PART I

CHAPTER I

INTRODUCTORY

SYNOPSIS

A. CONSTITUTIONAL LAW

A state is defined in International Law as "an independent political entity" "occupying a defined territory" "the members of which are united together for the purpose of resisting external force and preservation of internal order."

This statement lays stress on what may be called 'police functions' of the state, *viz.*, preservation of law and order and defence of the country from external aggression. It needs to be emphasized however that no modern state today rests content with such a limited range of functions. A modern state does not rest content with being merely a 'police' or 'law and order' state. It is much more than that. It tends to become a social welfare state.

The significant point however is that in order to carry out its activities and functions, whatever may be their range, it becomes necessary for any state to establish certain basic organs or agents or instrumentalities which act on its behalf and through which the state can function and operate. All the people in a state cannot combine and operate all together all the time to achieve the desired goals. Thus, certain fundamental organs become necessary. This creates the need for Constitutional Law. If there is need for certain organs through which the state acts, there must be some law to lay down how these organs are to be established? How these organs are to function? What their powers are going to be? What is to be their mutual relationship with each other? A state cannot govern itself on an *ad hoc* basis without their being some norms to regulate its basic institutions. There must be a predictable body of norms and rules from which the governmental organs must draw their powers and functions. The purpose of having a Constitution is to have a frame-work of government which is likely to endure through the vicissitudes of a nation. This purpose does not appear to have been achieved in India. There have been nearly 300 amendments to the Constitution.

The Legal System of a country is divisible into—(i) Law governing the state; (ii) Law by which the state governs or regulates the conduct of its members. Laws like Contracts, Torts, Property, Criminal Law fall in the second category. Constitutional Law, Administrative Law and Public International Law fall in the first category. These are laws which seek to govern the state. Laws governing the state fall in the category of Public Law. Laws governing the affairs of the citizens fall in the category of Private Law.

Speaking generally, the Constitution of a country seeks to establish its fundamental or basic or apex organs of government and administration, describe their structure, composition, powers and principal functions, define the inter-relationship of these organs with one another, and regulate their relationship with the people, more particularly, the political relationship.[1] And even about these basic institutions, only the basic norms are inscribed in the Constitution. All and sundry rules are not brought into discussion under the rubric of Constitutional Law. It may be noted that the term "Constitutional law" is broader than the term "Constitution", as it comprises of the "Constitution", relevant statutory law, judicial decisions and conventions.

Traditionally, the structure of a country's government is divided into three institutional components; (1) Legislature to make laws; (2) Executive to implement and execute laws; and (3) Judiciary to interpret the laws and administer justice. Thus, the Constitution deals with such questions as: How is the Legislature structured, composed and organised? What are its powers and functions? Similar questions are to be asked about each of the other two organs as well. Some other questions which the Constitution has to answer are: What is the mutual relationship between the Legislature and the Executive? Or, between the Executive and the Judiciary? Or, between the Legislature and the Judiciary? What is the relationship between these organs and the people? Does the Constitution guarantee any rights for the people?

While these three organs are basic in any country, and the Constitution does invariably deal with them, the Constitution may also create any other organ

---

1. Wade & Phillips, *Const. & Adm. Law*, 1, 5 (IX Ed., ed Bradley); K.C. Wheare, *Modern Constitutions*, 1 (1971); O Hood Phillips, *Const. And Adm. Law*, 5 (1987).

which it may regard as significant and fit for inscription in the Constitution. For example, the Indian Constitution provides for the creation of a Finance Commission every five years to settle the financial relationship between the Centre and States and it also establishes on a permanent footing an Election Commission to ensure free and fair elections. In *Chander Hass*[2] a two judge Bench of the Supreme Court citing Montesquieus has unqualifiedly stated the Montesquieus view of separation of powers and the dangers involved in deviating from his view was an apt warning for the Indian Judiciary which has been "rightly criticized for 'overreach' and encroachment in the domain of the other two organs" i.e., the Parliament and the Executive. The Bench seems to have broken down in the face of intensely adverse criticism launched principally against the Supreme Court's 'activist' role by the legislators as well as the Executive.[3] All the observations of the Court relating to separation of powers was wholly uncalled for since the real question in controversy was whether the Punjab and Haryana High Court could direct creation of posts to accommodate daily wage earners who, according to the High Court, ought to have been regularized. This issue had been answered in the negative by a long line of cases and, therefore, the law was well settled on the issue. In fact the sudden attack on the Judiciary by the Judiciary finds place in the judgment after the Court, having considered the merits concluded:

> "Consequently, this appeal is allowed and the judgment and order of the High Court as well as that of the first appellate court are set aside and the judgment of the trial court is upheld. The suit is dismissed. No costs".

Then they said:

> "Before parting with this case we would like to make some observations about the limits of the powers of the judiciary. We are compelled to make these observations because we are repeatedly coming across cases where judges are unjustifiably trying to perform executive or legislative functions. In our opinion this is clearly unconstitutional. In the name of judicial activism judges cannot cross their limits and try to take over functions which belong to another organ of the State."

What followed covering about 7 pages of the report is not only obiter but betrays a constitutional fundamental that the judges cannot convert the courts into hustings. Uninformed, obiter of the Supreme Court can attract media attention to the Judges who author such obiter but tends to lower reputation of the Court amongst the right thinking members of the society and shake the confidence of the people in an institution charged by the Constitution to enforce the rule of law.[4] These observations are not 'law declared' within the meaning of Art. 141 of the Constitution.

A significant aspect of the relationship between the government and the people is the guaranteeing of certain Fundamental Rights to the people. Modern Constitutions lay a good deal of emphasis on people's Fundamental Rights. The underlying idea is that there are certain basic rights which are inherent in a human

---

2. *Divisional Manager, Aravali Golf Club v. Chander Hass,* (2008) 1 SCC 683 : (2007) 12 SCR 1084 : (2008) 3 JT 221.

3. Significantly, while condemning what is currently referred to as judicial activism the Bench displayed an amazing lack of courage in pointing out any particular precedent when the Courts have exceeded their jurisdictions and usurped the powers of the other two organs of the State.

4. It will be out of place to go into the question at greater length in a book like this.

being and which no government should seek to take away either by legislation or by executive action. The judiciary is endowed with the function of protecting these rights and acting as the guardian thereof. If the legislature passes any law or the executive takes an action, so as to infringe any of the Fundamental Rights, then the courts may declare such a law or action as unconstitutional. Some of these basic rights are: freedom of the person, freedom of speech, right to equality, freedom of conscience and religion, etc.

The Constitution of a country may be federal or unitary in nature. In a federal Constitution there is a Central Government having certain powers which it exercises over the entire country. Then there are regional governments and each of such governments has jurisdiction within a region. All kinds of relations arise between the Central Government and the Regional Governments. India is an example of a federal Constitution. Some other federal Constitutions are: U.S.A., Canada, Australia, Malaysia, Germany, etc.

A federal Constitution is a much more complicated and legalistic document than a unitary Constitution which has one Central Government in which all powers of government are concentrated and which can delegate such of its powers to such of its agencies as it likes. A federal Constitution must settle many details (like distribution of powers between the Central Government and the regional governments) which a unitary Constitution is not concerned with. Britain, Sri Lanka, Singapore have unitary Constitutions.

The Constitutional law of a country consists of both 'legal' as well as 'non-legal' norms. 'Legal' norms are enforced and applied by the courts and if any such norm is violated, courts can give relief and redress. On the other hand, 'non-legal' norms arise in course of time as a result of practices followed over and over again. Such norms are known as conventions, usages, customs, practices of the Constitution. There may be nothing in the Constitution sanctioning them, nevertheless, they exist. In the words of Jennings: "Thus within the framework of the law there is room for the development of the rules of practice, rules which may be followed as consistently as the rules of law which determines the procedure which the men concerned with Government follow."[5]

According to KEETON, the conventions of the Constitution are 'the unwritten principles which, though they could never be enforced as law in the courts are nonetheless rules since in fact the players of the constitutional game do observe them, for if they are not observed, the constitutional game would immediately degenerate into a political fracas or, worse still, a bloody revolution.[6]"

The sanction behind conventions is mostly political or public opinion. As AHMADI, C.J., has observed about the growth of conventions: "Conventions grow from long-standing accepted practice or by agreement in areas where the law is silent and such a convention would not breach the law but fill the gap."[7] Constitutional conventions provide the flesh which clothes the dry bones of the law.

---

5. W.I. Jennings, Law and the Constitution.

6. KEETON, *THE UNITED KINGDOM, COMMONWEALTH SERIES*, I, 36-37 (1955).

7. *S.P. Anand v. H.D. Deve Gowda*, AIR 1997 SC 272, 279 : (1996) 6 SCC 734. For discussion on this case, see, Ch. III, *infra.*

On conventions, also see, Ch. XL, *infra*.

Conventions play a more significant role in an unwritten Constitution than in a written Constitution but to have a full picture of a country's Constitutional law, reference needs to be made not only to 'legal' but to 'non-legal' norms as well. Britain is a very good example of a country where conventions play a very active role. In India, conventions operate in several areas, the most significant of which is the relationship between the Executive and the Legislature. Reference to conventions is made at several places in the following pages.[8]

Generally, it is said that conventions may not lead to any court case and are not enforceable by the courts. But there are instances of conventions being recognised, and even applied by the Courts in India as well as abroad. Reference may be made in this connection *inter alia* to the following cases : *Carltona Ltd. v. Commissioners of Works;*[9] *Madzimbamuto v. Lardner-Burke;*[10] *Att. Gen. v. Jonathan Cape Ltd.,*[11] *Adegbenx v. Akintola,*[12] *Re Amendment of the Constitution of Canada*[13]*, Ram Jawaya v. State of Punjab;*[14] *U.N.R. Rao v. Indira Gandhi;*[15] *Samsher Singh v. State of Punjab*[16]. These examples show that constitutional conventions do influence judicial decisions to some extent. With the judicial recognition of conventions, the distinction between law and conventions has become blurred in course of time.

