having their own Significance and all efforts have been made to ensure that the real spirit of the Constitution shall be expressed in the Preamble. It contains the essential principles and goals of the Constitution.

Fraternity is a very significant tool to combat the divisive forces. The present paper is deliberating upon the concept of secularism in this background. Religious harmony is a must to promote fraternity particularly in Indian context. So, it's a Constitutional mandate upon the state to combat the factors which curtails

religious fraternity. It is also incumbent upon the state to take positive as well as negative actions to promote fraternity. Article 25(1) guarantee to every person the freedom of conscience and the right to profess, practice and prorogate religion. So, it is the manifestation of state neutrality in the matter of religion as it implies equal conservations of all religion and equal religious right to all the citizens. Along with that it prohibits discrimination on the ground of the religion race, caste, sex or place of the birth. Article 29(2) provide that no citizen shall be denied admission into any educational institution maintained by the state, receiving aid out of the state funds on grounds only of religion , race , caste , languages or any of them .

In *S.R. Bommai v. Union of India*, it was held that religious tolerance and equal treatment of all religious group and protection of their life and property and the places of their worship are an essential part of secularism enshrined in our Constitution. While the citizen of this country are free to profess, practice and prorogate such religion, faith or belief as they choose, so for as the state is concerned i.e. from the point of view of the state, the religion, faith or belief of a person is immaterial to it, all are equal and all are entitled to be treated equally." Further the Court while emphasizing upon the significance of Secularism declared it as the basic structure of the Constitution.

The concept of secularism was not expressly incorporated in the Constitution at the stage of its making. However its operation was visible in the fundamental rights and directive principles. The concept of secularism, though not expressly stated in the Constitution, was, nevertheless deeply embedded in the Constitutional philosophy. The concepts of secularism are not static; it is elastic in connotation. In this area, flexibility is most desirable as there cannot be any fixed views in this concept for all time to come. The Courts decide from time to time the contours of the concepts of secularism and enforce it in practice.

In. M. Ismail Farooq v. Union of India, it was held that it is clear from the Constitutional scheme that it guarantees equality in the matters of religion to all individuals and groups irrespective of their faith emphasizing that there is no religion of the state itself. The preamble of the Constitution read in particular with Articles 25 to 28 emphasis this aspect and indicates that it is in this manner this concept of secularism embodied in the Constitutional scheme as a creed adopted by the Indian people has to be understood while examining the Constitutional validity of any legislation on the touch stone of the Constitution. The concept of Secularism is one facet of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution. Any steps inconsistent with these mandates are unconstitutional. The Court further held that any state Government which pursues unsecular policies or unsecular course of action acts contrary to the Constitutional mandate and renders itself amenable to action under Article 356.

In *Aruna Roy v. Union of India*, the Court held that concept of secularism is not endangered if the basic tenets of all religions all over the world are studied and learned. Value based education will help the nation to fight against fanaticism, ill-will, violence, dishonesty and corruption. These values can be inculcated if the basic tenets of all religions are learned. The Hon'ble Supreme Court has held in *Lata Singh v. state of U.P*," that caste barriers in societal interactions are anti – secular. Inter caste marriage shall be promoted, protected and conserved by the state to promote greater secular values. This is also a part of secularization process. The concept of secularism is not merely a positive attitude of religion tolerance. It is also a positive concept of equal treatment of all religions.

As Article 25, 15(3), 29 reflect the state neutrality in the matters of religion. These are the restrictive dimensions of secularism. Now the question for consideration is that whether this state neutrality or such restricted role is sufficient to fulfill the Constitutional goal which is incumbent upon the state. To answer this question the nature of Indian secularism has to be keenly observed. The western secularism implies the state neutrality in the matters of religion because they are having a uni religious society. So state neutrality is sufficient and no further action is required on the part of the state to create religious harmony.

In Indian context the state as a neutral entity in a matter of religion was never an issue because all elements enshrined in the Constitution are interwoven and we have adopted our society with all its peculiar features thereby automatic adoption of the multi religiosity also . It's a Constitutional mandate upon the state to bring a harmonization between various religions. So, Indian secularism has to be seen in its own light as compared to the western secularism. in Indian context mere state neutrality in the matters of religion is not sufficient as Article 25 , 15(1) ,29(2) manifests non declaration of any state religion or it talks about a mere guarantee of fundamental right to religion to the citizens. These are the restrictive or narrow aspects of secularism in Indian context. Indian secularism requires something more than the above mentioned things. It's a way of life in India as it is deep rooted in Indian society. So to promote the Constitutional goal of fraternity, for promotion and assurance of individual dignity and unity and integrity the pro active role of the state is required for religious harmony and tolerance. State has to curb the situations which would result in to religious apathy and try to create a balance in religious diversities which exists both in belief and practice in India. Socio economic upliftment, creation of religious harmony, inculcating religious tolerance among the citizens by education regarding secular values can be some tools to promote secularism in Indian context.

Rights of Accused:

A person in custody of the police, an under-trial or a convicted individual does not lose his human and fundamental rights by virtue of incarceration. The two cardinal principles of criminal jurisprudence are that the prosecution must prove its charge against the accused beyond shadow of reasonable doubt and the onus to prove the guilt of the accused to the hilt is stationary on the prosecution and it never shifts. The prosecution has to stand on its own legs so as to bring home the guilt of the accused conclusively and affirmatively and it cannot take advantage of any weakness in the defense version. The intention of the legislature in laying down these principles has been that hundreds of guilty persons may get scot free but even one innocent should not be punished. Indian Constitution itself provides some basic rights/safeguards to the accused persons which are too followed by the authorities during the process of criminal administration of justice. There are some provisions which expressly and directly create important rights in favour of the accused/arrested person.

Protection in respect of conviction for an offences:

Following are some important provisions creating rights in favour of the accused/ arrested persons:- Regarding protection in respect of conviction for offence, Article 20 of the Constitution, following are some important provision creating right a favour of the accused / arrested person.

1. No person shall be convicted of any offence excepts for violation of a law in force at the time of commission of the act charged as an offence, nor be subjected to a penalty greater the 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". The Article 20 of the Constitution of India provides three types of safeguard to the person accused of crimes namely –

- Protection against ex-post facto Law.
- Guarantee against double Jeopardy, and
- Privilege against self incrimination.

Protection against Ex post facto law:

Clause (1) of Article 20 of the Indian Constitution says that "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, nor 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. Article 11, para 2 of the Universal Declaration of Human Rights, 1948 provides freedom from ex-post facto laws. An ex post facto law is a law which imposes penalties retrospectively, i.e., on acts already done and increases the penalty for such acts. The American Constitution also contains a similar provision prohibiting ex post facto laws both by the Central and the State Legislatures. If an act is not an offence at the date of its commission it cannot be an offence at the date subsequent to its commission. The protection afforded by clause (1) of Article 20 of the Indian Constitution is available only against conviction or sentence for a criminal offence under ex post facto law and not against the trial. The protection of clause (1) of Article 20 cannot be claimed in case of preventive detention, or demanding security from a person. The prohibition is just for conviction and sentence only and not for prosecution and trial under a retrospective law. So, a trial under a procedure different from what it was at the time of the commission of the offence or by a special Court constituted after the commission of the offence cannot ipso facto be held unconstitutional. The second part of clause (1) protects a person from „a penalty greater than that which he might have been subjected to at the time of the commission of the offence.

In *Kedar Nath v. State of West Bengal*, the accused committed an offence in 1947, which under the Act then in force was punishable by imprisonment or fine or both. The Act was amended in 1949 which enhanced the punishment for the same offence by an additional fine equivalent to the amount of money procured by the accused through the offence. The Supreme Court held that the enhanced punishment could not be applicable to the act committed by the accused in 1947 and hence, set aside the additional fine imposed by the amended Act. In the criminal trial, the accused can take advantage of the beneficial provisions of the ex-post facto law. The rule of beneficial construction requires that ex post facto law should be applied to mitigate the rigorous (reducing the sentence) of the previous law on the same subject.

Double jeopardy (Article 20(2) :

According to this doctrine, if a person is tried and acquitted or convicted of an offence, he cannot be tried again for the same offence or on the same facts for any other offence. This doctrine has been substantially incorporated in the Article 20(2) of the Constitution and is also embodied in Section 300 of the Criminal Procedure Code, 1973.

a. When once a person has been convicted or acquitted of any offence by a competent Court, any subsequent trial for the same offence would certainly put him in jeopardy and in any case would cause him unjust harassment. Such a trial can be considered anything but fair, and therefore has been prohibited by the Code of Criminal Procedural as well as by the Constitution.

b. A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted for such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of section 221, or for which he might have been convicted under sub-section (2) thereof. The dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section. Constitutional provision to the same effect is incorporated in Article 20 (2) which provides that no person shall be prosecuted and punished for the same offence more than once. These pleas are taken as a bar to criminal trial on the ground that the accused person had been once already charged and tried for the same alleged offence and was either acquitted or convicted. These rules or pleas are based on the

principle that "a man may not be put twice in jeopardy for the same offence". Article 20(2) of the Constitution recognizes the principle as a fundamental right. It says," no person shall be prosecuted and punished for the same offence more than once". While, Article 20(2) does not in terms maintain a previous acquittal, Section 300 of the Code fully incorporates the principle and explains in detail the implications of the expression "same offence".

