Chapter 1 : Introduction

Topics to study

1. *The significance and importance of study of Constitution*
2. *Types of Constitutions*
3. *Forms of government- Parliamentary-Presidential-Monarchial form*

1. **The significance and importance of study of Constitution:**

i. The study of Constitution is important because it protects individual freedom, and its fundamental principles govern the United States. The Constitution places the government's power in the hands of the citizens. It limits the power of the government and establishes a system of checks and balances.

ii. The primary function of a constitution is to lay out the basic structure of the government according to which the people are to be governed. It is the constitution of a country, which establishes the three main organs of the government, namely, the legislature, executive and judiciary.

iii. The constitution of a country not only defines the powers allotted to each of the three main organs, but it also significantly makes a clear demarcation of the responsibilities assigned to each of them. It effectively regulates the relationship between these organs as well as the relationship between the government and its people.

iv. Since the country's constitution stands superior to all the laws framed within the territorial precincts of the country, any law enacted by the ruling government has to be in conformity with the concerned constitution.

v. It deals with limitations on power. Since power corrupts and absolute power corrupts absolutely, a constitution is established to restrict the abuse of power by those who conduct governmental functions.

vi. The constitution of a particular country lays down the national goals which form the basic edifice on which the nation rests upon. For instance, the constitution of India has inscribed in it the primary facets of the nation which are democracy, socialism, secularism and national integration.

vii. A constitution, besides thrusting on the rights of the citizens of the concerned nation, also has embedded in it the duties that the citizens require to adhere to as well.

Types of Constitution:

1. Written and Unwritten Constitution

Written constitution is a type of document or documents created in a form of laws. It`s usually very precise and systematic. The creation of this constitution is usually defined as a deliberate efforts of the people.

This legal body is elected to be the main legal document for the specific period of history. It's also very precise about its written date. Most countries have a written constitution, like the USA, India, Russia, France, Germany, Nigeria, etc.

The unwritten constitution is a legal body where the principles have never been enacted as laws. It consists of various customs, principles or traditions of a country. It does not have a specific date of creation. It`s not clear or precise in any way. It`s usually a result of the historical development of a country. One of the classical examples is the English Constitution.

2. **Flexible and Inflexible Constitution**:

It generally refers to how easy you can change some clauses of the constitution. Codified constitutions have a strict set of rules for when it comes to constitution changes. One of the examples of inflexible constitutions is the USA constitution. The specificity of this constitution makes it very inflexible for changes. At the same time, the British Constitution has constantly been changing since the 13th century.

Forms of government:

1. **Parliamentary form of government:**

The government generally has three distinct powers: executive, legislative and judicial powers. Parliamentary form of government may be described as a form of government wherein the executive branch of the government is elected /chosen from the legislative branch (which is called the parliament in England) and the executive is responsible to the parliament.

The parliamentary form of government evolved in England owing to its peculiar constitutional history. Indeed development of this Parliamentary form of government is journey from absolute monarchy to a notional monarchy spanning over nine hundred years.

British parliament is therefore the mother of all parliaments. The parliamentary form of government has been adopted in a number of countries particularly in those countries which formed part of the British Empire.

Indian Parliamentary System:

In India, there is a parliamentary form of government both at center and at the states.

The executive power of the union is vested in the president who exercises his powers and functions with the aid and advice of the council of ministers headed by a Prime Minister.

Government at State Level:

The same is the position of a Governor of the state who is required to act as a Constitutional

Head and act according to the advice of his ministers except when he acts in his discretion.

There were many reasons why the framers of the constitution preferred the parliamentary system of government to the presidential system.

The people of India were already familiar with the working of the parliamentary system.

A parliamentary system could provide effective leadership in emergencies. Cabinet system ensures harmony between the executive and the legislature.

Parliamentary system gives more responsibility. The assessment of the responsibility of the executive is both on daily as well as periodic basis.

The members of parliament can make the ministers responsible by putting questions, moving resolutions and no-confidence motions, adjournment motions and debates on address by the President.

Elections are held after regular intervals and that gives the voters an opportunity to express their approval or dissatisfaction with the government in power.

In fact federal Parliamentary character of the Indian Constitution has been recognized by the Supreme Court of India as basic structure of constitution.

It is to be noted that, though the Indian Constitution provides for the parliamentary form of government

but unlike Britain, the Parliament is not supreme under the Indian Constitution.

In India, the constitution is supreme. In England, Laws passed by the Parliament cannot be declared unconstitutional while the Indian Constitution expressly vests this power in the courts.

2. **Presidential Form of Government:**

In a presidential system, the head of the government leads an executive, that is distinct from the legislature. Here, the head of the government and the head of the state are one and the same. Also, a key feature is that the executive is not responsible to the legislature.

Features :

1. The executive (president) can veto acts by the legislature.
2. The president has a fixed tenure and cannot be removed by a vote of no-confidence in the legislature.
3. Generally, the president has the power to pardon or commute judicial sentences awarded to criminals.
4. The president is elected directly by the people or by an electoral college.

Merits:

The advantages of the presidential system are given below:

1. **Separation of powers:** Efficiency of administration is greatly enhanced since the three arms of the government are independent of each other.
2. **Expert government:** Since the executive need not be legislators, the President can choose experts in various fields to head relevant departments or ministries. This will make sure that people who are capable and knowledgeable form part of the government.
3. **Stability:** This type of government is stable. Since the term of the president is fixed and not subject to majority support in the legislative, he need not worry about losing the government. There is no danger of a sudden fall of the government. There is no political pressure on the president to take decisions.
4. **Less influence of the party system:** Political parties do not attempt to dislodge the government since the tenure is fixed.

Demerits:

The disadvantages of the presidential system are given below:

1. **Less responsible executive:** Since the legislature has no hold over the executive and the president, the head of the government can turn authoritarian.
2. **Deadlocks between executive and legislature**: Since there is a more strict separation of powers here, there can be frequent tussles between both arms of the government, especially of the legislature is not dominated by the president's political party. This can lead to an erosion in efficiency because of wastage of time.
3. **Rigid government:** Presidential systems are often accused of being rigid. It lacks flexibility.

4. **Spoils system:** The system gives the president sweeping powers of patronage. Here, he can choose executives as per his will. This gives rise to the spoils system where people close to the president (relatives, business associates, etc.) get roles in the government.

3. Monarchial Form of Government:

Constitutional monarchy, system of government in which a monarch shares power with a constitutionally organized government.

The monarch may be the de facto head of state or a purely ceremonial leader.

The Constitution allocates the rest of the government's power to the legislature and Judiciary.

E.g Britain, Belgium,Sweden, Thailand.

Chapter 2 : Federalism - Comparative Study

Topics for study

(a) Principle of federalism
(b) Legal features of federalism
(c) Co-operative federalism

(a) Principle of federalism: A federal government is recognizable as a system of divided sovereignty. Most federal states are seen to have two common characteristics: first, they comprise a group of states or constituent units – which prior to the formation of the federation were closely connected by geographical proximity and a common political and cultural history.

Secondly, the motivation behind these units forming a federal structure include a desire to unite as such – for a myriad possible reasons, ranging from security and administrative ease to unification for cultural and linguistic similarities. Though the basic premise of federalism rests upon a division of powers at two (or even multiple) levels, there is no single form that it can assume.

Each recognized federal structure has its own distinguishing features as well but is similar
as there is always an attempt made to carefully preserve the federal government's authority along with the regions.