It may also be noted that even some legal rules may be characterised as 'directory' and not 'mandatory'. This may especially be so with respect to procedural rules contained in the Constitution.[17]

The Constitution is a source of, and not an exercise of, legislative power.[18]

A Constitution may be written or unwritten. A written Constitution is one which is written down in the form of a Constitutional document. The British Constitution is characterised as 'unwritten' because it is not embodied in one comprehensive Constitutional document. It is interspersed in several statutes which define some Constitutional principles; in court decisions; in common law principles and in conventions and usages. The central doctrine of the British Constitution is Sovereignty of Parliament which means that Parliament can make or unmake any law and no distinction is drawn between an ordinary law and the Constitutional law. The cornerstone of the British Constitution, the principle of Sovereignty of Parliament, is in itself nothing more than a concept based on tradition which is recognised and enforced by the courts. Characterising this as the "formlessness of the British Constitution", KEETON goes on to observe:

> "The absence of a written Constitution deprives us of a fundamental starting point from which all Constitutional law can be derived. We have no *grundnorm*

---

8. See, for example, Chs. III, VII and XL.
9. [1943] 2 All ER 560.
10. [1969] 1 AC 645.
11. (1976) Q.B. 752 (known as the Crossman Diaries case).
12. (1963) A.C. 614.
13. (1981) 123 DLR (3rd) (Canada).
14. AIR 1955 SC 549 : (1955) 2 SCR 225; Ch. III, *infra.*
15. AIR 1971 SC 1002 : (1971) 2 SCC 63; Ch. III, *infra*.
16. AIR 1974 SC 2192 : (1974) 2 SCC 831.
Also see, *infra*, Chs. III, VII and XL.
17. S.A. de Smith, *Constitutional and Administrative Law*, 44-62, 99-108, 144-172 (1977).
An example of a "directory" rule in India is to be found in Art. 77 of the Constitution, see, Ch. III, *infra.* Also see, "Directive Principles", Ch. XXXIV, *infra.*
18. *Pratap Singh v. State of Jharkhand*, (2005) 3 SCC 551 : AIR 2005 SC 2731.

from which the individual norms of Constitutional law can receive their validity."

Most of the modern Constitutions are of the written type. The U.S.A. wrote its Constitution in 1787, Canada in 1867, and Australia in 1900. The U.S. Constitution is a brief, compact and organic instrument which shuns details.[19] Even in Britain, many voices can be heard now that it ought to write down its Constitution and that Fundamental Rights should be guaranteed therein.[20] However, even a written Constitution generates some conventions and customs which help in bringing the Constitution in conformity with the constantly changing social and economic conditions. Also, no written Constitution can contain all the detailed rules needed for the working of various bodies and institutions in the country. Therefore, subject to the Constitution, a number of statutes may have to be enacted laying down the detailed working rules for many purposes.

The difference between a written and unwritten Constitution is somewhat basic. A written Constitution is the formal source of all Constitutional law in the country. It is regarded as the supreme or fundamental law of the land, and it controls and permeates each institution in the country. Every organ in the country must act in accordance with the Constitution.

This means that the institutions of government created by the Constitution have to function in accordance with it. Any exercise of power outside the Constitution is unconstitutional. The government being the creature of the Constitution, Constitution delimits the powers of governmental organs and any exercise of power beyond the constitutional parameters becomes unauthorized. Therefore, any law made by the Legislature, any action taken by the Executive, if inconsistent with the Constitution, can be declared unconstitutional by the courts[21].

The Constitution is an organic living document. Its outlook and expression as perceived and expressed by the interpreters of the Constitution must be dynamic and keep pace with the changing times. Though the basics and fundamentals of the Constitution remain unalterable, the interpretation of the flexible provisions of the Constitution can be accompanied by dynamism and lean, in case of conflict, in favour of the weaker or the one who is more needy.[22]

The courts are regarded as the interpreters as well as the guardian of the Constitution. It is for the courts to scrutinize every act of the government with a view to ensure that it is in conformity with the Constitution. If a law passed by the legislature or an act done by the executive is inconsistent with a constitutional provision, the court will say so, and declare the law or the act as unconstitutional and void.

It is the obligation of the judiciary to see that the Constitution is not violated by any governmental organ and hence the judiciary is called as the guardian

---

19. "The Constitution of the United States is not a prolix document. Words are sparingly used; and often a single phrase contains a vast arsenal of power." Douglas, *From Marshall To Mukherjea*, 146 (*Tagore Law Lectures*, 1956).

20. Leslie Scarman, *English Law—The New Dimension*.

A debate was held on this issue in the House of Lords: See, *The Times*, Nov. 30, 1978. Also see, Lord Hailsham's *Richard Dimbleby Lecture* in *The Times*, Oct. 15, 1976. Lord Hailsham has characterised the present-day government in Britain as "elective dictatorship". Also see, *infra*, Ch. XX.

21. For further discussion on this point, see, Chs. IV, VIII, XX, XXXIII and XL, *infra.*

22. *State of W.B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201 : AIR 2005 SC 1646.

and protector of the Constitution. Judicial review has come to be regarded as an integral part of a written Constitution.[23] The courts thus play a much more creative role under a written Constitution than they do under an unwritten Constitution. In a written Constitution, courts not only interpret ordinary laws and do justice between man and man, they also give meaning to the cold letter of the Constitution and this may, at times, vitally affect the Constitutional process in the country.

What do the words used in a constitutional document actually mean? Whenever such a question arises, it is ultimately for the courts to decide. In the ultimate analysis, the word of the Apex Court as to what the Constitution means prevails. The role of the judiciary in the U.S.A. has been underlined in the following words by HUGHES who later became the Supreme Court Chief Justice: "We are under a Constitution but the Constitution is what the judges say it is". DOWLING emphasizes the judicial role in the U.S.A. by saying: "The study of Constitutional law... may be described in general terms as a study of the doctrine of judicial review in action".[24] These statements do reveal the truth although they give a much more exaggerated picture of the courts' role than what it truly is.

Another significant feature of a written Constitution is the need of special procedure to amend it. This procedure is more complicated and rigorous than passing an ordinary law and is characterised as the constituent process as distinguished from ordinary legislative process.[25] Thus, a written Constitution is often characterised as rigid as contrasted with an unwritten Constitution, which is called flexible, as it can be changed by an ordinary legislation. It can be appreciated that if the written Constitution is not rigid, if it can be amended easily, and if it is not deemed to be the fundamental law of the country, then it ceases to effectively limit and restrain power.

It is also to be noted that a Parliament functioning under a written Constitution cannot claim for itself unlimited power to do what it likes. It has become fashionable for politicians in India to say that Indian Parliament is sovereign, meaning it can do whatever it desires. Such an assertion is not realistic. Parliament is sovereign to the extent that India is a sovereign country and that it is not subject to any external power. But Indian Parliament is not sovereign if it means that it has uncontrolled power to do what it likes. Since Parliament functions under a written Constitution, it has to observe the restrictions imposed on it by the Constitution. It can do what the Constitution permits it to do but cannot do what the Constitution prohibits.[26] Similar is the position of the Executive.[27] Thus, a written Constitution may seek to put formal restraints upon the abuse of power. This may be lacking in an unwritten Constitution.

All the points mentioned above will become clear as we go along through the following pages.

---

23. See, Ch. XL, *infra.*
24. DOWLING, *CASES AND MATERIALS ON CONSTITUTIONAL LAW*, 19 (1965).
25. See, Ch. XLI, *infra.*
26. See, Ch. II, Sec. M, *infra.*
Also, Ch. XL, *infra.*
27. See, Ch. III, *infra.*

B. CONSTITUTIONALISM

Besides the concept of the Constitution, there is also the all-important concept of 'Constitutionalism'.

Modern political thought draws a distinction between 'Constitutionalism' and 'Constitution'. A country may have the 'Constitution' but not necessarily 'Constitutionalism'. For example, a country with a dictatorship, where the dictator's word is law, can be said to have a 'Constitution' but not 'Constitutionalism'.

The underlying difference between the two concepts is that a Constitution ought not merely to confer powers on the various organs of the government, but also seek to restrain those powers. Constitutionalism recognises the need for government but insists upon limitations being placed upon governmental powers. Constitutionalism envisages checks and balances and putting the powers of the legislature and the executive under some restraints and not making them uncontrolled and arbitrary.

Unlimited powers jeopardise freedom of the people. As has been well said: power corrupts and absolute power corrupts absolutely. If the Constitution confers unrestrained power on either the legislature or the executive, it might lead to an authoritarian, oppressive government. Therefore, to preserve the basic freedoms of the individual, and to maintain his dignity and personality, the Constitution should be permeated with 'Constitutionalism'; it should have some in-built restrictions on the powers conferred by it on governmental organs.

'Constitutionalism' connotes in essence limited government or a limitation on government. Constitutionalism is the antithesis of arbitrary powers.[28] 'Constitutionalism' recognises the need for government with powers but at the same time insists that limitations be placed on those powers. The antithesis of Constitutionalism is despotism. Unlimited power may lead to an authoritarian, oppressive, government which jeopardises the freedoms of the people. Only when the Constitution of a country seeks to decentralise power instead of concentrating it at one point, and also imposes other restraints and limitations thereon, does a country have not only 'constitution' but also 'constitutionalism'.

