Meaning of Constitution :-

the basic principles and laws of a nation, state, or social group that determine the powers and duties of the government and guarantee certain rights to the people in it.
And its a written instrument embodying the rules of a political or social organization

A constitution is a statement of the basic principles and laws of a nation, state, or group, such as the U.S. Constitution. Another very common meaning of *constitution* is the physical makeup of a person.

The noun *constitution* is from Latin, from *constitutus* "set up, established" plus the suffix *-ion-* "act, state, or condition." So think of a constitution as how a body (yours, the government's) is set up. If you have a strong constitution, it means you don't get sick very often.

Different Types of Constitution:

A constitution has been defined as a body of rules established to regulate the system of government within a state. The reason for drafting a codified constitution is usually associated with the time in which a particular State is formed or associated with a major change that has taken place at national level. For instance, Italy drew up a new constitution in 1948 and Germany did the same in 1949 following their defeat in Word War II and also to mark the destruction of their previous regimes. The United States drafted a codified constitution upon independence from Britain in 1787, and India drafted a constitution after independence from Britain, in 1950.

In Britain, the constitution remains un codified, and Bogdanor argues that the reasons for this are both historical and conceptual. The former reflects the fact that British history has remained continuous since 1689, and there has not been an obvious break which would have called for drafting a codified constitution. As such, Britain has lacked a "constitutional moment". However, that is not to say that there have not been important historical events, which influenced the way Britain is governed. There have been many such events: The Great Reform Act 1832, the Acts of the Union with Scotland and Ireland in 1707 and 1801 respectively, and the Anglo-Irish Treaty of 1921, to name a few. Conceptually, Bogdanor argues, the reason for not having a codified constitution in Britain is because the basis of the government is the sovereignty of Parliament; this concept seems incompatible with a codified constitution simply because a codified constitution would limit that sovereignty.

1. Codified, Uncodified, Flexible and Inflexible Constitutions

That difference between a codified and uncodified constitution is also reflected on the fact that what is written in the constitutional document becomes a superior law that can only be judged by a Constitutional Court. This brings us to another classification of constitutions as "flexible", such as the British constitution that can be amended with ease, and "inflexible", such as the US constitution, which contains entrenchments that make it very difficult to make constitutional changes. In constitutions of the inflexible type, it is the constitution, not the legislature that is supreme. Arguably, codified constitutions provide mechanisms to effect constitutional changes. However, making those changes is not necessarily easy. In the Canadian Constitution of 1982, the whole of Part V of the constitutional document lays down the procedures for constitutional amendment, and as a consequence, the constitution is criticised for being at a standstill.

2. Monarchical and Republican Constitutions

Continuing the comparison between the British and American constitutions, a further constitutional classification is possible: monarchical and republican. In the former, the monarch is the head of state, although in Britain"s case, the powers of the monarch are limited, and the Queen reigns in accordance with the constitution. The political power lies with the Prime Minister. Accordingly, a constitutional monarchy is a limited monarchy. A republican constitution on the other hand, provides for the election of a President who is the head of state and the head of the government.

Arguably, the modern concept of a constitution has been attributed to the American Constitution of 1787, which includes a Bill of Rights, and also to the French Declaration of Rights of 1789. Both constitutions were created as a consequence of liberation, from colonialism and the monarchy respectively, in order to promote The Republic, and they had behind them violent revolutions. No longer was a constitution a body of law, institutions and customs forming the State, but it contained the concept of republicanism: the people constituting a State.

3. Presidential and Parliamentary Constitutions

By the fact that a republican constitution places the power in the hands of the President, while the British constitution places the power on Parliament, it would be possible to make a further classification of a constitution as "presidential", or "parliamentary". This affects the way the government operates. In the case of the former, the President will be the head of state and the head of the executive branch of the government but not the head of the legislature and not accountable to it. Furthermore, the President is not a member of the House of Representatives or the Senate. By contrast, in a Parliamentary constitution, the head of the executive branch of the government is the Prime Minister, who will also be the head of the executive, and also a member of the legislative branch of the government and accountable to it.

4. Federal and Unitary Constitutions

In a federal system such as the one in the US, it can also be said that the constitution is a "federal" constitution, instead of a "unitary" one. In the former, apart from a central government, there is also government at state level, with legislative competence under the constitutional arrangements. This is the case not just in the US but also in Australia, Canada and South Africa. On the other hand, Britain has a unitary constitution and it is centrally governed. However, this point may now be challenged because due to devolution powers to Scotland, Wales and Northern Ireland, perhaps there is an incipient federal aspect to the British constitution.

5. Political and Legal Constitutions

A further constitutional classification is a "political" and a "legal" constitution. The former is associated with holding to account those who hold political power, because it advocates that the making of laws is the exclusive domain of Parliament, and only when Parliament legislates, does the law become legitimatised.Behind a political constitution such as the British constitution is the concept of "majoritarianism", that is, that an elected majority should make the decisions affecting the voters, rather than leaving those decisions to the courts. In contrast, a legal constitution such as the American one, empowers the courts, in particular the Constitutional Court to establish the limits of government power.

Advocates of a political constitution such as Griffith and Tomkins argue that politics is the best way to exert government control because entrusting government accountability to the judiciary is neither democratic nor effective, due to the fact that judges do not have the democratic legitimacy of an elected government. As such, a political constitution is the living representation of the politics that create it. Perhaps an important difference between a political and a legal constitution is the weight given to the latter. A political constitution is flexible and changeable while a legal constitution, such as the American Constitution, has the status of a civil religion or scripture, the constitutional document is held in high esteem and the Supreme Court has a very high status within the country as the "guardian" of the Constitution.

An example of constitutional zeal is seen in the "Tea Party", which advocates carrying a copy of the constitution at all times. Furthermore, literal constitutional interpretation by the Supreme Court has helped to perpetuate the second amendment which allocates a right "to keep and bear arms", interpreted by the more liberal as applying only to a "well regulated militia" but interpreted by the Supreme Court in *District of Columbia v Heller* as allowing the citizens to keep and bear arms regardless of whether certain states had banned weapons based on public safety.

Arguably, the British political constitution based on the sovereignty of Parliament has changed through the enactment of the European Communities Act 1972 (ECA) which incorporated the European Union (EU) Treaties into the British constitution, allowing also for the primacy of EU law. A further constitutional change was the incorporation of the European Convention on Human Rights into national law by the enactment of the Human Rights Act 1998 (HRA), in order to protect fundamental rights which were not considered to be protected by common law in a sufficient manner or to have proper judicial articulation.

Critics may argue that this is a sign that the British political constitution is beginning to show tendencies towards becoming a legal constitution, and that both the ECA and the HRA have created entrenchments. However, it could also be argued that this is merely the effect of Britain being part of a global economy, and that because it remains un codified, the British constitution remains flexible, and able to change with the times.

Conclusion

In conclusion, whether a constitution is codified or un codified, flexible or inflexible, presidential or monarchical, republican or parliamentary, political or legal, the one thing they have in common is that all constitutions are unique. Par worth states, quoting Finer, that the reason for this uniqueness is that all constitutions contain autobiographical elements, and they are therefore idiosyncratic. Furthermore, they are based on different historical contexts that have generated different preoccupations, and therefore different priorities.

Despite that, it can be argued that there is a general level that should be upheld in every constitution regardless of how it is classified: a democratic basis, protection against the abuse of power, promotion of the separation of powers, implementation of the rule of law and a proper system of checks and balances to affect government control. Constitutional maintenance should occur through active constitutional surveillance and assessment. In

"Constitutionalism"

Definition of Constitutionalism

As Americans, we hear a lot about the U.S. Constitution. After all, along with the Declaration of Independence, it is a founding document. Maybe some of you have even been to the National Archives in Washington, D.C., to see it. We understand that our government is based on the U.S. Constitution, but what exactly is constitutionalism? Maybe you've heard this term; maybe you haven't.