Prohibition against self incrimination or testimonial compulsion Article 20(3):

Article 20(3) provides that no person accused of any offence shall be compelled to be a witness against himself. Thus Article 20(3) embodies the general principles of English and American jurisprudence that no one shall be compelled to give testimony which may expose him to prosecution for crime. The cardinal principle of criminal law which is really the bed rock of English jurisprudence is that an accused must be presumed to be innocent till the contrary is proved5. It is the duty of the prosecution to prove the offence. The accused need not make any admission or statement against his own free will. The fundamental rule of criminal jurisprudence against self-incrimination has been raised to a rule of Constitutional law in Article 20(3).The guarantee extends to any person accused of an offence and prohibits all kinds of compulsions to make him a witness against himself. Explaining the scope of this clause in *M.P. Sharma v. Satish Chandra* (1954), the Supreme Court observed that this right embodies the following essentials: (a) It is a right pertaining to a person who is "accused of an offence." (b) It is a protection against "compulsion to be a witness".

Meaning and concept of "Right to Life":

'Everyone has the right to life, liberty and the security of person.' The right to life is undoubtedly the most fundamental of all rights. All other rights add quality to the life in question and depend on the pre-existence of life itself for their operation. As human rights can only attach to living beings, one might expect the right to life itself to be in some sense primary, since none of the other rights would have any value or utility without it. There would have been no Fundamental Rights worth mentioning if Article 21 had been interpreted in its original sense. This Section will examine the right to life as interpreted and applied by the Supreme Court of India.

Article 21 of the Constitution of India, 1950 provides that, *"No person shall be deprived of his life or personal liberty except according to procedure established by law."* 'Life' in Article 21 of the Constitution is not merely the physical act of breathing. It does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to live with human dignity, right to livelihood, right to health, right to pollution free air, etc. Right to life is fundamental to our very existence without which we cannot live as human being and includes all those aspects of life, which go to make a man's life meaningful, complete, and worth living. It is the only Article in the Constitution that has received the widest possible interpretation. Under the canopy of Article 21 so many rights have found shelter, growth and nourishment. Thus, the bare necessities, minimum and basic requirements that is essential and unavoidable for a person is the core concept of right to life.

The scope of Article 21 have been expands over the years through judicial pronouncements over the years. The Supreme Court of India in the famous *Gopalan Case* (1950) held that protection under Article 21 is available only against arbitrary executive action and not against arbitrary legislative action. It clarified that if personal liberty of an individual is taken away by a law, the validity of the law cannot be questioned. In the same case the Supreme Court held personal liberty would only mean liberty relating to the person or body of the individual.

However, in the *Maneka Gandhi Case* (1973) the Supreme Court overruled its judgement in the Gopalan Case by widely interpreting Article 21. It stated that protection under Article 21 should be available not

only against arbitrary executive action but also against arbitrary legislative action by introducing the American concept of 'due process of law'. It pronounced the expression 'Personal Liberty' in Article 21 is of the widest amplitude and it covers a wide range of rights that go to constitute the personal liberties of a man.

The Court's decision in Maneka Gandhi Case has been reaffirmed in the subsequent cases. In the way of widening the implications of personal liberty, in 1993, the Supreme Court recognized primary education as a fundamental right under Article 21. It recognized right to free education until the completion of 14 years as a Fundamental Right overruling its earlier judgement in 1992, which declared that there was a Fundamental Right to education to any level including professional education like medicine and engineering. The 86th Constitutional Amendment Act of 2002 inserted Article 21A for making only elementary education a Fundamental Right.

These rights are guaranteed by the Constitution. One of these rights is provided under Article 21 which reads as follows:-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. Though the phraseology of Article 21 starts with negative word but the word No has been used in relation to the word deprived. The object of the fundamental right under Article 21 is to prevent encroachment upon personal liberty and deprivation of life except according to procedure established by law. It clearly means that this fundamental right has been provided against state only.

If an act of private individual amounts to encroachment upon the personal liberty or deprivation of life of other person. Such violation would not fall under the parameters set for the Article 21. in such a case the remedy for aggrieved person would be either under Article 226 of the Constitution or under general law. But, where an act of private individual supported by the state infringes the personal liberty or life of another person, the act will certainly come under the ambit of Article 21. Article 21 of the Constitution deals with prevention of encroachment upon personal liberty or deprivation of life of a person.

The state cannot be defined in a restricted sense. It includes Government Departments, Legislature, Administration, Local Authorities exercising statutory powers and so on so forth, but it does not include non-statutory or private bodies having no statutory powers. For example: company, autonomous body and others. Therefore, the fundamental right guaranteed under Article 21 relates only to the acts of State or acts under the authority of the State which are not according to procedure established by law. The main object of Article 21 is that before a person is deprived of his life or personal liberty by the State, the procedure established by law must be strictly followed. Right to Life means the right to lead meaningful, complete and dignified life. It does not have restricted meaning. It is something more than surviving or animal existence. The meaning of the word life cannot be narrowed down and it will be available not only to every citizen of the country. As far as Personal Liberty is concerned, it means freedom from physical restraint of the person by personal incarceration or otherwise and it includes all the varieties of rights other than those provided under Article 19 of the Constitution. Procedure established by Law means the law enacted by the State. Deprived has also wide range of meaning under the Constitution. These ingredients are the soul of this provision. The fundamental right under Article 21 is one of the most important rights provided under the Constitution which has been described as heart of fundamental rights by the Apex Court.

The scope of Article 21 was a bit narrow till 50s as it was held by the apex Court in *A.K.Gopalan v. State of Madras* that the contents and subject matter of Article 21 and 19 (1) (d) are not identical and they proceed on total principles. In this case the word deprivation was construed in a narrow sense and it was held that the deprivation does not restrict upon the right to move freely which came under Article 19 (1) (d). at that time *Gopalans* case was the leading case in respect of Article 21 along with some other Articles of the Constitution, but post *Gopalan* case the scenario in respect of scope of Article 21 has been expanded

or modified gradually through different decisions of the Apex Court and it was held that interference with the freedom of a person at home or restriction imposed on a person while in jail would require authority of law. Whether the reasonableness of a penal law can be examined with reference to Article 19, was the point in issue after *Gopalan* case in the case of *Maneka Gandhi v. Union of India*, the apex Court opened up a new dimension and laid down that the procedure cannot be arbitrary, unfair or unreasonable one. Article 21 imposed a restriction upon the state where it prescribed a procedure for depriving a person of his life or personal liberty.

This view has been further relied upon in a case of *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* and others as follows: Article 21 requires that no one shall be deprived of his life or personal liberty except by procedure established by law and this procedure must be reasonable, fair and just and not arbitrary, whimsical or fanciful. The law of preventive detention has therefore now to pass the test not only for Article 22, but also of Article 21 and if the Constitutional validity of any such law is challenged, the Court would have to decide whether the procedure laid down by such law for depriving a person of his personal liberty is reasonable, fair and just.

In another case of *Olga Tellis and others v. Bombay Municipal Corporation and others*, it was further observed: Just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right must conform the norms of justice and fair play. Procedure, which is just or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. As stated earlier, the protection of Article 21 is wide enough and it was further widened in the case of *Bandhua Mukti Morcha v. Union of India* and others in respect of bonded labour and weaker section of the society. It lays down as follows: Article 21 assures the right to live with human dignity, free from exploitation. The state is under a Constitutional obligation to see that there is no violation of the fundamental right of any person, particularly when he belongs to the weaker section of the community and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him. Both the Central Government and the State Government are therefore bound to ensure observance of the various social welfare and labour laws enacted by the Parliament for the purpose of securing to the workmen a life of basic human dignity in compliance with the directive principles of the state policy.

The meaning of the word life includes the right to live in fair and reasonable conditions, right to rehabilitation after release, right to live hood by legal means and decent environment. The expanded scope of Article 21 has been explained by the apex Court in the case of *Unni Krishnan v. State of A.P* and the Apex Court itself provided the list of some of the rights covered under Article 21 on the basis of earlier pronouncements and some of them are listed below:

(1) The right to go abroad.

(2) The right to privacy.

(3) The right against solitary confinement.

(4) The right against hand cuffing.

(5) The right against delayed execution.

(6) The right to shelter.

(7) The right against custodial death.

(8) The right against public hanging.

(9) Doctors assistance

It was observed in *Unni Krishnan case* that Article 21 is the heart of Fundamental Rights and it has extended the Scope of Article 21 by observing that the life includes the education as well as, as the right to education flows from the right to life. As a result of expansion of the scope of Article 21, the Public Interest Litigations in respect of children in jail being entitled to special protection, health hazards due to pollution and harmful drugs, housing for beggars, immediate medical aid to injured persons, starvation deaths, the right to know, the right to open trial, inhuman conditions in aftercare home have found place under it.