'Constitutions spring from a belief in limited government'.[29] According to SCHWARTZ, in the U.S.A., the word Constitution means "a written organic instrument, under which governmental powers are both conferred and circumscribed". He emphasizes that "this stress upon grant and limitation of authority is fundamental".[30] As PROFESSOR VILE has remarked:[31]

> "Western institutional theorists have concerned themselves with the problems of ensuring that the exercise of governmental power, which is essential to the realisation of the values of their societies, should be controlled in order that it should not itself be destructive of the values it was intended to promote."

The idea of Constitutionalism is not new. It is embedded deeply in human thought. Many natural law philosophers have promoted this idea through their writ-

---

28. CHARLES H. MCILWAIN, *CONSTITUTIONALISM : ANCIENT AND MODERN*, 21; S.A. DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW*, 34 (1977); GIOVANNI SARTORI, Constitutionalism : A Preliminary Discussion, (1962) 56 *Am. Pol. SC Rev*., 853

29. WHEARE, op. cit., 7.

30. SCHWARTZ, *CONSTITUTIONAL LAW : A TEXT BOOK*, 1 (1972).

31. M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS*, 1

ings. Some of these philosophers are: ACQUINAS, PAINE, LOCKE, GROTIUS AND ROUSSEAU.[32] The Magna Carta (1215) strengthened the traditional view that law is supreme. As observed by ARTHUR SUTHERLAND, "The Great Charter was obviously a cherished standard, a welcome assurance that people could set some limitation on the arbitrary power of the king."[33]

A written Constitution, independent judiciary with powers of judicial review, the doctrine of rule of law and separation of powers, free elections to legislature, accountable and transparent democratic government, Fundamental Rights of the people, federalism, decentralisation of power are some of the principles and norms which promote Constitutionalism in a country.

C. RULE OF LAW

A few words may be said here about the concept of Rule of Law as other ideas and concepts relating to Constitutionalism will be discussed in due course in the following pages.

The doctrine of Rule of Law is ascribed to DICEY whose writing in 1885 on the British Constitution included the following three distinct though kindered ideas in Rule of Law:[34]

(i) *Absence of Arbitrary Power* : No man is above law. No man is punishable except for a distinct breach of law established in an ordinary legal manner before ordinary courts. The government cannot punish any one merely by its own fiat. Persons in authority in Britain do not enjoy wide, arbitrary or discretionary powers. Dicey asserted that wherever there is discretion there is room for arbitrariness.

(ii) *Equality before Law* : Every man, whatever his rank or condition, is subject to the ordinary law and jurisdiction of the ordinary courts. No man is above law.

(iii) *Individual Liberties* : The general principles of the British Constitution, and especially the liberties of the individual, are judge-made, *i.e*., these are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts from time to time.

DICEY asserted that the above-mentioned features existed in the British Constitution.

The British Constitution is judge-made and the rights of the individual form part of, and pervade, the Constitution. The rights of the individuals are part of the Constitution because these are secured by the courts. The British Constitutional

---

32. FRIEDMANN, *LEGAL THEORY;* Dias and Hughes, *JURISPRUDENCE;* Lloyd, *INTRODUCTION TO JURISPRUDENCE.*

33. *CONSTITUTIONALISM IN AMERICA*, 13.

34. DICEY, A.V., *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION*, Ch. 4 (X ed.). For discussion on DICEY'S views see COSGROVE, *THE RULE OF LAW*, 66-113 (1980). WADE & PHILLIPS, *CONSTITUTIONAL AND ADMINISTRATIVE LAW*, 86 (ed, Bradley, IX Ed.); O' HOOD PHILLIPS, *CONST. AND ADM. LAW*, 33-39 (1987); S.A. DE SMITH, *op. cit*., 35, JAIN, M.P. *A TREATISE ON ADM. LAW*, I, 17-23.

Law is not the source, but the consequence, of the rights of the individuals as defined by the courts.

DICEY was thinking of the common law freedoms, such as, personal liberty, freedom of speech, public meeting, etc. What DICEY was saying was that certain Constitutions proclaim rights but do not provide adequate means to enforce those rights. In the British Constitution, on the other hand, there is inseparable connection between the means of enforcing a right and the right to be enforced.

Referring in particular to the *Habeas Corpus* Act, DICEY said that it was "worth a hundred Constitutional articles guaranteeing individual liberty." DICEY however accepted that there was rule of law in the U.S.A., because there the rights declared in the Constitution could be enforced, and the Constitution gave legal security to the rights declared.

The third principle is peculiar to Britain. In many modern written Constitutions, the basic rights of the people are guaranteed in the Constitution itself. This is regarded as a better guarantee for these rights and even in Britain there exists at present strong opinion that basic rights should be guaranteed.

DICEY'S thesis has been criticised by many from various angles but, the basic tenet expressed by him is that power is derived from, and is to be exercised according to law. In substance, DICEY'S emphasis, on the whole, in his enunciation of Rule of Law is on the absence of arbitrary power, and discretionary power, equality before Law, and legal protection to certain basic human rights, and these ideas remain relevant and significant in every democratic country even to-day.

It is also true that dictated by the needs of practical government, a number of exceptions have been engrafted on these ideas in modern democratic countries, *e.g.*, there is a universal growth of broad discretionary powers of the administration[35]; administrative tribunals have grown[36]; the institution of preventive detention has become the normal feature in many democratic countries[37]. Nevertheless, the basic ideas are worth preserving and promoting.

The concept of Rule of Law has been discussed in several international forums.[38] The effort being made is to give it a socio-legal-economic content and a supranational complexion.[39]

Rule of Law has no fixed or articulate connotation though the Indian courts refer to this phrase time and again. The broad emphasis of Rule of Law is on absence of any centre of unlimited or arbitrary power in the country, on proper structurisation and control of power, absence of arbitrariness in the government. Government intervention in many daily activities of the citizens is on the increase creating a possibility of arbitrariness in State action. Rule of Law is useful as a counter to this situation, because the basic emphasis of Rule of Law is on exclusion of arbitrariness, lawlessness and unreasonableness on the part of the government.

---

35. For a detailed discussion on Discretionary Powers, see, JAIN, *A TREATISE ON INDIAN ADMINISTRATIVE LAW, I,* Chs. XVII-XIX*;* JAIN, *CASES & MATERIALS ON INDIAN ADM. LAW, III*, Ch. XVI.

36. For Tribunals, see JAIN, *TREATISE,* Ch. XIII; *CASES,* II, Ch. XII; *infra,* Ch. VIII.

37. *Infra,* Ch. XXVII.

38. INTERNATIONAL COMMISSION OF JURISTS, *DELHI DECLARATION, 1959.*

39. WADE & PHILLIPS, 93-5.

Rule of Law does not mean rule according to statutory law pure and simple, because such a law may itself be harsh, inequitable, discriminatory or unjust. Rule of law connotes some higher kind of law which is reasonable just and non-discriminatory. Rule of Law to-day envisages not arbitrary power but controlled power. Constitutional values, such as constitutionalism, absence of arbitrary power in the government, liberty of the people, an independent judiciary etc. are imbibed in the concept of Rule of Law.

The Indian Constitution by and large seeks to promote Rule of Law through many of its provisions. For example, Parliament and State Legislatures are democratically elected on the basis of adult suffrage.[40] The Constitution makes adequate provisions guaranteeing independence of the judiciary.[41] Judicial review has been guaranteed through several constitutional provisions.[42] The Supreme Court has characterised judicial review as a "basic feature of the Constitution"[43] Art. 14 of the Constitution guarantees right to equality before law.[44] This Constitutional provision has now assumed great significance as it is used to control administrative powers lest they should become arbitrary.[45]

The Supreme Court has invoked the Rule of Law several times in its pronouncements to emphasize upon certain Constitutional values and principles. For example, in *Bachan Singh,*[46] Justice BHAGWATI has emphasized that Rule of Law excludes arbitrariness and unreasonableness. To ensure this, he has suggested that it is necessary to have a democratic legislature to make laws, but its power should not be unfettered, and that there should be an independent judiciary to protect the citizen against the excesses of executive and legislative power.

In *P. Sambamurthy v. State of Andhra Pradesh,*[47] the Supreme Court has declared a provision authorising the executive to interfere with tribunal justice as unconstitutional characterising it as "violative of the rule of law which is clearly a basic and essential feature of the Constitution."[48]

In *Wadhwa,*[49] the Supreme Court has again invoked the Rule of Law concept to decry too frequent use by a State Government of its power to issue ordinances as a substitute for legislation by the Legislature.[50]

In *Yusuf Khan v. Manohar Joshi,*[51] the Supreme Court has laid down the proposition that it is the duty of the state to preserve and protect the law and the

---

40. *Infra,* Chs. II, VI and XIX.
41. *Infra,* Chs. IV and VIII.
42. *Infra.* Chs. IV, VIII, XXIII, XL and XL.
43. *Minerva Mills Ltd. v. Union of India,* AIR 1980 SC 1789 : (1980) 2 SCC 591.
For discussion on the doctrine of Fundamental Features of the Constitution, see, *infra,* Ch. XLI.
44. *Infra,* Ch. XXI.
45. *Ibid.* Also see, M.P. JAIN, *A TREATISE OF ADMINISTRATIVE LAW,* I, Ch. XVIII; M.P. JAIN, *INDIAN ADM. LAW—CASES & MATERIALS,* II, Ch. XV.
46. *Bachan Singh v. State of Punjab,* AIR 1982 SC 1325 : (1982) 3 SCC 24; *infra,* Ch. XXVI.
47. AIR 1987 SC 663 : (1987) 1 SCC 362.
48. *Infra,* Ch. IX.
49. *D.C. Wadhwa v. State of Bihar,* AIR 1987 SC 579 : (1987) 1 SCC 378; *infra,* Ch. III, Sec. D(ii)(d) and Ch. VII, Sec. D(ii)(c).
50. On Ordinance-Making Power, see, *infra,* Ch. III and Ch. VII.
51. (1999) SCC (Cri) 577.