Federalism can be defined as the existence of multiple levels of government within a single polity.

Each of the constituent units is assured a certain level of internal autonomy over a defined jurisdiction – usually through constitutional mandate.

(b) Legal features of federalism:

1. **Dual Government**

A dual system of government is essential under the federal constitution. Federation denotes a particular type of relationship between Central Government and government of units. There cannot be a federation without two sets of government (Central Government and State/regional government) States are not administrative agency of the centre. They are supreme and independent in their own sphere of activities.

2) Distribution of powers

The distribution of powers is an essential feature of federalism. Federalism ensures independence and coordination between both the government the governments are not dependent upon each other.

3) A Written constitution

A federal constitution must almost necessarily be a written constitution. the written constitution provides the

sovereign powers of both governments (for example, Centre and State). In case disputes and issues arise between these two institutions, it can be settled with the provisions of the constitution.

4) Supremacy of the constitution

A Federal state derives its existence from the constitution, just as a corporation derives its existence from the grant by which it is created. Hence every power, executive, legislative or judicial whether it belongs to the nation or to the individual State is subordinate to and controlled by the constitution. The constitution is supreme law of the land and therefore the provisions of the Constitution shall prevail over all other laws.

5) Independent Judiciary

An independent judiciary is an integral part of a federal form of government. In a federal State, the legal Supremacy of the Constitution is essential for the existence of the federal system. A Federal state involves division of powers between the central and state government under the framework of Constitution. It is, therefore, essential to maintain this division of powers between the two levels of governments. Sometimes disputes between centre and state government arises in respect of any particular matter. Some third independent authority must resolve such dispute and this task is entrusted to the Judiciary, Hence, the independence of Judiciary is essential in federalism. The Judiciary has, in a federal polity, the final power to interpret the constitution and guard the entrenched provisions of the constitution.

6) Rigidity of the constitution

A natural corollary of a written constitution is rigidity. A constitution of which is the supreme law of the land must also be rigid. The principle of supremacy of the Constitution and the rigidity of the Constitution goes hand in hand. Federal constitution has to be a rigid and constitutional law has to be placed the above ordinary law. In a rigid constitution, the procedure of amendment is very complicated and difficult. but it does not mean that the constitution should be legally unalterable. it simply means that the power of amending the Constitution should not remain exclusively with either the central or state Governments

7) Dual system of court

In federalism, there is a division of Judiciary between the federal and state governments. Cases arising out of the Federal Constitution and Federal laws are tried by the federal courts, while State Court deal with cases arising out of the State Constitution and State Law.

8) Division of public services

In federalism, it is essential that there must be the division of public services. in the United States of America, have their own officials to administer their respective laws and functions. Generally, the officials of Federal and State Governments are separate to execute the law.

9) Dual system of accounts and Audit machinery

In federalism, there is separate accounts and Audit machinery for Federal Government and state governments in the ideal form of Federation

10) Dual system of election machinery

In federalism, there is a separate election machinery for Federal and State Government to deal with election process effectively.

(c) Co -operative federalism:

The constitution lays down various provisions to secure cooperation and coordination between the centre and the states.

These include:

(i) **Article 261** states that "Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State".

(ii)**Article 262,** the parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley.

(iii) **Article 263** empowers the President to establish an inter-State Council to inquire into and advise upon disputes between states, to investigate and discuss subjects in which some or all of the States, or the Union and one or more of the States, have a common interest.

Centre-State Relations during Emergency

(i) During a national emergency (under Article 352), the state government become subordinate to the central government. All the executive functions of the state come under the control of the union government.

(ii) During a state emergency (under Article 356), the president can assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or authority in the State other than the Legislature of the State.

(iii) During the operation of financial emergency (under Article 360), the Union may give directions to any State to observe such canons of financial propriety as may be specified in the directions, and to the giving of such other directions as the President may deem necessary and adequate for the purpose.

(a) Distribution of legislative and financial powers:

The co-existence of two governments, each with its own specified sphere of administration necessarily involves the distribution of powers between these two governments— the central or federal government and the state governments. This division of powers is indeed, the very essential condition of a federal government whose formation is based upon this and 3 this principle alone.

The distribution of powers is an essential feature of federalism. The object for which a federal state is formed, involves a division of authority between the national government and the separate states.

While dividing the legislative power the constitution of India follows the plan embodied in the Government of India Act 1935.

As under the Government of India Act 1935, there is a three fold distribution of legislative powers between the union and the States, under the Constitution of India.

Thus there, are three legislative lists in the VII' th schedule of the Constitution.

" A common feature of many federal constitutions which follow the American federal model is to enumerate a List of Legislative powers and assign them to the union and leave the 93 residue to the states.

The Canadian Constitution, on the other hand, follows a different system according to which there are two lists of legislative powers one for the centre and the other for the Provinces and the residue is vested in the Centre.

The Constitution of India follows a system similar to the Canadian but with more elaborate lists which include an additional one called the Concurrent List. In drawing up an elaborate concurrent list, the framers followed the Australian pattern of federal 12 division of powers. t Thus the scheme of the distribution of legislative powers established by the Constitution of India consists of three 13 lists.

All the lists are sufficiently comprehensive and the scope of residuary power is very much limited. Our constitution vests such residuary power in the Union Parliament.

To some critics this is a significant departure from the normal pattern of federalism and in favour of Centre.

In order to get a clear picture of the. legislative relations between the Union and the State governments, it is necessary to examine all these three lists as given by the Framers of our Constitution.

1. **The Union List:** The Union List contains 97 subjects and is the largest of all the three lists. The subjects included in it affect the whole country and are of national importance.. Parliament has the exclusive power to make laws for the whole or any part of the territory of India in respect of these subjects. The Constitution of India is designed to serve the needs of rapid economic development the scope of the union authority in economic sphere is bound to be wide.

   The Constitution confers a certain priority to the Union List in relation to the legislation enacted by the States in respect of the subjects included in the other two lists (state list and concurrent list).

2. **State List:** Distinct primacy has been given'to the union Parliament for the resolution of conflicts of legislative jurisdiction of the Union and states. The State List: The State List contains 66 subjects. The subjects included in this list are public order, police, administration of - justice, local government, public health and sanitation, intoxicating liquors, unemployment, communications, agriculture, water, forests, organization of all courts except the Supreme Court and High Courts, land revenue, taxes on agricultural incomes, regulation of mines and mineral development, industries subject to relevant provisions of List 1. This list has been prepared with an eye on local conditions and problems.

   The state legislatures have normally exclusive authority to make laws for the whole or any part of the State in respect of these subjects.

3. **Concurrent List**: The Constitution of India also provides for a Concurrent jurisdiction where both the centre and the states are empowered to legislate. The provision for concurrent list is made because there are certain matters which cannot be allocated exclusively to the Central or state legislature. The purpose behind -the Concurrent list is that it is to serve as a device to avoid the excessive rigidity of a two-list distribution which is to create two water-tight compartments. In fact the concurrent list including matters having varying degree of local and national interests, is like a shock absorber which enables both the

Union and the states to go beyond their exclusive legislative spheres, as necessity arises so as to meet exigencies without transgressing the boundaries of each other."

4. **The Residuary Powers**: Residuary powers not mentioned in the three lists have been vested with the Centre.