Through various judgments the Apex Court also included many of the non-justifiable Directive Principles embodied under part IV of the Constitution and some of the examples are as under:

(a) Right to pollution free water and air.

(b) Protection of under-trial.

(c) Right of every child to a full development.

(d) Protection of cultural heritage.

Maintenance and improvement of public health, improvement of means of communication, providing human conditions in prisons, maintaining hygienic condition in slaughter houses have also been included in the expanded scope of Article 21. This scope further has been extended even to innocent hostages detained by militants in shrine who are beyond the control of the state.

The Apex Court in the case of *S.S. Ahuwalia v. Union of India and others* it was held that in the expanded meaning attributed to Article 21 of the Constitution, it is the duty of the State to create a climate where members of the society belonging to different faiths, caste and creed live together and, therefore, the State has a duty to protect their life, liberty, dignity and worth of an individual which should not be jeopardized or endangered. If in any circumstance the state is not able to do so, then it cannot escape the liability to pay compensation to the family of the person killed during riots as his or her life has been extinguished in clear violation of Article 21 of the Constitution.

While dealing with the provision of Article 21 in respect of personal liberty, Hon'ble Supreme Court put some restrictions in a case of *Javed and others v. State of Haryana* (2003) as follows: at the very outset we are constrained to observe that the law laid down by this Court in the decisions relied on either being misread or read divorced of the context. The test of reasonableness is not a wholly subjective test and its contours are fairly indicated by the Constitution. The requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights. The lofty ideals of social and economic justice, the advancement of the nation as a whole and the philosophy of distributive justice- economic, social and political- cannot be given a go-by in the name of undue stress on fundamental rights and individual liberty. Reasonableness and rationality, legally as well as philosophically, provide colour to the meaning of fundamental rights and these principles are deducible from those very decisions which have been relied on by the learned counsel for the petitioners.

The apex Court led a great importance on reasonableness and rationality of the provision and it is pointed out that in the name of undue stress on Fundamental Rights and Individual Liberty, the ideals of social and economic justice cannot be given a go-by. Thus it is clear that the provision Article 21 was constructed narrowly at the initial stage but the law in respect of life and personal liberty of a person was developed gradually and a liberal interpretation was given to these words. New dimensions have been added to the scope of to protection of a person's tradition, culture, heritage and all that gives meaning to a man's life. It includes the right to live in peace, to sleep in peace and the right to repose and health.

Further it imposed a limitation upon a procedure which prescribed for depriving a person of life and personal liberty by saying that the procedure which prescribed for depriving a person of life and personal liberty by saying that the procedure must be reasonable, fair and such law should not be arbitrary, whimsical and fanciful. The interpretation which has been given to the words life and personal liberty in various decisions of the Apex Court, it can be said that the protection of life and personal liberty has got multi dimensional meaning and any arbitrary, whimsical and fanciful act of the State which deprived the life or personal liberty of a person would be against the provision of Article 21 of the Constitution.

Protection or safeguard or remedies: Article 22)

Article 22(1) and 22(2) of the Indian Constitution provide the following rights to the person arrested and detained in custody under the ordinary law of crimes. Right to be informed of ground s of arrest: Article 22 (1) of the Constitution provides that a person arrested for an offence under ordinary law be informed as soon as may be the grounds of arrest. In addition to the Constitutional provision, Section 50 of Criminal Procedure Code also provides for the same. The grounds of arrest should be communicated to the arrested person in the language understood by him; otherwise it would not amount to sufficient compliance with Constitutional requirements. Right to be defended by lawyer is one of the fundamental rights enshrined in our Constitution under this provision. Article 22 (1) of the Constitution provides, *inter alia*, that no person who is arrested shall be denied the right to consult and to be defended by a legal practitioner of his choice. The right of the accused to have a counsel of his choice is fundamental and essential to fair trial. The right is recognized because of the obvious fact that ordinarily an accused person does not have the knowledge of law and the professional skill to defend him before a Court of law wherein the prosecution is conducted by a competent and experienced prosecutor.

This has been eloquently expressed by the Supreme Court of America in Powell *v. Alabama*. The Court observed that "*The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and the knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step of the proceeding against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect?*" In *Huassainara Khatoon (IV) v. Home Secretary, State of Bihar*, the Supreme Court after adverting to Article 39-A of the Constitution and after approvingly referring to the creative interpretation of Article 21 of the Constitution as propounded in its earlier epoch-making decision in Maneka Gandhi v. Union of India10 , has explicitly observed as follows:

The right to free legal services is, therefore, clearly an essential ingredient of „reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a Constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course the accused person does not object to the provision of such lawyer. It has been categorically laid down by the Supreme Court that the Constitutional right of legal aid cannot be denied even if the accused failed to apply for it. It is now therefore clear that unless refused, failure to provide legal aid to an indigent accused would vitiate the trial, entailing setting aside of conviction and

sentence. These questions are now of academic importance only. Because the Supreme Court has now recognized that every indigent accused person has a fundamental Constitutional right to get free legal services for his defense.

The Constitution as well as Section 303 of Code of Criminal Procedure recognized the right of every arrested person to consult a legal practitioner of his choice. Article 22 (1) provides, " *No person who is arrested shall be detained in custody without being inform, 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*".

The right begins from the moment of arrest i.e. pre-trial stage. The arrestee could also have consultation with his friends or relatives, the consultation with the lawyer may be in the presence of police officer but not within his hearing, right to be produced before magistrate, the arrested person must be taken to the Magistrate within 24 hours of arrest. Similar provision has been incorporated under Section 56 of Criminal Procedure Code. A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station etc.

In *Hariharnand v. Jailor*, the Court been held that the arrested person will be entitled to be released, If twenty four hours passed and the person arrested has not been produced before Magistrate. The magistrate before whom the arrested person is presented is required to apply his judicial mind to determine be whether the arrest is regular and in accordance with law. Arrested person no detention beyond 24 hours except by order of the magistrate Article 22(2) of the Constitution provides: *"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 the Court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate."* The right to be brought before a Magistrate within a period of not more than 24 hours of arrest has been created with aims:

a. to prevent arrest and detention for the purpose of extracting confessions, or as a means of compelling people to give information;

b. to prevent police stations being used as though they were prisons – a purpose for which they are unsuitable. Hussainara Khatoon (IV) v. Home Secy., State of Bihar, Sundar Singh v. Emperor 32 ,to afford an early recourse to a judicial officer independent of the police on all questions of bail or discharge. If a police officer fails to produce an arrested person before a magistrate Within 24 hours of the arrest, he shall be held guilty of wrongful detention

Right to free legal aid Article 39 (a) the "right to counsel" would remain empty if the accused due to his poverty or indigent conditions has no means to engage a counsel for his defence. The state is under a Constitutional mandate (implicit in Article 21 of the Constitution, explicit in Article 39-A of the Constitution-a directive principle) to provide free legal aid to an indigent accused person *Sukhdas v. Union Territory of Arunachal Pradesh.* In *Khatri (II) V. State of Bihar*, the Supreme Court has held that the State is under a Constitutional mandate to provide free legal aid to an indigent accused person, and that their Constitutional obligation to provide legal aid does not arise only when the trial commences but also when the accused is for the first time produced before the Magistrate as also when he is remanded from time to time. However this Constitutional right of an indigent accused to get free legal aid may prove to be illusory unless he is produced before promptly and duly informed about it by the Court when he is produced before it. The Supreme Court has therefore cast a duty on all Magistrate and Courts to inform the indigent accused about his right to get free legal aid.

Right to be tried in presence of accused the personal presence of the accused throughout his trial would enable him to understand properly the prosecution case as it is unfolded in the Court. This would facilitate in the making of the preparations for his defence. A criminal trial in the absence of the accused is unthinkable. A trial and a decision behind the neck of the accused person are not contemplated by the Code, though no specific provision to that effect is found therein. The requirement of the presence of the accused during his trial can be implied from the provisions which allow the Court to dispense with the personal attendance of the accused person under certain circumstances.

Right to speedy trial Justice delayed is justice denied. This is all the more true in a criminal trial where the accused is not released on bail during the pendency of the trial and trial is inordinately delayed. However, the code does not in so many words confer any such right on the accused to have his case decided expeditiously. In *Hussainara Khatoon (IV) v. State of Bihar*, the Supreme Court considered the problem in all its seriousness and declared that speedy trial is an essential ingredient of „reasonable, fair and just procedure guaranteed by Article 21 and that it is the Constitutional obligation of the state of devise such a procedure as would ensure speedy trial to accused. The State cannot avoid its Constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability.

The State is under a Constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the Constitutional obligation of this Court, as the guardians of the fundamental rights of the people, as a sentinel on the qui vie, to enforce the fundamental right of the accused to speedy trial by issuing necessary directions to the State. The spirits underlying these observations have been consistently rekindled by the Supreme Court in several cases.This has again been expressed in *Raj Deo Sharma v. State of Bihar* wherein the Court ordered to close the prosecution cases, if the trial had been delayed beyond a certain period in specified cases involving serious offences. *Madheshwardhari Singh v. State of Bihar*, the right to speedy trial came to receive examination in the Supreme Court in *Motilal Saraf v. State of J&K*. Dismissing a fresh complaint made after 26 years of an earlier complaint the Supreme Court explained the meaning and relevance of speedy trial right thus: The concept of speedy trial is read into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under our Constitution. The right to speedy trial begins with actual restraint imposed by arrest and consequent incarceration, and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impressible and avoidable delay from the time of the commission of the offence will if consummates into a finality, can be averted.