Constitution and that it cannot permit any violent act which may negate the rule of law.

The two great values which emanate from the concept of Rule of law in modern times are:

(1) no arbitrary government; and

(2) upholding individual liberty.

Emphasizing upon these values, KHANNA, J., observed in *A.D.M. Jabalpur v. S. Shukla.*[52]

> "Rule of law is the antithesis of arbitrariness...Rule of law is now the accepted norm of all civilised societies...Everywhere it is identified with the liberty of the individual. It seeks to maintain a balance between the opposing notions of individual liberty and public order. In every state the problem arises of reconciling human rights with the requirements of public interest. Such harmonizing can only be attained by the existence of independent courts which can hold the balance between citizen and the state and compel governments to conform to the law".

A significant derivative from 'Rule of Law' is judicial review. Judicial review is an essential part of Rule of Law. Judicial review involves determination not only of the constitutionality of the law but also of the validity of administrative action. The actions of the state public authorities and bureaucracy are all subject to judicial review; they are thus all accountable to the courts for the legality of their actions. In India, so much importance is given to judicial review that it has been characterised as the 'basic feature' of the Constitution which cannot be done away with even by the exercise of the constituent power.[53]

D. HISTORICAL PERSPECTIVE

The Constitution of India, the precursor of the new Indian renaissance, became effective on January 26, 1950.[54] Before the advent of the Constitution, India was governed under the Government of India Act, 1935, which became effective in 1937. India was then a part of the British Empire; sovereignty of the British Crown prevailed over the country and it was in the exercise of this sovereignty that the British Parliament had enacted the Act of 1935.

Only two major features of the Act need be mentioned here. First, the Act conferred only a very limited right of self-government on the Indians. The executive authority in a Province was vested in the Governor appointed by the Crown. He was to act ordinarily on the advice of the Ministers who were to be responsible to the Provincial Legislature which was elected on a limited franchise. But the Governor could exercise certain functions 'in his discretion' or 'individual judgment' in which case he was not bound by the ministerial advice and was subject to the control of the Governor-General.

---

52. AIR 1976 SC 1207, at 1254, 1263 : (1976) 2 SCC 521; see, Ch. XXXIII, Sec. F.

53. *State of Bihar v. Subhash Singh,* AIR 1997 SC 1390 : (1997) 4 SCC 430. Also see, *infra,* Ch. XLI.

54. However, a few provisions of the Constitution, viz., Arts. 5, 6, 7, 8, 9, 60, 324, 366, 367, 379, 380, 388, 391, 392, 393 and 394, came into force on November 26, 1949.

The executive authority at the Centre was vested in the Governor-General appointed by the Crown. Though ordinarily the Governor-General would act on ministerial advice, he could discharge certain functions 'in his discretion' or 'individual judgment' in which case he was not bound by ministerial advice but was subject to the control of the Secretary of State for India who was a member of the British Cabinet. Defence and external affairs, among others, fell in this category.

Secondly, the Act of 1935 sought to change the character of the Indian Government from unitary to federal. The Indian Federation was to consist of the Provinces in which British India was divided, and the States under the native princes.

The federal scheme, however, never became fully operative as the princes did not join the Federation; the federal concept was implemented partially in so far as the relationship between the Centre and the Provinces was ordered on this basis. Further, the ministerial form of government, as envisaged by the Act of 1935, could not also be introduced at the Centre which continued to function under the Government of India Act, 1919. Accordingly, the Central Government consisted of the Governor-General and a nominated Executive Council. In this structure, the Governor-General occupied the key position as he could overrule his Council on any point if in his opinion the safety, tranquility or interests of British India were materially affected.[55]

In short, before 1947, the effective power and control over the Indian Administration lay with the Secretary of State, the Governor-General and the Governors; Indian participation in the governmental process was minimal and naturally the Indians never felt reconciled to such a dispensation.

There thus arose an insistent demand for independence which resulted in the setting up of a Constituent Assembly for drafting a Constitution for a free India. The Assembly formally commenced its task of Constitution-making from December 9, 1946, when it held its first meeting but could not make much headway because of the political impasse arising from a lack of understanding between the two major political parties, the Indian National Congress and the Muslim League. The political deadlock was resolved in 1947 when the British Parliament enacted the Indian Independence Act which partitioned the country into two independent units—India and Pakistan. The Constituent Assembly then embarked on its work in right earnest, and after three years' hard labour finalised and adopted the Constitution of India on November 26, 1949.

E. SALIENT FEATURES OF THE INDIAN CONSTITUTION

(a) MODERN CONSTITUTION

The fact that the Indian Constitution was drafted in the mid-twentieth century gave an advantage to its makers in so far as they could take cognisance of the various constitutional processes operating in different countries of the world and thus draw upon a rich fund of human experience, wisdom, heritage and traditions in the area of governmental process in order to fashion a system suited to the

---

55. For details see, KEITH, *CONSTITUTIONAL HISTORY OF INDIA*, 331-357 (1937); GLEDHILL, *THE REPUBLIC OF INDIA*, 17-42 (1964); M. RAMASWAMY, CONSTITUTIONAL DEVELOPMENTS IN INDIA, (1955) *Stanford Law Review*, 326.

political, social and economic conditions in India.[56] In the end result, the Indian Constitution has turned out to be a very interesting and unique document.

One could discern in it the impact of several Constitutions. As for instance, the Indian Federalism is influenced by the American, Canadian and Australian Federalism. Fundamental Rights in India owe a great deal to the American Bill of Rights; the process of Constitutional amendment adopted in India is a modified version of the American system.

The influence of the British Constitutional Law, theories and practices on the Indian Constitution is quite pervasive. As for example, the parliamentary form of government in India closely follows the British model in substance; the system of prerogative writs which plays a crucial role in protecting peoples' legal rights and ensuring judicial control over administrative action is Britain's contribution to India. Australia's experiences have been especially useful for ordering the Centre-State financial relationship, and for promoting the concept of freedom of trade and commerce in the country. Inspiration has come from the Irish Constitution in the shaping of the Directive Principles of State Policy.

The Government of India Act, 1935, which preceded the Indian Constitution, has furnished not only administrative details, but also the verbatim language of many provisions of the Constitution.

It will, however, be wrong to suppose that the Indian Constitution is just a carbon copy of other Constitutions and contains nothing new and original. While adopting some of the principles and institutions developed in other democratic and federal countries, it yet strikes new paths, new approaches and patterns, in several directions. It makes bold departures in many respects from the established Constitutional norms and introduces many innovations. For example, in the area of Centre-State relationship, with a view to achieve the twin objectives of promoting the unity of India and reducing rigidity inherent in a federal system, the Indian Constitution makes several provisions which are original in conception as nothing parallel to these is to be found in any other federal Constitution and, to this extent, it makes a distinct contribution to the development of theories and practices of federalism in general.

(b) WRITTEN CONSTITUTION

India's Constitution is a lengthy, elaborate and detailed document. Originally it consisted of 395 Articles arranged under 22 Parts and eight Schedules. Today, after many amendments, it has 441 Articles and 12 Schedules. It is probably the longest of the organic laws now extant in the world.

---

56. The Draft Constitution was criticized on the floor of the Constituent Assembly on the ground that most of it had been borrowed from other constitutions and that it could claim very little originality. In reply to this, AMBEDKAR observed:

"One likes to ask whether there can be anything new in a Constitution framed at this hour in the history of the world. More than hundred years have rolled over when the first written Constitution was drafted. It has been followed by many other countries reducing their Constitutions to writing. What the scope of a Constitution should be has long been settled. Similarly, what are the fundamentals of a Constitution are recognised all over the world. Given these facts, all Constitutions in their main provisions must look similar. The only new things, if there can be any, in a Constitution framed so late in the day are the variations made to remove the faults and to accommodate it to the needs of the country."

See, VII *CONSTITUENT ASSEMBLY DEBATES* (hereinafter cited as *CAD*), 35-56.

Several reasons contributed to its prolixity. First, the Constitution deals with the organisation and structure not only of the Central Government but also of the States. Secondly, in a federal Constitution, Centre-State relationship is a matter of crucial importance. While other federal Constitutions have only skeletal provisions on this matter, the Indian Constitution has detailed norms. Thirdly, the Constitution has reduced to writing many unwritten conventions of the British Constitution, as for example, the principle of collective responsibility of the Ministers, parliamentary procedure, etc.

Fourthly, there exist various communities and groups in India. To remove mutual distrust among them, it was felt necessary to include in the Constitution detailed provisions on Fundamental Rights, safeguards to minorities, Scheduled Tribes, Scheduled Castes and Backward Classes.

Fifthly, to ensure that the future India be based on the concept of social welfare, the Constitution includes Directive Principles of State Policy.

Lastly, the Constitution contains not only the fundamental principles of governance but also many administrative details such as the provisions regarding citizenship, official language, government services, electoral machinery, etc. In other Constitutions, these matters are usually left to be regulated by the ordinary law of the land. The framers of the Indian Constitution, however, felt that unless these provisions were contained in the Constitution, the smooth and efficient working of the Constitution and the democratic process in the country might be jeopardised.