   Doctrine of Repugnancy: There is an explicit provision in the Constitution that if any provision of law made by the Legislature of the State is repugnant to any provision of law# the law made by Parliament shall prevail and the law made by the Legislature of the State shall be void to the extent of repugnancy. Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter the law so made by the Legislature of that state shall if it has been reserved for the consideration of the President and has received his assent prevail in that State.

Distribution of Financial Powers:

Distribution of Financial Powers The essence of federalism lies in proper division of powers between the various levels of government. Of these finances are the backbone of Politico-economic strength and hence an essential prerequisite of government .

In an ideal federation it must be ensured that each level of government gets adequate financial resources so as to enable each of them to perform its exclusive functions. "Financial provisions are embodied in Part XII of the Constitution of India (From Articles 264 to 300) .

However the actual provisions regarding the distribution of financial powers between the Centre and the states can be studied under the following heads

1) Separation of sources of tax revenue

2) Separation of non-tax resources

3) Actual levying collection and appropriation of the tax revenue,

4) Borrowings

5)' Mechanism of resource transfers

The Distribution of financial powers in Indian federal system is the most controversial provision from the federal set-up point of view which undermines the State autonomy to a great extent. In financial matters, the States have been left high and dry at the whims of the Union.

The States have been allotted with minor and unimportant heads of taxing powers, like, land revenue, agricultural income including succession and estate duty, taxes on lands and buildings, taxes on mineral rights subjects to Union’s power, sale tax on goods, tax on vehicles, Tolls, taxes on animal and boats etc. These taxes do not meet even one-third requirement of the States.

On the other hand, Union power to tax includes, Taxes on Income, customs duties, duties of excise, corporation tax, terminal taxes, taxes on services etc. and any other residuary tax not mentioned in Lists II and III. Thus all major heads of income are allotted to the Union.

The idea behind this type of distribution was that Union taxes will be shared between the Union and the States to avoid any disputes or controversies relating to double taxation if left in the concurrent field as many federal systems provide.

The scheme of Union Taxes is as follows: There are some minor heads of taxes in the Union List whose net proceeds are handed over in entirety or partially to the States.

1. Art. 268: These include, stamp duties and such duties of excise on medicinal and toilet preparations

2. Art. 268 : A service tax levied by Union and collected and appropriated by the Union and the States

3.Art. 269: Taxes on the sale or purchase of goods and taxes on the consignment of goods .

For the other taxes the scheme of distribution has been drastically modified by the Eightieth Amendment Act, 2000 which is based on the recommendations of the 10th Finance Commission

Before this amendment only Income Tax and Union excise duties were shareable. After this Amendment Act, except the duties and taxes referred to in Articles 268, 268A and 269, surcharges on taxes and duties referred to in Article 271 and any cess levied for specific purposes.

All taxes and duties referred to in the Union List shall be levied and collected by the Government of India and shall be distributed between the Union and the States as prescribed by the President by order after considering the recommendations of the Finance Commission

Grants-in-aid: Article 275 authorizes the Union to make grants-in-aid to the States which are in need of assistance and different sums may be fixed for different States. These are needbased grants. Then, there are compulsory grants for promoting the welfare of the Scheduled Tribes in a State or raising the level of administration of the Scheduled Areas therein. There are specific provisions for grants-in-aid for the State of Assam and the autonomous State under Article 244 A which have to be provided for by Parliament from the consolidated fund of India.

Article 282: The Union or State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may make laws. These are public purpose grants.

Finance Commission: In order to resolve the financial controversies amicably, the Constitution provides for a Finance Commission under Article 280. Article 280 states that the President shall, within two years from the commencement of this Constitution and thereafter at the expiration of every five year or at such earlier time as the President considers necessary, by order Constitute a Finance Commission which shall consists of a Chairman and four other members to be appointed by the President.

Parliament may by law determine the qualifications which shall be requisite for appointment as members of the Commission and the manner in which they shall be selected. Accordingly, the Finance Commission (Miscellaneous Provisions) Act, 1951, has been enacted by Parliament which requires that the Chairman of the Commission shall be selected from among persons who have had experience in public affairs and the four other members shall be selected from among persons who:

(i) are, or have been, or 37 are qualified to be appointed as judges of a High Court, or

(ii) have special knowledge of the finance and accounts of governments, or

(ii) have had wide experience in financial matters and in administration or

(iii) have special knowledge of economics.

(iv) The tenure shall be fixed by the President and shall be eligible for reappointment. The members shall render whole-time or part-time service as the President may specify.

(v) The Commission shall determine their procedure and in performance of their functions shall have all the powers of a civil court while trying a suit in respect of summoning and enforcing the attendance of witnesses, production of any document and requisitioning any public record from any court or office.

(vi) The Commission shall also have power to require any person to furnish information on such points or matter as in the opinion of the Commission may be useful for, or relevant to, any matter under its consideration.

(vii) It shall be the duty of the Commission to make recommendations to the President as to –

(a) The distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them and the allocation between the States of the respective shares of such proceeds;

(b) The principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India. The Constitution 73rd and 74th Amendment Acts, 1992 have further enlarged the powers of the Commission. Under Article 281, the President shall cause every recommendation made by the Finance Commission together with an explanatory memorandum as to the action taken thereon to be laid before each House of Parliament.

Chapter 3: Judicial Review

Topics for study:

(a) Evolution and concept of Judcial Review
(b) Meaning of Judicial Review
(c) Characteristics of modern constitution and impact on Judicial Review
(d) Constitutional growth in India under Judicial Review and it's impact

(A) Evolution and concept of Judicial Review:

The United States of America gave to the world a new gleam of judicial review. The concept of judicial review as evolved in America was the result of continuous thinking and growth. It had the heritage of Plato and Aristotle also.

The doctrine of judicial review of the United States of America is really the precursor of judicial review in other constitutions of the world which evolved after the 18th century and in India also it has been a matter, of great inspiration.

"From a historical point of view Marbury V. Madison ,1803 is of crucial importance as the first case establishing the power of the 2 Supreme Court to review constitutionality" . The system of judicial review thereafter became the integral part of the system

Thus the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all the written constitutions, that a law repugnant to the constitution is void; and that courts as well as other departments are bound by that instrument".

(b) Meaning of Judicial review:

Judicial review is the power of the courts to determine the constitutionality of legislative acts. It determines the ultra vires or intra vires of the Act s challenged before it.

Judicial review is not an expression exclusively used in Constitutional Law. Judicial review, literally means the revision of the decree or sentence of an inferior court by a superior court.

Judicial review has however, a more technical significance in public law, particularly in countries having a written constitution where the courts perform the role of expounding the constitution and exercise power of declaring any law or administrative action which may be inconsistent with the constitution as unconstitutional and hence void.

This judicial function stems from a feeling that a system based on a written constitution can hardly be effective in practice without an authoritative, independent and impartial arbiter of constitutional issues and also to restrain governmental organs from exercising powers which may not be sanctioned by the constitution.

A federal constitution effects division of powers - legislative, executive and in some cases judicial also between the General and Regional Governments established under it and which according to the true federal principles are coordinate and independent of each other in the areas allotted to them by the constitution. The two governments thus operate simultaneously upon the same people and territory.

The distribution of legislative powers, which is the hall-mark of a federal constitution, quite often presents an important question as to who is to decide in case of a dispute as to whether the law made by the state legislative encroaches upon the area assigned to the central legislature or vice versa.