Right to appeal the Supreme Court has observed: One component of fair procedure is natural justice. Generally speaking and subject to just exceptions, at least a single right of appeal on facts, where criminal conviction is fraught with loss of liberty, is basic to civilized jurisprudence. It is integral to fair procedure; natural justice and normative universality save in special cases like the original tribunal being a high bench sitting on a collegiate basis. Appeal is one of the two important review procedures. An appeal is an inferior one, whose judgment or decision the Court above is called upon to correct or reverse. An appeal is a creature of statute and there can be no inherent right of appeal from any judgment or determination unless an appeal is expressly provided for by the law itself. Complaint to a superior Court of an injustice done or error committed by an.

Freedom of Religion in India - Article 25(1)

This guarantees to every person the freedom of conscience and right to profess, practise and propagate religion. This right is however, subjected to public order, morality and health and to the other provisions of Part III of Constitution. Also, under sub-Clauses(a) and (b) of Clause (2) of Article 25 The State is empowered by law:

a. to regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practice;

b. to provide for (i) social welfare and reform, and (ii) to throw open Hindu religious institution of a public character to all classes and sections of Hindus.

Article 25 (1) also guarantees not right to convert any person to one's own religion, but it allows to transmit or spread one's religion by an explosion of its tenets. It therefore postulates that there is not fundamental tight to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion that would impinge on the "freedom of conscience" guaranteed to all the citizens of the country alike. The protection of Article 25 and 26 is thus not limited to matters of doctrine of belief. It extends also to acts done in pursuance of 'religion' and, therefore, contains a guarantee for rituals and observances, ceremonies and mode of worship which are integral parts of religion. What constitute an essential part of religion or religious practice has to be decided by the Courts with reference to a doctrine of a particular religion and include practice which is regarded by the community as a part of its religion.

Restriction on freedom of religion:

1. **Religious liberty subjected to public order, morality and health:** In the name of religion no act can be done against public order, morality and health of public. Thus Section 34 of the Police Act prohibits the slaughter of cattle or indecent exposure of one's person in public place. These acts cannot be justified on plea of practice of religious rites. Likewise, in the name of religion 'untouchability' or traffic in human begins' e.g. system of Devdasis cannot be tolerated. These rights are subjected to the reasonable restrictions under clause (2) of Article 19. For instance, a citizen's freedom of speech and expression in matters of religion is subjected to reasonable restrictions under Article 19 (2).Right to propagate one's religion do not give right to anyone to "forcibly" convert any person to one's own religion. Forcible conversion of any person to one's own religion might disturb the public order and hence could be prohibited by law.

2. **Regulation of economic, financial, political and secular activities associated with religious practices-Clause (2) (a):** The freedom to practice extends only to those activities which are the essence of religion. It would not cover secular activities which do not form the essence of religion. It is not always easy to say which activities fall under religious practice or which are of secular, commercial or political nature associated with religion practice. Each case must be judge by its own facts and circumstances.

3. **Social Welfare and Social Reforms-Clause (2) (b):** Under this clause the State empowered to make laws for social welfare and social reform. Thus under this clause the State can eructate social practices and dogmas which stand in the path of the country's onward progress. Such laws do not affect the essence of any religion. This declares that where there is conflict between the need of social welfare and reform and religious practice must yield. Prohibition of evil practices such as Sati or system of Devadasi has been held to be justified under this clause. The right protected under this clause is a right to enter into a temple for the purpose of worship. But it does not follow from this that, that right is, absolute and unlimited in character. No one can claim that a temple must be kept open for worship at all hours of the day and night or that he should be permitted to perform services personally which the Acharya alone could perform. The State cannot regulate the manner in which the worship of the deity is performed by the authorized pujaris of the temple or the hours and days on which the temple is to be kept open for Darshan or Puja for devotees. The right of Sikhs to wear and carry Kripan is recognized as a religious practice in Explanation 1 of Article 25. It does not mean that he can keep any number of Kripans. He cannot possess more than one Kripan without license.

The Supreme Court observation on freedom of religion:

The right to religion guaranteed under Articles 25 & 26 is not an absolute or unfettered right; they are subject to reform on social welfare interpreting Article 25 and 26 strikes a careful balance between matters which are essential and integral part and those which are not and the need for the State to regulate or control in the interests of the community — *A.S Narayana Deeshitalyu v State of Andhra Pradesh*

The right to religion guaranteed under Article 25 or 26 is not an absolute or unfettered right; they are subject to reform on social welfare by appropriate legislation by the State. The Court therefore while interpreting Article have been numerous other rulings explaining the scope and connotation of the religious liberty provisions in the Constitution. Given below is a summary of the major rulings:

Articles 25-30 embody the principles of religious tolerance that has been the characteristic feature of Indian civilization from the start of history. They serve to emphasize the secular nature of Indian democracy which the founding fathers considered should be the very basis of the Constitution –*Sardar Suedna Taiiir Saifiiddin v. State of Bombay.*

Freedom of conscience connotes a person's right to entertain beliefs and doctrines concerning matters which are regarded by him to be conducive to his spiritual well being – *Ratilal Panachand Gandhi v. State of Bombay.*

Cultural and Educational Rights:

The Indian Constitution guarantees Cultural and Educational Rights under Articles 29 and 30. In India education finds place in the Concurrent list. India is a vast land where resides different races, languages, cultures and castes. Indian people are not integrated by racial unity, unity of language and literature, geographical proximity, historical unity, religious unity, unity of economic interest and cultural unity. In such a country it is essential to protect the interest and identities of the minority.

Both Article 29 and Articles 30 guarantee certain right to the minorities. Article 29 protects the interests of the minorities by making a provision that any citizen / section of citizens having a distinct language, script or culture have the right to conserve the same. Article 29 mandates that no discrimination would be done on the ground of religion, race, caste, language or any of them. Article 30 mandates that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. Article 30 is called a Charter of Education Rights. Article 30 provides an absolute right to the minorities that they can establish their own linguistic and religious institutions and at the same time can also claim for grant-in-aid without any discrimination.

Article 29 (1) guarantees to any section of the citizen residing in any part of India having a distinct language, script or culture of its own, the right to conserve the same, i.e. language, script or culture. A minority community can preserve its language, script or culture by and through educational institutions. Therefore, the right to establish and maintain institutions of their choice, is necessary concomitant to the right to preserve its distinctive language, script or culture. This right is guaranteed to them by Article 30 (1) which says that all minorities whether bases on religion or language shall have the right to establish and administer educational institutions of their choice. This right is further protected by Article 30 (2) which prohibits the State in granting aid to educational institutions from discriminating against any educational institutions on the ground that it is under the management of a minority whether based on religion or language. This right, however, subjected to clause (2) of Article 29, according to which no citizen shall be denied admission into any educational institutions maintained by the State or receiving aid out of State funds on grounds only for religion, race, caste, language or any of them. This Article applies to both citizen and non-citizen.

In *D.A.V. College, Bhatinala v. State of Punjab*, (1971), the Punjab University was established at Patiala under the Punjab University Act, 1961. After the reorganization of the State of Punjab in 1969, the Punjab Government issued a notification providing for the compulsory affiliation of all the colleges situated within the area under the jurisdiction of the Punjab University, Patiala. Thereafter, the University issued the impugned circular to all the affiliated colleges requiring them to introduce Punjab in Gurmukhi script as the Court struck down the circular as well a examinations. The Supreme Court struck down the circular as violative of the right of the petitioner to conserve their script and language and to administer their institutions in their own way.

Right of Minorities to establish and manage educational institutions:

Article 30 (1) guarantees to all linguistic and religious minorities the 'right to establish' and 'right to administer' educational institutions of their own choice. The right is conferred by this clause on two types of minorities - religious and linguistic minorities. The word 'establish' indicates the right to bring into existence, while the right to administer an institution means the right to effectively manage and conduct the affairs of the institution. The administration connotes management of the affairs of the institution. The management must be free of control so that the founders of their nominees can mould the institution as they think fit in accordance with their ideas of how the interest of community in general and the institution in particular will be served.

Power of Government to regulate minority run educational institutions:

The right conferred on the religious and linguistic minorities to administer educational institutions of their choice is not an absolute right. This right is not free from regulation. Just as regulatory measures are necessary for maintaining educational character and content of minority institutions similarly regulatory measures are necessary for ensuring orderly, efficient and sound administration. In *St.Stephen College v. University of Delhi* (1992) it was held that the State of University cannot make admissions to a minority educational institutions and it shall be on the basis of merit. *In T.M.A. Pai Foundation v. Union of India* (2002), it was held that the aided minority educational institution has the right to admit student belonging to the minority but it may be required by the State government to admit a reasonably number of non-minority students. Reasons would depends on the type of institution, courses being run and educational needs of the minority. But it as declared that the admission to unaided minority institutions cannot be regulated by the State or University but it may make qualification and minimum conditions of eligibility in the interest of academic standard. The unanswered questions in the T.M.A. Pai foundation case was referred in Islamic Academy case (2004) and P.A. Inamdar case (2005).