The form of administration has a close relation with the form of the Constitution, and the former must be appropriate to, and in the same sense as, the latter. It is quite possible to pervert the Constitutional mechanism without changing its form by merely changing the form of the administration and making it inconsistent with, and opposed to, the spirit of the Constitution. Since India was emerging as an independent country after a long spell of foreign rule, the country lacked democratic values. The Constitution-makers, therefore, thought it prudent not to take unnecessary risks, and incorporate in the Constitution itself the form of administration as well, instead of leaving it to the legislature, so that the whole mechanism may become viable.

It would, however, be wrong to suppose that the Indian Constitution with all its prolixity finally settles all problems of government. It leaves a number of matters to be taken care of by ordinary legislation. It also provides scope, though not so much as in Britain, for the growth and development of conventions.[57] Thus, the relationship between the President or the State Governor and his Council of Ministers, the concept of ministerial responsibility for acts of the officials, the relationship between the Prime Minister or the Chief Minister in a State and his Council of Ministers, the appointment of a State Governor, dissolution of the Lok Sabha or of a State Legislative Assembly by the President or the Governor respectively, the relations between the President and the Governor, are some of the matters which are left to be evolved by conventions.[58]

It is not correct to assume that the conventions of the British Constitution would operate *suo motu* in India wherever relevant and applicable. In course of time, some of these conventions have been questioned, and new conventions are

57. *Supra*, pp. 4-5.
58. See, Chs. III and VII, *infra*.

in the process of emergence. This is mainly because most of the conventions of the British Constitution have been evolved in the context of a two-party system, while in India, a multiparty system is envolving. More will be said on this subject in later pages.

(c) PREAMBLE

Unlike the Constitutions 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 the 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 objectives?

The Preamble does not grant any power but it gives a direction and purpose to the Constitution. It outlines the objectives of the whole Constitution. The Preamble contains the fundamentals of the Constitution. It serves several important purposes, as for example:

(1) It contains the enacting clause which brings the Constitution into force.

(2) It declares the great rights and freedoms which the people of India intended to secure to all its citizens.

(3) It declares the basic type of government and polity which is sought to be established in the country.

(4) It throws light on the source of the Constitution, viz. the People of India.

The words in the Preamble, "We the people of India...in our Constituent Assembly...do hereby adopt, enact and give to ourselves this Constitution", propound the theory that the 'sovereignty' lies in the people, that the Constitution, emanates from them; that the ultimate source for the validity of, and the sanction behind the Constitution is the will of the people; that the Constitution has not been imposed on them by any external authority, but is the handiwork of the Indians themselves.

Thus, the source of the Constitution are the people themselves from whom the Constitution derives its ultimate sanction. This assertion affirms the republican and democratic character of the Indian polity and the sovereignty of the people. The People of India thus constitute the sovereign political body who hold the ultimate power and who conduct the government of the country through their elected representatives.

The claim that the People of India have given to themselves the Constitution is in line with similar claims made in several other democratic Constitutions, such as those of the U.S.A.,[59] Ireland, etc.

---

59. "That the people have original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme and can seldom act, they are designed to be permanent."
MARSHALL, C.J., in *Marbury v. Madison*, 1 Cr. 137.
"India and the United States both recognise that the people are the basis of all sovereignty." DOUGLAS, *supra*, at 6.

As regards the nature of the Indian Polity, the Preamble to the Constitution declares India to be a 'Sovereign Socialist Secular Democratic Republic'. The term 'Sovereign' denotes that India is subject to no external authority and that the state has power to legislate on any subject in conformity with constitutional limitations.[60] The term 'democratic' signifies that India has a responsible and parliamentary form of government which is accountable to an elected legislature. The Supreme Court has declared 'democracy' as the basic feature of the Constitution.[61] The term 'Republic' denotes that the head of the state is not a hereditary monarch, but an elected functionary.

As to the grand objectives and socio-economic goals to achieve which the Indian Polity has been established, these are stated in the Preamble. These are: to secure to all its citizens social, economic and political justice; liberty of thought, expression, belief, faith and worship; 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.

Emphasizing upon the significance of the three concepts of liberty, equality and fraternity used in the Preamble, Dr. Ambedkar observed in his closing speech in the Constituent Assembly on November 25, 1949 : "The principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality liberty would produce the supremacy of the few over the many. Equality without liberty, would kill individual initiative".[62]

The Supreme Court has emphasized that the words "fraternity assuring the dignity of the individual" have "a special relevance in the Indian context" because of the social backwardness of certain sections of the community who had in the past been looked down upon.[63]

To give a concrete shape to these aspirations, the Constitution has a Chapter on Fundamental Rights which guarantee certain rights to the people, such as, freedom of the person, freedom of speech, freedom of religion, etc.[64]

According to the Supreme Court, "The Constitution envisions to establish an egalitarian social order rendering to every citizen, social, economic and political justice in a social and economic democracy of the Bharat Republic."[65] The Constitution thus ensures economic democracy along with political democracy.

The goals and objectives of the Indian Polity as stated in the Preamble are sought to be further clarified, strengthened and concretised through the Directive Principles of State Policy.[66] Therefore, it is essential that the Preamble be read

---

60. *Synthetics v. State of Uttar Pradesh,* (1990) 1 SCC 109 : AIR 1990 SC 1927.
Also see, *Charan Lal Sahu v. Union of India,* (1990) 1 SCC 613 : AIR 1990 SC 1480.
61. See, *infra,* Ch. XLI; *S.R. Bommai v. Union of India,* AIR 1994 SC 1918 : (1994) 3 SCC 1.
62. B. SHIVA RAO, *THE FRAMING OF INDIAN CONSTITUTION : SELECT DOCUMENTS,* Vol. IV, 944.
63. *Indra Sawhney v. Union of India,* AIR 1993 SC 477 : 1992 Supp (3) SCC 217.
For a fuller discussion on this case, see, *infra,* under Art. 16; Ch. XXII.
64. See, *infra,* pp. 22-23; Chs. XX-XXXIII, *infra.*
65. *Samatha v. State of Andhra Pradesh,* AIR 1997 SC at 3326 : (1997) 8 SCC 191.
66. See below under "Welfare State", p. 20; Ch. XXXIV, *infra.*

along with the Directive Principles which lay down certain goals for the government to achieve so as to maximize social welfare of the people.

The Constitution is thus an instrument to achieve the goal of economic democracy along with political and social democracy. This aspect was emphasized upon by Dr. Ambedkar in his concluding speech in the Constituent Assembly:

> "Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognises liberty, equality and fraternity..."

Ordinarily, Preamble is not regarded as a part of the statute, and, therefore, at one time, it was thought that the Preamble does not form part of the Constitution.[67] But that view is no longer extant. The majority of the Judges constituting the Bench in *Kesavananda* have laid down that the Preamble does form part of the Constitution. These Judges have bestowed great respect on the Preamble to the Constitution. For example, SIKRI, C.J., has observed in *Kesavananda Bharati v. Union of India*.[68]

> "It seems to me that the Preamble to our Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble."

SHELAT and GROVER, J.J., have observed in the same case:[69]

> "Our Court has consistently looked to the Preamble for guidance and given it a transcendental position while interpreting the Constitution or other laws".

The Supreme Court has referred to the Preamble several times while interpreting constitutional provisions.[70]

The Preamble lays emphasis on the principle of equality which is basic to the Indian Constitution. The principle of equality is a basic feature or structure of the Constitution which means that even a constitutional amendment offending the basic structure of the Constitution is *ultra vires.* A legislature cannot transgress this basic feature of the Constitution while making a law.[71]

(d) SOCIALIST STATE

The word "socialist" was not there originally in the Preamble. It was added to the Preamble by the 42nd Amendment of the Constitution in 1976.[72] Thus, the concept of "socialism" has been made explicit and India's commitment to this ideal has been underlined and strengthened.

The term "socialist" has not been defined in the Constitution. It does not however envisage doctrinaire socialism in the sense of insistence on state ownership

---

67. *In re Berubari Union and Exchange of Enclaves,* AIR 1960 SC 845 : (1960) 3 SCR 250; *infra*, Ch. V.
68. AIR 1973 SC 1461 at 1506 : (1973) 4 SCC 225.
69. *Ibid* at 1578.
70. See, for example : *In re : Berubari Union,* AIR 1960 SC 845 : (1960) 3 SCR 250; *Behram Khurshid Pesikaka v. State of Bombay,* AIR 1955 SC 123 : (1955) 1 SCR 613; *Basheshar Nath v. Commr. I.T.,* AIR 1959 SC 149 : 1959 Supp (1) SCR 528; *In re Kerala Education Bill,* 1957, AIR 1958 SC 956 : 1959 SCR 995; *Kesavananda Bharati v. State of Kerala,* AIR 1973 SC 1461 : (1973) 4 SCC 225.
71. See, *infra,* Ch. XLI.
72. See, Chs. XXXIV and XLII, *infra.*

as a matter of policy. It does not mean total exclusion of private enterprise and complete state ownership of material resources of the Nation.

In India, there has always been emphasis on mixed economy, i.e., along with a public sector, the private sector also has a role to play. The government accepts the policy of mixed economy where both public and private sectors co-exist side by side. However, the private enterprises has so far been rigorously controlled by the government[73], but signs are appearing on the horizon that in future the private enterprise is going to play a much more important economic role than it has played so far.