For the purpose of resolving such disputes, the power is given to the courts and they are vested with the power of Judicial review, as to the validity of the laws made by the legislature. The power of judicial review is not limited to enquiring about whether the power belongs to the particular legislature under the constitution. It extends also as to whether the laws are made in conformity with and not in violation of other provisions of the constitution. For example in our constitution, if the courts find that the law made by legislature - union or state is violation of the various fundamental rights guaranteed in Part III the law shall be struck down by the courts on unconstitutional under Article 13(2).

Kinds of Judicial Review:

1. **Direct review:** The direct judicial review involves the court to declare a legislative enactment or an executive act as null and void because it is unconstitutional.
2. **Indirect review:** In the other type of judicial review which is termed indirect, the court attempts to give such interpretation to the impugned statute so that it may be held constitutional. Such a situation can arise only in those cases where a statute is susceptible of double meaning- one which would make the statute unconstitutional and the other which would steer clear the element of unconstitutionality and in such a situation the court would be prove to adopt that construction of the statute which would save it from being held unconstitutional.

(c) Characteristics of modern constitution and impact on Judicial Review:

1. Constitution of Canada, Australia:

The constitutions of Canada, Australia and U.S.A. do not contain any provisions for direct judicial review, but it has become an integral part of the constitutional law of these countries.

2. Position in U.S.A

The American judicial review, however, is a peculiar Governmental feature among the nations of the world. It is a limitation on popular government and is a fundamental part of the Constitutional Scheme of America.

The concept of Judicial Review has its foundation on the doctrine that the constitution is the supreme law.

It has been so ordained by the people, and in the American conception, it is the ultimate source of all political authority. The constitution confers only limited source powers on the legislature. If the legislature consciously or unconsciously oversteps these limitations there must be some authority competent to hold it in control, to thwart its unconstitutional attempt, and thus to indicate and presence inviolate the will of the people as expressed in the constitution.

Characteristics of Judicial Review:

(a) The Government that cannot satisfy the governed of the legitimacy of its action cannot expect to be considered legitimate and democratic, and such government also cannot expect to receive the confidence and satisfaction of the governed.

(b) The government in a democracy is a government of limited powers, and a government with limited powers has to take recourse to a machinary or agency for the scrutiny of charges of legislative vices and constitutional disobedience, and such act of scrutiny can be done impartially and urbiasedly only by the court.

(c) Each citizen in a democracy, who is aggrieved of a legislative Act on the ground of constitutional violation, has to inherent right to approach the court to declare such legislative Act unconstitutional and void.

(d) In a federal state, judicial arbitration is inevitable in order to maintain balance between the Centre and the State.

(e) Where the constitution guarantees the fundamental rights, legislative violations of the rights can be scrutinized by the court alone.

(f) The legislature being the delegate and agent of the sovereign people has no jurisdiction and legal authority to delegate essential legislative function to any other body.

Constitutional growth in India under Judicial Review and its impact:

1. **Art. 13(2):**

   It states the Indian Constitution believed that countrywide shall not create any regulation, those abbreviates or take absent the right as deliberated in its Part three, in respect of important rights of the inhabitants of India. If any rule was created against this clause of the Constitution, it will come within the purview of infringement and will be declared as void.

2. **Art. 131 :**

   This article of the Indian Constitution states that for dispute between two States or difference amongst Indian government and states one or more or between two or more than two state. If the question involved of law and fact on which the legal rights depend. The judicial review is subject to provision under the Article 131of the Indian Constitution.

3. **Art.133:** Article 133 judicial review can be made in the civil matters on plea from the higher courts of states to the Supreme Court on receiving its final order, decree of judgment of civil proceeding, within the domain of India.

   The Supreme Court has appellate jurisdiction for judicial review, in respect of criminal matters. Any final order or sentence and judgment, passed by the High Court, the person can file an appeal against this judgment.

4. **Art.317:** In respect of removal or suspension of a public servant, rules on the matter of summary determination of the appeal, provided to the court, which may be vexatious or frivolous, which are conveyed to the court for the purpose of delay, rules on the matter of review and the procedure of review including the time within, which the application to be entertained for that the review to be entered by the court.

5. **Issue of writs and Judicial Review**

The court principally adopts the strategy of judicial review using writs to grant the rights of appeal, or to grant extraordinary relief or to direct the authority to seize the property. However, in Article thirty-two of the Constitutional necessities is completed that the S.C.I. under Article two hundred twenty-six of issue writs in case of infringement of fundamental rights. There are five types of writs; habeas corpus, certiorari, mandamus, quo warranto and prohibition .

Chapter 4: Impact of emergency under different constitutions

Topics for study:

(a) Express emergency provisions under Constitutions
(b) Justifiability of the proclamation of emergency
(c) Impact of emergency on the rights

(a) Express emergency provisions under Constitutions

1. National Emergency:

a. Article 352 provides that if the President is satisfied that a grave emergency exists whereby the security of India or any part of its territory is threatened by war, or external aggression or armed rebellion, he may by proclamation, make a declaration to that effect.
b. The proclamation of emergency can take place not only after the incidents of war or external aggression or armed rebellion but even before the actual occurrence, if the President is satisfied that there is imminent danger thereof.
c. According to the Constitution (Forty Fourth Amendment) Act, 1978, the President can declare such an emergency only if the Cabinet headed by the Prime minister and other Ministers of Cabinet rank recommends in writing doing so.
d. This was incorporated to avoid the kind of situation of 1975 wherein on the oral advice of the prime minster, the Proclamation of emergency was declared.

Procedure for proclaiming emergency:

1. Every proclamation needs to be laid before both Houses of Parliament.

If both Houses of Parliament do not approve of it within one month, it will cease to operate at the expiration of thirty days from the date on which the proclamation was issued.

2. This is intended to ensure an amount of accountability and legitimacy of executive action.

In case the Lok Sabha stands dissolved at the time of proclamation of emergency or is not in session, it has to be approved by the Rajya Sabha within one month and later on by the Lok Sabha also within one month of the commencement of its next session.

Once approved by the Parliament, the emergency remains in force for a period of six months from the date of proclamation.

In case it is to be extended beyond six months, another resolution has to be passed by the Parliament Procedure of revoking emergency .

. The proclamation of the emergency can be revoked by another proclamation by the President of India. The Constitution (Forty Fourth Amendment) Act 1978, has added certain control mechanisms to be exercised by the House of the People if it passes a resolution to that effect.

If the House of the People is not in session, then ten per cent or more members of that House can issue a notice in writing to the speaker if the House is in session or to the president if the House is not in session for the

revocation of the emergency and if passed by a simple majority emergency will immediately become inoperative.

If the notice is given to the President, he shall convene the session of the House of the People for a special sitting within fourteen days from the date on which such notice is received by the Speaker or as the case may be by the President, for the purpose of considering such resolution.

2. State Emergency:

1 .Article 356 has been debated hotly among the political and intellectual circle.37Article 355 of the Constitution of India enjoins a responsibility on the Union Government to protect States against external aggression and internal disturbance.

2. In pursuance of this goal Article 356 provides that if the President is satisfied on receipt of a report from the Governor or otherwise that a situation has arisen in which the Government of a State cannot be carried on in accordance with the provisions of the Constitution, he is empowered to issue a proclamation under Article 356.

3. The proclamation may be revoked subsequently; if not, it shall be laid before both Houses of Parliament, if Parliament does not approve of it within two months, it will become ineffective.