Constitutionalism is a political philosophy based on the idea that government authority is derived from the people and should be limited by a constitution that clearly expresses what the government can and can't do. It's the idea that the state is not free to do anything it wants, but is bound by laws limited its authority. Constitutionalism has a vibrant history among the English people, and that tradition has been passed on to other nations, most notably to us as Americans. Let's dig deeper and learn more about constitutionalism.

The Origins of Constitutionalism

The roots of constitutionalism go way back. It didn't just spring up out of nowhere, but rather evolved into what it is now. Way back in 1215, King John of England was forced by a group of wealthy nobles to sign a document called the Magna Carta. The **Magna Carta** set certain limits on the king's power. The practical importance of the Magna Carta has been exaggerated over the years, but nevertheless, it did set a precedent for limited government.

Jump ahead to the year 1689. In that year the **English Bill of Rights** was signed by King William III of England. King William III, who had previously been known as William of Orange, came to power in what is called the Glorious Revolution. Basically, the people of England were tired of King James II's pro-Catholic policies and invited William, who was a Protestant, to come invade their country and become their new king. The English Bill of Rights outlined what rights English citizens possessed, and placed limits on the monarch and Parliament. The English Bill of Rights is a foundational constitutional document that helped inspire the American Bill of Rights.

Political theorist John Locke played a huge role in cementing the philosophy of constitutionalism. Locke was an English intellectual who helped develop the concept of **social contract theory**. According to this theory, government itself is a sort of contract between the people and the state, and if the state abuses its power or doesn't hold up its end of the bargain, the people have the right to make the contract null and void. Does this concept sound familiar? Yep, America's Founding Fathers were big fans of Locke, and his ideas provided the philosophical justification for American Revolution.

Constitutionalism has a variety of meanings. Most generally, it is "a complex of ideas, attitudes, and patterns of behavior elaborating the principle that the authority of government derives from and is limited by a body of fundamental law". A political organization is constitutional to the extent that it "contain[s] institutionalized mechanisms of power control for the protection of the interests and liberties of the citizenry, including those that may be in the minority". As described by political scientist and constitutional scholar David Fellman: It may be said that the touchstone of constitutionalism is the concept of limited government under a higher law.

Constitutionalism' means limited government or limitation on government. It is antithesis of arbitrary powers. Constitutionalism recognizes the need for government with powers but at the same time insists that limitation be placed on those powers. The antithesis of constitutionalism is despotism. A government which goes beyond its limits loses its authority and legitimacy. Therefore, to preserve the basic freedoms of the individual, and to maintain his dignity and personality, the Constitution should be permeated with 'Constitutionalism'; it should have some inbuilt restrictions on the powers conferred by it on governmental organs.

Usage of Constitutionalism

Constitutionalism has prescriptive and descriptive uses. Law professor Gerhard Casper captured this aspect of the term. Used descriptively, it refers chiefly to the historical struggle for constitutional recognition of the people's right to 'consent' and certain other rights, freedoms, and privileges.... Used prescriptively ... its meaning incorporates those features of government seen as the essential elements of the ... Constitution."

Descriptiveuse · [Descriptive use]

One example of constitutionalism's descriptive use is law professor Bernard Schwartz's seeks to trace the origins of the U.S. Bill of Rights. While hardly presenting a "straight-line," the account illustrates the historical struggle to recognize and enshrine constitutional rights and principles in a constitutional order.

Prescriptiveuse presp [prescriptive use]

In contrast to describing what constitutions are, a prescriptive approach addresses what a constitution should be. As presented by Canadian philosopher Wil Waluchow, constitutionalism embodies "the idea ... that government can and should be legally limited in its powers, and that its authority depends on its observing these limitations.

History of Constitutionalism

In discussing the history and nature of constitutionalism, a comparison is often drawn between **Thomas Hobbes** and ***John Locke*** who are thought to have defended, respectively, the notion of constitutionally unlimited sovereignty (e.g., Rex) versus that of sovereignty limited by the terms of a social contract containing substantive limitations (e.g., Regina). But an equally good focal point is the English legal theorist **John Austin** who, like Hobbes, thought that the very notion of limited sovereignty is incoherent. For Austin, all law is the command of a sovereign person or body of persons, and so the notion that the sovereign could be limited by law requires a sovereign who is self-binding, who commands him/her/itself. But no one can "command" himself, except in some figurative sense, so the notion of limited sovereignty is, for Austin (and Hobbes), as incoherent as the idea of a square circle. Austin says that sovereignty may lie with the people, or some other person or body whose authority is unlimited. Government bodies - e.g., Parliament or the judiciary - can be limited by constitutional law, but the sovereign - i.e., "the people" - remains unlimited. But if we identify the commanders with "the people", then we have the paradoxical result identified by **H.L.A. Hart** - the commanders are commanding the commanders.

Important Features of Constitutionalism

Entrenchment:

According to most theorists, one of the important features of constitutionalism is that the norms imposing limits upon government power must be in some way be entrenched, either by law or by way of constitutional convention. Entrenchment not only facilitates a degree of stability over time, it is arguably a requirement of the very possibility of constitutionally limited government. Were a government institution entitled, at its pleasure, to change the very terms of its constitutional limitations, we might begin to question whether there would, in reality, be any such limitations.

Writtenness:

Some scholars believe that constitutional rules do not exist unless they are in some way enshrined in a written document. Others argue that constitutions can be unwritten, and cite, as an obvious example of this possibility, the constitution of the United Kingdom. Though the UK has nothing resembling the American Constitution and its Bill of Rights, it nevertheless contains a number of written instruments which arguably form a central element of its constitution. Magna Carta (1215 A.D.) is perhaps the earliest document of the British constitution, while others include The Petition of Right (1628) and the Bill of Rights (1689).

Elements of Constitutionalism

Written constraints in the constitution, however, are not constraining by themselves. Tyrants will not become benevolent rulers simply because the constitution tells them to. In order to guard against violations against the letter and spirit of the constitution, there needs to be a set of institutional arrangements. Louis Henkin defines constitutionalism as constituting the following elements: (1) government according to the constitution; (2) separation of power; (3) sovereignty of the people and democratic government; (4) constitutional review; (5) independent judiciary; (6) limited government subject to a bill of individual rights; (7) controlling the police; (8) civilian control of the military; and (9) no state power, or very limited and strictly circumscribed state power, to suspend the operation of some parts of, or the entire, constitution.

Broadly speaking, Henkin's nine elements of constitutionalism can be divided into two groups, one concerns power construction and power lodging; and the other deals with rights protection. These two groups of institutional arrangements work together to ensure the supremacy of the constitution, the existence of limited yet strong government, and the protection of basic freedom.

Constitutionalism And Democracy

Authoritarian governments are by their very nature unconstitutional. Such governments think of themselves as above the law, and therefore see no necessity for the separation of powers or representative governance. Constitutionalism however, is primarily based on the notion of people's sovereignty, which is to be exercised--in a limited manner--by a representative government. The only consensual and representative form of governance in existence today, is democratic government. In this way, there is a very important and basic link between democracy and constitutionalism. Just as mere constitutions do not make countries constitutional, political parties and elections do not make governments democratic. Genuine democracies rest on the sovereignty of the

people, not the rulers. Elected representatives are to exercise authority on behalf of the people, based on the will of the people. Without genuine democracy, there can be no constitutionalism.