Right to Constitutional Remedies:

Remedies for enforcement of rights conferred by this Part (Article 32):

- The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
- The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant to and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
- 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).
- The right guaranteed by this Article shall not be suspended except as otherwise provided for by this Constitution.

Power of High Courts to issue certain rights (Article 226):

- 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 warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

- 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.

- 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.

- 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.

Compensatory Jurisprudence:

Compensation to victims is a recognised principle of law being enforced through the ordinary civil Courts. Under the law of torts the victims can claim compensation for the injury to the person or property suffered by them. It is taking decades for the victims to get a decree for damages or compensation through Civil Courts, which is resulting in so much hardship to them. The emergence of compensatory jurisprudence in the light of human rights philosophy is a positive signal indicating that the judiciary has undertaken the task of protecting the right to life and personal liberty of all the people irrespective of the absence of any express Constitutional provision and of judicial precedents. Article 32 of the Constitution of India confers power on the Supreme Court to issue direction or order or writ, 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 Part III of the Constitution. The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III is "guaranteed", that is to say, the right to move the Supreme Court under Article 32 for the enforcement of any of the rights conferred by Part III of the Constitution is itself a fundamental right.

The approach of redressing the wrong by award of monetary compensation against the State for its failure to protect the fundamental right of the citizen has been adopted by the Courts of Ireland, which has a written Constitution, guaranteeing fundamental rights, but which also like the Indian Constitution contains no provision of remedy of compensation for the infringement of those rights. That has, however, not prevented the Courts in Ireland from developing remedies, including the award of damages, not only against individuals guilty of infringement, but also against the State itself. Article 32(1) provides for the

right to move the Supreme Court by appropriate proceedings for the enforcement of the fundamental rights. The Supreme Court under Article 32(2) is free to devise any procedure for the enforcement of fundamental right and it has the power to issue any process necessary in a given case. In view of this Constitutional provision, the Supreme Court may even give remedial assistance, which may include compensation in "appropriate cases".

In Sant Bir v. State of Bihar the question of compensating the victim of the lawlessness of the State was left open. In Veena Sethi v. State of Bihar also the Court observed that the question would still remain to be considered whether the petitioners are entitled to compensation from the State Government for the contravention of the right guaranteed under Article 21 of the Constitution. In the light of the views expressed by the Court in the above cases it can be said that the Court had shown its concern for the protection of right to life and liberty against the lawlessness of the State but did not actually grant any compensation to the victims. The seed of compensation for the infraction of the rights implicit in Article 21 was first sowed in Khatri, Sant Bir and Veena Sethi, which sprouted with such a vigorous growth that it finally enabled the Court to hold that the State is liable to pay compensation. This dynamic move of the Supreme Court resulted in the emergence of compensatory jurisprudence for the violation of right to personal liberty through *Rudal Shah* The Supreme Court of India in *Rudal Shah v. State of Bihar* brought about a revolutionary breakthrough in human rights jurisprudence by granting monetary compensation to an unfortunate victim of State lawlessness on the part of the Bihar Government for keeping him in illegal detention for over 14 years after his acquittal of a murder charge. In simple terms, enforcement of the Article 32 and 226 is done with the help of five prerogative Writs Writ of Habeas Corpus, Writ of Certiorari, Writ of Mandamus, Writ of QuoWarranto, Writ of Prohibition.

1. Writ of Habeas Corpus:

The meaning of the Latin phrase Habeas Corpus is 'have the body'. According to Article 21, "no person shall be deprived of his life or personal liberty except according to the procedure established by law". The writ of Habeas corpus is in the nature of an order directing a person who has detained another, to produce the latter before the Court in order to examine the legality of the detention and to set him free if there is no legal justification for the detention. It is a process by which an individual who has been deprived of his personal liberty can test the validity of the act before a higher Court.

The objective of the writ of habeas corpus is to provide for a speedy judicial review of alleged unlawful restraint on liberty. It aims not at the punishment of the wrongdoer but to resume the release of the retinue. The writ of habeas corpus enables the immediate determination of the right of the appellant's freedom. Article 22 of the Constitution requires an arrested person to be produced within 24 hours of his arrest and failure to do so would entitle the person arrested to be released. The grounds of his arrest should also be informed to him. Even when the arrest is valid, failure to inform the grounds within a reasonable time would make the detention unconstitutional. In such cases, the writ of Habeas corpus acts as a Constitutional privilege. If the Court finds that there was no legal ground for the imprisonment of a person, it will pass an order to release him forthwith. The question before the Court is whether the detention is lawful. In the writs of habeas corpus, the merits of the case or the moral justification for the imprisonment or detention are irrelevant. Any person whether he is guilty or not, is entitled to be set at liberty if his imprisonment is not as per law.

Habeas corpus and the emergency powers of the executive:

Various legislations have curtailed the power of this writ to a great extent. For example, the declaration of emergency and other national security laws etc. The executive has the power to detain a person on its discretion preventively. As per the existing national security laws, the grounds of arrest need not be revealed

to the person arrested. In such instances, the judiciary has only very little scope for review. Similarly, Article 359 of the Constitution empowers the president of India to suspend the right to move any Court for the enforcement of any of the fundamental right, specified in his order.

2. Writ of Certiorari:

The writ of Certiorari is generally issued against authorities exercising quasi-judicial functions. The Latin word Certiorari means 'to certify'. Certiorari can be defined as a judicial order of the supreme Court or by the high Courts to an inferior Court or to any other authority that exercise judicial, quasi-judicial or administrative functions, to transmit to the Court the records of proceedings pending with them for scrutiny and to decide the legality and validity of the order passed by them. Through this writ, the Court quashes or declares invalid a decision taken by the concerned authority. Though it was meant as a supervisory jurisdiction over inferior Courts originally, these remedy is extended to all authorities who issue similar functions. The concept of natural justice and the requirement of fairness in actions, the scope of certiorari have been extended even to administrative decisions. Whether the decision is judicial or quasi judicial is irrelevant nowadays.

Grounds for Certiorari:

The following are the grounds for Certiorari:

1. Lack of jurisdiction

When the authority has no jurisdiction to take action, it is lack of jurisdiction. When an authority is improperly constituted or is incompetent to take action and if it acts under an invalid law, it will amount to lack of jurisdiction. Similarly when the authority acts without jurisdiction, fails to exercise the vested jurisdiction or acts in excess of the limits, there involves a defect of jurisdiction or power. The Court can issue certiorari to quash such orders.

2. Abuse of jurisdiction:

If an authority abuses its jurisdiction, a certiorari can be issued. When the authority exercises its power for improper purposes it is abuse of jurisdiction. Similarly if the authority acts in bad faith or ignores relevant points and facts or acts on some other considerations abuse of jurisdiction occurs and the writ of certiorari becomes applicable.

3. Jurisdictional facts:

A jurisdictional fact is that fact or facts upon which an authority's power to act depends. In the absence of jurisdiction for collateral facts an authority cannot exercise jurisdiction over a dispute and decide it. If the authority takes a decision on the wrong assumption of existence of jurisdictional facts, the order is liable to be quashed by the writ of certiorari.

4. Error of law apparent on the face of record:

A writ of certiorari can be issued to quash an order if there is an error of law apparent on the record. An error is apparent on the face of record if it is self evident. i.e. if the error can be ascertained by a mere perusal of the record without a detailed argument or further evidence. An error of law apparent on the face of the record is treated as an insult to the legal system. Ignorance or neglect of law, wrong proposition of law, inconsistency between the facts, law and the decision etc amount to errors of law.

5. Violation of the principle of natural justice:

When there is a violation of the principle of natural justice, a writ of certiorari can be issued. An authority is bound to observe the principles of natural justice. Anyone who decides a case must adhere to the minimum standards of natural justice. Hence when there occurs an infraction of fundamental right, the writ of certiorari comes for restoration of that right.

3. Writ of Prohibition:

The grounds for issuing the writs of certiorari and prohibition are generally the same. They have many common features too. The writ of prohibition is a judicial order issued to a Constitutional, statutory or non statutory body or person if it exceeds its jurisdiction or it tries to exercise a jurisdiction not vested upon them. It is a general remedy for the control of judicial, quasi judicial and administrative decisions affecting the rights of persons.

Grounds:

1. The writs of prohibition and certiorari are issued more or less on similar grounds. Absence or excess of jurisdiction: The writ if Prohibition prohibits an authority from exercising a jurisdiction not vested on it. When there is absence of jurisdiction or total lack of jurisdiction an authority cannot act.
2. Violation of fundamental rights:When an authority acts in violation or infringement of the fundamental rights of a person, a writ of prohibition can be invoked.
3. Violation of the principles of natural justice: All authorities are to observe the principles of natural justice while exercising their powers. If an authority fails in this regard the decision of that authority is liable to be quashed through the writ of prohibition.