Effect of a proclamation issued under Article 356 :

The proclamation issued under article 356 due to the breakdown of constitutional machinery in a State has the following effects:

i. The president may assume to himself all or any of the functions of the government of the State and all or any of the powers vested in or exercisable by the Governor or anybody or authority in the state other than the Legislature of the state;he may declare that the powers of the State legislature shall be exercisable by or under the authority of Parliament;

Landmark decision:

S. R. Bommai v. Union of India,1994

The Supreme Court's ruling in the Bommai's case highlighted clearly the many conditions for the valid exercise of the power under Article 356.

They are:

- Article 356 should be used sparingly as to not to disturb the delicate balance of power between Centre and states. Federalism constitutes a basic structure of the constitution;
- The essential condition for the intervention by the Centre is the political instability of the State, that is, the virtual breakdown of the parliamentary system of the government.
- The Union will watch the situation of instability with utmost caution and provide every opportunity for the formation of an alternative ministry.
- The power conferred by Article 356 upon the President is a conditioned power. It is not an absolute power. An objective analysis of conditions must precede before the imposition of president's rule by invoking Article 356.
- The State's Assembly must not be dissolved before both Houses of Parliament have approved the proclamation made by the President under Article 356. Until such approval, the President can only

suspend the Legislative Assembly by suspending the provisions of Constitution relating to the Legislative Assembly.

- Judicial review is part of basic structure and hence court will have the power to consider independently whether in fact conditions so existed as to warrant exercise of the power under article 356. Once a prima facie case is made out, the burden of proof will lie on the Government of India to justify the action.

3. Financial Emergency:

1.If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or any part of it is threatened, he may declare a financial emergency under Article 360.

2. The proclamation in this case also should be approved by Parliament as in the other two cases mentioned above. During a financial emergency, "the executive authority of the Union shall extend to the giving of directions to any State, to observe such canons of financial propriety as may be specified in the direction, or any other directions which the President may deem necessary for the purpose."

3.Such directions may include those requiring the reduction of salaries and allowances of Government servants and even those of Judges of the Supreme Court and the High Courts.

4. However, it is interesting to note that no such proclamation has been issued under article 360 so far.

Justifiability of the proclamation of emergency:

This point can be cleared with the help of few caelaws:

1. ***K.K. Aboo vs. Union of lndia ,1965***

In this first Case the Kerala High Court considered the legality and constitutionality of the Presidential Proclamation of dissolving the Kerala Legislative Assembly after elections in March, 1965 without giving a chance to the assembly to be assembled.

The facts in this Case are that a general election of Legislative Assembly was held in February I March, 1965, for the purpose of constituting a new Legislative Assembly in the State, but it led to an inconclusive result as it gave no clear majority to any political party.

The CPI(M) had won fourty seats in the House of I03 and had emerged as the single largest party.

The then Governor of Kerala, A.P. Jain, after a brief discussion with leaders of various political parties regarding the formation of a ministry, reported to the President that no political party could form a stable government in the existing circumstances. Consequently, President's Rule was imposed in Kerala on March 24, 1965 along with the dissolution of the State Legislative Assembly.

This action was challenged in the Kerala High Court.

The Kerela High Court ruled that Article 356 empowered the President to proclaim the President's Rule when he is satisfied that a Constitutional Government is not possible in the State and that Article does not prescribe

any condition for use of this power. Speaking for the Court M. Madhavan Nair J., held that the validity of Proclamation under Article 356, cannot be challenged in Courts.

It is matter of personal satisfaction of the President, who is Constitutional head. It can be questioned in Parliament which can withhold its approval. Thus, the Court refused to go into the Constitutionality of the Proclamation.

The validity of Proclamation under Article 356 cannot be challenged in Courts. It is a matter of personal satisfaction of the President, who is the constitutional head. However, it can be questioned in Parliament which can withhold its approval. The Court held that "The President who is an integral part of the Parliament (vide Article 79) may not be the executive head but the constitutional head of India. If that be the correct view, a challenge of his Proclamation under Article 356 behind his back cannot be heard in a Court of law

2. In S.R. Bommai V. Union of India, 1994

The Supreme Court has rendered a landmark decision on Art. 356 (1) in S.R. Bommai V. India. The case arose in the context of the followings facts.

The scope of judicial scrutiny is therefore confined to an examination whether the disclosed reasons bear any rational nexus to the action proposed or Proclamation issued.

Bommai appealed to the Supreme Court against the High Court decision. Besides the Karnataka Proclamation, the Supreme Court was also called upon to decide the validity of similar Proclamations under Art. 356 (1) in the States of Meghalaya and Nagaland.

A Bench of nine Judges was constituted in Bommai Case to consider the various issues arising in the several cases, and seven opinions were delivered. While some of the judges (AHMADI, VERMA, RAMASWAMY, JJ.) adopted a passive attitude towards 'judicial review' of the Presidential Proclamation under Art. 356(1), others adopted somewhat activist stance.

On the basis of consensus among the judges, the following propositions can be enunciated in relation to Art. 356 (1) and the scope of judicial review there under:

1) The President exercises his power under Art. 356 (1) on the advice of the council of ministers to which, in effect, the power really belongs though it may be formally vested in the President.

2) The question whether the incumbent State Chief Minister has lost his majority support in the Assembly has to be decided not in the Governor's chamber but 'on the floor of the House'. There should be test of strength between the Government and others on the floor or the house before recommending imposition of the president's rule in the State.

The Court ruled that the Karnataka High Court was wrong in holding that floor test was neither compulsory nor obligatory nor a pre-requisite to sending the Report to the president recommending action under Art. 356 (1)

3) The Governor should explore the possibility of installing an 164 alternative ministry, when the erstwhile ministry loses support in the house.

4) The validity of the Proclamation issued under Art. 356 (1), is justiciable on such grounds as: whether it was issued on the basis of any material at all, or whether the material was relevant, or whether the Proclamation was issued in the mala fide exercise of the power, or was based wholly on extraneous and/or irrelevant ground.

5) There should be material before the President indicating that the Government of the State cannot be carried on in accordance with the Constitution. The 'material' in question before the President should be such as would induce a reasonable man to come to the conclusion in question. Once such 'material' is shown to exist, 'the satisfaction' of the President based on such 'material' will not be open to question. But if no such 'material' exists, or if the 'material' before the President cannot reasonably suggest that the State Government cannot be carried on in accordance with the Constitution, the Proclamation made by the President is open to challenge.

6) When a prima facie case is made out against the validity of the Proclamation, it is for the Central Government to prove that the relevant material did in fact exist. Such material may 165 be the Report of the Governor or any other material.

7) The dissolution of the Legislative Assembly in the State is not automatic consequence of the issuance of the Proclamation. The dissolution of the assembly is also not a must in every case. It should be done only when it is found to be necessary for achieving the purposes of the Proclamation.

8) The provisions in Art. 356(3) are intended to be a check on the powers of the President under Art. 356(1). If the Proclamation is not approved within two months by the two Houses of Parliament, it automatically lapses. This means that the President ought not to take any irreversible action till the Proclamation is approved by the Houses of Parliament. Therefore, the State Assembly ought not to be dissolved.

The State Legislative Assembly should be kept in suspended animation in the meantime. Once the Parliament has put its seal of approval on the Proclamation, the State Assembly can then be dissolved. The Assembly which was suspended will revive and get reactivated if the Proclamation is not approved by Parliament.