Constitutionalism And Rule of Law

Rule of law refers to the supremacy of law: that society is governed by law and this law applies equally to all persons, including government and state officials. Following basic principles of constitutionalism, common institutional provisions used to maintain the rule of law include the separation of powers, judicial review, the prohibition of retroactive legislation and habeas corpus. Genuine constitutionalism therefore provides a minimal guarantee of the justice of both the content and the form of law. On the other hand, constitutionalism is safeguarded by the rule of law. Only when the supremacy of the rule of law is established, can supremacy of the constitution exist. Constitutionalism additionally requires effective laws and their enforcement to provide structure to its framework.

Constitutionalism And Constitutional Convention

The idea of constitutionalism is usually thought to require legal limitation on government power and authority. But according to most constitutional scholars, there is more to a constitution than constitutional law. But there is a long-standing tradition of conceiving of constitutions as containing much more than constitutional law. Dicey is famous for proposing that, in addition to constitutional law, the British constitutional system contains a number of "constitutional conventions" which effectively limit government in the absence of legal limitation. These are, in effect, social rules arising within the practices of the political community and which impose important, but non-legal, limits on government powers.

Constitutionalism In Different Countries

UnitedStates

American constitutionalism has been defined as a complex of ideas, attitudes, and patterns of behavior elaborating the principle that the authority of government derives from the people, and is limited by a body of fundamental law. These ideas, attitudes and patterns of behavior, according to one analyst, derive from "a dynamic political and historical process rather than from a static body of thought laid down in the eighteenth century". In U.S. history, constitutionalism—in both its descriptive and prescriptive sense—has traditionally focused on the federal Constitution. Indeed, a routine assumption of many scholars has been that understanding "American constitutionalism" necessarily entails the thought that went into the drafting of the federal Constitution and the American experience with that constitution since its ratification in 1789. There is a rich tradition of state constitutionalism that offers broader insight into constitutionalism in the United States.

UnitedKingdom

The United Kingdom is perhaps the best instance of constitutionalism in a country that has an un codified constitution. A variety of developments in seventeenth-century England, including "the protracted struggle for power between king and Parliament was accompanied by an efflorescence of political ideas in which the concept of countervailing powers was clearly defined," led to a well-developed polity with multiple governmental and private institutions that counter the power of the state.

Polish–Lithuanian Commonwealth

From the mid-sixteenth to the late eighteenth century, the Polish–Lithuanian Commonwealth utilized the liberum veto, a form of unanimity voting rule, in its parliamentary deliberations. The "principle of liberum veto played an important role in [the] emergence of the unique Polish form of constitutionalism." This constraint on the powers of the monarch were significant in making the "[r]ule of law, religious tolerance and limited constitutional government ... the norm in Poland in times when the rest of Europe was being devastated by religious hatred and despotism."

Constitutionalism In India

India is a democratic country with a written Constitution. Rule of Law is the basis for governance of the country and all the administrative structures are expected to follow it in both letter and spirit. It is expected that Constitutionalism is a natural corollary to governance in India. But the experience with the process of governance in India in the last six decades is a mixed one. On the one hand, we have excellent administrative structures put in place to oversee even the minutest of details related to welfare maximization but crucially on the other it has only resulted in excessive bureaucratization and eventual alienation of the rulers from the ruled. Since independence, those regions which were backward remained the same, the gap between the rich and poor has widened, people at the bottom level of the pyramid remained at the periphery of developmental process, bureaucracy retained colonial characters and overall development remained much below the expectations of the people.

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

In **I.R. Coelho (Dead) By LRs. vs. State of Tamil Nadu and Ors.** view taken by the Supreme Court - The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centers of decision making. The protection of fundamental constitutional rights through the common law is main feature of common law constitutionalism.

In **Rameshwar Prasad and Ors. Vs. Union of India (UOI) and Anr.** "The constitutionalism or constitutional system of Government abhors absolutism - it is premised on the Rule of Law in which subjective satisfaction is substituted by objectivity provided by the provisions of the Constitution itself." Constitutionalism is about limits and aspirations.

As observed by **Chandrachud, CJ,** in **Minerva Mills Ltd.** – "The Constitution is a precious heritage and, therefore, you cannot destroy its identity'"

On one hand, our judiciary elicit such intellectual responses that "Faith in the judiciary is of prime importance. Ours is a free nation. Among such people respect for law and belief in its constitutional interpretation by courts require an extraordinary degree of tolerance and cooperation for the value of democracy and survival of constitutionalism" said in **Indra Sawhney and Ors. vs.Union of India (UOI) and Ors.**

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Preamble

Preamble: meaning, scope, importance

The Preamble to a Constitution embodies the fundamental values and the philosophy, on which the Constitution is based, and the aims and objectives, which the founding fathers of the Constitution enjoined the polity to strive to achieve. The importance and utility of the Preamble has been pointed out in several decisions of the Supreme Court of India.

Though, by itself, it is not enforceable in Court of Law , the Preamble to a written Constitution states the objects which the constitution seeks to establish and promote and also aids the legal interpretation of the Constitution where the language is found to be ambiguous .**The Preamble to our Constitution serves, two purposes:**

(a) It indicates the source from which the constitution derives its authority:

(b) It also states the objects which the constitution seeks to establish and promote.

The words- We, the people of India adopt, enact and give to ourselves this Constitution?, thus, declare the ultimate sovereignty of the people of India and that the constitution rests on their authority . Sovereignty means the independent authority of a state. It means that it has the power to legislate on any subject; and that is not subject to the control of any other state or external power. The Preamble declares, therefore, in unequivocal terms that the source of all authority under the Constitution is the people of India and that there is no subordination to any external authority. It means a government by the people and for the people.

The fraternity which is professed in the Preamble is not confined within the bounds of the national territory; it is ready to overflow them to reach the loftier ideal of universal brotherhood; which can hardly be better expressed than in the memorable words of **Pandit Nehru:**

"the only possible, real object that we, in common with other nations, can have is the object of co-operating in building up some kind of a world structure, call it one world, call it what you like."

That this Democratic Republic stands for the good of all the people is embodied in the concept of a Welfare State that inspires the Directive Principles of State policy. The economic justice assured by the Preamble can hardly achieved if the democracy envisaged by the Constitution were confined to a political democracy. **Dr. Radhakrishnan has put it-**

"Poor people who wander about, find no work, no wages and starve, whose lives are a Continual round of sore affliction and pinching poverty, cannot be proud of the constitution or its law."

This shows that the Indian Constitution provides not only political but also social democracy, as explained by **Dr. Ambedkar** in his speech in 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 that recognizes liberty, equality and fraternity, which 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."

Meaning and Concept

The term 'Preamble' means the introduction to a statute. It is the introductory part of the constitution. A preamble may also be used to introduce a particular section or group of sections.[According to Chambers Twentieth Century Dictionary, a preamble means preface, introduction, especially that of an act of Parliament, giving its reasons and purpose – a prelude.

Black's Law Dictionary states that the preamble means *a clause at the beginning or a statute explanatory of the reasons for its enactment and the objectives sought to be accomplished.* Generally, a Preamble is a declaration made by the legislature of the reasons for the passage of the statute and is helpful in the interpretation of any ambiguities within the statute to which it is prefixed.

The Constitution opens with a Preamble. Initially, the Preamble was drafted by Sh. **B. N. Rau** in his memorandum of May 30, 1947 and was later reproduced in the Draft of October 7, 1947. In the context of the deliberations by the Constituent Assembly, the Preamble was reformulated. The Committee claimed that they had tried to embody in it the spirit, and as far as possible, the language of the Objectives Resolution.[vi] Constitutions all over the world generally have a preamble. The form, content and length of the preamble differ from constitution to constitution. Irrespective of these differences the preamble generally sets the ideas and goals which the makers of the constitution intend to achieve through that constitution.