The Supreme Court has in a number of decisions referred to the concept of socialism and has used this concept along with the Directive Principles of State Policy[74] to assess and evaluate economic legislation. The Court has derived the concept of social justice and of an economically egalitarian society from the concept of socialism. According to the Supreme Court, "the principal aim of socialism is to eliminate inequality of income and status and standards of life, and to provide a decent standard of life to the working people."[75]

Democratic socialism aims to end poverty, ignorance, disease and inequality of opportunity. Socialistic concept of society should be implemented in the true spirit of the Constitution.[76] In *Samatha v. State of Andhra Pradesh,*[77] the Supreme Court has stated while defining socialism : "Establishment of the egalitarian social order through rule of law is the basic structure of the Constitution."[78]

The Court has laid emphasis on social justice so as to attain substantial degree of social, economic and political equality. Social justice and equality are complimentary to each other.[79]

Another idea propounded by the Court is that socialism means distributive justice so as to bring about the distribution of material resources of the community so as to subserve the common good.[80]

By reading the word 'socialist' in the Preamble with the Fundamental Rights contained in Arts. 14 and 16, the Supreme Court has deduced the Fundamental Right to equal pay for equal work and compassionate appointment.[81]

---

73. See, *infra,* under Art. 19(1)(g), Ch. XXIV, and Art. 301, Ch. XV.
Also see, Ch. XXXIV, *infra.*

74. See, Ch. XXXIV, *infra.*

75. *D.S. Nakara v. Union of India,* AIR 1983 SC 130 : (1983) 1 SCC 305. Also see, *Minerva Mills v. Union of India,* AIR 1980 SC 1789 : (1980) 2 SCC 591; *Randhir v. Union of India,* AIR 1982 SC 879 : (1982) 1 SCC 618; *S.R. Bommai v. Union of India,* AIR 1994 SC 1918 : (1994) 3 SCC 1.

76. *G.B. Pant University of Agriculture & Technology v. State of Uttar Pradesh,* (2000) 7 SCC 109 : AIR 2000 SC 2695; *HSEB v. Suresh,* (1999) 3 SCC 601 : AIR 1999 SC 1160.

77. AIR 1997 SC 3297, 3330 : (1997) 8 SCC 191.

78. For discussion on the concept of "Basic Structure of the Constitution", see *infra,* Ch. XLI.
For further discussion on the concept of socialism, see, Ch. XXXIV, *infra,* under Directive Principles.

79. *Air India Statutory Corp. v. United labour Union,* AIR 1997 SC 645 : (1997) 9 SCC 377.

80. For further discussion on this theme, see, Ch. XXXIV, *infra,* under "Directive Principles."

81. See, *infra,* Chs. XXI and XXIII; *Balbir Kaur v. Steel Authority of India,* AIR 2000 SC 1596 : (2000) 6 SCC 493.
Also see, Ch. XXXIV, *infra.*

(e) WELFARE STATE

The Indian Constitution has been conceived and drafted in the mid-twentieth century when the concept of social welfare state is the rule of the day. The Constitution is thus pervaded with the modern outlook regarding the objectives and functions of the state. It embodies a distinct philosophy of government, and explicitly declares that India will be organised as a social welfare state, *i.e*., a state which renders social services to the people and promotes their general welfare. In the formulations and declarations of the social objectives contained in the Preamble,[82] one can clearly discern the impact of the modern political philosophy which regards the state as an organ to secure the good and welfare of the people.

This concept of a welfare state is further strengthened by the Directive Principles of State Policy which set out the economic, social and political goals of the Indian Constitutional system. These directives confer certain non-justiciable rights on the people, and place the government under an obligation to achieve and maximise social welfare and basic social values like education, employment, health, etc.

In consonance with the modern beliefs of man, the Indian Constitution sets up a machinery to achieve the goal of economic democracy along with political democracy, for the latter would be meaningless without the former in a poor country like India.[83]

(f) SECULAR STATE

India is a country of religions. There exist multifarious religious groups in the country but, in spite of this, the Constitution stands for a secular state of India.

The word 'secular' was not present originally in the Preamble. It was added thereto by the 42nd Constitutional Amendment in 1976.[84] What was implicit in the Constitution until then became explicit. Even before 1976, the concept of secularism was very much embedded in the Indian constitutional jurisprudence as many court cases of this era would testify.[85]

The concept of "secularism" is difficult to define and has not thus been defined in the Constitution. Secularism has been inserted in the Preamble by reason of the Constitution (Forty-second Amendment) Act, 1976. The object of insertion was to spell out expressly the high ideas of secularism and the compulsive need to maintain the integrity of the nation which are subjected to considerable stresses and strains, and vested interests have been trying to promote their selfish ends to the great detriment of the public good.[86] The concept is based on certain postulates. Thus, there is no official religion in India. There is no state-recognised church or religion. Several fundamental rights guarantee freedom of worship and religion as well as outlaw discrimination on the ground of religion

---

82. See above (c) under "Preamble".
83. For Directive Principles, see Ch. XXXIV, *infra.*
84. See Ch. XLII, *infra.*
85. See, Ch. XXIX, *infra.*
86. *M. P. Gopalakrishnan Nair v. State of Kerala*, (2005) 11 SCC 45 : AIR 2005 SC 3053.

and, thus, by implication prohibit the establishment of a theocratic state. The state does not identify itself with, or favour, any particular religion. The state is enjoined to treat all religions and religious sects equally. No one is disabled to hold any office on the ground of religion. There is only one electoral roll on which are borne the names of all qualified voters.[87]

The essential basis of the Indian Constitution is that all citizens are equal, and that the religion of a citizen is irrelevant in the matter of his enjoyment of Fundamental Rights. The Constitution ensures equal freedom for all religions and provides that the religion of the citizen has nothing to do in socio-economic matters. "Though the Indian Constitution is secular and does not interfere with religious freedom, it does not allow religion to impinge adversely on the secular rights of citizens or the power of the state to regulate socio-economic relations."[88]

The Supreme Court has declared secularism as the basic feature of the Indian Constitution.[89] The Court has further declared that secularism is a part of fundamental law and an unalienable segment of the basic structure of the country's political system.[90] It has explained that secularism is not to be confused with communal or religious concepts of an individual or a group of persons. It means that the State should have no religion of its own and no one could proclaim to make the State have one such or endeavour to create a theocratic State. Persons belonging to different religions live throughout the length and breadth of the country. Each person, whatever be his religion, must get an assurance from the State that he has the protection of law freely to profess, practise and propagate his religion and freedom of conscience. Otherwise, the rule of law will become replaced by individual perceptions of one's own presumptions of good social order. Religion cannot be mixed with secular activities of the State and fundamentalism of any kind cannot be permitted to masquerade as political philosophies to the detriment of the larger interest of society and basic requirement of a Welfare State. The Court noted disturbing trends. It noted that lately, vested interests fanning religious fundamentalism of all kinds, and vying with each other, are attempting to subject the Constitutional machineries of the State to great stress and strain with certain quaint ideas of religious priorities.

(g) RESPONSIBLE GOVERNMENT

To give reality and content to the democratic ideals propounded in the Preamble, the Constitution establishes parliamentary form of government both at the

---

87. Ch. XIX, *infra.*

88. I.L.I., *SECULARISM : ITS IMPLICATIONS FOR LAW AND LIFE IN INDIA*, 4-5(1966); Also, V.P. LUTHRA, *CONCEPT OF THE SECULAR STATE IN INDIA (1964)*; J.M. SHELAT, *SECULARISM, PRINCIPLES AND APPLICATION*, (1972); SRIVASTAVA, *RELIGIOUS FREEDOM IN INDIA (1982).*

89. *Kesavananda v. State of Kerala,* AIR 1973 SC 1461 : (1973) 4 SCC 225; *infra,* Ch. XLI; *S.R. Bommai v. Union of India,* AIR 1994 SC 1918 : (1994) 3 SCC 1; *infra,* Chs. XIII and XXIX.

90. *State of Karnataka v. Praveen Bhai Thogadia,* (2004) 4 SCC 684 : AIR 2004 SC 2081.

Centre and the States, in which the executive is responsible to an elected legislature.

This system differs fundamentally from the presidential system prevailing in America. Whereas the American system is based on the doctrine of separation of powers between the executive and the legislative organs, the Indian system is based on the principle of co-ordination and co-operation of the two organs.[1]

The popular Houses at the Centre and the States are elected on the basis of adult suffrage.[2] The President, the Head of the Indian Union, is elected by the elected members of Parliament and the State Legislative Assemblies. This system of election ensures that the President is the choice of the people throughout the country and that he represents both the Centre and the States.[3]

The executive power though formally vested in the President, is in effect exercised by the Council of Ministers headed by the Prime Minister and responsible to the Lok Sabha.[4] The President is more of a symbol, a high dignitary having ceremonial functions. The same pattern has been duplicated in the States with some modifications.[5]

The head of a State is the Governor who is a nominee of the Centre and, though largely a symbol like the President, yet has some functions to discharge as a representative of the Central Government. Effective power in a State, like the Centre, lies in the Council of Ministers headed by the Chief Minister and responsible to the elected House of the State Legislature.[6]

Details of the relationship existing between the President or the Governor and the respective Council of Ministers are not fully set out in the Constitution. This is an area, therefore, where conventions play a significant role.[7]

(h) FUNDAMENTAL RIGHTS

The Indian Constitution guarantees to the people certain basic human rights and freedoms, such as, *inter alia*, equal protection of laws, freedom of speech and expression, freedom of worship and religion, freedom of assembly and association, freedom to move freely and to reside and settle anywhere in India, freedom to follow any occupation, trade or business, freedom of person, freedom, against double jeopardy and against *ex post facto* laws. Untouchability, the age old scourge afflicting the Hindu Society, has been formally abolished.[8]

A person can claim Fundamental Rights against the state subject to the state imposing some permissible restrictions in the interests of social control. The grounds for impositing these restrictions on Fundamental Rights are expressly mentioned in the Constitution itself and, therefore, these rights can be abridged only to the extent laid down.