2. ***State of Rajasthan V. Union of India'***, 1977

that the Proclamation is valid when issued under Art. 356 (1), and the State Legislature can be dissolved by the Centre without waiting for its approval by the houses of Parliament. But, in Bommai, the Court has disagreed 166 with this view and for a very good reason. If the Proclamation is not approved by Parliament, it automatically lapses after two months. How is the State Government to run there after? It would be inevitable that the dissolved Assembly be revived for no fresh elections can be held for the house within the short period of two months. Bommai view avoids any such embarrassment to the central Government.

3. *Jagdambika Pal v. Union of India 1999,*

In Uttar Pradesh in 1998 when Governor Romesh Bhandari, being of the view that Chief Minister Kalyan Singh Ministry had lost majority in the Assembly dismissed him without giving him opportunity to prove his majority on the floor of the House and appointed Shri Jagdambika Pal as the Chief Minister which was challenged by Shri Kalyan Singh before the High Court which by an interim order put Shri Kalyan again position as Chief Minister.

This order was challenged by Shri Jagdambika Pal before the Supreme Court which directed a "composite floor test" to be held between the contending parties which resulted in Shri Kalyan Singh securing majority. Accordingly, the impugned interim order of the High Court was made absolute.

(A) Impact of emergency on the rights:

1. During national emergency, the Constitution empowers the President to suspend the right to move any court of law for the enforcement of any of the fundamental Rights.

2. The Constitution (Forty Fourth Amendment) Act 1978, inserted a restraint on the unbridled power of executive.
3. After the Constitution (Forty Fourth Amendment) Act, Article 21 of the Constitution which guarantees right to life and personal liberty cannot be suspended even during emergency.
4. The Constitution (Forty Fourth Amendment) Act 1978 incorporated certain safeguards to protect the liberties of people during emergency. After this amendment, Article 21 of the Constitution which guarantees right to life and liberty, cannot be suspended even during emergency

Chapter 5: Parliamentary Privileges and Judicial Review

Topics for study:

(a) Parilimentary privileges- comparative study with different countries
(b) Parliamentary privileges and Anti Defection Law
(c) Need for legislation in India

(a) Parliamentary privileges: Comparative study with different countries

1. Position in England:

The English parliament is composed of three bodies, the King, the House of Lords, and the House of Commons and collectively known as the King-in-Parliament.

The parliament has the right to make or unmake any law whatsoever and that no person or body is recognized by the law of England as having a right to override or set aside the legislation of parliament.

This legislative omnipotence of Parliament is the most outstanding characteristic of the English Constitution. The Legislative Sovereignty of Parliament was not established in a day. In the course of history, the King, the Judges and the Houses of Parliament individually, each tried to assert independent legislative authority apart from parliament, but all of these rival claims have been set aside by severe constitutional struggle.

Monarchy in England was originally absolute and all authority was theoretically vested in the king. Thus, legislative authority resided in the King-in-Council, and even after the establishment of a representative body, the system of Royal legislation through ordinance and proclamations continued.

But in the struggle between the Crown and Parliament, the latter ultimately triumphed. The results of this triumph are embodied in the Great Constitutional Charters viz., The petition of Rights, 1628; The Bill of Right 1688; Act of Settlement, 1701. With the last of these, the struggle practically ended and the limits of Royal authority were fixed in accordance with the will of Parliament.

Some privileges rest solely upon the law and custom of parliament while others have been defined by statute.

Upon these grounds alone all privileges whatever, are founded. The Lords have ever enjoyed them, simply because they have place and voice in parliament; but a practice has obtained with the commons which would appear to submit their privileges to the royal favour.

At the commencement of every parliament it has been customary for the speaker, in the name, and on behalf of the commons, to lay claim by humble petition to their eminent and undoubted rights and privileges; particularly to freedom of speech in debate, freedom from arrest, freedom of access to Her Majesty, whenever, occasion shall require; and that the most favorable construction should be placed upon all their proceedings. The authority of the crown with regard to the privileges of the Commons, is further acknowledged by the Report of the speaker to the House, that their privileges have been confirmed in as full and ample in a manner as they have been here-before granted or allowed by Her Majesty or any of her royal predecessors.

This custom probably originated in the ancient practice of confirming in Parliament Laws that were already in force, by petitions from the commons, to which the assent of the King was given, with the advice and consent of the Lords.

The commons relied upon the Lords for the enforcement of their privileges, until they had fully established their position in parliament. In course of time, the House of Commons attempted to place its privilege on the footing of an unquestionable and unlimited power

2. **The Position in India**

The Indian Council Act, 1861, brought about the beginning of the representative institutions in India. It provided India with the framework of government, which lasted upto the present time, but it did not confer any privilege, power or immunity on the House thereof.

The Act further conferred unlimited power on the Governor General. This State of law continued till the advent of the Government of India Act of 1919, through which a qualified privilege of freedom of speech was conferred on the House of Legislatures.

In addition to freedom of speech, immunity from liability for publication of any matter in the official proceedings was also granted under the Government of India Act, 1919.

By an Amendment in the Civil Procedure Code in 1925, the members of legislature where exempted from arrest or detention under civil process during meetings of the legislature or of any of its committees for 14 days before and after such meeting.

Provisions under the Constitution of India

1. Article 105: **Powers, Privileges, etc., of the House of Parliament and of the members and committees thereof**.

1. Subject to the provisions of this constitution and to the rules and standing orders regulating the procedure of parliament, there shall be freedom of speech in parliament.

2. No member to any parliament, shall be liable to any proceedings in any court in respect of anything said or any vote given by him in parliament or any committee thereof and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament, of any report, paper, votes or proceedings. 3. In other respects, the power, privileges and immunities of each House of Parliament and members of the committee of each House shall be such as may be from time to time be defined by parliament by law, and until so defined shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the constitution (44th Amendment) Act, 1978.

4. The provisions of clause (1), (2) and (3) shall apply in relation to persons who by virtue of this constitution have the right to speak in and otherwise take part in the proceedings of a House of Parliament or any committee thereof as they apply in relation to members of that Legislature.

3. **Position in America:** The US has a Presidential form of government, which according to Dr. Garner, “is the system in which the executive (including both the head of the State and his ministers) is constitutionally independent of the Legislature in respect to the duration of his or their tenure and irresponsible to it for his or their political policies. In such a system the chief of the State is not merely the titular executive but he is real executive and actually exercises the powers which the constitution and laws confer upon him”.

In this system the President enjoys the real powers of the government. The legislative powers of the government in America are vested in the congress under the Article 1 of the American Constitution which

provides: "All Legislative Powers herein granted shall be vested in a congress of the United States which shall consist of a Senate and House of representatives. Thus the congress is the main Legislative organ of the American Government.

Immunity from arrest during sessions of the legislature was one of the protections asserted by the English Parliament in its struggle with the crown, and embodied in the English Bill of Rights .

Both the Houses of Congress may determine the rules of its proceedings, punish its members "for disorderly behaviour, and with, the concurrence of two thirds, expel a member. No person can doubt the propriety of the provision authorizing each House to determine the rules of its own proceedings. If the power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order.

Privileges of the House of the Congress of the United States include an inherent power to imprison a nonmember for contempt of the House, power to punish persons only for such conduct as tends to obstruct or prevent the discharge of legislative duties.