- Object, Purpose and Scope of the Preamble

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. The preamble to an Act sets out the main objectives which the legislation is intended to achieve.

The proper function of preamble is to explain and recite certain facts which are necessary to be explained and recited, before the enactment contained in an act of Parliament could be understood. A preamble may be used for other reasons, such as, to limit the scope of certain expressions or to explain facts or introduce definitions.

It usually states, or professes to state, the general object and meaning of the legislature in passing the measure. Hence it may be legitimately consulted for the purpose of solving an ambiguity or fixing the connotation of words which may possibly have more meaning, or determining of the Act, whenever the enacting part in any of these respect is prone to doubt. In a nutshell, a court may look into the object and policy of the Act as recited in the Preamble when a doubt arises in its mind as to whether the narrower or the more liberal interpretation ought to be placed on the language which is capable of bearing both meanings.

In ***A.K Gopalan*** **v.** ***State of Madra***, it was contended that the preamble to our constitution which seeks to give India a 'democratic' constitution should be the guiding start in its interpretation and hence any law made under Article 21 should be held as void if it offends the principles of natural justice, for otherwise the so-called "fundamental" rights to life and personal liberty would have no protection. The majority on the bench of the Supreme Court rejected this contention holding that 'law' in article 21 refers to positive or state made law and not natural justice, and that this meaning of the language of article 21 could not be modified with reference to the preamble.

In ***Berubari Union case the*** Supreme Court held that the preamble had never been regarded as the source of any substantive power conferred on the government or on any of its departments. The court further explained that "***what is true about the powers is equally true about the prohibitions and limitations***". It, therefore, observed that the preamble had limited application. The court laid down that the preamble would not be resorted to if the language of the enactment contained in the constitution was clear. However, "if the terms used in any of the articles in the constitution are ambiguous or capable of two meanings, in interpreting them some assistance may be sought in the objectives enshrined in the Preamble.

In ***State of Rajasthan*** v. ***Basant Nahata*** it was held that a preamble with an ordinary Statute is to be resorted only when the language is itself capable of more than one meaning and not when something is not capable of being given a precise meaning as in case of public policy.

In ***Kesavananda Bharati*** case the Supreme Court attached much importance to the preamble. In this case, the main question before the Supreme Court related to the scope of amending power of the Union Parliament under Article 368 of the Constitution of India. The Supreme Court traced the history of the drafting and ultimate adoption of the Preamble. **Chief Justice Sikri** observed,

"No authority has been referred before us to establish the propositions that what is true about the powers is equally true about the prohibitions and limitations. Even from the Preamble limitations have been derived in some cases. It seems to me that the preamble of 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."

A majority of the full bench held that the objectives specified in the preamble contain the basic structure of our constitution, which cannot be amended in exercise of the power under **Article 368** of the constitution. It was further held that being a part of the constitution, the preamble was not outside the reach of the amending power of the Parliament under article 368. It was in the exercise of this amending power that the constitution **(42nd amendment) Act 1976** amended the preamble inserting therein, the terms socialist, secular and integrity.

In the 1995 case of ***Union Government*** v. ***LIC of India*** also the Supreme Court has once again held that the Preamble is an integral part of the Constitution.

The Preamble serves the following purposes:

a) It indicates the source from which the Constitution comes, viz., the people of India.

b) It contains the enacting clause which brings into force, the Constitution which makes it an act of the people, for the people and by the people.

c) It declares the rights and freedoms which the people of India intended to provide to all citizens and the basic type of government and polity which was to be established.

Preamble: Whether a part of the Constitution?

It has been highly a matter of arguments and discussions in past that whether Preamble should be treated as a part of constitution or not. The vexed question whether the Preamble is a part of the Constitution or not was dealt with in two leading cases on the subject:

1. **Beruberi Case**

2. **Kesavananda Bharati case**

Berubari case was the Presidential Reference "under Article **143(1)** of the Constitution of India on the implementation of the Indo-Pakistan Agreement Relating to Beruberi Union and Exchange of Enclaves which came up for consideration by a bench consisting of eight judges headed by the Chief Justice B.P. Singh. Justice Gajendragadkar delivered the unanimous opinion of the Court. The court ruled out that the Preamble to the Constitution, containing the declaration made by the people of India in exercise of their sovereign will, no doubt it is "a key to open the mind of the makers" which may show the general purposes for which they made the several provisions in the Constitution but nevertheless the Preamble is not a part of the Constitution.

Kesavananda Bharati case has created history. For the first time, a bench of **13 judges** assembled and sat in its original jurisdiction hearing the writ petition. Thirteen judges placed on record 11 separate opinions. To the extent necessary for the purpose of the Preamble, it can be safely concluded that the majority in **Kesavananda Bharati** case leans in favor of holding,

(i) That the Preamble to the Constitution of India is a part of the Constitution;

(ii) That the Preamble is not a source of power or a source of limitations or prohibitions;

(iii) The Preamble has a significant role to play in the interpretation of statutes and also in the interpretation of provisions of the Constitution.

Kesavanada Bharati case is a milestone and also a turning point in the constitutional history of India. **D.G. Palekar, J.** held that the Preamble is a part of the Constitution and, therefore, is amendable under Article 368. It can be concluded that Preamble is introductory part of our Constitution. Preamble is based on the Objective Resolution of Nehru. Preamble tells about the nature of state and objects that India has to achieve. There was a controversial issue whether Preamble was part of Indian Constitution there were number of judicial interpretation but finally **Kesavanada Bharati** case it was held that the Preamble is a part of the Constitution.

Amendment to the Preamble

The issue that whether the preamble to the constitution of India can be amended or not was raised before the Supreme Court in the famous case of *Kesavananda Bharati* v. *State of Kerala, 1973.* The Supreme Court has held that Preamble is the part of the constitution and it can be amended but, Parliament cannot amend the basic features of the preamble. The court observed, "The edifice of our constitution is based upon the basic element in the Preamble. If any of these elements are removed the structure will not survive and it will not be the same constitution and will not be able to maintain its identity."

The preamble to the Indian constitution was amended by the **42nd** Amendment Act, 1976 whereby the words Socialist, Secular and Integrity were added to the preamble by the 42nd amendment Act, 1976, to ensure the economic justice and elimination of inequality in income and standard of life. Secularism implies equality of all religions and religious tolerance and does not identity any state religion. The word integrity ensures one of the major aims and objectives of the preamble ensuring the fraternity and unity of the state.

The Supreme Court in ***Union of India*** **v.** ***Madangopal***, referred to these words in the preamble while recognizing the power of the Indian legislatures, to enact laws with retrospective operation beyond the commencement of the constitution itself. The court observed that "our constitution as appears from the preamble derives its authority from the people of India".

In ***Excel Wear*** **v.** ***Union of India***, the Supreme Court observed that "the addition of the word socialist might enable the courts to lean more in favour of nationalization and state ownership of the industry. But, so long as private ownership of industries is recognized and governs an overwhelming large proportion of our economic structure, the principle of socialism and social justice cannot be pushed to such an extent so as to ignore completely or to a very large extent, the interest of another section of the public, namely, the private owners of the undertaking."

In ***D.S Nakara*** **v.** ***Union of India*** the court observed that, "the basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave." The principle aim of socialist State, the Supreme Court held, was to eliminate inequality in income and status and standard of life.

In ***Air India Statutory Corporation*** **v.** ***United Labour Union***, the Supreme Court elaborated the concept of "socialism" and stated that the word socialism was expressly brought in the constitution to establish an egalitarian social order through rule of law as its basic structure.