---

1. For discussion of the Presidential System, see, *infra*, Ch. III.
2. See, Chs. II, VI and XIX, *infra.*
3. See, Ch. III, *infra.*
4. See, *infra*, Ch. III.
5. See, Ch. VII, *infra.*
6. See, *infra*, Ch. VII, under State Executive.
7. See, *supra*, pp. 4-5.
8. For Fundamental Rights see, *infra*, Chs. XX-XXXIII.

These rights, in substance, constitute inhibitions on the legislative and executive organs of the state. No law or executive action infringing a Fundamental Right can be regarded valid. In this way, the Constitution de marcates an area of individual freedom and liberty wherein government cannot interfere.

The Constitution provides an effective machinery in Arts. 32 and 226 for the enforcement of these Rights.[9] Without due enforcement, these Rights will be of not much use. The judiciary ensures an effective and speedy enforcement of these rights.

Since the inauguration of the Constitution, many significant legal battles have been fought in the area of Fundamental Rights and, thus, a mass of interesting case-law has accumulated in this area. On the whole, the Supreme Court has taken the position that the Fundamental Rights should be interpreted broadly and liberally and not narrowly. As the Court has observed in *Maneka Gandhi v. Union of India:*[10]

> "The attempt of the Court should be to expand the reach and ambit of the Fundamental Rights rather than to attenuate their meaning and content by a process of judicial construction".

The Constitution-makers decided to incorporate Fundamental Rights in the Constitution because of several reasons, such as, consciousness of the massive minority problem in India; memories of the protracted struggle against the despotic British rule; acknowledgement of the Gandhian ideals; the climate of international opinion and the American experience.

These Fundamental Rights have been conceived in a liberal spirit and seek to draw a reasonable balance between individual freedom and social control. These rights constitute a counterpart of the American Bill of Rights and though there are quite a few signs of resemblance between the two, the Fundamental Rights in India cover a much wider ground and are expressed in much greater detail than is the case in the U.S.A. The Bill of Rights in the U.S.A. has served as a bulwark against abuse of authority by the organs of government and has made a tremendous contribution to the promotion of a regime of freedom and liberty. The Fundamental Rights also play a similar role and promote rule of law in India.[11]

One of the most notable developments which has taken place in the Indian Constitutional jurisprudence since 1978 has been that the Supreme Court has declared that Fundamental Rights can even be implied over and above those which have been expressly stated in the Constitution. The Supreme Court does not follow the rule that unless a right is expressly stated as a Fundamental Right, it cannot be treated as one. Overtime, the Court has been able to imply, by its creative interpretative process, several Fundamental Rights out of the ones expressly stated in the Constitution. Thus, the range and coverage of the Fundamental Rights can go on expanding as a result of judicial interpretation of the Constitution in tune with the needs of a developing socio-economic society.[12]

---

9. See, Chs. IV, VII and XXXIII, *infra.*

10. AIR 1978 SC 597 : (1978) 1 SCC 248. For a detailed discussion on this case, see, Ch. XXVI, *infra.*

11. See, *infra,* Ch. XL, on "Constitutional Interpretation".
Also, Chs. XX-XXXIII, *infra.*

12. For discussion on this aspect, see, *infra,* Chs. XXVI, XXXIV and XL.

(i) MINORITIES AND BACKWARD CLASSES

The Indian society lacks homogeneity as there exist differences of religion, language, culture, *etc*. There are sections of people who are comparatively weaker than others—economically, socially and culturally—and their lot can be ameliorated only when the state makes a special effort to that end. Mutual suspicion and distrust exists between various religious and linguistic groups.

To promote a sense of security among the Minorities, to ameliorate the conditions of the depressed and backward classes, to make them useful members of society, to weld the diverse elements into one national and political stream, the Constitution contains a liberal scheme of safeguards to Minorities, Backward Classes and Scheduled Castes. Provisions have thus been made, *inter alia*, to reserve seats in the Legislatures,[13] to make reservations in services,[14] to promote the welfare of the depressed and Backward Classes[15] and to protect the language and culture of the minorities.[16] No weightage or special privilege has, however, been accorded to any section in the matter of representation in the legislatures.[17]

The Constitution also sets up an effective institutional machinery to oversee that these safeguards are properly effectuated by the various governments in the country. This machinery has now been strengthened by statutory bodies.[18]

(j) ELECTIONS

India has adopted adult suffrage as a basis of elections to the Lok Sabha and the State Legislative Assemblies. Every citizen, male or female, who has reached the age of 18 years or over, has a right to vote without any discrimination.[19]

It was indeed a very bold step on the part of the Constitution-makers to adopt adult suffrage in a country of teeming millions of illiterate people, but they did so to make democracy broad-based and to base the system of government on the ultimate sanction of the people.

To introduce any property or educational qualification for exercising the franchise would have amounted to a negation of democratic principles, as such a qualification would have disenfranchised a large number of depressed and poor people. Further, it cannot be assumed that a person with a bare elementary education is in a better position to vote than a labourer or a cultivator who knows what his interests are and will choose his representatives accordingly.[20]

Several general elections have been held so far on the basis of adult franchise, and from all accounts, the step taken by the framers appears to have been well-advised.

To ensure free, impartial and fair elections, and to protect the elections from being manipulated by the politicians, the Constitution sets up an autonomous

---

13. Chs. II, VI and XXXV, *infra.*
14. Ch. XXIII, *infra.*
15. Chs. XXII, XXXIV and XXXV, *infra.*
16. Chs. XVI and XXX, *infra.*
17. JAIN, *Safeguards to Minorities*: *Constitutional Principles, Policies and Framework in I.L.I., MINORITIES AND THE LAW (1972).* Also see, *infra,* Chs. XIX and XXXV.
18. See, *infra,* Ch. XXXV, Sec. F.
19. See, Ch. XIX, *infra.*
20. ALLADI K. AYYAR, *CONSTITUTION AND THE FUNDAMENTAL RIGHTS,* 6; XI *CAD* 835.

Election Commission to supervise and conduct elections to Parliament and State Legislatures.[21]

(k) JUDICIARY

A notable feature of the Constitution is that it accords a dignified and crucial position to the judiciary.[22]

A well-ordered and well-regulated judicial machinery has been introduced in the country with the Supreme Court at the apex. The jurisdiction of the Supreme Court is very broad. It is the general court of appeal from the High Courts, the ultimate arbiter in all Constitutional matters and also enjoys an advisory jurisdiction.[23] It can hear appeals from any court or tribunal in the country and can issue writs for enforcing the Fundamental Rights.[24] There is thus a good deal of truth in the assertion that the Supreme Court of India has wider powers than the highest court in any other federation.

There exists a High Court in each State. The High Courts have wide jurisdiction and have been constituted into important instruments of justice. They are the general Court of appeal from the Courts subordinate to them. The most significant aspect of their jurisdiction is the power to issue writs[25]. The writ-jurisdiction of the High Courts is invoked very commonly to enforce Fundamental Rights and to control administrative process.

Although the Indian and the American Constitutions are both federal in nature, the Indian judicial system differs from that of the U.S.A., *inter alia*, in one very significant respect, *viz*., whereas the U.S.A. has a dual system of courts—a federal judiciary with the Supreme Court at the top along with a separate and parallel judicial system in each State—India has a unified and not a dual system of courts. The Supreme Court, the High Courts and the Lower Courts constitute a single, unified, judiciary having jurisdiction over all cases arising under any law whether enacted by Parliament or a State Legislature.

The unified judicial system avoids diversity in remedial procedures and confusing jurisdictional conflicts between the two parallel judicial systems such as arise in the U.S.A. The Indian system thus has the advantage of simplicity over its American counterpart. As Justice DOUGLAS observes, "The dual system is in many respects cumbersome, expensive and productive of delays in the administration of justice," and that "it has presented difficulties and perplexities that the other federal systems have not experienced".[26]

The judiciary in India has been assigned a significant role to play. It has to dispense justice not only between one person and another, but also between the state and the citizens. It interprets the Constitution and acts as its guardian by keeping all authorities—legislative, executive, administrative, judicial and *quasi*-judicial—within bounds. The judiciary is entitled to scrutinise any governmental action in order to assess whether or not it conforms with the Constitution and the valid laws made thereunder. The judiciary supervises the administrative process

---

21. Ch. XIX, *infra.*
22. For details of the Judicial System see, *infra,* Chs. IV and VIII.
23. See, *infra,* Ch. IV, for details.
24. See, Ch. XXXIII, Sec. A, *infra.*
25. See, *infra,* Chs. VIII and XXXIII.
26. DOUGLAS, *op. cit.*, 86-7.

in the country, and acts as the balance-wheel of federalism by settling inter-governmental disputes.