An important privilege which is established remains to the effect that the freedom of speech guaranteed to congressmen Article 1 Section 6 that they should not be questioned “in any other place" for any speech or debate.

This means that they cannot be sued for libel or slander, or in any other way held legally accountable for statements made in their official capacity except by the House or Senate itself. Not only words spoken on the floor of Congress, but written reports, resolutions offered, the act of voting, and all things done in a session by one of its members relating to the business before it, are covered.

(b) Parliamentary Privileges and Anti Defection Law India

It emerges that all countries like England, USA , Australia have enacted relevant statutes relating to Parliamentary privileges, while in India there is no such statute although the Constitution of India contains certain provisions.

It has been noticed that Indian Parliamentarians have defected without any restriction for more than three decades of the working of the Constitution. In Parliamentary political life, the term 'defection' connotes change of party affiliation or allegiance by the member of a legislature.

The Constitution (Fifty-second Amendment) Act, 1985, amended Articles 101, 102, 190 and 191 of the Constitution regarding vacation of seats and disqualification for membership of Parliament and the State legislatures and added a new Schedule i. e. Tenth Schedule to the condition setting out certain provisions as to disqualification on grounds of defections.

Anti-defection law in India also known as The Tenth Schedule to the Indian Constitution is a punitive law that seeks to address the political defection by preventing legislators from shifting allegiance to the parties they represent or disobey their parties’ decisions in critical times such as voting on an important resolution.

The Tenth Schedule was inserted in the Constitution in 1985. It lays down the process by which legislators may be disqualified on grounds of defection by the Presiding Officer of a legislature based on a petition by another

member of the House. A legislator is deemed to have defected if he either voluntarily gives up the membership of his party or disobeys the directives of the party leadership on a vote.

This implies that a legislator defying (abstaining or voting against) the party whip on any issue can lose his membership of the House. The law applies to both Parliament and state assemblies.

The law initially stated that the decision of the Presiding Officer is not subject to judicial review. This condition was struck down by the Supreme Court in 1992, thereby allowing appeals against the Presiding Officer's decision in the High Court and Supreme Court.

However, it held that there may not be any judicial intervention until the Presiding Officer gives his order.

The Constitution (Fifty-second Amendment) Act changed four Articles of the Constitution, viz., 101(3) (a), 102 (2), 190 (3) (a) and 191 (2) and added the Tenth Schedule thereto.

This amendment is often referred to as the anti defection law. Under Article 102 (2) a person is disqualified to be a member of either House of Parliament if he is so disqualified under the Tenth Schedule.

Tenth Schedule

The Tenth Schedule consisting of 8 Paragraphs.

The Paragraph 1 provides certain definitions. The disqualification on the ground of defection has been elaborated in Paragraph 2 of the Tenth Schedule.

Paragraph 2 of the Tenth Schedule, if a member voluntarily gives up his membership of, or votes or abstains from voting, in the House against the direction issued by the party on whose symbol he or she was elected then he or she would be liable to be disqualified from membership.

The act of disqualification occurs on a member voluntarily giving up his membership of a political party or at the point of defence of the whip issued to him.

The date of disqualification is the date on which the act takes place and not the date on which the Speaker takes a decision in that regard.

Nevertheless, the founding fathers of India's Constitution attached supreme importance to two privilege which they deemed essential for the success of parliamentary democracy and therefore, they enshrined them specifically in the specifically in the text of the constitution in Article 105(1) and (2).

These privileges of members of parliament are those of freedom of speech and vote on the floor of the House and in committees thereof and of full immunity from any proceedings any court in respect of anything said or any vote given by a member in a House of Parliament or any Committee thereof .

The paragraph 4 of the Tenth Schedule deals with the concept of merger and provides that disqualification on ground of defection not to apply in case of merger. Thus, whenever original political party merges with another political party the law of defection under Tenth Schedule would not apply. The merger of the original political party of a member of a House shall be deemed to have been taken place, and only if, not less than two-thirds of the members of the legislature party concerned have agreed with such merger.

Paragraph 5 provides an exception to the general rule. Thus, according to Paragraph 5 a person who has been elected to the office of the Speaker or the Deputy Speaker of the House of the People or the Deputy Chairman of the Council of States or the Chairman or the Deputy Chairman of the Legislative Council of a State or the Speaker or the Deputy Speaker of the Legislative Assembly of a State, shall not be disqualified under this Schedule.

Paragraph 6 of the Tenth Schedule provides that decision on questions as to disqualification on the ground of defection by the Speaker of the House is final.

Paragraph 7 bars jurisdiction of Courts. The rule making power has been given under Paragraph 8 of the Tenth Schedule. Thus if a member of Parliament falls within the concept of 'disqualification on the ground of defection' under Paragraph 2 of the Tenth Schedule he loses his privileges in Parliament as soon as he is losing his membership in the Parliament. For his speech and action in Parliament, a member is thus subject only to the provisions of the Constitution and the Rules and discipline of the House.

Absolute privilege has been given to him in respect of anything said or any vote given in Parliament or a Committee thereof. Members may speak and vote freely, without any fear or favour or apprehension of adverse consequences of any kind of speaking out their minds and expressing their views and voting as they liked.

(c)Need for Legislation in India

The anti-defection law seeks to provide a stable government by ensuring the legislators do not switch sides. However, this law also restricts a legislator from voting in line with his conscience, Judgment and interests of his electorate. Such a situation impedes the oversight function of the legislature over the government, by ensuring that members vote based on the decisions taken by the party leadership, and not what their constituents would like them to vote for.

Political parties issue a direction to MPs on how to vote on most issues, irrespective of the nature of the issue. Several experts have suggested that the law should be valid only for those votes that determine the stability of the government.

Chapter 6: Amenability of Constitution-amendments under different Constitutions

Topics for study:

1. *Process of amendment*
2. *Types of Amendment*
3. *Judicial scrutiny of the Amendments to the Constitutions*

1. **Process of amendment:**

The constitution of a country is described as the "supreme law of the land reflecting the general will of the people. To be reflective of the will of the people constitution cannot remain as static document. It has to be responsive to changing conditions. The framers of the Indian Constitution included article 368 as a formal method to amend the constitution whenever required.

According to Oxford's Dictioary of Law

"Amendment means changes made to legislation for the purpose of adding to, correcting or modifying the operation of the legislation." On the face of it, it appears that the amendment procedure to the Constitution reflects both flexibility and rigidity."

Amending procedure to the Indian constitution is reflective of the desire of Constituent legislative assembly to put in place a dynamic document.

In the words of Jawaharlal Nehru "While we want this Constitution to be as solid and as permanent a structure as we can make it, nevertheless there is no permanence in Constitutions. There should be certain flexibility.

If you make anything rigid and permanent, you stop a nation's growth, the growth of a living, vital, organic people. Therefore, it has to be flexible."

2. **Kinds of Amendments:**

1. **Amendment by a simple Majority:**
   Certain provisions can be amended by a simple majority almost like passing an ordinary law.
   E.g. creation of new states, alteration in the size of states, or qualification of Citizenship etc.

2. **Amendment by special majority:**

Most provisions of the constitution requires amendment through a special majority' Special majority is where 2/3rdmembers of house present and voting including majority of its total membership.

3**. Amendment by special majority and ratification by at least one half of the State Legislatures:**

E.g Election of President, list of subjects in the seventh schedule Relationship between Centre and states etc.