In ***Samatha*** **v.** ***State of Andhra Pradesh*** the Supreme Court observed that the word Socialist used in the Preamble must be read from the goals, Article 14,15,16,17,21,23,38,39,46 and all other cognate Articles sought to establish, i.e. to reduce inequalities in income and status and to provide equality of opportunities and facilities.

The Supreme Court in **St. Xavier's College v. State of Gujarat**, explained "secularism is neither anti-God nor pro-God, it treats alike the devout, the agnostic and the atheist. It eliminates God from the matters of the state and ensures that no one shall be discriminated against on the grounds of religion". That, every person is free to mould or regulate his relations with his God in any manner. He is free to go to God or to heaven in his own ways. And, that worshipping God is left to be dictated by his own conscience.

n **S.R Bommai v. Union of India**, a nine judge bench of the apex court observed that the concept of "Secularism" was very much embedded in our constitutional philosophy. What was implicit earlier had been made explicit by the constitution (42ndamendment) in 1976.

In **Aruna Roy v. Union of India**, the Supreme Court has said that secularism has a positive meaning that is developing, understanding and respect towards different religions. Recently in **I.R Coelho v. State of Tamil Nadu** it has been held that secularism is a matter of conclusion to be drawn from various Articles conferring Fundamental Rights. "If the secular character is not to be found in Part III", the Court ruled, "*it cannot be found anywhere else in the Constitution, because every fundamental right in Part III stands either for a principle or a matter of detail*".

In ***Valsamma Paul* v. *Cochin University***, the apex court emphasised that inter-caste marriages and adoption were two important social institutions through which "secularism" would find its fruitful and solid base for an egalitarian social order under the Constitution of India. "Secularism," the court said, was a bridge between religions in a multi-religious society to cross over the barriers of their diversity. In the positive sense it was the cornerstone of an egalitarian and forward looking society which our constitution endeavored to establish.

The Supreme Court in **Mohan Lal v. District Magistrate, Rai Bareilly** observed: "Democracy is a concept, a political philosophy, an ideal practised by many nations culturally advanced and politically mature by resorting to governance by representatives of the people elected directly or indirectly". The basic principle of democracy in a society governed by the rule of Law is not only to respect the will of the majority, but also to prevent dictatorship of the majority".

In ***Air India Statutory Corporation v. United labour Union***, the Supreme Court observed that the aim of social justice was to attain substantial degree of social, economic and political equality which was the legitimate expectation and constitutional goal. It was held that social justice was dynamic device to mitigate the sufferings of the poor, weak, dalits, tribals and deprived sections of the society and to elevate them to the level of equality, to live a life with dignity of person.

It was held in ***Meyer v. Nebraska***, "Liberty denotes not merely freedom from bodily restraint but also the right of the individual to contract, engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

The Preamble declares four aims in the governance of India-

- **Justice- social, economic and political;**
- **Liberty of thoughts, expression, belief, faith and worship;**
- **Equality of status and opportunity;**
- **And Fraternity assuring the dignity of the individual and the unity and integrity of the nation.**

- **Preamble as Projector of 'Desired Established State'**

Meaning of Citizenship

The population of State is derived into two classes, Citizens and Aliens. A citizen of a state is a person who enjoys full of Civil and political rights. Citizens are different from aliens who do not enjoy all these rights. Citizenship carries with it certain advantages conferred by the constitution. Aliens do not enjoy these advantages.

Constitutional Provisions:

Part- II of the Constitution simply describes classes of persons who would be deemed to be the citizens of India at the commencement of the Constitution, the 26th January, 1950, and leaves the entire Law of the citizenship to be regulated by law made by Parliament. Article 11 expressly confers power on Parliament to make law to provide for such matters. In exercise of its power the Parliament has elected the Indian citizenship Act, 1955. This Act provides for the acquisition and termination of citizenship subsequent to commencement of the constitution. A citizenship is a legal status acquired by a person. Though India is a federation having two levels of government there is only one citizenship. Example - Indian citizenship and no separate State citizenship.

Classification of Citizenship:

1. Citizens by domicile

2 Citizens by migration

3. Citizens by registration

1. Citizens by domicile (Article 5)

Domicile in India is considered an essential requirement for acquiring the status of Indian citizenship. But the term 'domicile' is not defined in the constitution anywhere. The domicile of a person is in that country in which he either has or is deemed by law to have his permanent house. There is distinction between domicile and residence. Residence alone in a place is not sufficient to constitute the domicile. It must be accompanied by the intention to make it his permanent home.
Every person having domicile in India at the commencement of the constitution and fulfilling the following condition is the citizen of India.

a. He was born in India

b. Either his parents was born in India.

c. Who has been ordinarily resident in India for not less than 5 years immediately preceding the commencement of the Constitution.

2. Citizens by Migration (Article 6)

At the time of independence of India there was large scale Migration of people from Pakistan to India. And special provisions are made for them under Article 6.

Under Article 6 an immigrant from Pakistan becomes a Citizen of India if:

- He was born in India, or
- Either of his parents was born in India. Or
- Either his grandparents was born in India (as it was prior to Independence) and in addition, fulfillment one of the following two conditions
  - In case of migrated to India before 19th July, 1948, he had been ordinarily resident in India since the date of migration, or
  - In case of he migrated on or after 19th July 1948, he had been registered as a citizen of India. A person could be registered only if he has been resident in India for at least 6 months preceding the date of his application for registration.

➢ **Citizen by registration - (Article 8)**

A Parson –

- who was born in India
- either of whose parents was born in India, or
- any of whose grandparents was born in India before independence, but who is ordinarily deciding in any country outside India and Pakistan may register himself as a citizen of India with the diplomatic or consular representative of India in the country of Residence. It was choice to those who want to acquire Indian citizenship.

➢ **Citizenship and under the citizenship Act 1955 –**

Parliament, in exercise of the powers given to it under article 11 of the Constitution, has passed the Citizenship Act, 1955, making provisions for acquisition and termination of citizenship after the commencement of the Constitution. The Act provides for the acquisition of Indian citizenship after the commencement of the Constitution in 5 ways. Examples Birth, Descent, registration, naturalization and incorporation of territory.

A) Citizenship by Birth –

A person born in India on or after 26 January 1950, is a citizen of India by birth except when

-

a) His father possesses diplomatic immunity and is not a citizen Indian citizen, or
b) His father is an enemy alien and he is born at the place under any occupation.

B) Citizenship by Descent –

A person born outside India on after 26 January 1951 is citizen of India by descent, if at the time of his birth his father is an Indian citizen- but

a) When his birth is registered at an Indian consulate, or

b) His father is at the time of his birth on service under Government of India.

Similarly, any person born outside the Territory of undivided India who was or deemed to be a citizen of India at the commencement of the Constitution is also considered to be a citizen of India by Descent only.

C) Citizenship by registration –

A person, who has not acquired citizenship under the provisions of citizenship Act, 1955, can acquire it by registration on application made by him subject to the conditions and restrictions that may be prescribed by appropriate authority. A person who wants to acquire citizenship by registration must fulfill any of the following conditions -

1) A person of Indian Origin, who ordinarily resides in India and have been so resident for 6 months immediately before making an application for registration.

2) A person of Indian Origin who ordinarily a resident of any country or place outside undivided India.

3) Women who are have been married to citizen of India.

4) Minor Children of Persons Indian citizens.

5) Persons of full age and capacity who are citizen of U.S.A, Canada, Australia, New Zealand, South Africa , Pakistan, Ceylon, Rhodesia and Ireland. These person required to take oath of allegiance before registration.