The judiciary has power to protect people's Fundamental Rights from any undue encroachment by any organ of the government. The Supreme Court, in particular, acts as the guardian and protector of the Fundamental Rights of the people. A person complaining of breach of his Fundamental Right can straight away invoke the Court's writ jurisdiction under Art. 32 of the Constitution.[27] In the words of the Court itself, it acts "as a sentinal on the *qui vive* to protect Fundamental Rights"[28]. While interpreting the Fundamental Rights and other Constitutional provisions, at times, the Supreme Court has displayed judicial creativity of a very high order. The Court accepts that it has to play a law-creative role.[29]

To enable the Supreme Court and the High Courts to discharge their functions impartially, without fear or favour, the Constitution contains provisions to safeguard judicial independence. The Judges of these Courts are appointed by the Central Executive on the advice of the Judges themselves. Once appointed, the Judges hold office till they reach the age of superannuation as fixed by the Constitution and, thus, their tenure is independent of the will of the executive. A special procedure has been laid down for removing the Judges on the ground of incapacity or misbehaviour.[30]

The Constitutional provisions establishing an independent judiciary, having the power of 'judicial review' go a long way in establishing within the country a government according to law. As already stated, 'judicial review' has been declared to be a basic feature of the Indian Constitution.[31]

(l) FEDERAL CONSTITUTION

India's Constitution is of the federal type. It establishes a dual polity, a two tier governmental system, with the Central Government at one level and the State Government at the other. The Constitution marks off the sphere of action of each level of government by devising an elaborate scheme of distribution of legislative, administrative, and financial powers between the Centre and the States. A government is entitled to act within its assigned field and cannot go out of it, or encroach on the field assigned to the other government.

India is a member of the family of federations, of which the better known members are the U.S.A., Canada and Australia. The Indian Federalism has been designed after a close and careful study of the contemporary trends in these federations. Consequently, the Indian federal scheme while incorporating the advantages of a federal structure, yet seeks to mitigate some of its usual weaknesses of rigidity and legalism.[32] It does not, therefore, follow strictly the conventional or orthodox

---

27. Ch. XXXIII, Sec. A, *infra.*

28. *Pathumma v. State of Kerala,* AIR 1978 SC 771, at 774 : (1978) 2 SCC 1. See, *infra,* Chs. XX-XXXIII.

29. See, *infra,* Ch. XL.

Some of the cases to which reference can be made in this connection are : *Golak Nath,* AIR 1967 SC 1643 : (1967) 2 SCR 762; *Kesavananda,* AIR 1973 SC 1461 : (1973) 4 SCC 225; *Maneka Gandhi,* AIR 1978 SC 597 : (1978) 1 SCC 248; *Unni Krishnan,* AIR 1993 SC 2178 : (1993) 1 SCC 645.

30. See Chs. IV and VIII, *infra,* for details of the process of judicial appointments.

31. See, Ch. XLI, *infra; supra,* footnote 53, on page 12.

32. For a detailed discussion on Federalism, see, *infra,* Chs. X-XVII.

federal pattern. Along with adopting some of the techniques developed in other federations for making the federal fabric viable, it also breaks much new ground and develops some novel expedients and techniques of its own, and is thus characterised by several distinctive features as compared with other federal countries.

Instead of the word "federation" the word "Union" was deliberately selected by the Drafting Committees of the Constituent Assembly to indicate two things *viz*. (a) that the Indian Union is not the result of an agreement by the states and (b) the component states; have no freedom to secede from it. Though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people a single people living under a single imperium derived from a single source.[33]

Within a federal framework, the Indian Constitution provides for a good deal of centralisation. The Central Government has a large sphere of action and thus plays a more dominant role than the States. There is a long Concurrent List containing subjects of common interest to both the Centre and the States. The emergency provisions provide a simple way of transforming the normal federal fabric into an almost unitary system so as to meet national emergencies effectively.[34]

In certain situations, Parliament becomes competent to legislate even in the exclusive State field, and the process of amending the Constitution is not very rigid. India's Federalism is thus a flexible mechanism. The Constitution devises several structural techniques to promote intergovernmental co-operation and thus India furnishes a notable example of co-operative federalism.

India is a dual polity but has only a single citizenship, *viz*., the Indian citizenship, and there is no separate State citizenship.[35] This is in contrast to the American pattern of dual citizenship—the citizenship of the U.S.A and that of each State. This creates the problem that a State may, in certain cases, discriminate in favour of its own citizens in some matters, such as, the right to hold a public office, to vote, to obtain employment, or to secure licences for practising such professions as law or medicine in the State. The concept of one citizenship in India seeks to avoid some of these difficulties. By and large, an Indian enjoys practically the same political and civil rights of citizenship throughout the country no matter in which State he resides.

While each State of the U.S.A is free to draft its own Constitution covering matters within its competence, it is not so in India where the Constitution is a single frame which applies to the Centre as well as the States, from which neither can get out and within which each must work. India has achieved, and seeks to maintain, uniformity in basic civil and criminal laws. In other federations, duality of government produces a diversity of laws. This diversity may be alright up to a point as being an attempt to accommodate the laws to local needs and circum-

---

33. *Hinsa Virodhak Sangh v. Mirzapur Moti Juresh Jamat,* (2008) 5 SCC 33 : AIR 2008 SC 1892.

34. "All federal systems including the American are placed in a tight mould of federalism. No matter what the circumstances, it cannot change its form and shape. It can never be unitary. On the other hand, the (Indian) Constitution can be both unitary as well as federal according to the requirements of time and circumstances. In normal times, it is framed to work as a federal system. But in times of war it is so designed as to make it work as though it was a unitary system".
AMBEDKAR, VII *CAD* 34-35.

35. On Citizenship, see, *infra,* Ch. XVIII.

stances. But then, beyond a certain point, it may cause confusion to the people. It may also retard movement of people from one place to another because something which is lawful in one State may be regarded as unlawful in another State. Such a situation has been largely avoided in India. Before 1935, India was governed as a unitary state, and a uniform system of laws had been established in many areas like civil procedure, criminal procedure, crimes, evidence, transfer of property, marriage, divorce, inheritance.[36] The Constitution places these subjects in the Concurrent List so that uniformity may be preserved in these laws which are at the basis of civil and corporate life without impairing the federal system.

Under the impact of wars, international crises, scientific and technological developments, and the emergence of the political philosophy of social welfare state, the whole concept of federalism has been undergoing a change; centralising tendencies have become manifest, and strong national governments have emerged in practically every federation. Taking note of these developments, and keeping in view the practical needs of the country, the Constitution-makers designed for India a federal structure, not with a view to its conformity with some static or theoretical pattern, but to subserve the needs of a vast and diverse country like India.

The Indian Constitution-makers were swayed not by any theoretical or *a priori,* but by pragmatic, considerations in designing federalism. The Constitution initiates a few new trends in the area of federalism. The scholars have characterised the Constitution in various ways, *e.g.*, *quasi*-federal, unitary with federal features, federal with unitary features, centralised federation, etc. The fact, however, remains that though the Centre in India is strong, and utmost intergovernmental co-operation is sought to be promoted within the Constitutional frame-work, yet the States are not agents of the Centre; they exist under the Constitution and not at the sufferance of the Centre; they enjoy large amount of autonomy in normal times; their powers are derived from the Constitution and not from the Central laws; and the federal portion of the Constitution can be amended not unilaterally by the Centre alone but only with the co-operation of the Centre and the States.[37] These aspects constitute the elements and essence of federalism and these are all present in the Indian Federation. Federalism has been declared to be an essential feature of the Constitution and a part of its basic structure.[38]

F. FUNDAMENTAL LAW

The Constitution of India being written constitutes the fundamental law of the land. This has several significant implications. It is under this fundamental law that all laws are made and executed, all governmental authorities act and the validity of their functioning adjudged. No legislature can make a law, and no governmental agency can act, contrary to the Constitution. No act, executive, legislative, judicial or *quasi*-judicial, of any administrative agency can stand if contrary to the Constitution. The Constitution thus conditions the whole governmental process in the country. The judiciary is obligated to see that the provisions

---

36. For a discussion on the process of development of laws in India see, JAIN, *OUTLINES OF INDIAN LEGAL HISTORY*, XXIV-XXVIII (1990).

37. On the Constitution Amendment Process, see, *infra,* Ch. XLI.

38. See, Ch. XLI, *infra.*

of the Constitution are not violated by any governmental organ. This function of the judiciary entitles it to be called as the 'guardian' of the Constitution and it can declare an Act of a legislature or an administrative action contrary to the Constitution as invalid.[39] A Constitutional right cannot be thwarted by any concession of counsel.[40]

Since Britain has no written Constitution, courts there interpret the law but not the Constitution. The Indian courts, on the other hand, are also entrusted with the task of rendering an authoritative interpretation of the Constitution, and because of this arbitral function, they assume the character of vital instruments of government and policy-making.[41] Further, the Constitution is amendable not by ordinary legislative process, but by a special and elaborate procedure and, therefore, the constituent process differs from the ordinary legislative process. The Indian Constitution can, therefore, be characterised as rigid as distinguished from the British Constitution which is of the flexible type as it can be amended by the ordinary legislative process.[42]

Though rigid, the Indian Constitution contains within itself elements of growth, dynamism, expansion and flexibility. It does not seek to impose on the country any particular economic philosophy or social order. It establishes a democratic process of government for over 1000 million people and for that reason India is characterised as the biggest democracy in the world. The founding fathers have given to the people of India a Constitutional fabric which is in line with the world's most democratic concepts and which the people can use to organize a social structure according to their genius and needs following the path of rule of law.

---

39. For Judicial Interpretation of the Constitution, see, Ch. XL, *infra.*

40. *Election Commission of India v. St. Mary's School*, (2008) 2 SCC 390 : AIR 2008 SC 655..

41. See, *infra*, Ch. XL. Also see, UPENDRA BAXI, *THE INDIAN SUPREME COURT AND POLITICS* (1980)

42. For Amending Process, of the Constitution, see, *infra*, Ch. XLI.