4. Writ of Mandamus:

The writ of mandamus is a judicial remedy in the form of an order from the supreme Court or high Courts to any inferior Court, government or any other public authority to carry out a 'public duty' entrusted upon them either by statute or by common law or to refrain from doing a specific act which that authority is bound to refrain from doing under the law. For the grant of the writ of mandamus there must be a public duty. The superior Courts command an authority to perform a public duty or to non perform an act which is against the law. The word meaning in Latin is 'we command'.The writ of mandamus is issued to any authority which enjoys judicial, quasi judicial or administrative power. The main objective of this writ is to keep the public authorities within the purview of their jurisdiction while performing public duties.

Conditions required for mandamus

- The petitioner must have the right to compel the performance of the duty. This writ cannot be invoked if the person complaining has no legal right.
- There must be public duty. That duty must be mandatory and not discretionary. But at the same time when a discretionary power is abused or improperly exercised, that would be treated as non exercise of discretion and the Court can command the authority to exercise the discretion in accordance with law.
- The petitioner must have made a specific demand for the performance of the duty and the authority must have made a refusal to perform. Then only a writ of Mandamus can be sought.
- A civil liability arising under a contract cannot be enforced through mandamus. The grant of mandamus is discretionary. If there is unreasonable delay in filing the petition or if there is an adequate alternate remedy mandamus may be refused by the Court.

Grounds:

The grounds for the writ of mandamus are similar to those of certiorari and prohibition.

- Lack of jurisdiction.
- Error of jurisdiction.
- Excess jurisdiction.
- Abuse of jurisdiction.
- Violation of the principles of natural justice.
- Error of law apparent on the face of the record etc.

In the modern age, administrative agencies enjoy vast discretionary powers. Judicial review of the administrative actions often becomes necessary. The judicial review of administrative functions also comes under the scope of mandamus. When an administrative authority who has the power of discretion fails to act bonafide or if it abuses or exceeds the jurisdiction and if it does not apply 'mind' in solving issues the writ of mandamus acts as an extraordinary remedy.

5. Writ of Quo Warranto:

The word meaning of 'Quo warranto' is 'by what authority'. It is a judicial order against a person who occupies a substantive public office without any legal authority. The person is asked to show by what authority he occupies the position or office. This writ is meant to oust persons, who are not legally qualified, fro substantive public posts. The writ of Quo warranto is to confirm the right of citizens to hold public offices. In this writ the Court or the judiciary reviews the action of the executive with regard to appointments made against statutory provisions, to public offices .It also aims to protect those persons who are deprived of their right to hold a public office.

Conditions:

The following conditions are to be present if the writ of quo warranto is to be issued.

- The office must be a 'public office'. All offices established by statutes or as per the provisions of the Constitution and which carry out public duties are public offices.
- It must be substantive in nature. A substantive office is independent and permanent. It must be held by an independent officer.
- The holder must be in actual possession of the office.
- The person must have actual possession of the office. A person who has been elected or appointed to a particular post cannot be sued upon unless he has not accepted the post.
- The holding of the post must be in contravention of law.The appointment of a person to a public office must be a clear violation of law. Irregularities in procedures etc cannot be taken as violation.

UNIT V

DIRECTIVE PRINCIPLE OF STATE POLICY

Introduction:

Dr. Ambedkar said "*The directive principles are like instruments of instructions which were issued to the Governor-in-General and Governors of colonies and to those of India by the British Government under the 1935 Act under the draft Constitution. It is proposed to issue such instructions to the president and governors. The text of these instruments of the instructions shall be found in Scheduled IV to the Constitution of India. What are called directive principles is that they are instructions to the Legislature and the Executive. Such a thing is, to my mind, to be welcomed.*"

The Directive Principle commits the State to promote the welfare of the people by affirming social, economic and political justice, as well as to fight economic inequality. According to the constitution, the government should keep them in mind while framing laws, even though they are in-justice in nature. The inspiration of Directive Principles of State Policy has been taken from the Irish Republic. They were inculcated in our Constitution in order to provide economic justice and also to avoid concentration of wealth in the hands of a few. Therefore, no government can afford to ignore them. They are in fact, the directives to the future governments to incorporate them in the decisions and policies to be formulated by them. The directives were meant to be the fundamental principles which should necessarily be made the basis of all executive and legislative actions that might be taken in future in the governance of the country. The Forty-second Amendment, which came into force in January 1977, attempted to raise the status of the Directive Principles by stating that no law implementing any of the Directive Principles could be declared unconstitutional on the grounds that it violated any of the Fundamental Rights. The amendment simultaneously stated that laws prohibiting 'antinational activities' or the formation of 'antinational associations' could not be invalidated because they infringed on any of the Fundamental Rights. It added a new section to the constitution on 'Fundamental Duties' that enjoined citizens "to promote harmony and the spirit of common brotherhood among all the people of India, transcending religious, linguistic and regional or sectional diversities."

However, the amendment reflected a new emphasis in governing circles on order and discipline to counteract what some leaders had come to perceive as the excessively freewheeling style of Indian democracy. After the March 1977 general election ended the control of the Congress (Congress (R) from 1969) over the executive and legislature for the first time since independence in 1947, the new Janata-dominated Parliament passed the Forty-third Amendment (1977) and Forty-fourth Amendment (1978). These amendments revoked the Forty-second Amendment's provision that Directive Principles take precedence over Fundamental Rights and also curbed Parliament's power to legislate against "antinational activities.". Among the primary duties of the state is the raising of the level of nutrition and the general standard of living of the people. The Principles expressed the hope that within ten years of the adoption of the Constitution there will be compulsory primary education for children up to the age of fourteen years. The other provisions of the Principles seek equally to secure the renovation of Indian society by improving the techniques of agriculture, husbandry, cottage industry, etc. The core of the commitment lies in the fundamental rights and the directive principles of state policy.

Part IV of the Constitution (Articles 36-51) provides the Directive Principles of state policy. These principles may include certain 'economic ideals' that states may, strive for; certain directions to the legislature and executive intended to show the manner in which the state should exercise their executive and legislative powers; and certain rights of the citizens which shall not be enforceable like the fundamental rights .It shall be the duty of administrators to follow these principles both in administration and legislation.

The Directive Principles of State Policy was described by *Dr.Ambedkar* as a 'novel feature of the constitution'. *Sir Ivor Jennings* claims that this part of the constitution expresses, 'Fabian socialism' without the word 'socialism'.

These principles are directives to the various governments and governmental agencies to be followed as fundamental in the governance of the country. It shall be the duty of the state to apply these principles in making laws. Thus they place an ideal before the legislatures of India while they frame new legislation. They lay down a code of conduct for the administrators of India. In short, the Directive Principles enshrines the fundamentals for the realisation of which the state in India stands. They guide the path which will lead the people of India to achieve the noble ideas which the Preamble of the constitution proclaims: Justice, Liberty and Fraternity. DPSP are not legally enforceable by any court and the state cannot be compelled through the courts to implement them. Nevertheless the constitution declares that they are "fundamental in the governance of the country and that it shall be the duty of the state to apply these principles in making laws".

Importance:

The concept of Directive Principles of State Policy was borrowed from the Irish Constitution. The Directive Principles of the Indian Constitution have been greatly influenced by the Directive Principles of State Policy of the Ireland. The idea of such policies "can be traced to the Declaration of the Rights of Man proclaimed by Revolutionary France and the Declaration of Independence by the American Colonies".

To have better knowledge about the comprehensiveness of the DPSP, it is convenient to classify them into related groups. According to *Dr.M.P.Sharma* that they can be grouped into three categories; socialistic, Gandhian, and liberal intellectualistic. The generally accepted classifications are:

1. Directive principles aim is to look into the establishment of a welfare state:

A large number of Directive principles of state policy aims at the establishment of a welfare state in India. E.g Articles 38, 39, 41, 42, 43,46, and 47.These articles cover a wide range of state activity embracing economic , social, legal educational and international problems. These Articles direct:

- To organise village panchayats,
- To secure the right to work, education and public assistance in cases unemployment, old age, sickness,
- To secure just and humane conditions of work and maternity relief,
- To secure uniform civil code,
- To promote the educational and economic interests of the weaker sections of the people,
- To secure the improvement of public health and the prohibition of intoxicating drinks and drugs,
- Taken together, these principles lay down the foundations on which a new democratic India will be built up.

2. Directions related with cultural and educational matters :

Another group of directive principles relates to the obligations of the state in educational and cultural matters. Article 45 declares that the state shall endeavour to provide within a period of ten years from the commencement of the constitution , for free and compulsory education for all the children until they complete age of fourteen years.

3. DPSP aiming to implement Gandhian Principles:

There are a number of Articles in DPSP which aims to implement Gandhian Principles. Some of the important principles are:

- Article 40: the state shall organise village panchayats as units of self government;
- Article 45: State shall promote with special care the educational and economic interests of the weaker sections of the people;
- Article 43: State shall try to promote cottage industries;
- Article 48: State shall preserve and improve the breeds and prohibit the slaughter of cows calves and other draught cattle;
- Article 47: State shall try to improve public health and the prohibition of intoxicating drinks and drugs.