D) Citizenship by naturalization -

Any person can acquire Indian citizenship by naturalization provided he couples following conditions and who are full age and capacity and not being to certain specified countries.

a) He should not be a Citizen of a country in which Indian citizen are prevented by law.

b) He must have renounced his earlier citizenship and communicated same to the central government.

c) He should be residing in India or should be in service of Government of India for the full period of 12 months before making application.

d) During the period of 7 years immediately preceding the above 12 month he should have resided in India

or should have in service of Government of India for the period of 4 years in the aggregate.

e) He should be a good character.

f) He should intend to reside in India.

E) Citizenship by incorporation of territory -

If any new territory becomes a part of India, the Government of India shall specify the persons of the territory to be citizens of India.

Conclusion -

Article 5 to 11 of the Indian Constitution lay down as to who are the citizens of India at the commencement of the Constitution as well as citizenship by citizenship Act, 1955. No person can be citizen of India if he has voluntarily acquired the Citizenship of foreign country.

Termination of citizenship

(1) Any citizen of India who by naturalization, registration or otherwise voluntarily acquires, or has at any time between the 26th January, 1950 and the commencement of this Act voluntarily acquired, the citizenship of another country shall, upon such acquisition or, as the case may be, such commencement, cease to be a citizen of India:

PROVIDED that nothing in this sub-section shall apply to a citizen of India who, during any war in which India may be engaged, voluntarily acquires the citizenship of another country, until the Central Government otherwise directs.

(2) If any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence, as may be prescribed in this behalf.

Loss of Citizenship

1. **By Renunciation** Declaration by the person himself.
2. **By Termination** On acquiring other citizenship, his/her Indian citizenship terminates automatically.
3. **By Deprivation** In the case of fraud acquisition of nationality or any disloyalty to constitution or country or any person citizen by registration or naturalization who imprisoned in any country for two years. Or citizen residing outside country for seven years, citizenship will be terminated.

State: Definition under article 12

Meaning of the State

According to Article 12 of the Constitution of India, the term 'State' can be used to denote the union and state governments, the Parliament and state legislatures and all local or other authorities within the territory of India or under the control of the Indian government.

Over the period of time, **the Supreme Court** has explained the ambit of 'State' to include Corporation such as LIC and ONGC since they perform tasks "very close to governmental or sovereign functions." In fact, the term 'State' also accommodates any authority that's created by the Constitution of India and has the power to make laws. It need not perform governmental or sovereign functions.

Understanding the Meaning of 'State' Under Article 12

Executive and legislature of Union and states include union and state governments along with Parliament and State legislatures. The President of India and Governors of states can also be referred as 'State' as they are a part of the executive. The term 'government' also includes any department of government or any institution under its control. The Income Tax Department and the International Institute for Population Sciences could be cited as examples.

Local authorities', as used in the definition, refers to municipalities, Panchayats or similar authorities that have the power to make laws & regulations and also enforce them. The expression 'Other authorities' could refer to any entity that exercises governmental or sovereign functions.

The state includes following points:

1. The Government and Parliament of India, i.e., Executive and Legislature of the Union.
2. The Government and Legislature of each State, i.e., Executive and Legislature of State.
3. All local and other authorities within the territory of India.
4. All local and other authorities under the control of the Government of India.

The term 'State' thus includes executives as well as the legislative organs of the Union and States. It is, therefore, the actions of these bodies that can be challenged before the courts as violating fundamental rights.

1) **Authorities** – According to Webster's Dictionary; "Authority" means a person or body exercising power to command. In the context of Article 12, the word "authority" means the power to make laws, orders, regulations, bye-laws, notification etc. which have the force of law and power to enforce those laws.
2) **Local Authorities** - 'Local authorities' as defined in Section 3 (31) of the General Clause Act refers to authorities like Municipalities, District Boards, Panchayats, Improvement Trust and Mining Settlement Boards. **In Mohammed Yasin v. Town Area Committee, the Supreme Court** held that the bye-laws of a Municipal Committee charging a prescribed fee on the wholesale dealer was an order by a State authority contravened article **19 (1) (g).** these bye-laws I effect and in substance have brought about a

total stoppage of the wholesale dealer's business in the commercial sense. **In Sri Ram v. The Notified Area Committee,** a fee levied under Section 29 of the U.P. Municipalities Act, 1919, was held to be invalid.

3) **Other authorities** - in Article 12 the expression 'other authorities' is used after mentioning a few of them, such as, the Government, Parliament of India, the Government and Legislature of each of the State and all local authorities. **In University of Madras v. Santa Bai, the Madras High Court** held that 'other authorities' could only mean authorities exercising governmental or sovereign functions. It cannot include persons, natural or juristic, such as, a University unless it is 'maintained by the State'.

4) In Article 12 the bodies specifically named are the Government of the Union and the States, the Legislature of the Union and the States and local authorities. There is no common genus running through these named bodies nor can these bodies so placed in one single category on any rational basis.

In Electricity Board, Rajasthan v. Mohan Lal, the Supreme Court held that the expression 'other authorities' is wide enough to include all authorities created by the Constitution or statute on whom powers are conferred by law. It is not necessary that the statutory authority should be engaged in performing governmental or sovereign function.

- **<u>New Judicial Trends On Concept of State Action- Need For Widening The Definition.</u>**

The extended Interpretation of the definition of the term 'State' is limited in its application only to Part III and Part IV and it does not extend to the other provisions of the Constitution, e.g., Article 309, 310, 311, which find a place in Part XIV. Therefore, an employee of a Statutory Corporation can claim the protection of Fundamental Rights but cannot seek the safeguards contained in Article 311 for the civil servants of the State.

The question as to when a body can be said to fall within the scope of the term "State" within the meaning of Article 12 was considered by a Constitution Bench of seven learned Judges of the S.C. **in Pradeep Kumar Biswas v. Indian Institute of Chemical Biology.** Referring to the different stages in the history of the development of the law by Judicial decisions on the subject and affirming the statement of the law made in **Rajasthan S.E.B. v. Mohan Lal,** the majority of five learned judges overruled Sabhajit Tewary v. Union of India, and held that the council of Scientific and Industrial Research, although a registered society, was a State within the meaning of Article 12.

Considering the test formulating in **Ajay Hasia v. Khalid Mujib, AIR 1981 SC 487** , and holding that the tests so laid down, were not a rigid set of principles, so that if a body fell within anyone of them, it must, ex hypothesis, be considered to be a State within the meaning of Article 12, the majority ruled that the question in each case would be – "whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of Government. Such control must be particular to the body in question and must be pervasive.

Both statutory non-statutory bodies can be considered as a 'State' provided they get financial resources from the government and "have deep pervasive control of government and with functional characters." ONGC, Delhi Transport Corporation, IDBI, and Electricity Boards are referred as a 'State'.

Whether Judiciary comes under the definition of State?

In America it is well-settled that the judiciary is within the prohibition of the 14th Amendment. The judiciary, it is said, though not expressly mentioned in Article 12 it should be included within the expression 'other authorities' since courts are set up by statute and exercise power conferred by law. it is suggested that discrimination may be brought about....even by judiciary and the inhibition of Article 14 extends to all actions of the State denying equal protection of the laws whether it be the action of any one of the three limbs of the State.

Although there is no specific mention of judiciary in Article 12, legal experts are of the opinion that the judiciary should be included in the definition of State. According to one school of thought, the Supreme Court has the power to make rules (to regulate practice & procedure of courts), appoint its staff and decide its service conditions (as mentioned in Article 147 and 146 of the Indian Constitution). Hence, it performs the role of a State.

In one of its latest observations, the apex court has held that judiciary can be considered as a 'State' as far as its rule-making power is concerned, but it would not be considered so when it exercises its judicial powers.