Procedure of Amendment under Art. 368

Art. 368(1): Article 368 of the constitution which deals with the last two categories of amendment lays down that parliament can add, vary or repeal any provision of this Constitution in accordance with the procedure laid down.

Art 368(2) lays down that amendment may be initiated in either house of parliament and has to be passed by a majority of total membership and by a majority of not less than two-thirds of the members of that House present and voting. In addition to these requirements certain amendments require not just special majority but ratification by the Legislatures of not less than one-half of the States.

3. Judicial scrutiny of the Amendments to the Constitutions

Parliament's power to amend the fundamental rights was challenged in year 1951.After independence several laws regarding Land Agrarian reforms were passed in several states with the aim of reforming land ownership and tenancy.

Land owners which were adversely affected by such laws challenged the same and the courts declared these laws as unconstitutional. Parliament by reacting to the decisions of the courts placed these laws in the ninth schedule of constitution and thus making them immune from judicial review through first and fourth constitutional amendment.

Landmark caselaws:

1. ***Shankari Prasad Deo vs. Union of India (1952)***
   In this case the validity of the Constitution (first Amendment) Act, 1951, which curtailed the right to property guaranteed by Article 31, was challenged.
   The argument against the validity of the First Amendment was that Article 13 prohibits enactment of a law infringing or abrogating the Fundamental Rights, that the word 'law' in Article 13 would include any law, even a law amending the Constitution and, therefore, the validity of such a law could be judged and scrutinised with reference to the Fundamental Rights which it could not infringe.
   The Supreme Court upheld the validity of the First Amendment by rejecting the contention and limited the scope of Article 13 by ruling that the word 'law in article 13 would not include a constitutional amendment passed under Article 368.
   The Court observed "we are of the opinion that in the context of article 13 law must be taken to mean rules and regulations made in the exercise of ordinary legislative power and not amendment made in the exercise of constituent power under article 368 of the constitution. Art.368 amend any provision of constitution including fundamental rights, in absence of any clear and express limitation to the contrary the plenary power of parliament cannot be restricted.

2. ***Sajjan Singh v. State of Rajasthan 1965***
   Wherein the validity of the constitution (Seventeenth Amendment) Act, 1964, was called in question. The impugned amendment again adversely affected the right to property.
   The Supreme Court again rejected the argument by a majority of 3 to 2.
   The majority ruled that the 'pith and substance' of the Amendment was only to amend the Fundamental Right so as to help the State Legislatures in effectuating the policy of the agrarian reform.
   The court held that the constituent power conferred by article 368 on the parliament included even the power to take away fundamental rights under part III of the constitution.

3. ***Golak Nath vs. State of Punjab AIR 1967***
   The question whether any of the Fundamental Rights could be abridged or taken away by Parliament in exercise of its power under article 368 was raised again in this case.

Again, the constitutional validity of the Constitution 1st Amendment Act, 1951, 4th Amendment Act, 1955, 17th Amendment Act, 1964 was challenged in a very vigorous and determined manner.

Eleven Judges participated in the decision and they divided 6:5.

The majority now held (overruling the earlier decisions in cases of Shankari Prasad & Sajjan Singh Case) that the Fundamental Rights were non-amendable through the constitutional amending procedure set out in article 368 while the minority upheld the line of reasoning adopted by the Court in the two earlier cases.

The majority now took the position that the Fundamental Rights occupy a "transcendental" position in the constitution, so that no authority functioning under the Constitution, including Parliament exercising the amending power under Art.368 would be competent to amend the Fundamental Rights.

It was also observed that article 368 merely laid down the procedure and it did not confer on parliament the power to amend the constitution. Chief Justice Subha Roa referred to the marginal heading of article 368.

The power to amend the constitutional was to be found in the residuary legislative power of parliament contained in Art.248, because such a power was not expressly conferred by any article or any legislative entry in the Constitution. Accordingly, amendment to the Constitutional would be a 'law' for purposes of Article 13.

The court held that the amending and legislative powers of the parliament were essentially same and therefore any amendment of constitution must be deemed law and falls under the purview of article 13(2) of constitution.

To neutralise the effect of Golak Nath decision, a bill was introduced in the Lok Sabha on April 7, 1967 to restore the parliament power to amend the fundamental rights. The object of the bill was to restore the original position of the parliament to make it explicit that parliament can amendment any provision of the constitution by following the procedure contained in Article 368. Accordingly, in 1971, parliament passed the Constitution (24th Amendment) Act to neutralize the effect of Golak Nath and set the stage for Keshavananda Bharati case in the Indian constitutional history.

By way of the Constitution (24th Amendment) Act, Parliament introduced certain modifications in Article 13 and Article 368 to assert the parliament's amending power and get over the Golak Nath case.

4. ***Keshavananda Bharati vs. State of Kerala AIR 1973***

25th Amendment which inserted a new article 31C Subsequently by the Constitution (29th Amendment) Act, the Kerala Land Reforms (Amendment) Act, 1969 and 1971 were included in the Ninth Schedule of the Constitution in order to making them immune from attack on the ground of violation of fundamental rights.

These amendments made by the parliament subsequent to the Golak Nath's case were challenged in which is popularly known as Fundamental Rights case. The petitioner in the instant case challenged the validity of Kerala Land Reforms Act , 1963 passed by the state government as unconstitutional .

He contended that the impugned Act violated his fundamental rights guaranteed under articles 14, 19(f), 25, 26 and 31.

While the case was pending in the supreme court the parliament passed the above amendments viz, constitutional 24th amendment , 1971, constitutional 25th Amendment Act, 1971, 29th Amendment Act 1972.

In order to sustain his claim before the court , the petitioner amended the petition and challenged the validity of 24th , 25th, and 29th Amendments. The case was heard by bench of 13 judges of supreme court.

The court laid down that the power of amendment under article 368 is unlimited.

Parliament can amend any part of the constitution including the preamble but the amending power should not affect the basic features of the constitution.

In other words parliament by exercising its amending power can not destroy the basic features of the constitution. However the courts did not define the basic structure with mathematical precision neither provided any guidelines so as to identify it.

However the courts recognize certain elements as the basic features of the constitution which cannot be amended. Majority of the judges observed that there are certain basic features of the constitution which can be altered in by exercising the powers under article 368 , constitutional amendment which seeks to alter or destroy the basic structure of the constitution of the constitution is ultra vires

5. **Minerva Mills V. Union of India AIR 1980**

The Supreme Court struck down these provisions and held them unconstitutional as they destroyed the essential features of constitution. The court unanimously held that judicial review is the basic feature of the constitution which cannot be destroyed also the changes to article were struck down and restored article 31-C to the original state in which it was inserted by 25th amendment in 1971.

Chandrachudu C.J; speaking for the majority observed, Fundamental rights occupy a unique place in the lives of civilized society and have been variously been described in the judgments of the supreme court as transcendental, inalienable etc.

For us they constitute the arc of constitution. To destroy guarantees given by part III in order to achieve the goals in part IV is plainly to subvert the constitution by destroying the basic structure.

The Indian constitution is founded on the bedrock of balance between part III and part IV of the constitution. This harmony and balance between part III and part IV is an essential feature of basic structure of the constitution.

Conclusion:

Thus it can be concluded that the amending power of the Parliament is not absolute but there are limitations upon the amending power of Parliament. It is subject to limitations imposed by the Constitution .The basic structure of the Constitution should not be disturbed while amending the provisions of the Constitution.