4. Directions related with International peace:

There are certain DPSP's related with international peace and security. Article 51 declares that the State shall endeavour to (a) promote international peace and security; (b) maintain just and honourable relations between nations; and (c) the settlement of international disputes through arbitration.

Directive in other parts of Constitution and Amendments:

There are many other provisions of Directive Principles of State Policy in our Constitution.

For instance Article 335 of the Constitution states that "the claims of SC/ST shall be taken into consideration, consistently with the maintenance of efficiency of administration in the making of appointment to services and posts in connection with affairs of the Union or of a State.

Article 350 says that every State and every local authority within the State to provide adequate facilities for the instruction in the mother tounge at the primary stage to children of linguistic minority areas.

Article 351 says that the Union should promote the spread of Hindi language so that it may serve as a medium of expression of all the elements of the composite culture of India.

There were many amendments made for addition of directive principle in our constitution. For example:

25TH Amendment Act, 1971:

With respect to the 25th Amendment Act of 1971, Article 31-C, inserted into the Directive Principles of State Policy which seeks to upgrade the DPSPs. According to Article 31 C:

"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 Right to Constitutional Remedies"

Objective of Article 31-C in the Indian Constitution:-

The twenty-fifth Amendment of the Constitution in 1971 added a new clause, Article 31 C, to the Constitution. Article 31 C was of a drastic character. The avowed objective underlying Article 31-C was to usher in the country at an early date the era of a socialist pattern of society. Article 31-C had two parts. The first part protected a law giving effect to the policy of the state towards securing the principles specified in Articles 39 (b) and (c) from being challenged on the ground of infringement of the Fundamental Rights under Article 14, 19 and 31. The second part of Article 31 C originally sought to oust the jurisdiction of the courts to find out whether the law in question gave effect to the principles of Articles 39 (b) and 39 (c).

In *Minerva Mills v. Union of India* is one of the omnipotent judgement related to the use of Article 31-C. In this case *Chandrachud, C.J*, observed that "Fundamental Rights are not an end in themselves but are the means to an end." The end is specified in the Directive Principles.

42nd Constitutional Amendment Act, 1976:

It was enacted during the period of internal emergency. It was passed by Parliament on November 11, 1976 and received Presidential assent on December 18, 1976.

The Amendment established beyond doubt the supremacy of Parliament over the other wings of Government; gave the Directive Principles precedence over the Fundamental Rights; enumerated for the first time a set of ten Fundamental Duties. It further imposed limits on the power and jurisdiction of the judiciary; raised the term of the Lok Sabha and the Vidhan Sabha from five to six years; authorised the use of Central armed forces in any State to deal with law and order problems, made the President bound by the advice of the Council of Ministers and envisaged the establishment of administrative tribunals for service matters of Government employees and also other tribunals for economic offences. The Act also clearly laid down that no Constitutional Amendment could be questioned in any court of law. It was added with the provision that there should be healthy development of children in our society, there should be equal justice and the poor should be provided with free legal aid. The citizen should protect and improve the environment and they should safeguard their environments and national monuments. Inclusion of Article 48-A was the formidable one in the history of Directive Principles. It states that "Protection and improvement of environment and safeguarding of forests and wild life The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country".

44th Constitutional Amendment Act, 1978:

It depicted that the government should minimise inequalities in income, facilities, status, and opportunities between rich and poor. he Constitution (45th Constitutional Amendment) Bill, re-numbered as the 44th Constitutional Amendment came into force on April 30, 1979, when the President gave his assent. The Act removes major distortions in the Constitution introduced during the Emergency. The duration of the Lok Sabha and State Legislative Assemblies has been reduced from six to five years—the normal term which was extended during the Emergency under the 42nd Amendment to achieve some political purposes. The Right to Property ceases to be a Fundamental Right and becomes only a legal right according to the Constitution 44th Amendment. The Act also extends, for the first time since independence, constitutional protection for publication of the proceedings of Parliament and State Legislatures, except in cases where it is proved to be "malicious". Another important feature of the Act is that any proclamation of Emergency need henceforward, be issued by the President only after receiving the advice of the Cabinet as a whole in writing. The President will not be called upon to act on the basis of advice by the Prime Minister on his own without consulting his Cabinet. Other safeguards provide that the proclamation will have to be adopted by a two-thirds majority of the members of both Houses of Parliament within a month. The 44th Amendment provides safeguards against future subversion of the Constitution for establishing an authoritarian regime.

It contains provisions which are designed to make it impossible to impose the kind of emergency the country had experienced for 19 months.

86TH Constitutional Amendment Act, 2002:

The 86th Amendment Act was one of the most highlighted amendments of all time because it withheld serious issues underneath it. It made an inclusion of Article 45 in the Indian constitution.

Article 45 of the Indian Constitution stated "Provision for free and compulsory education for children The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years". The inclusion of this article was to take into consideration the three objectives as follows:

- to provide for free and compulsory education to children in the age group of 6 to 14 years and for this purpose, a legislation would be introduced in Parliament after the Constitution i.e. Ninety-third Constitutional Amendment Bill, 200l is enacted;
- to provide in Article 45 of the Constitution that the State shall endeavour to provide early childhood care and education to children below the age of six years; and
- to amend Article 5l-A of the Constitution with a view to providing that it shall be the obligation of the parents to provide opportunities for education to their children.

97th Constitutional Amendment Act, 2011:

It is the latest amendment and this was to promote voluntary formation, autonomous functioning, democratic control and professional management of cooperative society. The Constitution (Ninety Seventh Amendment) Act 2011 relating to the co-operatives is aimed to encourage economic activities of cooperatives which in turn help progress of rural India. It is expected to not only ensure autonomous and democratic functioning of cooperatives, but also the accountability of the management to the members and other stakeholders.

The Amendment of the Constitution to make it obligatory for the states to ensure autonomy of cooperatives makes it binding for the state governments to facilitate voluntary formation, independent decision-making and democratic control and functioning of the cooperatives. It also ensures holding regular elections under the supervision of autonomous authorities, five-year term for functionaries and independent audit. Significantly, it also mandates that in case the board is dissolved, the new one is constituted within six months. Such a constitutional provision was urgently required as the woes of the cooperative sector are far too many, long-lasting and deep-rooted to be addressed under the present lax legal framework However, it fails to establish what constitutional amendments can't do in reviving institutions and may be victim of rival political institutions at the state level as happened in case of 73rd amendments. It is feared that state-level politicians will do to this amendment on cooperatives what they did to the one on panchayats. Barring exceptions in a few sectors and states, the cooperative sector, particularly cooperative credit societies numbering over 120 million, has for a long time been in a shambles with all kinds of vested interests using them as personal fiefdoms and ladders to political power and means of personal aggrandisement.

The question of relationship between the Directive Principles and the Fundamental rights has caused some difficulty, and the judicial attitude has undergone transformation on this question over time.

Initially, the courts adopted a strict and literal legal position in this respect. The Supreme Court adopting the literal interpretative approach to Art. 37 ruled that a Directive Principle could not override a Fundamental right, and that in case of conflict between the two, the Fundamental right would prevail over the Directive Principle.

Judicial interpretation of relationship between Fundamental Rights and Directive Principles of State policy:

The question of relationship between Directive Principles and Fundamental Rights has caused come difficulty and the judicial attitude has undergone a change over time. Conflict Between Fundamental Rights And Directive Principles Since the Directive Principles lay wide objectives of the State which cannot be legally enforced, while the Fundamental Rights are judicially enforceable, the question as to what happens if one is inconsistent with another, or one is in contravention of another naturally arises. For example a conflict can arise between the fundamental rights to carry on business guaranteed by Article 19(1) (g) and the Directive upon the State to safeguard and promote the interests of the workers under Article 39, 41-43. If one traces the way this problem has been approached by the judiciary it would show that while initially the judiciary adopted a strict legal position, and held that the Directive Principles are subservient to the Fundament Rights, while the later and more recent development has been towards avoidance of any conflict by applying the principles of reconciliation and harmonious construction.

In several early cases, the Supreme Court took the literal interpretive approach to Article 37 and ruled that Directive Principles could not over-ride a Fundamental Right, and in case of a conflict between the two, the Fundamental Right would prevail over the Directive Principles. This point was settled by the Supreme Court in *State of Madras v. Champakam Dorairajan,* where the court invalidated an order which provided for communal reservation of seats for admission into a State educational institution, even though it was inspired by Article 46. According to the court, since Fundamental Rights were enforceable and the directive Principles were not, the laws to implement Directive Principles could not take away Fundamental Rights. The Directive Principles should run subsidiary and conform to the Fundamental Rights.