The question whether the judiciary was included within the definition of the 'State' in Article 12 arose for consideration of **the Supreme Court in Naresh v. State of Maharashtra**. It was held that even if a Court is the State a writ under Article 32 cannot be issued to a High Court of competent jurisdiction against its judicial orders, because such orders cannot be said to violate the fundamental rights. **Mr. H.M. Seervai** is of opinion that the judiciary should be included in the definition of 'the State' and a judge acting as a judge is subject to the writ-jurisdiction of the Supreme Court.

Law

State is sovereign. Sovereignty is its exclusive and most important element. It is the supreme power of the state over all its people and territories. The State exercises its sovereign power through its laws. The Government of the State is basically machinery for making and enforcing laws.

Meaning and Definition of Law

The word 'Law' has been derived from the Teutonic word 'Lag, which means 'definite'. On this basis Law can be defined as a definite rule of conduct and human relations. It also means a uniform rule of conduct which is applicable equally to all the people of the State. Law prescribes and regulates general conditions of human activity in the state.

According to **Austin**: - "Law is the command of the sovereign." "It is the command of the superior to an inferior and force is the sanction behind Law."

Holland said that "A Law is a general rule of external behavior enforced by a sovereign political authority."

In simple words, Law is a definite rule of behavior which is backed by the sovereign power of the State. It is a general rule of human conduct in society which is made and enforced by the government' Each Law is a binding and authoritative rule or value or decision. Its every violation is punished by the state.

Art. 13(3) (a) defines 'law' very widely by an inclusive definition. It does not expressly include a law enacted by the legislature, for such an enactment is obviously law.

The definition of law includes:

(i) an Ordinance, because it is made in the exercise of the legislative powers of the executive;

(ii) an order, bye-law, rule, regulation and notification having the force of law because ordinarily they fall in the category of subordinate delegated legislation and are not enacted by the legislature;

(iii) Custom or usage having the force of law because they are not enacted law at all. This extended definition appears to have been given to 'law' in order to forestall a possible contention that law can only mean law enacted by the legislature.

DOCTRINE OF ECLIPSE

The Doctrine of Eclipse is based on the Principle that a law which violates Fundamental Rights is not nullity or void ab initio but becomes only unenforceable. It is overshadowed by the Fundamental Rights and remains dormant, but it is not dead.

According to Article 13(1) of the Indian Constitution, all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part,

shall, to the extent of such inconsistency, be void. Such laws are not dead they come alive if the restrictions posed by the fundamental rights of the constitution are removed. Also, such eclipsed laws are operative for cases that arose before the commencement of the Constitution. Hence, the Current Fundamental Rights eclipse the Contravening part of those laws, rendering that part of the law as dormant.

Bhikaji Narain Vs State of Madhya Pradesh (AIR 1955 SC 781 In this case provision of C.P. and Berar Motor vehicles Amendment Act, 1947 authorized the State Government to make up the entire motor transport business in the province to the exclusion of motor transport operators. This provision, though valid when enacted, became void on the be coming into force of the Constitution in 1950 as they violated Article 19 (1) (G) of the Constitution. However, 1951, clause (6) of Article 19 was amended by the constitution first Amendment Act, as so to authorize the Government to monopolies any business. The Supreme Court held that "the effect of the amendment was to remove the shadow and to make the impugned Act free from all blemish or infirmity".

It became enforceable against citizens as well as non-citizens after the constitutional impediment was removed. This law was merely Eclipsed for the time being by the fundamental rights. As soon as the eclipse is removed the law begins to operate from the date of such removal.

Deepchand V. State of Uttar Pradesh In this case, the supreme court held that a post-constitutional law made under article 13 (2) which contravenes a fundamental right is nullity from its Inception and a stillborn law. It is void ab initio. The doctrine of eclipse does not apply to post-constitutional laws and therefore, a subsequent Constitutional Amendment cannot revive it. The Doctrine of eclipse applies only to pre-constitutional law and not post-constitutional law.

1. It follows, therefore, that if at any subsequent point of time, the inconsistent provision is amended so as to remove its inconsistency with the fundamental rights, the amended provision cannot be challenged on the ground that the provision has become dead at the commencement of the Constitution and cannot be revived by the amendment. All acts done under the law since the amendment will be valid notwithstanding the fact of inconsistency before the amendment. It is known as the doctrine of eclipse.
2. For the same reason, if the Constitution itself is amended subsequently, so as to remove the repugnancy, the impugned law becomes free from all blemishes from the date when the amendment of the Constitution takes place.

Pre constitutional laws are the laws which were enacted and enforced before the enactment of the Constitution of India, 1950. For example Indian Penal Code, 1860, Societies Registrations Act, 1860, Police Act, 1861 etc. I have mentioned the three major enactments of the British Empire after the revolt of 1857 when through Queen's Proclamation India became part of British Empire and subject to laws enacted by British Parliament.

The Constitution of India vide its article 395 repealed the Indian Independence Act, 1947, the Govt. of India Act 1935 and all other Acts supplementing or amending the Govt. of India Act, 1935, however, it

did not generally repeal all the laws enacted before the commencement of the Constitution, therefore,

- laws like Indian Penal Code, Indian Evidence Act, Police Act, Societies Registrations Act, are still valid law.

The issue of pre and post constitutional arises mostly in cases of dispute of fundamental rights. The general rule is that any law (see Article 12 and 13 for definition of law) shall be void to the extent of its conflict with fundamental rights. This principle was expounded by the Supreme Court and came to be known as Doctrine of Eclipse, wherein the law to the extent of conflict with Fundamental Rights shall be inoperative, akin to eclipse, and shall revive only once the conflict has been cured.

Although a **pre-constitutional law** is saved in terms of Art. 372 of the Constitution challenge to its validity on the touchstone of Arts. 14, 15 and 19 of the Constitution is permissible in law. Validity of a statute may be subject to changes occurring in societal conditions in domestic as well as in international arena with time.

Post-Constitution laws, which are inconsistent, shall be void *ab initio:*

Post Constitutional Laws are the laws which are enacted after the enactment of Constitution of India, 1950. All the acts which came into force after January 26, 1950 are post constitutional laws.

Art. 13(2) provides that any law made by any legislature or other authority after the commencement of the Constitution, which contravenes any of the fundamental rights included in Part III of the Constitution shall, to the extent of the contravention, be void.

This does not mean that the offending law is wiped out from the statute book altogether. It remains in operation as regards to persons who are not entitled to the fundamental rights in question (e.g., a non-citizen in respect of a right guaranteed by Art. 19). (2) Authorize the Courts to interfere with the passing of a bill on the ground that it would, when enacted, be void for contravention of the Constitution. The jurisdiction of the Court arises when the bill is enacted into law.

DOCTRINE OF SEVERABILITY

It is not the whole Act which would be held invalid by being inconsistent with Part III of the Constitution but only such provisions of it which are violative of the fundamental rights, provided that the part which violates the fundamental rights is separable from that which does not isolate them. But if the valid portion is so closely mixed up with invalid portion that it cannot be separated without leaving an incomplete or more or less mingled remainder the court will declare the entire Act void. This process is known as doctrine of severability or reparability.

The Supreme Court considered this doctrine in ***A.K. Gopalan*** **v.** ***State of Madras***, and held that the preventive detention minus section 14 was valid as the omission of the Section 14 from the Act will not change the nature and object of the Act and therefore the rest of the Act will remain valid and effective.

The doctrine was applied in ***D.S. Nakara*** **v.*Union of India***, where the Act remained valid while the invalid portion of it was declared invalid because it was severable from the rest of the Act.

In ***State of Bombay*** **v.*F.N. Balsara***, it was held that the provisions of the Bombay Prohibition Act, 1949 which were declared as void did not affect the validity of the entire Act and therefore there was no necessity for declaring the entire statute as invalid.

The doctrine of severability has been elaborately considered by the Supreme Court and the following rules regarding the question of severability has been laid down:

(1) The intention of the legislature is the determining factor in determining whether the valid parts of a statute are severable from the invalid parts.

(2) If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from the other, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid what remains is itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest had become unenforceable.

(3) Even when the provisions which are valid, are distinct and separate from those which are invalid if they form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole.

(4) Likewise when the valid and invalid parts of a Statute are independent and do not form part of a Scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of legislature, then also it will be rejected in its entirety.

(5) The severability of the valid and invalid provisions of a Statute does not depend on whether provisions are enacted in same section or different section, it is not the form but the substance of the matter that is material and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein.

(6) If after the invalid portion is expunged from the Statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void as otherwise it will amount to judicial legislation.

(7) In determining the legislative intent on the question of severability, it will be legitimate to take into account the history of legislation, its object, the title and preamble of it.

Judicial Review and Article 13

A **Judicial review** is the power of the **Supreme Court** of the United States to review actions taken by the legislative branch (Congress) and the executive branch (president) and decide whether or not those actions are legal under the **Constitution**. The court can nullify or invalidate an action if it is deemed **unconstitutional**. Judicial review is an essential part of checks and balances within the federal government giving the Supreme Court (judicial branch) equal power with the other two branches of government.

The Supreme Court did not have the power of judicial review under the initial provisions of the Constitution as drafted in 1787. This important power was acquired through the landmark case, ***Marbury v. Madison*** in 1803. The case was rooted in the divisions between the Federalist and Republican parties following the election of 1800. During this election, Thomas Jefferson (Republican) defeated President John Adams (Federalist), who was seeking a second term.

Judicial Review as a part of the Basic Structure: In the celebrated case of Keshavananda Bharati v. State of Kerala11, the Supreme Court of India the propounded the basic structure doctrine according to which it said the legislature can amend the Constitution, but it should not change the basic structure of the Constitution, The Judges made no attempt to define the basic structure of the Constitution in clear terms. S.M. Sikri, C.J mentioned five basic features:

1.Supremacy of the Constitution.

2. Republican and democratic form of Government.

3. Secular character of the Constitution.

4. Separation of powers between the legislature, the executive and the judiciary.

5. Federal character of the Constitution.

In **S.P. Sampath Kumar v. Union of India P.N. Bhagwati, C.J.,** relying on Minerva Mills Ltd14, declared that it was well settled that judicial review was a basic and essential feature of the Constitution. If the power of judicial review was absolutely taken away, the Constitution would cease to be what it was. In Sampath Kumar case the Court further declared that if a law made under Article 323-A (1) were to exclude the jurisdiction of the High Court under Articles 226 and 227 without setting up an effective alternative institutional mechanism or arrangement for judicial review, it would be violative of the basic structure and hence outside the constituent power of Parliament.

In **Kihoto Hollohan v. Zachillhur** another Constitution Bench, while examining the validity of Para 7 of the Tenth Schedule to the Constitution which excluded judicial review of the decision of the Speaker/Chairman on the question of disqualification of MLAs and MPs, observed that it was unnecessary to pronounce on the contention whether judicial review is a basic feature of the Constitution and para 7 of the Tenth Schedule violated such basic structure.

in L. **Chandra Kumar v. Union of India** a larger Bench of seven Judges unequivocally declared: "that the power of judicial review over legislative action vested in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure"

Applicability of Article 13:

In **State of M.P v. G. C. Mandawar,** the Supreme Court holds that the power of the Court to declare law void under Article 13 should be exercised with reference to the specific legislation which is impugned. Where the same Legislature has enacted two different laws but apparently one in substance, it may be open to the court to disregard the form and treat them as one and strike it down, if in their conjunction they result in discrimination, though such a course would no be open where the two laws so sought to be read in conjunction are by different Legislatures. The striking down of a law of one State on the ground that in contrast with a law of another State, on the same subject, its provisions are discriminatory is not authorized. The source of the two statutes being different, a law of the Centre or of the State dealing with similar subjects being held to be unconstitutional by a process of comparative study of the provisions of the two enactments would, similarly be unauthorized.

Can a person waive any of his Fundamental Rights? The doctrine of waiver has no application to the provision of law enshrined in Part III of the Constitution. It is not open to an accused person to waive or give up his Constitutional rights and get convicted In **Behram v. State of Maharashtra** , divided the Fundamental Rights into two broad categories: a. Rights conferring benefits on the individual, and b. Those rights conferring benefits on the general public. The learned Judge opined that a law would not be nullity but merely unenforceable if it was repugnant with a Fundamental Right in the former category, and that the affected individual could waive such unconstitutionality, in which case the law would apply to him. The majority on the bench, however, was not convinced with the argument and repudiated the doctrine of waiver saying that the Fundamental Rights were not put in the Constitution merely for individual benefit. These Rights were there as a matter of public policy and, therefore, the doctrine of waiver could have no application in case of Fundamental Rights. A citizen cannot invite discrimination by telling the state 'you can discriminate', or get convicted by waiving the protection given to him under Arts. 20 and 21.

The question of waiver of Fundamental Right has been discussed more fully by the Supreme Court in **Basheshar Nathe v. I.T. Commissioner** the petitioner's case was referred to Income Tax-Investigation Commission under Sec.5 (1) of the relevant Act. After the commission had decide upon the amount of concealed income, the petitioner on May 19- 1954, agreed as a settlement to pay in monthly installments over Rs. 3 lacs by way of tax and penalty. In 1955, the Supreme Court declared S. 5 (1)

ultra virus Art. 14. The petitioner therefore challenged the settlement between him and the commission, but the plea of waiver was raised against him. The Supreme Court however upheld his contention. In their judgments, the learned Judges expounded several views regarding waiver of Fundamental Rights:

1. Art. 14 cannot be waived for it is an admonition to the state as a matter of public policy with a view to implement its object of ensuring equality. No person can, therefore, by any act or conduct, relieve the state of the solemn obligation imposed on it by the Constitution.

2. A view, somewhat broader than the first, was that none of the Fundamental Rights can be waived by a person. The Fundamental Rights are mandatory on the state and no citizen can by his act or conduct relieve the state of the solemn obligation imposed on it.

The Constitution makes no distinction between Fundamental Rights enacted for the benefit of an individual and those enacted in public interest or on grounds of public policy.

Large majorities of the people in India are economically poor, educationally backward and politically not yet conscious of their rights thus it is the duty of the state to protect their rights against themselves.

3. The minority judges took the view that an individual could waive a Fundamental Right which was for his benefit, but he could not waive a right which was for the benefit of the general public

In view of the majority decision **in Basheshar,** it is now an established proposition than an individual cannot waive any of his Fundamental Rights. This proposition has been applied in number of cases.

In Olga Tellis v. Bombay Municipal Corporation the court asserted that the high purpose which 'the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit the individual but to secure the larger interests of the community.' Therefore, even if a person says, either under mistake of law or otherwise, that he would not enforce any particular Fundamental Right, it cannot create estoppels against him.

"Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument of estoppels valid, an all-powerful state could easily tempt an individual to forgo his precious personal freedoms on promise of transitory, immediate benefits."

In Nar Singh Pal v. Union of India the Supreme Court asserted: "Fundamental Rights under the Constitution cannot be bartered away. They cannot be compromised nor there any estoppels against the exercise of Fundamental Rights available under the Constitution.