In *Venkataraman v. State of Madras* also the same point was reiterated, and said that the Madras Government's order to give preference to the Harijans and backward classes was unconstitutional for it was discriminatory in relation to other backward classes. As a result of these judgments, where the orders were struck down as violative of Article 15(1) and 29(2), the Constitution (First Amendment) Act, 1951 was brought about, 1951, which added clause 4 to Article 15, stating that nothing in Article 15(1) or 29(2) shall prevent the state from making any social provision for the advancement of socially and educationally backward classes. This made it clear that Directive Principles were no less important than Fundamental Rights, However, despite the amendment courts did not give much importance to the Directive Principles.

The Doctrine of Harmonious Construction:

Though the judiciary continued to hold that the Directives were subordinate to the Fundamental Rights, an attempt was made to achieve the ideals mentioned Directive Principles. The Supreme Court's view regarding the interplay of Directive principles and Fundamental Rights underwent a change. The courts came to realize that there should not be any conflicts between two sets of provisions of the Constitution which have a common origin and a common objective as would nullify either of them. The way out was found to lie in the doctrine of harmonious construction, arising out of the cannon of interpretation that parts of the same instrument must be read together in order to reconcile them with one another. Applying this doctrine, the Supreme Court came to adopt the view that in determining the ambit the ambit of Fundamental Rights themselves, the court might look at relevant Directive Principles. However it must be noted that the earliest formulation of the doctrine of harmonious construction, the court looked at the problem form the other end, namely reading the Directives as being limited by the Fundamental Rights. The doctrine of harmonious construction as a new technique of interpretation in this field was introduced in Hanif Quareshi Mohd. v. State of Bihar , where the court invalidated a ban on the slaughter of all cattle, on the ground that it constituted an unreasonable restriction on the right to carry on a butcher's business, as guaranteed by Article 19(1)(g), notwithstanding the Directive under Article 41. However it was stated that the Constitution

has to be interpreted harmoniously, and the Directive principles must be implemented, but it must not be done in such a way that its laws takes away or abridge the fundamental rights. Otherwise the protecting provisions of Chapter III will be "a mere rope of sand".

Similar view was expressed in *In Re Kerala Education Bill* (1957) where the court held that a law which sought to compel minority education institutions for children, not to charge fees would contravene the fundamental right guaranteed to such institution by Article 30, even though the State was enjoined by Article 45 to provide free education for children below 14. However, Das C.J., was said that the courts must not entirely ignore the Directive Principles and the principle of harmonious construction should be adopted to give effect to both Fundamental Rights and Directive Principles as much as possible. It was stated that while interpreting a statute, the courts would look for the light to the 'lode star' of Directive Principles.

Fundamental Rights and Directive Principles are co-equal:

A change in the judicial attitude can be perceived in *Sajjan Singh v. State of Rajasthan,* (1965) where Mudholkar J., said that even if the fundamental Rights were taken as unchangeable, the much needed dynamism may be achieved by properly interpreting the Fundamental Rights in the light of Directive Principles. According to him, Part IV, is "fundamental in the governance of the country and the provisions of Part III must be interpreted harmoniously with these principles." Here not only it was emphasized that there is a need to resolve the conflicts between the fundamental rights and the directive principles, but also that the former should be interpreted in light of the latter.

In *Bijoya Cotton Mills v. State of West Bengal* (1955) the Apex Court laid down two rules of construction- one, in case of a conflict between the right of the individual and the laws aiming to implement socio-economic policies, in pursuance to Directive Principles, weight should be given to the latter, and two- every legislation enacted in pursuance of Directive Principles should be construed as one purporting to be in public interest, or as a reasonable restriction to the Fundamental Rights.

In *Golak Nath v. State of Punjab* (1967) the same principle was applied by *Justice Subba Rao,* and it was emphasized that the Fundamental Rights and the Directive Principles form an 'integrated scheme' which was elastic enough to respond to the changing needs of the society. All the Fundamental Rights are not only in consonance with the provisions of Article 37, but also in complete harmony with the intention of the Constitution makers and the Preamble of the Constitution. Since then the judiciary's attitude has become more positive and affirmative towards Directive Principles, and both came to be regarded as co-equal. Hence without making the Directive Principles justiciable as such, the judiciary began to implement the values underlying these Principles to the extent possible.

The Supreme Court in *C.B. Boarding and Lodging v. State of Mysore* (asserted that there is "no conflict on the whole", between the Fundamental Rights and Directive Principles. Here it was stated that the ambit of freedom of business guaranteed Article 19(1) (g) should be determined in the light of the Directive Article, and that the Fundamental Rights and the Directive Principles are complementary and supplementary to each other. The court further elaborated that the provisions of the Constitution are not created as barriers to progress. They provide a plan for orderly progress towards social order contemplated by the Preamble to the Constitution. According to the court, it is a fallacy to think that the Constitution provides for only rights and no duties. While rights conferred under Part III are fundamental, the Directions under Part IV are fundamental in the governance of the country. There is no conflict between the provisions in Part III and Part IV both are complementary and supplementary to each other.

Champakam Dorairajan case, 1951

- The Directive Principles should conform, and run as subsidiary, to the Fundamental rights.
- The Directive Principles of the state policy, which by Article 37 are expressly made unenforceable by a court cannot override the provisions found in part III (fundamental rights) which, notwithstanding other provisions, are expressly made enforceable by appropriate writs, orders or directions under Article 32.
- The chapter on fundamental rights is sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate article in Part III.
- The Directive Principles of state policy have to conform to and run as subsidiary to the chapter on Fundamental rights.

Harmonious Construction:

The Supreme Court started giving a good deal of value to the Directive principles from a legal point of view and started arguing for harmonizing the two the Fundamental rights and Directive Principles."Where two judicial choices are available, the construction in conformity with the social philosophy" of the Directive Principles has preference. The courts therefore could interpret a statute so as to implement Directive Principles instead of reducing them to mere theoretical ideas. This is on the assumptions that the law makers are not completely unmindful or obvious of the Directive Principles.

Further the courts also adopted the view that in determining the scope and ambit of Fundamental rights, the Directive Principles should not be completely ignored and that the courts should adopt the principles of harmonious construction and attempt to give effect to both as far as possible.

In Minerva Mills v Union of India (1980) the Court observed as follows:

- The fundamental rights "**are not an end in themselves but are the means to an end.**" The end is specified in the directive principles.
- Fundamental Rights and Directive principles together "constitute the core of commitment to social revolution and they, together, are the **conscience of the constitution.**" The Indian constitution is founded on the bedrock of "balance" between the two.
- To give absolute primacy to one over the other is to disturb the harmony of the constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the constitution.
- The goals set out in directive principles are to be achieved without abrogating the fundamental rights.

It is in this sense that fundamental rights and directive principles together constitute the **core of our constitution and combine to form its conscience**. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our constitution.

Differences:

Fundamental Rights	Directive principles of State Policy
• Fundamental rights are enforceable through courts of law. (justice able)	• Directive principles of State policy are not enforceable (non-justice able)
• Fundamental rights prohibit the state from doing certain things.	• Directives are affirmative instruction to the State to do certain things.
• Civil and political rights are predominant in fundamental rights.	• Economic and social rights are predominant in the directive principle
• Contravention of any fundamental rights can be rescinded by the court.	• The courts cannot declare any law as void on the ground that it contravenes any of the directive principles.
• Courts can strike down an act of Government violative of any fundamental right and can enforce the right against the Government.	• Directives do no confer upon or take away any legislative power from the appropriate legislature.

Fundamental Duties:

By the 42nd Amendment of the Constitution, adopted in 1976, Fundamental Duties of the citizens have also been enumerated and mentioned in Article 51A of the Constitution. It is given as follows:

- to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;
- to cherish and follow the noble ideals which inspired our national struggle for freedom;
- to uphold and protect the sovereignty, unity and integrity of India;
- to defend the country and render national service when called upon to do so;
- to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
- to value and preserve the rich heritage of our composite culture;
- to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;
- to develop the scientific temper, humanism and the spirit of inquiry and reform;
- to safeguard public property and to abjure violence;
- to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

Enforceability of Fundamental Duties:

The fundamental duties enjoined on citizen under Article 51A should also guide the legislative and executive actions of elected or non-elected institutions and organizations of the citizens including the municipal bodies. Duties are observed by individuals as a result of dictates of the social system the environment in which one lives, under the influence of role models, or on account of punitive provisions of law. It may be necessary to enact suitable legislation wherever necessary to require obedience of obligations by the citizens. If the existing laws are inadequate to enforce the needed discipline, the legislative vacuum needs to be filled. If legislation and judicial directions are available and still there are violations of duties by the citizens, this would call for other strategies for making them operational.

The legal utility of fundamental duties are similar to that of the directives, while the directive principles are addressed to the state, the duties addressed to the citizens, without any legal sanction for their violation. Every citizen should keep in mind that he owes the duties specified in Article 51A to the State. If citizen does not care for the duties, he does not deserve the rights. The duties are not legally enforceable in the Courts of law, but if a law has been made to prohibit any act or conduct in violation of the duties, it would be reasonable restriction on the relevant fundamental rights. Since the Fundamental Duties are not addressed to the State, a citizen cannot claim that he must be properly equipped by the state so that he may perform his duties under Article 51A.

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